



ASIC
Australian Securities &
Investments Commission

REGULATORY GUIDE 246

Conflicted and other banned remuneration

November 2024

About this guide

This guide is for Australian financial services (AFS) licensees and their representatives and other entities that must comply with the conflicted and other banned remuneration provisions in Divs 4 and 5 of Pt 7.7A of the Corporations Act.

It sets out our guidance on complying with these provisions and how we will administer them.

The provisions apply to financial product advice given to retail clients and certain benefits given in relation to life risk insurance products.

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 guide was issued in November 2024 and is based on legislation and regulations as at the date of issue.

In January 2025, we updated the date in notes under RG 246.56, RG 246.58 and RG 246.77 to '9 July 2025'.

Previous versions:

- Superseded Regulatory Guide 246 *Conflicted and other banned remuneration*, issued December 2017, reissued December 2020
- Superseded Regulatory Guide 246 *Conflicted remuneration*, issued March 2013

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.

Contents

A	Overview	5
	What this guide is about	5
	Conflicted remuneration.....	5
	Other banned remuneration.....	8
	What happens if the ban is breached?	9
	Previously grandfathered benefits	10
	The anti-avoidance provision.....	10
	How we administer the provisions	10
B	Benefits that influence advice or product choice	12
	Benefits that influence the advice	12
	Examples of conflicted remuneration in relation to advice	13
C	Benefits that are excluded from the ban	17
	Benefits given by the client.....	17
	Client-directed fees from superannuation funds.....	20
	General and consumer credit insurance commissions.....	21
	Benefits with a small value	23
	Passing on excluded benefits	24
D	Exclusions in relation to life risk insurance products	25
	Benefits that do not influence information given to a client	25
	Commissions that satisfy the ‘benefit ratio’ and ‘clawback’ arrangements.....	25
E	Performance benefits for employees	33
	Performance benefits and conflicted remuneration	33
	Evaluating the performance benefit.....	35
	Transitional arrangements for remuneration for employees of an ADI	38
	Performance benefits relating to life risk insurance products	38
F	Volume-based benefits	40
	Volume-based benefits and conflicted remuneration	40
	Rebutting the presumption in s963L.....	42
	Examples of volume-based benefits.....	42
	Volume-based benefits for life risk insurance products.....	49
G	Volume-based shelf-space fees	50
	The ban on volume-based shelf-space fees.....	50
	The fee-for-service exclusion.....	51
	The scale efficiencies exclusion	52
	Passing on a volume-based shelf-space fee to the client	54
	Non-volume-based shelf-space fees	55
H	Asset-based fees on borrowed amounts	56
	The general ban on asset-based fees on borrowed amounts	56
	Interaction with the best interests duty	57
	Instalment warrants	57
	Portfolios of products	58
	When the ban does not apply	58
I	The anti-avoidance provision	60
	What is anti-avoidance?	60
	Avoidance schemes.....	60
	Schemes that are unlikely to be avoidance schemes	63

Appendix 1: Benefits that are excluded from the ban on conflicted remuneration	64
Appendix 2: Previously grandfathered benefits	71
Rebate of previously grandfathered benefits	71
Record-keeping obligations for AFS licensees	74
Key terms	76
Related information.....	81

A Overview

Key points

The conflicted and other banned remuneration provisions in the Corporations Act ban the giving of certain benefits to persons who provide financial product advice and other financial services to clients.

This guide sets out:

- an overview of the conflicted and other banned remuneration provisions and relevant exceptions;
- how we expect persons to comply with the conflicted and other banned remuneration provisions; and
- how we will administer these provisions.

What this guide is about

- RG 246.1 This guide is for Australian financial services (AFS) licensees and their representatives.
- RG 246.2 It explains the conflicted and other banned remuneration provisions in Divs 4 and 5 of Pt 7.7A of the Corporations Act. These provisions ban the giving of benefits that may influence the provision of financial services and financial products to retail clients.
- RG 246.3 The purpose of the conflicted and other banned remuneration provisions is to improve the quality of advice and other financial services that retail clients receive, and build trust and confidence in the financial services industry.

Note 1: In this guide, we use the term ‘advice’ to mean ‘financial product advice’, as defined in s766B of the Corporations Act, and the term ‘client’ to mean ‘retail client’, as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the *Corporations Regulations 2001* (Corporations Regulations).

Note 2: Unless otherwise specified, references in this guide to sections (s), divisions (Divs) and parts (Pts) are to the Corporations Act, and references to regulations (regs) are to the Corporations Regulations.

Conflicted remuneration

What is the ban on conflicted remuneration?

- RG 246.4 The ban on conflicted remuneration is outlined in Div 4 of Pt 7.7A of the Corporations Act.
- RG 246.5 The ban restricts the giving of ‘conflicted remuneration’, which is any benefit that:
- (a) could reasonably be expected to influence the product recommended or the advice given (see RG 246.7–RG 246.8); or

- (b) are provided in response to information on, or dealing in, a life risk insurance product: see RG 246.10–RG 246.12.

RG 246.6 The ban applies to:

- (a) an AFS licensee and its representatives (including authorised representatives), who are prohibited from accepting conflicted remuneration (see s963E, 963G and 963H). An AFS licensee must also take reasonable steps to ensure that its representatives do not accept conflicted remuneration (see s963F);
- (b) product issuers and sellers, who are prohibited from giving conflicted remuneration to a licensee and its representatives (see s963K); and
- (c) an employer of a licensee or representative, who is prohibited from giving its licensee or representative employees conflicted remuneration for work they carry out as an employee (see s963J).

Benefits that influence advice or product choice

RG 246.7 Unless a specific exclusion applies, conflicted remuneration is any benefit, given to an AFS licensee or its representatives where:

- (a) the licensee and its representatives provide financial product advice to clients; and
- (b) because of the nature of the benefit or the circumstances in which it is given, the benefit could reasonably be expected to influence:
 - (i) the choice of financial product recommended to clients by the licensee or its representatives; or
 - (ii) the advice given to clients by the licensee or its representatives (see s963A(1) and Section B).

RG 246.8 Performance benefits given by employers to their employees (other than salary) may be banned depending on how these benefits are structured and how employees qualify for these benefits (see Section E).

RG 246.9 There is a presumption that volume-based benefits are conflicted remuneration (see Section F).

Benefits in relation to life risk insurance products

RG 246.10 Certain benefits given in relation to information given on, or dealing in, a life risk insurance product are also considered to be conflicted remuneration, even in the absence of advice:

- (a) a benefit given to an AFS licensee or its representatives that relates to information given to a client about a life risk insurance product where access to the benefit, or the amount of the benefit, is dependent on the value or number of life risk insurance products subsequently acquired or

varied by the person to whom the information was given (see reg 7.7A.11B(1)); and

- (b) a benefit given to an AFS licensee or its representatives in relation to dealing in a life risk insurance product with a client where access to the benefit, or the value of the benefit, is dependent on the value or number of life risk insurance products to which the dealing relates (see reg 7.7A.11B(2)).

Note: The benefits described in RG 246.10 are in addition to benefits under s963A in relation to life insurance.

- RG 246.11 There is an exclusion from the ban on conflicted remuneration if the benefit relates to a life risk insurance policy issued (or applied for) before 1 January 2018: see s1549B(2) and reg 7.7A.16H(2). Section D and Appendix 1 also set out specific exclusions that apply to benefits given in relation to life risk insurance products.
- RG 246.12 If the benefit relates to multiple activities (i.e. advice, information and/or dealing), the ban on conflicted remuneration only applies to one activity. The ban relating to advice is the primary ban, followed by information and then dealing: see regs 7.7A.11B(1)(d) and 7.7A.11B(2)(c).

What benefits are restricted under the ban?

- RG 246.13 The ban on conflicted remuneration applies to a range of benefits that may be monetary or non-monetary. Non-monetary benefits could take a number of forms, including the following:
- (a) free or subsidised business equipment or services (e.g. computers and other hardware, software, information technology support and stationery);
 - (b) hospitality-related benefits (e.g. tickets to sporting events or concerts and subsidised travel);
 - (c) shares or other interests in a product issuer or AFS licensee;
- Note: Whether shares or other interests in a product issuer or licensee are conflicted remuneration is discussed at RG 246.139–RG 246.144.
- (d) marketing assistance; and
 - (e) promotion or other ways of recognising an employee based on product recommendations or sales.

Note: This is not intended to be an exhaustive list. This guide sets out in further detail whether a benefit, including a non-monetary benefit, is conflicted remuneration.

Are there exceptions to the ban?

- RG 246.14 There are a number of exceptions to the ban. For example, benefits given by a client to a licensee or a representative in relation to the provision of a financial product or service are expressly excluded. There are also exceptions for commissions in relation to life risk insurance products. Further information on the exceptions is outlined in Section C, Section D and Appendix 1.

Other banned remuneration

RG 246.15 In addition to the conflicted remuneration provisions in Div 4 of Pt 7.7A, the Corporations Act prohibits other forms of remuneration that have the potential to influence the advice received by clients: see Div 5 of Pt 7.7A. The other forms of remuneration that are generally prohibited are:

- (a) a platform operator accepting a volume-based shelf-space fee from a funds manager (see Section G); and

Note: A shelf-space fee is a fee for making a funds manager's products available through a platform. It also includes a discount on an amount payable, or a rebate of an amount paid, by a platform operator to a funds manager, where the discount or rebate is for the funds manager's products being available through the platform. A fee will be volume based if it is wholly or partly dependent on the total number or value of the funds manager's financial products to which the custodial arrangement relates.

- (b) an AFS licensee or its representatives, who provide advice to a client, charging asset-based fees on borrowed amounts used to acquire financial products by, or on behalf of, the client (see Section H).

Note: An asset-based fee is a fee paid by a client for receiving advice, where that fee is dependent on the amount of funds used or to be used to acquire financial products by, or on behalf of, the client. A fee is an asset-based fee even if it is paid by a third party holding assets on behalf of the client, provided that the client directs the third party to pay the fee.

Table 1: Types of remuneration covered in this guide

Type of remuneration	Does the conflicted remuneration ban or another ban apply?	RG references
Benefits that can influence the advice or product choice	Yes. This type of remuneration is banned—it is conflicted remuneration under s963A	Section B
Certain benefits in relation to information and dealing in life risk products	Yes. This type of remuneration is banned—it is conflicted remuneration even in the absence of advice: see reg 7.7A.11B(1) and (2)	RG 246.10–RG 246.12
Benefits given by a client	No. This is not conflicted remuneration: see s963A(1)(b).	Section C
Life risk benefits that do not influence the information given to a client	No. This is not conflicted remuneration: see regs 7.7A.11C and 7.7A.11D	Section D
Life risk benefits that satisfy the 'benefit ratio' and 'clawback' arrangements	No. This is not conflicted remuneration: see s963B(1)(b) and regs 7.7A.11C(1)(b) and 7.7A.11D(1)(b)	Section D
Performance benefits for employees who provide advice to clients	This may be banned conflicted remuneration depending on the nature of the performance benefit	Section E

Type of remuneration	Does the conflicted remuneration ban or another ban apply?	RG references
Volume-based benefits that are wholly or partly dependent on the total number of products recommended or acquired	Yes. This type of remuneration is banned—it is presumed to be conflicted remuneration: see s963L	Section F
Volume-based shelf-space fees	Yes. This type of remuneration is banned—it is another type of banned remuneration: see s964A(1)	Section G
Asset-based fees on borrowed amounts	Yes. This type of remuneration is banned—it is another type of banned remuneration: see s964D and 964E	Section H
Benefits in relation to general insurance products	No. This is not conflicted remuneration: see s963B(1)(a), s963BB, s963C(1)(a) and reg 7.7A.12G.	Appendix 1
Advice fees paid by superannuation trustees with member consent	No. This is not conflicted remuneration: see s963B(1)(bb)	Appendix 1

Note: This is not an exhaustive list. Appendix 1 contains a range of other benefits that are also excluded from the ban. Appendix 2 sets out benefits that were previously grandfathered benefits.

What happens if the ban is breached?

RG 246.16 The consequences of breaching the ban on conflicted remuneration are set out in Table 2.

Table 2: Consequences of breaching the ban on conflicted remuneration

Person	Consequence of breach
AFS licensee	Civil penalty or administrative sanctions (e.g. a licence suspension or cancellation)
Authorised representative	<p>Civil penalty, except where:</p> <ul style="list-style-type: none"> the AFS licensee provides the authorised representative with information about the nature of the benefit to be accepted by the authorised representative; at the time the authorised representative accepts the benefit, they are not aware that the benefit is conflicted remuneration because the representative is acting in reliance on that information; and the representative's reliance on that information is reasonable (see s963G(2)) <p>Administrative sanctions (e.g. a banning order)</p>
Other representative	<p>Administrative sanctions (e.g. a banning order)</p> <p>Note: Section 963H does not prohibit a representative that is not an authorised representative from accepting conflicted remuneration from their employer. However, the employer will be liable for a civil penalty if it gives an employee conflicted remuneration for the work they carry out: see s963J.</p>

Person	Consequence of breach
Employer of an AFS licensee or its representatives for employees who provide advice to clients	Civil penalty or administrative sanctions
Product issuers and sellers	Civil penalty

Onus of proof

- RG 246.17 It is generally the party claiming that the ban on conflicted remuneration has been breached that bears the onus of proving that a benefit is conflicted remuneration. However, where the presumption that volume-based benefits are conflicted remuneration applies, the onus is on the person who is responding to a claim that they have breached the ban to show why giving or accepting the volume-based benefit is not conflicted remuneration.

Note: For more information on volume-based benefits, see Section F.

Previously grandfathered benefits

- RG 246.18 Before 1 January 2021, the ban on conflicted and other banned remuneration under Div 4 and 5 of Pt 7.7A did not apply to certain ‘grandfathered’ arrangements.
- RG 246.19 Appendix 2 provides information on the scheme under which grandfathered conflicted remuneration that remains payable on or after 1 January 2021 must be rebated. Appendix 2 also provides information on the records that an AFS licensee who is required to rebate conflicted remuneration must keep.

The anti-avoidance provision

- RG 246.20 There is also a ban on entering into or carrying out a scheme that is designed to avoid the application of the provisions in Pt 7.7A, including the conflicted and other banned remuneration provisions: see s965 and Section I. The anti-avoidance provision is designed to ensure that the policy intent of Pt 7.7A is not avoided through industry or transaction structuring.

How we administer the provisions

- RG 246.21 The following principles guide our approach to administering the conflicted and other banned remuneration provisions:
- (a) the provisions are designed to more closely align the interests of those who provide advice to clients with the interests of those clients; and

- (b) this alignment of interests depends on the substance of a benefit over its form—that is, whether a benefit is one that could reasonably be expected to influence financial advice or financial product recommendations is more relevant than how the benefit has been labelled or presented to the client.

RG 246.22 We are less likely to scrutinise benefits that are designed to achieve the outcome in RG 246.21(a). When looking at the substance of a benefit over its form, we will consider the overall circumstances in which the benefit is given, in deciding whether a benefit is conflicted remuneration.

B Benefits that influence advice or product choice

Key points

Conflicted remuneration is any benefit given to an AFS licensee or its representatives that could reasonably be expected to:

- influence the advice given to clients by the licensee or its representatives; or
- influence the choice of financial product recommended to clients by the licensee or its representatives.

Benefits that influence the advice

RG 246.23 A benefit will be conflicted remuneration if it could reasonably be expected to influence the advice given.

RG 246.24 Whether a benefit is capable of doing this depends on the nature of the benefit or the circumstances in which it is given or accepted.

Note: Additional obligations apply under the Corporations Act when an AFS licensee or its representatives provide advice to clients. For more information on some of the obligations that apply when advice is provided to clients, see Regulatory Guide 36 *Licensing: Financial product advice and dealing* ([RG 36](#)), Regulatory Guide 175 *AFS licensing: Financial product advisers—Conduct and disclosure* ([RG 175](#)) and Regulatory Guide 244 *Giving information, general advice and scaled advice* ([RG 244](#)).

Evaluating the substance of the benefit

RG 246.25 When determining whether a benefit is conflicted remuneration, we will look at the substance of a benefit over its form, and consider the overall circumstances in which the benefit is given or accepted. This includes how an AFS licensee's or its representative's business is structured, the type of advice they provide and the types of products to which the advice relates.

RG 246.26 This means, for example, that if a benefit is conflicted remuneration, doing the following does not change this fact:

- (a) stating in documentation that a benefit is not intended to influence the advice given; or
- (b) renaming the conflicted remuneration as a form of remuneration that is not prohibited by the Corporations Act—for example, renaming a commission from a product issuer as an 'asset-based fee', even though the fee continues to be paid by the product issuer to the AFS licensee.

- RG 246.27 We will also look at a range of factors, including:
- (a) how the AFS licensee or its representatives gained (or gains) access to the benefit;
 - (b) who is giving the benefit;
 - (c) when the benefit is given or accepted;
 - (d) what reasonably appears to be the likely reason for giving the benefit;
 - (e) how the value of the benefit is determined; and
 - (f) what the benefit is and its features.
- RG 246.28 A benefit may be conflicted remuneration if it could reasonably be expected to influence an AFS licensee or its representatives in giving advice recommending that clients acquire financial products or increase their interest in a financial product, rather than providing them with strategic advice, such as retirement planning advice or advice on wealth accumulation strategies. This is because conflicted remuneration includes benefits that, because of their nature or the circumstances in which they are given, could reasonably be expected to influence the advice given to clients by a licensee or its representatives: see s963A(1)(a)(ii).
- RG 246.29 This means that it is possible for a product-neutral benefit—that is, a benefit that is the same regardless of which financial products a client acquires—to be conflicted remuneration if it could reasonably be expected to influence the advice provided and it is not excluded from the ban on conflicted remuneration.
- Note: For more information on providing non-product-specific personal advice, see [RG 175](#).
- RG 246.30 We are less likely to scrutinise benefits that are designed to more closely align the interests of those who provide advice to clients with the interests of their clients.

Examples of conflicted remuneration in relation to advice

- RG 246.31 The following are examples of benefits that are generally conflicted remuneration:
- (a) commissions (whether upfront or trailing, fixed or variable) paid by a product issuer to an AFS licensee (whether the payment is made directly or through some other arrangement);
- Note: Commissions relating to life risk insurance products are excluded in certain circumstances: see Section D.
- (b) volume-based payments from a platform operator to a licensee;

- (c) volume-based payments from a licensee to an authorised representative or other representative;
- (d) volume-based bonuses and other payments, such as a commission or one-off payment, to a financial adviser, which are calculated by reference to the number or value of financial products acquired by clients following the advice of the financial adviser. The payment could be made by:
 - (i) the financial adviser's licensee;
 - (ii) a platform operator; or
 - (iii) a product issuer; and
- (e) a discount on the fees paid by an authorised representative to its licensee based on client funds held in a particular financial product issued by a related party.

Example 1: Sponsorship of conferences and soft-dollar benefits (conflicted remuneration)

Scenario 1

An AFS licensee, whose representatives advise on a range of financial products from different product issuers, organises a conference for its representatives. The licensee invites product issuers to pay a substantial sponsorship fee in return for attending the conference and presenting information about their financial products.

Scenario 2

A group of financial advisers is invited to attend an overseas conference organised by a product issuer. The invitation includes complimentary business class flights, five-star accommodation and a networking dinner from the product provider to the financial advisers.

Commentary

The test for determining whether the benefits provided in either scenario are conflicted remuneration is whether those benefits could reasonably be expected to influence the choice of financial products recommended or advice given. This depends on a number of factors, including:

- the nature of the benefit, the circumstances in which it was given and how generous it is; and
- what a reasonable person would consider to be the purpose of the person soliciting or giving the benefit (regardless of the actual purpose of the person soliciting or giving the benefit).

The definition of conflicted remuneration in s963A is objective and it does not matter if the benefits actually do influence the advice given by the advisers.

Both these examples are likely to breach the ban on conflicted remuneration.

Example 2: Financial adviser receiving commissions from a property developer (conflicted remuneration)

Scenario

A financial adviser has an arrangement with a property developer. Each time one of the adviser's self-managed superannuation fund (SMSF) clients purchases a property from the developer, the developer pays a commission to the adviser. The adviser regularly provides advice to clients recommending that they establish an SMSF in order to invest in property using their superannuation money.

Commentary

The commissions paid to the adviser by the property developer are likely to breach the ban on conflicted remuneration. This is because, in the circumstances in which the commissions are paid, they could reasonably be expected to influence the adviser to recommend that its clients establish an SMSF, or use an existing SMSF, to invest in property when the adviser might not otherwise do so.

Benefits that do not have an influence on advice

RG 246.32 Benefits that do not influence advice are not conflicted remuneration.

RG 246.33 Examples of benefits that generally do not influence advice include:

- (a) salary given to an AFS licensee or its representative; and
- (b) a licensee paying for a representative's business expenses.

Salary

RG 246.34 Salary given to an AFS licensee or its representatives is generally not conflicted remuneration.

Note: For a situation where a salary increase could be conflicted remuneration, see Example 8.

RG 246.35 This includes salary paid by an employer that is:

- (a) an AFS licensee who pays an employee that is an authorised representative or other representative; and
- (b) an authorised representative who pays an employee that is a representative.

RG 246.36 Specifically, the base salary given to such an employee is not conflicted remuneration if neither the level nor a component of the base salary or salary increases could reasonably be expected to influence the advice given.

RG 246.37 An employee's salary is generally conflicted remuneration if it is calculated by reference to the number or value of financial products recommended by

the employee to clients. Guidance on salary and the ban on conflicted remuneration is set out in Section E.

Licensees paying for a representative's business expenses

- RG 246.38 Benefits provided by an AFS licensee to its representatives (including authorised representatives) to cover business expenses incurred when providing advice on behalf of the licensee are generally not conflicted remuneration (e.g. business equipment such as telephones, desks and chairs), particularly where they are purchased for market value. However, this applies only if the availability of these resources:
- (a) does not depend on a factor that could reasonably be expected to influence the advice given by the AFS licensee or its representatives; or
 - (b) is covered by an exclusion from the ban on conflicted remuneration.

C Benefits that are excluded from the ban

Key points

Certain benefits are specifically excluded from the ban on conflicted remuneration. These include, but are not limited to:

- benefits given by the client;
- client-directed fees from superannuation funds;
- some insurance commissions;
- 'buyer of last resort' arrangements; and
- benefits with a small value.

When an excluded benefit is passed on, or reflected in a benefit given to another AFS licensee or its representatives that provide advice to clients, this is a separate benefit.

Note: These benefits are excluded regardless of whether or not they are volume based. See Appendix 1 and Section D for additional benefits that are excluded.

Benefits given by the client

RG 246.39 A monetary or non-monetary benefit is not conflicted remuneration if it is given by a client in relation to a financial product or financial service provided by the licensee or representative to the client: see s963A(1)(b).

RG 246.40 This means that fee-for-service arrangements relating to the issue or sale of a financial product or financial product advice given by the licensee or a representative to the client are not conflicted remuneration.

RG 246.41 To ensure a benefit given by a client is not conflicted remuneration, the benefit must be given in the following circumstances:

- (a) the benefit is given directly by the client, or the client causes or authorises another party to give the benefit on their behalf; and
- (b) the benefit is given by the client, or on behalf of the client, including from one or more financial products in which the client has rights or benefits. This can include, for example, where a benefit is paid out of a premium paid by a client.

Note: See paragraph 1.258 of the Revised Explanatory Memorandum to the Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024.

RG 246.42 In receiving the benefit, it will also be necessary for the licensee or representative to ensure compliance with the other obligations under the Corporations Act that apply to the provision of advice to the client.

Note: See [RG 36](#), [RG 175](#) and [RG 244](#) for guidance on complying with the additional obligations that apply to the provision of advice including the best interests duty.

Authorised by the client

RG 246.43 When a benefit is given by another party on behalf of the client, that benefit must be ‘authorised’ by the client: see s963A(2).

RG 246.44 We will administer the law on the basis that a benefit has been authorised by a client if the benefit is given at the client’s direction or with their clear consent. In our view, consent is ‘clear’ if it is genuine, express and specific. Mere knowledge of the benefit, or agreement to proceed with financial services in light of a disclosure about the benefit, is not clear consent.

Note: A benefit is not given by a client if it is provided at the instruction of the product issuer or seller—see paragraph 1.259 of the Revised Explanatory Memorandum to the Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024.

RG 246.45 A client will not be considered to have given clear consent if the consent was not clearly and expressly sought. For example, where consent has been sought as part of a broad range of terms and conditions agreed by the client in aggregate rather than in a separate and distinct section of the terms and conditions, clear consent would not have been provided.

RG 246.46 If a client has withdrawn their consent to the benefit, future benefits arising from the original consent are not authorised.

Client’s own funds

RG 246.47 For a benefit to be given by a client and not be conflicted remuneration, the benefit must also have been given by the client using the client’s own funds. Benefits given by third parties that are borne out of their own funds are not benefits given by the client.

RG 246.48 Below are some examples of benefits that are not covered by s963A(1)(b) and are thus considered to be conflicted remuneration.

Example 3: Benefits that are not covered by s963A(1)(b) (conflicted remuneration)

Scenario 1

Payments are made to a financial adviser by a responsible entity or platform operator from fees received by the responsible entity for operating a registered managed investment scheme (registered scheme) or by the platform operator for administering a platform. These are a benefit given by the responsible entity or platform operator out of their fees.

Scenario 2

Payments are made to a financial adviser by a margin lender from interest the margin lender charges and receives from its loan holders. These are a benefit given by the margin lender out of the interest the lender receives.

Commentary

In both scenarios, the benefits are *not* given by the client in relation to financial product advice or a service provided by the licensee or authorised representative, even if consented to by the client. The benefits, therefore, are not covered by s963A(1)(b) and we would consider them to be conflicted remuneration.

Passing on client benefits

- RG 246.49 Subject to RG 246.51, third parties (such as trustees of registrable superannuation entities and responsible entities of registered schemes) may, with the client's consent, direct the client's funds to an AFS licensee or its representatives.
- RG 246.50 In addition, an AFS licensee may:
- (a) subsequently pass on the benefit, or a portion of the benefit, to one of its authorised representatives or other representatives; or
 - (b) pass on the benefit, or a portion of the benefit, to an authorised representative, and the authorised representative may pass on the benefit, or a portion of the benefit, to another representative of the licensee (e.g. an employee of the authorised representative).
- RG 246.51 However, the benefit will be conflicted remuneration if an AFS licensee or authorised representative that passes on a benefit has discretion over the portion of the benefit that is passed on. In this situation, we do not consider that the benefit has been given at the client's direction or with their clear consent: see RG 246.43–RG 246.46.

Example 4: Fees agreed through an application form (not conflicted remuneration)**Scenario**

A product issuer issues financial products to clients through a third-party AFS licensee whose representatives provide personal advice and general advice to clients in relation to managed investment schemes.

The application form for the product provides space for the client, or the AFS licensee on behalf of the client and with the client's specific authority, to indicate the fee the client has agreed that the licensee will receive for any advice provided. Before the client signs the application form, the representative of the licensee tells the client that they are authorising the licensee to receive the fees set out in the application form.

The application form states that the fee paid by the client to the AFS licensee will be collected by the product issuer as agent of the licensee. The fee will then be sent by the product issuer to the licensee. The form also includes a section for the licensee to consent to this arrangement.

Commentary

We consider that s963A(1)(b) applies to the fee collected by the product issuer and passed on to the AFS licensee. The client specified the fee and authorised the product issuer to collect the fee from the client on behalf of the licensee. Therefore, the fee is not conflicted remuneration.

Example 5: Benefits given to an authorised representative (not conflicted remuneration)**Scenario**

An authorised representative is self-employed as a financial adviser and gives advice to clients.

Clients pay fees to the AFS licensee for the advice the representative provides to the client on behalf of the licensee. These fees are a combination of flat fees (e.g. \$2,000) and asset-based fees.

The AFS licensee passes 90% of all fees received from the client to the authorised representative.

The authorised representative also employs three other financial advisers who are representatives of the AFS licensee.

Commentary

The following benefits are not conflicted remuneration:

- the fees received by the AFS licensee from the client;
- the portion of the fees from the client that the licensee passes on to the authorised representative, provided that the client has authorised this and the licensee has no discretion over the portion of the benefit that is passed on; and
- any fee the authorised representative passes on to representatives of the licensee that they employ, provided that the client has authorised this and the authorised representative has no discretion over the portion of the benefit that is passed on.

These benefits are not conflicted remuneration because they are given by a client for the provision of advice: see s963A(1)(b) and RG 246.39–RG 246.51.

Client-directed fees from superannuation funds

RG 246.52 A benefit is not conflicted remuneration where it is:

- (a) given to the AFS licensee or an authorised representative of a licensee by a trustee of a superannuation fund;
- (b) given in relation to financial product advice that is personal advice, which is provided by the licensee or authorised representative to a retail client, about the client's interest in the fund; and

- (c) charged against the client's interest in the fund, or against the interests of the client and other members of the fund (see s963B(1)(bb)).

RG 246.53 In giving the benefit, the trustee will need to ensure compliance with the relevant obligations under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and the *Income Tax Assessment Act 1997*. This includes compliance with s99FA of the SIS Act, which outlines the requirements to be satisfied before the trustee can charge the cost of advice against the client's interest in the fund and specifically provides that s52(2)(c) and s62 of the SIS Act continue to apply.

Note: Information Sheet 287 *FAQs: Non-ongoing fee requests or consents* ([INFO 287](#)) provides guidance on the consent requirements when charging personal advice costs to a client's superannuation account.

General and consumer credit insurance commissions

RG 246.54 Monetary benefits given to an AFS licensee or an authorised representative of a licensee for certain general insurance products and consumer credit insurance are not conflicted remuneration: see s963B and s963BB.

Note: An exclusion also applies for monetary benefits in relation to life risk insurance products, see Section D.

RG 246.55 Non-monetary benefits given to an AFS licensee or an authorised representative of a licensee in relation to a general insurance product are also not conflicted remuneration: see s963C(1)(a).

RG 246.56 The exclusion from the conflicted remuneration provisions for these products will only apply to personal advice situations if the client gives their informed consent to the monetary benefit being given: see s963BB(1) and RG 246.58.

Note: Informed consent requirements apply to benefits given on or after 9 July 2025, in relation to insurance products issued or sold on or after that date (except renewals of general insurance products originally issued before this date).

RG 246.57 Section 145 of the National Credit Code (Sch 1 to the *National Consumer Credit Protection Act 2009*) also sets limitations on the amount of commission paid by an insurer in connection with consumer credit insurance taken out by a debtor. The total of any commission accepted by the credit provider, supplier or an agent of the credit provider or supplier must not exceed 20% of the premium.

Informed consent requirements

RG 246.58 If an AFS licensee or their representative provides, or is likely to provide, personal advice to a retail client in relation to a life risk insurance, general insurance or consumer credit insurance product, a monetary benefit given in

connection with the issue or sale of the product will be conflicted remuneration unless the AFS licensee or representative first obtains the client's informed consent to the monetary benefit being given: see s963BB.

Note 1: Information Sheet 292 *FAQs: Informed consents for insurance commissions (INFO 292)* provides guidance on the requirements that must be met in relation to informed consent. This includes disclosing certain information to the client before informed consent is given and record-keeping requirements. It also provides guidance on good practice for informed consent.

Note 2: Informed consent requirements apply to benefits given on or after 9 July 2025, in relation to insurance products issued or sold on or after that date (except renewals of general insurance products originally issued before this date).

'Buyer of last resort' arrangements

RG 246.59 Arrangements for the purchase of a financial advice business in the future are sometimes called 'buyer of last resort' arrangements.

RG 246.60 A monetary benefit (purchase price) payable for a financial advice business is not conflicted remuneration if:

- (a) the benefit is given to an AFS licensee or its representative;
- (b) the benefit is paid as part of the purchase or sale of all or part of the licensee's or representative's financial advice business; and
- (c) the price of the financial advice business is calculated using a formula:
 - (i) that is based, in whole or in part, on the number or value of all or part of the financial products held by the licensee's clients or the representative's clients; and
 - (ii) in which the weighting attributed to the financial products issued by the licensee, a related body corporate, or other person is the same as the weighting attributed to other similar financial products (see reg 7.7A.12EA).

Note: Similar exclusions apply when a monetary benefit is given to an AFS licensee or its representative as part of the purchase or sale of all, or part of, the licensee's or representative's business in relation to information on, or dealing in, a life risk insurance product. See Appendix 1 for further information.

RG 246.61 We consider that financial products are similar if they perform broadly the same function. Whether financial products are similar depends on the circumstances.

RG 246.62 In particular, we will scrutinise arrangements where different weightings are attributed to different financial products so that products issued by a particular issuer or issuers, or issuers in a particular corporate group or groups, are given more weight.

RG 246.63 If this exclusion, or another exclusion from the ban on conflicted remuneration, does not apply to the purchase or sale of an AFS licensee's or

representative's financial advice business, the agreement to purchase at the relevant price may be conflicted remuneration if it could reasonably be expected to influence advice given to a client.

Benefits with a small value

- RG 246.64 A non-monetary benefit is not conflicted remuneration if:
- (a) its value is less than \$300 for each AFS licensee or its representative that is the final recipient of the benefit, and
 - (b) identical or similar benefits are not given on a frequent or regular basis: see s963C(1)(b) and reg 7.7A.13.

Note: Similar exclusions apply when the benefit relates to information on, or dealing in, a life risk insurance product. See Appendix 1 for further information.

- RG 246.65 If a benefit is given to an AFS licensee and the licensee passes on this benefit to a representative, the representative is the final recipient of the benefit. If the licensee keeps half of a benefit and passes on the other half to a representative, the licensee is the final recipient of half of the benefit and the representative is the final recipient of the other half.

- RG 246.66 The \$300 limit applies to a non-monetary benefit given in a single event, taking into account that the exclusion will not apply if identical or similar benefits are given on a frequent or regular basis.

- RG 246.67 An AFS licensee must keep records of non-monetary benefits with a value of between \$100 and \$300 that are given to the licensee or any of its representatives: see reg 7.8.11A.

- RG 246.68 We use the amounts in regs 7.7A.13 and 7.8.11A as a guide in considering when we are more likely to scrutinise a monetary benefit to determine whether it is conflicted remuneration.

- RG 246.69 Accordingly, we are more likely to scrutinise monetary benefits to determine whether they are conflicted remuneration if:

- (a) for benefits that are given on a frequent or regular basis:
 - (i) the value of each benefit is over \$100; and
 - (ii) the combined value of all benefits is greater than \$300 for each AFS licensee or representative that is the final recipient of the benefit; or
- (b) for benefits that are not given on a frequent or regular basis, the value of the benefit is greater than \$300 for each licensee or representative that is the final recipient of the benefit.

RG 246.70 We consider that the benefits in RG 246.69 are more likely to influence the advice given.

Passing on excluded benefits

RG 246.71 When an excluded benefit is passed on, or reflected in a benefit given to another AFS licensee or its representatives that provide advice to clients, this is a separate benefit. This is because the circumstances in which the separate benefit is given are different from the circumstances in which the excluded benefit was given.

RG 246.72 The separate benefit does not automatically continue to be excluded from the ban on conflicted remuneration. It is only excluded if it satisfies the conditions of an exclusion, or could not reasonably be expected to influence the advice provided by the AFS licensee or its representatives that receive the benefit.

RG 246.73 For example, asset-based fees paid by clients to an AFS licensee for advice provided by a representative on behalf of the licensee are not conflicted remuneration: see s963A(1)(b). However, this does not necessarily mean that a performance benefit or other benefit paid by the licensee to the representative, based on the increase in asset-based fees paid by the representative's clients, is excluded from the ban on conflicted remuneration.

RG 246.74 If no exclusion applies, the performance benefit or other benefit will be conflicted remuneration if it could reasonably be expected to influence the advice provided by the representative: see Example 8.

D Exclusions in relation to life risk insurance products

Key points

There are specific exclusions from the ban on conflicted remuneration for benefits that are given in relation to life risk insurance products and that do not influence the advice given to a client.

Commissions in relation to life risk insurance that satisfy the ‘benefit ratio’ and ‘clawback’ arrangements are also not considered to be conflicted remuneration.

Benefits that do not influence information given to a client

RG 246.75 Benefits relating to information given on, or dealing in, a life risk insurance product are not conflicted remuneration if they could not reasonably be expected to influence:

- (a) whether the AFS licensee or its representative gives information to a person or deals in a life risk insurance product; or
- (b) the way in which the licensee or its representative presents the information about, or deals in, a life risk insurance product (see regs 7.7A.11C and 7.7A.11D).

Note: The examples in RG 246.32–RG 246.38 and the principles in Section E and Section F are also relevant when determining whether a benefit is conflicted remuneration because it may influence the information given on, or dealing in, a life risk insurance product.

Commissions that satisfy the ‘benefit ratio’ and ‘clawback’ arrangements

RG 246.76 A monetary benefit relating to a life risk insurance product is not conflicted remuneration if:

- (a) it is the same for the year in which the product or products are issued as it is for each year in which the product or products are continued (i.e. a level commission); or
- (b) it satisfies the ‘benefit ratio’ and the ‘clawback’ arrangements (see s963B(1)(b) and regs 7.7A.11C(1)(b) and 7.7A.11D(1)(b)).

RG 246.77 In addition, if an AFS licensee or their representative provides, or is likely to provide, personal advice to a retail client in relation to certain life insurance products, general insurance or consumer credit insurance products, a

monetary benefit given in connection with the issue or sale of the product will be conflicted remuneration unless the AFS licensee or representative first obtains the client's informed consent to the monetary benefit being given: see s963BB(1) and RG 246.58.

Note 1: [INFO 292](#) provides guidance on the requirements that must be met in relation to informed consent. This includes disclosing certain information to the client before informed consent is given and record-keeping requirements. It also provides guidance on good practice for informed consent.

Note 2: Informed consent requirements apply to benefits given on or after 9 July 2025 and that were given in relation to insurance products issued or sold on or after that date (except renewals of general insurance products originally issued before this date).

The benefit ratio and clawback arrangements are determined by ASIC and are set out in [ASIC Corporations \(Life Insurance Commissions\) Instrument 2017/510](#). The commission cap in the first year is set at 60% of the policy cost (i.e. upfront commission), and 20% of the policy cost after the first year (i.e. trailing commission): see section 5(2) and (3) of the instrument.

RG 246.78 The exclusion does not apply to monetary benefits relating to the following products:

- (a) a group life risk policy inside superannuation, whether it is for a default superannuation fund or another type of superannuation fund; and
- (b) an individual life insurance policy for the benefit of a member of a default superannuation fund.

RG 246.79 Depending on the circumstances, a commission given to an AFS licensee or its representative may or may not include GST. When a commission includes a GST component, the GST component is not intended to be a benefit for the purposes of the ban on conflicted remuneration: see paragraph 1.29 of the Explanatory Memorandum to the Corporations Amendment (Life Insurance Remuneration Arrangements) Bill 2016.

Acceptable benefit ratio

Upfront commission given when there is a client-initiated increase

RG 246.80 When there is action taken by the client that results in an increase in the policy cost, the commission cap is 60% of the increase in the policy cost for the 12 months after the increase, and 20% of the increase in the policy cost after the first 12 months: see section 5(4) and (5) of [ASIC Instrument 2017/510](#).

Note: A client-initiated increase is defined in section 4 of the instrument and includes matters such as the policy holder agreeing to an increase in the sum insured or that the premium basis should change from a stepped premium to a level premium.

Example 6: Calculating the acceptable benefit ratio with a client-initiated increase

A life risk insurance product is issued with a policy cost for the year of \$1,000. An acceptable benefit ratio for a benefit provided to an AFS licensee or its representative for the initial 12-month period is 0.6 (i.e. the maximum commission payable is 60% of the policy cost). Accordingly, the allowable commission is no more than \$600.

The policy holder decides to continue the product into a second year and to increase the sum insured. The policy cost for the second year increases to \$1,200, with \$150 of the increase being because of the decision to increase the sum insured and the remaining \$50 because of a CPI increase to the sum insured. The \$150 is a client-initiated increase and an acceptable benefit ratio of 0.6 applies for a benefit provided for the second year in relation to the \$150 increase.

Therefore, a benefit of up to \$90 may be given in relation to this increase. An acceptable benefit ratio of 0.2 applies for a benefit provided for the second year in relation to the \$1,050 balance of the policy cost. Therefore, a benefit of up to \$210 may be given in relation to the \$1,050 balance of the policy cost. Accordingly, the maximum total benefit that may be given for the second year is \$300.

Commission for a client-initiated increase that occurs part way through a year

RG 246.81 Table 3 provides the method for calculating the allowable upfront and trailing commission in relation to an increase in the policy cost if the client-initiated increase occurs part way through the year.

Table 3: Calculating the commission for a client-initiated increase that occurs part way through a year

Commission	Method
Upfront commission	<p>Calculate the maximum allowable commission in relation to the annual increase in policy cost following the client-initiated increase—that is:</p> $\text{Total annual client-initiated increase} \times 0.6$ <p>For example, for a client-initiated increase that resulted in an increase in the policy cost of \$250 a year where the client-initiated increase occurred 292 days into the first year, the allowable commission would be \$150 (i.e. \$250 multiplied by 0.6).</p>

Commission	Method
Trailing commission	<p>Where a client-initiated increase has occurred in the previous year, the 20% trailing commission cap applies to the client-initiated increase commencing 12 months after the time of the client-initiated increase. The trailing commission is calculated from the 12-month anniversary of the policy increase (and not from the anniversary of the issue of the policy) because the 60% commission cap for the client-initiated increase applies to the 12-month period from the date of the client-initiated increase.</p> <p><i>Step 1:</i> Calculate the acceptable benefit ratio using the following formula:</p> $\frac{0.2 \times \text{Relevant days in year}}{365}$ <p>'Relevant days in year' means the number of days from 12 months after the client-initiated increase until the end of the year.</p> <p>Following the previous example, if the policy continued for a further year, the acceptable benefit ratio would be 0.04 (i.e. (0.2 x 73) divided by 365).</p> <p><i>Step 2:</i> Calculate the maximum allowable commission by multiplying the acceptable benefit ratio and the total annual client-initiated increase.</p> <p>Following the example, the maximum allowable commission would be \$10 (i.e. 0.04 multiplied by \$250). A further trailing commission of up to 20% of the remaining policy cost could also be paid in relation to the policy.</p>

Source: See section 5(4) and (5) of [ASIC Instrument 2017/510](#).

- RG 246.82 The commission can be paid in full or by instalments as long as it is a commission for the year in which the increase occurred. For example, if an obligation to pay a commission was incurred at the time of the increase, with the commission to be paid by instalments, the commission would be a commission for the year in which the increase occurred despite being paid by instalments.

Clawback arrangements

- RG 246.83 The arrangement under which the benefit is given must include a clawback requirement that provides that, when a policy is cancelled, not continued or the policy cost is reduced in the first two years, a certain percentage of the commission must be repaid to the party who provided the benefit (i.e. 'clawed back').
- RG 246.84 [ASIC Instrument 2017/510](#) sets out the amount, or way of working out the amount, that must be repaid. If an insurer does not follow the methodology in the instrument, the clawback amount must be equal to or greater than the amount determined by using the methodology: see s963BA(3)(b)–(4).
- RG 246.85 The clawback should be calculated against the total policy cost (or reduction in the total policy cost), rather than for each component of the policy that may be cancelled or not continued, or the cost reduced: see [ASIC Instrument 2017/510](#) and s963BA(3).

RG 246.86 The law does not prescribe a time period for repayment of commissions. This is a matter to be determined between AFS licensees or representatives and life insurers.

RG 246.87 The clawback arrangements for trigger events are detailed in Table 4, Table 5 and Table 6.

When clawback does not apply

RG 246.88 Clawback does not apply to the 20% trail commission paid in the second year of a policy if the policy is cancelled or not continued in the second year: see section 6(17) of [ASIC Instrument 2017/510](#).

RG 246.89 Clawback does not apply when the policy is cancelled or not continued in the first two years due to:

- (a) the death of the insured;
- (b) situations of self-harm;
- (c) the insured reaching an age at which coverage is no longer provided; or
- (d) an administrative error (see reg 7.7A.12EB).

RG 246.90 Clawback also does not apply when there is a reduction in the policy cost during the first two years due to:

- (a) the insurer and the insured agreeing to a reduction in a risk in relation to the insured (e.g. the insured decides to stop smoking);
- (b) rebates or discounts provided to the insured that are intended to encourage the acquisition or continued holding of a life insurance product (e.g. a loyalty-based premium reduction);
- (c) the insurer reducing the policy cost without changing the coverage provided (e.g. the insurer reduced the policy cost for competitive reasons);
- (d) a claim being made under the policy (e.g. a total and permanent disability claim being made on a policy that has both a death and a total permanent disability component could result in the policy only having a death benefit); or
- (e) an administrative error (see reg 7.7A.12EC).

Table 4: Clawback arrangements—Commission given for the first year not because of a client-initiated increase

Trigger event	Clawback amount
<p>Policy cancelled or not continued in the first year</p> <p>Note: If the policy is in force for exactly 12 months, and then cancelled or not continued into a second year, the second-year clawback provisions will apply (i.e. the clawback rate is 60% of the first-year commission, rather than 100% of the first-year commission).</p>	<p>The clawback amount is 100% of the commission.</p> <p>If an amount has already been clawed back due to a reduction in the policy cost, the commission is adjusted by subtracting the clawed back amount from the commission before clawing back 100% of the 'adjusted' commission.</p>
<p>Product cancelled or not continued in the second year</p> <p>Note: If the policy is in force for exactly 24 months, and then cancelled or not continued into a third year, there will be no clawback.</p>	<p>The clawback amount is 60% of the commission.</p> <p>If an amount has already been clawed back due to a reduction in the policy cost, the commission is adjusted by subtracting the clawed back amount from the commission before clawing back 60% of the 'adjusted' commission.</p> <p>Note: A different rule applies to a benefit given for a client-initiated increase benefit in the first year and within 12 months, and for reductions in policy cost (see below).</p>
<p>Policy cost reduced in the first year</p>	<p>The clawback amount is a percentage of the commission that is equal to the percentage by which the policy cost has been reduced. For example, if the policy cost is reduced by 20% in the first year, 20% of the commission would be clawed back.</p>
<p>Product continued into the second year at a reduced policy cost</p> <p>Policy cost reduced in the second year below the initial second-year policy cost (where there has not been a client-initiated increase)</p>	<p>The clawback amount is 60% of the percentage of the commission that is equal to the percentage by which the policy cost has been reduced. For example, if the policy cost is reduced by 10%, then 60% of 10% of the commission will be clawed back.</p>

Source: See section 6 of [ASIC Instrument 2017/510](#).

Note: When determining the policy cost for a product for the first year or the second year at a particular time, the policy cost for the year at that time is taken to be the amount that would have been the policy cost for the year if the product had been held on the terms and conditions applying at that time for the whole of the year: see section 6(18) of [ASIC Instrument 2017/510](#).

Table 5: Clawback arrangements—Commission given for the first year because of a client-initiated increase

Trigger event	Clawback amount
<p>Product cancelled or not continued in the second year and within 12 months of the client-initiated increase</p>	<p>The clawback amount is 100% of the commission from the client-initiated increase.</p>
<p>Policy cancelled or not continued in the second year and more than 12 months after the client-initiated increase</p>	<p>The clawback amount is 60% of the commission from the client-initiated increase.</p>

Trigger event	Clawback amount
Product is continued for the second year at a reduced policy cost and within 12 months of the client-initiated increase	<p>The clawback amount is a percentage of the commission from the client-initiated increase that is equal to the percentage by which the policy cost has been reduced.</p> <p>For example, if there is a client-initiated increase from \$800 to \$1,000 in the first year, there is a commission of \$120 from that client-initiated increase in the first year. If the policy cost for the second year decreased from \$1,000 in the first year to \$800 at the start of the second year, the percentage of the reduction in policy cost is 20%. The clawback amount on the client-initiated increase would be the percentage of the reduction multiplied by the commission amount (i.e. 20% of \$120 = \$24).</p>
Policy cost for the second year is reduced to less than the policy cost at the start of the second year and within 12 months of the client-initiated increase	<p>The clawback amount is a percentage of the commission from the client-initiated increase that is equal to the percentage by which the policy cost has been reduced below the initial second-year policy cost.</p> <p>For example, the second-year policy cost begins at \$1,000, then part way through the second year reduces to \$800. The clawback amount will be the percentage of the reduction (20%) multiplied by the commission amount from the first-year client-initiated increase.</p>
Policy cost is reduced 12 months after the client-initiated increase	<p>The clawback amount is 60% of the percentage of the commission from the client-initiated increase that is equal to the percentage by which the policy cost has been reduced.</p>
Policy cost for the second year is reduced more than 12 months after the client-initiated increase to an amount that is less than the policy cost for the product for the second year	<p>The clawback amount is 60% of the percentage of the commission from the client-initiated increase that is equal to the percentage by which the policy cost has been reduced below the policy cost as at 12 months after the client-initiated increase.</p>

Source: See section 6 of [ASIC Instrument 2017/510](#).

Note: When determining the policy cost for a product for the first year or the second year at a particular time, the policy cost for the year at that time is taken to be the amount that would have been the policy cost for the year if the product had been held on the terms and conditions applying at that time for the whole of the year: see section 6(18) of [ASIC Instrument 2017/510](#).

Table 6: Clawback arrangements—Commission given for the second year because of a client-initiated increase in the second year

Trigger event	Clawback amount
Policy cancelled or not continued in the second year	The clawback amount is 100% of the commission from the client-initiated increase in the second year.
Policy cost for the second year is reduced	<p>The clawback amount is 100% of the commission from the client-initiated increase if the reduced policy cost is less than the policy cost immediately before the client-initiated increase.</p> <p>In any other circumstance (e.g. the policy cost for the second year is reduced but is still more than the policy cost immediately before the client-initiated increase), the following formula should be used to determine how much of the commission paid (i.e. 'benefit') must be clawed-back:</p> $\frac{\text{Benefit} \times \text{Aggregate reduction}}{\text{New policy cost}}$ <p>'Aggregate reduction' means the amount by which the policy cost for the second year (determined immediately after the reduction) is less than the policy cost for the second year (determined immediately after the client-initiated increase).</p> <p>'New policy cost' means the part of the policy cost payable for the second year (determined immediately after the client-initiated increase) that is payable because of the client-initiated increase.</p> <p>For example, if the policy cost for the second year began at \$1,100, then increased to \$1,200 due to a client-initiated increase, the maximum commission from the client-initiated increase would be \$60 (i.e. \$100 multiplied by 60%).</p> <p>If a \$60 commission were paid and the policy cost then reduced in the second year to \$1,000 (i.e. below the policy cost for the second year), the clawback amount would be 100% of the commission from the client-initiated increase (i.e. \$60 would be clawed back).</p> <p>If, however, the policy cost reduced in the second year to \$1,150 (i.e. less than the increased amount, but more than the policy cost before the client-initiated increase), the clawback amount would be \$30 (i.e. \$60 multiplied by (\$1,200 minus \$1,150) divided by \$100).</p> <p>ASIC Instrument 2017/510 notes that each application of section 6(14) gives rise to a separate clawback amount. This means that when there have been two commissions (e.g. from the issue of the product and from a client-initiated increase), a particular trigger event can result in separate clawback amounts being calculated for each commission.</p>

Source: See section 6 of [ASIC Instrument 2017/510](#).

Note: When determining the policy cost for a product for the first year or the second year at a particular time, the policy cost for the year at that time is taken to be the amount that would have been the policy cost for the year if the product had been held on the terms and conditions applying at that time for the whole of the year: see section 6(18) of [ASIC Instrument 2017/510](#).

E Performance benefits for employees

Key points

Some performance benefits for employees who provide advice to clients may be conflicted remuneration.

Relevant factors that an employer should consider when giving a performance benefit include:

- the eligibility criteria for the performance benefit and how difficult it is to meet these criteria;
- the weighting of the benefit in relation to an employee's total remuneration; and
- what involvement the employee has in the advice-giving process.

Performance benefits and conflicted remuneration

- RG 246.91 The ban on conflicted remuneration may affect performance benefits given by an employer (e.g. an AFS licensee or authorised representative) to employees who provide advice to clients.
- RG 246.92 The ban on conflicted remuneration does not prohibit employees who provide advice to clients from receiving performance pay. However, it does affect how these arrangements may be structured.
- RG 246.93 A representative of an AFS licensee, other than an authorised representative, is not prohibited from accepting a 'conflicted' performance benefit that is given to them by their employer: see s963H. However, their employer, or an employer of a licensee, must not give its employees conflicted remuneration for work they carry out as an employee: see s963J.
- RG 246.94 Performance benefits for employees may include:
- (a) bonuses;
 - (b) pay rises;
 - (c) promotion or other forms of recognition;
 - (d) reward-focused entertainment or travel; and
 - (e) shares or options in the employer's business (see RG 246.139–RG 246.144).
- Note: This is not intended to be an exhaustive list.
- RG 246.95 These benefits are only conflicted remuneration if they could reasonably be expected to influence the advice given by an employee where the employee is an AFS licensee or one of its representatives.

- RG 246.96 We recognise that not all performance benefits provided to employees could reasonably be expected to influence the advice they provide.

Example 7: A bonus paid to a financial adviser (not conflicted remuneration)

Scenario

A financial adviser who is a representative of an AFS licensee and provides advice to clients receives a \$5,000 bonus from their licensee.

The bonus is paid in recognition of:

- high levels of customer satisfaction;
- an increase in customer referrals;
- an outstanding compliance rating; and
- developing referral networks with other professional services firms.

Commentary

The bonus is unlikely to be conflicted remuneration because it would not reasonably be expected to influence the advice given by the adviser.

- RG 246.97 Some performance benefits are entirely volume based. In these situations, we consider it would be difficult for the employer to rebut the presumption that the benefit is conflicted remuneration. For guidance on considerations that may be relevant in rebutting the presumption, see Section F and RG 246.120.

- RG 246.98 A performance benefit calculated on remuneration that is excluded from being conflicted remuneration may still be conflicted remuneration if it could reasonably be expected to influence the advice provided and it is not itself excluded from the provisions.

Example 8: Remuneration for a financial adviser

Scenario

A financial adviser (a representative) receives a base salary of \$80,000 to service the client base of their employer who is an AFS licensee. The work they do for their employer includes attending half-yearly meetings with some of the licensee's clients, responding to telephone queries and providing quarterly portfolio reports.

For the ongoing service, clients pay an annual percentage-based fee to the AFS licensee calculated using the value of financial products that they have acquired based on the advice provided by the licensee's advisers (an asset-based fee). Each year the adviser's salary is adjusted to reflect any increase in the asset-based fees paid by the clients they advise.

Commentary

The asset-based fees paid by clients to the AFS licensee would not be conflicted remuneration if the payments are for the provision of financial services to the client (see s963A(1)(b) and Section C).

However, how the ban on conflicted remuneration applies to the salary increases by the employer to the employee needs to be considered separately.

In this case, access to, and the value of, the future salary increases depend on the value of financial products acquired by the adviser's clients. The benefit would be presumed to be conflicted remuneration because it is volume based: see s963L. To rebut the presumption, the employer needs to show that future salary increases could not reasonably be expected to influence the advice given.

The employer may be able to show that, in the circumstances, the prospect of future salary increases could not reasonably be expected to influence the advice the adviser provides because this does not influence:

- whether the adviser provides product-specific advice (for which asset-based fees are charged) instead of strategic advice; and
- if the adviser provides product-specific advice, which products the adviser recommends.

If this is the case, the future salary increases are not conflicted remuneration.

For more details on how to evaluate whether a performance benefit is conflicted remuneration, see Table 7.

Evaluating the performance benefit

- RG 246.99 Some employers determine the amount of any performance benefit given to an employee based on a number of differently weighted criteria. This approach is referred to by many employers as a 'balanced scorecard' approach.
- RG 246.100 Often, one or more criteria in the balanced scorecard relate to the volume of financial products recommended or acquired by clients (volume-based criteria). If this is the case, the part of the performance arrangement that is volume based is presumed to be conflicted remuneration under s963L. The onus is on the employer to show that it is not conflicted remuneration, taking into account all the circumstances.
- RG 246.101 Some of the types of non-volume-based criteria on which a balanced scorecard may be based include:
- (a) compliance with the law;
 - (b) meeting the employer's compliance and other corporate policies;
 - (c) the quality of financial advice given by the employee;
 - (d) client satisfaction with the employee;
 - (e) measures of customer loyalty or advocacy, such as the employee's net promoter score;
 - (f) the number of new clients the employee has brought to the business;

- (g) the value of investable assets of the employee’s clients;
 - (h) the amount of time-based fees generated by the employee;
 - (i) the training undertaken by the employee; and
 - (j) the number of complaints received about the employee.
- RG 246.102 A performance benefit based only on non-volume-based criteria is not presumed to be conflicted remuneration.
- RG 246.103 Some of the criteria in a balanced scorecard may be prerequisites for eligibility to receive a performance benefit (a ‘gate opener’), rather than a factor on which the value of the performance benefit is based. For this reason, employers need to evaluate the performance benefit as a whole to determine whether or not it is not conflicted remuneration.
- RG 246.104 In doing this, relevant factors for an employer to consider are likely to include the issues set out in Table 7. For the benefit not to be conflicted remuneration, it must:
- (a) not reasonably be expected to influence the advice given by the employee; or
 - (b) be excluded from the ban on conflicted remuneration (see Section C and Appendix 1).
- RG 246.105 We are less likely to scrutinise performance benefits that are designed to more closely align the interests of employees who provide advice to clients with the interests of their clients—for example a performance benefit that only rewards an employee for providing good quality advice and does not depend on a particular type of product being recommended or the type of advice being provided.

Table 7: Factors to consider when evaluating performance benefits

Factor	Description
Eligibility criteria	<p>What are the criteria that must be met for an employee to be eligible to receive a performance benefit, and could satisfying such criteria reasonably be expected to influence the advice given? For example, a relevant consideration is whether eligibility criteria explicitly or implicitly encourage the recommendation of a particular product.</p> <p>The more difficult it is to satisfy the eligibility criteria, the less likely it is that the performance benefit could reasonably be expected to influence the advice given. One way to measure this might be by reference to the proportion of employees who are able to meet the criteria.</p>
Purpose of the benefit	<p>What behaviour does the employer appear to be trying to encourage through the performance benefit? For example, the criteria that make up the balanced scorecard may appear to be designed to encourage an employee to recommend that clients acquire specific financial products regardless of their interests, which means the performance benefit is likely to be conflicted remuneration. It may also cause advice to be given that does not comply with the best interests duty and related obligations in Div 2 of Pt 7.7A.</p>

Factor	Description
Weighting of the benefit in relation to total remuneration	What is the relative proportion of the benefit compared to the employee's overall remuneration? For example, the overall remuneration would include the performance benefit and any other forms of remuneration (e.g. salary).
Link between the benefit and the advice	How direct is the link between the performance benefit and the value or number of financial products recommended or acquired by clients, based on the advice provided by the employee? For example, a performance benefit is more likely to be conflicted remuneration if it contains a criterion based on the volume of product sales compared with one that contains a criterion based on the profitability of an employee's business unit: see RG 246.106.
Involvement of recipient in the advice-giving process	How directly involved in the advice-giving process is the recipient of the benefit? For example, if the recipient of a benefit helps prepare the advice but does not provide input into the recommendations that are made to a client, the performance benefit is less likely to be conflicted remuneration.
Environment in which the benefit is given	<p>In addition to the factors above, it is also relevant to consider whether the benefit is given in an environment that encourages the provision of good quality advice that is in the client's interests.</p> <p>This could be specifically evidenced if, to qualify for the benefit, the recipient must also satisfy other criteria, such as criteria based on the quality of advice given, consumer satisfaction, and compliance with internal processes and legal requirements.</p> <p>It may also be relevant to consider non-performance-based practices, such as:</p> <ul style="list-style-type: none"> • training; • monitoring and supervision; and • workplace policies and procedures, including the consequences of not complying with such policies and procedures.
Excluded benefits	If part of a performance benefit is not conflicted remuneration because one or more exclusions apply, it is not relevant to consider that part of the benefit in determining whether the rest of the performance benefit is conflicted remuneration.

Remuneration based on total profitability

RG 246.106 If an employee is remunerated based on the total profitability of their employer or the business unit in which they work, and not the employee's individual sales, this would not be conflicted remuneration if the size of the business unit is large enough that the impact of the individual employee's sales on the profitability of the employer or the relevant business unit could not reasonably be expected to influence the advice given.

Keeping records

RG 246.107 We expect employers to keep records of how an employee's performance benefit has been calculated. Among other things, the employer's remuneration policy and documentation for how individual performance benefits are calculated are relevant records. Keeping records is essential to help the employer show that the presumption in s963L can be rebutted.

Transitional arrangements for remuneration for employees of an ADI

- RG 246.108 Monetary and non-monetary benefits given to agents and employees of Australian authorised deposit-taking institutions (ADIs) have previously been subject to an exception from the definition of conflicted remuneration in the following circumstances:
- (a) the benefit is, in whole or in part, remuneration given to the licensee or representative for work carried out (or to be carried out) as agent or employee of the ADI or otherwise acting by arrangement with the ADI under the name of the ADI;
 - (b) access to the benefit or the amount of the benefit in whole or in part is dependent on the licensee or representative recommending a basic banking product, general insurance product or consumer credit insurance (and the advice on any combination of those products does not involve advice on other unrelated financial products) (see s963D and reg 7.7A.12H).

- RG 246.109 This exception will be repealed from 10 January 2025 (see s1708D and reg 10.52.02). From this date, entering arrangements (or varying existing arrangements) in order to give the benefits, and giving the benefits (whether in accordance with an arrangement or outside of an arrangement) will be prohibited.

Note: Transitional arrangements apply for remuneration paid under arrangements existing at this time until the giving of benefits under the arrangement is varied (including by the end of the arrangement).

- RG 246.110 The removal of the exception is not intended to prevent ADIs from providing their employees with performance-related benefits and incentives under a balanced scorecard approach that includes a broad range of criteria (see RG 246.99–RG 246.101 and Table 7).

Performance benefits relating to life risk insurance products

- RG 246.111 The ban on conflicted remuneration applies to performance benefits relating to advice on life risk insurance products, unless an exemption applies.
- RG 246.112 As noted at RG 246.10–RG 246.12, certain benefits that relate to information given on, or dealing in, a life risk insurance product are considered to be conflicted remuneration. These benefits will not be conflicted remuneration if the benefit could not reasonably be expected to influence whether the AFS licensee, or its representative:
- (a) gives the information to the person, or the way in which the licensee or representative presents the information in giving it to the person; or

- (b) deals in the life risk insurance product, or the way in which the licensee or representative deals in the life risk insurance product (see regs 7.7A.11C–7.7A.11D).

RG 246.113 The principles set out in this section and the factors in Table 7 are relevant to the determination of whether performance benefits paid to persons that give information on, or deal in, life risk insurance products could not reasonably be expected to have such an influence.

Example 9: Remuneration to employees of a direct life insurer

Scenario

A life insurer employs sales staff to sell its products to customers over the telephone. The sales staff give information to customers about the life risk insurance products they are selling (they do not give advice). The sales staff are paid using a 'balanced scorecard' approach.

The balanced scorecard includes various elements that must be satisfied before a bonus will be paid. The elements relate to customer satisfaction, compliance with legal obligations, adherence to internal operating policies and call scripts, and a volume-based element based on the number of life risk insurance products purchased as a result of the information given to clients.

Commentary

Unless an exclusion applies, the bonus paid under the balanced scorecard will be considered to be conflicted remuneration because access to the bonus is dependent on the number of life risk insurance products acquired as a result of information given by the sales staff: see reg 7.7A.11B(1).

However, an exclusion will apply and the benefit will not be conflicted remuneration if it could not reasonably be expected to influence whether sales staff give information to customers, or the way in which sales staff present information to customers: see reg 7.7A.11C.

Whether this is the case will depend on the criteria of the balanced scorecard, and the different weightings applied to the criteria. If significant weight is placed on the volume-based criteria, it is likely that the benefit will be conflicted remuneration.

If, however, the weighting of the balanced scorecard predominantly favours the non-volume-based criteria, it is more likely that the bonus will not influence the information given to customers and will, therefore, not be conflicted remuneration.

F Volume-based benefits

Key points

Volume-based benefits that are wholly or partly dependent on the total number or value of financial products recommended to, or acquired by, clients are presumed to be conflicted remuneration.

Factors to consider in showing that a volume-based benefit is not conflicted remuneration include the connection of the benefit to the advice, how to access the benefit, the value of the benefit and the content of the advice.

Volume-based benefits and conflicted remuneration

RG 246.114 There is a presumption that volume-based benefits are conflicted remuneration: see s963L. A benefit is volume based if access to the benefit or the value of the benefit is wholly or partly dependent on the total number or value of financial products:

- (a) recommended to clients by an AFS licensee or its representatives; or
- (b) acquired by clients to whom a licensee or its representatives provide advice.

Note 1: A non-volume-based benefit may also be conflicted remuneration if it could reasonably be expected to influence the advice given. This is not covered by the presumption in s963L.

Note 2: The presumption in s963L also applies to volume-based benefits in relation to advice on life risk insurance products, unless an exclusion applies.

RG 246.115 A benefit may be a volume-based benefit if, for example, it is:

- (a) calculated as a fixed percentage (e.g. 1%) of all client funds invested in financial products based on the recommendations of a representative;
- (b) calculated based on a sliding scale, such as:
 - (i) 0.5% for the first \$10 million in client funds invested based on the recommendations of a representative;
 - (ii) 0.75% for amounts over \$10 million and less than \$20 million; and
 - (iii) 1% for amounts over \$20 million; or
- (c) a flat fee that will only be paid if a threshold based on the number or value of financial products recommended by an AFS licensee or its representatives, or acquired by their clients, is met—for example, a \$12,000 bonus that is only paid if client funds in a particular financial product exceed \$20 million.

- RG 246.116 In these cases, either the value of, or access to, the benefit is dependent on the total value of financial products acquired, based on the recommendations of an AFS licensee or its representatives.
- RG 246.117 Some asset-based fees paid by clients are a volume-based benefit. However, the fee will not be conflicted remuneration where it is a benefit given by the client: see s963A(1)(b).
- RG 246.118 It is up to the party seeking to prove that a volume-based benefit is not conflicted remuneration to rebut the presumption and show that the benefit is not one that could reasonably be expected to influence the advice.

Example 10: White-label arrangements (conflicted remuneration)

Scenario 1

A platform operator provides a white label platform to an AFS licensee that labels the platform as its own. The sub-plans on the platform are the same as the sub-plans the platform operator uses for white label arrangements it has with other licensees.

The client pays the platform operator a bundled fee for administration services provided by the platform operator and promotion and distribution services provided by the AFS licensee. The fee is split between the platform operator and the licensee.

Note: A 'white label' arrangement for a platform is an arrangement where an AFS licensee enters into contractual arrangements with a platform operator to rebrand the platform operator's platform to make it appear as its own—that is, the platform is 'badged' or 'promoted' by the licensee.

Scenario 2

A responsible entity provides a white label registered scheme to an AFS licensee that labels the scheme as its own.

The client pays the responsible entity a bundled fee for administration services provided by the responsible entity and promotion and distribution services provided by the AFS licensee. This fee is split between the responsible entity and the licensee.

Commentary

In both scenarios, to the extent that the share of the fee between the platform operator/responsible entity and the AFS licensee is volume based, any volume-based margin accessed by the licensee would be presumed to be conflicted remuneration.

Example 11: Benefits given to an authorised representative (conflicted remuneration)

Scenario

An authorised representative is self-employed as a financial adviser and provides advice to clients.

One of the products on which the authorised representative gives advice is the preferred platform of the AFS licensee that authorises the authorised representative to provide advice on the licensee's behalf.

The authorised representative pays the AFS licensee a 'licensee fee' every quarter for the services the licensee provides to the authorised representative (e.g. compliance support). This fee is offset against the money the licensee pays the authorised representative for the revenue the authorised representative generates.

If client funds held in products that are available through the preferred platform increase by \$4 million in a quarter, the AFS licensee will waive the licensee fee for that quarter.

Commentary

The fee waiver is volume based and is presumed to be conflicted remuneration.

Rebutting the presumption in s963L

RG 246.119 The presumption in s963L could be rebutted by showing that, for example:

- (a) the value of the benefit is not significant enough that it could reasonably be expected to influence the advice given to a client; or
- (b) how the benefit is accessed could not reasonably be expected to influence the advice given to a client.

RG 246.120 Whether the presumption can be rebutted needs to be assessed objectively, based on the circumstances as a whole. Considerations that may be relevant include:

- (a) the connection between the benefit and the advice that is provided to clients;
- (b) how often the AFS licensee or its representatives who receive the benefit provide advice to clients;
- (c) the value of the benefit, including relative to the total remuneration of the licensee or its representatives;
- (d) what a licensee or its representatives need to do to access the benefit;
- (e) the content of the advice; and
- (f) who is advantaged by the benefit.

Examples of volume-based benefits

RG 246.121 Set out below are examples of volume-based benefits and whether the presumption in s963L may be rebutted in those circumstances.

Note: In some situations, an AFS licensee or its representatives may be able to show that a performance benefit that is volume based is not conflicted remuneration: see Section E.

Benefits that are passed on to the client

- RG 246.122 Some AFS licensees and representatives—typically, authorised representatives—receive volume-based benefits and pass on the whole amount to their clients. We think it is unlikely that the benefit is conflicted remuneration if:
- (a) it is promptly passed on to the client (as soon as practicable but no later than three months after receiving the benefit) by the licensee or its representatives that accept the benefit; and
 - (b) the licensee or its representatives accept the benefit on the condition that it will be passed on to the client.
- RG 246.123 In this situation, the benefit is unlikely to influence the advice provided.
- RG 246.124 In many cases, a product issuer or seller may be able to satisfy itself that it is not giving an AFS licensee or its representatives conflicted remuneration if:
- (a) the benefit is given on the condition that it is passed on in its entirety to the client; and
 - (b) a product issuer reasonably believes the benefit will be passed on.

Benefits that are not passed on to the adviser

- RG 246.125 Some AFS licensees receive benefits, which are often volume based, from platform operators and other product issuers but do not pass on these benefits, or any portion of them, to the individual representatives who provide the advice to clients.
- RG 246.126 Instead, the AFS licensee uses the benefit to pay for its operating expenses. It may also pass on a portion of the benefit to an authorised representative to help pay for the authorised representative's operating expenses. The authorised representative does not pass on this benefit to individual representatives who provide the advice to clients.
- RG 246.127 When this occurs, we are less likely to scrutinise the benefit under the ban on conflicted remuneration if there are controls in place to ensure that the benefit does not influence the advice given by representatives of the AFS licensee.

Note: For information on implementing and maintaining policies in the context of conflicts management arrangements, see Regulatory Guide 181 *Licensing: Managing conflicts of interest* ([RG 181](#)). For more information on how the ban on conflicted remuneration applies to non-monetary benefits (e.g. information technology costs), see Appendix 1.

Example 12: Benefits that are not passed on to the adviser (not conflicted remuneration)

Scenario

An AFS licensee receives a commission from a platform operator but does not pass on any portion of the commission to its advisers who provide advice to clients on behalf of the licensee. Instead, the licensee uses the benefit to pay for its operating expenses, such as information technology costs.

Commentary

We are less likely to scrutinise the benefit if the AFS licensee can show, or a product issuer or seller can rely on the licensee showing, that:

- no portion of the benefit is passed on to an individual who provides advice to a client;
- the platforms and the products its advisers can recommend to clients are not selected based on the potential value of the benefit the licensee receives from the platform operator or other product issuer (e.g. it could show this by demonstrating it has robust policies that are implemented and maintained for platform and product selection);
- it does not promote any specific platform or other product to its individual advisers or clients other than by way of general adviser education that is equally available for all platforms and products its advisers can recommend to clients; and
- it makes available a diverse range of platforms and has an extensive list of products its advisers can potentially recommend to clients.

In this situation, we think it is unlikely that the benefit could reasonably be expected to influence the advice given to a client. This is because the individual adviser does not receive any portion of the benefit, and the AFS licensee does not influence the specific products (if any) that its advisers recommend to clients. We expect licensees to continually monitor the products being recommended by their advisers in order to identify whether in fact there does appear to be an influence on the advice being given to clients.

If the benefit is volume based, the onus is on the AFS licensee to show that the benefit is not conflicted remuneration. We expect the licensee to keep sufficient records relating to the benefit to be able to show that the benefit could not reasonably be expected to influence the advice.

We also think it is unlikely that the benefit could reasonably be expected to influence the advice given to a client if the AFS licensee passed on a portion of the benefit to an authorised representative that also uses the benefit to pay for its operating expenses, and the authorised representative can show the matters listed above.

White label stockbroking platforms and securities dealers

RG 246.128 Where an AFS licensee that is not a market participant outsources trading activities on licensed markets to a third-party market participant, this is usually done through a white label stockbroking platform offered by the

market participant. The licensee (known as a ‘securities dealer’) promotes the market participant’s trading platform to make it appear as its own.

- RG 246.129 The main purpose of the platform is to provide execution services to clients. However, the securities dealer might also give personal advice or general advice in the form of research about financial products and markets.
- RG 246.130 While many business models exist, clients generally pay the market participant a product-neutral, percentage-based fee on all transactions conducted through the platform (‘brokerage’). The market participant then passes a portion of this fee back to the securities dealer.
- RG 246.131 If the brokerage paid by a client to a market participant for executing transactions is subsequently passed on to the securities dealer, there is an exclusion from the ban on conflicted remuneration that may apply, provided that neither the market participant nor the securities dealer give personal advice to the client for the relevant transaction, and certain other conditions are met: see reg 7.7A.12D(1A) and Appendix 1.
- RG 246.132 If a securities dealer receives a portion of brokerage, which is volume based, from a market participant for executing transactions and reg 7.7A.12D(1A) is not satisfied (e.g. because personal advice has been given to the client to which the transaction relates), this is presumed to be conflicted remuneration under s963L, unless an exclusion applies.
- RG 246.133 If no exclusion applies, the securities dealer needs to rebut the presumption in s963L and show that the benefit received is not conflicted remuneration.

AFS licensees that are platform operators (or other product issuers)

- RG 246.134 If an AFS licensee is a platform operator or other product issuer, some benefits provided to the licensee in its capacity as a platform operator or other product issuer may be conflicted remuneration. This may be the case if the increased use of the platform or other product would increase the benefit given to the licensee (e.g. management fees for the product).
- RG 246.135 For example, some payments made to an AFS licensee that operates a platform under a private label arrangement might also be conflicted remuneration. This is because the benefits are given to a licensee, or its representatives, who provide advice to clients. The ban on conflicted remuneration applies regardless of whether the licensee provides other financial services connected with the financial products they issue, such as a platform.

Note: A ‘private label’ arrangement for a platform is where an AFS licensee is also a platform operator, although it typically outsources the administration of the platform to another platform operator.

RG 246.136 If the benefit is volume based, the onus is on the AFS licensee to rebut the presumption in s963L and show that the volume-based benefits are not conflicted remuneration. The licensee can do this by showing that the benefit could not reasonably be expected to influence the advice given.

Relevant factors

- RG 246.137 Factors that are relevant in determining whether a benefit is conflicted remuneration when it is accepted by an AFS licensee that is also a platform operator (or other product issuer) include:
- (a) those listed at RG 246.27 (e.g. what reasonably appears to be the likely reason why the benefit is being given);
 - (b) what benefit is generated by a recommendation of the licensee to acquire, hold or increase a client's interest in a product it also issues; and
 - (c) whether the product fees received by the licensee in its capacity as a platform operator (or other product issuer) are a benefit that could reasonably be expected to influence the advice.
- RG 246.138 We consider that the following examples involve payments that are conflicted remuneration.

Example 13: Preferred marketing payment (conflicted remuneration)

Scenario

A funds manager makes a payment (either volume based or a flat fee) to an AFS licensee that is also a platform operator to get preferred marketing access to the licensee's advisers.

Commentary

Such a payment is conflicted remuneration whether or not the AFS licensee is also a platform operator. This is because the licensee's advisers are more likely to recommend that a client acquire the funds manager's products through the platform.

Example 14: Volume bonuses (conflicted remuneration)

Scenario

A funds manager makes a payment to an AFS licensee that is also a platform operator. The payment is based on the volume of the funds manager's products acquired by clients of the licensee's advisers.

Commentary

The payment is presumed to be conflicted remuneration under s963L. The AFS licensee may be able to rebut the presumption if it can show that the payment could not reasonably be expected to influence the advice given to clients (e.g. if the payment is not passed on to advisers: see Section B and RG 246.127).

Equity arrangements

- RG 246.139 Equity arrangements involve giving shares or other interests in an AFS licensee's business. Depending on how the arrangement is structured, it may enable representatives to receive volume-based payments in the form of dividends or other profit-sharing benefits, which may be conflicted remuneration.
- RG 246.140 Equity arrangements with a representative may be put in place to more closely align the interests of the representative with the ongoing success of the AFS licensee's business. For example, the profitability of the licensee is likely to improve as more fee-for-service revenue from clients is received based on advice given by representatives on behalf of the licensee. This, in turn, is likely to mean increased dividends for representatives with shares in the licensee's business.
- RG 246.141 An equity arrangement is only conflicted remuneration if it could reasonably be expected to influence the advice that the representative gives.

Relevant factors

- RG 246.142 Factors that are relevant in determining whether an equity arrangement with a representative is conflicted remuneration include:
- (a) how direct the link is between the value of the equity arrangement and the value or number of financial products recommended or acquired based on the advice of the representative (e.g. a benefit is less likely to be conflicted remuneration if it is not dependent on the type of financial products acquired by clients or the type of advice given);
 - (b) the remuneration a representative is eligible to receive from the equity arrangement (e.g. dividends);
 - (c) the potential value of the equity interest;
 - (d) the portion of the AFS licensee's business that involves, or is dependent on, remuneration generated from providing advice to clients; and
 - (e) the criteria a representative needs to satisfy to be eligible for an equity interest in the licensee's business (e.g. a benefit is more likely to be conflicted remuneration if eligibility is based on meeting financial product sales targets).
- RG 246.143 RG 246.120 sets out other considerations that may be relevant in showing whether an equity arrangement is conflicted remuneration.
- RG 246.144 Apart from equity arrangements with representatives, other types of equity arrangements may also be conflicted remuneration.

Example 15: A white label platform arrangement (conflicted remuneration)**Scenario**

An AFS licensee company (the promoter) is established to operate a white label platform arrangement. The promoter issues shares to another licensee that is a financial planning business. The financial planning business includes the promoter's white label platform on its approved product list. The promoter pays regular dividends to the financial planning business as a shareholder, based on the profit derived from the white label platform arrangement.

Commentary

A benefit given under this arrangement is presumed to be conflicted remuneration under s963L because it is a volume-based payment. It is up to the promoter or the financial planning business to show that the arrangement is not conflicted remuneration because it could not reasonably be expected to influence the choice of financial products (in this case the platform) recommended by the financial planning business and its representatives.

Management or administration fees charged by product issuers

- RG 246.145 The ban on conflicted remuneration may prevent product issuers—such as trustees of superannuation funds, responsible entities and platform operators—from giving advice to a client to increase or maintain their investment or other interest in the issuer's products. This is because such advice may result in increasing, or maintaining, the management or administration fees payable, which is often based on the volume of funds the client holds in the product.
- RG 246.146 We will not take action against product issuers for breaching the ban on conflicted remuneration if they breach the provisions only because they provide general advice about their own products and accept management or administration fees for those products.
- RG 246.147 In relation to a responsible entity of a registered scheme, we will also not take action for any breach of s601FC(1)(k) as a result of the unlawful payment. Section 601FC(1)(k) requires, among other things, that a responsible entity ensures that all payments out of scheme property, such as management fees, are made in accordance with the scheme's constitution and the Corporations Act.
- RG 246.148 The no-action positions in RG 246.146–RG 246.147 only apply if the product issuer does not provide any personal advice about products that it issues or about products of that class.

Note: An ASIC no-action position merely states our current intention not to take regulatory action on a particular state of affairs or conduct. It does not preclude third parties from taking legal action on conduct covered by the no-action position: see Regulatory Guide 108 *No-action letters* ([RG 108](#)).

Volume-based benefits for life risk insurance products

RG 246.149 The presumption in s963L applies to benefits relating to advice on life risk insurance products, unless an exemption applies.

RG 246.150 However, the presumption in s963L does not apply to benefits relating to information given on, or dealing in, a life risk insurance product.

Note: Volume-based benefits that relate to information given on, or dealing in, a life risk insurance product are considered to be conflicted remuneration, unless an exclusion applies: see Section D and Appendix 1.

RG 246.151 The principles set out at RG 246.119–RG 246.120, and the principles underlying the examples at RG 246.121–RG 246.144, are relevant when determining whether the exclusions for benefits that do not influence the information given on, or dealing in, a life risk insurance product apply: see regs 7.7A.11C(1)(a) and 7.7A.11D(1)(a).

G Volume-based shelf-space fees

Key points

In addition to the ban on conflicted remuneration, banned remuneration includes benefits given to platform operators that are ‘volume-based shelf-space fees’.

There are exceptions to this ban referred to as the ‘fee-for-service’ exclusion and the ‘scale efficiencies’ exclusion.

We will not take action against a platform operator who accepts a volume-based shelf-space fee if that fee is passed on promptly to clients.

The ban on volume-based shelf-space fees

RG 246.152 Under Div 5 of Pt 7.7A of the Corporations Act, a platform operator is prohibited from accepting a benefit if it is a volume-based shelf-space fee: see s964A(1). As stated in the Revised Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012, the purpose of the ban is to prevent:

... [t]he receipt by platform operators of volume-based benefits to the extent that such incentives are merely a means of product issuers or funds managers ‘purchasing’ shelf space or preferential positions on administration platforms (paragraph 2.61).

RG 246.153 This ban applies if:

- (a) an AFS licensee or a trustee that is a registrable superannuation entity (RSE) licensee (the platform operator) is, or offers to be, the provider of a custodial arrangement;
- (b) a monetary or non-monetary benefit is given, or is to be given, by another AFS licensee or RSE licensee (the funds manager) to the platform operator; and
- (c) a financial product to which the custodial arrangement relates is a financial product in which the funds manager deals (see s964).

RG 246.154 A platform operator, for the purposes of this ban, is typically an operator of an investor directed portfolio service (IDPS), an IDPS-like scheme, a nominee or custody service, or a superannuation master trust.

Note 1: A ‘platform’, for the purposes of the conflicted and other banned remuneration provisions, is defined in the ‘key terms’ at the end of this guide.

Note 2: For more information on IDPSs and nominee and custody services, see Regulatory Guide 148 *Platforms that are managed investment schemes and nominee and custody services* ([RG 148](#)).

- RG 246.155 In particular, platform operators are prohibited from accepting volume-based shelf-space fees from funds managers: see s964A(1). If a platform operator provides advice to clients, the ban on conflicted remuneration in Div 4 of Pt 7.7A is also relevant: see Section E and Section F.
- RG 246.156 A shelf-space fee is a fee for making a funds manager's products available through the platform. It also includes a discount on an amount payable, or a rebate of an amount paid, by a platform operator to a funds manager, if the discount or rebate is for the funds manager's products being made available through the platform.
- RG 246.157 A benefit is generally presumed to be a volume-based shelf-space fee if the benefit, or the value of the benefit, is wholly or partly dependent on the total number or value of the funds manager's financial products to which the custodial arrangement relates: see s964A(2). This includes fees that are based on past, current or projected volumes, even if other factors were considered in determining the value of the benefit: see Example 16. It also includes a fee paid by a funds manager, calculated by reference to each of its products on the platform.
- RG 246.158 The presumption in s964A(2) does not apply to the extent that a platform operator can show that one of the following applies to all or part of the benefit:
- (a) the benefit is 'a reasonable fee for a service provided to the funds manager by the platform operator or another person' (fee-for-service exclusion); or
 - (b) the benefit is 'a discount on an amount payable, or a rebate of an amount paid, to the funds manager by the platform operator, the value of which does not exceed an amount that may reasonably be attributed to efficiencies gained by the funds manager because of the number or value of financial products in relation to which the funds manager provides services to the platform operator, or through the platform operator to another person' (scale efficiencies exclusion) (see s964A(3)).
- Note: Platform operators must also consider their obligations under Pt IV of the *Competition and Consumer Act 2010*.
- RG 246.159 If one or both of these exclusions applies to a benefit, or part of a benefit, the benefit or part of it will not be presumed to be a prohibited volume-based shelf-space fee. However, even if a platform operator believes it can rely on one or both of the two exclusions in s964A(3), it is still possible that the fee is a prohibited volume-based shelf-space fee.

The fee-for-service exclusion

- RG 246.160 Whether the fee-for-service exclusion (see RG 246.158(a)) can be relied on depends on the circumstances of the case. The services provided by the platform operator to the funds manager need to be identified. For the fee to be

reasonable, we consider there should generally be a correlation between the fee and the platform operator's costs in providing the service. We recognise that other factors may be relevant in setting the price of the fee.

RG 246.161 The types of fees to which this exclusion apply include:

- (a) fees charged to cover the platform operator's costs in listing a product on its platform; and
- (b) fees for reporting services provided by the platform operator to the funds manager about clients who have invested in its products and advisers who have recommended its products.

Note: This is not intended to be an exhaustive list.

RG 246.162 We are more likely to scrutinise a fee to determine whether it is a prohibited volume-based shelf-space fee (because the fee-for-service exclusion does not apply) if:

- (a) there was a sudden increase in the fee after the commencement of s964A that is unrelated to the platform operator's costs;
- (b) the fee is based on the value of funds under management (these fees are unlikely to correlate with the platform operator's costs in providing the service);
- (c) the fee is inconsistent with the fees charged for similar services provided to other funds managers; or
- (d) the fee is inconsistent with the average fees charged by other platform operators.

Note: The fee may still not be a prohibited volume-based shelf-space fee to the extent that the scale efficiencies exclusion applies.

The scale efficiencies exclusion

RG 246.163 The scale efficiencies exclusion (see RG 246.158(b)) is mainly designed to apply to situations where the funds manager can realise economies of scale due to the volume of business it generates by placing its products on the platform ('scale efficiencies'). In such a situation, a discount may be given or a rebate may be paid to the platform operator by the funds manager in recognition of these economies of scale.

RG 246.164 To rely on the scale efficiencies exclusion, a platform operator must be able to demonstrate how a rebate or discount was arrived at and how it is referable to scale efficiencies or estimated scale efficiencies gained by the funds manager from distributing its products through the platform.

RG 246.165 One way a platform operator may do this is by receiving and keeping regular and appropriately verified written analyses from the funds manager about its

costs and how the value of the rebate or discount is referable to scale efficiencies or estimated scale efficiencies. The analysis should set out details about how the funds manager's fixed costs (as opposed to costs that vary with each financial product sold) have reduced by reference to the number or value of financial products that are acquired by clients using the platform.

- RG 246.166 The value of the rebate or discount for scale efficiencies will therefore change depending on the number or value of financial products acquired through the platform.
- RG 246.167 A platform operator may rely on other methods to demonstrate that the amount of the discount or rebate is not more than the scale efficiencies. We expect that these other methods would, at a minimum, have the same level of analysis and veracity in demonstrating the scale efficiencies or estimated scale efficiencies as described at RG 246.165.
- RG 246.168 We do not consider that receiving a written confirmation from a funds manager alone that states that a discount or rebate is referable to the scale efficiencies gained by the funds manager without providing further information has the same level of analysis and veracity as described at RG 246.165.

Example 16: A volume-based shelf-space fee (prohibited)

Scenario

A responsible entity enters into a fixed-price contract for three years to rebate an amount of management fees charged to a platform operator. The annual amount is calculated based on the average volume of retail client business that the responsible entity has been able to generate by placing its financial products on the platform over the preceding three-year period. This amount exceeds the actual scale efficiencies gained by the responsible entity in placing its financial products on the platform.

Commentary

The rebate is presumed to be a volume-based shelf-space fee because it is based on the value of the responsible entity's financial products acquired by clients to which the custodial arrangement with the platform operator relates. This is the case even if the rebate is based on the value of products acquired over a particular period in the past.

The platform operator cannot rely on the scale efficiencies exclusion for this rebate because it is not directly referable to the scale efficiencies the responsible entity gains by using the platform.

Example 17: A fee for 'scale efficiencies' (not prohibited)**Scenario**

A responsible entity enters into an agreement for interests in its XYZ Managed Investment Scheme to be made available through a platform.

Under the agreement, a rebate of management fees charged is to be paid to the platform operator based on the estimated scale efficiencies the responsible entity gains by distributing interests in the XYZ Managed Investment Scheme through the platform.

The rebate is reviewed annually based on a statement provided to the platform operator by the responsible entity that contains details about:

- the fixed and variable costs that the responsible entity incurs on interests acquired or held in the scheme through the platform;
- the estimated costs that the responsible entity would have incurred on the products if it had not been able to use the platform but instead offered the products to individual clients directly and the clients held the investments in their own name (these costs have been determined using reasonable assumptions);
- how the difference between these two costs represents the value of the scale efficiencies the responsible entity has been able to realise by selling products through the platform; and
- the calculation of the rebate as a percentage (of no more than 100%) of the value of these efficiencies.

The platform operator also receives an opinion from an expert about the statement, including how the rebate was calculated and the reasonableness of any assumptions used.

Commentary

In this situation, we think it is likely that the scale efficiencies exclusion can be relied on. As mentioned at RG 246.159, even if the scale efficiencies exclusion applies, it is still possible that the fee is a prohibited volume-based shelf-space fee. However, this is unlikely to be the case if the rebate:

- is for the reasonable costs that are likely to be saved by the product issuer as a result of clients acquiring financial products through the platform; and
- is not related to making the products available through the platform.

Passing on a volume-based shelf-space fee to the client

RG 246.169 We will not take action against a platform operator that accepts a fee if that fee is passed on to clients promptly—that is, as soon as practicable but no later than three months after receiving the benefit. In this case, we do not consider that the fee will be regarded as a volume-based shelf-space fee. We consider that taking such an approach is consistent with the overall policy intent of the ban on volume-based shelf-space fees, which is designed to prevent funds managers from purchasing preferential positions on platforms.

- RG 246.170 If a volume-based shelf-space fee is rebated back to clients, the volume-based shelf-space fee is unlikely to influence how platform operators select which products are available on the platform or the prominence they are given.

Non-volume-based shelf-space fees

- RG 246.171 Although the ban on volume-based shelf-space fees in s964A does not extend to non-volume-based fees paid by funds managers to platform operators, platform operators must still comply with the general obligation in s912A(1)(aa) to have in place adequate arrangements to manage conflicts of interest. [RG 181](#) sets out our general approach to assessing compliance with s912A(1)(aa).

Note: A flat fee based on the historical number or value of the funds manager's financial products available through a platform is a volume-based shelf-space fee and is included in the ban in s964A: see RG 246.157.

- RG 246.172 If a platform operator or its representatives also provide advice to clients, the ban on conflicted remuneration may apply: see RG 246.134–RG 246.138.
- RG 246.173 If a platform operator accepts a non-volume-based shelf-space fee, this may be an avoidance scheme to which the anti-avoidance provision applies: see RG 246.199–RG 246.201.

H Asset-based fees on borrowed amounts

Key points

Asset-based fees on borrowed amounts are another type of remuneration that is generally banned under the Corporations Act.

The ban on asset-based fees on borrowed amounts does not apply:

- to brokerage fees;
- if it is not reasonably apparent that an amount is borrowed;
- if the fees are not for providing advice; and
- to financial products that are acquired under a dividend or distribution reinvestment plan.

The general ban on asset-based fees on borrowed amounts

- RG 246.174 An AFS licensee and its authorised representatives that provide advice to clients are generally prohibited from charging asset-based fees on borrowed amounts that are to be used to acquire financial products by or on behalf of a client: see s964D and 964E. If a licensee or its representatives are found to have charged asset-based fees on borrowed amounts, they may be liable for a civil penalty.
- RG 246.175 An AFS licensee also contravenes this general prohibition if one of its representatives (other than an authorised representative) charges an asset-based fee on a borrowed amount used to acquire financial products by or on behalf of a client: see s964D(2).
- RG 246.176 The ban applies regardless of how the amount is borrowed. An amount could be borrowed through secured or unsecured means, including through a credit facility, such as a personal loan or a credit card, or a margin lending facility: see s964G(1). An amount is no longer borrowed if it has been repaid: see s964G(2).
- RG 246.177 The purpose of this ban is to prevent advisers from artificially increasing the size of their advice fees by ‘gearing up’ their clients: see the Hon Bill Shorten MP’s second reading speech to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 on 24 November 2011. ‘Gearing up’ refers to increasing the amount of a client’s portfolio based on borrowed amounts.

Example 18: Asset-based fees charged on a margin loan (prohibited)**Scenario**

An AFS licensee charges a client, to whom it provides advice, an advice fee of 1% of the margin loan, which one of the licensee's advisers has arranged for the client. The purpose of the margin loan is to provide the client with funds that they can invest, based on the advice of the adviser.

Commentary

The AFS licensee is prohibited from charging the client this fee under s964D. It is an asset-based fee charged on a borrowed amount that will be used to acquire financial products on behalf of the client.

It is possible that a client may also contribute some of their own funds (e.g. as initial security for the loan). To the extent that these funds are not borrowed, asset-based fees may be charged.

See RG 246.184–RG 246.185 for more information on how such fees may be charged on a portfolio of products purchased with a combination of borrowed and non-borrowed amounts.

Interaction with the best interests duty

RG 246.178 When an AFS licensee or its authorised representative provides personal advice to a client, they must make inquiries into the client's relevant circumstances to comply with the best interests duty in s961B. In the course of making these inquiries, they are likely to discover if the client is asking them to acquire financial products using money that the client has borrowed.

RG 246.179 The ban on charging asset-based fees on borrowed amounts does not affect the obligation under s961B to make inquiries into the client's relevant circumstances. An AFS licensee and its representatives cannot ignore the information they have discovered in the course of making these client inquiries when determining whether an amount is borrowed for the purposes of the ban on charging asset-based fees on borrowed amounts: see s964D(5) and 964E(4).

Note: See [RG 175](#) and [RG 244](#) for guidance on complying with the best interests duty.

Instalment warrants

RG 246.180 An instalment warrant gives the holder of the warrant a beneficial interest in an underlying financial product. It generally has:

- (a) an equity component, which is paid when the warrant is acquired; and
- (b) a debt component, which is generally a limited recourse loan (i.e. the warrant issuer has no recourse against the warrant holder for repayment of the loan).

- RG 246.181 The holder of the warrant may acquire legal ownership of the underlying financial product by repaying the loan.
- RG 246.182 We consider that the ban on asset-based fees on borrowed amounts applies to the extent that an asset-based fee is referable to the debt component of an instalment warrant. When this is the case, we consider any asset-based fees charged are charged on a borrowed amount used, or to be used, to acquire the instalment warrant by or on behalf of the client: see s964D and 964E.
- RG 246.183 The ban also applies to any borrowed amounts used to purchase the instalment warrant.

Portfolios of products

- RG 246.184 A client may have a portfolio of products purchased with a combination of borrowed and non-borrowed amounts. In this case, we consider that, to charge an asset-based fee, the net value of the portfolio should be determined, and the amount borrowed (less any amount repaid) should then be deducted from this net value. Asset-based fees should only be charged on the resulting value of the portfolio after borrowed amounts are deducted.
- RG 246.185 The proportion of borrowed and non-borrowed assets may change over time—for example, if a client borrows additional amounts to add to their portfolio—and fee arrangements should be adjusted to reflect this.

When the ban does not apply

Brokerage fees

- RG 246.186 The ban on asset-based fees on borrowed amounts does not apply if an asset-based fee is a brokerage fee: see regs 7.7A.17 and 7.7A.18.

If it is not reasonably apparent that an amount is borrowed

- RG 246.187 While the ban applies regardless of how the amount is borrowed, the ban does not apply if it is not reasonably apparent that an amount has been borrowed: see s964D(3) and 964E(2). This is an objective standard based on whether something would be apparent to a person with a reasonable level of expertise in the subject matter of the advice sought by the client, who has exercised care and objectively assessed the information given by the client to the AFS licensee or its representatives: see s964H.
- RG 246.188 This means that the ban on charging asset-based fees does not apply to an AFS licensee or its authorised representative if they do not know that an

amount used to acquire financial products by or on behalf of a client has been borrowed, as long as this fact is not reasonably apparent.

Note: RG 246.178–RG 246.179 discuss how the obligation to make inquiries as part of the best interests duty interacts with the ban on asset-based fees on borrowed amounts.

Example 19: Client borrows money to invest without the adviser's knowledge

Scenario

A client borrows an amount of money for investment purposes from an entity that is unrelated to the client's adviser. The client then seeks personal advice from their adviser. The adviser has no prior knowledge that the client has borrowed funds for investment purposes. The adviser recommends some investments to the client and proposes to charge an asset-based fee for this advice.

Commentary

Generally, the process of making reasonable inquiries about the client's relevant circumstances in the course of providing advice should include inquiries about the source of the funds the client has available to them to invest, and whether they were borrowed. If the adviser is made aware that the client's funds are borrowed, then charging an asset-based fee on financial products purchased with the borrowed amount is prohibited under s964D. In this case, it would not be relevant that the client borrowed the amount before the advice was given.

However, if for some reason the client did not inform the adviser that the funds were borrowed despite reasonable inquiries being made, we consider that it would not be reasonably apparent to the adviser that an amount had been borrowed, and the prohibition would not apply.

The fee is not for providing advice

- RG 246.189 A fee for providing advice to a client is an asset-based fee to the extent that it is dependent on the amount of funds to be used to acquire financial products by or on behalf of the client: see s964F.
- RG 246.190 If a fee charged is not for providing advice, the ban on asset-based fees on borrowed amounts does not apply to the fee. For example, application fees and the interest charged on a loan taken out by a client to purchase financial products are generally not fees for providing advice.

Dividend or distribution reinvestment plans

- RG 246.191 When a client acquires a financial product and participates in a dividend or distribution reinvestment plan in relation to that holding, we consider that the ban on asset-based fees on borrowed amounts does not apply to products issued under the dividend or distribution reinvestment plan. This is because these products are not acquired with borrowed amounts.

I The anti-avoidance provision

Key points

There is a prohibition on arrangements designed to avoid the conflicted and other banned remuneration provisions (the anti-avoidance provision).

In administering the anti-avoidance provision, we are more likely to scrutinise schemes that appear to have no commercial purpose other than to avoid the application of the conflicted and other banned remuneration provisions.

What is anti-avoidance?

RG 246.192 A person must not enter into or carry out a scheme to avoid the application of any provision in Pt 7.7A: see s965. This includes:

- (a) the ban on conflicted remuneration in Div 4 of Pt 7.7A, including where the scheme seeks to avoid the application of the ban to benefits relating to life risk insurance products (see Section B, Section E and Section F);
- (b) the ban on platform operators accepting volume-based shelf-space fees in Subdiv A of Div 5 of Pt 7.7A (see Section G); and
- (c) the ban on charging asset-based fees on borrowed amounts in Subdiv B of Div 5 of Pt 7.7A (see Section H).

RG 246.193 The effect of the anti-avoidance provision is that a person must not, either alone or with other people, enter into or carry out a scheme if:

- (a) it would be concluded that they did so for the sole or non-incidental purpose of avoiding the application of any provision of Pt 7.7A; and
- (b) the scheme or part of the scheme has achieved—or, apart from s965, would achieve—that purpose (see s965(1)).

RG 246.194 A person may be liable for a civil penalty if they are found to have breached s965(1).

RG 246.195 Section 965(1) could potentially apply to a broad range of schemes (e.g. any contract, agreement, plan, proposal, course of action or course of conduct).

Avoidance schemes

RG 246.196 A person may contravene s965 if they enter into or carry out a scheme that meets the criteria in RG 246.193.

RG 246.197 We are more likely to scrutinise schemes that appear to have no commercial purpose other than to avoid the application of the conflicted and other banned remuneration provisions.

Note: The discussion in this section on arrangements to which the anti-avoidance provision applies is not intended to be exhaustive.

Schemes with related parties

RG 246.198 A scheme may be an avoidance scheme if it is structured so that an entity that is related to:

- (a) a person to whom the ban on conflicted remuneration in Div 4 of Pt 7.7A applies—accepts or gives conflicted remuneration;
- (b) a platform operator—accepts a fee that would otherwise be a prohibited volume-based shelf-space fee; or
- (c) an AFS licensee or its authorised representative, to which the ban on charging asset-based fees on borrowed amounts applies—charges a client an asset-based fee on a borrowed amount.

Example 20: Establishing a special purpose AFS licensee (likely to be an avoidance scheme)

Scenario

A platform operator provides a white label or private label platform arrangement to an AFS licensee (Licensee A).

The directors and shareholders of Licensee A are also financial advisers who provide advice to clients. A separate AFS licensee (Licensee B) is established for the labelled platform arrangement to separate it from Licensee A. The financial advisers are also directors and shareholders of Licensee B.

The client pays a fee to the platform operator for administration services as well as distribution services. The administration services are for holding the products through the platform and the reporting that is provided to clients. The distribution services are offering and issuing any financial products available through the platform to clients.

The platform operator gives a portion of the fee to Licensee B. Their portion is a percentage-based share of the fee based on the level of assets held on the platform.

Commentary

While the volume-based fee is received by Licensee B that does not provide advice to clients, the directors and shareholders of the licensee provide advice to clients. This arrangement could reasonably be expected to influence the advice given to clients by Licensee A and its representatives.

Such an arrangement is likely to be an avoidance scheme. This is because the payment would be conflicted remuneration if it were paid to Licensee A. However, in this case, it is not conflicted remuneration because it is paid to Licensee B.

In the circumstances and in the absence of another commercial purpose, it could be concluded that the payment was made to Licensee B for a purpose (i.e. not incidental) of avoiding the application of the ban on conflicted remuneration.

If payments are made by Licensee B to its directors and shareholders, this may also breach the ban on conflicted remuneration.

Non-volume-based shelf-space fees

- RG 246.199 A scheme may be an avoidance scheme if it is structured so that a platform operator is given or accepts a large flat fee that has no connection to:
- (a) the volume of financial products recommended or acquired by clients; or
 - (b) the number or value of financial products available through a platform.
- RG 246.200 Such fees may be used to ‘purchase’ preferential positions on a platform. The purpose of the ban on volume-based shelf-space fees is to prevent such arrangements from occurring.
- RG 246.201 These arrangements may also be a form of conflicted remuneration if the platform operator provides advice to clients, such as in the case of a private label arrangement.

Trading participants and brokerage

- RG 246.202 Regulation 7.7A.12D generally excludes brokerage from being conflicted remuneration if it is given to a trading participant of a prescribed financial market or ASX 24, or its representative: see Appendix 1.
- RG 246.203 The exclusion may apply when a person is a trading participant of one prescribed financial market and trades on another financial market.
- RG 246.204 We are more likely to scrutinise conduct to determine whether the anti-avoidance provision has been breached if:
- (a) a person receives brokerage and is a trading participant of a market;
 - (b) the person’s business does not involve genuine measures to deal on this market on behalf of clients;
 - (c) the person’s business substantially consists of arranging transactions on a different market; and
 - (d) the person is not a trading participant of the different market.
- RG 246.205 This is because we consider this conduct is more likely to be carried out for the purpose (that is not incidental) of avoiding the ban on conflicted remuneration.

Schemes that are unlikely to be avoidance schemes

RG 246.206 In administering the anti-avoidance provision, we are unlikely to scrutinise schemes that are normal commercial transactions conducted in the ordinary course of business.

RG 246.207 We are also unlikely to take action on arrangements that have been genuinely entered into to comply with the ban on conflicted remuneration.

Example 21: Benefits for information technology software and support (not an avoidance scheme)

Scenario

A product issuer offers to provide an AFS licensee with access to software that it owns, which allows the performance of a client's investment in the issuer's products to be monitored. The software can be accessed by all of the licensee's financial advisers.

Commentary

We would not consider the offer to provide access to this software to be an avoidance scheme. Nor would we consider it to be a form of conflicted remuneration because of the exclusion in s963C(1)(d) for providing information technology software and support: see Appendix 1.

Appendix 1: Benefits that are excluded from the ban on conflicted remuneration

RG 246.208 This appendix (Table 8) sets out examples of benefits that are excluded from the ban on conflicted remuneration in Div 4 of Pt 7.7A. It does not include all exclusions from the ban on conflicted remuneration. For example, it does not list conduct that is excluded from all of Pt 7.7A (e.g. see regs 7.7A.40 and 9.12.04).

Table 8: Benefits that are not conflicted remuneration

Type of benefit	Circumstances in which the benefit is given to an AFS licensee or its representatives that provide advice to clients
Benefits given by the client: see s963A(1)(b)	A monetary or non-monetary benefit is not conflicted remuneration if it is given by a client in relation to a financial product or financial service provided by the licensee or representative to the client: see RG 246.39–RG 246.51.
Benefits in relation to general insurance products: see s963B(1)(a), s963BB, s963C(1)(a) and reg 7.7A.12G	<p>A monetary or non-monetary benefit, such as a commission, is not conflicted remuneration if it is given in relation to a general insurance product.</p> <p>Where personal advice is provided, or is likely to be provided, on general insurance products, the exclusion for monetary benefits only applies if the client's informed consent to the monetary benefit has first been given.</p> <p>See RG 246.54–RG 246.58 and INFO 292.</p>
Benefits in relation to life risk insurance products: s963B(1)(b), s963BB and regs 7.7A.11C(1)(b) and 7.7A.11D(1)(b)	<p>A monetary benefit is not conflicted remuneration if it is given in relation to a life risk insurance product.</p> <p>This exclusion only applies if either:</p> <ul style="list-style-type: none"> the benefit ratio for the benefit is the same for the year in which the product or products are issued as it is for each year in which the product or products are continued; or the benefit ratio requirements and clawback requirements are satisfied in relation to the benefit. <p>In addition, where personal advice is provided, or is likely to be provided, on certain life insurance products (as described in section 963B(1)(b)), the exclusion only applies if a client's informed consent to the monetary benefit has first been given.</p> <p>See Section D and INFO 292.</p>
Benefits in relation to consumer credit insurance: see s963B(1)(ba), s963BB, regs 7.7A.11C(1)(c), 7.7A.11D(1)(c)	<p>A monetary benefit is not conflicted remuneration if it is given in relation to consumer credit insurance.</p> <p>Where personal advice is provided, or is likely to be provided, on consumer credit insurance, the exclusion only applies if the client's informed consent to the monetary benefit has first been given.</p> <p>See RG 246.54–RG 246.58 and INFO 292.</p>

Type of benefit	Circumstances in which the benefit is given to an AFS licensee or its representatives that provide advice to clients
Advice fees paid by superannuation trustees with member consent: see s963B(1)(bb)	<p>A benefit is not conflicted remuneration if it is:</p> <ul style="list-style-type: none"> • given to an AFS licensee, or an authorised representative of a licensee, by a trustee of a superannuation fund; • given in relation to financial product advice that is personal advice, which is provided by the licensee or authorised representative to a retail client, about the client's interest in the fund; and • charged against the client's interest in the fund, or against the interests of the client and other members of the fund. <p>For more information, see RG 246.52–RG 246.53.</p>
'Stamping fees': see reg 7.7A.12B	<p>A monetary benefit is not conflicted remuneration if it is a 'stamping fee' given to facilitate an offer to issue or sell a financial product where the purpose of the offer is to raise funds for the person issuing or selling the financial product (i.e. capital raising).</p> <p>A stamping fee is a fee, or part of a fee, that a person, including an issuer of a financial product or a person acting on behalf of the issuer, pays either directly or indirectly to an AFS licensee or its representatives in connection with:</p> <ul style="list-style-type: none"> • an offer by the issuer to issue or sell a financial product; or • an invitation by the issuer for an application to issue or sell a financial product. <p>This exclusion only applies to financial products that are:</p> <ul style="list-style-type: none"> • debentures, stocks or bonds that are, or are proposed to be, issued by a government; • shares in, or debentures of, a body that are, or are proposed to be, listed on a prescribed financial market; • interests in a managed investment scheme that is, or is proposed to be, listed on a prescribed financial market; or • a right to acquire, by way of issue, the shares, debentures or interests referred to in the preceding two bullet points. <p>This exclusion does not apply to interests, or proposed interests, in:</p> <ul style="list-style-type: none"> • a company (other than an infrastructure entity) that is, or is proposed to be, listed and whose main purpose is investing in passive investments; and • a managed investment scheme (other than a real estate investment trust or an infrastructure entity) that is, or is proposed to be, listed.

Type of benefit	Circumstances in which the benefit is given to an AFS licensee or its representatives that provide advice to clients
<p>Purchase or sale of a financial advice business ('buyer of last resort' arrangements): see regs 7.7A.11C(1)(e), 7.7A.11D(1)(e) and 7.7A.12EA</p>	<p>A monetary benefit (purchase price) is not conflicted remuneration to the extent that:</p> <ul style="list-style-type: none"> • the benefit is given to an AFS licensee or its representative; • the benefit is paid as part of the purchase or sale of all or part of the licensee's or representative's financial advice business; and • the price of the financial advice business is calculated using a formula: <ul style="list-style-type: none"> – which is based, in whole or in part, on the number or value of all or part of the financial products held by the licensee's clients or the representative's clients; and – in which the weighting attributed to the financial products issued by the licensee, a related body corporate, or other person is the same as the weighting attributed to other similar financial products. <p>Further, a monetary benefit is not conflicted remuneration if it is given to an AFS licensee or representative as part of the purchase or sale of all or part of the licensee or representative's business in relation to:</p> <ul style="list-style-type: none"> • information given to a person about a life risk insurance product; or • dealing in a life risk insurance product. <p>For more information, see RG 246.59–RG 246.63.</p>
<p>Benefits for advice on interests in a time-sharing scheme: see reg 7.7A.12C</p>	<p>A benefit is not conflicted remuneration if it is given for advice about an interest in a time-sharing scheme.</p>

Type of benefit	Circumstances in which the benefit is given to an AFS licensee or its representatives that provide advice to clients
<p>Brokerage: see reg 7.7A.12D</p>	<p>A monetary benefit is not conflicted remuneration if:</p> <ul style="list-style-type: none"> • the benefit consists of a percentage, of no more than 100%, of a brokerage fee that is given to a trading participant of Asia Pacific Exchange Limited, ASX Limited, Chi-X Australia Pty Ltd, National Stock Exchange of Australia Limited or SIM Venture Securities Exchange Ltd (prescribed financial markets) or ASX 24; and • the trading participant, directly or indirectly, gives the benefit to a representative of the trading participant. <p>A fee is also not conflicted remuneration if:</p> <ul style="list-style-type: none"> • it is paid between a trading participant and another AFS licensee that is not a trading participant (non-trading participant) in respect of dealings by a client through a 'specified service' (see definition below); • each of those trades is executed by the trading participant on behalf of the client; • the fee is a percentage, not exceeding 100%, of a brokerage fee paid directly or indirectly by the client; and • no portion of the benefit is paid to a person other than the trading participant or the non-trading participant. <p>A trading participant is a participant of a market (listed above) admitted under the market's operating rules who is allowed, under the market's operating rules, to deal in one or more of the financial products that are traded on the market.</p> <p>A brokerage fee is a fee that a client pays to a trading participant in relation to a transaction in which the trading participant, on behalf of the client, deals in a financial product that is traded on:</p> <ul style="list-style-type: none"> • a prescribed financial market; • ASX 24; or • a prescribed foreign financial market. <p>A specified service is a service that:</p> <ul style="list-style-type: none"> • is provided for clients under the name or brand name of the trading participant or non-trading participant; • relates to the dealing, on behalf of the client, in a financial product traded on: <ul style="list-style-type: none"> – a prescribed financial market; or – a prescribed foreign financial market; • is provided in either or both of the following ways: <ul style="list-style-type: none"> – by direct electronic access; or – by telephone, but only if direct electronic access is unavailable for a temporary period, or the client expresses a preference for the service to be provided by telephone and neither the trading participant nor the non-trading participant provides advice to the client by telephone for dealings undertaken on the client's behalf; and • is provided in circumstances in which neither the trading participant nor the non-trading participant provides personal advice to the client for the dealing undertaken on the client's behalf.

Type of benefit	Circumstances in which the benefit is given to an AFS licensee or its representatives that provide advice to clients
Benefits with a small value: see s963C(1)(b) and regs 7.7A.11C(2)(b), 7.7A.11D(2)(b), 7.7A.13 and 7.8.11A	<p>A non-monetary benefit is not conflicted remuneration if the value is less than \$300 for each AFS licensee or its representative that is the final recipient of the benefit and identical or similar benefits are not given on a frequent or regular basis.</p> <p>An AFS licensee must keep records of benefits with a value between \$100 and \$300 that are given to the licensee or any of its representatives that give advice: see reg 7.8.11A. We encourage licensees to similarly keep records where the benefit relates to information about a life risk insurance product or dealing in a life risk insurance product.</p> <p>See RG 246.64–RG 246.70.</p>
Benefits with an educational or training purpose: see s963C(1)(c) and regs 7.7A.11C(2)(c), 7.7A.11D(2)(c), 7.7A.14, 7.7A.15 and 7.8.11A	<p>A non-monetary benefit, regardless of who gives it, is not conflicted remuneration if it has a genuine educational or training purpose that is relevant to:</p> <ul style="list-style-type: none"> • if the AFS licensee or representatives gives advice—the carrying on of a financial services business; or • for all AFS licensees or representatives—giving information on life risk insurance products or dealing in life risk insurance products. <p>The benefit must:</p> <ul style="list-style-type: none"> • be for the provision of an education or training course to an AFS licensee or its representative (the participant); or • have the dominant purpose of education or training. <p>Where the benefit is for the provision of an education or training course:</p> <ul style="list-style-type: none"> • education and training activities for the course must take up at least the lesser of six hours a day or 75% of the time spent on the course; and • the participant or their employer or AFS licensee must pay for travel and accommodation relating to the course, and events and functions held in conjunction with the course (e.g. day trips or dinners). <p>Examples of benefits to which this exclusion applies include written material on the tax implications of a product and research on a class of products an adviser gives advice on that would further the adviser’s knowledge about these products.</p> <p>An AFS licensee must keep records of education and training benefits that it or its representatives receive that relate to the carrying on of a financial services business, where the licensee or its representatives gives advice: see reg 7.8.11A. We encourage licensees to similarly keep records where the benefit relates to information on, or dealing in, a life risk insurance product.</p>

Type of benefit	Circumstances in which the benefit is given to an AFS licensee or its representatives that provide advice to clients
<p>Life risk insurance benefits that do not influence advice: see regs 7.7A.11C(1)(a), 7.7A.11C(2)(a), 7.7A.11D(1)(a) and 7.7A.11D(2)(a)</p>	<p>A monetary or non-monetary benefit given to an AFS licensee or its representative in relation to information given to a person on, or dealing in, a life risk insurance product, is not conflicted remuneration if:</p> <ul style="list-style-type: none"> • because of the nature of the benefit, or the circumstances in which it is given, the benefit could not reasonably be expected to influence: <ul style="list-style-type: none"> – whether the licensee or its representative gives the information to the person, or whether the licensee or its representative deals in the product; or – the way in which the licensee or its representative presents the information in giving it to the person, or the way in which the licensee or its representative deals in the product. <p>See RG 246.75.</p> <p>Benefits relating to advice on a life risk insurance product or other financial products are also not conflicted remuneration if they do not influence the advice: see Section B.</p>
<p>Benefits for information technology software and support: see s963C(1)(d) and regs 7.7A.11C(2)(d), 7.7A.11D(2)(d) and 7.8.11A</p>	<p>A non-monetary benefit is not conflicted remuneration if it is for the provision of information technology software or support, and the benefit relates to:</p> <ul style="list-style-type: none"> • providing advice to clients about the financial products issued or sold by the benefit provider; or • giving information on, or dealing in, a life risk insurance product. <p>We consider that the following types of benefit are likely to be covered by this exclusion:</p> <ul style="list-style-type: none"> • software for an administration platform where the benefit is given by the owner or distributor of the software; • access to an information technology 'help desk' for problems that an AFS licensee or its representative experiences in using administration platform software, where the benefit is given by the software owner or distributor; and • access to a website to place client orders. <p>We consider that the following types of information technology software and support are unlikely to be covered by the exclusion:</p> <ul style="list-style-type: none"> • payroll administration software and related support services; • accounting software and related support services to manage the accounts of an AFS licensee's or one of its representative's business; and • anti-virus software. <p>If an AFS licensee receives benefits for information technology software and support and uses them to meet operating costs, we are less likely to scrutinise the benefit under the ban on conflicted remuneration if:</p> <ul style="list-style-type: none"> • the benefit is not passed on to the adviser; and • there are controls in place to ensure that the benefit does not influence the advice. <p>Our views on when this could be the case are discussed at RG 246.125–RG 246.127.</p> <p>An AFS licensee must keep records of information technology software or support that it or its representatives receive that relate to providing advice to clients about the products issued or sold by the benefit provider: see reg 7.8.11A. We encourage licensees to similarly keep records where the benefit relates to information on, or dealing in, a life risk insurance product.</p>

Type of benefit	Circumstances in which the benefit is given to an AFS licensee or its representatives that provide advice to clients
Mixed benefits: see reg 7.7A.12I	<p>Where a portion of a benefit is excluded from being conflicted remuneration, the benefit will continue to be excluded even if:</p> <ul style="list-style-type: none"> • the benefit also relates to other activities, but only to the extent that the part of the benefit that relates to the other activities is not conflicted remuneration; or • the AFS licensee or its representative that provides advice to a client provides other services (whether or not financial services) at the same time. <p>This exclusion does not apply to the extent that the provisions under which the benefit is given state that:</p> <ul style="list-style-type: none"> • the benefit may only relate to particular financial products or services; or • an AFS licensee or its representative must not receive the benefit if they, at the same time, provide other specified financial services. <p>The effect of this exclusion is that, among other things:</p> <ul style="list-style-type: none"> • an excluded benefit may also relate to products that are not financial products (such as credit facilities) unless the provision excluding the benefit provides otherwise; and • an excluded benefit may also relate to other financial services provided: <ul style="list-style-type: none"> – the component that relates to the other financial services is not conflicted remuneration; and – the provision excluding the benefit does not provide otherwise.

Appendix 2: Previously grandfathered benefits

Key points

'Grandfathering' of conflicted and other banned remuneration in relation to advice ended on 1 January 2021.

This appendix provides guidance on:

- The scheme under which grandfathered conflicted remuneration that remains payable on or after 1 January 2021 must be rebated, including the just and equitable test that should be applied to determine the rebate amount; and
- The records that an AFS licensee who is required to rebate conflicted remuneration must keep.

Rebate of previously grandfathered benefits

- RG 246.209 Before 1 January 2021, the ban on conflicted and other banned remuneration under Divs 4 and 5 of Pt 7.7A did not apply to certain 'grandfathered' benefits.
- RG 246.210 Previously grandfathered benefits that are given from 1 January 2021 are subject to the ban on conflicted and other banned remuneration, including where the legal obligation to give the benefits accrued before 1 January 2021 (e.g. where a product issuer is legally obliged to give an AFS licensee a benefit in December 2020, but does not give the benefit until on or after 1 January 2021).
- RG 246.211 Amendments to the Corporations Regulations by the *Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Regulations 2019* (Ending Grandfathered Conflicted Remuneration Regulations) provided for a rebating scheme for grandfathered benefits that would have been paid as conflicted remuneration: see regs 7.7A.15AJ–7.7A.15AK. Under this scheme, conflicted remuneration for advice that remains payable on or after 1 January 2021 must be rebated by a covered person to a product holder instead of being paid to an AFS licensee or its representatives.
- RG 246.212 A covered person is a person who would be legally obliged to pay conflicted remuneration to another person on or after 1 January 2021 but for the ban on conflicted remuneration in Div 4 of Pt 7.7A: see s963M and reg 7.7A.15AK. Generally, a covered person is a product issuer.

Note: A covered person who fails to pay an amount or monetary benefit in accordance with the Ending Grandfathered Conflicted Remuneration Regulations is liable to a civil penalty: see s963P and 1317E(3).

- RG 246.213 A product holder includes:
- (a) a client who received, or was legally entitled to receive, advice in connection with the conflicted remuneration; and
 - (b) a person who holds the same financial products (or products in the same class) as those for which the conflicted advice was provided (see s963N(2) and (3)).
- RG 246.214 Generally, a product holder is a person who holds a product directly or indirectly through a third party that holds the product on that person's behalf. If a financial product is held by a person on behalf of another person, both people are product holders.
- RG 246.215 The obligation on a covered person under the rebating scheme extends only to payments of conflicted remuneration banned under Subdiv C of Div 4 of Pt 7.7A. It does not extend to other remuneration banned under Div 5 of Pt 7.7A such as volume-based shelf-space fees and asset-based fees on borrowed amounts.

Just and equitable test

- RG 246.216 The amount paid, or the amount of the monetary benefit provided, to a product holder under a rebating scheme must be an amount that is just and equitable in the circumstances: see reg 7.7A.15AK(2).
- RG 246.217 The matters that a covered person should consider when determining whether an amount is just and equitable are:
- (a) the amount of the conflicted remuneration that would have been payable;
 - (b) the amount invested by each product holder in the financial products—generally, for an amount to be just and equitable, a product holder with more invested should receive a larger rebate;
 - (c) the structure of the fees (if any) that the product holder has paid for those financial products—this is relevant to determining whether the product holder has incurred the cost of the conflicted remuneration and should therefore receive a rebate;
 - (d) the extent to which the sum of the amounts to be paid and the amount of the monetary benefits to be provided to the product holder equals the amount of, or the present value of, the conflicted remuneration (see RG 246.222–RG 246.223); and
 - (e) any other relevant matter—for example, a factor that is unique to an individual product holder that could help to determine the rebate that the specific product holder receives (see reg 7.7A.15AK(3)).

- RG 246.218 The just and equitable test is intended to give some flexibility to a covered person so that the rebate amount provided does not need to precisely match the amount of conflicted remuneration. However, the matters listed in RG 246.217 have the effect that the total amount of monetary benefits provided to a product holder must, in aggregate, closely match the conflicted remuneration that would otherwise have been paid by the covered person.
- RG 246.219 A nil amount for a particular product holder may be just and equitable if the product holder holds the financial product on behalf of another product holder.
- RG 246.220 It is possible for a product holder to incur the cost of conflicted remuneration, even though that product holder has never received advice. In these cases, whether or not the product holder received advice, including whether or not the covered person has records of the product holder receiving advice, will not be a relevant factor in determining if a covered person has distributed a monetary benefit in a just and equitable manner.
- RG 246.221 The cost of providing a monetary benefit to a product holder is not a matter that a covered person can consider when determining whether an amount is just and equitable: see reg 7.7A.15AK(4).

One-off lump sum payments

- RG 246.222 For some financial products, it may be just and equitable to pay a one-off lump sum to a client reflecting the present value of future conflicted remuneration.
- RG 246.223 This approach may be appropriate for products such as annuities if the length of time a client will be in the product is known (e.g. fixed-term annuities or endowments) or if the term can be determined based on life expectancy (e.g. lifetime annuities or whole-of-life conventional products) and the amount of conflicted remuneration to be paid is known.

Example 22: Making a one-off lump sum payment to clients

Scenario

A product issuer is the provider of a fixed-term annuity product to clients. The product issuer is required under contract to pay \$3 million in conflicted remuneration to various dealer groups in relation to 20,000 client accounts on or after 1 January 2021.

The product issuer determines that the cost of funding the \$3 million in conflicted remuneration will be borne by all 20,000 client accounts because all clients pay the same product fee regardless of whether they received advice associated with the conflicted remuneration.

The product issuer decides to rebate the conflicted remuneration by paying a one-off lump sum to all clients that reflects the present value of future conflicted remuneration. The present value of the future conflicted

remuneration is determined by assuming no future voluntary surrender of the product.

Commentary

In this situation, we think it is just and equitable for the product issuer to rebate the conflicted remuneration by paying a one-off lump sum to all clients because the length of time the clients will be in the fixed-term annuity is known.

How benefits can be rebated

- RG 246.224 The conflicted remuneration can be rebated to a product holder by making a payment or providing a monetary benefit: see s963N. A monetary benefit can be provided, for example, by passing previously grandfathered benefits to a product holder in the form of higher interest rates or reducing a product-based fee that a product holder must pay.
- RG 246.225 Providing a monetary benefit by reducing product fees may be suitable in situations when a rebate is to be provided to all product holders.

Timeframe in which rebates must occur

- RG 246.226 A covered person must pay the amount or provide the monetary benefit to a product holder no later than one year after the date by which the covered person is legally obliged (disregarding the ban) to give the conflicted remuneration to another person: see reg 7.7A.15AK(1). This one-year limit allows a monetary benefit to be provided by reducing a product-based fee that is charged on an annual basis.

Record-keeping obligations for AFS licensees

- RG 246.227 An AFS licensee that is a covered person must keep certain records: see reg 7.8.11B. The record-keeping obligations apply to financial records for periods ending after 1 January 2021: see reg 10.33.02.
- RG 246.228 An AFS licensee that is a covered person must keep records of:
- (a) all conflicted remuneration the licensee is legally obliged (disregarding the ban on conflicted remuneration in Subdiv C of Div 4 of Pt 7.7A) to give to another person for a financial year;
 - (b) all amounts paid and monetary benefits provided to clients by the licensee as required by reg 7.7A.15AK for a financial year; and
 - (c) all cases where the licensee determined that an amount that was just and equitable was nil (see reg 7.8.11B(1)).

- RG 246.229 An AFS licensee that is a covered person must also keep records on:
- (a) how the licensee ascertained the identity of the product holders;
 - (b) how the licensee determined the amounts that, in the circumstances, were just and equitable to pay or provide to the product holders, including:
 - (i) nil amounts; and
 - (ii) any discrepancy if the total amount of payments and monetary benefits provided to product holders does not match the conflicted remuneration;
 - (c) the financial product or products to which the conflicted remuneration relates including:
 - (i) the name or names of the product or products; and
 - (ii) any product identification numbers of that product or products;
 - (d) the dates that the licensee was required under reg 7.7A.15AK to pay the amounts or provide the monetary benefits;
 - (e) the date or dates on which the amounts were paid or the monetary benefits were provided; and
 - (f) how the amounts were paid or the monetary benefits were provided (see reg 7.8.11B(2) and (3)).

Key terms

Term	Meaning in this document
ADI	An authorised deposit-taking institution—a corporation that is authorised under the <i>Banking Act 1959</i> . ADIs include: <ul style="list-style-type: none"> • banks; • building societies; and • credit unions
advice	Financial product advice
advice provider	A person to whom the obligations in Div 2 of Pt 7.7A of the Corporations Act apply when providing personal advice to a client. This is generally the individual who provides the personal advice. However, if there is no individual who provides the advice, which may be the case if advice is provided through a computer program, the obligations in Div 2 of Pt 7.7A apply to the legal person that provides the advice (e.g. a corporate licensee or authorised representative)
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition in s9.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act
arrangement	For the purposes of Ch 7 (financial services and markets) has the meaning given in s761B of the Corporations Act
ASIC	Australian Securities and Investments Commission
ASIC Instrument 2017/510	An ASIC instrument (in this example numbered 201/510)
asset-based fee	A fee paid by a client for receiving advice, where that fee is dependent on the amount of funds used or to be used to acquire financial products by, or on behalf of, the client. A fee is an asset-based fee even if it is paid by a third party holding assets on behalf of the client, provided that the client directs the third party to pay the fee
ASX 24	The exchange market formerly known as Sydney Futures Exchange (SFE), operated by Australian Securities Exchange Limited (ACN 000 943 377)

Term	Meaning in this document
authorised representative	A person authorised by an AFS licensee, in accordance with s916A or 916B of the Corporations Act, to provide a financial service or services on behalf of the licensee Note: This is a definition in s9.
avoidance scheme	A scheme to avoid the application of a provision in Pt 7.7A of the Corporations Act
ban on asset-based fees on borrowed amounts	The provisions in Subdiv B of Div 5 of Pt 7.7A of the Corporations Act
best interests duty	The duty to act in the best interests of the client when giving personal advice to a client as set out in s961B(1) of the Corporations Act
best interests duty and related obligations	The obligations in Div 2 of Pt 7.7A of the Corporations Act
client	A retail client as defined in s761G and 761GA of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations
conflicted and other banned remuneration provisions	The provisions on conflicted remuneration and other banned remuneration in Divs 4 and 5 of Pt 7.7A of the Corporations Act and in Div 4 of Pt 7.7A of the Corporations Regulations
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	<i>Corporations Regulations 2001</i>
covered person	Person covered by s963M of the Corporations Act
Ending Grandfathered Conflicted Remuneration Regulations	<i>Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Regulations 2019</i>
fee-for-service exclusion	When the presumption in s964A(2) of the Corporations Act that certain fees are volume-based shelf-space fees does not apply because a benefit is a reasonable fee charged for a service provided to the funds manager by the platform operator or another person: see s964A(3)(a)

Term	Meaning in this document
financial product	<p>A facility through which, or through the acquisition of which, a person does one or more of the following:</p> <ul style="list-style-type: none"> • makes a financial investment (see s763B); • manages financial risk (see s763C); • makes non-cash payments (see s763D) <p>Note: This is a definition contained in s763A of the Corporations Act: see also s763B–765A.</p>
financial product advice	<p>A recommendation or a statement of opinion, or a report of either of these things, that:</p> <ul style="list-style-type: none"> • is intended to influence a person or persons in making a decision about a particular financial product or class of financial product, or an interest in a particular financial product or class of financial product; or • could reasonably be regarded as being intended to have such an influence. <p>This does not include anything in an exempt document.</p> <p>Note: This is a definition in s766B of the Corporations Act.</p>
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
funds manager	Has the meaning given in s964 of the Corporations Act
general advice	<p>Advice that is not personal advice</p> <p>Note: This is a definition in s9 of the Corporations Act.</p>
grandfathered benefit	A benefit to which the conflicted and other banned remuneration provisions did not apply because of certain transitional provisions in the Corporations Act and the Corporations Regulations
IDPS	An investor directed portfolio service as defined in ASIC Corporations (Investor Directed Portfolio Services) Instrument 2023/669 or any instrument that amends or replaces that instrument
IDPS-like scheme	An investor directed portfolio services-like scheme as defined in ASIC Corporations (Investor Directed Portfolio Services Provided Through a Registered Managed Investment Scheme) Instrument 2023/668 or any instrument that amends or replaces that instrument
influence the advice	<p>Something that, because of its nature or the circumstances in which it is given, could be expected to influence:</p> <ul style="list-style-type: none"> • the choice of financial products recommended to clients by an AFS licensee or its representatives; or • the advice given to clients by the licensee or its representatives
licensee	An AFS licensee

Term	Meaning in this document
life risk insurance product	Has the meaning given in s764A(1)(e) of the Corporations Act
nominee and custody service	A nominee and custody service as defined in ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156 or in any instrument that amends or replaces that instrument
personal advice	Financial product advice given or directed to a person (including by electronic means) in circumstances where: <ul style="list-style-type: none"> the person giving the advice has considered one or more of the client's objectives, financial situation and needs; or a reasonable person might expect the person giving the advice to have considered one or more of these matters <p>Note: This is a definition in s9 of the Corporations Act.</p>
platform	For the purposes of Divs 4 and 5 of Pt 7.7A of the Corporations Act, a custodial arrangement (as defined in s1012IA(1)), subject to s964(3)
platform operator	Has the meaning given in s964 of the Corporations Act
prescribed financial market	A financial market prescribed in reg 1.0.02A of the Corporations Regulations
private label arrangement	An arrangement where an AFS licensee is also a platform operator, although it typically outsources the administration of the platform to another platform operator
product holder	Has the meaning given in s963N of the Corporations Act
Pt 7.7A (for example)	A part of the Corporations Act (in this example, numbered 7.7A), unless otherwise specified
reg 7.7A.13 (for example)	A regulation of the Corporations Regulations (in this example numbered 7.7A.13), unless otherwise specified
registered scheme	A managed investment scheme that is registered under s601EB of the Corporations Act
representative	Means: <ul style="list-style-type: none"> an authorised representative of the licensee; an employee or director of the licensee; an employee or director of a related body corporate of the licensee; or any other person acting on behalf of the licensee <p>Note: This is a definition contained in s9 of the Corporations Act.</p>
retail client	A client as defined in s761G and 761GA of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations

Term	Meaning in this document
RG 181 (for example)	An ASIC regulatory guide (in this example numbered 181)
RSE licensee	A registrable superannuation entity licensee—has the meaning given in s10 of the SIS Act
s964 (for example)	A section of the Corporations Act (in this example numbered 964), unless otherwise specified
scale efficiencies exclusion	When the presumption in s964A(2) of the Corporations Act that certain fees are volume-based shelf-space fees does not apply because a benefit is a discount on an amount payable, or a rebate of an amount paid, to the funds manager by the platform operator, the value of which does not exceed an amount that may reasonably be attributed to efficiencies gained by the funds manager because of the number or value of financial products in relation to which the funds manager provides services to the platform operator, or through the platform operator to another person: see s964A(3)(b)
shelf-space fee	A fee for making a funds manager's products available through a platform. It also includes a discount on an amount payable, or a rebate of an amount paid, by a platform operator to a funds manager, where the discount or rebate is for the funds manager's products being available through the platform
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
SMSF	A self-managed superannuation fund
superannuation master trust	A superannuation fund that has an obligation to give documents to retail clients under s1012IA of the Corporations Act
volume-based benefit	A benefit that is not excluded from being conflicted remuneration where access to the benefit or the value of the benefit is dependent on the total number or value of financial products: <ul style="list-style-type: none"> • recommended to a client by an AFS licensee or its representatives; or • acquired by a client to whom a licensee or its representatives provide advice
white label arrangement	An arrangement where an AFS licensee enters into contractual arrangements with a platform operator to rebrand the platform operator's platform to make it appear as its own—that is, the platform is 'badged' or 'promoted' by the licensee

Related information

Headnotes

AFS licensees, asset-based fees, authorised representatives, avoidance, ban on conflicted remuneration, best interests duty, client, conflicted and other banned remuneration, conflicted remuneration, covered person, fee-for-service exclusion, financial product advice, general advice, grandfathered benefits, influence the advice, informed consent, just and equitable, life risk insurance products, management fees, performance benefits, personal advice, private label arrangements, product holder, rebate, rebating scheme, record-keeping obligations, representatives, retail clients, scale efficiencies exclusion, volume-based benefits, volume-based shelf-space fees, white label arrangements

Regulatory guides

[RG 36](#) *Licensing: Financial product advice and dealing*

[RG 104](#) *AFS licensing: Meeting the general obligations*

[RG 108](#) *No-action letters*

[RG 148](#) *Platforms that are managed investment schemes and nominee and custody services*

[RG 175](#) *AFS licensing: Financial product advisers—Conduct and disclosure*

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

[RG 244](#) *Giving information, general advice and scaled advice*

Information sheets

[INFO 286](#) *FAQs: Ongoing fee arrangements and consents*

[INFO 287](#) *FAQs: Non-ongoing fee requests or consents*

[INFO 292](#) *FAQs: Informed consents for insurance commissions*

Legislative instruments

[ASIC Corporations \(Nominee and Custody Services\) Instrument 2016/1156](#)

[ASIC Corporations \(Life Insurance Commissions\) Instrument 2017/510](#)

[ASIC Corporations \(Investor Directed Portfolio Services Provided Through a Registered Managed Investment Scheme\) Instrument 2023/668](#)

[ASIC Corporations \(Investor Directed Portfolio Services\) Instrument 2023/669](#)

Legislation

Competition and Consumer Act 2010, Pt IV

Corporations Act 2001, Pts 7.7 and 7.7A, s601FC, 761G, 766B, 912A, 916A, 961B, 963A, 963B, 963BB, 963BA, 963C, 963D, 963E, 963F, 963G, 963H, 963J, 963K, 963L, 963M, 963N, 963P, 964, 964A, 964D, 964E, 964F, 964G, 964H, 965, 1317E, 1549B, 1708D

Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012

Corporations Amendment (Life Insurance Remuneration Arrangements) Act 2017

Corporations Amendment (Life Insurance Remuneration Arrangements) Bill 2016

Corporations Amendment (Life Insurance Remuneration Arrangements) Regulations 2017

Corporations Regulations 2001, Pt 7.1, regs 7.7A.11B, 7.7A.11C, 7.7A.11D, 7.7A.12B, 7.7A.12C, 7.7A.12D, 7.7A.12EA, 7.7A.12EB, 7.7A.12EC, 7.7A.12G, 7.7A.12H, 7.7A.12I, 7.7A.13, 7.7A.14, 7.7A.15, 7.7A.15AJ–7.7A.15AK, 7.7A.16H, 7.7A.17, 7.7A.18, 7.7A.40, 7.8.11A, 7.8.11B, 9.12.04, 10.33.02, 10.52.02

Income Tax Assessment Act 1997

National Consumer Credit Protection Act 2009, Sch 1 s145

Superannuation Industry (Supervision) Act 1993, s10, 52, 62, 99F

Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Act 2024

Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024

Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Regulations 2019