



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 98

Licensing: Administrative action against financial services providers

July 2013

About this guide

This guide is for Australian financial services (AFS) licensees, their representatives, and advisers.

It describes the administrative powers available to ASIC to enforce compliance with the *Corporations Act 2001* (Corporations Act), including the financial services licensing and market integrity provisions. It also indicates the matters ASIC generally takes into account when exercising these powers.

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 version was issued in July 2013 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 98, issued 18 November 2010, reissued 28 July 2012.
- Superseded ASIC guide *Licensing: Administrative action against financial services providers*, issued 26 April 2006, rebadged as Regulatory Guide 98 on 5 July 2007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

ASIC is responsible for regulating persons who carry on a financial services business in Australia, including:

- licensing those persons;
- monitoring licensees for ongoing compliance with their licence and other legal obligations; and
- taking action, where appropriate, to enforce the law when it is breached by a licensee (or a person acting on its behalf).

ASIC's powers to take action to protect investors may involve the use of an administrative remedy, which may be in addition to civil or criminal remedies.

We will use the remedy, or combination of remedies, that best achieves our aim of promoting compliance with the law and raising ethical standards in the financial services industry.

For AFS licensees who are market participants, we may also administer remedies for breaches of the market integrity rules through the Markets Disciplinary Panel (MDP).

RG 98.1 This guide provides guidance for participants in the financial services industry on the administrative powers we use to enforce the financial services laws. It describes the administrative actions we have available, and indicates the matters we generally take into account when exercising these powers, with some illustrative examples.

Note: This guide does not discuss the administrative powers that we may exercise in relation to credit licensees. These are explained in Regulatory Guide 218 *Licensing: Administrative action against persons engaging in credit activities* (RG 218).

RG 98.2 In this guide, we explain how we approach our task of protecting the public and reinforcing the integrity and reputation of the financial services industry.

RG 98.3 This guide focuses solely on our options for administrative action. It does not discuss ASIC's complementary criminal and civil enforcement powers.

Note: See Information Sheet 151 *ASIC's approach to enforcement* (INFO 151) for guidance about ASIC's approach to enforcement more generally.

RG 98.4 This guide should be read in conjunction with regulatory guides and information sheets we have published on how we will administer the financial services provisions of the *Corporations Act 2001* (Corporations Act): see 'Related information'.

ASIC's responsibilities

- RG 98.5 We are responsible for regulating persons who carry on a financial services business in Australia, as well as those who provide financial services on behalf of persons who carry on a financial services business.
- RG 98.6 The financial services regime is intended to ensure that investors can feel confident when dealing with persons (or those acting on their behalf) who are licensed to provide those services or products or engage in those activities. This is because licensees and other financial services providers are subject to the legal obligations that attach to their licensee or provider status. ASIC's powers to protect the public include the power to apply a variety of administrative remedies against financial services providers that breach or are likely to breach those obligations, where this is appropriate.
- RG 98.7 To promote public confidence in the financial services industry, we endeavour to ensure that providers of financial services comply with their obligations and meet community expectations. We educate investors so that they will be in a better position to make informed decisions. We also educate industry participants to raise compliance standards generally. Where necessary, we will take action to protect the public as well as deter industry participants from engaging in misconduct.

AFS licensees and their representatives

- RG 98.8 Our regulatory role in relation to the financial services regime involves a responsibility for licensing persons who wish to carry on a business of providing financial services in Australia. These persons are generally required to hold an Australian financial services (AFS) licence: s911A.
- RG 98.9 We are also responsible for monitoring AFS licensees for ongoing compliance with their licence and other legal obligations. To this end, among other things, we conduct surveillance and analyse the complaints we receive.
- RG 98.10 Lastly, we are responsible for taking action, where appropriate, to enforce the law when it is breached by an AFS licensee or a person acting on behalf of an AFS licensee. If appropriate, that enforcement action may involve the use of an administrative remedy, sometimes in addition to civil or criminal remedies.
- RG 98.11 We will use the remedy or combination of remedies that best achieves the aims set out in RG 98.6–RG 98.10.

ASIC's administrative powers

- RG 98.12 The financial services laws over which we have jurisdiction set out the remedies available to us. These remedies can be broadly categorised as:
- (a) criminal action;

- (b) civil action; and
- (c) administrative action.

We may use these remedies in combination.

RG 98.13 The administrative actions that may be available to us are:

- (a) immediately suspending or cancelling an AFS licence in certain limited circumstances;
- (b) suspending or cancelling an AFS licence after offering a hearing;
- (c) banning a person from providing financial services (via a banning order), either immediately, in certain limited circumstances, or after offering a hearing;
- (d) varying AFS licence conditions after offering a hearing;
- (e) directing an AFS licensee to provide us with a statement, which we may require to be audited, containing specified information about the business, activities or services provided by the licensee or its representatives;
- (f) in the case of a contravention of the market integrity rules by an AFS licensee that is a market participant, asking the Markets Disciplinary Panel (MDP) to issue an infringement notice; and
- (g) accepting an enforceable undertaking as an alternative to other remedies, where we consider it appropriate to do so.

Note: We have a broad range of other administrative remedies (e.g. stop orders) that are beyond the scope of this guide.

RG 98.14 ASIC's administrative powers and the types of administrative action available to us are explained in more detail in Section B.

When we will take administrative action

RG 98.15 In determining the type of administrative action that may be taken, we consider the circumstances of each matter on a case-by-case basis. Any administrative action we take may supplement civil or criminal action we are taking against the person or business.

Note: We do not discuss our complementary criminal and civil enforcement powers in this guide.

RG 98.16 Circumstances in which we will take particular administrative action and factors that we may take into account are explained in more detail in Section C.

B ASIC's administrative powers

Key points

ASIC's powers to protect investors include the power to apply a variety of administrative remedies where AFS licensees and those acting on their behalf breach (or we have reason to believe that they are likely to breach) their legal obligations.

The administrative remedies that may be available to us are:

- suspending or cancelling an AFS licence (with or without a hearing);
- making a temporary or permanent banning order preventing a person from providing all or specified financial services;
- varying or imposing further conditions on an AFS licence;
- directing an AFS licensee to provide us with a statement, which we may require to be audited, containing specified information about the business, activities or services provided by the licensee or its representatives; and
- accepting an enforceable undertaking as an alternative to other remedies, where we consider it appropriate to do so.

Power to suspend or cancel an AFS licence

Immediate suspension or cancellation

- RG 98.17 If appropriate, we may suspend or cancel an AFS licence in certain circumstances without giving the licensee the opportunity of a hearing or to make submissions: s915B.
- RG 98.18 The circumstances where we may suspend or cancel an AFS licence immediately vary according to whether the AFS licensee is a natural person, a partnership, a body corporate or a trustee.
- RG 98.19 For instance, if the AFS licensee is a body corporate, we may suspend or cancel the licence without offering a hearing if the body corporate:
- (a) ceases to carry on the financial services business covered by the AFS licence;
 - (b) becomes an externally administered body;
 - (c) is a responsible entity of a registered scheme whose members have suffered, or are likely to suffer, loss or damage because the body has breached the Corporations Act; or
 - (d) applies to us to have the AFS licence suspended or cancelled.

Note: See s915B for when an AFS licence held by a natural person, a partnership or a trustee can be suspended or cancelled without a hearing.

Suspension or cancellation after offering a hearing

RG 98.20 We may also suspend or cancel an AFS licence after giving the licensee an opportunity to appear or be represented at a private hearing before us and to make submissions: s915C.

Note: The principles and procedures we adopt for these hearings are set out in Regulatory Guide 8 *Hearings practice manual* (RG 8) at www.asic.gov.au/hearingsmanual. For details of our overall approach to the obligations of an AFS licensee, see Regulatory Guide 104 *Licensing: Meeting the general obligations* (RG 104) and Regulatory Guide 105 *Licensing: Organisational competence* (RG 105).

RG 98.21 For an AFS licensee, the following circumstances may give rise to suspension or cancellation under s915C:

- (a) the application for an AFS licence contained materially false or misleading information or omitted material information;
- (b) the licensee failed to comply with its obligations as a financial services licensee as specified in s912A, or we have reason to believe that the licensee is likely to contravene an obligation under that section;
- (c) if the licensee is a natural person, we are no longer satisfied as to the person's good fame or character;
- (d) if the licensee is a body corporate, we are no longer satisfied as to the good fame or character of one or more of the licensee's responsible officers;
- (e) if the licensee is a partnership, we are no longer satisfied as to the good fame or character of one or more of the partners;
- (f) a banning order or disqualification order under s920A or 921A is made against the licensee; or
- (g) a banning order or disqualification order is made against a representative of the licensee, and we consider that the representative's involvement in the provision of the licensee's financial services will significantly impair the licensee's ability to meet its obligations under Ch 7 of the Corporations Act.

RG 98.22 If we suspend or cancel an AFS licence, we may, however, specify that the licence continues in effect, for the purposes of specified provisions of the Corporations Act in relation to specified matters or for a specified period, or both: s915H.

Note: An example of when we might allow an AFS licence to continue in effect for a specified purpose would be to enable investors affected by a licensee's conduct to have their complaints investigated and acted upon by an ASIC-approved external dispute resolution (EDR) scheme. When an AFS licence is suspended or cancelled, the licensee ordinarily ceases to be a member of the EDR scheme, preventing investors from accessing the service.

Power to make a banning order

RG 98.23 We can ban a person from providing financial services by making a banning order: s920A.

What is a banning order?

RG 98.24 A banning order is a written order by us that prohibits the banned person from providing financial services, whether as an AFS licensee or as a representative of such a licensee. We can make an order that either prevents a person from providing all financial services, or from providing specified financial services, in specified circumstances. A banning order may be permanent or for a specified period.

RG 98.25 A person subject to a banning order cannot be granted a licence contrary to the banning order: s920C.

Making a banning order

RG 98.26 We can make a banning order which has immediate effect, without giving the person the opportunity of a hearing, if the person has been convicted of serious fraud or the person's AFS licence has been suspended or cancelled under s915B: see s920A(3).

RG 98.27 In other cases, we can only make a banning order after giving the person the opportunity to appear or to be represented at a private hearing before us and to make submissions: s920A(1)–(2).

RG 98.28 The circumstances in which we can make a banning order in relation to a person under s920A are:

- (a) we have suspended or cancelled an AFS licence held by the person;
- (b) the person has not complied with their obligations under s912A;
- (c) we have reason to believe that the person is likely to contravene their obligations under s912A;
- (d) the person becomes an insolvent under administration;
- (e) the person is convicted of fraud;
- (f) the person has not complied with a financial services law or has been involved in the contravention of a financial services law by another person;
- (g) we have reason to believe that the person is likely to become involved in the contravention of a financial services law by another person;
- (h) we have reason to believe that the person is not of good fame or character;

Note: For matters ASIC must have regard to in considering whether a person is not of good fame or character see s920A(1A).

- (i) we have reason to believe that the person is not adequately trained, or is not competent, to provide a financial service or financial services; or
- (j) we have reason to believe that the person is likely to contravene a financial services law.

Note: To avoid doubt, a person contravenes a financial services law if a person fails to comply with a duty imposed under that law, even if the provision imposing that duty is not an offence provision or a civil penalty provision: s920A(1)(1b).

RG 98.29 For some examples of factors likely to lead to a banning for a greater or lesser period of time, see Table 2 in Section C. ASIC's licensing and banning powers were amended by the Corporations Amendment (Future of Financial Advice) Bill 2011. Additional explanation about ASIC's banning powers is provided in paras 2.17–2.20 and 2.28–2.39 of the Explanatory Memorandum to the Corporations Amendment (Future of Financial Advice) Bill 2011. In particular, the Explanatory Memorandum notes that in determining whether a licensee is likely to contravene an obligation under s912A, for the purpose of suspending or cancelling an AFS licence, ASIC may take into account any information relevant to this question, such as:

- (a) conduct of the licensee that shows deliberation and planning in wilfully disregarding the law;
- (b) the extent of compliance by the licensee with analogous obligations in another regime; or
- (c) any other conduct of the licensee that may lead ASIC to conclude, on reasonable grounds, that the applicant is not likely to comply.

Limited and permissive banning orders

RG 98.30 We have the power to impose both limited and permissive banning orders. That is, we may impose a banning order:

- (a) that applies only in specified circumstances or capacities (limited banning order) (s920B(1)); or
- (b) that generally prohibits a person from providing financial services, but also includes a provision allowing the person to perform specified acts, in specified circumstances, that the order would otherwise prohibit them from doing (permissive banning order) (s920B(3)).

However, we consider that it is generally not appropriate to impose limited or permissive banning orders.

RG 98.31 In considering whether to make a limited or permissive banning order, we will take into account:

- (a) the factors set out in Table 1 in Section C;
- (b) considerations of specific and general deterrence; and

- (c) whether such an order is consistent with our priority of protecting investors.

RG 98.32 If we were to make a permissive banning order in a particular case, the banning order would likely be subject to conditions that add to existing obligations under the financial services laws and that would address our concerns about the person in question. For example, we may consider imposing:

- (a) conditions requiring the person to undertake and successfully complete additional relevant education or training before being permitted to provide financial services; and
- (b) conditions requiring additional monitoring, supervision or audit of the person by their AFS licensee or by a suitably qualified external expert appointed by the licensee and approved by us.

RG 98.33 We will not consider setting conditions that impose any obligations on us. Nor will we consider making a permissive banning order unless a nominated AFS licensee has agreed to appoint or continue to engage the person and to comply with any conditions applicable to the licensee under the order.

Other action ASIC may take

Variation of licence conditions

RG 98.34 We may impose conditions, or further conditions, on an AFS licence at any time, whether at the time of granting the licence or subsequently, and may vary or revoke the conditions: s914A(1).

RG 98.35 Before imposing any such conditions after the licence has been granted, or before varying any such conditions, we must give the AFS licensee an opportunity to appear or be represented at a private hearing before us and to make submissions to us: s914A(3).

RG 98.36 If appropriate, we may use our power to impose additional licence conditions to address systemic compliance issues. These licence conditions may, for example, preclude the AFS licensee from providing certain types of financial services, or may impose different or additional compliance obligations on the licensee, such as requiring the licensee to engage an independent external compliance consultant and provide us with ongoing reports of its progress in remedying previously identified deficiencies in compliance measures.

Direction to provide a statement

- RG 98.37 We may give written notice to an AFS licensee to provide statements containing specified information about its financial services business. We may also require the statements to be audited before being given to us: s912C.

Enforceable undertakings

- RG 98.38 We may accept an enforceable undertaking as an alternative to pursuing other remedies in certain circumstances. The factors that we might consider when deciding whether to accept an enforceable undertaking are set out in Regulatory Guide 100 *Enforceable undertakings* (RG 100). We will not, however, accept an enforceable undertaking in lieu of commencing criminal proceedings against a party.
- RG 98.39 We will generally only consider accepting an enforceable undertaking when we:
- (a) consider the enforceable undertaking to be an appropriate regulatory outcome, taking into account the significance of the issues to the market and the community;
 - (b) consider the person is likely to comply with the enforceable undertaking (any history of complaints may be relevant); and
 - (c) have considered the nature of the alleged breach and the regulatory impact of the enforceable undertaking compared to that of other available enforcement remedies.
- RG 98.40 For example, if there is a range of remedial action that can be taken to rectify the consequences of the misconduct, we may consider an enforceable undertaking as a more effective and flexible outcome. However, an undertaking offering a voluntary disqualification for a specified period may not provide an appropriate regulatory outcome, and we may regard a banning order to be a more appropriate regulatory outcome as:
- (a) we maintain a public register where investors can find information about persons who have been banned by us;
 - (b) a banning order clearly expresses our view of the nature and extent of the misconduct; and
 - (c) breach of a banning order is a criminal offence, which is not the case with a breach of an enforceable undertaking (s920C).

Note: This approach is consistent with the approach taken in *Sage v Australian Securities and Investments Commission* [2005] FCA 1043, where an undertaking offered to the court as an alternative to banning action was not considered to be an adequate alternative.

Refer the matter to the MDP

RG 98.41 In the case of alleged breaches of the markets integrity rules by AFS licensees that are market participants, we may refer the matter to the MDP seeking an infringement notice or approval for an agreed enforceable undertaking. Compliance with an infringement notice may involve payment of a penalty, undertaking remedial measures, accepting sanctions or entering into an enforceable undertaking. Our policy on the role and operation of the MDP is set out in Regulatory Guide 216 *Markets Disciplinary Panel* (RG 216).

C When we will take administrative action

Key points

The factors we will take into account when making decisions about whether to take administrative action will depend on the circumstances of each matter.

The factors may include whether:

- we detect non-compliance by a licensee or by a person acting on its behalf;
- the non-compliance involves serious corporate wrongdoing;
- an achievable or appropriate remedy exists for us to pursue; or
- we consider action is required to protect investors and deter financial services providers from engaging in misconduct.

Where we decide to take administrative action, the type of administrative action we take will depend on the nature and seriousness of the conduct involved.

Our approach

- RG 98.42 Factors underlying our decisions about whether to take administrative action (and what type of administrative action to take) include:
- (a) whether we have jurisdiction in the matter;
 - (b) the strategic significance of taking action;
 - (c) the benefits of pursuing misconduct;
 - (d) issues specific to the case; and
 - (e) alternatives to formal investigation.
- RG 98.43 In determining the type of administrative action that may be taken, we consider the circumstances of each matter on a case-by-case basis. Any administrative action we take may supplement other civil or criminal action we are taking against the person or business.
- RG 98.44 In general, we are likely to suspend, cancel or vary an AFS licence or ban a person where we have serious concerns about the licensee or person, or the way their business is being or has been conducted. This is particularly so in instances where there is a need to protect the public and where conduct may result in investor detriment.

Relevant factors

RG 98.45 Whether administrative action will be taken will turn on the facts of each matter. While it is not possible to identify all factors relevant to that decision, Table 1 sets out factors that may be taken into account. Table 2 provides examples of conduct and indicates the potential consequences that may follow from engaging in that conduct.

Note: The lists in Table 1 and Table 2 are not exhaustive and there will be other factors or conduct that are not mentioned in this guide that could lead to these outcomes.

Cancelling or suspending a licence

RG 98.46 As noted in RG 98.34–RG 98.40, we can vary licence conditions, direct a licensee to provide statements containing specified information or accept an enforceable undertaking. In cases where misconduct cannot be addressed by these actions, we may cancel an AFS licence: see RG 98.17–RG 98.22.

RG 98.47 Examples of misconduct that may result in an AFS licence being cancelled are:

- (a) dishonesty by a licensee;
- (b) systemic or persistent breaches of the licensee's obligations (and the licensee has failed to address these issues after they were brought to its attention) when there is actual or potential significant risk to investors or market integrity; and
- (c) the licensee has, at senior levels of management, misled or hindered ASIC, including by concealing or deliberately destroying records it is required to keep.

RG 98.48 We may also cancel an AFS licence when there is actual or potential significant risk to consumers because the licensee:

- (a) does not have the organisational capacity to continue to meet its obligations; or
- (b) does not comply with the conditions of its licence.

RG 98.49 In appropriate cases, investor protection considerations may be satisfied by suspending rather than cancelling a licence (e.g. to enable necessary remedial or compliance measures to be put in place by the licensee).

Table 1: Key factors we consider in deciding to take administrative action

Factors	Relevant considerations
Nature and seriousness of the suspected misconduct	<ul style="list-style-type: none"> • Whether there is evidence that the contravention involved dishonesty or was intentional, reckless or negligent • The amount of any benefit gained or detriment suffered as a result of the misconduct • The amount of any loss caused to investors and consumers • The impact of the misconduct on the market, including potential loss of public confidence • Whether the conduct is continuing • Whether the misconduct indicates systemic compliance failures • Whether the licensee or person has a poor compliance record (e.g. they have previously engaged in the misconduct) • Conduct which may amount to a serious conflict of interest
Internal controls	<ul style="list-style-type: none"> • Whether the licensee had in place effective internal procedures to ensure compliance with obligations and to detect any breaches of them • Whether those procedures were complied with and whether any breaches of obligations were detected • If the misconduct was committed by a representative of a licensee, whether it indicates a systemic compliance failure of the licensee • Whether a corporate culture conducive to compliance with obligations is evident (e.g. effective educational and compliance programs)
Conduct after the alleged contravention occurs	<ul style="list-style-type: none"> • When and how the breach came to the attention of ASIC • The level of cooperation with our investigation • Whether remedial steps have been taken
The expected level of public benefit	<ul style="list-style-type: none"> • Whether the case is likely to help participants in financial markets to better understand their obligations • The protective effect for the public and reinforcement of the integrity and reputation of the financial services industry
Likelihood that: <ul style="list-style-type: none"> • the person's or entity's behaviour will change in response to a particular action • the business community is generally deterred from similar conduct through greater awareness of its consequences 	<ul style="list-style-type: none"> • The compliance history of the licensee or person • Whether behaviour (of an entity or broader industry) is more likely to change if the person is banned or has their licence suspended or cancelled
Mitigating factors	<ul style="list-style-type: none"> • Whether there would be any personal hardship were a banning order to be made • Whether the misconduct relates to an isolated complaint and consumers have generally not suffered substantial detriment • Whether the misconduct was inadvertent and the person undertakes to cease or correct the conduct

Table 2: Factors and examples of conduct relating to specific periods of banning

Outcome	Factors	Examples of conduct (indicative only)
Banning for less than 3 years	<ul style="list-style-type: none"> • Conduct is the result of carelessness or inadvertence • Attempt to remedy the contravention and person has fully cooperated with ASIC • No loss (or minimal loss) to client 	<ul style="list-style-type: none"> • Giving a complying disclosure document, but not within the required time • Failing to lodge documents with ASIC as required • Failing to notify ASIC about a representative's breach of the licensee's obligations
Banning for 3–10 years	<ul style="list-style-type: none"> • Conduct inconsistent with the orderly operation of a financial market • Adverse impact on confidence in or the integrity of a financial market • False, misleading or deceptive, or unconscionable conduct, or conduct with a lesser degree of dishonesty • A deliberate course of conduct to enrich themselves at others' expense • Incompetence, irresponsibility or high level of carelessness, but with the possibility that the person may develop requisite skills and abilities • Disregard for the law and compliance with regulations 	<ul style="list-style-type: none"> • Insider trading • Market manipulation or other misconduct in relation to a financial product traded on a financial market (e.g. s1041A–1041E) • Misconduct in relation to financial products or financial services (e.g. s1041F–1041H and Div 2 of Pt 2 of the <i>Australian Securities and Investments Commission Act 2001</i> (ASIC Act)) • Not acting in the best interests of the client, in relation to any personal financial advice given, and not complying with the associated best interests obligations (s961B–961Q) <ul style="list-style-type: none"> Note: For our policy on what is 'acting in the best interests of the client and associated obligations', see Regulatory Guide 175 <i>Licensing: Financial product advisers—Conduct and disclosure</i> (RG 175). • Offering or recommending interests in a managed investment scheme that needs to be registered, but has not been • Carrying on a financial services business without holding an AFS licence • Providing financial services that are not covered by the AFS licence, if one is required • Providing financial services contrary to s911B • Failing to keep financial records that must be kept • Failing to comply with disclosure requirements, including not disclosing commissions and other benefits or relevant interests and associations <ul style="list-style-type: none"> Note: For our policies on disclosure, see 'Related information'. • Unauthorised discretionary trading • Failure by a director of the licensee to ensure the licensee complies with its obligations • Misleading clients about the nature of the products being acquired or disposed of on their behalf that are not for the clients' benefit

Outcome	Factors	Examples of conduct (indicative only)
Banning for 10+ years and permanent banning	<ul style="list-style-type: none"> • Dishonesty or intent to defraud • Continued, knowing and wilful contraventions of the law, including market integrity rules and disregard of legal obligations • Previous contraventions of the law • Serious incompetence and irresponsibility • A likelihood that the person will engage in contravening conduct in the future • Significant adverse impact on confidence in or the integrity of a financial market • Conduct significantly inconsistent with the orderly operation of a financial market • Any dishonest conduct involving clients 	<ul style="list-style-type: none"> • Misappropriation of client funds or otherwise engaging in fraud or theft • Falsification, concealment or deliberate destruction of records required to be kept • Engaging in a pattern of persistent contraventions that indicates systemic failure or a general lack of understanding of and regard for compliance • More substantial insider trading • More substantial market manipulation or other significant misconduct in relation to a financial product traded on a financial market (e.g. s1041A–1041E) • Failure to apply client's funds in accordance with the client's instructions • Forging a client's signature • Providing clients with false insurance documents

Note: These factors and examples are indicative only. Each case must depend on its particular circumstances and will be determined on a case-by-case basis. The factors in this table have been compiled taking into account the propositions formulated in *HIH Insurance Ltd and HIH Casualty and General Insurance Ltd, Re: ASIC v Adler*, (2002) 42 ACSR 80. A combination of more than one example of misconduct can increase the seriousness of the misconduct, so that a longer banning than indicated by this table is merited. Investor loss is not a prerequisite for a period of banning.

Variation or cancellation of banning orders

- RG 98.50 We may vary or cancel a banning order if we are satisfied that 'it is appropriate to do so because of a change in any of the circumstances based on which ASIC made the order': s920D(1). We may do so on our own initiative or if the person against whom the order was made lodges an application for us to cancel or vary the banning order.
- RG 98.51 If we propose not to vary or cancel a banning order in accordance with an application lodged by a banned person, we must give the person an opportunity to appear or be represented at a private hearing and to make submissions: s920D(3).
- RG 98.52 We take a wide range of matters into account when we make a decision to vary or cancel a banning order (i.e. 'a change in any of the circumstances based on which we made the order'). While it is not possible to identify all of the matters that may be relevant to a decision whether to vary or cancel a banning order, they may include the following:
- the seriousness of the misconduct that resulted in the order;
 - the period that has elapsed since the order was made and whether the person continues to pose a risk to investors or to confidence in the financial system by reason of the conduct for which we made the banning order;

- (c) any action taken by the person to remedy the misconduct or the cause of the misconduct (e.g. if the misconduct was the result of incompetence, the person may have remedied this by satisfactorily completing relevant training and obtaining relevant qualifications); and
- (d) any information that, if it had been known to us at the time, would have been relevant to our decision to make the banning order.

RG 98.53 If the person applying for the variation or cancellation of a banning order is doing so to work in the financial services industry (as will usually be the case), it is likely that we will want to take the following matters into account:

- (a) the nature of the financial services the person proposes to provide or be involved in and the capacity in which they will do so;
- (b) where the person proposes to act as a representative of an AFS licensee, the compliance record of the licensee; and
- (c) details of the compliance and supervisory regime under which the person would operate if their application is granted by ASIC, including details of any independent auditing of the person's activities.

Overlap with the MDP processes

RG 98.54 The market integrity rules may deal with matters that are also covered by provisions of the Corporations Act or the ASIC Act. Also, a breach of those rules is necessarily a breach of a financial services law: s798H. It follows that a range of administrative actions may be available to respond to a breach of a market integrity rule. Alleged breaches that we refer to the MDP may result in the issue of an infringement notice to the market participant concerned or the entry into an enforceable undertaking by them. Compliance with an infringement notice may also involve entry into such an undertaking.

RG 98.55 When the market participant complies with an infringement notice or enforceable undertaking, we will generally not take any further action against it for the event(s) in question. In these circumstances, we will only take further action if it has provided false or misleading information to, or withheld evidence or information from, us and/or the MDP about the alleged breach, or if the infringement notice has been withdrawn: see RG 216.72.

RG 98.56 Compliance with an infringement notice by its recipient does not, however, preclude us from taking action against other persons who were involved in the misconduct: see RG 216.73.

Note: Compliance with an infringement notice also does not affect the rights of third parties who have been adversely affected by the recipient's conduct to bring proceedings against the recipient for the alleged breach (including under s1101B). We are not prevented from applying for an order on behalf of a plaintiff in accordance with the Corporations Act: see RG 216.74.

Public notification of decisions

RG 98.57 We are required to make public our decisions to vary, suspend or cancel an AFS licence or to make, vary or cancel an order banning a person by publishing a notice in the *ASIC Gazette*: s915F and 920E.

RG 98.58 Such a notice will be gazetted no earlier than the second business day after the person concerned has been given notice of the decision. For example, if the banning decision is given to the person on a Wednesday, the notice will be gazetted no earlier than the following Friday.

RG 98.59 Similarly, we will update our publicly accessible registers with the relevant details of our administrative actions no earlier than the second business day after the person concerned has been given notice of the decision.

Note: We are required to establish one or more registers relating to financial services: s922A(1). A person may inspect the registers and may make copies of, or take extracts from, them: s922B(1). The registers must include details about licensees and people who have been banned: regs 7.6.05 and 7.6.06 of the Corporations Regulations 2001.

RG 98.60 As a general principle, it is our view that there is significant public interest in ensuring that investors and the broader community are aware of and informed about action taken by us. Transparency and disclosure are important factors in market integrity and investor confidence, and serve to promote deterrence as well as to educate.

Note: The importance of the public being promptly informed about our banning decisions was confirmed by the Full Court of the Federal Court in *Australian Securities and Investments Commission v Administrative Appeals Tribunal* (2009) 181 FCR 130.

Public comment

RG 98.61 Our approach to public comment on our decisions to vary, cancel or suspend an AFS licence or make, vary or cancel a banning order will be governed by our stated policy: see Information Sheet 152 *Public comment* (INFO 152). We will not make a public comment in accordance with that policy before we gazette a notice of the decision or update the relevant register.

Your rights

RG 98.62 You may have a right to complain to the Commonwealth Ombudsman or to seek other independent review of our decisions.

RG 98.63 For further information about your rights in dealing with ASIC, see Information Sheet 9 *ASIC decisions—your rights* (INFO 9) and Information Sheet 107 *Guidelines for managing allegations of misconduct against ASIC officers* (INFO 107).

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B that authorises a person who carries out a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an Australian financial services licence under s913B Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i> , including regulations made for the purposes of that Act
banning order	A written order by ASIC that prohibits a banned person from providing financial services
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
credit licensee	A person who holds an Australian credit licence under s35 of the <i>National Consumer Credit Protection Act 2009</i>
EDR scheme	An external dispute resolution scheme approved by ASIC under RG 139
enforceable undertaking	An enforceable undertaking that may be accepted by ASIC under reg 7.2A.01 of the <i>Corporations Regulations 2001</i>
financial product	Generally a facility through which, or through the acquisition of which, a person does one or more of the following: <ul style="list-style-type: none"> • makes a financial investment (see s763B); • manages financial risk (see s763C); • makes non-cash payments (see s763D) Note: See Div 3 of Pt 7.1 of the <i>Corporations Act</i> for the exact definition.
financial service	Has the meaning given in Div 4 of Pt 7.1 of the <i>Corporations Act</i>
financial services provider	A person who provides a financial service
financial services business	A business of providing financial services Note: This is a definition contained in s761A. The meaning of carry on a financial services business is affected by s761C.
financial services laws	Has the meaning given in s761A

Term	Meaning in this document
infringement notice	An infringement notice issued under reg 7.2A.04 of the Corporations Regulations 2001
investor	In relation to an AFS licensee, includes an existing, potential or prospective client
market integrity rules	Rules made by ASIC, under s798G of the Corporations Act, for trading on domestic licensed markets
market participant	An entity that is a participant of a financial market on which financial products are traded
MDP (Markets Disciplinary Panel)	ASIC's Markets Disciplinary Panel, through which ASIC exercises its power to issue infringement notices and to accept enforceable undertakings in relation to breaches of the market integrity rules
provide a financial service	A person provides a financial service if they: <ul style="list-style-type: none"> • provide financial product advice; • deal in a financial product; • make a market for a financial product; • operate a registered scheme; or • provide a custodial or depository service <p style="text-align: center;">Note: This is a definition contained in s766A.</p>
reg 7.6.01 (for example)	A regulation of the Corporations Regulations 2001 (in this example numbered 7.6.01)
representative (of a licensee)	Has the meaning given in s910A
RG 148 (for example)	An ASIC regulatory guide (in this example numbered 148)
s766E (for example)	A section of the Corporations Act (in this example numbered 766E), unless otherwise specified

Related information

Headnotes

administrative powers, AFS licence, AFS licensees, banning orders, cancellation, enforceable undertaking, licence conditions, Markets Disciplinary Panel, MDP, suspension, public comment

Regulatory guides

RG 8 *Hearings practice manual*

RG 100 *Enforceable undertakings*

RG 104 *Licensing: Meeting the general obligations*

RG 105 *Licensing: Organisational competence*

RG 165 *Licensing: Internal and external dispute resolution*

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

RG 214 *Guidance on ASIC Market integrity rules for ASX and ASX 24 markets*

RG 216 *Markets Disciplinary Panel*

RG 218 *Licensing: Administrative action against persons engaging in credit activities*

Information sheets

INFO 1 *Administrative hearings*

INFO 9 *ASIC decisions—your rights*

INFO 107 *Guidelines for managing allegations of misconduct against ASIC officers*

INFO 151 *ASIC's approach to enforcement*

INFO 152 *Public comment*

Legislation and rules

ASIC Act, Pt 2 Div 2, s1041F–1041H

Corporations Act, Ch 7, s911A, 911B, 912A, 912C, 914A(1), 914A(3), 915B, 915C, 915F, 915H, 920A, 920A, 920B, 920C, 920D, 921A; Corporations Regulations 2001, regs 7.6.05, 7.6.06; Explanatory

Memorandum to the Corporations Amendment (Future of Financial Advice) Bill 2011, paras 2.17–2.20 and 2.28–2.39

Cases

Australian Securities and Investments Commission v Administrative Appeals Tribunal (2009) 181 FCR 130

HIH Insurance Ltd and HIH Casualty and General Insurance Ltd, Re: ASIC v Adler, (2002) 42 ACSR 80

Sage v Australian Securities and Investments Commission [2005] FCA 1043