



# ASIC

Australian Securities &  
Investments Commission

## REGULATORY GUIDE 98

# ASIC's powers to suspend, cancel and vary AFS licences and make banning orders

September 2018

### 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 provisions, by suspending, cancelling and varying AFS licences and making banning orders. 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 September 2018 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- Superseded Regulatory Guide 98, issued 18 November 2010, reissued 28 July 2012 and 30 July 2013
- Superseded ASIC guide *Licensing: Administrative action against financial services providers*, issued 26 April 2006, rebadged as Regulatory Guide 98 on 5 July 2007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 conditions and other legal obligations as licensees; and
- taking action, where appropriate, to enforce the laws ASIC administers when they are breached by a licensee (or a person acting on their behalf).

ASIC's powers to take action to protect investors and consumers may involve the use of an administrative remedy, which may be in addition to civil or criminal remedies. These remedies may include suspending, cancelling or varying an Australian financial services (AFS) licence, or making a banning order prohibiting a person from providing financial services.

We will use a remedy, or combination of remedies, where it most effectively and efficiently achieves our aim of promoting the objects of Chapter 7 of the Corporations Act: see s760A. This includes by promoting compliance with the law through deterring misconduct and raising professionalism in the financial services industry.

RG 98.1 This guide provides guidance for participants in the financial services industry on ASIC's administrative powers to suspend, cancel or vary an AFS licence and to make a banning order prohibiting a person from providing financial services under s914A, 915B, 915C and 920A. It 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 promoting the objects of the financial services regime, including by protecting investors and consumers and reinforcing the integrity and reputation of the financial services industry.

RG 98.3 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: see 'Related information'.

RG 98.4 This guide does not deal with the broad range of other administrative actions that might be available to ASIC, including, for example:

- (a) making a stop order;
- (b) issuing an infringement notice; or
- (c) for AFS licensees who are market participants, referring alleged breaches of the market integrity rules to the Markets Disciplinary Panel.

RG 98.5 This guide also does not discuss ASIC's complementary civil or criminal enforcement powers or its power to accept an enforceable undertaking.

Note: See [Information Sheet 151](#) *ASIC's approach to enforcement* (INFO 151) for guidance about ASIC's approach to enforcement more generally. See [Regulatory Guide 100](#) *Enforceable undertakings* (RG 100) and [Regulatory Guide 216](#) *Markets Disciplinary Panel* (RG 216) for guidance about ASIC's approach to enforceable undertakings.

## ASIC's responsibilities

RG 98.6 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 98.7 Our regulatory responsibilities are underpinned by the objects of the financial services regime, which include promoting:

- (a) investors and consumers making confident and informed decisions;
- (b) fairness, honesty and professionalism by those who provide financial services; and
- (c) fair, orderly and transparent markets for financial products: see s760A.

RG 98.8 The financial services regime is intended to ensure that investors and consumers can feel confident when dealing with persons who are licensed to provide financial services (or those acting on their behalf). 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 investors and consumers 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 98.9 To promote investor and consumer 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 and consumers 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 investors and consumers.

RG 98.10 The administrative action we take against a financial services provider demonstrates to the provider, to participants in the financial services industry more generally, and to investors and consumers that the particular conduct is unacceptable. This in turn promotes the objects of the financial services regulatory regime and may deter industry participants from engaging in misconduct.

Note: In *HIH Insurance Ltd and HIH Casualty and General Insurance Ltd, Re: ASIC v Adler* (2002) 42 ACSR 80, Santow J summarised the principles by which the discretionary power to disqualify directors is exercised (at [56]). These principles are applicable to ASIC's exercise of administrative powers to cancel or suspend a licence or to make a banning order.

### **AFS licensees and their representatives**

- RG 98.11 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 AFS licence: see s911A.
- RG 98.12 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 reports of misconduct we receive.
- RG 98.13 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 98.14 When we seek a remedy, we will use the remedy or combination of remedies that best achieves the aims set out in RG 98.7–RG 98.13.

### **ASIC's administrative powers**

RG 98.15 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 98.16 The administrative actions that may be available to us in respect of holding an AFS licence include:
- (a) immediately suspending or cancelling an AFS licence in certain limited circumstances;
  - (b) suspending or cancelling an AFS licence after offering a hearing; and
  - (c) varying AFS licence conditions after offering a hearing, including by imposing additional licence conditions or removing licence authorisations.
- RG 98.17 ASIC's administrative powers to suspend, cancel or vary an AFS licence are explained in more detail in Section B.
- RG 98.18 An administrative action that may be available to us in respect of a provider of financial services is banning that person from providing financial services (via a banning order), either immediately, in certain limited circumstances, or after offering a hearing.
- RG 98.19 ASIC's administrative powers to make a banning order are explained in more detail in Section C.

## When we will take administrative action

- RG 98.20 Whether we will take administrative action to suspend, cancel or vary an AFS licence or make a banning order will depend on the facts of each matter. Factors underlying our decision about whether to take this type of administrative action include:
- (a) whether the proposed action is within our power;
  - (b) whether taking the action will promote the objects of the financial services regime;
  - (c) whether taking the action will deter misconduct;
  - (d) the strategic significance of taking action;
  - (e) the need to protect investors and consumers;
  - (f) other benefits of pursuing misconduct;
  - (g) whether taking the proposed action is preferable to taking another type of administrative action, in terms of cost and timeliness; and
  - (h) issues specific to the case.
- RG 98.21 Any administrative action we take may supplement civil or criminal action we are taking against the person or business.

## A person's rights in dealing with ASIC

- RG 98.22 For information about a person's 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).
- RG 98.23 The person may have a right to complain to the Commonwealth Ombudsman or to seek other independent review of our decisions.

## B Suspending, cancelling or varying an AFS licence

### Key points

Where AFS licensees breach (or we have reason to believe that they are likely to breach) their legal obligations, ASIC's powers include the power to:

- suspend or cancel an AFS licence (with or without a hearing); and
- vary or impose further conditions on an AFS licence.

The factors we will take into account when deciding whether to suspend, cancel or vary an AFS licence will depend on the circumstances of each matter.

The factors we will consider when making these decisions may include whether:

- we detect non-compliance by a licensee (or by a person acting on their behalf) and the nature and seriousness of that non-compliance;
- the licensee has lodged a breach report, and the nature and seriousness of the breach;
- suspension, cancellation or variation is an appropriate remedy for us to pursue;
- there is a more appropriate alternative remedy for us to pursue;
- action is desirable to protect investors and consumers;
- action is likely to promote confident and informed decision making by investors and consumers;
- action may deter industry participants from engaging in misconduct; or
- action is likely to promote fairness, honesty and professionalism by industry participants.

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.

## Power to suspend, cancel or vary an AFS licence

### Immediate suspension or cancellation

- RG 98.24 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: see s915B.
- RG 98.25 The circumstances where we may immediately suspend or cancel an AFS licence vary according to whether the AFS licensee is a natural person, a partnership, a body corporate or a trustee.

- RG 98.26 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 98.27 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: see s915C.

Note: The principles and procedures we adopt for these hearings are set out in [Information Sheet 1 Administrative hearings](#) (INFO 1) and [Regulatory Guide 8 Hearings practice manual](#) (RG 8). For details of our overall approach to the obligations of an AFS licensee, see [Regulatory Guide 104 Licensing: Meeting the general obligations](#) (RG 104), [Regulatory Guide 105 Licensing: Organisational competence](#) (RG 105), [Regulatory Guide 165 Licensing: Internal and external dispute resolution](#) (RG 165), [Regulatory Guide 175 Licensing: Financial product advisers—Conduct and disclosure](#) (RG 175) and [Regulatory Guide 181 Licensing: Managing conflicts of interest](#) (RG 181).

- RG 98.28 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 98.29 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: see 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 and consumers affected by a licensee's conduct to have their complaints dealt with by the relevant external dispute resolution (EDR) scheme. When an AFS licence is suspended or cancelled, the licensee may cease to be a member of the EDR scheme, preventing investors and consumers from accessing the service.

### Varying or imposing licence conditions

RG 98.30 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: see s914A(1).

RG 98.31 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: see s914A(3).

RG 98.32 If appropriate, we may use our power to impose additional licence conditions to address 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.

## When we will suspend, cancel or vary an AFS licence

### Our approach

RG 98.33 The foundation of ASIC's approach to taking administrative action to suspend, cancel or vary an AFS licence is to take action where necessary or desirable to promote the objects of the financial services regime: see s760A.

Note: ASIC's approach is reflected in *Sovereign Capital Limited and Australian Securities and Investments Commission* [2008] AATA 901 at [84]: 'A licence should only be suspended or cancelled if it is necessary to do so in order to accomplish the objects of the legislative scheme'.

- RG 98.34 We are likely to take administrative action in instances where there is a need to protect investors and consumers, to deter misconduct, or where conduct of the licensee may result in investor or consumer detriment. Whether administrative action will be taken will depend on the facts of each matter. In general, we may consider:
- (a) suspending, cancelling or varying an AFS licence where we have concerns about the licensee, or the way their business is being or has been conducted; and
  - (b) cancelling an AFS licence where we have concerns about the accuracy and completeness of the application.

### **Relevant factors ASIC will consider**

- RG 98.35 ASIC's licensing powers were amended by the Corporations Amendment (Future of Financial Advice) Bill 2011. Additional explanation about ASIC's licensing powers is provided in paragraphs 2.17–2.27 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.

- RG 98.36 While it is not possible to identify all factors relevant to a decision to suspend, cancel or vary a licence, Table 1 sets out factors that may be taken into account.

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

**Table 1: Key factors we consider in deciding to suspend, cancel or vary a licence**

Factors	Relevant considerations
<b>Nature and seriousness of the suspected misconduct</b>	<ul style="list-style-type: none"> <li>• Whether the conduct of the licensee shows deliberation and planning in wilfully disregarding the law</li> <li>• Whether there is evidence that the contravention involved dishonesty or was intentional, reckless or negligent</li> <li>• Whether the misconduct poses an unacceptable risk to investors and consumers</li> <li>• The amount of any benefit gained or detriment suffered as a result of the misconduct</li> <li>• The amount of any loss caused to investors and consumers</li> <li>• The impact of the misconduct on the market, including potential loss of public confidence</li> <li>• Whether the conduct is continuing or appears likely to recur</li> <li>• Whether the misconduct indicates systemic compliance failures</li> <li>• Whether the licensee has a poor compliance record (e.g. they have previously engaged in misconduct)</li> <li>• The extent of compliance by the licensee with analogous obligations in another regime</li> <li>• Failing to manage a material conflict of interest</li> </ul>
<b>Internal controls</b>	<ul style="list-style-type: none"> <li>• Whether the licensee had effective internal policies and procedures in place to ensure that the licensee and its representatives complied with obligations and that any breaches were detected</li> <li>• Whether those policies and procedures were complied with and whether any breaches of obligations were detected</li> <li>• Whether the licensee ever lodged breach reports with ASIC</li> <li>• If the misconduct was committed by a representative of a licensee, whether it indicates a systemic failure of supervision by the licensee</li> <li>• Whether a corporate culture conducive to compliance with obligations is evident (e.g. effective educational and compliance programs)</li> </ul>
<b>Conduct after the alleged contravention occurs</b>	<ul style="list-style-type: none"> <li>• When and how the breach came to the attention of ASIC</li> <li>• The level of cooperation with our investigation</li> <li>• Whether timely and effective remedial steps have been taken</li> <li>• Whether the licensee has been proactive in making appropriate changes to policies and procedures and, where applicable, changing its approach to ensure the effective functioning of its dispute resolution systems</li> <li>• Whether the licensee has been proactive in compensating client losses and in communicating with clients about the contravention</li> </ul>
<b>The expected level of public benefit</b>	<ul style="list-style-type: none"> <li>• The protective effect for investors and consumers</li> <li>• The reinforcement of the integrity and reputation of the financial services industry</li> <li>• Whether the case is likely to help participants in financial markets to better understand their obligations and thereby promote compliance</li> </ul>

Factors	Relevant considerations
<p><b>Likelihood that:</b></p> <ul style="list-style-type: none"> <li>• <b>the licensee's behaviour will change in response to a particular action; and/or</b></li> <li>• <b>other industry participants will be deterred from engaging in similar conduct through greater awareness of the consequences</b></li> </ul>	<ul style="list-style-type: none"> <li>• The compliance history of the licensee</li> <li>• Whether there has been a change in control or management of the licensee</li> <li>• Whether behaviour (of a licensee or broader industry) is more likely to change if the licensee has their licence suspended or cancelled</li> </ul>
<p><b>Mitigating factors</b></p>	<ul style="list-style-type: none"> <li>• Whether the misconduct relates to an isolated complaint and investors and consumers have generally not suffered substantial detriment or been placed in a position of unacceptable risk</li> <li>• Whether the misconduct was inadvertent and the licensee undertakes to cease or correct the conduct</li> </ul>

### Whether suspension, cancellation or variation is more appropriate: Considerations

- RG 98.37 In deciding whether it is more appropriate to suspend or to cancel a licence, we have regard to the principle set out in *Sovereign Capital Limited and Australian Securities and Investments Commission* [2008] AATA 901: a suspension will ordinarily be preferable if there is a reasonable prospect that the licence holder can remedy the defects which prompted the concern.
- RG 98.38 In appropriate cases, the objects of the licensing regime 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).
- RG 98.39 Similarly, in appropriate cases, the objects of the licensing regime may be satisfied by varying licence conditions rather than suspending or cancelling the licence (e.g. imposing special compliance consultant review and report conditions or restrictive conduct and enhanced disclosure conditions might be preferable to suspending or cancelling the licence).

### Examples of misconduct that may result in cancellation or suspension

- RG 98.40 Examples of misconduct that may result in an AFS licence being cancelled or suspended include:
- (a) dishonesty by a licensee;
  - (b) the licensee failing to implement and maintain effective compliance measures;
  - (c) systemic or persistent breaches of the licensee's obligations;

- (d) the licensee has, at senior levels of management, misled or hindered ASIC, including by concealing or deliberately destroying records it is required to keep; and
- (e) there is actual or potential significant risk to investors and consumers because the licensee does not comply with its obligations under s912A, for example, by:
  - (i) not having adequate resources, risk management arrangements or arrangements to manage conflicts of interest to continue to meet its obligations; or
  - (ii) not complying with the conditions of its licence.

Note: These examples are not exhaustive and are intended to only give an indication of misconduct that might lead to ASIC taking administrative action.

### **Administrative action may be taken even if breaches are rectified**

RG 98.41 We may cancel, suspend or vary an AFS licence even if the licensee has rectified breaches. We may do so to deter the licensee or others from engaging in misconduct. In deciding whether to do so, we will consider, among other things, whether the licensee has been reactive rather than proactive in its approach to compliance. The attitude of an individual licensee to compliance and the organisational culture of a corporate licensee are examples of factors we will take into account when forming a view about whether the licensee has a reactive or proactive compliance approach.

Note: See *Masu Financial Management Pty Ltd and Australian Securities and Investments Commission* [2017] AATA 97.

### **Change in control does not neutralise history of non-compliance**

RG 98.42 A change in the control or the management of a body corporate licensee does not mean that ASIC will disregard the licensee's history of non-compliance. In appropriate circumstances, ASIC may cancel, suspend or vary the licensee's AFS licence even if there is a change in control or in management. This is because even if breaches occurred before the change, those breaches form part of the licensee's compliance history and may remain relevant.

## C Banning orders

### Key points

ASIC's powers to protect investors and consumers include the power to make a temporary or permanent banning order preventing the person from providing all or specified financial services. We will consider using these powers where a person breaches (or we have reason to believe that they are likely to breach) their legal obligations or is involved in another person's contravention of financial services laws.

The factors we will take into account when deciding whether to make a banning order will depend on the circumstances of each matter.

The factors we will consider when making these decisions may include whether:

- we detect non-compliance by the person;
- a banning order would be an appropriate remedy for us to pursue;
- there is a more appropriate alternative remedy for us to pursue;
- action is desirable to protect investors and consumers;
- action is likely to promote confident and informed decision making by investors and consumers;
- action may deter industry participants from engaging in misconduct; or
- action is likely to promote fairness, honesty and professionalism by industry participants.

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

### Power to make a banning order

RG 98.43 We can ban a person from providing financial services by making a banning order: see s920A.

#### What is a banning order?

RG 98.44 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 98.45 A person subject to a banning order cannot be granted a licence contrary to the banning order: see s920C.

## Making a banning order

RG 98.46 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 98.47 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: see s920A(1)–(2).

RG 98.48 The circumstances in which we can make a banning order in relation to a person under s920A are when:

- (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 that 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 1: The circumstances listed in paragraphs RG 98.48(a)—RG 98.48(j) do not include those in which we make a banning order under provisions inserted into the Corporations Act by the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (see RG 98.50).

Note 2: To avoid doubt, a person contravenes a financial services law if they fail 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 (see s920A(1)(1b)).

RG 98.49 ASIC's banning powers were amended by the *Corporations Amendment (Future of Financial Advice) Act 2012*. For additional explanation about ASIC's banning powers, see paragraphs 2.17–2.20 and 2.28–2.39 of the Explanatory Memorandum to the Corporations Amendment (Future of Financial Advice) Bill 2011.

- RG 98.50 Amendments were also made to ASIC's banning powers by the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017*, which inserted s920A(1)(db)–(de) into the Corporations Act. Information about these new powers is contained in the Explanatory Memorandum to the Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016: see paragraphs 2.30 and 2.45. We will issue guidance on the use of our powers in s920A(1)(db)–(de) in conjunction with guidance about the other provisions of the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017*.

## When we will make a banning order

### Our approach

- RG 98.51 The foundation of ASIC's approach to taking administrative action to make a banning order is to take action where necessary or desirable to promote the objects of the financial services regime: see s760A.
- RG 98.52 We are likely to take administrative action in instances where there is a need to protect investors and consumers, to deter misconduct, or where the person's conduct may result in investor or consumer detriment. Whether administrative action will be taken will depend on the facts of each matter. In general, we may consider banning a person where we have concerns about the person, or the way their business is being or has been conducted.
- RG 98.53 We may ban a financial services provider even if the person has rectified breaches or has taken steps to prevent further non-compliant conduct, such as by completing additional training. We may do so to deter misconduct by the provider or others. In deciding whether to do so we will consider, among other things, whether the person has been reactive rather than proactive in their approach to compliance. The person's attitude to compliance is an example of a factor we will take into account when forming a view about whether they have a reactive or proactive compliance approach.

Note: Consideration of deterring others from engaging in misconduct is fundamental in determining whether to impose a banning order: see *Australian Securities and Investments Commission v McCormack* [2017] FCA 672 at [47].

### Relevant factors ASIC will consider

- RG 98.54 While it is not possible to identify all factors relevant to a decision to ban a person from providing financial services, Table 2 sets out factors that may be taken into account.

Note: The list in Table 2 is not exhaustive and there will be other factors or conduct that are not mentioned in this guide that could lead to a decision to ban a person from providing financial services.

**Table 2: Key factors we consider in deciding to make a banning order**

Factors	Relevant considerations
<b>Nature and seriousness of the suspected misconduct</b>	<ul style="list-style-type: none"> <li>• Whether there is evidence that the contravention involved dishonesty or was intentional, reckless or negligent</li> <li>• The amount of any benefit gained or detriment suffered as a result of the misconduct</li> <li>• The amount of any loss caused to investors and consumers</li> <li>• The impact of the misconduct on the market, including potential loss of public confidence</li> <li>• Whether the conduct is continuing or likely to recur</li> <li>• Whether the person has a poor compliance record (e.g. they have previously engaged in misconduct)</li> <li>• Failing to manage a material conflict of interest</li> </ul>
<b>Internal controls</b>	<ul style="list-style-type: none"> <li>• Whether the person complied with internal procedures</li> </ul>
<b>Conduct after the alleged contravention occurs</b>	<ul style="list-style-type: none"> <li>• When and how the breach came to the attention of ASIC</li> <li>• The level of cooperation with our investigation</li> <li>• Whether timely and effective remedial steps have been taken</li> <li>• If in a position to do so, whether the person has been proactive in making appropriate changes to policies and procedures and, where applicable, changing their approach to ensure the effective functioning of their dispute resolution systems</li> <li>• Whether the person has been proactive in compensating client losses and in communicating with clients about the contravention</li> </ul>
<b>The expected level of public benefit</b>	<ul style="list-style-type: none"> <li>• The protective effect for investors and consumers</li> <li>• The reinforcement of the integrity and reputation of the financial services industry</li> <li>• Whether the case is likely to help participants in financial markets to better understand their obligations and thereby promote compliance</li> </ul>
<b>Likelihood that:</b> <ul style="list-style-type: none"> <li>• the person's behaviour will change in response to a particular action; and/or</li> <li>• other industry participants will be deterred from engaging in similar conduct through greater awareness of the consequences</li> </ul>	<ul style="list-style-type: none"> <li>• The compliance history of the person</li> <li>• Whether behaviour (of the person or broader industry) is more likely to change if the person is banned</li> </ul>
<b>Mitigating factors</b>	<ul style="list-style-type: none"> <li>• The extent to which there would be any personal hardship were a banning order to be made</li> <li>• Whether the misconduct relates to an isolated complaint</li> <li>• Whether investors or consumers have generally not suffered substantial detriment or been placed in a position of unacceptable risk</li> <li>• Whether the misconduct was inadvertent and the person undertakes to cease or correct the conduct</li> </ul>

## Banning periods

- RG 98.55 Our primary purpose in making banning orders is to promote the objects of the financial services regime. Banning orders protect investors and consumers and deter misconduct. In determining the period of a banning order, deterring others from engaging in misconduct is fundamental.
- Note: See *Australian Securities and Investments Commission v McCormack* [2017] FCA 672 at [47].
- RG 98.56 It is also appropriate that we assess the risk that the person poses to investors and consumers if they are not banned. A longer banning period will apply to a person assessed as posing a higher risk.
- RG 98.57 In our risk assessment, we consider what the person's conduct shows about them, and about their motivation, if any, for engaging in the conduct. For example, we are likely to consider that:
- (a) a person who has acted dishonestly, or has chosen to engage in conduct despite knowing that it could potentially adversely affect others, poses a higher risk than a person who should have realised the potential for adverse consequences to others but did not, or a person whose misconduct is the result of being careless; and
  - (b) a person who shows a deliberate disregard for compliance with the law poses a higher risk than a person who fails to comply due to incompetence.
- RG 98.58 In our risk assessment, we also consider the actual or potential impact of the person's conduct on relevant persons (e.g. investors and consumers, licensees, ASIC and ASX). For example, conduct that has resulted in unfair enrichment—such as the person receiving excessive commissions—or that has the potential to lead to a loss of confidence in the integrity of a market for financial products is likely to lead to a longer banning period than conduct that has a minimal adverse impact. Actual investor or consumer loss is not a prerequisite for a period of banning.
- RG 98.59 Multiple instances of misconduct can increase the seriousness of risk that the person poses to investors and consumers if they are not banned and may lead to a longer banning period.
- RG 98.60 We emphasise that each case must depend on its particular circumstances and will be determined on a case-by-case basis.
- RG 98.61 We may ban a person if they are involved in another person's contravention or we have reason to believe that they are likely to become involved in another person's contravention: see s920A(1)(g) and 920A(1)(h). We may impose a banning period on them that is similar to the banning period that we would impose on the person who engaged in the conduct.

RG 98.62 Table 3 sets out factors and examples of conduct and indicates the potential banning period that may follow from engaging in that conduct. These factors and examples are indicative only.

Note: If ASIC has reason to believe that a person is not of good fame or character and is satisfied that a banning order should be made, ASIC is required to make a permanent banning order: see s920B(2).

**Table 3: Factors and examples of conduct relating to specific periods of banning**

Outcome	Factors	Examples of conduct (indicative only)
<b>Banning for less than 3 years</b>	<ul style="list-style-type: none"> <li>• Conduct is the result of carelessness or inadvertence</li> <li>• The person attempted to remedy the contravention and has fully cooperated with ASIC</li> <li>• No loss (or minimal loss) to client</li> </ul>	<ul style="list-style-type: none"> <li>• Giving a complying disclosure document, but not within the required time</li> <li>• Failing to lodge documents with ASIC as required</li> <li>• Failing to notify ASIC about a representative's breach of the licensee's obligations</li> </ul>
<b>Banning for 3–10 years</b>	<ul style="list-style-type: none"> <li>• Conduct is inconsistent with the orderly operation of a financial market</li> <li>• Adverse impact on confidence in or the integrity of a financial market</li> <li>• False, misleading or deceptive, or unconscionable conduct</li> <li>• A deliberate course of conduct to enrich themselves at others' expense</li> <li>• Conduct shows incompetence, irresponsibility or a high level of carelessness, but with the possibility that the person may develop requisite skills and abilities</li> <li>• Disregard for the law and compliance with regulations</li> </ul>	<ul style="list-style-type: none"> <li>• Insider trading</li> <li>• Market manipulation or other misconduct in relation to a financial product traded on a financial market (e.g. s1041A–1041E)</li> <li>• 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))</li> <li>• 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"> <li>Note: For our policy on what is 'acting in the best interests of the client and associated obligations', see <a href="#">RG 175</a>.</li> </ul> </li> <li>• Offering or recommending interests in a managed investment scheme that needs to be registered, but has not been</li> <li>• Carrying on a financial services business without holding an AFS licence</li> <li>• Providing financial services that are not covered by the AFS licence, if one is required</li> <li>• Providing financial services contrary to s911B</li> <li>• Failing to keep financial records that must be kept</li> <li>• Failing to comply with disclosure requirements, including not disclosing commissions and other benefits or relevant interests and associations <ul style="list-style-type: none"> <li>Note: For our policies on disclosure, see <a href="#">RG 104</a>, <a href="#">RG 175</a> and <a href="#">RG 181</a> which are referred to in 'Related information'.</li> </ul> </li> <li>• Unauthorised discretionary trading</li> <li>• Failure by a director of the licensee to ensure the licensee complies with its obligations</li> <li>• Misleading clients about the nature of the products being acquired or disposed of on their behalf that are not for the clients' benefit</li> </ul>

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

### Limited and permissive banning orders

RG 98.63 We have the power to impose both limited and permissive banning orders. That is, we may impose a banning order that:

- (a) applies only in specified circumstances or capacities (limited banning order)—see s920B(1); or
- (b) 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)—see s920B(3).

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

RG 98.64 In considering whether to make a limited or permissive banning order, we will take into account:

- (a) the objects of the financial services regulatory regime;
- (b) the factors set out in Table 2;

- (c) whether such an order is consistent with deterring misconduct; and
- (d) whether such an order is consistent with our priority of protecting investors and consumers.

RG 98.65 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 would address our concerns about the person in question. For example, we may consider imposing conditions that:

- (a) require the person to undertake and successfully complete additional relevant education or training before being permitted to provide financial services; and
- (b) require 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 98.66 We will not consider setting conditions that would make it necessary for us to take further action. Generally, it is also unlikely that we would consider making a permissive banning order unless a nominated AFS licensee had agreed to appoint or continue to engage the person and to comply with any conditions applicable to the licensee under the order.

## Varying or cancelling banning orders

RG 98.67 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': see 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 98.68 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: see s920D(3).

RG 98.69 Examples of matters that may be relevant to a decision whether to vary or cancel a banning order include:

- (a) the seriousness of the misconduct that resulted in the order;
- (b) the period that has elapsed since the order was made and whether the person continues to pose a risk to investors and consumers or to confidence in the financial system due to 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. For example, 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 98.70 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) the compliance record of the licensee—where the person proposes to act as a representative of an AFS 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.

## D Publicising our decisions

### Key points

We will make public our decisions to vary, suspend or cancel an AFS licence or to make, vary or cancel a banning order by publishing a notice in the [ASIC Gazette](#).

We will not publicly comment on these administrative actions before these decisions are gazetted, or the relevant registers are updated.

### Public notification of decisions

RG 98.71 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](#): see s915F and 920E.

RG 98.72 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 98.73 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: see s922A(1). A person may inspect the registers, and may make copies of or take extracts from them: see s922B(1). The registers must include details about licensees and people who have been banned: see regs 7.6.05 and 7.6.06 of the Corporations Regulations 2001.

RG 98.74 As a general principle, it is our view that there is significant public interest in ensuring that investors and consumers 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 and consumer confidence. They serve to educate, as well as to deter misconduct and to promote compliance by demonstrating the regulatory consequences of engaging in unacceptable conduct.

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 98.75 Our approach to public comment on our decisions to vary, cancel or suspend an AFS licence or to make, vary or cancel a banning order will be governed by our stated policy: see [Information Sheet 152](#) *Public comment on ASIC's regulatory activities* (INFO 152). As set out in [INFO 152](#), we will not make a public comment before we gazette a notice of the decision or update the relevant register.

## Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B that authorises a person who carries on a financial services business to provide financial services  Note: This is a definition contained in s761A.
AFS licensee	A person who holds an Australian financial services licence under s913B
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
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
Corporations Regulations	Corporations Regulations 2001
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
EDR scheme	An external dispute resolution scheme approved by ASIC under the Corporations Act (see s912A(2)(b) and 1017G(2)(b)) and/or the National Credit Act (see s11(1)(a)) in accordance with our requirements in <a href="#">Regulatory Guide 139 Approval and oversight of external complaints resolution schemes</a> (RG 139)
enforceable undertaking	A court enforceable undertaking that may be accepted by ASIC under reg 7.2A.01 of the Corporations Regulations and s93A and s93AA of the ASIC Act
financial product	A facility through which, or through the acquisition of which, a person does one or more of the following: <ul style="list-style-type: none"> <li>• makes a financial investment (see s763B);</li> <li>• manages financial risk (see s763C);</li> <li>• makes non-cash payments (see s763D)</li> </ul> Note: This is a definition contained in s763A of the Corporations Act: see also s763B–765A.
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
financial services business	A business of providing financial services  Note: This is a definition contained in s761A of the Corporations Act. The meaning of 'carry on a financial services business' is affected by s761C.

Term	Meaning in this document
financial services law	Has the meaning given in s761A
financial services provider	A person who provides a financial service
infringement notice	An infringement notice issued under reg 7.2A.04 of the Corporations Regulations
market integrity rules	Rules made by ASIC, under s798G of the Corporations Act, for trading on domestic licensed markets
market participant	Has the meaning given in s761A of the Corporations Act
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
provide a financial service	<p>A person provides a financial service if they:</p> <ul style="list-style-type: none"> <li>• provide financial product advice;</li> <li>• deal in a financial product;</li> <li>• make a market for a financial product;</li> <li>• operate a registered scheme;</li> <li>• provide a custodial or depository service;</li> <li>• provide a crowd-funding service; or</li> <li>• as a trustee company, provide traditional trustee company services</li> </ul> <p>Note: This is a definition contained in s766A.</p>
reg 7.6.05 (for example)	A regulation of the Corporations Regulations (in this example numbered 7.6.05)
representative (of an AFS licensee)	<p>Means:</p> <ul style="list-style-type: none"> <li>• an authorised representative of the licensee;</li> <li>• an employee or director of the licensee;</li> <li>• an employee or director of a related body corporate of the licensee; or</li> <li>• any other person acting on behalf of the licensee</li> </ul> <p>Note: This is a definition contained in s910A of the Corporations Act.</p>
RG 100 (for example)	An ASIC regulatory guide (in this example numbered 100)
S920A (for example)	A section of the Corporations Act (in this example numbered 920A), unless otherwise specified

## Related information

### Headnotes

administrative powers, AFS licence, AFS licensees, banning orders, cancellation, licence conditions, public comment, suspension

### 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 181](#) *Licensing: Managing conflicts of interest*

[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 on ASIC's regulatory activities*

### Legislation

ASIC Act, Pt 2 Div 2, s1041F–1041H

Corporations Act, Ch 7, s760A, 911A, 911B, 912A, 912C, 914A(1), 914A(3), 915B, 915C, 915F, 915H, 920A, 920B, 920C, 920D, 920E, 921A, 1041A–1041E

Corporations Amendment (Future of Financial Advice) Act 2012

Corporations Amendment (Future of Financial Advice) Bill 2011

*Corporations Amendment (Professional Standards of Financial Advisers) Act 2017*

Corporations Regulations 2001, regs 7.6.05, 7.6.06

Explanatory Memorandum to the Corporations Amendment (Future of Financial Advice) Bill 2011, paragraphs 2.17–2.39

Explanatory Memorandum to the Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016, paragraphs 2.30, 2.45

*National Consumer Credit Protection Act 2009*

## **Cases**

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

*Australian Securities and Investments Commission v McCormack* [2017] FCA 672

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

*Masu Financial Management Pty Ltd and Australian Securities and Investments Commission* [2017] AATA 97

*Sovereign Capital Limited and Australian Securities and Investments Commission* [2008] AATA 901