



# Summary of feedback to CP 385 and ASIC's response

In Consultation Paper 385 *Proposed update to RG 181 Licensing: Managing conflicts of interest* ([CP 385](#)), we sought feedback on an updated draft Regulatory Guide 181 *Licensing: Managing conflicts of interest* (draft RG 181).

We received 26 submissions. We have summarised key feedback on draft RG 181 and our responses, including how we have addressed the feedback in the final Regulatory Guide 181 *AFS licensing: Managing conflicts of interest* ([RG 181](#)) where relevant. This document is not intended to be a comprehensive summary of all feedback or all changes to the guidance.

Note: Non-confidential submissions are published on the landing page for [CP 385](#).

## Section B: Your conflicts management obligation

Feedback	ASIC's response	Reference in RG 181
One respondent suggested that the guidance should clearly state that conflicts of interest cannot always be avoided but must be managed appropriately and transparently.	We have amended our guidance to clarify that the conflicts management obligation does not require Australian financial services (AFS) licensees to eliminate all conflicts of interest, but to adequately and effectively <i>manage</i> conflicts.	RG 181.7
Two respondents suggested that we clarify our guidance that the conflicts management obligation is 'intended to address information asymmetry', noting that information asymmetry is just one scenario that can give rise to a conflict of interest. The respondents considered that, while it is a relevant consideration, it should not be a central focus of evaluating an actual or potential conflict of interest.	We have amended our guidance on the purpose of the conflicts management obligation to reduce the emphasis on addressing information asymmetry. Although information asymmetry is an important situation to address through adequate and effective conflicts management, we have updated the guidance to more closely reflect: <ul style="list-style-type: none"><li>the purpose of the obligation, as set out in the Explanatory Memorandum to the <i>Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003</i> (<a href="#">Explanatory Memorandum</a>); and</li><li>the objectives of the financial services regime (including for the general licensing obligations)—see s760A of the <i>Corporations Act 2001</i> (Corporations Act).</li></ul>	RG 181.9

Feedback	ASIC's response	Reference in RG 181
<p>The scope of the conflicts management obligation applies to <i>all</i> conflicts of interest other than those wholly outside the financial services business of an AFS licensee and their representative. Several respondents asked ASIC to provide additional guidance and examples to clarify the meaning of 'wholly outside' the financial services business.</p>	<p>We have updated the guidance to clarify what conflicts of interest the conflicts management obligation applies to, including by providing further detail around when a conflict might arise between a financial services business and something outside it.</p> <p>We have not amended our guidance to include an example of conflicts of interest that might occur wholly outside the financial services business. This is because whether a conflict is wholly outside the financial services business may differ between businesses and will depend on the facts and circumstances of an AFS licensee's situation.</p>	<p>RG 181.11– RG 181.13</p>
<p>In relation to guidance on how the conflicts management obligation interacts with the fiduciary duties of AFS licensees, one respondent suggested highlighting that AFS licensees with fiduciary duties may require more stringent conflicts management arrangements.</p> <p>Another respondent suggested that the guidance should reflect the fundamental general law position that there may be no conflict between a fiduciary and client or beneficiary if what would otherwise be a conflict is authorised by the terms governing the relationship—for example, a trust deed authorising a trustee to act in its own interests.</p>	<p>We have considered the case law around fiduciary duties and have amended the guidance to reflect that whether an AFS licensee is in a fiduciary position will also inform the adequacy of their conflict management arrangements: see <i>Australian Securities and Investments Commission v Avestra Asset Management Limited (In Liquidation)</i> (2017) 348 ALR 525 (<i>ASIC v Avestra</i>) at paragraph 562.</p> <p>We have also updated the guidance to incorporate the general law position relating to the terms governing fiduciary relationships.</p>	<p>RG 181.20– RG 181.22</p>
<p>In relation to guidance on how the conflicts management obligation interacts with other related obligations, one respondent suggested that RG 181 should clarify whether the other obligations are in parallel to, broader than, or a subset of, the conflicts management obligation. They noted that this may help to clarify whether compliance with other obligations would or would not result in compliance with the conflicts management obligation.</p>	<p>We have not included guidance on whether other related legal obligations are in parallel to, broader than, or a subset of, the conflicts management obligation. Compliance with one legal obligation may not automatically satisfy another legal obligation, such as the conflicts management obligation. However, we have clarified that some related legal obligations may determine the way that AFS licensees manage certain conflicts.</p>	<p>RG 181.17</p>

## Section C: Identifying conflicts of interest

Feedback	ASIC's response	Reference in RG 181
<p>Some respondents supported the updated guidance clarifying that the conflicts management obligation applies to <i>all</i> conflicts (actual, perceived and potential), noting that this reflects the current law. However, some respondents requested additional guidance on the meaning of actual, perceived and potential conflicts (including examples).</p> <p>One respondent disagreed with the application of the conflicts management obligation to perceived and/or apparent conflicts. They suggested that we remove perceived conflicts from our guidance on the basis that its inclusion is not supported by the terms of s912A(1)(aa), the explanatory material and the general law. They also suggested that it could create confusion and uncertainty.</p>	<p>We have updated our guidance to remove references to apparent or perceived conflicts of interest as a separate type of conflict for the purposes of the conflicts management obligation. This change better aligns with an objective standard for identifying conflicts of interest, as whether there is a perception of a conflict should be determined by reference to whether a reasonable person might consider an actual or potential conflict to exist.</p> <p>To assist AFS licensees (and their representatives), we have also clarified that when determining whether there is a conflict of interest, they should use a common-sense, objective and fact-based approach. We have also provided guidance on the meaning of actual and potential conflicts.</p>	<p>RG 181.29– RG 181.32</p>
<p>A few respondents requested further guidance to help licensees assess the 'materiality' of a conflict. They also requested guidance on determining the extent to which the conflict is material and how that affects whether it should be addressed as a priority or avoided entirely (rather than managed).</p>	<p>Whether a conflict of interest is material or serious will depend on the facts and circumstances of an AFS licensee's situation. We have amended our guidance to expand and clarify the factors relevant to assessing the materiality or seriousness of a conflict of interest. For example, we have included reference to negative consequences for consumers, and the relevance of other legal duties, obligations and prohibitions that apply to a conflict.</p>	<p>RG 181.34</p>

Feedback	ASIC's response	Reference in RG 181
<p>Many respondents found the illustrative examples of different types of conflicts in Table 1 useful. However, some respondents highlighted conceptual challenges with the illustrative examples in Table 1, noting that they focused on:</p> <ul style="list-style-type: none"> <li>the harm or misconduct resulting from a conflict, without clearly articulating the underlying conflict of interest; and</li> <li>poor conflict management practices, rather than the underlying conflict.</li> </ul>	<p>We have clarified Table 1 to address the conceptual challenges raised by respondents. For example, we have sought to draw a clearer distinction between what gives rise to an actual or potential conflict (such as the interests arising from individuals and their relationships) and the resulting harm, detriment or misconduct occurring when that interest sways judgement or actions in an adverse way.</p>	<p>Table 1</p>
<p>Some respondents requested that we provide additional examples in Table 1. They include examples in relation to the type of conflicts that might arise in insurance, vertically integrated businesses, and new business models (such as digital asset platforms).</p>	<p>We have updated Table 1 to include further examples, including in relation to insurance and vertical integration.</p>	<p>Table 1</p>
<p>One respondent asked that we clarify why RG 181 includes guidance about 'conflicts of duties', when the obligation in s912A(1)(aa) focuses on an AFS licensee's conflicts of interests.</p>	<p>We have not included additional guidance on why conflict of duties is a factor to consider when identifying conflicts. Our guidance already outlines that a conflict of duties will generally give rise to a conflict of interest—for example, where fiduciary, director or professional duties conflict with each other or with personal or organisational interests.</p> <p>However, we have amended our guidance to include an additional example illustrating the situation of a conflict between a firm's fiduciary duties to clients in one part of the business and its business interests in another.</p>	<p>RG 181.41– RG 181.42</p>

## Section D: Having adequate arrangements

Feedback	ASIC's response	Reference in RG 181
<p>Many respondents supported the guidance in RG 181 that AFS licensees should take a proportionate and risk-based approach to complying with their conflicts management obligation.</p> <p>However, some respondents suggested that the guide could be improved—for example, by including additional guidance to:</p> <ul style="list-style-type: none"> <li>• set clearer expectations about how the adequacy of arrangements should be assessed by AFS licensees; and</li> <li>• outline how the 'nature, scale and complexity' of a financial services business will affect what are adequate arrangements.</li> </ul>	<p>We have amended the guidance to clarify how AFS licensees should assess the adequacy of their arrangements to manage conflicts of interest. This includes that AFS licensees should take a proportionate and risk-based approach, tailored to their facts and circumstances.</p> <p>We have clarified how the 'nature, scale and complexity' of a financial services business may affect the adequacy of arrangements. For example, we have:</p> <ul style="list-style-type: none"> <li>• included a further example of when conflicts management arrangements may differ, based on the nature and complexity of their business (where a firm is part of a multi-national group); and</li> <li>• clarified that the level of sophistication of an AFS licensee's clients (e.g. whether they meet the criteria of the wholesale investor or wholesale client tests) may also influence the nature and scale of their arrangements.</li> </ul>	<p>RG 181.48– RG 181.50, RG 181.52– RG 181.53, RG 181.58– RG 181.59</p>
<p>One respondent suggested that we should ensure that our guidance on the 'adequacy' of arrangements is not overly prescriptive, given that what amounts to adequate arrangements for managing conflicts will depend on the nature, scale and complexity of the AFS licensee's business.</p>	<p>RG 181 is intended to be principles-based guidance. We have updated the guidance to clarify that adequacy is a question of fact in each case and that arrangements should be robust, effective, and tailored to an AFS licensee's circumstances.</p>	<p>RG 181.48– RG 181.49, Table 2</p>

Feedback	ASIC's response	Reference in RG 181
<p>One respondent requested further guidance on how AFS licensees can appropriately manage conflicts when providing multiple services.</p> <p>The respondent provided the example of an AFS licensee that provides advice, portfolio management and managed discretionary account operation services. They suggested that the guidance could include an example demonstrating how, for each service provided, the licensee could manage conflicts through a combination of identification, controls, disclosure and ongoing management or other mechanisms.</p>	<p>We have amended our guidance to recognise that nature, scale and complexity of a financial services business, including the type and number of financial services that an AFS licensee offers, may influence what arrangements are considered adequate to manage conflicts of interest.</p> <p>We have not included examples on how specific conflicts of interest should be managed. How a conflict is managed, including whether arrangements are adequate or effective, will depend on the facts and circumstances for each AFS licensee.</p>	<p>RG 181.58– RG 181.59</p>
<p>One respondent suggested that the guidance should reinforce that proportionality is not static, and that arrangements should be regularly reviewed and adapted as business operations, market conditions, and regulatory developments change.</p> <p>However, another respondent suggested that an arrangement does not need to be 'regularly' reviewed to be considered adequate.</p>	<p>We have amended our guidance to remove the reference to arrangements being 'regularly' reviewed. While changes to business operations, market conditions and regulatory obligations may affect the adequacy of your arrangements, the timing and frequency of reviews will depend on the facts and circumstances of each AFS licensee.</p>	<p>Table 2</p>
<p>There was mixed feedback from some respondents about the guidance in Table 2 that states that 'Merely having or possessing conflicts management arrangements is insufficient'. While one respondent suggested that the statement should be removed entirely from the table, others had suggestions for how the statement could be further clarified.</p>	<p>We have clarified our guidance in Table 2. Our guidance retains the statement that 'Merely having or possessing conflicts management arrangements is insufficient'. However, we have included additional guidance to clarify that to meet their conflicts management obligation, AFS licensees should be able to demonstrate that their arrangements for managing conflicts of interest are integrated into their business operations.</p>	<p>Table 2</p>

Feedback	ASIC's response	Reference in RG 181
One respondent suggested that the guidance should provide practical benchmarks, risk indicators, or decision frameworks to help licensees self-assess the appropriate level of arrangements for their business model, governance and risk profile.	We have not amended our guidance to include prescriptive benchmarks or frameworks. We consider that whether arrangements for managing conflicts of interest are adequate depends on the facts and circumstances of each AFS licensee's situation.	Not applicable
To demonstrate compliance with the conflicts management obligation, some respondents suggested that the records and documentation of an AFS licensee's arrangements should be proportionate to the significance of the conflict. One respondent suggested that we should provide a conflicts register template and outline the minimum information that is expected.	We have not amended our guidance or provided a conflicts register template. RG 181 sets out the types of documents and records that AFS licensees should keep for conflicts management arrangements to be adequate. Whether arrangements are adequate will depend on the facts and circumstances of each AFS licensee.	RG 181.63

## Section E: Effective conflicts management

Feedback	ASIC's response	Reference in RG 181
One respondent suggested that the guidance further explore the difference between avoiding and controlling a conflict of interest.	We have amended our guidance to clarify that 'avoiding' a conflict of interest involves identifying conflicts, or classes of conflict, that <i>could</i> arise and implementing controls to prevent them from occurring. In contrast, 'controlling' a conflict of interest involves implementing measures that mitigate the risk of an existing or identified conflict.	RG 181.68
One respondent suggested the use of the term 'favoured' in the example of a conflict to avoid in RG 181.63(a) (i.e. 'when one client will be favoured over another...') was unclear and could be interpreted inconsistently.	We have amended the example to clarify that a conflict of interest should be avoided when the interests of one client are in direct conflict with the interests of another in the provision of financial services.	RG 181.69

Feedback	ASIC's response	Reference in RG 181
One respondent noted that the guidance states that 'information barriers' can be used as a mechanism to control or avoid a conflict of interest but requested further examples to differentiate between the two.	We have amended our guidance to clarify that information barriers may be used to avoid or control conflicts, depending on the situation. For example, information barriers between different business units can be used to avoid conflicts by preventing the flow of confidential information and ensuring structural separation between areas with differing interests. Information barriers may also be used to prevent or restrict information from being accessed to mitigate the impact of an identified conflict.	RG 181.70 and Table 3
One respondent suggested clarifying the phrase 'overly influenced by' in the context of controlling conflicts on the basis that it was difficult to understand.	We have amended our guidance on controlling conflicts of interest to align it with our guidance on what is a conflict of interest at RG 181.30. In particular, we removed our guidance that licensees should ensure that decision makers are not 'overly influenced by' any conflicts and clarified that licensees should aim to limit situations where there is a real and sensible possibility that a conflict will adversely sway or influence the judgement or actions of decision makers.	RG 181.73
Several respondents requested clarifications to the examples of control mechanisms set out in Table 3. Specifically, they sought: <ul style="list-style-type: none"> <li>• clarification on the distinction between communication policies and controls;</li> <li>• clarification around 'staff rotation' as a control mechanism; and</li> <li>• inclusion of 'independent decision makers or committees' as a control mechanism.</li> </ul>	We have amended our guidance in Table 3 to clarify the types of controls mechanisms, as well as their operation. Specifically, we have: <ul style="list-style-type: none"> <li>• clarified that 'communication controls' includes, but is not limited to, communication policies;</li> <li>• replaced 'rotation of staff' with 'removal of staff' and amended the corresponding summary to clarify that removal of staff from a particular transaction or the provision of certain financial services can be an appropriate control mechanism where a conflict has been identified; and</li> <li>• amended the summary of the 'compliance monitoring' control to include a reference to compliance committees, who are responsible—along with compliance officers—for monitoring compliance with documented conflict policies.</li> </ul>	Table 3
One respondent suggested they would welcome additional guidance, including examples, on: <ul style="list-style-type: none"> <li>• effective disclosure practices, including for timing, format and prominence; and</li> <li>• categories of 'affected parties' to whom conflicts should be disclosed to help conflict management (e.g. risk and compliance teams).</li> </ul>	We have amended our guidance for disclosing conflicts of interest to clarify that the categories of 'affected parties' to whom conflicts may need to be disclosed include customers (e.g. clients, members and investors) and prospective customers.  However, we have not provided additional guidance on effective disclosure practices for timing, format and prominence. These practices are discussed in Table 4 under general disclosure principles.	RG 181.75, Table 4



Feedback	ASIC's response	Reference in RG 181
Two respondents suggested further guidance on when fee arrangements may give rise to a conflict of interest.	We have removed our guidance that AFS licensees should 'avoid remuneration practices that are purely intended to maximise fees or returns at the expense of clients or members'. Such remuneration practices do not necessarily give rise to a conflict of interest. In some situations, the nature of the financial services being provided is such that the licensee will necessarily profit at the expense of the client (e.g. market making). Whether a particular fee arrangement gives rise to a conflict will depend on the facts and circumstances.	Not applicable
Several respondents suggested that we should reconsider the statement that 'mere disclosure is unlikely to be sufficient to effectively manage conflicts'. They noted that whether disclosure is an effective method to manage conflicts will depend on the facts of a situation, including the level of materiality of the conflict. A few respondents gave suggestions for how the statement could be amended.	We have clarified our guidance on the effectiveness of disclosure alone as a mechanism to manage conflicts of interest. We have replaced our guidance that 'mere disclosure is unlikely to be sufficient' with 'in many cases, disclosure alone may be insufficient'. This additional nuance recognises that whether or not disclosure is an effective method to manage conflicts will depend on the facts and circumstances of the AFS licensee.	RG 181.78
Several respondents suggested that the guidance on disclosure content in Table 4 is highly prescriptive and risks creating duplication with existing statutory disclosure requirements—specifically, in relation to Financial Services Guide (FSG) disclosure. The proposed guidance could require system-wide amendments to FSGs, which would increase document length and complexity.	Our guidance in Table 4 on disclosure content is based on our existing conflicts policy and judicial consideration of the conflicts management obligation in <i>ASIC v Avestra</i> .  We have amended Table 4 to clarify that conflicts of interest disclosures should generally include the disclosure content set out in the table. We have made minor amendments to align this content more closely with the relevant case law and have cited <i>ASIC v Avestra</i> in a note. We have also added a note to clarify that the guidance is not intended to operate as a prescriptive list of content requirements for all disclosures of conflicts of interest, including those required in an FSG. Disclosure content should be proportionate and risk based, tailored to the specific circumstances of the conflict.	Table 4
Two respondents suggested amendments to our guidance on commission-based remuneration structures to clarify that there are situations where such arrangements can be acceptable.	We have clarified our guidance on commission-based remuneration structures to reflect that these structures should be avoided where <i>advisers</i> only earn commission.	RG 181.84

Feedback	ASIC's response	Reference in RG 181
Several respondents suggested that the guidance include specific examples or case studies demonstrating how certain conflicts or classes of conflict should be managed, or what would constitute effective management of conflicts in certain circumstances.	We have not provided prescriptive guidance on how certain conflicts of interest should be managed, as what constitutes effective management will depend on the specific facts and circumstances of the AFS licensee.	Not applicable
Some respondents suggested clearly distinguishing between services provided to wholesale clients and retail clients when outlining expectations for the effective management of conflicts of interest.	We have not amended our guidance on effective conflicts management to set out a different standard applicable to services provided to wholesale clients versus retail clients. The conflicts management obligation applies to financial services provided to both wholesale and retail clients. While the sophistication of a client may influence how a conflict is managed, AFS licensees should take a proportionate and risk-based approach to their obligation, tailored to their specific facts and circumstances.	Not applicable

## Appendix: Catalogue—Key legal obligations and information relevant to conflicts management

Note: We updated the name of the appendix from 'roadmap' to 'catalogue' to better reflect the nature and purpose of the content.

Feedback	ASIC's response	Reference in RG 181
Most respondents found the catalogue useful for outlining how the conflicts management obligation interacts with other key obligations dealing with conflicts. However, some respondents emphasised that the catalogue should retain its broad approach and not evolve into a checklist.	We acknowledge respondents' concerns about the catalogue being used by some AFS licensees as a checklist. However, our guidance is clear that the catalogue is intended to signpost key obligations and information and is not an exhaustive list of legal obligations and information that may relate to conflicts management.	Not applicable

Feedback	ASIC's response	Reference in RG 181
Some respondents recommended that the catalogue should be a stand-alone document, instead of an appendix in RG 181. They expressed concern that the catalogue could become outdated quickly in the guide.	<p>We have decided to retain the catalogue as an appendix in RG 181. This approach reduces the number of regulatory resources that AFS licensees are required to access for relevant information about managing conflicts of interest. It also ensures that a clear link is maintained between the catalogue and the guidance in RG 181—without the context of this guidance, the catalogue would be incomplete.</p> <p>We commit to an ongoing process of reviewing and updating our regulatory guide, including technical updates in response to regulatory developments.</p>	Not applicable
Some respondents expressed concern about the inconsistency between the conflicts management obligation in s912A(1)(aa) and Standard 3 in the <a href="#">Financial Planners and Advisers Code of Ethics 2019</a> (Code of Ethics), which requires relevant providers to avoid all conflicts.	The Minister is responsible for developing and updating the Code of Ethics for relevant providers. As such, amendments to the Code of Ethics are a matter for Government and outside of the scope of RG 181.	Not applicable
Some respondents suggested that the catalogue could be improved further by outlining how the obligations interact with each other.	We have not amended the catalogue to outline how the obligations in the catalogue interact with the conflicts management obligation. We have clarified that some related legal obligations may determine the way that AFS licensees manage certain conflicts (at RG 181.17). However, compliance with one legal obligation may not automatically satisfy another legal obligation, such as the conflicts management obligation.	Not applicable
<p>Some respondents suggested that the catalogue should be expanded to cover obligations relating to, for example:</p> <ul style="list-style-type: none"> <li>• the Financial Accountability Regime (FAR);</li> <li>• the design and distribution obligations; and</li> <li>• payments systems regulations.</li> </ul>	<p>We have not amended the catalogue to include obligations under the FAR, the design and distribution obligations or the payments system regulations.</p> <p>The catalogue is intended to cover key obligations for AFS licensees relating to conflicts of interest or conduct potentially affected by conflicts of interest. The catalogue is not intended to be an exhaustive list, and licensees must consider other legal requirements that may apply.</p>	Not applicable

## Other

Feedback	ASIC's response	Reference in RG 181
Some respondents suggested that we provide an implementation or transition period following the release of updated RG 181 to allow AFS licensees to update their governance arrangements.	We have not provided an implementation or transition period. Our updated guidance reflects the current legal framework for managing conflicts of interest. Our regulatory guides are based on legislation and regulations at the date of issue. It is the responsibility of regulated entities to ensure that they comply with their legal obligations.	Not applicable
Several respondents suggested that the guidance include further consideration of emerging and specialised sectors, such as carbon markets, digital assets and sustainability-linked products.	We have not amended our guidance to provide examples of conflicts that are highly specific to emerging sectors, which may become out-of-date as the sector evolves. RG 181 is intended to provide general guidance on meeting the conflicts management obligation for all AFS licensees. The illustrative examples set out in Table 1 are intended to highlight types of conflicts that may arise across a broad range of sectors.	Not applicable