5 September 2025

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

Dear Ms Hadisutanto

Submission: Update to Regulatory Guide 181 (RG 181): Managing Conflicts of Interest

The Australian Investment Council (the Council) welcomes the opportunity to comment on Consultation Paper 385 regarding the proposed update to Regulatory Guide 181 (RG 181): Managing Conflicts of Interest.

The Council is the peak body for private capital investment in Australia, representing over 220 members, including leading domestic and international private capital firms. Private capital spans private equity, venture capital, private credit, family offices, superannuation funds, and sovereign wealth funds. These investors collectively back more than 1,100 businesses across the Australian economy – predominantly SMEs – and support over 600,000 full-time jobs and contribute approximately three per cent to national GDP.

High quality and risk-proportionate conflict of interest management promotes investor confidence in private equity, venture capital and private credit, by directly affecting the cost, feasibility and timing of origination, acquisitions, exits, and value creation strategies.

We support ASIC's objective of ensuring that RG181 remains fit-for-purpose, up to date with regulatory developments, aligned with legislation and effective in promoting both consumer protection and market integrity. We provide feedback on ASIC's draft RG181 guidance, consultation questions (B1–B7), as well as broader recommendations on regulatory simplification.

Key feedback on draft RG181 guidance

While there are helpful aspects of the draft guidance, its breadth, including indicating that all conflicts that arise in relation to a financial services business need to be considered, characterises the legal obligations of licensees more broadly than the requirements of section 912A(1)(aa) of the Corporations Act *2001* (Cth) (the Act) (which are limited to conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or its representative in the provision of financial services as part of the financial services business of the licensee or its representative). As a result, it will be difficult for licensees to determine what is required and how to comply. The breadth of the draft guidance could contribute to a lack of focus on material conflicts that lead to investor harm.

We recommend:

- Clear articulation of the key conflicts that ASIC believes are detrimental to investors.
- Additional focus on proportionality and materiality throughout the guidance to ensure regulator and licensee effort is directed towards key issues.
- More explicit recognition of effective conflict management, including disclosure and processes that enable a required percentage of investors (or of a representative committee) to vote on the conflict.
- Clarification in the guidance regarding the extent to which licensees are free to consider and act in their own interests when negotiating arrangements with prospective clients.

- The roadmap includes *Design and Distribution Obligations,* the *Financial Accountability Regime* and *Payment Systems Regulation Act*.
- A further round of industry consultation on compliance costs and transition planning occurs prior to the finalisation of RG181 in late 2025.

Our recommendations will make licensee implementation and adherence easier thereby promoting market integrity. Clearer guidance and a focus on material conflicts will also assist with ASIC's surveillance and enforcement activity. Appendix 1 contains detailed feedback on the consultation questions.

Regulatory simplification

The direct cost of monitoring, implementing and complying with layers of regulation that are not aligned to market risk, while disproportionately burdensome on smaller members, impacts all our members. In addition, uncertainty about further regulatory change comes with a significant opportunity cost as members are unable to redirect scarce resources to growth.

ASIC has identified conflicts of interest as a key focus area and has noted the updates to RG181 forms part of its on-going program in private markets, which is expected to continue into later this year and next year. It is not clear that once RG181 is updated, ASIC will be comfortable that its program in relation to conflict obligations is complete or whether further changes are intended.

We strongly recommend ASIC commits to a period of regulatory stability in relation to conflict-of-interest obligations once RG181 is updated. This would provide confidence and certainty to our members. We also recommend ASIC clarifies the process for finalisation of RG181 including whether there will be further material shifts in obligations or guidance following market surveillance activity.

ASIC Simplification Consultative Group

ASIC has also identified that navigating regulatory complexity is a significant challenge. The Council notes ASIC's 3 September 2025 report on regulatory simplification, which complements the Government's commitment to seek specific measurable actions to reduce compliance costs without compromising standards.

We recommend the *ASIC Simplification Consultative Group (the Group)* consider:

- broadening representation to include market participants;
- clarifying how the work of the Group will inform the regulatory simplification program that the Treasurer flagged will be undertaken through the Council of Financial Regulators; and
- promoting engagement and transparency by publishing meeting agendas, minutes and the forward program (or roadmap).

Conclusion

The Council acknowledges that high quality and risk-proportionate conflict of interest management promotes investor confidence in private equity, venture capital and private credit. We welcome the opportunity to work with ASIC as it moves towards finalising RG181 and public-private markets review.

Kind regards

AUSTRALIAN INVESTMENT COUNCIL

[redacted]

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Appendix 1 - Detailed responses to consultation questions

B1. Scope of Conflicts Management Obligation

We propose to include guidance clarifying that the conflicts management obligation is broad and is intended to apply to all conflicts of interest other than those wholly outside the financial services business of a licensee or its representatives.

B1Q1: Is our guidance clear?

B1Q2: Do you suggest changes to our guidance? If so, please provide details.

Response

- While the conflicts management obligation may be broad, the obligation as expressed in section 912A(1)(aa) of the Act has limits. In our view that obligation as expressed in that section is:
    - limited to conflicts that may arise in relation to the financial services that the licensee actually provides to clients (for example, the nature of the conflicts that arise for a custodian that acts only on an instructed basis are likely to be narrower than those arising in relation to providers of other financial services and a conflict that relates to certain classes of investments may not arise in respect of a specific client of an investment advisor where the client has agreed with the investment advisor that the client will receive recommendations from the investment advisor in respect of a different class of investments only); and
    - not concerned with the negotiation of and exercise of express rights under agreements between the financial service provider and the client under which the financial service provider provides financial services to the client, as any conflict that may arise in that context is not in relation to the activities undertaken by the licensee in the provision of financial services.
- We are concerned that, by indicating that all conflicts that arise in relation to a financial services business need to be considered, the guidance characterises the legal obligations of licensees more broadly than the requirements of the Act (which provides that the relevant conflicts are those that may arise in relation to the activities undertaken in the provision of financial services as part of the financial services business of the licensee). This broader application of the obligation to have adequate arrangements for the management of conflicts of interest suggests that licensees must have regard to conflicts outside the activities agreed to be undertaken for clients, which in turn gives clients the benefit of protections beyond the commercial arrangements agreed.
- It would be desirable and appropriate for the guidance to provide greater clarity regarding the extent to which licensees are free to consider and act in their own interests:
    - in negotiating their arrangements with prospective clients (including the quantum of fees charged to clients for the provision of financial services) (at least as far as this conflict-of-interest obligation is concerned); and

    - to the extent the conflicts may arise outside the activities undertaken in the provision of financial services being provided to the client (that is, outside the financial services business of the licensee, noting that aspects of that business may not directly relate to the financial services provided to one or more or all clients).
- In addition, we recommend that RG181.29 should also include a reference to the 'perception' of a real and sensible possibility that the conflict could sway a licensee's judgement or actions. Although RG181.31 notes that conflicts may be "actual (real), perceived (apparent), or potential", in our view it would also assist to briefly expand on what that means. For example, we suggest adding the following sentence to RG181.31: "Actual conflicts are conflicts of interest that are occurring in the business. Perceived conflicts are circumstances that may appear to others (such as members or clients) to create a conflict of interest. Potential conflicts of interest are circumstances that could result in a conflict of interest." We consider that this will assist licensees to understand the different types of conflicts and in turn, understand how to manage different actual (real), perceived (apparent), or potential conflicts of interest.
- Further, we consider that the materiality of a conflict of interest under RG181.33 should also include a reference to whether the financial service provider has other relevant obligations, such as a fiduciary duty or a best interests duty under the Act. Similarly, the outcome of a conflict of interest noted in RG181.33(c) should specify that conflicts can result in negative outcomes for members / clients.

Other changes we recommend include:

- Adding a visual representation of who the guidance applies to like Figure 1 in RG132.
- In respect of RG 181.11, we recommend it include a cross reference to Table 1 which contains additional examples of conflicts.
- In respect of draft RG 181.12, we recommend guidance include examples of conflicts that would be outside the scope of the obligations.

B2. Interaction with Other Legal Obligations

We propose to include guidance clarifying how the conflicts management obligation operates in connection with other legal obligations of an AFS licensee (including other AFS licensing obligations). This guidance is supported by a non-exhaustive list of legal obligations and information (a 'roadmap') that may relate to the conflicts management obligation.

B2Q1: Is our guidance clear in draft RG 181?

B2Q2: Do you suggest changes to our guidance in draft RG 181? If so, please provide details.

Response

We recommend a series of changes to the roadmap including:

- Adding a visual representation of market participants and the application of the roadmap.
- Consider including *the Design and Distribution Obligations (DDO)*, *Financial Accountability Regime* and *Payments Systems Regulation Act* in the roadmap.
- Highlight overlaps with APRA's prudential requirements where applicable, particularly in relation to superannuation and banking groups.

We consider that this section could be further improved by outlining how the obligations interact with each other. For example:

- whether the other obligation(s) are in parallel to the conflicts management obligation such that compliance with the other obligation(s) will not necessarily result in compliance with the conflicts management obligation and vice versa;
- whether the other obligation(s) are broader than the conflicts management obligation such that if the licensee complies with the other obligation(s) it will also then be in compliance with the conflicts management obligation; or
- whether the other obligation(s) are a sub-set of the conflicts management obligation such that the licensee's compliance with the conflicts management obligation will result in compliance with the other obligation(s).

In this regard, proposed paragraphs RG181.20 – RG181.22 should highlight that those with fiduciary duties may require more stringent conflicts management arrangements (see ASIC v Avestra [194](a)).

Similarly, it would also be relevant to flag that some sections of the Act may mandate how conflicts must be managed, such as:

- section 601F(1)(c) of the Act regarding the requirement to give priority to members where there is a conflict of interest between the responsible entity and the members; and
- Part 7.7A Division 4 Subdivision C of the Act regarding the ban on conflicted remuneration.

We understand that the guidance is not intended to be a repository of all obligations, however, these two prominent examples may assist licensees to understand how the conflicts management obligation interacts with their other obligations.

B3. Types of Conflicts of Interest

We propose to update our guidance on types of conflicts of interest that an AFS licensee should consider.

B3Q1: Is our guidance clear?

B3Q2: Do you suggest changes to our guidance? If so, please provide details.

Response

Please refer to our response to B1.

B4. Illustrative Examples of Conflicts

We propose to include illustrative examples of the types of conflicts of interest that an AFS licensee may need to consider.

B4Q1: Is our guidance clear?

B4Q2: Do you suggest changes to our guidance? If so, please provide details.

Response

- We agree that the use of examples can assist licensees to understand their obligations, however, some of the examples provided have the potential to create further confusion.
- In particular, some examples reference the actions of "a fund", however, the majority of funds in Australia are structured as unit trusts (although we acknowledge that in some circumstances an investment fund may be structured as a limited partnership or CCIV). Accordingly, in

circumstances where the fund is a unit trust, the "fund" does not have legal personality and actions on behalf of the fund may be undertaken by the trustee, the responsible entity or the investment manager, depending on the exact nature of the fund. By listing the "fund" as the entity which is acting, there can be confusion as to whether the conflict of interest is occurring with respect to the trustee / responsible entity or the investment manager (as applicable).

- Similarly, we are concerned that some of the illustrative examples as included are not as helpful as intended as they do not have sufficient regard to the specific circumstances in which the example may arise. In many cases, whether there is an actual or potential conflict of interest depends on the terms of the agreements and the legal nature of the arrangements between the parties. For example, a fund manager may have a clear express right to charge fees that some may regard as excessive to members of the fund, to treat the members of the fund differently or to receive default or origination fees (which are posed as conflicts of interest in the proposed draft regulatory guide).
- Additional detail should be added that clarify the specific circumstances giving rise to the conflict. For example, 'where a fund manager is obliged to treat members equally, the fund treats the members of the fund differently'. Or, 'where the fund manager receives default or origination fees (in place of the fund) in the absence of an express contractual right and disclosure of that intention at the time of the entry into the arrangements with the clients.
- It is not clear to us the extent to which the licensee is able to manage conflicts between third-parties. We query why those examples are included and do not consider that those examples are consistent with the licensee's obligation to manage its conflicts of interest in the provision of financial services.

B5. Adequate Arrangements

We propose to include additional guidance on what 'adequate arrangements' involve. That is, adequate arrangements:
(a) should identify, assess and respond to (i.e. effectively manage) conflicts of interest; and
(b) require an AFS licensee to implement, monitor, maintain, and review these arrangements.
B5Q1: Is our guidance clear?
B5Q2: Do you suggest changes to our guidance? If so, please provide details.

Response

- The guide provides that a failure to effectively manage a conflict may result in a breach of the conflicts management obligation. Technically, the law requires the licensee to have adequate arrangements in place (as opposed to effectively managing the conflict). We consider that the regulatory guide should be explicitly consistent with the law.
- Preferably, the guidance would be clear that, consistent with the case law on section 912A(1)(aa) of the Act, the arrangements do not need to be 100 per cent effective to be adequate (acknowledging that conflicts management arrangements involve some level of subjectivity with respect to decision making and accordingly, 'perfection' may not be achievable)
- Similarly, the case law indicates that conflicts management arrangements need not be fully documented. In our view, this clarification should be reflected in the guide.

B6. Proportionate and Risk-Based Approach

We propose to include guidance on a proportionate and risk-based approach to having and applying adequate arrangements.

B6Q1: Is our guidance clear?
B6Q2: Do you suggest changes to our guidance? If so, please provide details.

Response

- We welcome the references to a proportionate and risk-based approach and would like this to be made more explicit throughout the guidance.
- In this regard, we suggest that the description of a risk-based approach outlines that licensees should consider both the likelihood of a conflict occurring and the severity of the outcome if that conflict did occur in order to achieve a risk rating. The licensee should then consider how any conflict management activities may change the risk profile of such conflict.

B7. Holistic and Nuanced Approach
We propose to update our guidance to outline a more holistic and nuanced approach that AFS licensees can adopt to effectively manage their conflicts, consistent with existing legal principles and policy.

Response

- It would be useful to clarify when disclosure of conflicts is relevant, which presumably is when there is a decision point by the client. For example, the decision to engage the licensee or invest in a fund.
- It would also be useful if the guide commented on the extent to which, and the circumstances in which, the disclosure of conflicts in marketing and similar materials may be effective. There are circumstances in which such disclosure, when combined with facilitative contractual terms, may be adequate, particularly in wholesale arrangements where clients are more likely to have legal representation and opportunities to negotiate the legal terms.
- It would also be useful if the guide commented on the extent to which a conflict approved by a required percentage of members of a fund or by a representative committee of members of a fund is adequate.
- In place of '*mere disclosure is unlikely to be sufficient effectively manage conflicts*' we query whether it would be better to say *'whether disclosure is sufficient to effectively manage a conflict will depend on the circumstances, including on the seriousness of the conflict, the financial services being provided and the sophistication of the client. In many cases disclosure alone may be insufficient to effectively manage the conflict.*' Whether disclosure is sufficient depends on the circumstances and the parties.
- With respect to paragraphs RG181.83 – RG181.85 (Fair treatment of clients and members) we consider that further detail is needed to specify under what circumstance a fee between the financial service provider and client would create a conflict. We lean towards the view that it is up to the market to decide whether the financial service (including its fees) provide sufficient value to the client. If the fees do not provide sufficient value, there should be enough competition in the market to enable a different service provider to make a more appealing offer. Similarly, it is also up to clients to review disclosure and make an educated consideration (or otherwise obtain financial advice) on whether they believe that the fees payable for the financial service are consummate for the benefits received. The duty to adequately manage conflicts of interest should not expand to include whether a fee between the financial service provider and the client may be excessive. We recommend that excessive fees are managed in accordance with the obligation to provide financial services efficiently, honestly and fairly. In this regard, it

could be useful for the guidance to reference fees for a proper purpose or ensuring fees are linked to a service provided.

- The guide provides that '*Where required, you must prioritise the interests of your client or member.*' For clarity, preferably this would be amended to read '*Where required by your legal obligations*.'