



ASIC

Australian Securities & Investments Commission

REPORT 319

Response to submissions on CP 182 on the best interests duty and related obligations and CP 183 on scaled advice

December 2012

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 182 *Future of Financial Advice: Best interests duty and related obligations—Update to RG 175* and Consultation Paper 183 *Giving information, general advice and scaled advice*. This report also details our responses in relation to those issues.

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.

Disclaimer

This report 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.

This report does not contain ASIC policy. Please see Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* and Regulatory Guide 244 *Giving factual information, general advice and scaled advice* (RG 244).

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A Overview

- 1 In April 2010, the former Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen MP, announced the Australian Government's Future of Financial Advice (FOFA) reform package.
- 2 The Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 states:

The underlying objective of the reforms is to improve the quality of financial advice while building trust and confidence in the financial advice industry through enhanced standards which align the interests of the adviser with the client and reduce conflicts of interest. The reforms also focus on facilitating access to financial advice, through the provision of simple or limited advice.
- 3 On 25 June 2012, the Parliament passed the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* to give effect to the objectives of the FOFA reforms and introduce the obligation to act in the best interests of the client (best interests duty) and related obligations in Div 2 of Pt 7.7.A of the *Corporations Act 2001* (Corporations Act).
- 4 To help Australian financial services (AFS) licensees and their representatives comply with the best interests duty and related obligations, we consulted on proposed guidance in the form of:
 - (a) Consultation Paper 182 *Future of Financial Advice: Best interests duty and related obligations—Update to RG 175* (CP 182), which includes a draft new section of Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* (RG 175); and
 - (b) Consultation Paper 183 *Giving factual information, general advice and personal advice* (CP 183).
- 5 This report highlights the key issues that arose out of the submissions received on CP 182 and CP 183, and our responses to those issues.
- 6 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 182 and CP 183. We have limited this report to the key issues.
- 7 For a list of the non-confidential respondents to CP 182 and CP 183, see the appendix. Copies of the submissions are on the ASIC website at www.asic.gov.au/cp under CP 182 and CP 183.

Consultation process

CP 182

- 8 In CP 182, we consulted on proposals to help people who provide personal advice to retail clients comply with the best interests duty and related obligations in Div 2 of Pt 7.7A.
- 9 Our proposed guidance in CP 182 set out our expectations for how advice providers should comply with their obligation to:
- (a) act in the best interests of the client in s961B(1) (including by satisfying the steps for the ‘safe harbour’ in s961B(2));
 - (b) provide appropriate personal advice in s961G;
 - (c) prioritise the interests of the client in s961J; and
 - (d) comply with the modified best interests duty.
- 10 We proposed a principles-based approach to providing guidance with examples to illustrate how our guidance would apply in particular scenarios.
- 11 Our proposals for practical guidance on giving scaled advice (i.e. advice that is limited in scope) that complies with the best interests duty and related obligations were set out in CP 183: see paragraphs 13–15.
- 12 We have now released our final guidance on the best interests duty and related obligations. This is set out in Section E of RG 175. We will assess whether there is a need for further guidance after observing how industry have sought to comply with the best interest duty and related obligations, in light of our regulatory experience and any case law on these obligations.

CP 183

- 13 In CP 183, we consulted on proposals for practical guidance to help people who give information and advice to retail clients comply with their advice obligations under the Corporations Act.
- 14 Our proposed guidance in CP 183 sought to:
- (a) explain the distinction between giving factual information, general advice and personal advice;
 - (b) provide industry-specific examples of giving factual information, general advice and scaled advice (with longer examples in the appendix and shorter examples in the body of the consultation paper);
 - (c) provide guidance about how to give scaled advice that complies with the personal advice obligations in Ch 7, including the best interests duty and related obligations;

- (d) explain the importance of communicating to a client the type of advice that is being provided; and
 - (e) explain that the Corporations Act is generally neutral about how advice is delivered—that is, the law is generally the same, regardless of whether advice is provided face-to-face, by telephone or email, or on the internet.
- 15 We have now released our final guidance on giving information and advice to retail clients. This is set out in Regulatory Guide 244 *Giving factual information, general advice and personal advice* (RG 244).

Responses to consultation

CP 182

- 16 We received 28 responses on CP 182 from industry associations, banks, trustees of superannuation funds, financial advisory, stockbroking and insurance firms, and legal practitioners. We are grateful to the respondents for taking the time to send us their comments.
- 17 We also held roundtable discussions with the following industry groups and their members:
- (a) Abacus Australian Mutuals;
 - (b) Association of Financial Advisers;
 - (c) Association of Superannuation Funds Australia;
 - (d) Australian Bankers' Association;
 - (e) Australian Financial Markets Association;
 - (f) Australian Institute of Superannuation Trustees;
 - (g) Consumer representatives;
 - (h) external dispute resolution (EDR) schemes
 - (i) Financial Planning Association
 - (j) Financial Services Council;
 - (k) Industry Super Network;
 - (l) Insurance Council of Australia;
 - (m) Melbourne Compliance Forum;
 - (n) Stockbroking Association of Australia; and
 - (o) the Joint Accounting Bodies.

- 18 We also met with a wide range of industry participants—including industry associations, individual firms and legal practitioners—over many months to discuss our proposed guidance.
- 19 EDR schemes, consumer representatives, the not-for-profit superannuation sector and the accounting sector were very supportive of our proposed guidance.
- 20 Other respondents had specific concerns about certain aspects of the guidance.
- 21 Respondents expressed concerns about our proposed guidance that:
- (a) to comply with the best interests duty, the advice should be likely to leave the client in a better position if the client acts on the advice provided;
 - (b) to comply with the requirement to conduct a reasonable investigation of financial products, in some cases this will require an advice provider to investigate and consider products that are not on their AFS licensee’s approved product list; and
 - (c) to comply with the requirement to prioritise the interests of the client, an advice provider should be guided by what an advice provider without a conflict of interest would do.
- 22 Sections B–E set out in more detail the issues raised, and our responses to those issues.

CP 183

- 23 We received 17 responses from industry associations, banks, trustees of superannuation funds, financial advisory, stockbroking and insurance firms, legal practitioners, and consumer representatives. We are grateful to the respondents for taking the time to send us their comments.
- 24 We also held roundtable discussions on CP 183 with the industry groups listed in paragraph 17.
- 25 Most concerns raised by respondents related to a range of technical issues. However, the following issues are worth noting:
- (a) Respondents from the banking and insurance sectors expressed concern about the commentary in Example C on consumer credit insurance (CCI).
 - (b) Although respondents were supportive of our guidance that it is possible to give general advice if an advice provider has personal information about the client, a number of respondents also said that they needed more certainty about how this can be done.
 - (c) A number of respondents asked for additional guidance explaining in more detail how we expect advice providers to use a ‘triage’ process

when deciding on the scope of the advice that is in the best interests of the client.

26 Section F set out in more detail the issues raised, and our responses to those issues.

B Acting in the best interests of the client

Key points

This section outlines the key issues raised in submissions on CP 182 relating to the best interests duty in s961B(1), and our responses to those issues.

It covers our proposed guidance on:

- our expectation that the processes an advice provider follows in acting in the best interests of the client will result in the client being in a better position, if the client acts on the advice provided;
- the factors that ASIC will consider in determining whether an advice provider has acted in the client's best interests; and
- the interaction between the best interests duty in s961B(1) and the safe harbour for complying with the best interests duty in s961B(2).

Advice that is likely to leave the client in a better position

- 27 In CP 182, we proposed guidance that to comply with the requirement to act in the best interests of the client in s961B(1), we expect an advice provider to follow processes that will be likely to result in the client being in a better position, if the client acts on the advice. Whether advice is likely to leave the client in a better position will be assessed objectively, based on the facts existing at the time the advice is provided and by reference to the subject matter of the advice sought by the client. We refer to this as the 'better position' standard.
- 28 EDR schemes, consumer representatives, the not-for-profit superannuation sector and the accounting sector expressed support for the better position standard.
- 29 More than half of the submissions did not support the better position standard. These respondents were mainly from the banking, financial advice, stockbroking and legal sectors. They expressed concern that the better position standard is focused on the outcome to the client after they follow the advice and this is not something that is in the advice provider's control. They also thought the standard implies that the advice should provide the 'best outcome for the client'.
- 30 These respondents argued that the key issue should be whether the advice provider has adopted an appropriate decision-making process that focuses on the client's best interests, rather than the outcome of following the advice.
- 31 These respondents also expressed concerns that:
- (a) the better position standard imposes a higher standard of advice than the law requires; and
 - (b) ASIC and EDR schemes will apply the better position standard subjectively.

ASIC's response

The better position standard is our interpretation of what s961B means in practice and in our view does not impose a standard higher than the law. The standard is something that we will consider in assessing whether an advice provider has complied with the best interests duty: see RG 175.229.

In CP 182 and in our guidance, we make it clear that the better position standard is an objective standard for assessing the effectiveness of the processes used when complying with s961B.

We have also modified our approach as proposed in CP 182 to provide greater certainty. The better position standard is based on what a reasonable advice provider would believe. We made this change to emphasise that this is an objective standard.

The assessment of whether an advice provider has complied with the best interests duty depends on the circumstances and includes factors such as the position that the client would have been in if they did not follow the advice and the client's objectives, financial situation and needs: see RG 175.230.

We have also clarified that in considering whether the best interests duty has been complied with, we will not examine investment performance retrospectively, with the benefit of hindsight. This is in response to feedback that the approach proposed in CP 182 could depend on factors outside the advice provider's control.

We also state that the better position standard does not impose a 'perfect advice' standard. This is in response to concerns that our guidance could require the 'best outcome for the client' to be achieved: see RG 175.231.

Processes used when providing advice

- 32 In CP 182, we included a list of features that we expected processes for complying with the best interests duty would have. Submissions were generally supportive of our proposed guidance.
- 33 A few respondents asked for further clarification on specific factors identified in our guidance. For example, respondents noted that the processes for complying with the best interests duty should take into account the client's susceptibility and desire to take risk. This is because there will be circumstances where clients, having been properly advised, have chosen deliberately to take the risk that a financial product may not produce the expected returns.
- 34 Other respondents expressed some concern that the factors listed in CP 182 could impede the provision of scaled advice.

ASIC's response

Based on the feedback received, we have amended our guidance to clarify that an advice provider should include the client's tolerance for risk as a feature of the processes used in complying with the best interests duty: see RG 175.238(a).

We have also reviewed RG 175 and RG 244 to ensure consistency between the two regulatory guides.

C Satisfying the steps for the safe harbour

Key points

This section outlines the key issues raised in submissions on CP 182 relating to satisfying the steps for the safe harbour in s961B(2) in complying with the best interests duty, and our responses to those issues.

It covers our proposed guidance on:

- identifying the subject matter of the advice sought by the client;
- assessing the expertise of the advice provider;
- deciding when it is reasonable for an advice provider to recommend a financial product; and
- taking other reasonable steps to comply with the best interests duty.

The subject matter of the advice sought by the client: s961B(2)(b)

- 35 In CP 182, we proposed to give guidance on the factors that may be relevant in identifying the subject matter of the advice sought by the client under s961B(2)(b)(i). Most respondents were generally supportive of our proposed guidance.
- 36 Some respondents expressed the view that our guidance should clarify the extent to which the subject matter of the advice sought by the client can be negotiated and agreed between the advice provider and the client.
- 37 They also recommended that our guidance should state explicitly that an advice provider can determine the subject matter of the advice sought by the client following discussions with the client. They thought that the risk of an important issue being excluded from the scope of advice could be managed through adequate disclosure by the advice provider.

ASIC's response

Based on the feedback received, we have clarified that an advice provider or client can suggest limiting or revising the subject matter of the advice. We have also stated that the advice provider must comply with the best interests duty and related obligations in relation to the revised subject matter: see RG 175.263.

Only after identifying the subject matter of the advice sought by the client can an advice provider determine the scope of the advice. An advice provider must use their judgement to determine the scope of the advice in a way that is consistent with the client's relevant circumstances and the subject matter of the advice the client is seeking: see RG 175.264–RG 175.265.

An advice provider cannot contract out of the best interests duty or limit the steps they need to take by disclosing that they will not take those steps—for example, by limiting the scope of advice: see RG 175.213.

- 38 In RG 175, we previously stated that advice providers must form their own view about how far s945A requires inquiries to be made into the client’s attitude to environmental, social or ethical considerations. In CP 182, we asked for feedback from stakeholders on whether we should give guidance on the extent to which the safe harbour for the best interests duty in s961B(2) requires advice providers to determine if the subject matter of advice sought by the client includes their attitude towards labour standards and/or environmental, social or ethical issues.
- 39 Most submissions did not comment on whether we should provide guidance. Two respondents expressed support for some ASIC guidance on this topic. A few respondents thought that no inquiries need to be made.

ASIC’s response

We have retained our previous guidance on determining the client’s attitude to environmental, social or ethical considerations. We state that advice providers must form their own view about how far the best interests duty requires them to make inquiries into the client’s attitude to labour standards and/or environmental, social or ethical issues: see RG 175.293.

We have taken this approach because the client’s attitude to these issues will be relevant in some circumstances, but not all.

Assessing the expertise of the advice provider: s961B(2)(d)

- 40 To assess the expertise of the advice provider under the safe harbour for the best interests duty in s961B(2), we proposed to give guidance that the advice provider must have generic knowledge about the broad range of relevant strategies, classes of financial products and specific financial products.
- 41 A few respondents suggested that this would limit an advice provider’s ability to provide scaled advice because, in their view, our guidance does not allow advice providers to specialise in certain financial advice topics.
- 42 As an alternative approach, these respondents suggested our guidance should make it clear that an advice provider has satisfied this step if they meet:
- (a) the training requirements in Regulatory Guide 146 *Licensing: Training of financial product advisers* (RG 146); and
 - (b) the relevant professional qualifications and/or knowledge and skills in the subject area.

ASIC's response

We have not implemented the suggestion of some respondents that our guidance should state explicitly that meeting the training requirements in RG 146, as well as the relevant professional qualifications or skills and knowledge requirements, is sufficient to satisfy this step.

We consider that other factors are also relevant, such as any specific requirements or limitations on providing advice that are imposed on the advice provider by their AFS licensee or authorised representative: see RG 175.301.

The Revised Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 states that an advice provider who is competent for the purposes of the Corporations Act will not always satisfy the requirement in s961B(2)(d), especially where the client requests advice that is particularly complex or technical.

When it is reasonable to recommend a financial product: s961B(2)(e)

- 43 In CP 182, we proposed to give guidance on what advice providers need to do to satisfy the requirement under the safe harbour for the best interest duty in s961B(2) for the advice provider to, at times, to conduct a reasonable investigation into financial products.
- 44 We stated that we expect advice providers to formulate the strategy they are basing the advice on before recommending to a client that the client acquires a financial product.
- 45 Among other things, we proposed guidance that, to demonstrate that an advice provider has conducted a reasonable investigation for s961B(2)(e), advice providers may need to consider and investigate the client's existing product, any potential new products and the new product recommended to the client, in the case of advice to replace one financial product with another financial product—also referred to as 'switching advice'.
- 46 One submission suggested that an advice provider can satisfy this requirement by benchmarking a product against the market for similar types of products to establish whether the product is competitive on key criteria, such as performance history, fees, risk and features.
- 47 A few submissions also suggested that our guidance should acknowledge that the requirement to conduct a reasonable investigation is scalable.

ASIC's response

We have taken into account the feedback on benchmarking products. In our guidance, we state that an advice provider can take into account 'market benchmarking' at appropriate intervals when conducting a reasonable investigation into financial products for the purposes of s961B(2)(e)(i).

We also state that:

- advice providers still need to understand the features of the product they are investigating; and
- the benchmarking must be reasonably representative of the market for similar products offered by different issuers: see RG 175.318–RG 175.320.

We believe this is consistent with the policy objective of s961B(2)(e) as set out in the Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011. This is that an advice provider can determine the scope of the products they investigate and select for a client based on the objectives and needs of the client, but they do not need to investigate 'every product that is available on the market'.

We have clarified our guidance to confirm that the requirement to conduct a reasonable investigation is scalable: see RG 175.312–RG 175.313.

Approved product lists: based on s961B(2)(e) requirements

- 48 To demonstrate that an advice provider has conducted a reasonable investigation for the purposes of s961B(2)(e), we proposed to give guidance that, in some cases, an advice provider will need to investigate and consider a product that is not on their AFS licensee's approved product list.
- 49 In CP 182, we included the following examples of situations when an advice provider must consider products that are not on an approved product list they use:
- (a) if the client's existing products are not on the approved product list of the advice provider's AFS licensee; or
 - (b) if an advice provider's approved product list is restricted to one class of product and there are products that are not in that class of products that would better meet the needs of the client.
- 50 A few respondents supported this approach, noting that an advice provider should not be able to abdicate responsibility for complying with the requirement to undertake a reasonable investigation of a product by simply referring to their AFS licensee's approved product list.

- 51 However, a number of respondents interpreted our proposed guidance to mean that AFS licensees, authorised representatives and advice providers must investigate and consider *all* products available in the market to determine whether there is an alternative product that would better meet the clients' objectives, financial situation or needs.
- 52 Some respondents also recommended that the guidance should limit any requirement for an advice provider to investigate and consider products outside the approved product list to the two examples set out in paragraph 49. Other respondents thought that the approved product list could be confined to related party products.
- 53 One submission recommended that it may also be appropriate for an advice provider to investigate and consider a product that is not on their AFS licensee's approved product list where the client specifically requests the advice provider to do so.

ASIC's response

Our guidance does not state that advice providers need to investigate all products in the market to comply with the obligation in s961B(2)(e). This was also not proposed in CP 182.

To provide assurance to industry, we have clarified our guidance so that it states explicitly that, in some cases, it is possible for an advice provider to conduct a reasonable investigation for the purposes of s961B(2)(e) by considering the products on their AFS licensee's approved product list: see RG 175.329.

We have also amended our guidance to state that advice providers need to consider a specific financial product that is not on the approved product list they use where the client requests they do so: see RG 175.330(c).

We have not provided an exhaustive list of when an advice provider will need to consider and investigate products that are not on their AFS licensee's approved product list. This is not the role of ASIC guidance. The circumstances when this may be necessary will vary depending on the circumstances and will change over time.

Finally, RG 175 does not distinguish between different business models used to provide personal advice. For this reason, we have not provided any guidance on how to satisfy s961B(2)(e) where the advice provider uses an approved product list that only has products issued by related parties of their AFS licensee.

Other reasonable steps: s961B(2)(g)

54 In CP 182, we proposed to give guidance on the steps an advice provider may need to undertake to satisfy the ‘any other reasonable steps’ obligation in s961B(2)(g). The proposed steps were:

- (a) explain clearly to the client the advice service that *is* or *is not* being provided;
- (b) if the advice includes a product recommendation, provide strategic recommendations that benefit the client;
- (c) depending on the subject matter of the advice, specify in the advice that the client should review any decision made about financial products on the basis of the advice provided:
 - (i) once after a period of time;
 - (ii) regularly (e.g. every one to two years); or
 - (iii) if the client’s circumstances change; and
- (d) offer to provide advice (or refer the client to someone who can provide advice) on any other key issues identified by the advice provider that do not form part of the scope of the advice.

55 Most respondents agreed with this proposed guidance.

56 One respondent suggested that it would be helpful for the guidance described in paragraph 54(b) to clarify that the strategic recommendation must be related to the product recommendation, instead of implying it was additional to the advice.

57 Some respondents expressed concern about the guidance described in paragraph 54(d). For example, one submission noted that this step would be difficult to implement in practice, especially where the advice provider has completed an investigation into the client’s relevant circumstances and the subject matter of advice sought by the client has been revised from what was originally sought. Another submission suggested that this step should be removed from the guidance completely because it appears to go beyond what the law requires.

ASIC’s response

It is clear from our guidance that there is no absolute requirement for the steps described at paragraph 54 to be undertaken by an advice provider in all cases—whether or not an advice provider will need to undertake these steps will depend on the circumstances: see RG 175.340–RG 175.342.

We have also clarified that any strategic recommendation that is provided to satisfy s961B(2)(g) need only relate to the product recommendation: see RG 175.340(b).

D Prioritising the interests of the client

Key points

This section outlines the key issues raised in submissions on CP 182 relating to the obligation for an advice provider to prioritise the interests of the client in s961J, and our responses to those issues.

It covers our proposed guidance on:

- giving priority to the interests of the client; and
- putting in place information barriers.

Giving the client's interests priority

- 58 In CP 182, we proposed to give guidance that to prioritise the interests of the client for the purposes of s961J, an advice provider should be guided by what an advice provider without a conflict of interest would do.
- 59 Some respondents expressed concern with this aspect of our proposed guidance. They said it may be difficult for advice providers to put themselves in the position of a hypothetical advice provider without a conflict of interest.
- 60 One submission suggested that to demonstrate that the client's interests have been prioritised, the guidance should make it clear that the materiality of the conflict of interest is an important consideration. That is, the more direct and material the conflict of interest, the more rigorous the processes an advice provider must adopt to ensure they give priority to the client's interests.

ASIC's response

Our guidance on s961J is principles based. Like other guidance on the best interests duty and related obligations, we will assess whether there is a need for further guidance after observing how industry complies with these obligations and in light of our regulatory experience and any case law on these obligations.

We have retained, with some minor modifications, our proposed guidance on considering what an advice provider without a conflict of interest would do. Specifically, in RG 175.376, we state that '[i]n complying with this obligation, advice providers should consider what a reasonable advice provider without a conflict of interest would do'. We consider that this is a relevant consideration for an advice provider in complying with s961J.

We have also amended our guidance to clarify that the more material the conflict of interest for the advice provider or their related party, the more that is required of the advice provider to prioritise the interests of their client: see RG 175.377.

- 61 A few respondents thought that where an advice provider has complied with the best interests duty in s961B, they will have also complied with the obligation to prioritise the client’s interests in s961J. They asked us to confirm this in our final guidance.

ASIC’s response

We have not done this, because the best interests duty in s961B and the conflicts priority rule in s961J are separate legal requirements. If Parliament had intended that s961J will be satisfied if the best interests duty is satisfied, this would have been reflected in the law.

- 62 In CP 182, we proposed to include in our guidance an example on related party products (Example 16). Although most respondents agreed with the proposed example, some thought it would not be useful for industry because it does not closely reflect what happens in practice. These respondents suggested that often there may be a range of factors that lead to the selection of a slightly more expensive financial product and in practice no two products are identical.

ASIC’s response

We have removed Example 16 from RG 175 in light of the feedback received that this example was not useful for industry.

Putting in place information barriers

- 63 In CP 182, we proposed guidance that information barriers may be used by an AFS licensee or authorised representative to prevent an advice provider from becoming aware of any conflicts of interest with the advice provider’s related parties.

- 64 A few respondents noted that some conflicts of interest must be disclosed in Statements of Advice (SOAs) and Financial Services Guides (FSGs), which limits the effectiveness of information barriers. As a result, some respondents asked us to provide a further explanation, including examples, of the type of circumstances in which the use of information barriers could inadvertently result in a breach of the obligation in s961J.

ASIC’s response

Based on the feedback we received about conflicts of interest that are disclosed in FSGs and SOAs, we have removed the proposed guidance that information barriers may be used by an advice provider to control what information they are aware of, or should reasonably be aware of.

We state that we expect advice providers to be aware of conflicts of interest disclosed in FSGs issued by related parties and conflicts disclosed in SOAs they help prepare for their AFS licensee or authorised representative: see RG 175.371.

The lack of explicit guidance from us on information barriers does not prevent them from being used as a compliance tool. However, we think that they will be of limited effectiveness given the conflicts of interest that must be disclosed in FSGs and SOAs.

We have clarified in our guidance that to comply with the obligation in s961J, we do not expect advice providers to make inquiries to determine what conflict of interests their related parties have: see RG 175.370.

E Complying with the modified best interests duty

Key points

This section outlines the key issues raised in submissions on CP 182 relating to our proposed guidance on the modified best interests duty, and our responses to those issues.

- 65 In CP 182, we proposed that where the modified best interest duty applies, our guidance on complying with the best interest duty in s961B(1) (the better position standard) and the safe harbour in s961B(2)(a)–(c) would also apply.
- 66 The modified best interests duty applies to advice on:
- (a) basic banking products where the advice provider is an agent or employee of an Australian authorised deposit-taking institution (Australian ADI), or otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI;
 - (b) general insurance products;
 - (c) a basic banking product, a general insurance product or a combination of those products, where the advice provider is an agent or employee of an Australian ADI, or otherwise acting by arrangement with an Australian ADI under the name of an Australian ADI; and
 - (d) general insurance and other products.
- 67 The majority of respondents are not directly affected by the modified best interests duty and did not comment on the proposed guidance.
- 68 Consumer representatives, EDR schemes, the not-for-profit superannuation sector and the accounting sector supported our proposal to apply the better position standard to the modified best interests duty.
- 69 Submissions from the banking and insurance sectors argued that the better position standard imposes a higher standard than the current appropriate advice obligation in s945A, and that this is inconsistent with the intent of the FOFA reforms.
- 70 They recommended that our final guidance should confirm that a lower standard of conduct is required where the modified best interests duty applies, compared to the standard that applies to advice on ‘more complex’ financial products.

ASIC's response

It is clear in our guidance that different requirements apply where the modified best interests duty applies: see RG 175.247 and Table 7 in RG 175.

We have retained the proposed approach in CP 182 that our guidance on the safe harbour in s961B(2)(a)–(c) is also relevant where the modified best interests duty applies. However, based on feedback received, we note that scaled advice can be provided where the modified best interests duty applies: see RG 175.248 and Table 7. This is consistent with our guidance in RG 244.

We do not agree with submissions from the banking and insurance sectors that the better position standard should not apply when we administer the best interests duty and related obligations.

In our guidance, we confirm that where the modified best interests duty applies, we will consider whether a reasonable advice provider would believe that the client is likely to be in a better position if the client follows the advice: see RG 175.354(b).

- 71 A few respondents expressed concern about Example 13 in CP 182, which illustrated how we would expect an employee in a retail banking scenario to give appropriate advice in a way that complies with the modified best interests duty.
- 72 These respondents argued that Example 13 should not involve the bank branch employee giving personal advice because this does not reflect what happens in practice for most bank branch employees. One submission also argued that substantial changes to existing personal advice models and compliance systems would be required if the retail banking sector was required to adopt the approach outlined in this example.

ASIC's response

The submissions contained some useful comments about how we could improve Example 13, and we have made some changes to the example to take into account the feedback received.

For example, we have amended the example to make it clear that it only applies where personal advice is provided. This is because the modified best interests duty only applies when personal advice is provided: see Example 17 in RG 175.

F Giving factual information, general advice and scaled advice

Key points

This section outlines the key issues covered in submissions received on CP 183, and our responses to those issues.

In general, the feedback we received covered a range of technical issues in relation to our proposed guidance on:

- giving factual information;
- giving general advice;
- giving scaled advice;
- communicating the service provided;
- delivering the information or advice; and
- examples in the appendix.

Giving factual information

73 In Section B of CP 183, we set out our proposed guidance on giving factual information. This included guidance that:

- (a) AFS licensees can give factual information to a client, even if they hold personal information about the client; and
- (b) it is possible to tailor the factual information that is given to the client using personal information about the client.

74 About half of the submissions supported our proposed guidance. Respondents were particularly supportive of our guidance that it is possible to use personal information about the client to tailor factual information provided to the client.

75 We also received feedback from a number of respondents on some of the terminology used in CP 183 about giving factual information. Specifically, respondents highlighted that we referred interchangeably to ‘tailoring’, ‘considering’ and ‘use of’ personal information that an AFS licensee may have about their clients, which is confusing for industry because the distinction between each term was not outlined in the proposed guidance. (This feedback also applied to our guidance on general advice.)

ASIC’s response

We have amended our guidance to ensure that the language and terms used are clear and consistent. Our guidance now refers to an AFS licensee adjusting the factual information (or general advice) given to the client so that it is relevant and useful to the client: see RG 244.34 and RG 244.46–RG 244.47.

76 Respondents from the banking and insurance sectors expressed concerns about the commentary in Example C on consumer credit insurance (CCI). The commentary indicates that the home loan specialist may have given personal advice in this example because they have not provided the client with ‘balanced and complete information’ about the CCI product.

77 The respondents were concerned that the reference to ‘balanced and complete’ factual information creates a higher regulatory benchmark for information providers. They also expressed concerns about the uncertainty of what is required by the phrase ‘balanced and complete’ information.

ASIC’s response

We do not consider that provision of ‘balanced and complete’ information creates a higher regulatory benchmark. However, we have removed Example C from RG 244 in light of feedback that the example created uncertainty about giving factual information.

Giving general advice

78 In Section C of CP 183, we proposed to give guidance on how AFS licensees can provide general advice to clients when they hold personal information about the clients. About half of the submissions supported our proposed guidance.

79 Although respondents were supportive of our guidance that it is possible to give general advice if an AFS licensee has personal information about the client, a number of respondents also said that they needed more certainty about how this can be done.

ASIC’s response

We have clarified that advisers can provide general advice to a client even if they have personal information about the client: see RG 244.46–RG 244.47.

To give further assurance to industry, we have incorporated a no action position in our guidance. We will not take action against an AFS licensee, authorised representative or advice provider where personal advice is given merely because general advice using personal information about the client’s relevant circumstances to choose general advice that is relevant and useful to the client: see RG 244.48–RG 244.49.

The no action position only applies where:

- the AFS licensee, authorised representative or advice provider does not, in fact, consider the client’s relevant circumstances when they prepare the advice; and
- it is unlikely that the client would expect that the advice reflected a consideration of all their relevant circumstances.

80 We received feedback from a number of respondents about the consistency of terminology used in CP 183 in relation to our proposed guidance about

giving general advice to clients. This feedback also applied to our guidance on factual information: see paragraph 75 for our response to this issue.

Giving scaled advice

- 81 In Section D of CP 183, we proposed to give guidance to help advice providers meet the best interests duty and related obligations in Div 2 of Pt 7.7A when giving scaled advice to clients. Our guidance recognised that:
- (a) all advice is scaled to some extent—that is, advice is either less or more comprehensive in scope along a continuous spectrum;
 - (b) the same rules apply to all personal advice on the same topic, regardless of the scope of advice;
 - (c) scaled advice does not equate to lesser quality advice for clients or lower training standards for advice providers; and
 - (d) it is possible to provide scaled advice that is limited in scope that meets the best interests duty and related obligations.

82 Almost half of the submissions supported our proposed guidance, especially where we recognised that scaled advice does not equate to poor quality advice.

83 Some respondents suggested that we amend our guidance to confirm that a client can agree to limit the scope of the advice.

ASIC's response

Based on the feedback received, we have clarified our guidance to state explicitly that it is possible for either an advice provider or client to suggest limiting the subject matter of the advice.

However, our final guidance also states that we expect advice providers to use their judgement when determining the scope of the advice and the scope of advice must result in advice that is in the best interests of the client: see RG 244.65.

We do not agree that clients should be able to consent to advice that is of narrow scope, regardless of whether the resulting advice is in the client's best interests.

This would not meet the Australian Government's objective to improve trust and confidence in the financial advice industry through enhanced standards that align the interests of the adviser with the client.

84 In CP 183, we proposed to give principles-based guidance about how to limit the scope of personal advice, and the role of a 'triage' process. The appendix to CP 183 included numerous detailed examples illustrating how this process could work in practice.

85 A number of respondents asked for additional guidance explaining in more detail how we expect advice providers to use the 'triage' process when deciding on the scope of the advice that is in the best interests of the client.

- 86 For example, they suggested the guidance could include further details about the types of client circumstances that would require an advice provider to:
- (a) increase the inquiries made about the client’s relevant circumstances; or
 - (b) decide that scaled advice would not be in the best interests of a particular client, and they should receive more comprehensive advice.
- 87 Some respondents also asked for:
- (a) specific guidance about a scaled advice scenario that could arise in relation to their specific industry sector; and
 - (b) guidance about how scaled advice can be given in an online context.

ASIC’s response

Our guidance is intended to be principles based and apply across all industry sectors. It is not possible to provide detailed guidance for each industry sector. A principles-based approach gives advice providers greater flexibility to determine appropriate processes and business models to comply with the best interests duty and related obligations. In addition, RG 244 provides numerous detailed examples about how the guidance can be applied in practice.

To the extent possible, we have provided further guidance to clarify issues raised in feedback received. These include:

- a new example showing how a triage process could work in an online setting and a contrasting ‘negative’ example of a triage process where the best interests duty and related obligations have not been complied with (see Examples D7 and D8 in RG 244); and
- additional commentary in some of the examples in the appendix to illustrate the types of questions that can help advice providers determine whether a client has relatively straightforward or more complex circumstances, as part of a triage or filtering process (see Examples 6, 9 and 10 in the appendix to RG 244).

At the same time, we note that these examples are illustrative only, and are confined to their particular facts.

Communicating the service provided

- 88 Most submissions supported our proposed guidance in Section E of CP 183 that an advice provider must communicate clearly to clients the type of information or advice they are providing to clients. Some respondents said that when giving information or advice, it may be obvious to the client what they are receiving, and further explaining this could lead to confusion.

ASIC’s response

As a result of this feedback, we have amended our guidance to clarify that an advice provider must take reasonable steps to communicate clearly to the client the type of service they are

giving. What is reasonable will depend on the circumstances. In some cases, this will be self-evident: see RG 244.85–RG 244.86.

- 89 A key purpose of our proposed guidance was to ensure that the client understands any significant limitations or qualifications that apply to the information or advice. This included guidance that advice providers who are giving scaled advice must ensure that they communicate clearly to clients what advice *is* and *is not* being provided, and the implications of this.
- 90 Some submissions suggested that our guidance may be difficult to implement because, in practice, the list of advice topics that a client is not receiving could be infinite.

ASIC's response

As a result of this feedback, we have clarified our guidance to state that advice providers do not need to list every possible topic of advice that *is not* being provided to the client.

However, advice providers must explain any topics of advice that are relevant to the client and within the subject matter of the advice sought that are not being provided to the client.

It is also good practice to explain clearly why this potentially relevant advice is not being provided: see RG 244.90. For an illustration of how this could be done in practice, see the SOA in Examples 2 and 3 in the appendix to RG 244.

Delivering the information or advice

- 91 In Section F of CP 183, we proposed to give guidance outlining a number of delivery methods and channels for providing factual information and advice to clients, including by telephone, email, internet and face-to-face communication, or any combination of these methods.
- 92 Most submissions supported our proposed guidance. However, some respondents recommended that we include language that is more technology neutral. This is because consumers are increasingly seeking access to self-service information and advisory services through computer-based and online services.

ASIC's response

The Corporations Act is neutral about technology. Our guidance was drafted to be consistent with the language used in the Act and is intended to facilitate technological innovation in providing advice.

Based on the feedback received, we have included new examples to illustrate how advice can be provided online in a way that complies with the best interests duty: see Examples D7 and D8 in RG 244.

Examples in the appendix

- 93 In the appendix to CP 183, we set out some examples of giving factual information, general advice and scaled advice to take into account different circumstances where a client contacts a financial planner, superannuation fund, insurer, bank and stockbroker.
- 94 Most submissions made technical comments about examples that were relevant to their sector.

ASIC's response

Where appropriate, we have amended the examples in light of this feedback.

Appendix: List of non-confidential respondents

Non-confidential respondents to CP 182	Non-confidential respondents to CP 183
<ul style="list-style-type: none"> • Abacus Australian Mutuals • Australian Bankers' Association • Association of Financial Advisers • Australian Financial Markets Association • CPA Australia/Institute of Chartered Accountants Australia • Financial Planners Association • Financial Services Council • Henry David York Lawyers • Industry Super Network/Australian Institute of Super Trustees • Johnson Winter & Slattery • Lindgren, The Hon Kevin and Stone, the Hon Margaret • McCullough Robertson Lawyers • My Longevity Pty Ltd • Price Financial Intelligence Pty Ltd • State Super Financial Services Australia • Stockbrokers Association of Australia • Suncorp Group • Vanguard 	<ul style="list-style-type: none"> • Abacus Australian Mutuals • Australian Bankers' Association • Association of Financial Advisers • Australian Financial Markets Association • CPA Australia/Institute of Chartered Accountants Australia • Financial Services Council • Henry David York Lawyers • Industry Super Network/Australian Institute of Super Trustees • Insurance Council of Australia • McCullough Robertson Lawyers • Stockbrokers Association of Australia