

18 September 2025



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Australian Securities and Investments Commission
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MELBOURNE VIC 3001
Via email: rri.consultation@asic.gov.au

Dear Ms Hadisutanto

RE: Proposed update to RG 181 Licensing: Managing conflicts of interest

Thank you for the opportunity to provide comment on proposed updates to ASIC's Regulatory Guide 181 Licensing: Managing Conflicts of Interest (**the proposed RG**). The management of conflicts of interest is a key part of maintaining a professional and reputable financial services organisation and Financial Services Council (FSC) members respect the importance of having robust processes in place.

The FSC is supportive, in principle of updates to the RG however, it should be noted that in widening the explicit scope of the RG, this creates further uncertainty, for which further guidance is required. Although in some parts of the updated RG, this has been provided, the FSC would like to provide comment in relation to areas that require further clarity.

Summary of Recommendations

1. Clarify how the examples in the table are considered by ASIC to be conflicts to ensure that they adequately illustrate how regulated entities should be considering conflicts of interest.
2. ASIC remove and refine references to the charging of fees being a conflict of interest to explain in what instances a conflict might arise, as the charging of fees in and of itself is not a conflict. ASIC include SPG 521 in its list of legal obligations contained in the roadmap.
3. ASIC should consult further with industry on providing illustrative examples regarding potential conflicts in vertically integrated and other related businesses.
4. ASIC should clarify how adequacy will be assessed under the new proposed regulatory guide.
5. ASIC should clarify its expectations regarding documentation, particularly in relation to all of the obligations listed in the appendix of the proposed regulatory guide.
6. ASIC should establish clear materiality thresholds below which simplified documentation requirements apply, recognising that not all conflicts pose the same level of risk to consumers.
7. ASIC should outline its expectations as to how the risks associated with a conflict of interest or class of interests would be measured and how a risk rating would inform an appropriate response.

Specifically, ASIC should clarify that risk assessment means evaluating the potential harm to clients rather than the risk of conflicts occurring, and provide practical examples of how this assessment would work in practice.

8. ASIC include an express acknowledgement that the content of disclosures may vary depending on the circumstances.
9. In relation to superannuation funds, references to 'member' should be changed to 'members' in acknowledgement of funds working in the interests of the whole member base, rather than individual members.
10. ASIC should provide explicitly scaled supervision requirements that recognise diverse business models.
11. ASIC should provide a minimum 18-month transition period from finalisation of the guidance

About the Financial Services Council

The FSC is a peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services. Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, and financial advice licensees.

The financial services industry is responsible for investing more than \$3 trillion on behalf of over 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is one of the largest pools of managed funds in the world.

Consultation Questions

B1: The Conflicts Management Obligation & B4: Illustrative Examples

The proposed updates include "clarifying that the conflicts management obligation is broad and is intended to apply to all conflicts of interest other than those wholly outside the financial services business of a licensee or its representatives. Further, proposal B4 notes that ASIC proposes to include illustrative examples of the types of conflicts of interests that may need to be considered.

The FSC appreciates that this clarification does not necessarily increase the bounds of the existing obligation but merely explicitly states that the scope of expected conflict management processes applies to all conflicts. However, Table 1 (which provides the illustrative examples of conflicts of interest) has some examples which do not necessarily accord with a reasonable view of what is a conflict of interest or do not provide sufficient detail to be useful examples.

For example, under *Conflicts with Clients or Members* it is noted that 'a fund charging excessive or unnecessary fees to members, not in their best financial interests' is a conflict.

The FSC believes the inclusion of 'unnecessary' should be removed, and greater clarification provided. Funds already have existing fiduciary duties, and superannuation funds have an existing statutory duty to act in their members' best financial interest. We note that the existence of a fee that generates profit in exchange for a service provided is not in itself indicative of whether there is a conflict of interest that needs to be managed. Many funds

need to be profitable to operate as part of a legitimate commercial arrangement in providing their investment management services, as well as to invest in providing good customer service to their members. In a superannuation context the right of a trustee company to obtain remuneration (generally through fees) is a matter for the trust deed.

Similarly, under *Conflicts Between Clients, Members, or Classes of Persons* it is noted that “a conglomerate firm using information obtained from one client to benefit another client” is a conflict of interest. This demonstrates a conflict scenario that doesn’t illustrate, with necessary specificity what conflicts might be considered to have arisen. For instance, superannuation funds are required under their Retirement Income Covenant obligations to use data about their members to identify member cohorts, and tailor engagement and product availability for the benefit of those cohorts. The fulfilment of this obligation would appear to be in contradiction to this conflict scenario.

The FSC recommends ASIC review the table to ensure that it is clear not just in the illustration of conflicts but how those examples should be taken to be conflicts i.e. being more explicit on the competing interests.

Recommendation 1

Clarify how the examples in the table are considered by ASIC to be conflicts to ensure that they adequately illustrate how regulated entities should be considering conflicts of interest.

As above, the FSC also notes the inclusion of remuneration practices which might be considered conflicted with the illustrative example of “being charged unnecessary fees” being provided. Further, proposed RG 181.81 notes that organisations “should avoid remuneration practices that are purely intended to maximise fees or returns at the expense of clients or members.

Again, the FSC notes that many organisations within the financial services industry operate a ‘for profit’ model. This, in and of itself, is not a conflict of interest, as profitability is important to the operation of a business and its ability to invest and innovate.. As with the discussion in the previous recommendation, the FSC believes that ASIC should provide clearer examples of how fee arrangements might come to be conflicted as charging fees. Maximising profit, is not, in and of itself a conflict of interest and does not therefore provide useful guidance in approaching conflict management.

RG 181.78 also refers to remuneration practices being ‘efficient’. It is not clear what efficient means in this content and this reference should be further explained or removed.

Recommendation 2

ASIC refine references to the charging of fees being a conflict of interest to explain in what instances a conflict might arise, as the charging of fees in and of itself is not a conflict.

The FSC would also like to note that the proposed guidance remains at odds with the *Financial Planners and Advisers Code of Ethics 2019 (Code of Ethics)* and the Corporations Act 2001 (Cth). Standard 3 of the Code of Ethics requires that advisers **avoid** **all** conflicts of interest while the ASIC guidance talks of **managing** conflicts.

Avoiding all conflicts of interest is an unworkable expectation and the FSC supports the

Code of Ethics being similarly reviewed to be more suitable.

B2 Guidance and Roadmap

The FSC welcomes the inclusion of a non-exhaustive list of legal obligations as a useful tool in bringing together the scope of conflict management obligations. Noting that it is intended to be a non-exhaustive list, the FSC believes that there is one key piece of prudential architecture missing which is APRA's SPG 521: Conflicts of Interest.

This guide is central to a superannuation trustee's obligations through the prudential system and is worth calling out explicitly in the roadmap.

On a technical note, the FSC would like to point out that in the roadmap references to s941A and 941B of the Corporations Act 2001 (Cth) appear to be wrong. The obligation under those sections is to give a person a Financial Services Guide (FSG) if a financial service is provided to a retail customer. Content requirements for FSGs (and, in particular, content disclosures for conflicts) are set out in s942B and 942C.

Recommendation 3

ASIC include SPG 521 in its list of legal obligations contained in the roadmap.

Further, the FSC believes that ASIC could provide more examples that relate to related entity conflicts. Many FSC members run businesses that could be considered to be vertically integrated. The management of potential conflicts that can arise in these related businesses is a key part of properly integrating these functions into the wider business. Further clarity about how ASIC views the potential conflicts of these business models will assist FSC members in ensuring their consumer protections remain robust.

Notwithstanding the above, in providing further examples, ASIC should note that related entity conflicts, including vertical integrations require nuanced, case-by-case assessments often involving high complexity. Examples in the guidance may not consider the particularities of each case and may create more uncertainty than provide clarity.

Any examples should be framed to ensure they provide not just the example of the conflict but how the matter is actually a conflict to fully illustrate how conflicts should be considered. ASIC should engage further with industry on any additional examples.

Recommendation 4

ASIC should consult further with industry on providing illustrative examples regarding potential conflicts in vertically integrated and other related businesses.

B5: Additional Guidance on Adequate Arrangements & B6: Risk-Based Approach

Proposal B5 notes that ASIC intends to provide additional guidance on what 'adequate arrangements' involve. Although the RG provides some detail as to what arrangements should be in place, the meaning of the word 'adequate' in this part of the RG is not completely clear. Further clarity as to how deep and far reaching the arrangements should be to ensure that the requirements are satisfied is requested.

The FSC acknowledges that the proposed guide speaks to applying a risk-based and proportional approach to determining whether something is adequate however, it would be best for ASIC to set clear expectations about how adequacy will be assessed.

Recommendation 5

ASIC should clarify how adequacy will be assessed under the new proposed regulatory guide.

The FSC would also like clarity as to what the expectations are with regard to documentation, especially in relation to the various other legal obligations listed in the appendix. While the proposed RG highlights the importance of record keeping and documentation and lists some areas that should be documented, it is unclear what ASIC's expectations are specifically in relation to what artefacts should be produced and if ASIC expects that one artefact is to be produced that covers all expectations. Typically, organisations will have multiple documents that may cover various matters including Insider Trading Policies, Compliance Plans, Gift and Entertainment Policies, and a general Code of Ethics/Conduct.

Recommendation 6

ASIC should clarify its expectations with regard to documentation, particularly in relation to all of the obligations listed in the appendix of the proposed regulatory guide.

Furthermore, the FSC notes that requiring the same level of documentation for all conflicts regardless of materiality creates unnecessary compliance burden. Clear materiality thresholds would enable organisations to apply proportionate documentation based on the significance and risk of specific conflicts.

Recommendation 7

ASIC should establish clear materiality thresholds below which simplified documentation requirements apply, recognising that not all conflicts pose the same level of risk to consumers.

Page 16, Table 2 outlines the further emphasis placed on assessing risks associated with conflicts which states "*this may include undertaking a risk assessment of a conflict of interest or class of interests and evaluating what an appropriate response will be*". It is unclear whether ASIC have expectations about how this risk will be measured given that in a traditional risk setting this would be achieved through considering the likelihood and the consequences of a risk occurring. Noting that conflicts can be perceived, potential or actual – and so for actual conflicts the likelihood rating is irrelevant.

It is also unclear whether risk rating a conflict would inform an appropriate response given that Table 3 outlines control mechanisms for conflicts management to be established based on the nature of the conflict rather than its risk rating.

The FSC suggests that ASIC clarify that risk assessment should focus on evaluating the potential harm to clients, members or market integrity, rather than the likelihood of conflicts

occurring. This would provide a logical framework for assessing actual conflicts (which already exist) as well as potential conflicts.

Recommendation 8

ASIC should outline its expectations as to how the risks associated with a conflict of interest or class of interests would be measured and how a risk rating would inform an appropriate response. Specifically, ASIC should clarify that risk assessment means evaluating the potential harm to clients rather than the risk of conflicts occurring, and provide practical examples of how this assessment would work in practice.

The FSC would also like to note that the principles for disclosure content are quite prescriptive. Organisations of different size and scale will respond, report, and disclose conflicts in varying ways commensurate with this size and scale and the matter at hand. There should be an express acknowledgement that the content of disclosures may vary depending on the circumstances.

Recommendation 9

ASIC include an express acknowledgement that the content of disclosures may vary depending on the circumstances.

In relation to 181.83 – 181.85, the FSC notes that references to ‘member’ should be amended to read ‘members’ as superannuation funds typically must act in the interests of the member cohort as a whole, rather than singular members. The interests of the one do not and should not outweigh the interests of the members as a whole and this vernacular could cause some confusion.

Recommendation 10

In relation to superannuation funds, references to ‘member’ should be changed to ‘members’ in acknowledgement of funds working in the interests of the whole member base, rather than individual members.

Supervision Across Diverse Business Models

Many FSC members operate complex organisational structures that include both institutional operations and advice licensees supervising networks of authorised representatives. The proposed Table 2 framework requires comprehensive monitoring at every stage without acknowledging the practical challenges this presents across diverse business models.

The one-size-fits-all approach to supervision fails to recognise that different supervision approaches are necessary and appropriate for different business models - from directly employed advisers to self-employed authorised representatives, from institutional trading desks to small advice practices.

ASIC should provide explicitly scaled supervision requirements that recognise diverse business models. This should include:

- Different supervision standards for employed versus self-employed representatives

- Risk-based supervision approaches that allow licensees to allocate resources based on assessed risk
- Recognition that technology-enabled supervision can be more effective than traditional methods
- Flexibility in how outcomes are achieved rather than prescriptive methods

Recommendation 11

ASIC should provide explicitly scaled supervision requirements that recognise diverse business models.

Implementation Timeline

The proposed guidance provides no transition period despite being the first comprehensive update to the RG in over 20 years. FSC members, particularly those with complex structures including multiple licensees and adviser networks, require adequate time to:

- Review and update documentation across all entities
- Implement new systems and monitoring processes
- Train staff across institutional and advice operations
- Cascade changes through authorised representative networks
- Update technology platforms and integration points.

Without adequate implementation time, there is significant risk of incomplete or inadequate compliance responses that could ultimately harm consumers through service disruption.

ASIC should provide a minimum 18-month transition period from finalisation of the guidance, with consideration for:

- Phased implementation allowing prioritisation of highest-risk areas
- Grandfathering of existing compliant arrangements during transition
- No enforcement action for good faith implementation efforts during the transition period
- Alignment with existing compliance cycles to minimise disruption.

Recommendation 12

ASIC should provide a minimum 18-month transition period from finalisation of the guidance

The FSC welcomes the opportunity to further discuss these matters with ASIC. For further information or to set up a meeting, please do not hesitate to contact me.

Yours sincerely,

Kirsten Samuels

Policy Director, Superannuation and Funds Management