



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 133

Managed investments and custodial or depository services: Holding assets

November 2013

About this guide

This guide is for:

- responsible entities of registered managed investment schemes;
- licensed providers of custodial or depository services (licensed custody providers);
- operators of managed discretionary account (MDA) services that are responsible to clients for assets held under an MDA service; and
- investor directed portfolio service (IDPS) operators that are responsible to clients for assets held under an IDPS.

It explains the Australian financial services (AFS) licence obligations that apply to these entities in relation to holding assets and sets out minimum standards for asset holders.

About ASIC regulatory documents

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

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

Regulatory guides: give guidance to regulated entities by:

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

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

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

Document history

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

Previous versions:

- Superseded Regulatory Guide 133 *Managed investments: Scheme property arrangements*, issued 3 August 1998, reissued 6 October 1998 and 2 June 1999, rebadged as a regulatory guide 5 July 2007

Disclaimer

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

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

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A Overview

Key points

This guide explains:

- the obligations that apply to Australian financial services (AFS) licensees in relation to holding assets;
- the minimum standards and related requirements an asset holder must meet;
- what AFS licensees must do if they engage another asset holder;
- the requirements for documented compliance measures;
- the additional requirements that apply to primary production schemes that include rights for the use of land; and
- the limited class order relief we have given responsible entities from the obligation to separate assets to allow the use of omnibus accounts, and the requirements that apply when other AFS licensees use omnibus accounts.

A staged implementation of the requirements in this guide applies: see Table 1.

Purpose of this guide

- RG 133.1 This guide sets out minimum standards for responsible entities of registered managed investment schemes (registered schemes) and other asset holders in relation to holding assets to ensure they meet their obligations under their AFS licence.
- RG 133.2 We consider that clients' confidence will be better maintained if asset holders are required to meet minimum standards to ensure that:
- (a) client assets are not exposed to unnecessary risks because of the way assets are held; and
 - (b) efficient operational arrangements exist for holding and dealing with client assets.
- RG 133.3 The minimum standards will help to ensure that clients maintain confidence in the provision of the services provided and to promote a fair and efficient market for the provision of asset-holding services.
- RG 133.4 The minimum standards for asset holders are set out in Section B of this guide.
- RG 133.5 This guide also explains:
- (a) the requirements that apply if you engage another person, either directly or indirectly through a master custodian, as an asset holder, including doing all things necessary to ensure the asset holder meets the minimum

- standards, as well as requirements relating to the content of your agreement with the asset holder or master custodian (see Section C);
- (b) the requirement for documented compliance measures that minimise the risks to clients (see Section D);

Note: For compliance measures, see also Regulatory Guide 132 *Managed investments: Compliance plans* (RG 132).

- (c) the requirements that apply to offers of interests in a registered scheme involving primary production that requires the use of particular land (see Section E); and
- (d) the limited class order relief available to responsible entities and conditions applicable to other asset holders from the obligation to separate assets when holding certain classes of asset together with other assets held on trust where this would be impracticable or unreasonably burdensome (see Section F).

Who this guide applies to

RG 133.6 This guide is for:

- (a) responsible entities of registered schemes;
- (b) licensed providers of custodial or depository services (licensed custody providers), including, where relevant, entities that provide custodial or depository services incidentally;
- (c) operators of managed discretionary account (MDA) services that are responsible to clients for assets held under an MDA service; and
- (d) investor directed portfolio service (IDPS) operators that are responsible to clients for assets held under an IDPS.

Note: For the purposes of this guide, we do not consider, as asset holders, persons who must be, or are customarily, used to clear, settle or hold assets to participate in particular kinds of transactions on financial markets, such as certain securities depositories and clearing systems.

Services that form part of a custodial or depository service

RG 133.7 The minimum standards and related requirements apply to all licensed custody providers, regardless of whether the services are provided as a main business of the provider or as an incidental provider. In some cases, the nature and scale of the services provided may affect what is required to meet the minimum standards.

Note: See Regulatory Guide 166 *Licensing: Financial requirements* (RG 166) for an explanation of 'incidental providers'.

RG 133.8 We also consider that services performed as a result of holding financial products or a beneficial interest in financial products in providing a custodial

or depository service are a part of holding the assets and so form part of the custodial or depository service.

RG 133.9 On this basis, the following services form part of the custodial or depository service when provided in that way:

- (a) *Exercising rights as a holder*: This involves exercising the rights and obligations associated with assets held that are securities or interests in managed investment schemes other than dealing in the assets. For example, this applies to:
 - (i) the exercise of voting rights arising from the reorganisation or restructure of a listed company's capital or of a registered scheme;
 - (ii) electing to participate in dividend or distribution reinvestment plans; and
 - (iii) electing to accept offers made on the basis of holding the assets, such as certain placements and rights issues.
- (b) *Tax reclamations*: This involves reclaiming recoverable portions of taxes withheld from interest or dividend payments by foreign taxation authorities on investments held.
- (c) *Reconciliations*: This involves reconciling the asset holder's own records of its holdings against the records of various third parties, such as fund managers, banks, other custodians or depositories.
- (d) *Record keeping and reporting*: This involves maintaining statements of holdings and completed transaction reports, and keeping records of valuations provided to the asset holder.

This list is not exhaustive. Other services may be provided from time to time that may be considered to form part of the provision of a custodial or depository service.

RG 133.10 Other services that may be provided by custodial or depository service providers include:

- (a) fund accounting;
- (b) unit pricing and determining asset values and net asset values;
- (c) compliance monitoring and reporting;
- (d) maintaining and operating a basic deposit product; and
- (e) performance measurement and monitoring.

Note: Information Sheet 141 *Dealing and providing a custodial or depository service as a secondary service* (INFO 141) may also be relevant in determining whether an intermediary is providing a custodial or depository service and subject to this guide.

When the requirements apply

RG 133.11 A staged implementation of the requirements applies: see Table 1.

Transitional requirements

RG 133.12 Transitional requirements apply if you were first authorised as a responsible entity or to provide a custodial or depository service, or you first held assets of an IDPS or MDA service, or arranged for these assets to be held, before 2 January 2014.

RG 133.13 Before the relevant commencement date in Table 1, if you do not meet the enhanced minimum standards and related requirements in this guide, you must continue to meet the minimum standards and related requirements in the former version of RG 133—reproduced as an appendix to this guide: see RG 133.166–RG 133.208. However, you must meet the enhanced minimum standards and related requirements in this guide by the relevant date specified in Table 1.

Table 1: When the requirements apply

Requirements	When the requirements apply	
	If your authorisation date ¹ or asset-holding commencement date ² is before 2 January 2014	If your authorisation date ¹ or asset-holding commencement date ² is on or after 2 January 2014
If you are an asset holder, you must:		
<ul style="list-style-type: none"> meet the minimum standards for asset holders in Section B and the relevant compliance measures in Section D 	From 2 January 2015 ³	From 2 January 2014
If you engage another person as an asset holder, you must:		
<ul style="list-style-type: none"> meet the requirements in RG 133.54–RG 133.79 and RG 133.121–RG 133.123 in Section C and the relevant compliance measures in Section D; and meet the requirements for the content of custody agreements in RG 133.80–RG 133.120 in Section C 	From 2 January 2015 ³	From 2 January 2014
<ul style="list-style-type: none"> meet the requirements for the content of custody agreements in RG 133.80–RG 133.120 in Section C 	From 1 November 2015 ³	From 2 January 2014
If you are offering interests in a registered scheme to retail clients on or after 2 January 2014 involving primary production that requires the use of particular land, you must meet the additional requirements in Section E	From 1 July 2014	From 1 July 2014

¹ 'Authorisation date' means the date on which you were first authorised as a responsible entity or authorised to provide a custodial or depository service.

² 'Asset-holding commencement date' applies to IDPS or MDA operators and means the date on which you first held assets of an IDPS or MDA service, or arranged for these assets to be held.

³ For the transitional requirements that apply, see RG 133.12–RG 133.13 and the appendix to this guide.

B Minimum standards and related requirements for asset holders

Key points

If you are an asset holder, you must meet certain minimum standards, either directly as an AFS licensee or, in the case of holders of scheme property of a registered scheme, through requirements that the responsible entity must impose on you.

As an AFS licensee, if you engage another asset holder, you must ensure that the asset holder meets these standards: see Section C.

To meet the minimum standards, asset holders must:

- have an adequate organisational structure (see RG 133.31–RG 133.36);
- have adequate staffing capabilities (see RG 133.37–RG 133.40);
- have adequate capacity and resources to perform core administrative activities (see RG 133.41–RG 133.44); and
- hold assets on trust for the client, which includes the obligation to separate assets (see RG 133.45–RG 133.48).

An AFS licensee must keep records for seven years demonstrating compliance with the minimum standards for organisational structure, staffing capabilities, and capacity and resources: see RG 133.49.

We expect an asset holder that is an AFS licensee to conduct checks on its clients before providing the service and then, as appropriate, to ensure that it meets its licensee obligations: see RG 133.50–RG 133.53.

Note: For the commencement dates for the requirements in this section, see Table 1 in Section A.

Your obligations

- RG 133.14 A responsible entity must act in the best interests of the registered scheme members in exercising its powers and carrying out its duties, and this includes its powers and duties as trustee of scheme property.

Note: A responsible entity or another person engaged by it to hold assets of a registered scheme does not need to hold an AFS licence authorising it to provide a custodial or depository service for this purpose. This is because holding those assets is not regulated as a custodial or depository service under s766E(3)(b) of the *Corporations Act 2001* (Corporations Act). Holding assets is a part of the operation of the registered scheme by the responsible entity.

- RG 133.15 As AFS licensees, responsible entities and licensed custody providers must do all things necessary to ensure that they carry on the financial services for which they are licensed efficiently, honestly and fairly.

Note: An MDA operator for an MDA service must be a licensed custody provider unless another custody provider directly contracts with all retail clients to be the asset holder: see Regulatory Guide 179 *Managed discretionary account services* (RG 179).

RG 133.16 If an IDPS operator or MDA operator arranges on behalf of its clients for client assets of the IDPS or client portfolio assets of the MDA service that are financial products to be acquired by an asset holder, it is providing a financial service of dealing in financial products. As an AFS licensee, an IDPS operator or MDA operator must do all things necessary to ensure that it provides the financial services for which it is licensed honestly, efficiently and fairly.

RG 133.17 If you are an asset holder, you must meet the minimum standards in this section, either directly as an AFS licensee or, in the case of holders of scheme property of a registered scheme, through requirements that the responsible entity must impose on you.

Note: For the definition of 'asset holder', see 'Key terms'.

RG 133.18 If you apply for an AFS licence as a licensed custody provider or if you are a responsible entity that is the asset holder, you will need to demonstrate that you meet the minimum standards in this section. These minimum standards apply while the assets are held.

RG 133.19 If you are an AFS licensee, you must also meet any other obligations that apply to your licence.

Note: See Regulatory Guide 104 *Licensing: Meeting the general obligations* (RG 104) and Regulatory Guide 105 *Licensing: Organisational competence* (RG 105).

RG 133.20 As an AFS licensee, if you engage another asset holder, you must do all things necessary to ensure that the asset holder meets these standards. For more detailed guidance on the obligations that apply generally to licensees that engage another asset holder, see Section C.

RG 133.21 An asset holder's arrangements for meeting the minimum standards may vary depending on the particular assets being held. We have not prescribed specific arrangements for different asset holders.

RG 133.22 We expect that you will seek independent verification of the robustness of your controls applying to the asset holding, where appropriate in relation to the nature of the assets.

RG 133.23 You must establish adequate procedures for giving instructions to the asset holder or, if you are the asset holder, your custody staff, and ensure that the associated risks are managed appropriately and reasonable controls are in place to ensure the instructions are followed. You should have regard to relevant industry best practice for providing instructions, including data, when establishing your procedures for interacting with the asset holder.

RG 133.24 A responsible entity must set out in writing and implement a reasonable process for determining if it should hold scheme property or, if it is to engage another person as asset holder, which asset holder and on what terms. The process must apply a reasonable written policy approved by the directors, which addresses potential conflicts of interest and other considerations relevant to the best interests of members.

The minimum standards and related requirements

RG 133.25 Asset holders must:

- (a) have an adequate organisational structure (see RG 133.31–RG 133.36);
- (b) have adequate staffing capabilities (see RG 133.37–RG 133.40);
- (c) have adequate capacity and resources to perform core administrative activities (see RG 133.41–RG 133.44); and
- (d) hold assets on trust for the client, which includes the obligation to separate assets (see RG 133.45–RG 133.48).

RG 133.26 These minimum standards apply, regardless of whether:

- (a) you are the asset holder;
- (b) you engage another asset holder (see Section C); or
- (c) the custodial and depository services are provided as a main business of the provider or merely incidentally (see RG 133.6–RG 133.10).

RG 133.27 In some cases, the nature and scale of the services provided may affect what is required to meet the minimum standards.

RG 133.28 The minimum standards are set by modification of the Corporations Act under:

- (a) Class Order [CO 13/1409] *Holding assets: Standards for responsible entities*;
- (b) Class Order [CO 13/1410] *Holding assets: Standards for providers of custodial or depository services*;
- (c) Class Order [CO 04/194] *Managed discretionary accounts*; and
- (d) Class Order [CO 13/763] *Investor directed portfolio services*.

Note: The application of the minimum standards by class order replaces the licence conditions in Pro Forma 209 *Australian financial services licence conditions* (PF 209). PF 209 has been amended accordingly.

RG 133.29 A responsible entity, a licensed custody provider and an IDPS operator or MDA operator that engages an asset holder to hold assets held under the IDPS or client portfolio assets of the MDA service must keep records for seven years demonstrating compliance with the minimum standards for organisational structure, staffing capabilities, and capacity and resources: see RG 133.49.

- RG 133.30 We expect asset holders that are AFS licensees to conduct checks on their clients before providing the service and then, as appropriate, to ensure that the asset holder will meet its licensee obligations: see RG 133.50–RG 133.53.

Organisational structure

- RG 133.31 The asset holder must have an organisational structure that supports the separation of the assets held from its own assets, and those of any other client or any other managed investment scheme, except to the extent permitted for omnibus accounts: see Section F. Use of nominee companies is a means of separating client assets.
- RG 133.32 The asset holder must ensure that custodial staff are segregated from staff performing other functions in a way that minimises the potential for a conflict of interest arising between:
- (a) the duties of custodial staff; and
 - (b) the duties and interests of persons who make investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of client assets other than discretionary decisions in relation to certain at-call deposit accounts with regulated deposit takers and foreign exchange transactions.

This is particularly important where the asset holder is the responsible entity or an IDPS or MDA operator performing transactional functions, or a related body corporate.

- RG 133.33 Custodial staff and other staff involved in these discretionary decisions must be located sufficiently separately to reduce, as far as is reasonably practicable, the risk of inappropriate influence on decisions relating to holding client assets.
- RG 133.34 In addition, the asset holder must have a documented policy designed to ensure that custodial staff are not influenced to act other than in accordance with their duties because of a conflict of interest. The policy must be approved by the asset holder's directors or governing body, a senior manager authorised by the directors or governing body to give approval or, for an AFS licensee that is a foreign company, its senior officer in Australia. The asset holder must undertake reasonable checks to ascertain and document whether there has been any attempt to inappropriately influence custodial staff, and must take reasonable action if this occurs.

Note: In addition, where the asset holder is an AFS licensee, it has a general obligation to adequately manage conflicts of interest: see Regulatory Guide 181 *Licensing: Managing conflicts of interest* (RG 181).

- RG 133.35 The reporting lines must be independent of potentially conflicting activities up to the point of reporting to the level of managing director or senior officer in Australia. The asset holder must have arrangements that have the effect that custodial staff who are not involved in potentially conflicting activities can report directly, or through other custodial staff:
- (a) to the board of directors or governing body of the client;
 - (b) for a registered scheme with a compliance committee, to the committee; or
 - (c) for non-Australian clients, to the most senior officer of the client in Australia, or the relevant foreign jurisdiction in which the assets are held.
- RG 133.36 The asset holder's organisational structure must ensure that custodial staff can report directly to the directors of the asset holder or, in the case of a responsible entity, the compliance committee (directly or through other custodial staff). The custodial staff and their managers must not also be responsible for investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of client assets, other than discretionary decisions in relation to holding certain at-call deposit accounts with regulated deposit takers and foreign exchange transactions.

Staffing capabilities

- RG 133.37 Custodial staff must have the knowledge and skills necessary to perform their functions properly. The asset holder must provide adequate ongoing training and educational programs so that staff knowledge remains at a level necessary for performing their assigned responsibilities. The training must cover the asset holder's legal obligations, to the extent relevant to enable the staff members to perform their particular responsibilities.
- RG 133.38 Responsible entities, licensed custody providers, MDA operators and IDPS operators have obligations to conduct 'know your staff' risk-based due diligence inquiries under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act).
- RG 133.39 In addition to these inquiries, we would expect that, where appropriate, résumé, police (where available) and reference checks would be carried out and appropriate oversight applied to address the risk of fraud and any other risks in relation to the asset holding (including exercising rights as holder) that might arise from the engagement of an employee.
- RG 133.40 We expect an asset holder to assess the risks associated with the various employee functions that are established within its organisation, and design measures which it considers are appropriate to the nature of the risks faced by it in relation to potential fraud (e.g. mandatory absence periods, dual approval processes, staff rotation and 'maker/checker' processes).

Capacity and resources

RG 133.41 The asset holder's staff must have the necessary time and authority to perform their duties associated with holding client assets. This will vary depending on the nature of the assets.

RG 133.42 The asset holder must make resources available to custodial staff, including in specialist areas, to the extent necessary for them to adequately perform their duties.

RG 133.43 This capacity is likely to include custodial staff having available:

- (a) computer systems that are reasonably up to date and secure from any actual or potential threats, including from fraud;
- (b) systems capable of handling record keeping and transaction processing that will be needed (appropriate to the volume of transactions), and capable of reliably identifying assets for each client, particularly when omnibus accounts are used;
- (c) systems capable of handling client instructions for assets held (e.g. exercising voting rights or other rights conferred on the asset holder on client instructions);
- (d) procedures for accurately recording all client assets held, all movements of those assets and evidence of authorisation for such movements, including who gave authorisation, how and when, and all income and other related administrative activities;
- (e) access to information sources which may be relevant to being aware of action that may be taken in exercising rights as an asset holder and pricing information;
- (f) memberships at depositories, where relevant to client assets;
- (g) access to and, if necessary membership of, any relevant settlement and clearance systems;
- (h) where appropriate, access to relevant and appropriate domestic or global sub-custodial networks;
- (i) where physical assets are held, secure physical storage;
- (j) appropriate business continuity and disaster recovery procedures; and

Note: AFS licensees that are bodies regulated by the Australian Prudential Regulation Authority (APRA) are excluded from the requirement to have risk management systems under s912A(1)(h), except for responsible entities that are trustees of regulated superannuation funds in relation to certain matters from 1 July 2015.

- (k) appropriate systems and procedures for change management.

RG 133.44 In all circumstances, such systems, processes and procedures should ensure that opportunities for fraud and operational error are reduced as far as reasonably practicable. We expect that, as part of having adequate risk management arrangements for AFS licensees to whom that requirement applies, licensees that are responsible for giving instructions on the use of assets where high-volume

transactions are likely to occur will ensure that, except as may be needed in exceptional circumstances, automated systems are used, where practicable, to authenticate instructions rather than manual systems (e.g. faxes) and that asset holders have reasonable capacity to accept and act on instructions through such processes.

Holding assets on trust

- RG 133.45 An asset holder must do all things necessary to ensure that it and any other asset holder it engages holds the property on trust, except for assets held:
- (a) outside of Australia where a trust structure is not recognised under the foreign law and it is reasonable to hold the assets in accordance with the foreign law; or
 - (b) outside of Australia where it is not reasonable to hold the assets on trust under the foreign law and the client has documented that they are satisfied that the assets are held in a manner that, given the relevant laws, provides reasonably effective protection in case of insolvency of the asset holder, including the basis on which the asset holder is satisfied; or
 - (c) under certain prime brokerage arrangements (see Class Order [CO 03/1110] *Prime brokerage services: Relief from obligation to hold client property on trust* and Class Order [CO 03/1111] *Prime brokerage services: Relief from obligation to hold scheme property separately*) and requirements in relation to omnibus accounts (see Section F); or
 - (d) if the asset holder is providing a custodial or depository service through its authorised representative if:
 - (i) the asset holder is liable to the client for the acts and omissions of the authorised representative as if they were the acts or omissions of the asset holder; and
 - (ii) revenue received from the client in relation to the provision of the custodial or depository service is revenue of the asset holder.

The conditions in paragraph (d) avoid the application of regulatory requirements creating an incentive for the AFS licensee to engage an authorised representative to hold the property on its behalf.

- RG 133.46 The trust may be a bare trust or directed trust held on the basis that the asset holder holding the assets under such a trust will have no active powers and limited duties in relation to the trust assets, except as provided for in the custody agreements.

- RG 133.47 In the case of a deposit-taking facility, it is the rights under the facility rather than any money that has been deposited in that account which comprise the client assets and it is these rights that should be held on trust. For example,

this can be achieved by establishing the account on the basis that the account is recorded in the issuer's records as 'X Ltd as trustee for Y registered scheme'. In this example, X Ltd may be the responsible entity or a custodian. We consider an issuer of a deposit-taking facility cannot hold the facility on trust.

- RG 133.48 An asset holder must also:
- (a) identify the assets, as far as is reasonably practicable, as held for the client; and
 - (b) keep the assets of a client held on trust separate from the assets of the assets of the asset holder and any other person or scheme other than the one for which the asset holder is acting, and from the assets of any other person or scheme, except where permitted for certain omnibus accounts (see Section F).

Keeping compliance records

- RG 133.49 An AFS licensee that is required to do all things necessary to ensure the minimum standards are met must keep for seven years records demonstrating how it has done so in relation to the minimum standards for organisational structure, staffing capabilities, and capacity and resources described in RG 133.31–RG 133.44.

Making client inquiries

- RG 133.50 Responsible entities, licensed custody providers, IDPS operators and MDA operators have obligations under the AML/CTF Act to conduct certain 'know your client' risk-based due diligence inquiries, to the extent that they are 'designated service providers' under the AML/CTF Act.
- RG 133.51 In addition, we expect asset holders that are AFS licensees to conduct pre-contract inquiries—and subsequent inquiries, when appropriate, taking into account the client and other circumstances—in relation to their clients. These inquiries will help ensure that licensees comply with their obligations to provide financial services efficiently, honestly and fairly, and reduce the risk of unexpected differences in capabilities or service requirements, which could lead to potentially avoidable operational risks and other issues. Such inquiries may form part of the adequate risk management systems that licensees must have in place under s912A(1)(h) (except for bodies regulated by APRA that are excluded from this requirement).
- RG 133.52 These inquiries may also result in information that would form part of the factual background against which the AFS licensee can meet its obligations to report to ASIC in certain circumstances.

RG 133.53 We suggest that asset holders engaged to provide services to another person may wish to consider making the following inquiries about their clients, as appropriate:

- (a) for assets that are to be held by the asset holder, the identification of these assets from at least the client, clarification of the sources of pricing for assets that are to be applied by the asset holder and reconciliation of holdings against relevant counterparties such as unit registries and on transition from a retiring asset holder;
- (b) when acting as a licensed custody provider, verification of the wholesale status of the client unless the licensed custody provider complies on the basis that the client is a retail client;
- (c) review of the scope of business and breadth of the operation for which custody is provided, including what assets the asset holder may be called on to hold and what transactions it may be called on to undertake;
- (d) understanding the process of providing instructions to the asset holder, including from a third-party fund manager or investment administrator;
- (e) an assessment of whether the asset holder is able to carry out the mandate of the client (e.g. can the asset holder hold the type of assets involved and provide the reporting required by the client for these assets?); and
- (f) review of public registers concerning a corporate client's corporate status and relevant licences.

C Requirements when engaging another asset holder

Key points

You must take certain steps to protect clients if you are a responsible entity, a licensed custody provider or an MDA operator or IDPS operator and you arrange for another person to hold client assets.

You must:

- ensure that you have a basis to be confident that the asset holder will meet the minimum standards in Section B, and document how you do this; and
- monitor ongoing compliance with the minimum standards and deal appropriately with any deficiencies that arise (see RG 133.65–RG 133.79).

You must ensure that there is a legally enforceable agreement, which addresses certain issues, with any asset holder you engage (see RG 133.81–RG 133.105) or any master custodian you engage (see RG 133.116–RG 133.120).

If you are engaged on or after 1 November 2015 as an asset holder by a retail client, your agreement must address certain issues: see RG 133.106–RG 133.115.

For retail clients, we expect the engagement of the asset holder to be disclosed and the role of the asset holder to be properly explained: see RG 133.121–RG 133.122.

If you are a responsible entity and change the asset holder, you must consider whether it is appropriate to obtain an independent report on the transfer of assets: see RG 133.123.

Note: For the commencement dates of the requirements in this section, see Table 1 in Section A.

Your obligations

- RG 133.54 If you are a responsible entity, a licensed custody provider or an MDA operator or IDPS operator that arranges for client assets to be held by another asset holder, you must take certain steps to protect clients as set out in this section.
- RG 133.55 A responsible entity that engages an asset holder to hold scheme property is liable to members for the acts and omissions of the asset holder under s601FB(2) of the Corporations Act.
- RG 133.56 As a responsible entity, licensed custody provider, MDA operator or IDPS operator, you may engage another asset holder because you are not permitted to

hold assets under your AFS licence (e.g. because you cannot meet the financial requirements in RG 166) or because you do not wish to be an asset holder for those assets.

RG 133.57 If you are a responsible entity and you engage another asset holder because you do not meet the financial requirements under Class Order [CO 13/760] *Financial requirements for responsible entities and operators of investor directed portfolio services*, you must ensure that all the relevant assets are held by another person, apart from any exceptions permitted under [CO 13/760]. For responsible entities, these exceptions are ‘Tier \$500,000 class assets’ and ‘special custody assets’.

Note: See [CO 13/760] and RG 166 for the definitions of these terms.

RG 133.58 As an AFS licensee, you must also ensure that client assets are held on trust and segregated from your own property and the property of any other scheme or person, except as discussed in Section F for omnibus accounts.

RG 133.59 If you apply for an AFS licence as a responsible entity, licensed custody provider, MDA operator or IDPS operator and you plan to engage another asset holder, you will need to demonstrate that you will ensure that any asset holder that holds client assets on your behalf meets the minimum standards in Section B.

RG 133.60 The asset holder you engage may or may not be an AFS licensee. If the asset holder is providing a financial service to clients on your behalf, including (for example) dealing in a financial product, it will generally need to be either your authorised representative, exempted from holding an AFS licence, or acting on behalf of another licensee: see s911B(1).

RG 133.61 The asset holder may also be providing a financial service to you. The client who is provided with a custodial or depository service is the person on whose behalf the financial products are held, or for whom the financial products are held on trust. Depending on the terms of the arrangement, a person who contracts with the provider for the custodial or depository service to be provided may be the client of that service or merely a person who is arranging for the service to be provided to another person. If you are the client, provided that the requirements in reg 7.6.01(1)(k) of the Corporations Regulations 2001 (Corporations Regulations) are satisfied, the asset holder may not need an AFS licence to hold the client assets that are financial products or beneficial interests in financial products.

RG 133.62 This exemption may be relevant to sub-custodians and applies if:

- (a) the asset holder holds the financial products on trust for, or on behalf of, a licensed custody provider; and
- (b) the licensed custody provider in turn holds the beneficial interest on trust for, or on behalf of, the client of the licensed custody provider.

- RG 133.63 The exemption under reg 7.6.01(1)(k) takes into account the responsibility of an AFS licensee that holds the beneficial interest in the financial products, which may be a financial service provided to the person for whom the beneficial interest is held, to ensure that the holder of the financial products meets appropriate standards.
- RG 133.64 The requirement that asset holders meet certain minimum standards reflects this responsibility by applying to AFS licensees that directly or indirectly engage others as asset holders of client assets. Ensuring that asset holders meet the minimum standards helps licensees meet their broader licensee obligations and safeguards clients' interests.

Ensuring the asset holder meets the minimum standards

- RG 133.65 The minimum standards in Section B apply to all asset holders, regardless of whether you engage the asset holder directly or the asset holder is engaged by another person authorised by you (master custodian). The minimum standards also apply if there are further links in a chain (e.g. a sub-sub-custodian).
- RG 133.66 You do not routinely need to explain to us how your choice of asset holder or master custodian will meet the minimum standards when you apply for an AFS licence or otherwise, although you need when applying for a licence to explain the process you will use. However, if you plan to engage another person as asset holder directly, or indirectly through a master custodian, you must be able to demonstrate how you will:
- (a) ensure any asset holder that is engaged meets the minimum standards;
 - (b) monitor ongoing compliance with the minimum standards and deal with any deficiencies that arise; and
 - (c) achieve the outcomes in paragraphs (a) and (b) where the assets are outside Australia except where exceptions are recognised.
- RG 133.67 Where appropriate, you may be able to meet the obligations in RG 133.66 in relation to an asset holder that is appointed by a master custodian by seeking appropriate information or assurance from the master custodian.
- RG 133.68 To check compliance, we may ask for written evidence at any time about how you are satisfied that a particular person should be appointed or remain as the asset holder.
- RG 133.69 You must ensure that any relevant master custodian has adequate processes. This includes adequate processes for selecting, monitoring and reviewing any other person engaged as asset holder, including if the asset holder is a related party, and taking appropriate action on any deficiency of performance.

RG 133.70 You must document key processes. This includes the processes you have followed or will follow for appointing, monitoring and reviewing the activities of the asset holder or master custodian. Where the asset holder is a related party, you must have adequate arrangements to manage any conflicts of interest under s912A(1)(aa) to ensure that you meet all your obligations, including that the minimum standards are met.

Note: See also RG 181.

Selecting an asset holder

RG 133.71 You must follow a reasonable documented process in selecting an appropriate asset holder or master custodian. We expect you to consider, for example:

- (a) the adequacy of financial, human and technological resources, and risk management systems of the asset holder; and
- (b) where you engage a master custodian, the basis under which the master custodian will engage any sub-custodian.

RG 133.72 If you are a responsible entity, IDPS operator or MDA operator, the engagement must be in accordance with a documented policy approved by your directors. The policy must address any conflict of interest that might arise in relation to the engagement and, in the case of a responsible entity, any other considerations relevant to the best interests of members.

RG 133.73 The appropriateness of the policy must be reviewed at least every 13 months. At our request, you must, at your own expense, arrange for a report on the effectiveness or reasonableness of the policy. The written direction may specify who is to prepare the report and the timing of it.

RG 133.74 We expect that the risks arising from engaging an asset holder will be addressed in your risk management arrangements where these arrangements are required under s912A(1)(h). We also expect you to apply appropriate resources to ensure that any arrangements for holding assets are consistent with your obligations, including ensuring that the minimum standards are met.

Monitoring ongoing compliance

RG 133.75 You must have an established process to monitor and assess the asset holder's performance of its obligations. If you delegate decisions to the asset holder about which Australian deposit-taking institution (ADI) or foreign equivalent it uses, or how foreign exchange transactions are entered, you must be satisfied about the asset holder's written processes for determining which account to use, monitoring performance of the issuer's obligations and taking action in case of a deficiency arising from the failure of the issuer of the account.

- RG 133.76 In addition, if you permit the asset holder to choose to use its associate, you will need to check the adequacy of the process to ensure that the conflict is managed to result in a no less favourable outcome than if there was not an association. If you are a responsible entity, you must also comply with Pt 5C.7 of the Corporations Act.
- RG 133.77 You must ensure that records of your assets are kept in a way that enables the holding of the assets to be audited. You should also ensure that you enforce contractual rights to a written annual acknowledgement by the asset holder that any relevant assets are held in compliance with the minimum standards, including that the assets are held on trust when required and separated, subject to the permitted use of omnibus accounts: see Section F. This also applies where a master custodian engages an asset holder.
- RG 133.78 In addition, we expect you to seek:
- (a) information to satisfy yourself that the asset holder's internal processes and controls are adequate and continue to operate effectively, and that they are subject to appropriate independent checking; and
 - (b) periodic information from the asset holder about the effectiveness of such controls, and actions taken or planned to address any concerns.
- RG 133.79 We expect that, where appropriate, you will obtain a copy of and consider an independent audit of the effectiveness of the controls applying to the asset holding, such as an audit based on Guidance Statement GS 007 *Audit implications of the use of service organisations for investment management services*, issued by the Auditing and Assurance Standards Board (AUASB), or another appropriate international equivalent (e.g. Statement on Standards for Attestation Engagements (SSAE) No. 16 *Reporting on controls at a service organization*). This audit may be performed on the basis of an engagement by the asset holder.

Note: GS 007 is designed to provide detailed and transparent reporting on relevant control frameworks of asset holders and other custodians. It includes guidance on how to apply the AUASB's relevant auditing and assurance standards when preparing audit and assurance reports on the description, design and operating effectiveness of the service organisation's controls over the investment management services.

Requirements for the content of custody agreements

Note: For the commencement date of the requirements for the content of custody agreements, see Table 1 in Section A.

- RG 133.80 You must ensure that there is a legally enforceable agreement with any asset holder you engage. The agreement must address the issues set out in this section. For a responsible entity, MDA operator or IDPS operator, there must be an agreement with any master custodian and between any master custodian and asset holder (sub-custodian) that addresses these issues. The

agreement must generally be in writing, unless you meet the criteria in RG 133.118–RG 133.120.

Your agreement with an asset holder

RG 133.81 Your agreement with an asset holder must address the issues in RG 133.82–RG 133.105.

Your rights to review and monitor the asset holder

RG 133.82 Your agreement must provide you with reasonable rights for the ongoing review and monitoring of the asset holder and any sub-custodians, and address the criteria against which their performance will be assessed. We expect that rights and criteria must be adequate to ensure:

- (a) you can meet your obligations to your clients under the Corporations Act;
- (b) ASIC's minimum standards for asset holders are met; and
- (c) the services provided will at least meet the standards generally applying in the relevant markets for the assets held.

Written certification

RG 133.83 Your agreement must require that the asset holder will certify to you in writing at least every 13 months that, other than in any trivial respect or as previously disclosed to you in writing, it believes on reasonable grounds that, since the date of the previous statement in writing or the commencement of the agreement:

- (a) it has met, and has no reason to believe that it will not continue to meet, the minimum standards in the relevant class order which reflect the standards for asset holders (whether or not there is any explicit reference to the class order in the agreement); and
- (b) it is complying with the agreement.

Manner in which assets are held

RG 133.84 Your agreement must require that the asset holder, on request, will:

- (a) formally acknowledge the manner in which it holds assets; and
- (b) notify any other person where the asset holder is aware to do so might protect the interest in the assets of the client that the assets are so held unless you direct in writing otherwise.

Giving of instructions

RG 133.85 Your agreement must address how instructions will be given to the asset holder.

Liability

- RG 133.86 Your agreement must contain reasonable liability provisions and contain, if appropriate, reasonable indemnity provisions in relation to losses caused to you by the acts and omissions of the asset holder that relate to the agreement.
- RG 133.87 We expect that you would not compromise the interests of your clients in the presence of liability or indemnity provisions unless you are satisfied that any additional cost would be disproportionate to the benefits to your clients. Clients have a significant interest in promoting compliance by the asset holder and, in the event of non-compliance, receiving compensation for loss by the asset holder. Without implying that it would be sufficient, at a minimum, you must not agree any broad exclusion of any liability for direct losses that would apply for the failure to take reasonable care under general law and only allow any limited exclusion if reasonable.

Security interests, mortgages, liens or other encumbrances

- RG 133.88 Your agreement must prohibit the asset holder from taking or granting to its associates a security interest, mortgage, lien or other encumbrance over, or in relation to, the assets held under the agreement unless you reasonably believe for documented reasons that any conflict that may arise as a result of the security interest, mortgage, lien or other encumbrance will not materially increase the risk that the asset holder will fail to meet its obligations.
- RG 133.89 You must keep the written record of reasons for seven years after the security interest, mortgage, lien or other encumbrance, as relevant, has ceased. For example, an asset holder may have a lien over assets held to secure entitlement to expenses incurred and we understand that it may exercise that right in its own interest subject to the terms of, or legal rights under, the lien. You should be satisfied that the asset holder would meet its obligations under the agreement, even if acting contrary to the agreement might maximise the value of the lien.

Record keeping and reporting

- RG 133.90 Your agreement must address how records of the assets are held, the transactions and by whom, by what means and when they were authorised. These records must be kept and maintained by the asset holder and made available to you, including:
- (a) the verification procedures for the appropriately frequent reconciliation and checking of the balances of client assets held by the asset holder; and
 - (b) the requirements for reporting by the asset holder.

Auditing

RG 133.91 Your agreement must require that the asset holder provides all reasonable access and assistance to any auditor engaged to audit your financial statements or, for a registered scheme, the financial statements of the registered scheme.

Note 1: Under reg 5C.4.02, an agent of a responsible entity, such as an asset holder, must give the auditor of the scheme's compliance plan access to the books of the scheme, and assist in the conduct of the audit. Under reg 5C.5.01, responsible entities and their agents must give the compliance committee access to the books of the scheme and assist the committee in the performance of its functions.

Note 2: We may require an AFS licensee and an agent of a responsible entity to assist us in checking compliance: s601FF, 912E and reg 5C.2.01. We also have powers to require production of books under the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

Identity of any agents

RG 133.92 Your agreement must provide that before arranging for assets to be held by another person as agent, the arranging asset holder will provide you with written notice of the identity of, and contact information for, each agent, where reasonably practicable and in any event before the assets are held, except in exceptional circumstances identified in the agreement.

Termination

RG 133.93 Your agreement must address the circumstances in which you have the right to terminate the agreement, if you have reasonable grounds for believing that the asset holder is not complying with, or is unlikely to comply with, the agreement that would mean that to a material extent it will not comply with the relevant requirements, having regard to any remedy provided or that may be expected to be provided by the asset holder. The relevant requirements are the requirements that you are required to ensure the asset holder meets in providing the services under the agreement reflecting ASIC's minimum standards and the requirement that records must be kept so as to enable convenient audit.

RG 133.94 The provisions for termination, if you have reasonable grounds for holding that belief, must include, at a minimum, provisions to the effect that you may terminate the agreement:

- (a) without payment, other than in relation to entitlements previously accrued or the reasonable fees, costs and expenses involved in the transfer of the assets to you or another asset holder; and
- (b) without limiting any right to damages you may have under the agreement, including recovering the expenses referred to in paragraph (a) if the asset holder is in breach.

- RG 133.95 Your agreement must also require that, on termination, the assets will be transferred to you (if not already held by you) or otherwise be transferred as you lawfully direct (including to another asset holder) within a reasonable period. The agreement must provide for the obligations of the parties at termination, including the payment of outstanding fees and charges to the asset holder and any costs of the transfer.

Breach reporting

- RG 133.96 Your agreement must require that material or systemic breaches of the agreement by you or the asset holder will be notified in writing by the asset holder to you—or, if you are a responsible entity, your board of directors or the compliance committee of each relevant scheme—within a reasonable timeframe of the asset holder becoming aware of the breach.

Arrangements with other parties

- RG 133.97 Your agreement must address the terms on which the asset holder is authorised to directly or indirectly engage another party as asset holder and require provisions of the appointment in a written agreement in accordance with the requirements in this guide (subject to the exceptions noted at RG 133.118).

Business continuity

- RG 133.98 Your agreement must require that the asset holder will establish and maintain business continuity arrangements that are reasonable for the nature, scale and complexity of its business.

Confidentiality

- RG 133.99 Your agreement must require that the asset holder will keep any information of a confidential nature in confidence, apart from any disclosure to ASIC or as permitted by law or by the client.

Suspicious matter reporting for responsible entities

- RG 133.100 If you are a responsible entity, your agreement must provide that the asset holder will establish and maintain adequate arrangements to ensure that it will report to ASIC within 10 business days if it suspects you have breached your obligations to report your own breaches as required by s912D(1B) or, where relevant, s601FC(1)(l) of the Corporations Act.
- RG 133.101 The required arrangements relate only to what the asset holder does after that suspicion has arisen, whether from inquiries it undertakes for another purpose (including in relation to other arrangements with the asset holder that reflect obligations applying under the AML/CTF Act), information obtained in the ordinary course of business, or information received from

another source. The required arrangements are not the source of any obligation to make inquiries.

- RG 133.102 We would expect the asset holder to use reasonable judgement in determining whether to discuss the suspicion with the client before reporting to ASIC. We accept that, under the required arrangements, if an employee or agent of the asset holder has such a suspicion, the asset holder may give reasonable consideration to determine if there are grounds for the suspicion before reporting to ASIC.
- RG 133.103 Your agreement must not contain any provision that would require the asset holder to notify the client of suspicious matter reporting by the asset holder to ASIC in relation to the client's activities. However, except as otherwise restricted by law or where it would be imprudent in light of the risk of tipping off a person engaged in misconduct, it may generally be appropriate to seek clarification from the responsible entity, after the matter is considered under the internal governance arrangements of the asset holder.
- RG 133.104 We consider that the requirement for such arrangements may have some deterrence benefits for entities that may be considering committing, or not reporting, significant breaches if they know that the asset holder may identify such a breach and report it to ASIC (if it believes that the entity has not reported it).
- RG 133.105 We also consider that asset holders that provide services under contract and their employees can report suspicious matters to ASIC under the whistleblower protection in Pt 9.4AAA of the Corporations Act, including where the AML/CTF Act may not apply.

Note: See Information Sheet 52 *Protection for whistleblowers* (INFO 52).

Your agreement with a retail client to hold assets

- RG 133.106 If you are engaged on or after 1 November 2015 as an asset holder by a retail client, your agreement with the retail client must address the issues in RG 133.107–RG 133.115, as relevant.

Manner in which assets are held

- RG 133.107 Your agreement must require that you will acknowledge to the retail client on request the manner in which you hold the assets.

Giving of instructions

- RG 133.108 Your agreement must address how instructions will be given to you.

Liability

- RG 133.109 Your agreement must state that you are liable to the client if there is a loss to the client because of a failure by you, or any asset holder engaged by you, to comply with the duties under the agreement, or to observe reasonable standards generally applied by providers of custodial or depository services, subject to provision for you to limit your liability resulting from the failure of an asset holder you have appointed if that asset holder is insolvent and you have taken reasonable care in appointing and monitoring the asset holder's compliance.

Security interests, mortgages, liens or other encumbrances

- RG 133.110 Your agreement must prohibit you from taking or granting a security interest, mortgage, lien or other encumbrance over, or in relation to, the assets held under the arrangement unless it is:
- (a) for expenses and outlays made within the terms of the agreement other than any of your unpaid fees; or
 - (b) in accordance with the client's written instructions.

Record keeping and reporting

- RG 133.111 Your agreement must address how records of the assets and any transactions and how, by whom and when they were authorised are held. These records must be kept and maintained by you and made available to the client, including:
- (a) the verification procedures for the appropriately frequent reconciliation and checking of the balances of client assets held by you; and
 - (b) the requirements for reporting by you.

Identity of any agents

- RG 133.112 Your agreement must state that, where practicable, before arranging for the assets to be held by another person as agent and, in any event, before the assets are held, except in exceptional circumstances identified in the agreement, you will provide the client with written notice of the identity of, and contact information for, each agent.

Termination

- RG 133.113 Your agreement must require that, on termination, the assets will be transferred to the client or otherwise transferred as the client lawfully directs within a reasonable time. The agreement must provide for other obligations of the parties at termination, including the payment of outstanding fees and charges to the asset holder and any costs of the transfer.

Business continuity

- RG 133.114 Your agreement must state that you will establish and maintain arrangements to enable you to provide the services under the agreement in any contingency for which you should reasonably plan. Those arrangements must be reasonable for the nature, scale and complexity of your business.

Confidentiality

- RG 133.115 Your agreement must require that you will keep any information of a confidential nature in confidence, apart from any disclosure to ASIC or as permitted by law or by the client.

Your agreement with a master custodian

- RG 133.116 In many cases, a responsible entity, MDA operator or IDPS operator will not directly engage an asset holder, but will engage a master custodian that engages the asset holder (or sub-custodian). As far as possible, the same minimum standards should apply for an asset holder that is engaged by a master custodian, except that in the case of a responsible entity, the provisions referred to in RG 133.100–RG 133.105 on suspicious matter reporting need not be included if the master custodian holds a beneficial interest in the client assets for you as responsible entity.
- RG 133.117 If you engage a master custodian that appoints another asset holder, you must enter into a written agreement with the master custodian reflecting the terms required in an agreement with the asset holder in RG 133.82–RG 133.99. That agreement must contain an obligation for the master custodian engaged to ensure that any agreement between the master custodian and the asset holder is in writing and on substantively the same terms as required for the agreement with the asset holder, other than the requirement in RG 133.100–RG 133.105 on suspicious matter reporting, to the extent that it is practicable from time to time to obtain the services of an asset holder for the relevant assets outside Australia that is willing to accept those terms.
- RG 133.118 In some cases, it may not be reasonably practicable to engage another person to hold client assets outside Australia who is willing to include such matters in the agreement. In this case, the agreement does not need to contain the matters referred to in RG 133.82–RG 133.99 or RG 133.107–RG 133.115, as applicable, to the extent that it is not reasonably practicable for you to ensure such compliance.
- RG 133.119 However, in that case, the client of the master custodian must be provided with documents that demonstrate that it is not reasonably practicable to engage another person to hold the assets who is willing to include such matters in the agreement.

- RG 133.120 The requirement that a master custodian enters into an agreement does not apply if the asset holder is controlled by the master custodian and the master custodian is liable to its client for the acts and omissions of the asset holder as if they were the acts or omissions of the asset holder.

Disclosure to retail clients of relationship with asset holder

- RG 133.121 For retail clients, we expect responsible entities, IDPS operators and MDA operators to explain the limited role of the asset holder in the Product Disclosure Statement (PDS), Financial Services Guide (FSG) or IDPS Guide in relation to a scheme in which the asset holder is holding the scheme property, and is acting only as a custodian, and more generally in communications with clients that refer to the asset holder as a custodian. To promote understanding, in communications to retail clients, the role of the asset holder should be explained in a clear, concise and effective manner, including the limited nature of the services undertaken.
- RG 133.122 Where some of the scheme property may not be held on trust by the asset holder, these circumstances may also need to be explained in communications.

Transfer of assets when asset holder is changed

- RG 133.123 If you are a responsible entity and change the asset holder, you must consider whether it is appropriate to obtain a report from an unrelated person with relevant knowledge, confirming that all assets to be transferred have been identified and transferred as required. Verification of the appropriate identification and transfer of assets may involve checking reconciliations between the outgoing and incoming asset holder or obtaining an audit. If you do not consider it is in the best interests of members to obtain the report, you must keep for seven years a record in writing of the grounds for your belief.

D Compliance measures

Key points

As an AFS licensee, you must have documented measures to ensure that you comply with your obligations in relation to client assets.

Compliance measures may vary depending on the nature and amount of assets and who holds them.

Compliance plans may need to satisfy particular requirements depending on your situation.

Note: For the commencement dates for the requirements in this section, see Table 1 in Section A.

Compliance measures must cover risks to client assets

RG 133.124 All AFS licensees must establish and maintain compliance measures as a condition of their licence. As a responsible entity, licensed custody provider, MDA operator or IDPS operator that is responsible for client assets, your documented compliance measures must include measures to minimise the risks to clients from any non-compliance in holding these assets.

RG 133.125 If you are a responsible entity, you must have a compliance plan for each registered scheme that sets out adequate measures to ensure that you comply with your obligations under the Corporations Act and the scheme constitution: s601HA.

Note: See RG 132.

RG 133.126 If you are a licensed custody provider, MDA operator or IDPS operator, you must establish and maintain adequate documented measures to demonstrate that you are complying with your AFS licence obligations.

Compliance measures may vary

RG 133.127 We have not prescribed in detail what measures for dealing with client assets should be included in the compliance plan of a responsible entity, or in the documented compliance measures of a licensed custody provider, MDA operator or IDPS operator. This is consistent with our general approach to documenting compliance measures in RG 132.

RG 133.128 There will be different risks to clients arising out of the different ways that client assets are held, including whether you are the asset holder or you engage another asset holder to hold some or all the assets. We also recognise

that what is required in documented compliance measures will depend on the nature and amount of assets held.

- RG 133.129 For example, more sophisticated compliance measures, processes and procedures may be required by a stand-alone custody business that provides services for a full range of financial products, compared to an AFS licensee that holds only a limited range and value of assets.

If you are the asset holder

- RG 133.130 If you are the asset holder, your documented compliance measures will include:
- (a) regular checks to ensure that all record keeping for client assets is carried out in a timely and accurate manner; and
 - (b) measures for ensuring that the minimum standards in Section B of this guide are met.

If another person is the asset holder

- RG 133.131 If you engage another person as an asset holder, we expect you to ensure that clients are protected from the possible compliance risks arising from this arrangement.
- RG 133.132 Your documented compliance measures will set out the measures you will take to minimise these risks. This would include, for example, measures for ensuring that:
- (a) you will allow a person to be the asset holder only if they meet the minimum standards in Section B;
 - (b) the activities of the asset holder will be actively monitored and appropriate action taken in case of deficiencies; and
 - (c) any agreement entered into with the asset holder will remain compliant and current.

Compliance plans of responsible entities

- RG 133.133 For registered schemes, Ch 5C recognises that there are risks to scheme members depending on how the scheme property is held. The compliance plan should describe in some detail the scheme property arrangements.
- RG 133.134 For example, the compliance plan of a registered scheme must set out arrangements for ensuring that scheme property is clearly identified as scheme property and held separately from the property of the responsible entity and the property of any other scheme: see s601HA(1)(a) and RG 132.

Table 2 sets out minimum standards for what should be addressed, depending on your situation.

Table 2: Responsible entities: What to address in your compliance plan

Your situation	What your compliance plan should include
<p>You hold assets for a registered scheme (sometimes called 'self-custody').</p>	<p>Your compliance plan should:</p> <ul style="list-style-type: none"> • comply with RG 132; • set out how you will deal with risks to scheme members that might arise from non-compliance by you in holding scheme property; • include measures to satisfy the board or compliance committee, on a regular basis, that you are complying with your obligations under s601FC(1)(i) (i.e. that scheme property is clearly identified as scheme property and held separately from the property of the responsible entity and property of any other scheme, subject to any relevant exemption) and that you are meeting the minimum standards in Section B of this guide; and • contain measures with sufficient scope and specificity that the audit of the compliance plan will provide an independent verification of the robustness of the asset-holding arrangements in relation to material compliance risks, particularly any risks that apply more specifically to self-custody. We expect this to include, where applicable, measures to ensure that the responsible entity's risk management arrangements adequately address operational risks arising in relation to holding scheme property.
<p>You hold assets where it may not be practicable to identify publicly that they are held on trust.</p>	<p>Your compliance plan would generally need to include specific measures to ensure you comply with your obligations to scheme members for those assets. The plan might, for example, include special authorisation procedures.</p>
<p>You have engaged an asset holder that is your related body corporate or other associate.</p>	<p>If you arrange for a person who is legally or commercially related to you to be the asset holder, we expect you to include the same types of measures that you would use if you were the asset holder.</p>

E Protection of rights for land used in registered schemes

Key points

We have modified the Corporations Act where an offer of interests in a registered scheme requires the use of particular land on which the scheme will occur.

The purpose of the modification is to protect members by requiring:

- the land to be held by members, a company controlled by members, or on trust for members; and
- the registered scheme to provide measures, including registration of a protective interest in the land, to ensure as far as possible continuing access to the land required for the purposes of the scheme.

The instrument to register the protective interest must be lodged under state or territory land title laws before or immediately after interests in the registered scheme are issued.

Note: For the commencement dates for the requirements in this section, see Table 1 in Section A.

Protecting members' rights

- RG 133.135 In many primary production registered schemes, members contract with the responsible entity to set up and maintain the scheme, and harvest or exploit its products in the context that there will be arrangements allowing the use of certain land. This could apply to schemes involved in agriculture, use of animals, harnessing energy from solar or wind energy, or obtaining benefits from sequestering carbon dioxide. The land often remains the property of the responsible entity, or an associate or unrelated landowner, and reverts to it when the scheme ends.
- RG 133.136 We consider that it is inconsistent with the obligation of a responsible entity to do all things necessary to ensure that it operates a registered scheme efficiently, honestly and fairly to operate the scheme if the scheme is subject to risks of failure because of inadequate protection of the rights to use the land for the scheme for the expected duration of the scheme. We consider the rights of members requiring protection in relation to the land include the rights sufficient to enable access, cultivation, transmission, exploitation, maintenance, protection, repair, refurbishment, and harvesting or obtaining output from the scheme, where relevant to the scheme.
- RG 133.137 To provide adequate protection in relation to land, it is appropriate that members have an interest in the land registered in accordance with the state or territory land title laws, such as by lodging the instruments before or immediately after the interests in the registered scheme are issued. We consider

that land should be held in a way that protects members from risks outside the scope of the scheme, such as the insolvency of a landowner.

RG 133.138 Certain risks arise if members are not protected by an interest in land needed for operation of the scheme that is registered under state or territory laws, and that is paramount and cannot lawfully be adversely affected by any existing or subsequent secured creditor or a transferee, other than one whose title has been conferred by the responsible entity in accordance with its duties.

RG 133.139 Risks to members include the following:

- (a) The holder of the interest in the land may have used, or may use, the land as security without acknowledging the interests of members and, if there is a default, the secured creditor may act without regard to the interests of the members.
- (b) A person holding an interest in the land on which the registered scheme relies (landowner)—or a liquidator of a landowner or other person authorised to act on a landowner's behalf—may restrict access to land not covered by the interest that is reasonably necessary for the operation of the scheme.
- (c) A landowner—or a liquidator of a landowner or other person authorised to act on the landowner's behalf—may transfer the land (or an interest in the land) to a transferee who may not be under an obligation to recognise the rights of the members regarding the land.
- (d) It may be practically difficult to continue to operate or to wind up the registered scheme if a landowner has become insolvent.

RG 133.140 Where the interest in the land continues only while the obligations of the interest holder to others with an interest in the land (e.g. a secured creditor or lessor) are being met, failure to meet these obligations may result in the loss of the interest. Retail investors may not expect the registered scheme to be put at risk by such failures. Where the security or lease has been entered into by the responsible entity in accordance with its duties, risk remains and may require disclosure to retail clients.

Note: Regulatory Guide 232 *Agribusiness managed investment schemes: Improving disclosure for retail investors* (RG 232) includes a disclosure principle dealing with a responsible entity's disclosure obligations in relation to the arrangements entered into to secure rights of access or tenure to the resources and infrastructure required to operate the agribusiness scheme, including any land, licences or leases, and water.

RG 133.141 Registration of an interest does not ensure the land right that the interest might normally confer can be used. There may be other rights to use land such as native title rights. A responsible entity must only offer interests in the registered scheme if following reasonable inquiry it does not believe that there are such rights or that government action or refusal to grant permission will mean the land cannot be used for the scheme as intended.

Registration of protective interest

- RG 133.142 Where an offer of interests in a registered scheme involves the use of particular land that is reasonably required for the benefits to be produced by the scheme through primary production, certain additional requirements apply.
- RG 133.143 We have modified the Corporations Act so that these additional requirements apply to any offer of interests in a registered scheme that is made to retail clients on or after 2 January 2014, and that is made with, or includes, an offer of rights attaching to or arising from the land on which the scheme will occur: see Class Order [CO 13/1406] *Land holding for primary production schemes*.
- RG 133.144 Under [CO 13/1406], the responsible entity must:
- (a) take reasonable steps to ensure that any regulatory approvals are necessary to carry out the primary production activities that the scheme involves are obtained and maintained;
 - (b) protect the rights of members to have use of the relevant land on which the primary production occurs, including the rights sufficient to enable access, cultivation, transmission, exploitation, maintenance, and harvesting or obtaining output from a registered scheme, as relevant to the scheme and for the expected duration of the scheme through an appropriate registered interest in the land under state or territory land title laws;
 - (c) register the interest in such a form and in such a way that it cannot be adversely affected either by the interests of others in the land or, as far as possible, by any future interests, unless the interests of others were properly created by the responsible entity in accordance with its duties or were interests of which the responsible entity was not aware after reasonable inquiry. For example, the AFS licensee will need to obtain written consents from the entities external to the scheme (e.g. the landowner or secured creditors) to postpone the priority of their interests in the land over the scheme members' interests in the same land, and may need to register the consents in accordance with state or territory land title laws; and
 - (d) ensure that, if the registered interest is a lease or an instrument that confers the right to use land which requires regular payments to be made:
 - (i) the constitution of the scheme gives the responsible entity the power to require members to make payments to meet the obligations under the terms of any lease or instrument;
 - (ii) any amounts paid by members are retained in relation to the lease or instrument on trust until the money is used to meet lease or

rental payments relating to the land necessary for the continuity of a required registered interest;

- (iii) the terms of the lease or instrument are not less favourable to the scheme than on an arm's length basis and exclude any action by the lessor or a head lessor in connection with the lease or instrument that would adversely affect the interests of members without the responsible entity having at least three months written notice; and
- (iv) on receipt of a notice under paragraph (iii), affected members are promptly notified in writing and advised of members' rights to requisition a meeting.

RG 133.145 The interest must be:

- (a) registered in the name of the members collectively or in the name of a company controlled by scheme members;
- (b) held by each member in relation to that portion of the land on which the primary production business in which the member has an interest is being conducted;
- (c) held by the asset holder or other person entitled to hold scheme property as trustee for members, or in trust for the responsible entity if it holds the beneficial interest in trust for members; or
- (d) held by the responsible entity as trustee for members.

If the notice of the trust cannot be registered on that register, we expect the responsible entity to lodge a caveat and the trust deed with the land titles registrar where possible and when it would be of assistance in reducing risk.

RG 133.146 [CO 13/1406] does not allow for arrangements that require the use of land outside Australia. However, we will consider case-by-case applications for relief for the use of foreign land by a particular registered scheme. The applicant will need to demonstrate that arrangements will be put in place that are as effective as those that would be required for Australian land.

F Relief from the obligation to separate assets

Key points

As a responsible entity, you must ensure that scheme property is clearly identified as scheme property and held separately from your property and the property of any other scheme.

We have given limited class order relief to responsible entities from this requirement, and make similar exceptions for other asset holders, to allow the use of omnibus accounts.

Obligation to hold assets separately

RG 133.147 Generally, unless an exemption applies, as a responsible entity that holds scheme property on trust under s601FC(2), you must ensure that property of the registered scheme is:

- (a) clearly identified as scheme property (s601FC(1)(i)(i)); and
- (b) held separately from your property and the property of any other scheme (s601FC(1)(i)(ii)).

RG 133.148 Similar requirements apply if you hold assets as a licensed custody provider under [CO 13/1410], an MDA operator under [CO 04/194] or an IDPS operator under [CO 13/763].

RG 133.149 In some circumstances, it may not be appropriate to separate assets from those of other persons or schemes. Holding certain classes of assets separately may be inconsistent with market practice where it is likely to substantially add to the cost of holding scheme property. We have given limited relief from s601FC(1)(i) to responsible entities, in certain circumstances, subject to requirements to ensure that the interests of members are not put at any additional risk of being lost by any pooling arrangements: see [CO 13/1409].

Note: Before 2 January 2015, a responsible entity may instead rely on Class Order [CO 98/51] *Relief from duty to separate assets of a managed investment scheme* if it chooses.

RG 133.150 Similar requirements apply to licensed custody providers under [CO 13/1410], IDPS operators under [CO 13/763], and MDA operators under [CO 04/194] when they do not hold assets separately. The requirements only apply from 2 January 2015 for certain licensees as set out in Table 1.

Relief for omnibus accounts

RG 133.151 Our relief under [CO 13/1409] applies to responsible entities holding any:

- (a) Australian or foreign currency;
- (b) deposit-taking facility with a body carrying on a business of accepting money on deposit, including rights under that facility;
- (c) securities; or
- (d) derivatives.

This relief applies subject to ASIC's power to exclude reliance by a responsible entity in certain circumstances.

RG 133.152 Provisions regarding the use of pools (i.e. omnibus accounts) also apply to other AFS licensees.

RG 133.153 Omnibus accounts are permitted where:

- (a) the assets are held separately from the assets of the AFS licensee engaging the asset holder and the asset holder;
- (b) the AFS licensee responsible for ensuring that the assets are held (e.g. the responsible entity) ensures that the asset holder:
 - (i) maintains adequate records at all times showing the entitlement of clients in the assets not held separately;
 - (ii) performs reconciliation procedures on each business day in relation to the assets not held separately unless, because of the nature of assets of a particular type, it is ordinary and reasonable commercial practice to reconcile such assets less frequently. ASIC expects that this standard will generally be required daily for financial products traded on a financial market and deposit products;
 - (iii) does not restrict its capacity to exercise or cause the exercise of powers in relation to the assets, including any power to direct voting; and
 - (iv) ensures that the omnibus account does not fail to be sufficient after the end of the second business day to meet the entitlements of the client and any other person in relation to the assets not held separately, if necessary, through the asset holder supplementing the assets not held separately with its own assets. The amount paid in would become held for the persons having a beneficial interest in the omnibus account, other than the asset holder. If, because of later repayments, the account goes into surplus, the asset holder can be reimbursed with equivalent assets; and
- (c) the AFS licensee responsible for ensuring that the assets are held:
 - (i) documents its policy in relation to not holding assets separately and its reasons why that policy is appropriate, having regard to any extent to which it might expose the relevant clients to unreasonable

risk or have any reason to believe that applying the policy would not be in accordance with its duties to the relevant clients;

- (ii) ensures the policy has been reviewed during the previous 13 months and a written record of the outcome of the review recorded; and
- (iii) keeps a record of the policy and the record of its review for seven years after it has ceased to be the current policy that enables the assets not to be held separately.

RG 133.154 For retail clients of licensed custody providers, the potential use of omnibus accounts must be notified in the asset holder's FSG and expressly agreed to in writing by the retail client.

Key reasons for permitting use of omnibus accounts

RG 133.155 If s601FC(1)(i) applied, omnibus accounts, which are typically used to hold financial assets, would cause the responsible entity to be in breach of the obligation to clearly identify scheme property and hold it separately from the property of the responsible entity and the property of any other scheme.

RG 133.156 A responsible entity might reasonably consider that holding scheme property separately from property of other schemes would be inappropriate if it increases the costs to scheme members without materially increasing any risk. A risk could arise from holding assets together to the extent that the assets of one client could be used to settle the obligations of another client.

RG 133.157 Ensuring efficient and compliant operation by the asset holder may include operating separate omnibus accounts for different types of clients (e.g. buy–hold clients versus broker–dealer clients). Specifically, if there is a non-trivial risk of a shortfall in a client's account due to the nature of the client or the types of transaction entered into that would not be addressed by the asset holder paying in assets to cover a shortfall, we would expect that the asset holder would, as part of its risk management system, segregate the client's assets to minimise potential losses to other clients or to the asset holder itself.

RG 133.158 If an asset holder has used assets in the omnibus account to which a client is entitled for the benefit of another client not in accordance with the first client's instructions and a shortfall arises, the asset holder must cover the shortfall after the end of the second business day after the shortfall arises.

Relief does not extend to non-financial assets

RG 133.159 Our policy on omnibus accounts does not extend to assets other than financial assets (e.g. real property). For example, responsible entities or other persons holding scheme property are not permitted to hold a single piece of other property as trustee for a registered scheme and also another scheme.

- RG 133.160 However, we consider that the obligation to hold assets separately arises only to the extent that this can be done. This may not be possible for real property (e.g. where disclosure of trusts in the land titles register may not be permitted) and certain other assets. In this case, we accept that real property can be registered in the name of the asset holder without breaching the obligation in s601FC(1)(i), or the requirement under [CO 04/194] for MDA operators, [CO 13/763] for IDPS operators or [CO 13/1410] for licensed custody providers, to hold the assets separately.
- RG 133.161 In the case of a responsible entity, we consider the obligation to separate scheme property extends to doing all that is practicable to achieve separation, given the nature of the property and its ownership. Therefore, we do not consider it necessary to give any relief from s601FC(1)(i) in this situation. However, we expect compliance arrangements to particularly address the risks of this asset-holding arrangement.

Appendix: Transitional requirements

- RG 133.162 As noted in Section A (see Table 1), a transitional period applies to some AFS licensees (i.e. if your authorisation date or asset-holding commencement date is before 2 January 2014). If a transitional period applies to you, you have until the implementation dates specified in Table 1 to comply with the relevant requirements. However, until you do meet the revised requirements, you must meet the requirements in the former version of RG 133, which are reproduced in this appendix.
- RG 133.163 The requirements under the previous version of RG 133, if applicable as applied by Regulatory Guide 148 *Platforms that are managed investment schemes* (RG 148) and Regulatory Guide 167 *Licensing: Discretionary powers* (RG 167), may continue to apply under the conditions of your AFS licence issued before 2 January 2014 until 2 January 2015 (or 1 November 2015 for the content of custody agreements requirements).
- RG 133.164 From 1 November 2015, this appendix will no longer apply, and all requirements and relief will be contained within updated RG 133 and the relevant class orders.
- RG 133.165 This appendix is not intended to state any new policy. It merely replicates the requirements that applied under the previous version of RG 133.

Note: A copy of the previous version of RG 133 is also available on request to custodyconsultation@asic.gov.au.

Minimum standards for scheme property custodians

- RG 133.166 A custodian of scheme property, whether it is the responsible entity or its agent, must meet minimum standards for:
- (a) organisational structure (see RG 133.171–RG 133.174);
 - (b) staffing capabilities (see RG 133.175–RG 133.176);
 - (c) ability and resources to perform core administrative activities (see RG 133.77–RG 133.78);
 - (d) arrangements on how various assets are held (see RG 133.179); and
 - (e) custody-related financial resources (see RG 133.180).
- RG 133.167 A responsible entity that does not meet these standards will still be given an AFS licence if it meets our other licensing requirements. However, its licence will be subject to a condition that another entity, which meets the standards, must be the custodian of all the property of any scheme that the responsible entity operates.

Underlying principles

- RG 133.168 The Corporations Act highlights the importance of arrangements that a responsible entity puts in place to ensure proper standards for the safe keeping of scheme property. We believe that members' interests will be better protected if the scheme property is held only by entities that meet minimum standards.
- RG 133.169 These standards seek to ensure that:
- (a) scheme property is not exposed to unnecessary risks because of the way it is held; and
 - (b) efficient operational arrangements exist for holding and dealing with scheme property.

Explanations

Standards for holding scheme property

- RG 133.170 We expect that, in most cases, the standards will be met by the responsible entity appointing a third-party custodian. We have not attempted to prescribe detailed requirements that custodians must meet. Instead, as referred to in RG 133.166, we have set out what we consider are the minimum outcomes which a custodian must achieve, whether the custodian is the responsible entity or its agent.

Organisational structure

- RG 133.171 The custodian must have an organisational structure that supports the segregation of scheme property from its own assets. This segregation should happen regardless of whether the custodian is the responsible entity or its agent.
- RG 133.172 There may be a conflict of interest between the custody operations and other operational areas of the custodian. If there could possibly be a conflict, the custodian must make sure that custodial staff are segregated in a way that minimises the potential for conflict.
- RG 133.173 At a minimum, the custodian should be structured so that custodial staff can report directly to the compliance committee or board of directors of the responsible entity. They should report to these groups rather than to people who are responsible for other functions such as investment, marketing or operations.
- RG 133.174 The organisation should also be structured to ensure that the duties of custody staff are appropriately segregated from the duties of other employees. This would mean, for example, that custody staff must not also be responsible for investment decisions, trading decisions or other decisions

resulting in the movement of scheme property. This may also mean, in some circumstances, that custody staff are physically separated from other staff of the responsible entity.

Staffing capabilities

- RG 133.175 Custodial staff must have the experience, qualifications, knowledge and skills necessary to perform their functions properly. The entity must undertake adequate ongoing training and educational programs so that the officers' knowledge remains at a level necessary for performing assigned responsibilities.
- RG 133.176 The entity should make available to custodial staff resources in specialist areas which may be necessary for them to adequately carry out their duties.

Administrative resources

- RG 133.177 The custodian must have the necessary capacity to perform the core administrative activities associated with holding scheme property. This will vary depending on the nature of the scheme and its assets.
- RG 133.178 Generally, however, this capacity is likely to include having:
- (a) computer systems which are secure and capable of handling the record-keeping and transaction processing for the scheme (given the volume of transactions) and the capacity to separately identify scheme property;
 - (b) procedures in place for accurately recording all scheme property, all movements of scheme property, and all income, pricing and other related core administrative activities;
 - (c) access to information sources which may be relevant to corporate actions and proxy voting, or for pricing information;
 - (d) memberships at depositories relevant to the scheme property;
 - (e) access to and, if necessary membership of, relevant settlement and clearance systems; and
 - (f) access to relevant domestic or global sub-custodial networks.

Arrangements on how various assets are held

- RG 133.179 A responsible entity and any of its agents must hold scheme property in a way which ensures that those assets are clearly identified as scheme property and held separate from the property of the responsible entity and property of any other scheme: s601FC(1)(i). We are relying on the responsible entity to ensure that custodial arrangements are suitable for the particular assets being held. Therefore, we have not prescribed specific custodial arrangements for different asset types.

Note: For details of the limited relief that may be available for omnibus accounts, see RG 133.201–RG 133.208.

Financial resources

RG 133.180 A custodian must continue to meet our financial requirements for custodians: see Regulatory Guide 166 *Licensing: Financial requirements* (RG 166).

Custodial standards and licensing

RG 133.181 Once the AFS licence is issued, the custodian must continue to meet these minimum standards. If it does not continue to meet the standards, we will consider revoking or varying the AFS licence of the responsible entity.

Appointing an agent as custodian

RG 133.182 In order to ensure that agents meet the same minimum standards as custodians, we have set out the following guidance for responsible entities who engage agents to act as custodians.

RG 133.183 You must:

- (a) ensure that your agent meets the minimum standards for holding scheme property in RG 133.171–RG 133.180;
- (b) describe, in your licence application, the process which you have followed or will follow when making the appointment; and
- (c) make a written agreement with your agent addressing the key issues in RG 133.188. Your AFS licence will be conditional on this written agreement being made.

Underlying principles

RG 133.184 The same standards that apply to a responsible entity should apply to any agent of the responsible entity. Accordingly, it is important that any agent meet the minimum standards for holding scheme property in RG 133.171–RG 133.180. A key element in achieving this is for the responsible entity to follow a structured and systematic process in selecting agents. This process must be designed to ensure that the agent is capable of holding scheme property in a way which meets its obligations under the Corporations Act.

Explanations

RG 133.185 As a responsible entity, you may engage an agent as custodian, either because you are required to do so by your AFS licence or because you do not wish to undertake the custodial function yourself. Regardless of the reason, you remain responsible for the actions, or failures to act, of your agent: s601FB(2).

Describe process in licence application

- RG 133.186 We will not normally require you to justify your choice of custodian to us. However, we do want to know in your licence application how you will go about appointing or replacing an agent. Further guidance on describing the appointment process is given in the AFS licence application form. If we have concerns, we may ask you further questions about the appointment of agents.
- RG 133.187 Applicants who meet our standards for holding scheme property, and who will be holding scheme property themselves, will not need to describe the process of appointing a custodian.

Agreement with agent

- RG 133.188 As a condition of your AFS licence, you must make a written agreement with the agent who you appoint as custodian. This agreement should clearly cover:
- (a) what are the scope and expectations of the relationship;
 - (b) the rights that you will have in relation to ongoing review and monitoring of the agent and the standards against which that agent's performance will be assessed;
 - (c) how the agent will provide assurances that it meets the minimum standards in RG 133.171–RG 133.180;
 - (d) how you will give authorised instructions to the agent;
 - (e) how the scheme will be compensated if there is a loss to the scheme as a result of the agent failing in its obligations under the agreement and the extent to which the custodian must maintain a minimum level of professional indemnity insurance;
 - (f) that the agent is prohibited from taking a charge, mortgage, lien or other encumbrance over, or in relation to, assets of the scheme. They may, however, do this for expenses and outlays made within the terms of the agreement (but not including unpaid custodian fees);
 - (g) what should be in the written agreement between the agent and any sub-custodians used. A written agreement should be in place when practicable. The agreement should cover, to the extent practicable and relevant, the same issues which should be covered in the agreement between you and the agent. The agreement should also cover the liability of the sub-custodian to the responsible entity and the agent when acts or omissions of the sub-custodian make them liable;
 - (h) how records identifying the scheme's assets will be maintained; and
 - (i) how and when you will receive periodic reports, including notifications of any transfers to, or from, the scheme's account.

Compliance plan covers scheme property

- RG 133.189 There will be different risks to members of the scheme arising out of the different ways that scheme property is held. The compliance plan must be designed to minimise those risks. These risks will vary depending on whether the property is held by:
- (a) the responsible entity (see RG 133.194);
 - (b) a third-party custodian (see RG 133.197); or
 - (c) a related party of the responsible entity (see RG 133.200).
- RG 133.190 The compliance plan for each scheme must describe arrangements for ensuring that scheme property is:
- (a) clearly identified as scheme property; and
 - (b) held separately from the property of the responsible entity and property of any other scheme.

Underlying principles

- RG 133.191 We have not prescribed what exact measures should be included in a compliance plan when the responsible entity or an agent holds scheme property. Such an approach would be inconsistent with our general approach to preparing compliance plans. This is set out in Regulatory Guide 132 *Managed investments: Compliance plans* (RG 132).
- RG 133.192 Because there are risks to scheme property depending on how the scheme property is held, we do expect that the compliance plan will describe in some detail the scheme property arrangements.

Explanations

- RG 133.193 A compliance plan of a registered scheme must set out arrangements for ensuring that scheme property is clearly identified as scheme property and held separately from the property of the responsible entity and property of any other scheme: s601HA. Part 1 of the annexure to RG 132 at RG 132.25 sets out examples of outcomes that might typically be included in a compliance plan to address this. In addition to those general outcomes, there are specific measures you should consider including in a compliance plan if:
- (a) the responsible entity holds scheme property; or
 - (b) an agent is appointed as custodian.

Compliance plan content when the responsible entity holds scheme property

- RG 133.194 As the responsible entity, you may hold scheme property. If you do, the compliance plans of schemes you operate must set out how you will deal with risks to members because you hold scheme property.
- RG 133.195 We expect that your compliance plan will include:
- (a) measures which will satisfy the board or compliance committee, on a regular basis, that you are meeting your duties under s601FC(1)(i);
 - (b) regular checks to ensure that all record keeping for scheme property is carried out in a timely and accurate manner; and
 - (c) measures for making sure that the standards on organisational separation are strictly enforced.
- RG 133.196 If you hold scheme property as a responsible entity, it is essential that custody staff are appropriately segregated from the rest of the organisation. This means that staff responsible for making and maintaining records for scheme property must not also be responsible for making investment decisions, trading decisions or other decisions resulting in the movement of scheme property.
- RG 133.197 There should be specific compliance arrangements if you hold real property in your own name as responsible entity. This is because registration requirements may prohibit the title from indicating any interest of the scheme. In this case, the compliance plan would have to include specific measures to ensure you and your officers comply with your duties to scheme members for that real property. The plan might, for example, include special authorisation procedures for any dealings with that real property.

Compliance plan content when a custodian is appointed

- RG 133.198 As the responsible entity, you may engage an agent as custodian of your scheme's property. If you do engage an agent, you must ensure that your members are protected from the possible risks arising from this arrangement. Therefore, your compliance plan must set out what measures you will take to minimise these risks.
- RG 133.199 For example, this may include measures for ensuring that:
- (a) the agent continues to meet the standards for holding scheme property;
 - (b) the activities of the agent are actively monitored;
 - (c) contractual arrangements entered into with the agent remain current and respond to necessary changes; and
 - (d) the agent maintains appropriate arrangements with information providers, registries, sub-custodians and clearing systems.

Related parties holding scheme property

- RG 133.200 We expect that the types of measures that will be necessary if you hold scheme property as a responsible entity will also be relevant if you appoint a third-party custodian that is legally or commercially related to you.

Relief from duty to separate assets

- RG 133.201 In certain circumstances, it may not be practical or may be too costly to separate scheme property from property of other schemes. We have modified the Corporations Act to give limited relief from s601FC(1)(i), which requires that scheme property must be held separate from the property of other schemes. This relief applies to financial assets when:
- (a) the property of the scheme is held separately from the assets of the responsible entity and the custodian;
 - (b) the custodian performs regular reconciliation procedures appropriate to the nature of the assets held; and
 - (c) the responsible entity reasonably considers that holding scheme property separately from property of other schemes is not in the interests of members.

Explanations

- RG 133.202 Section 601FC(1)(i) of the Corporations Act imposes a duty on a responsible entity to ensure that scheme property is:
- (a) clearly identified as scheme property; and
 - (b) held separately from property of the responsible entity and property of any other scheme.
- RG 133.203 Applied strictly, this would mean that omnibus account structures, typically used by custodians to hold financial assets, would be in breach of the duty.
- RG 133.204 We have modified the Corporations Act to give limited relief from s601FC(1)(i) to allow the use of omnibus account structures in certain circumstances: see Class Order [CO 98/51] *Relief from duty to separate assets of a managed investment scheme*. Custodians will be able to hold financial assets in a way that does not separate those assets from the property of other schemes in the circumstances set out in RG 133.201. Financial assets are cash (including foreign exchange), securities and derivatives.
- RG 133.205 One of the limitations of the relief is that it applies only when the responsible entity reasonably considers that holding the scheme property separately from property of other schemes would not be in the interests of members. This limitation may be satisfied, for example, if holding property

separate from the property of other schemes would increase the costs to members without providing any improved security. Conversely, mere administrative inconvenience for the custodian would not be an adequate reason.

- RG 133.206 We will consider applications for relief which fall outside the terms of [CO 98/51] on a case-by-case basis.
- RG 133.207 Real property registration requirements may, in some jurisdictions, prohibit the title from indicating any interest of the scheme. Despite this, we accept that real property may be registered in the name of the responsible entity without breaching the duty in s601FC(1)(i). Therefore, we do not consider it necessary to give any relief from s601FC(1)(i) in this respect. However, as discussed in RG 133.197, compliance arrangements in this situation must particularly address the risks of this holding arrangement.
- RG 133.208 Our relief in [CO 98/51] does not extend to assets other than financial assets (e.g. it does not extend to real property). Accordingly, a responsible entity could not hold a single piece of real property, in its name, on behalf of several schemes. Such an arrangement would breach the duty in s601FC(1)(i) to hold the property separately from property of other schemes.

Key terms

Term	Meaning in this document
ADI	Authorised deposit-taking institution—has the meaning given in s5 of the <i>Banking Act 1959</i>
AFS licence	An Australian financial services licence under s913B 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
AML/CTF Act	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
asset holder	A person who holds scheme property or other assets of a registered scheme, client assets of an IDPS, client portfolio assets of an MDA service, or financial products or a beneficial interest in financial products held under a custodial or depository service
AUASB	Auditing and Assurance Standards Board
client	A member of a registered scheme, a client of an IDPS operator, a client of an MDA operator or a client of a custodial or depository service being a person for whom financial products or a beneficial interest in financial products are held in providing the custodial or depository service (as the case may be)
client assets	Scheme property or other assets of a registered scheme, the assets held under an IDPS (other than by the client), the client portfolio assets of an MDA service, or financial products or a beneficial interest in financial products held under a custodial or depository service
client portfolio assets	Financial products and other property that are the client's contribution to an MDA service or that are derived directly or indirectly from the client's contributions
[CO 04/194] (for example)	An ASIC class order (in this example numbered 04/194)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001

Term	Meaning in this document
custodial or depository service	<p>The service provided under an arrangement between the provider and the client, or between the provider and another person with whom the client has an arrangement (whether or not there are also other parties to any such arrangement), under which a financial product, or a beneficial interest in a financial product, is held by the provider in trust for, or on behalf of, the client or another person nominated by the client unless the service is not a custodial or depository service under s766E(3)</p> <p>Note: This is a definition contained in s766E of the Corporations Act.</p>
custodial staff	<p>Natural persons who have duties relating to:</p> <ul style="list-style-type: none"> • holding assets; • record keeping for assets; • checking authorisations for instructions to transact; or • functions incidental to these powers (but does not include functions that involve the exercise of a material discretion whether under an arrangement with the asset holder or a person engaged by the asset holder other than in relation to an at-call deposit account of a regulated deposit taker or transactions in foreign exchange contracts)
custodian	<p>A provider of a custodial or depository service as defined in s766E of the Corporations Act or a person that holds scheme property of a registered scheme, assets held under an IDPS, or client portfolio assets of an MDA service</p>
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"> (a) makes a financial investment (see s763B); (b) manages financial risk (see s763C); (c) makes non-cash payments (see s763D) <p>Note: This is a definition contained in s763A of the Corporations Act: see also s763B–765A.</p>
Financial Services Guide (FSG)	<p>A document that must be given to a retail client in relation to the provision of a financial service in accordance with Div 2 of Pt 7.7 of the Corporations Act</p> <p>Note: See s761A of the Corporations Act for the exact definition.</p>
GS 007	<p>Guidance Standard 007 <i>Audit implications of the use of service organisations for investment management services</i>, issued by the AUASB in October 2011</p>
IDPS	<p>An investor directed portfolio service, which has the same meaning as in Class Order [CO 13/763] <i>Investor directed portfolio services</i> or any class order that amends or replaces that class order</p>
IDPS Guide	<p>A document provided by an IDPS operator instead of a PDS to help retail clients decide whether they should use the IDPS</p>

Term	Meaning in this document
IDPS operator	A public company that is a holder of an AFS licence that is authorised to operate an IDPS and who provides an IDPS or a function that forms part of the IDPS
licensed custody provider	A person who holds an AFS licence authorising the licensee to provide a custodial or depository service
licensee obligations	The obligations of an AFS licensee as set out in Div 3 of Pt 7.6 and s912A and 912B of the Corporations Act, and the requirement to be of good fame and character as included in s913B
master custodian	A person with primary contractual responsibility to the AFS licensee who is authorised by the licensee to engage an asset holder
MDA operator	A person who holds an AFS licence with authorisations to provide MDA services Note: A detailed definition is contained in Class Order [CO 04/194] <i>Managed discretionary accounts</i> .
MDA service	A managed discretionary account service where: <ul style="list-style-type: none"> the client gives the MDA operator money or money's worth (client contributions); the MDA operator has the discretion to invest in financial products using client contributions without prior reference to the client for each transaction; and the MDA operator manages the client's investments as a discrete portfolio belonging to that client Note: A detailed definition is contained in [CO 04/194].
omnibus account	An account in which money, securities or derivatives for more than one beneficial owner are co-mingled by a custodian or a sub-custodian
PDS	Product Disclosure Statement
PF 209 (for example)	An ASIC pro forma (in this example numbered 209)
Product Disclosure Statement (PDS)	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A of the Corporations Act for the exact definition.
Pt 7.9 (for example)	A part of the Corporations Act (in this example numbered 7.9), unless otherwise specified
reg 7.6.04 (for example)	A regulation of the Corporations Regulations (in this example numbered 7.6.04)
registered scheme	A registered managed investment scheme or a proposed registered managed investment scheme Note: See s9 of the Corporations Act for the exact definition.

Term	Meaning in this document
responsible entity	<p>The company named in ASIC's record of the scheme's registration as the responsible entity or temporary responsible entity of the scheme</p> <p>Note: This is a definition contained in s9 of the Corporations Act.</p>
RG 132 (for example)	An ASIC regulatory guide (in this example numbered 132)
retail client	A client as defined in s761G of the Corporations Act and Ch 7, Pt 7.1, Div 2 of the Corporations Regulations
s912A (for example)	A section of the Corporations Act (in this example numbered 912A), unless otherwise specified
scheme property	<p>Means:</p> <ul style="list-style-type: none"> (a) contributions of money or money's worth to the scheme; (b) money that forms part of the scheme property under provisions of the Corporations Act or the ASIC Act; (c) money borrowed or raised by the responsible entity for the purposes of the scheme; (d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraphs (a), (b) or (c); and (e) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraphs (a), (b), (c) or (d) <p>Note: This is a definition contained in s9 of the Corporations Act.</p>

Related information

Headnotes

AFS licence, AFS licence conditions, AFS licensee obligations, asset holder, assets, Australian financial services licence, client assets, compliance measures, compliance plans, conflicts of interest, custodial or depository service, custodian, IDPS, IDPS operators, investor directed portfolio service, master custodian, licensed custody providers, managed discretionary account, MDA, MDA operators, minimum standards, obligation to separate scheme property, omnibus accounts, organisational structure, primary production schemes, registered interest, registered managed investment schemes, responsible entity, scheme property, staffing

Class orders and pro formas

[CO 98/51] *Relief from duty to separate assets of a managed investment scheme*

[CO 03/1110] *Prime brokerage services: Relief from obligation to hold client property on trust*

[CO 03/1111] *Prime brokerage services: Relief from obligation to hold scheme property separately*

[CO 04/194] *Managed discretionary accounts*

[CO 13/760] *Financial requirements for responsible entities and operators of investor directed portfolio services*

[CO 13/763] *Investor directed portfolio services*

[CO 13/1406] *Land holding for primary production schemes*

[CO 13/1409] *Holding assets: Standards for responsible entities*

[CO 13/1410] *Holding assets: Standards for providers of custodial and depository services*

[CO 13/1411] *Managed discretionary accounts: Amendment of Class Order [CO 04/194]*

[CO 13/1412] *Investor directed portfolio services: Amendment of Class Order [CO 13/763]*

PF 209 *Australian financial services licence conditions*

Regulatory guides

RG 104 *Licensing: Meeting the general obligations*

RG 105 *Licensing: Organisational competence*

RG 132 *Managed investments: Compliance measures*

RG 148 *Platforms that are managed investment schemes*

RG 166 *Licensing: Financial requirements*

RG 167 *Licensing: Discretionary powers*

RG 179 *Managed discretionary account services*

RG 181 *Licensing: Managing conflicts of interest*

RG 232 *Agribusiness managed investment schemes: Improving disclosure for retail investors*

Legislation

AML/CTF Act

ASIC Act

Corporations Act, Pt 9.4AAA, Ch 5C, Pt 5C.7, s601FB, 601FC, 601FF, 601HA, 766E, 911B, 912A, 912D, 912E

Corporations Regulations, regs 5C.2.01, 5C.4.02, 5C.5.01, 7.6.01(1)(k)

Consultation papers and reports

CP 197 *Holding scheme property and other assets*

REP 376 *Response to submissions on CP 197 Holding scheme property and other assets*

Information sheets

INFO 52 *Protection for whistleblowers*

INFO 141 *Dealing and providing a custodial or depository service as a secondary service*

Other documents

AUASB, GS 007 *Audit implications of the use of service organisations for investment management services*

SSAE No. 16 *Reporting on controls at a service organization*