12 September 2025

Maria Hadisutanto
Senior Manager
Regulatory Reform and Implementation
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001

Via email: rri.consultation@asic.gov.au

Dear Maria,

The Australian Financial Markets Association (**AFMA**) welcomes the opportunity to provide feedback to ASIC on *Consultation Paper 385: Proposed update to RG 181 Licensing: Managing conflicts of interest*. AFMA supports ASIC's undertaking to review and uplift outdated regulatory standards to improve consistency and efficiency in financial markets.

About AFMA and its Members

AFMA is the peak industry body for Australia's financial markets industry – including the capital, credit, derivatives, foreign exchange, and other specialist markets. AFMA represents more than 130 industry participants from Australian and international banks, leading brokers, securities companies, government treasury corporations to asset managers, energy firms, carbon market participants, and industry service providers. AFMA promotes efficiency, integrity, and professionalism in Australia's financial markets enabling the markets to continue to support the Australian economy.

AFMA welcomes the intention to update RG 181 to reflect developments in the regulatory landscape. AFMA agrees with the aim of ASIC to make the guide clear and fit for purpose. Industry appreciates the inclusion of a roadmap outlining the non-exhaustive list of relevant legal obligations and regulatory materials as a valuable tool that enhances the practical utility of the guidance.

We support a proportionate, principles and risk-based approach and acknowledgement that frameworks for managing conflicts of interest should be based on the nature, scale and complexity of a firm's business. In light of this, our feedback focuses on the importance of aligning to this priority and highlights where we believe the guide deviates from this principle.

Please refer to our response to the Consultation Paper below. The structure of our submission is to provide overarching comments accompanied by direct feedback on Parts C, D and E where applicable.

If you wish to discuss this submission, AFMA would be pleased to provide further information or clarity as required. Please contact [redacted]

Kind regards,

[redacted]

Overview

The reframing of Draft RG 181 is a positive development which promotes consistency in interpretation and implementation across industry. However, while clarity and consistent application is necessary, the guide suggests a highly prescriptive and uniform approach conflicting with the overarching principles. AFMA draws your attention to a few reoccurring themes throughout our feedback:

❖ <u>Proportionality and Risk-based Principles</u>

The introduction of prescriptive requirements contradicts the flexible, circumstances-based framework established by s912A(1)(aa) of the Corporations Act and affirmed by Federal Court decisions[1]. Further it deviates from the messaging ASIC has communicated in its simplification work– a commitment to proportionate regulation and reducing regulatory burden where possible whilst maintaining essential protections. This contradiction is particularly evident when examining ASIC's recent market development initiatives. For example, ASIC's paper titled *Australia's Evolving Capital Markets: A Discussion Paper on the Dynamics Between Public and Private Markets* dated 26 February 2025 recognises the need for regulatory settings that do not inadvertently disadvantage Australian markets.

RG 181.3 and 181.48 highlights the need to 'take a take a proportionate and risk-based approach to your conflicts management obligation', however the language and steps provided in Part C, D and E provides minimal nuance to how a firm manages its conflicts. While it may be reasonable to state these are just indeterminate examples, this does not provide much comfort to institutions taking an approach which deviates from the steps provided on the basis it is proportional to the business it runs.

If the intention is to right size the conflicts management framework, it is important to ensure that the guidance provided remains clearly aligned with the scope and intent of the legislative requirements and does not inadvertently expand or impose obligations beyond what is mandated under the legislation. This will help maintain legal clarity and avoid placing undue compliance burdens on reporting entities.

❖ <u>Wholesale and Retail Distinction</u>

The draft guide does not establish a clear distinction between financial service or advice provided to wholesale or retail clients, particularly when outlining the expectations for effective management. For example, Part E repeatedly states mere disclosure is not sufficient when managing a risk. This assertion assumes all clients have the same level of sophistication.

In practice, there may be situations where a conflict of interest can be appropriately managed with disclosure in a wholesale context but may be best avoided (or banned) in a retail context. For example, an investment advisor providing retail clients investment options with varying degrees of incentives may inherently be conflicted, and therefore may be best managed through avoidance. However, wholesale clients would be expected to have sufficient knowledge and resources to query the options

[1] *ASIC v Avestra* [2017] FCA 497 at [194]. The principles-based approach established in s912A(1)(aa) has been consistently affirmed across multiple Federal Court decisions, including ASIC v Avestra which emphasised that "adequate arrangements" must be assessed in the context of each licensee's business model and risk profile. Furthermore, in ASIC v Hobbs [2012] NSWSC 1276, the Full Federal Court criticised directors who, instead of properly managing conflicts of interest or fulfilling director duties, only performed minimal, procedural steps as if "checking the box," which led to substantive breaches and liability.

provided, and understand the potential conflicts presented via disclosures – a distinction that is recognized by ASIC's regulatory guides and regulations which apply only to advice provided to retail clients.

Coinciding with a principles-based approach, the guide should provide sufficient flexibility to firms to accommodate the specific needs of different client types and recognise the varying approaches within a framework. Overly prescriptive guidance minimises the real difference between client groups and may paradoxically result in negative outcomes if a standard box ticking approach is adopted.

❖ International Alignment

Australian conflicts management requirements should align with international approaches to avoid creating regulatory arbitrage or competitive disadvantages. To the extent that market convergence arises, conflict management standards and regulations should be interoperable to allow a more seamless and frictionless participation in global markets. The EU and UK models place emphasis on proportionality and arrangements appropriate to the size and complexity of the firm and the nature of its business. Australian conflicts management guidance on the law should facilitate compatibility within the scope of the local statutory requirement with international approaches to permit efficient cross-border compliance management. By adopting an overly prescriptive approach, Australia also diverges from international best practice which recognises market diversity. Interoperability and alignment with significant established offshore markets would facilitate Australian market development and regulatory leadership within APAC whilst maintaining appropriate regulatory settings/protections – consistent with ASIC's ongoing work to improve the competitiveness of Australian public and private markets.

❖ Information Asymmetry

RG 181.8 indicates that the conflicts of interest obligation is "intended to address information asymmetry". We do not think that information asymmetry should be the central focus in evaluating an actual or potential conflict of interest, as opposed to a relevant consideration or input in a broader assessment as to what may constitute such a conflict of interest. In the context of the Explanatory Memorandum [paragraph 5.599], the obligation to manage conflicts of interest is stated to be intended to "supplement the existing general duty in paragraph 912A(1)(a) to provide financial services 'efficiently, honestly and fairly.'" We recommend that ASIC aligns RG 181.8 with this purpose and identify that information asymmetry is one of a number of relevant considerations in a licensee's assessment of an actual or potential conflict of interest.

Part C – Identifying conflicts of interest

Industry appreciates ASIC's efforts to clearly outline the different types of conflicts in Table 1. Understanding ASIC's expectations enables firms to better comply with its obligations. While the examples in Table 1 are a step in the right direction, further refinement is needed. To enhance usability and clarity, AFMA has compiled a list of key issues below:

- Categorisation

  The inclusion of overlapping or duplicative categories in Table 1 may reduce clarity and create confusion in practical application. Better aligning the categories with commonly used industry terminology will encourage use, streamline guidance and support a more consistent interpretation across industries – categories such as 'Bank versus Client' and 'Client versus Client'. This approach highlights the nature of the relationship in which conflict arises, rather than the frame which may be ambiguous i.e. 'structural' or 'proprietary'. In addition, structuring the examples by licensee type would be beneficial in highlighting the difference amongst licensees and assist with proportional expectations e.g. superannuation, financial advice, sustainability.

- <u>Inconsistent Application</u>

  Many of the examples in Table 1 are inconsistent and describe the possible consequences of a conflict not being managed or avoided, including by listing illegal or prohibited conduct. This approach conflates the misconduct or consequence of a conflict not being appropriately managed with the conflict itself. In other instances, the example introduces the concept of materiality by implying a conflict only arises when the client suffers a detriment – this raises further confusion. These inconsistencies arise due to the examples amalgamating conflict identification with mechanisms to adequately manage (Part D), and effectively management (Part E) under one umbrella – for instance "*A private capital advisory (advising and dealing in a class of shares) not disclosing to a client its economic relationships with other investors in an equity deal*" outlines the conflict as well as the expectations for effective management i.e. disclosure. This goes beyond conflict identification which adds to the confusion. Table 1 examples should be limited to outlining instances where a conflict may arise without outlining what is deemed adequate or effective management. Conflating conflict identification with directives on adequate or effective management implies that in order to manage this conflict, this exact approach would need to be taken. This limits a firm's ability to adopt a risk-based approach in assessing what is appropriate for its institution when managing a conflict i.e. whether to disclose or control. In Appendix 1 we have created a table detailing commentary on examples which require further clarity.

- <u>Legitimate Practices</u>

  Some examples in Table 1 highlight legitimate business practices which do not necessitate a conflict e.g. "*A market maker (acting as both a buyer and seller in a market) providing preferential treatment to certain clients, such as offering better pricing or execution priority*". In practice, there are many justifications for providing preferential pricing (see Appendix 1 – Part 2). This example characterises legitimate commercial risk assessment and relationship-based pricing as inherent conflicts, potentially eliminating essential market functions. This is not appropriate to include in Table 1 and should be removed as an illustrative example.

- <u>Role of the Licensees</u>

  Table 1 lacks nuance and does not distinguish between the capacity or role in which a licensee may act. Omitting this factor overlooks the varying obligations which apply to licensees when servicing different markets or products. This differentiation is necessary when considering remuneration – for example, equities involves licensees acting as agents for clients with remuneration being fee and/or commissions based, while fixed income involves licensees acting as principal (facing counterparties), with remuneration being market making risk and/or P&L based. Moreover, Table 1 should acknowledge that licensees may act in fundamentally different capacities across various transactions, each carrying distinct legal obligations and risk profiles including principal vs agent, market maker and regulated entity.

Furthermore, when identifying conflicts of interest RG 181.44 states an entity must consider remuneration. Most AFMA members are APRA regulated with remuneration practices covered by existing standards e.g. CPS 511 as well as the Financial Accountability Regime. ASIC should take into account the role existing Australian remuneration regulation plays in fulfilling this obligation to avoid the unnecessary duplication of compliance work.

AFMA recognises it is impractical to expect an exhaustive list identifying all types of conflicts. To minimise confusion and support the consistent application across industries, with consideration for our comments in Appendix 1, AFMA supports ASIC adopting a high-level general approach when listing out examples – this would also aid firms in tailoring their conflict management frameworks to better suit their businesses needs and risks. The illustrative examples provide a beneficial tool which can assist entities interpret and apply the guidance in real-world scenarios. However, the examples should remain as such – as tools to assist firms identifying where a conflict may arise, not as a conduit to further layer legal prescription through guidance.

Part D – Adequate Arrangements

The additional guidance on adequate arrangements is helpful in highlighting what constitutes good practice. However, AFMA is cautious about the language creating a mandatory compliance framework that varies from the statutory requirement for "adequate" arrangements. The phrase "*should generally include but are not limited to*" implies a regulatory expectation that arrangements follow the prescribed model.

Any guidance provided should highlight best practice while providing sufficient flexibility for the framework to be adapted to the nature, scale and complexity of its business. This may look like amending RG 181.45 to reaffirm the principles of proportionality:

> "*You must have adequate arrangements to manage conflicts of interest. <u>Adequacy is determined by the effectiveness of arrangements in your specific circumstances, considering the nature, scale and complexity of your business. Arrangements need not be uniform across different business models or market types, provided they effectively manage material conflicts</u>.*"

Additionally, greater flexibility is necessary to account for the varying firms relying on the guidance for example, foreign branches and/or subsidiaries are often multi-national organisations which have different corporate and organizational structures influencing the implementation of policies and procedures – there may not be one overarching policy on conflicts of interest, but multiple different policies addressing the specific types of conflicts that are most prevalent in the organisation's activities. In other cases, the firm may be a smaller carbon market dealer without the resources to implement a comprehensive technologically enabled system. The guide should minimise prescription when defining what is 'adequate' to avoid necessitating specific guidance catering to each individual type of firm.

<u>Table 2 Feedback</u>

Below we have provided feedback and outlined where further clarification is needed in Table 2.

1. *Identify*: "Materiality" draws on the financial accounting concept of what the importance and impact of some action has on the decision-making processes of the client. In this context it would be affected by whether it is detrimental to the client. In a substantive way. Some discussion around being aware of possible determinant to the client would be useful.

2. *Assess*: Examples of what constitutes high risk conflict would be beneficial for licensees in prioritising mitigation efforts. However, consideration of the applicability across industries is necessary – for instance some examples may apply in the banking context but not as it relates to smaller firms e.g. carbon markets. ASIC should provide sector-specific guidance or acknowledge that examples may not be universally applicable.
3. *Respond*: No additional comments.
4. *Implement*: Further clarity is needed on what implementation may look like:
    - "*Your arrangements are approved and endorsed by your senior management and, if appropriate, your board*" – It is unclear if the inclusion of 'and if appropriate, your board' requires the board to approve the related frameworks, policies and procedures. Additional colour on ASIC's intentions of including this wording would be appreciated given many AFMA members are foreign ADI's with SOOA's which are not required to approve all arrangements in place. Further, APRA is currently undergoing a governance review which includes reviewing the expectations of arrangements which need to be approved by the board – consistency in regulator approach would be beneficial.
    - "*Merely having or possessing conflicts management arrangements is insufficient*" – This statement would benefit from illustrative examples.

The examples may need to address some specific issues of concern and uncertainty including:
- Definitional issues such as the meaning of "materiality".
- Sector specific issues e.g. those relating to carbon markets.
- Overlap with other regulatory requirements, where applicable, such as APRA requirements.
- Equivalent conflict arrangements of foreign subsidiaries operating in Australia.

The above feedback is provided noting any examples should be used to enable firms to perform its own risk assessments proportional to their type of business, rather than impose unduly onerous and enhanced requirements.

Part E Effective Management

The mechanisms outlining effective management are overly prescriptive which limits a business's ability to manage its conflicts according to its risks and needs. Below we have outlined key issues surrounding the guidance for avoiding, controlling and disclosing.

Avoiding

The statutory basis to address conflicts in section 912A(1)(aa), is a general obligation that requires a financial services licensee to have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative. This section requires licensees to "manage" conflicts, not necessarily eliminate or avoid all conflicts.

The terminology "avoiding" conflict as an approach is far reaching and extends beyond legislation which requires licensees to manage conflicts. There are many occasions when offering a financial service where a conflict may arise which can be "adequately managed" but not avoided.

For instance, RG 181.63 suggests that businesses will have to decline or limit its services with clients, even where that client can properly understand the commercial relationship and accept the terms of that relationship e.g. wholesale clients – this is problematic and out of step with the structural realities and legitimate commercial practices in markets, particularly regarding preferential treatment in commercial contexts. Additionally, the use of the term “favour” is unclear as, for example, in OTC bilateral transactions, one counterparty could provide a better credit risk hedge than another counterparty, this may be perceived as “favouring” that client.

The above examples, coupled with RG 181.71 guidance on disclosure and the lack of distinction between wholesale and retail clients, implies business are required to avoid activities which fall into the RG 181.63 description. The inclusion of this terminology, among others, risks:

- Undermining fundamental market practices;
- Discourages cornerstone investor arrangements essential for project financing;
- Prevents risk-based pricing reflecting genuine commercial considerations; and
- Unduly regulate standard commercial relationships.

The overly prescriptive rules which dictate where conflicts should be avoided for market making could eliminate these essential functions, harming rather than protecting clients; and is inconsistent with legislation that arguably is not intended to eliminate essential business functions or compel the restructure of essential market operations through conflicts regulation. Moreover, this approach contradicts ASIC’s recent efforts in increasing the competitiveness of Australian markets through its simplification and public/private market work.

Controlling

The examples provided in Table 3 are helpful, however could benefit from further clarification:

- *Communication policies*: The reference to “communication policies” as a control mechanism may cause confusion. The guidance should distinguish between policies and operational controls.
- *Rotation of staff*: While staff rotation may be appropriate in some contexts, it may conflict with other obligations such as ensuring staff are adequately trained and competent. The guidance should provide direction on how to balance these obligations.

Disclosures

The guidance surrounding disclosure is highly prescriptive with minimal consideration for the different types of clients, as mentioned previously. RG 181.71 states that disclosures are unlikely to be sufficient to effectively manage conflicts which is too broad a statement. A more accurate statement to reflect the fact that conflict management can be proportionate to the risk posed would be “in some cases, mere disclosure is unlikely to be sufficient to effectively manage conflicts”.

Furthermore, Table 4 indicates generic or ‘boilerplate’ disclosures are unlikely to effectively manage a conflict and states what effective disclosure may look like, implying standard form disclosures are not clear, targeted or useful. This view is not practical or accurate as standard form disclosures can be prepared for a subset of client classes and for similar product offerings. This terminology should be amended to provide flexibility for firms to use standard form disclosures where appropriate and suitable.

Standard form disclosures may be appropriate where conflicts arise from standard business arrangements affecting multiple similar clients. The use of "boilerplate" disclosures may also be legitimate efficiency measures which facilitates the efficient delivery of financial services. Arguably, the test should be whether the disclosure adequately conveys the nature and potential impact of the conflict, rather than whether it is customised for each individual client relationship.

APPENDIX 1.

The examples in ASIC's Table 1 may also raise additional questions and create further uncertainty regarding the scope of s912A(1)(aa). Many examples describe conduct that may be prohibited under other specific provisions of the Corporations Act, raising the question of whether the scope of the conflicts management obligation encompassed and overlap other existing prohibitions rather than covering distinct regulatory gaps. For example, the inclusion of already-prohibited conduct (such as front running, insider trading, confidentiality and related party transactions) in the guidance risks creating regulatory confusion and unnecessary compliance duplication. These examples could arguably be removed as they may already be prohibited under specific statutory provisions (such as ss1043A and 1043H of the Corporations Act) and therefore may not be as helpful in identifying legitimate conflicts requiring management.

<table>
<tr><td colspan="2">Part 1 – Unclear Examples
The below examples are unclear and require further clarification on the use of certain terms or the context of the conflict. The lack of clarity particularly affects:
▪ Cross-selling activities between related entities,
▪ Information sharing within corporate groups for legitimate business purposes, and
▪ Standard commercial relationship management practices.</td></tr>
<tr><td>“A conglomerate firm using information obtained from one client to benefit another client.”</td><td>This may be interpreted very broadly. As currently drafted, this could include, for example, passing investor feedback to a corporate client in the context of their equity issuance. It might also suggest that the industry experience gained from undertaking activities in a relevant sector may not be considered in the context of the business activities of an entity.

Recommendation: Revise the example to clearly state <u>confidential information</u> obtained from one client should not be shared with another (without the client’s consent).</td></tr>
<tr><td>“Conglomerate firm underwriting a public offer of an entity, while a different business unit is lending (as principal) to the entity.”</td><td>The use of the term conglomerate in this context is not clear – does it refer to a diversified financial group or a banking institution?

Recommendation: This term should be defined more precisely (e.g. financial institution, financial intermediary, investment bank).</td></tr>
<tr><td>“A corporate advisory advising and dealing in a ‘take-private’ equity deal, providing certain classes of persons (e.g. directors and management) with confidential information and preferential treatment over other shareholders or potential bidders.”</td><td>It is unclear what is meant by ‘dealing’ in a take private and where the conflict arises in this example – is the conflict owned by the corporate advisor or the potential bidder from within the entity which is being taken private?

Recommendation: Implement high level examples in relevant categories where the conflict in the</td></tr>
</table>

	relationship is more easily ascertained e.g. Bank vs client.
"Different business units in the same multi-disciplinary firm providing audit and financial services to the same client, compromising an auditor's objectivity and independence – for example, a firm's sell-side business publishing research in a client newsletter that is being compromised by information from the market-market side of the business."	This example appears to conflate multiple different issues. It is not clear why an example dealing with audit has been combined with the example of sell-side research in a client newsletter. **Recommendation:** Implement high level examples in relevant categories where the conflict in the relationship is more easily ascertained and focuses on one issue e.g. Bank vs client.
"A financial institution hedging risks or obtaining a beneficial price in proprietary trading by using confidential information accessed at a client's issuance, to the client's detriment."	It is unclear why this is one of only a few examples to explicitly reference that the activity is to the client's detriment. This wording implies the conflict is contingent on the outcome being to the client's detriment. **Recommendation:** Implement high level examples in relevant categories where the conflict in the relationship is the focus – not the outcome.
"An adviser encouraging clients to invest in inappropriate financial products from a related entity, then hedging against a client's interests and directly seeking to generate revenue from expected client losses."	As mentioned above, under <u>Inconsistent Application</u>, this is an example where the outcome or action undertaken used to identify the conflict. **Recommendation**: Implement high level examples in relevant categories where the conflict in the relationship is the focus – not the outcome. For example, in this instance, this should state 'An adviser encouraging clients to invest in inappropriate financial products from a related entity'.
"A corporate advisory client's confidential information (from the sell-side of the business) being passed on to benefit clients in the buy-side of the business."	This example should specify the confidential information was shared without consent. **Recommendation**: Examples which relate to the use or sharing of confidential information should clearly outline there was no consent.

Part 2 – Legitimate Practice Examples

The below examples highlight legitimate practices by firms which do not necessarily give rise to a conflict.

Characterising legitimate commercial practices as inherent conflicts could impede/prevent essential market functions:

- Market making provides essential liquidity and price discovery,
- Volume-based pricing reflects legitimate cost efficiencies, and

▪ Relationship-based pricing accounts for credit risk and operational costs.	
"A market maker (acting as both a buyer and seller in a market) providing preferential treatment to certain clients, such as offering better pricing or execution priority."	There are many reasons why a firm might legitimately offer better pricing to one client. For example, a foundational client for a new business, or a client that directs significant volumes of business to the market maker thereby justifying a volume-related price. Another instance where this may apply is in OTC markets where prices for financial products are agreed bilaterally. In bilateral transactions, differentiated pricing is common and acceptable if it is fair, reasonable, and properly disclosed. In some cases, there might be allocations in capital raisings, where investors are prioritised according to the criteria provided by the client, if they are an existing holder or the feedback received/interest expressed. **Recommendation:** Remove this example from Table 1.
Part 3 – Misconduct Examples The below examples outline prohibited and illegal conduct which go beyond identifying conflicts of interest. Many of the examples have respective rules in place to govern this misconduct (e.g. front-running, insider trading, confidentiality breach). Including them in illustrative examples provides minimal benefit and increases regulatory duplication. Concerns include: ▪ Potential double-jeopardy/contravention scenarios where single conduct breaches multiple provisions ▪ Uncertainty about which regulatory framework applies to enforcement ▪ Inefficient allocation of regulatory resources ▪ Compliance confusion where conduct is clearly prohibited under existing law. **Recommendation:** Remove from Illustrative examples or provide more targeted examples highlighting relationships where conflicts may arise.	
"A trader accessing confidential information about a client to pass on to the trader's spouse who works for the client."	
"A financial institution hedging risks or obtaining a beneficial price in proprietary trading by using confidential information accessed at a client's issuance, to the client's detriment."	
"A market maker prioritising its interests over clients by using confidential information from client orders to benefit its proprietary trading—that is, by frontrunning a client order to take advantage of the anticipated price impact of the order."	
'A fund lending to a related company on better terms than if the fund were lending to an unrelated company or investor in similar circumstances, not in the interests of investors."	

“A research analyst’s report provided to clients being influenced and compromised by the analyst’s personal interests.”
“A director or executive of a fund using confidential information about fund transaction activity—such as price-sensitive information, confidential valuations of unlisted assets, or when investment strategies are switched—for personal gain.”

Emerging and Specialised Sectors

The examples in the guidance predominantly reflect traditional financial services without adequate consideration of emerging and specialised sectors such as carbon markets, digital assets, and sustainability-linked products.

For example, conflicts in carbon markets require specific guidance that reflects the sector's regulatory framework under the Carbon Credits (Carbon Farming Initiative) Act 2011 and interaction with the Clean Energy Regulator.

Similarly innovative (such technology) and emerging market sectors may not fit or align with traditional categories and require innovative management approaches consistent with a principles-based statutory framework rather than statutory prescription.