



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 214

Updated record-keeping obligations for AFS licensees

July 2013

About this paper

This consultation paper sets out our proposals to update the record-keeping obligations for Australian financial services (AFS) licensees when the licensee or its representatives provide financial product advice to retail clients in accordance with the new conduct obligations in Pt 7.7A of the *Corporations Act 2001* (Corporations Act).

We also propose to introduce record-keeping obligations that apply to superannuation trustees when giving personal advice for which they charge members collectively as intra-fund advice.

We are seeking feedback on our proposals from AFS licensees and their representatives (including authorised representatives) and consumers.

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 paper was issued on 31 July 2013 and is based on the Corporations Act as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

Contents

The consultation process	4
A Background to the proposals	6
Future of Financial Advice reforms	6
Stronger Super reforms	7
Current record-keeping obligations that apply to personal advice	9
Our proposed record-keeping obligations	10
ASIC’s facilitative approach to enforcement.....	13
Your feedback.....	14
B Proposed record-keeping obligations for AFS licensees	15
Record-keeping obligations when giving personal advice to retail clients..	15
Record-keeping obligations in relation to conflicted remuneration.....	17
Record-keeping obligations when giving intra-fund advice	19
C Regulatory and financial impact	22
Key terms	23
List of proposals and questions	27
Attachment 1: Proposed technical update to RG 175	30
Attachment 2: Proposed technical update to RG 245	33
Attachment 3: Proposed technical update to RG 246	35
Attachment 4: Proposed technical update to INFO 168	37

The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy. Among other things, we would like your feedback on the costs and benefits of implementing our proposed record-keeping obligations.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on the record-keeping obligations for AFS licensees when giving financial product advice to retail clients. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section C, 'Regulatory and financial impact'.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 23 October 2013 to:

Maria Hadisutanto
Lawyer
Strategy and Policy
Australian Securities and Investments Commission
GPO Box 9827
MELBOURNE VIC 3001
facsimile: 03 9280 3306
email: policy.submissions@asic.gov.au

What will happen next?

Stage 1	31 July 2013	ASIC consultation paper released
Stage 2	23 October 2013	Comments due on the consultation paper
	October– November 2013	Drafting of class order and updated regulatory guidance
Stage 3	November– December 2013	Class order and updated regulatory guidance released

A Background to the proposals

Key points

We have imposed a standard licence condition on Australian financial services (AFS) licensees to keep certain records for a period of at least seven years when the licensee or one of its representatives provides personal advice to retail clients.

However, the terms of our standard AFS licence condition in condition 57(b) of Pro Forma 209 *Australian financial services licence conditions* (PF 209) refer to the obligation in s945A of the *Corporations Act 2001* (Corporations Act), which was repealed on 1 July 2013 as a result of the Future of Financial Advice (FOFA) reforms. This means that the standard licence condition in PF 209, as currently drafted, no longer applies to new records created by AFS licensees from 1 July 2013.

We propose to update the current record-keeping obligations for AFS licensees when giving financial product advice to retail clients to refer to the new conduct obligations in Pt 7.7A of the Corporations Act, rather than s945A. The record-keeping obligations relate to personal advice, except for the conflicted remuneration provisions which relate to both personal and general advice.

In light of the Government's Stronger Super reforms, we also propose to introduce record-keeping obligations for trustees of regulated superannuation funds (superannuation trustees) when giving personal advice for which they charge members collectively as intra-fund advice.

The purpose of these requirements is to give industry certainty about its record-keeping obligations under the FOFA and Stronger Super reforms. In line with ASIC's approach to FOFA and Stronger Super more broadly, we will take a facilitative approach to compliance with these obligations until 30 June 2014.

Future of Financial Advice reforms

- 1 In April 2010, the Australian Government announced the FOFA reform package, which aimed to improve the trust and confidence of retail investors in the financial advice sector.
- 2 The *Corporations Amendment (Future of Financial Advice) Act 2012* and the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (FOFA Acts) amend the Corporations Act to implement the FOFA reforms.
- 3 Schedule 2 of each of the FOFA Acts commenced on 1 July 2012 and compliance is mandatory from 1 July 2013. The new conduct obligations

under the FOFA reforms are set out in Pt 7.7A of the Corporations Act. These include:

- (a) the best interests duty and related obligations (Div 2 of Pt 7.7A);
- (b) an opt-in requirement for advice providers to renew their clients' agreement to pay ongoing fees at least every two years (Div 3 of Pt 7.7.A);
- (c) the requirement to give retail clients an annual fee disclosure statement (FDS) if there is an ongoing fee arrangement (Div 3 of Pt 7.7A); and
- (d) the ban on conflicted and other remuneration (Divs 4 and 5 of Pt 7.7A).

4 We have released a suite of guidance to assist AFS licensees and their representatives (including authorised representatives), product issuers and sellers, and consumers to understand how we will administer the obligations in Pt 7.7A.

5 This consultation paper should be read in conjunction with our guidance on the FOFA reform package:

- (a) Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* (RG 175);
- (b) Regulatory Guide 183 *Approval of financial services sector codes of conduct* (RG 183);
- (c) Regulatory Guide 244 *Giving information, general advice and scaled advice* (RG 244);
- (d) Regulatory Guide 245 *Fee disclosure statements* (RG 245); and
- (e) Regulatory Guide 246 *Conflicted remuneration* (RG 246).

Stronger Super reforms

6 In December 2010, the Government announced the Stronger Super reform package, which formed the Government's response to the 2009 *Review into the governance, efficiency, structure and operation of Australia's superannuation system* (Super System Review). The Stronger Super reforms modified the *Superannuation Industry (Supervision) Act 1993* (SIS Act) to:

- (a) allow superannuation funds to offer members a simple, low-cost default superannuation product called 'MySuper';
- (b) implement a package of 'SuperStream' measures designed to improve the productivity of the superannuation system and make the system easier to use; and
- (c) implement a range of measures designed to improve the governance, integrity and regulatory settings of the superannuation system.

Giving and collectively charging for intra-fund advice

7 As part of the Stronger Super reforms, the Government amended the SIS Act to place specific restrictions on the types of personal advice for which superannuation trustees can collectively charge their members as intra-fund advice: see s99F of the SIS Act.

8 The purpose of the Government's amendment was to allow superannuation funds to continue to provide members with simple, non-ongoing personal advice on the member's interest in the fund and collectively charge for this advice.

9 However, the Government recognised it was important to ensure that retirement savings would not be eroded through excessive fees—commenting, at paragraph 1.42 of the Explanatory Memorandum, that:

The amendments do not seek to inhibit the ability of a superannuation trustee to provide advice to their members, but recognise the cost of providing some types of advice should be incurred directly by the member receiving the advice rather than the membership of the fund as a whole.

10 Under the SIS Act, superannuation trustees can collectively charge their members for specific types of personal advice where the advice is not ongoing and does not fall within one of the legislative prohibitions. The types of intra-fund advice for which trustees can collectively charge are likely to include:

- (a) the extent of cover provided by the insurance arrangements that apply to the member's interest in the fund;
- (b) increasing contributions; and
- (c) changing investment options.

Note: For a non-exhaustive list of the circumstances in which superannuation trustees may not charge their members collectively for personal advice, see s99F of the SIS Act and Information Sheet 168 *Giving and collectively charging for intra-fund advice* (INFO 168).

11 We note that intra-fund advice is a type of financial product advice and, as such, other relevant conduct obligations in the Corporations Act continue to apply to it—for example:

- (a) the new conduct obligations in Pt 7.7A, including:
 - (i) the best interests duty and related obligations in Div 2 of Pt 7.7A; and
 - (ii) the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A; and
- (b) the obligation for an AFS licensee or its authorised representatives to give the member a Statement of Advice (SOA), where applicable.

Note: For further information on other reforms that may affect the giving of intra-fund advice, see INFO 168.

- 12 However, intra-fund advice is exempt from the opt-in and fee disclosure requirements in Div 3 of Pt 7.7A. This is because the Corporations Regulations ‘carve out’ certain arrangements from Div 3 to the extent that the fee payable under the arrangement is a product fee, including a fee for intra-fund advice: see reg 7.7A.10(2) and (3).

Current record-keeping obligations that apply to personal advice

- 13 We have imposed a licence condition under s914A requiring AFS licensees to keep certain records of personal advice that the licensee or its representatives provide to clients in accordance with the ‘reasonable basis for advice’ obligation in s945A: see condition 57(b) in PF 209.
- 14 Specifically, under this licence condition, AFS licensees who provide personal advice to retail clients must ensure that they keep records of the following for at least seven years from the date that the personal advice was provided:
- (a) the client’s relevant personal circumstances within the meaning of s945A(1)(a)(i);
 - (b) the inquiries made in relation to those personal circumstances within the meaning of s945A(1)(a)(ii);
 - (c) the consideration and investigation conducted in relation to the subject matter of the advice within the meaning of s945A(1)(b); and
 - (d) the advice, including reasons why advice was considered to be ‘appropriate’ within the meaning of s945A(1)(a)–(c).

Note: For further details on these record-keeping obligations, see PF 209, condition 57(b).

- 15 This licence condition does not apply where an SOA does not need to be provided to the retail client, or where a record of advice is kept in accordance with s964B(3A).
- 16 We have provided some guidance in RG 175 on our expectations for AFS licensees to keep adequate records when they or their representatives provide personal advice to retail clients. For example, this includes keeping client records that demonstrate:
- (a) the inquiries an advice provider has made into the client’s relevant circumstances; and
 - (b) where relevant, any consideration and investigation of the financial products that the advice provider is advising on.

Note: See Section E of RG 175 for further details on the record-keeping obligations that apply to personal advice, including a list of the type of records that may be kept by AFS licensees.

Our proposed record-keeping obligations

- 17 In our view, under the duties imposed by the Corporations Act, AFS licensees are required to keep adequate records about their financial services business. This includes an obligation to keep adequate records of financial product advice provided to retail clients and how the advice is provided. The relevant duties of a licensee that imply such a record-keeping obligation include:
- (a) the duty to ‘do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly’ (s912A(1)(a)); and
 - (b) the duty to have an adequate dispute resolution system (s912A(1)(g)).
- 18 We consider it is important for AFS licensees to keep adequate records of the financial product advice provided to their clients. Keeping records will be necessary for licensees and their representatives to show that, in providing advice to retail clients, they have taken the necessary steps to comply with the requirements in the law, as well as our guidance.
- 19 We have proposed record-keeping obligations relating to:
- (a) personal advice provided to retail clients in accordance with the new FOFA conduct obligations in Divs 2 and 3 of Pt 7.7A, such as the best interests duty and related obligations;
 - (b) financial product advice provided to retail clients in accordance with the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A; and
 - (c) personal advice for which superannuation trustees are not permitted to collectively charge members as intra-fund advice in accordance with s99F of the SIS Act.
- 20 Our proposed record-keeping obligations are not designed to impose an additional administrative burden on industry. Instead, they are designed to help industry participants understand what records they should keep to demonstrate they have complied with their substantive obligations under the FOFA and Stronger Super regimes.
- 21 In line with ASIC’s approach to the FOFA and Stronger Super reforms more broadly, we will take a facilitative approach to compliance with these proposed record-keeping requirements until 30 June 2014.

Keeping records for personal advice provided to retail clients

- 22 The requirements in s945A and 945B for AFS licensees and their authorised representatives to have a reasonable basis for advice ceased to apply on 1 July 2013 as a result of the FOFA reforms. Under FOFA, these requirements have now been replaced by the best interests duty and related obligations in Div 2 of Pt 7.7A.

23 Given that the terms of the standard AFS licence condition on record keeping expressly refer to the ‘reasonable basis for advice’ obligation in s945A, this element of the licence condition no longer applies to new records created by AFS licensees from 1 July 2013.

24 In our view, it is important to retain the substance of the standard AFS licence condition on record keeping for personal advice.

25 We therefore propose to update the record-keeping obligations for AFS licensees, by way of class order, to require licensees to keep records of personal advice that the licensee or its representatives provide to retail clients. This obligation will refer to the new conduct obligations in Pt 7.7A of the Corporations Act, rather than s945A.

26 Under our proposed record-keeping obligations, AFS licensees will be required to keep records that demonstrate that their advice providers have complied with the conduct obligations under FOFA. These records can be categorised according to:

- (a) records to prove that licensees and their representatives have complied with the best interests duty and related obligations;
- (b) records of ongoing fee arrangements entered into with a client and any termination or assignment of those arrangements; and
- (c) copies of prescribed documents—that is, FDSs and renewal notices—that fee recipients must receive in relation to an ongoing fee arrangement.

Note: For further details on our proposed record-keeping obligations, see Section B.

27 We also propose to update our guidance on the record-keeping obligations that apply to personal advice in Section E of RG 175 and Section C of RG 245 to reflect our proposed requirements: see Attachments 1 and 2 to this consultation paper.

28 We note that the other AFS licence conditions on record keeping in PF 209 will remain in force. For example, PF 209 requires licensees to retain copies of Financial Services Guides and SOAs for at least seven years. These requirements will continue to apply.

29 In addition, where AFS licensees that provide personal advice to retail clients also hold an Australian credit licence, our proposed record-keeping obligations will need to be considered in light of the current record-keeping requirements for credit licensees under the *National Consumer Credit Protection Act 2009* (National Credit Act) and the Corporations Act.

Note 1: See Information Sheet 134 *Complying with your obligations if you are both a credit licensee and an AFS licensee* (INFO 134) for information on when it may be possible for you to avoid duplicating processes in complying with the AFS and credit licensing regimes.

Note 2: For detailed guidance on the specific record-keeping obligations that apply to credit licensees, see Regulatory Guide 205 *Credit licensing: General conduct obligations* (RG 205), Regulatory Guide 206 *Credit licensing: Competence and training* (RG 206), Regulatory Guide 207 *Credit licensing: Financial requirements* (RG 207), and Regulatory Guide 209 *Credit licensing: Responsible lending conduct* (RG 209).

Keeping records for the conflicted remuneration provisions

30 Under the Corporations Act:

- (a) AFS licensees and their representatives, including authorised representatives, are generally prohibited from accepting conflicted remuneration (s963E, 963G and 963H);
- (b) product issuers and sellers are prohibited from giving conflicted remuneration to AFS licensees or their representatives (s963K); and
- (c) employers of an AFS licensee or its representatives are prohibited from giving their licensee or representative employees conflicted remuneration for work carried out by an employee (s963J).

Note: See s963A of the Corporations Act for the definition of ‘conflicted remuneration’.

31 The ban on conflicted and other remuneration in Divs 4 and 5 of Pt 7.7A is subject to:

- (a) specific exclusions in s963B and 963C, or Div 4 of Pt 7.7A of the Corporations Regulations; and
- (b) ‘grandfathering’ because of the transitional provisions in s1528–1531, and the regulations made under these sections.

32 We propose to modify the law, by way of class order, to require AFS licensees to keep the following records when the licensee or its representatives provide financial product advice to retail clients:

- (a) records of any arrangement (or any change to an arrangement), on the basis of which the licensee considers that the conflicted remuneration provisions do not apply because of s1528–1531, as well as any payments made or accepted under such arrangements; and
- (b) where the licensee relies on s963B or 963C, or Div 4 of Pt 7.7A of the Corporations Regulations, to form the view that a monetary or non-monetary benefit that is given to the licensee or its representatives is not conflicted remuneration, records demonstrating the circumstances on which this reliance is based.

Note: For further details on our proposed record-keeping obligations, see Section B.

33 We also propose to update our guidance in Section B of RG 246 to reflect our proposed requirements: see Attachment 3 to this consultation paper.

Keeping records for intra-fund advice

- 34 If a superannuation trustee is an AFS licensee who provides and collectively charges for intra-fund advice to members, it is subject to the record-keeping obligations that apply to licensees who provide personal advice to retail clients. This means that superannuation trustees will be required to:
- (a) comply with our proposed record-keeping requirements for the new conduct obligations in Pt 7.7A (see proposal B1), except for those obligations relating to the opt-in and fee disclosure requirements in Div 3 of Pt 7.7A; and
 - (b) keep copies of SOAs provided to members for a period of seven years in accordance with the current AFS licence condition in PF 209.
- 35 We have provided a brief explanation of the record-keeping requirements for superannuation trustees in INFO 168, outlining our expectation that trustees should be able to demonstrate which advice provided to members is intra-fund advice to justify how they charge for this advice directly or indirectly.
- 36 In light of the Government's objective to ensure that the retirement savings of superannuation fund members are not diminished through excessive fees, we consider it is important that superannuation trustees should keep adequate records of how they collectively charge for intra-fund advice they provide to members.
- 37 We propose to modify the law, by way of class order, to introduce record-keeping obligations for superannuation trustees to ensure that trustees charge individual members for the full cost of intra-fund advice that is provided to them where the trustee is not allowed under s99F of the SIS Act to collectively charge all members for that advice. This proposal will also apply to an AFS licensee who gives personal advice acting under an arrangement with a superannuation trustee.
- Note: For further details on our proposed record-keeping obligations, see Section B.
- 38 We also propose to update our guidance in INFO 168 to reflect our proposed requirements: see Attachment 4 to this consultation paper.

ASIC's facilitative approach to enforcement

- 39 Where an AFS licensee fails to comply with our proposed record-keeping obligations, this will amount to a breach of the law for which ASIC may take enforcement action.

Note: For further information on ASIC's approach to enforcement, see Information Sheet 151 *ASIC's approach to enforcement* (INFO 151), Information Sheet 152 *Public comment* (INFO 152) and Regulatory Guide 100 *Enforceable undertakings* (RG 100).

- 40 We recognise, however, that both the FOFA and Stronger Super reforms have required businesses to undertake major work so that information technology (IT) systems and compliance requirements are in place in time for the commencement of both regimes on 1 July 2013.
- 41 We have adopted a facilitative approach to compliance with the FOFA and Stronger Super reforms until 30 June 2014. In line with this, we intend to adopt a measured approach where inadvertent breaches arise or systems changes are underway, provided that industry participants are making reasonable efforts to comply. However, we will take stronger regulatory action where we find cases of deliberate or systemic breaches of the law.
- 42 Our facilitative approach will extend to the enforcement of the proposed record-keeping obligations until 30 June 2014.

Your feedback

- 43 We are asking for your feedback on our proposals in this consultation paper to implement updated record-keeping obligations for AFS licensees. Among other things, we would like your feedback on the costs and benefits of implementing our proposed record-keeping obligations, rather than the costs and benefits of complying with the FOFA and Stronger Super reforms more broadly. These were extensively consulted on by the Government under a different process.
- 44 We will take your comments into account before we finalise and release our class order and updated regulatory guidance.
- 45 We have also allowed for a longer than usual consultation period of 12 weeks. This will enable us to continue our dialogue with industry on each of the proposals in this consultation paper, so that we can ensure that the introduction of the proposed record-keeping obligations takes place in a measured and sensible way.

B Proposed record-keeping obligations for AFS licensees

Key points

We propose to update the record-keeping obligations for AFS licensees, when the licensee or its representatives give financial product advice to retail clients, to reflect the new conduct obligations in Pt 7.7A. The record-keeping obligations relate to personal advice, except for the conflicted remuneration provisions which relate to both personal and general advice.

We also propose to introduce a record-keeping obligation that applies to trustees of regulated superannuation funds (as AFS licensees) when giving personal advice for which they charge members collectively as intra-fund advice. This proposal will also apply to a licensee who gives personal advice acting under an arrangement with a superannuation trustee.

Record-keeping obligations when giving personal advice to retail clients

Proposal

- B1** We propose to modify the law, by way of class order, to require that, when an AFS licensee or its representatives provide personal advice to retail clients, the licensee must retain a record of the following matters (whether in a material, electronic or other form) for at least seven years from the date that the personal advice is provided:
- (a) the information relied on and the action taken by the advice provider that show the advice provider has acted in the best interests of the client for the purposes of s961B(1);
 - (b) if s961B(2) is being relied on to show that s961B(1) has been complied with, the information relied on and the action taken by the advice provider that satisfy the safe harbour steps in s961B(2);
 - (c) the advice, including reasons why advice is considered to be 'appropriate' within the meaning of s961G;
 - (d) where an advice provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the advice provider, or one of their specified related parties, the information relied on and the action taken by the advice provider that show the advice provider has given priority to the client's interests when giving the advice for the purposes of s961J;
 - (e) any ongoing fee arrangement entered into with the client within the meaning of s962A;
 - (f) any assignment of an ongoing fee arrangement;
 - (g) a fee disclosure statement given to the client under Div 3 of Pt 7.7A;
 - (h) a renewal notice given to the client under Div 3 of Pt 7.7A;

- (i) any notification from a client given under Div 3 of Pt 7.7A that they elect to renew their ongoing fee arrangement; and
- (j) any fees charged after the termination of an ongoing fee arrangement.

We propose that the requirements in B1(a)–B1(c) do not apply to:

- (k) personal advice for which an SOA is not required; or
- (l) personal advice for which a record of the advice is kept in accordance with s946B(3A), as modified by regs 7.7.09 and 7.7.10AE of the Corporations Regulations.

Your feedback

B1Q1 Do you agree with our proposed record-keeping obligations for AFS licensees on the new conduct obligations in Pt 7.7A? If not, why not?

B1Q2 Will our proposed record-keeping obligations require AFS licensees to significantly change their existing record-keeping practices? If so, please describe the changes and the likely costs involved.

B1Q3 Are there any practical problems with the implementation of our proposal? Please provide details.

B1Q4 We propose to update our guidance in Section E of RG 175 and Section C of RG 245 to reflect the updated record-keeping obligations. Do you think we should provide any further guidance on our proposed record-keeping obligations? If so, please provide details.

Rationale

- 46 The terms of our standard AFS licence condition on record keeping (condition 57(b) of PF 209) refer explicitly to the current requirement in s945A, which ceased to apply on 1 July 2013. This means that this licence condition no longer applies to new records created from 1 July.
- 47 We think it is important to retain the substance of this element of the standard AFS licence condition on record keeping, but to update it to reflect the new conduct obligations under the FOFA reforms.
- 48 As discussed in paragraph 17, under the duties imposed by the Corporations Act, AFS licensees are required to keep adequate records about their financial services business, and this includes an obligation to keep records of personal advice and the steps an advice provider has taken in providing their client with that advice.
- 49 Adequate record keeping is also in the interests of AFS licensees, and is an important element of risk management. Good records will help a licensee to demonstrate that the licensee or its representatives have complied with the new conduct obligations in Divs 2 and 3 of Pt 7.7A, such as the best interests duty in s961B.

- 50 Our proposed record-keeping obligations are not intended to impose a significant administrative burden. Instead, they are designed to give industry greater certainty about the records that AFS licensees should retain in order to demonstrate that the licensee or its representatives have complied with the requirements in the law.
- 51 We note that our proposed record-keeping obligations will not extend to personal advice where the modified best interests duty applies to:
- (a) basic banking products only (s961B(3));
 - (b) general insurance products only (s961B(4));
 - (c) a combination of basic banking and general insurance products (reg 7.7A.1); and
 - (d) a combination of general insurance and other products (reg 7.7A.1).
- 52 There are no specific record-keeping obligations in this situation. AFS licensees should refer to our guidance on the record-keeping obligations that apply to personal advice in RG 175: see RG 175.396–RG 175.403.
- 53 AFS licensees must also continue to comply with the other record-keeping licence conditions in PF 209, which include a requirement for licensees to keep copies of SOAs provided to their clients. This is because, as discussed in paragraph 28, the other licence conditions on record keeping in PF 209 will continue to remain in force.

Record-keeping obligations in relation to conflicted remuneration

Proposal

- B2** We propose to modify the law, by way of class order, to require that, when an AFS licensee or its representatives provide financial product advice to retail clients, the licensee must retain a record of the following matters (whether in a material, electronic or other form) for at least seven years from the date that the advice is provided:
- (a) any arrangement, or any change to an arrangement, on the basis of which the licensee considers that the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A do not apply to the licensee or its representatives because of the transitional provisions in s1528–1531 of the Corporations Act and the regulations made under those sections;
 - (b) any payments made or accepted under arrangements to which the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A do not apply to the licensee or its representatives because of s1528–1531 of the Corporations Act and the regulations made under those sections; and

- (c) where the licensee relies on the exemptions in s963B or 963C of the Corporations Act, or Div 4 of Pt 7.7A of the Corporations Regulations, to form the view that a monetary or non-monetary benefit that is given to the licensee or its representatives is not conflicted remuneration, records demonstrating the circumstances on which this reliance is based.

Your feedback

- B2Q1 Do you agree with our proposed record-keeping obligations for AFS licensees on the new conduct obligations in Pt 7.7A? If not, why not?
- (a) Do you think there is a more cost-effective way to ensure that AFS licensees comply with the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A? Please provide details.
- (b) Do you think it is appropriate to require AFS licensees to keep records to demonstrate the circumstances on which it relies to form the view that a monetary or non-monetary benefit is not conflicted remuneration because of the exemptions stated in Proposal B2(c)? If not, why not?
- B2Q2 Will our proposed record-keeping obligations require AFS licensees to significantly change their existing record-keeping practices? If so, please describe the changes and the likely costs involved.
- B2Q3 Are there any practical problems with the implementation of our proposal? Please provide details.
- B2Q4 We propose to update our guidance in Section B of RG 246 to reflect our updated record-keeping obligations. Do you think we should provide further guidance on our proposed record-keeping obligations? If so, please provide details.

Rationale

- 54 As discussed in paragraph 17, we consider that the duties imposed by the Corporations Act require AFS licensees to keep adequate records about their financial services business. This includes an obligation to keep records of financial product advice that they provide to their clients.
- 55 We also consider it is in the interests of AFS licensees to have adequate record-keeping arrangements in place. Keeping records is an important element of risk management and will help licensees to defend any claim that the licensee or its representatives have failed to comply with the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A.
- 56 It is unlikely that many consumers will complain to ASIC about a breach of the ban on conflicted remuneration or volume-based shelf-space fees, because they will not have any visibility into the arrangements that provide

for the paying and giving of banned benefits. In these cases, breaches are most likely to be discovered from ASIC's surveillance activities.

- 57 Our proposed record-keeping obligations are designed to give AFS licensees greater certainty about the type of records they need to retain in order to demonstrate they have complied with aspects of the conflicted remuneration provisions, but they are not intended to increase the administrative burden for licensees.
- 58 AFS licensees must also continue to comply with the other record-keeping licence conditions in PF 209, which includes a requirement for AFS licensees to keep copies of SOAs provided to their clients. This is because, as discussed in paragraph 28, the other licence conditions on record keeping in PF 209 will continue to remain in force.

Record-keeping obligations when giving intra-fund advice

Proposal

- B3** We propose to modify the law, by way of class order, to require that, when the trustee of a regulated superannuation fund (as an AFS licensee) provides personal advice to members of the fund, the trustee must ensure that they retain a record of the following matters (whether in a material, electronic or other form) for at least seven years from the date that the personal advice is provided:
- (a) the advice, including a note to identify whether the cost of the advice is allowed to be charged to a member or members other than the recipient and, if so, on what basis—unless the cost is in fact wholly charged or borne in one or more of the following ways:
 - (i) charged to the member receiving the advice;
 - (ii) borne by the licensee if the licensee is not the trustee or an associate; and/or
 - (iii) charged to a person other than the trustee or an associate; and
 - (b) if the cost of the personal advice is not allowed to be charged to a member or members other than the recipient, a note identifying:
 - (i) how much it cost to provide the advice, including details about the method of calculation and why any estimation applied in the calculation is reasonable; and
 - (ii) how much the member receiving the advice was charged for the advice and how the cost was otherwise borne or charged.

This requirement would also apply to AFS licensees acting under an arrangement with a superannuation trustee, where the licensee or its representatives provide personal advice to members and that advice is charged for collectively.

AFS licensees would also be required to keep records in a way that enables the information to be readily provided for a particular period, if requested to do so by ASIC.

Your feedback

B3Q1 Do you agree with our proposed record-keeping obligations for superannuation trustees, and AFS licensees acting under an arrangement with a trustee, when providing intra-fund advice to members? If not, why not?

B3Q2 The objective of our proposal is to give greater certainty to superannuation trustees, and AFS licensees acting under an arrangement with a trustee, about the records they need to keep to comply with the requirements in s99F of the SIS Act. Do you think there is an alternative way for ASIC to meet this objective?

B3Q3 Will our proposed record-keeping obligations require superannuation trustees, and AFS licensees acting under an arrangement with a trustee, to significantly change their record-keeping practices? If so, please describe the changes and the likely costs involved.

B3Q4 Are there any practical problems with the implementation of our proposal? Please provide details.

B3Q5 We propose to update INFO 168 to reflect our updated record-keeping obligations. Do you think we should provide further guidance on our proposed record-keeping obligations? If so, please provide details.

Rationale

59 Keeping records will be necessary for superannuation trustees to show that they have complied with their obligations under s99F of the SIS Act. Our proposed record-keeping obligations are designed to give greater certainty to superannuation trustees, and AFS licensees acting under an arrangement with a trustee, about the records they need to keep to comply with the requirements in s99F of the SIS Act.

60 We expect trustees to be able to show for each instance of personal advice provided, where the cost of that advice is not permitted to be collectively charged to other members under s99F:

- (a) how much it cost to provide that advice to members (including details of the calculation method applied); and
- (b) whether the trustee has charged the full cost of the advice to members in a permitted way.

61 We also consider it is important that trustees keep these records in a way that enables the information to be readily provided if requested to do so by ASIC for a particular period.

- 62 In situations where the trustee has collectively charged its members for personal advice provided, we think that the client records should show the basis for the trustee's view that it was allowed to collectively charge for the advice, including why the prohibition in s99F of the SIS Act did not apply.
- 63 We note that, unless an exemption applies, superannuation trustees must comply with our proposed record-keeping requirements in relation to the conduct obligations in Pt 7.7A, as set out in Proposals B1 and B2. As discussed in paragraph 12, intra-fund advice is exempt from the opt-in and fee disclosure requirements in Div 3 of Pt 7.7A.
- 64 Superannuation trustees must also continue to comply with the other licence conditions on record keeping in PF 209, which include a requirement for AFS licensees to keep copies of SOAs provided to their clients. This is because, as discussed in paragraph 28, the other licence conditions on record keeping in PF 209 will continue to remain in force.

C Regulatory and financial impact

65 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us, we think they will strike an appropriate balance between:

- (a) ensuring that AFS licensees, who are already required to keep records under the standard licence condition in PF 209, continue to keep certain records for financial product advice provided to retail clients in accordance with:
 - (i) the new conduct obligations in Pt 7.7A of the Corporations Act; and
 - (ii) s99F of the SIS Act when giving intra-fund advice; and
- (b) not causing licensees to incur unreasonable costs in maintaining these records.

66 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
- (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

67 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

68 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

Key terms

Term	Meaning in this document
advice provider	<p>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 that 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)</p> <p>Note: These obligations apply from 1 July 2013.</p>
AFS licence	<p>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</p> <p>Note: This is a definition contained in s761A.</p>
AFS licensee	<p>A person who holds an AFS licence under s913B of the Corporations Act</p> <p>Note: This is a definition contained in s761A.</p>
ASIC	Australian Securities and Investments Commission
authorised representative	<p>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</p> <p>Note: This is a definition contained in s761A.</p>
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
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7), unless otherwise specified
client's relevant circumstances	The objectives, financial situation and needs of a client that would reasonably be considered relevant to the subject matter of the advice sought by the client
client's relevant personal circumstances	<p>Such a person's objectives, financial situation and needs as would reasonably be considered to be relevant to the advice</p> <p>Note: This is a definition contained in s761A of the Corporations Act.</p>

Term	Meaning in this document
conflicted remuneration	<p>A benefit given to an AFS licensee, or a representative of an AFS licensee, who provides financial product advice to clients that, because of the nature of the benefit or the circumstances in which it is given:</p> <ul style="list-style-type: none"> • could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to clients; or • could reasonably be expected to influence the financial product advice given to clients by the licensee or representative. <p>In addition, the benefit must not be excluded from being conflicted remuneration by the Corporations Act or Corporations Regulations</p>
conflicted 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 the Act
Corporations Regulations	Corporations Regulations 2001
fee disclosure statement (FDS)	A document required by s962G to be given in accordance with Div 3 of Pt 7.7A of the Corporations Act. Specifically, it is a statement in writing provided by a fee recipient to their client about the previous 12 months of their ongoing fee arrangement, including information about the amount of fees paid by the client, the services received by the client, and the services that the client was entitled to receive
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>

Term	Meaning in this document
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 • 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 contained in s766B of the Corporations Act.</p>
FOFA	Future of Financial Advice
general advice	<p>Financial product advice that is not personal advice</p> <p>Note: This is a definition contained in s766B(4) of the Corporations Act.</p>
grandfathering	<p>Where the conflicted remuneration provisions in Div 4 of Pt 7.7A of the Corporations Act do not apply to a benefit because of the transitional provisions in s1528–1531 and the regulations made under those sections</p>
modified best interests duty	<p>The limited number of steps an advice provider needs to take to act in the best interests of the client when the personal advice is about:</p> <ul style="list-style-type: none"> • a basic banking product only and the advice provider is an agent or employee of an Australian authorised deposit-taking institution (ADI), or otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI (s961B(3)); • a general insurance product only (s961B(4)); • a basic banking product, a general insurance product, or a combination of those products, and the advice provider is an agent or employee of an Australian ADI, or otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI (reg 7.7A.1(2)); or • general insurance and other products (reg 7.7A.1(3))
ongoing fee arrangement	<p>Where an AFS licensee, or representative of a licensee, gives personal advice to a retail client and enters into an arrangement under which the client is to pay a fee (however described or structured) for a period of more than 12 months</p> <p>Note: This is a definition contained in s962A of the Corporations Act.</p>
opt-in requirement	<p>The requirement in s962K of the Corporations Act for financial advisers who enter into ongoing fee arrangements with retail clients to renew their clients' agreement to pay ongoing advice fees at least every two years</p>

Term	Meaning in this document
personal advice	<p>Financial product advice given or directed to a person (including by electronic means) in circumstances where:</p> <ul style="list-style-type: none"> • the provider of the advice has considered one or more of the client's objectives, financial situation and needs; or • a reasonable person might expect the provider to have considered one or more of these matters <p>Note: This is the definition contained in s766B(3) of the Corporations Act.</p>
PF 209	An ASIC pro forma (in this example numbered 209)
Pt 7.7A (for example)	A part of the Corporations Act (in this example numbered 7.7A), unless otherwise specified
reg 7.7.09 (for example)	A regulation of the Corporations Regulations (in this example numbered 7.7.09)
RG 175 (for example)	An ASIC regulatory guide (in this example numbered 175)
representative of an AFS licensee	<p>Means:</p> <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 s910A of the Corporations Act.</p>
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of Ch 7 of the Corporations Regulations
s945A (for example)	A section of the Corporations Act (in this example numbered 945A), unless otherwise specified
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i> , including regulations made for the purposes of the Act
SOA (Statement of Advice)	<p>A document that must be given to a client for the provision of personal advice under Subdivs C and D of Div 3 of Pt 7.7 of the Corporations Act</p> <p>Note: See s761A for the exact definition.</p>
superannuation trustee	A trustee of a regulated superannuation fund
transitional provisions	The provisions in s1528–1531 of the Corporations Act, and the regulations made under those sections

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to modify the law, by way of class order, to require that, when an AFS licensee or its representatives provide personal advice to retail clients, the licensee must retain a record of the following matters (whether in a material, electronic or other form) for at least seven years from the date that the personal advice is provided:</p> <ul style="list-style-type: none"> (a) the information relied on and the action taken by the advice provider that show the advice provider has acted in the best interests of the client for the purposes of s961B(1); (b) if s961B(2) is being relied on to show that s961B(1) has been complied with, the information relied on and the action taken by the advice provider that satisfy the safe harbour steps in s961B(2); (c) the advice, including reasons why advice is considered to be 'appropriate' within the meaning of s961G; (d) where an advice provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the advice provider, or one of their specified related parties, the information relied on and the action taken by the advice provider that show the advice provider has given priority to the client's interests when giving the advice for the purposes of s961J; (e) any ongoing fee arrangement entered into with the client within the meaning of s962A; (f) any assignment of an ongoing fee arrangement; (g) a fee disclosure statement given to the client under Div 3 of Pt 7.7A; (h) a renewal notice given to the client under Div 3 of Pt 7.7A; (i) any notification from a client given under Div 3 of Pt 7.7A that they elect to renew their ongoing fee arrangement; and (j) any fees charged after the termination of an ongoing fee arrangement. 	<p>B1Q1 Do you agree with our proposed record-keeping obligations for AFS licensees on the new conduct obligations in Pt 7.7A? If not, why not?</p> <p>B1Q2 Will our proposed record-keeping obligations require AFS licensees to significantly change their existing record-keeping practices? If so, please describe the changes and the likely costs involved.</p> <p>B1Q3 Are there any practical problems with the implementation of our proposal? Please provide details.</p> <p>B1Q4 We propose to update our guidance in Section E of RG 175 and Section C of RG 245 to reflect the updated record-keeping obligations. Do you think we should provide any further guidance on our proposed record-keeping obligations? If so, please provide details.</p>

Proposal	Your feedback
<p>We propose that the requirements in B1(a)–B1(c) do not apply to:</p> <ul style="list-style-type: none"> (k) personal advice for which an SOA is not required; or (l) personal advice for which a record of the advice is kept in accordance with s946B(3A), as modified by regs 7.7.09 and 7.7.10AE of the Corporations Regulations. 	
<p>B2 We propose to modify the law, by way of class order, to require that, when an AFS licensee or its representatives provide financial product advice to retail clients, the licensee must retain a record of the following matters (whether in a material, electronic or other form) for at least seven years from the date that the advice is provided:</p> <ul style="list-style-type: none"> (a) any arrangement, or any change to an arrangement, on the basis of which the licensee considers that the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A do not apply to the licensee or its representatives because of the transitional provisions in s1528–1531 of the Corporations Act and the regulations made under those sections; (b) any payments made or accepted under arrangements to which the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A do not apply to the licensee or its representatives because of s1528–1531 of the Corporations Act and the regulations made under those sections; and (c) where the licensee relies on the exemptions in s963B or 963C of the Corporations Act, or Div 4 of Pt 7.7A of the Corporations Regulations, to form the view that a monetary or non-monetary benefit that is given to the licensee or its representatives is not conflicted remuneration, records demonstrating the circumstances on which this reliance is based. 	<p>B2Q1 Do you agree with our proposed record-keeping obligations for AFS licensees on the new conduct obligations in Pt 7.7A? If not, why not?</p> <ul style="list-style-type: none"> (a) Do you think there is a more cost-effective way to ensure that AFS licensees comply with the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A? Please provide details. (b) Do you think it is appropriate to require AFS licensees to keep records to demonstrate the circumstances on which it relies to form the view that a monetary or non-monetary benefit is not conflicted remuneration because of the exemptions stated in Proposal B2(c)? If not, why not? <p>B2Q2 Will our proposed record-keeping obligations require AFS licensees to significantly change their existing record-keeping practices? If so, please describe the changes and the likely costs involved.</p> <p>B2Q3 Are there any practical problems with the implementation of our proposal? Please provide details.</p> <p>B2Q4 We propose to update our guidance in Section B of RG 246 to reflect our updated record-keeping obligations. Do you think we should provide further guidance on our proposed record-keeping obligations? If so, please provide details.</p>

Proposal	Your feedback
<p>B3 We propose to modify the law, by way of class order, to require that, when the trustee of a regulated superannuation fund (as an AFS licensee) provides personal advice to members of the fund, the trustee must ensure that they retain a record of the following matters (whether in a material, electronic or other form) for at least seven years from the date that the personal advice is provided:</p> <p>(a) the advice, including a note to identify whether the cost of the advice is allowed to be charged to a member or members other than the recipient and, if so, on what basis—unless the cost is in fact wholly charged or borne in one or more of the following ways:</p> <ul style="list-style-type: none"> (i) charged to the member receiving the advice; (ii) borne by the licensee if the licensee is not the trustee or an associate; and/or (iii) charged to a person other than the trustee or an associate; and <p>(b) if the cost of the personal advice is not allowed to be charged to a member or members other than the recipient, a note identifying:</p> <ul style="list-style-type: none"> (i) how much it cost to provide the advice, including details about the method of calculation and why any estimation applied in the calculation is reasonable; and (ii) how much the member receiving the advice was charged for the advice and how the cost was otherwise borne or charged. <p>This requirement would also apply to AFS licensees acting under an arrangement with a superannuation trustee, where the licensee or its representatives provide personal advice to members and that advice is charged for collectively.</p> <p>AFS licensees would also be required to keep records in a way that enables the information to be readily provided for a particular period, if requested to do so by ASIC.</p>	<p>B3Q1 Do you agree with our proposed record-keeping obligations for superannuation trustees, and AFS licensees acting under an arrangement with a trustee, when providing intra-fund advice to members? If not, why not?</p> <p>B3Q2 The objective of our proposal is to give greater certainty to superannuation trustees, and AFS licensees acting under an arrangement with a trustee, about the records they need to keep to comply with the requirements in s99F of the SIS Act. Do you think there is an alternative way for ASIC to meet this objective?</p> <p>B3Q3 Will our proposed record-keeping obligations require superannuation trustees, and AFS licensees acting under an arrangement with a trustee, to significantly change their record-keeping practices? If so, please describe the changes and the likely costs involved.</p> <p>B3Q4 Are there any practical problems with the implementation of our proposal? Please provide details.</p> <p>B3Q5 We propose to update INFO 168 to reflect our updated record-keeping obligations. Do you think we should provide further guidance on our proposed record-keeping obligations? If so, please provide details.</p>

Attachment 1: Proposed technical update to RG 175

This attachment sets out our draft amendments to the relevant paragraphs of Section E of RG 175, which contain our proposed guidance on the updated record-keeping obligations that apply to personal advice, as set out in Class Order [CO XX/XX]. We propose that the draft amendments will replace the existing paragraphs at RG 175.396–RG 175.403, and will be incorporated into RG 175 once this guidance has been finalised.

Record-keeping obligations that apply to personal advice

- RG 175.396 We expect AFS licensees to keep records of how their advice providers have acted in relation to providing advice. This includes the inquiries an advice provider makes into the client’s relevant circumstances, and the consideration and investigation of the financial products they are advising on, if relevant.
- RG 175.397 In our view, under the duties imposed by the Corporations Act, AFS licensees are required to keep adequate records about their financial services business, and this includes an obligation to keep records of personal advice and the steps an advice provider has taken in providing their client with personal advice.
- RG 175.398 The relevant duties of an AFS licensee that we consider require such a record-keeping obligation include:
- (a) the duty to ‘do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly’ (s912A(1)(a)); and
 - (b) the duty to have an adequate dispute resolution system (s912A(1)(g)).
- RG 175.399 We expect that the types of records that are kept will vary depending on the advice that is provided, including its scope, and the obligations that apply when providing the advice—for example, if there is no requirement to give an SOA.
- RG 175.400 We have imposed a record-keeping obligation requiring AFS licensees and their representatives who provide personal advice to retail clients to ensure that records of the following matters are retained for at least seven years from the date that the licensee or one of its representatives provides the personal advice:
- (a) the information relied on and the action taken by the advice provider that show the advice provider has acted in the best interests of the client for the purposes of s961B(1);

DRAFT

- (b) if s961B(2) is being relied on to show that s961B(1) has been complied with, the information relied on and the action taken by the advice provider that satisfy the safe harbour steps in s961B(2);
- (c) the advice, including reasons why advice is considered to be ‘appropriate’ within the meaning of s961G;
- (d) where an advice provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the advice provider, or one of their specified related parties, the information relied on and the action taken by the advice provider that show the advice provider has given priority to the client’s interests when giving the advice for the purposes of s961J;
- (e) any ongoing fee arrangement entered into with the client within the meaning of s962A;
- (f) any assignment of an ongoing fee arrangement;
- (g) a fee disclosure statement given to the client under Div 3 of Pt 7.7A;
- (h) a renewal notice given to the client under Div 3 of Pt 7.7A;
- (i) any notification from a client given under Div 3 of Pt 7.7A that they elect to renew their ongoing fee arrangement; and
- (j) any fees charged after the termination of an ongoing fee arrangement.

Note: For details of these record-keeping obligations, see [CO XX/XX].

RG 175.401 These records may be kept in a material, electronic or other form.

RG 175.402 The record-keeping obligations in RG 175.400(a)–RG 175.400(c) do not apply to:

- (a) personal advice for which an SOA is not required; or
- (b) personal advice for which a record of the advice is kept in accordance with s946B(3A) (see regs 7.7.09 and 7.7.10AE).

RG 175.403 Records may take various forms, and do not have to be paper-based. For example, they may include:

- (a) the advice document;
- (b) file notes, including records of conversations;
- (c) correspondence;
- (d) working papers;
- (e) fact-finding documents used when making inquiries into the client’s relevant circumstances;
- (f) audio recordings; and
- (g) evidence of what compliance systems are used by the advice provider’s licensee or authorised representative. This includes:

DRAFT

- (i) training materials;
 - (ii) records of who is attending the training; and
 - (iii) call scripts; and
- (h) evidence of how the advice provider has complied with these systems.

Note: This list is not intended to be exhaustive.

- RG 175.404 We expect records to be kept in a way that enables the information to be readily provided if requested to do so by ASIC for a particular period.
- RG 175.405 Keeping records will be necessary for an advice provider to show they have satisfied the safe harbour for complying with the best interests duty, if it is being relied on. Good records will also assist an advice provider in defending a claim that they have breached their obligations under Div 2 of Pt 7.7A.
- RG 175.406 We consider that client records should contain evidence of the basis on which a reasonable advice provider would believe that the advice is likely to leave the client in a better position if the client follows the advice. For more information, see: RG 175.228–RG 175.235.
- RG 175.407 Client records should also contain evidence outlining the reasons why an advice provider considers the advice to be ‘appropriate’ for the purposes of s961G. In our view, advice is appropriate if it would be reasonable to conclude, at the time the advice is provided, that it is fit for purpose and the client is likely to be in a better position if they follow the advice. For more information, see RG 175.344–RG 175.350.
- RG 175.408 In cases where there is a conflict between the client’s interests and those of the advice provider or one of their related parties under s961J, we expect that records will cover the reasoning behind any recommendation that the client acquire new financial products or increase their interest in an existing product where this benefits the related party.

Attachment 2: Proposed technical update to RG 245

This attachment sets out our draft amendments to Section C of RG 245, which contain our proposed guidance on the updated record-keeping obligations that apply to personal advice, as set out in Class Order [CO XX/XX]. We propose that the draft amendments will be incorporated into RG 245 at RG 245.72 once this guidance has been finalised.

Record-keeping obligations that apply to personal advice

RG 245.72 We have imposed a record-keeping obligation requiring AFS licensees and their authorised representatives who provide personal advice to retail clients to ensure that records of the following matters are retained for at least seven years from the date that the licensee or one of its representatives provide personal advice:

- (a) any ongoing fee arrangement entered into with the client within the meaning of s962A;
- (b) any assignment of an ongoing fee arrangement;
- (c) a fee disclosure statement given to the client under Div 3 of Pt 7.7A;
- (d) a renewal notice given to the client under Div 3 of Pt 7.7A;
- (e) any notification from a client given under Div 3 of Pt 7.7A that they elect to renew their ongoing fee arrangement; and
- (f) any fees charged after the termination of an ongoing fee arrangement.

Note: For details of these record-keeping obligations, see [CO XX/XX].

RG 245.73 These records may be kept in a material, electronic or other form.

RG 245.74 Where AFS licensees or their authorised representatives provide personal advice to their clients, and have an ongoing fee arrangement with them, we consider that keeping adequate records will be necessary to show that the licensee or its authorised representatives have complied with their obligations in Div 3 of Pt 7.7A.

RG 245.75 We expect records to be kept in a way that enables the information to be readily provided if requested to do so by ASIC for a particular period.

RG 245.76 In cases where an ongoing fee arrangement has been renewed with the client under the 'opt-in requirement' in s962K, we expect AFS licensees to keep records confirming the client's consent to the terms, fees and scope of the renewed arrangement.

Note: Under s962CA, we may grant relief from the opt-in requirement in s962K if we are satisfied that a financial adviser is bound by an approved code of conduct that

DRAFT

obviates the need for complying with this requirement. For more information, see Section E of RG 183.

DRAFT

Attachment 3: Proposed technical update to RG 246

This attachment sets out our draft amendments to RG 246, which contain our proposed guidance on the updated record-keeping obligations that apply to personal advice, as set out in Class Order [CO XX/XX]. We propose that the draft amendments will replace the existing paragraphs at RG 246.80–RG 246.81, and will be incorporated into RG 246 once this guidance has been finalised.

Other obligations

RG 246.80 Other obligations in the Corporations Act apply when personal advice is given to a retail client—for example, the best interests duty and related obligations in Div 2 of Pt 7.7A, and the requirement to give a Financial Services Guide (FSG) and Statement of Advice (SOA) in Pt 7.7. These requirements operate alongside the conflicted remuneration provisions and apply even if a benefit is excluded from the conflicted remuneration provisions.

Note: For more information on the best interests duty and related obligations, see RG 175 and RG 244. For more information on providing FSGs and SOAs, see RG 175.

RG 246.81 We have also imposed a record-keeping obligation requiring AFS licensees and their representatives who provide financial product advice to retail clients to ensure that records of the following matters are retained for at least seven years from the date that the licensee or one of its representatives provides the advice:

- (a) any arrangement, or any change to an arrangement, on the basis of which the licensee considers that the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A do not apply to the licensee or its representatives because of the transitional provisions in s1528–1531 of the Corporations Act and the regulations made under those sections;
- (b) any payments made or accepted under arrangements to which the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A do not apply to the licensee or its representatives because of s1528–1531 of the Corporations Act and the regulations made under those sections; and
- (c) where the licensee relies on the exemptions in s963B or 963C of the Corporations Act, or Div 4 of Pt 7.7A of the Corporations Regulations, to form the view that a monetary or non-monetary benefit that is given to the licensee or its representatives is not conflicted remuneration, records demonstrating the circumstances on which this reliance is based.

Note: For details of these record-keeping obligations, see [CO XX/XX].

DRAFT

- RG 246.82 These records may be kept in a material, electronic or other form.
- RG 246.83 We expect records to be kept in a way that enables the information to be readily provided if requested to do so by ASIC for a particular period.
- RG 246.84 Reg 7.8.11A also requires records to be kept of non-monetary benefits between \$100 and \$300 where the exclusions in s963C(c) or 963C(d) apply for non-monetary benefits with an educational or training purpose or for information technology software and support.
- RG 246.85 Keeping records will be necessary to show that AFS licensees and representatives have complied with the conflicted remuneration provisions under Divs 4 and 5 of Pt 7.7A.
- RG 246.86 Where a volume-based benefit is presumed to be conflicted remuneration because the presumption in s963L applies, keeping records is also necessary to rebut this presumption and show that a benefit could not reasonably be expected to influence the advice: see, for example, the commentary in Example 9 and RG 246.144.
- RG 246.87 In addition to these obligations, AFS licensees need to have in place adequate arrangements to manage conflicts of interest that may arise in relation to activities undertaken by the licensee or its representatives: s912A(1)(aa). This is particularly relevant where a benefit is excluded from the conflicted remuneration provisions. Some benefits that are excluded from the conflicted remuneration provisions can create conflicts of interest for an AFS licensee and/or its representatives.

Note: For more information on complying with the conflicts management obligation in s912A(1)(aa), see Regulatory Guide 181 *Licensing: Managing conflicts of interest* (RG 181). This guidance will be incorporated into RG 246 once it has been finalised.

Attachment 4: Proposed technical update to INFO 168

This attachment sets out our draft amendments to INFO 168, which contain our proposed guidance on the updated record-keeping obligations that apply to personal advice, as set out in Class Order [CO XX/XX]. We propose that the draft amendments will replace the current section on ‘What records must I keep?’ in INFO 168. This guidance will be incorporated into INFO 168 once it has been finalised.

What records must I keep?

We expect you to be able to demonstrate how you charge for advice that is not intra-fund advice to ensure that it is being charged to the individual member receiving the advice.

If you are an AFS licensee, you must keep records of any personal advice that is provided for seven years, including:

- copies of SOAs provided to your clients (see Pro Forma 209 *Australian financial services licence conditions* (PF 209), condition 57); and
- records to demonstrate you have complied with the conduct obligations in Pt 7.7A of the Corporations Act (see Class Order [CO XX/XX]).

We have also imposed a specific record-keeping obligation on trustees of regulated superannuation funds (who are AFS licensees), and licensees acting under an arrangement with a superannuation trustee, where the licensee or its representatives provide personal advice for which they charge members collectively as intra-fund advice: see [CO XX/XX].

Under this obligation, you must ensure that a record of the following matters (whether in a material, electronic or other form) is retained for at least seven years from the date that the personal advice is provided:

- the advice, including a note to identify whether the cost of the advice is allowed to be charged to a member or members, other than the member receiving the advice, under s99F of the SIS Act and, if so, on what basis—unless the cost is in fact wholly charged or borne in one or more of the following ways:
 - charged to the member receiving the advice;
 - borne by the licensee if the licensee is not the trustee or an associate; and/or
 - charged to a person other than the trustee or an associate; and

DRAFT

- if the cost of the personal advice is not allowed to be charged to a member or members, other than the member receiving the advice, under s99F, to the extent that the personal advice is not collectively charged to members, a note identifying:
 - how much it cost to provide the advice, including details about the method of calculation; and
 - how much the member receiving the advice was charged for the advice and how the cost was otherwise borne or charged.

In our view, keeping records will be necessary for superannuation trustees to show that they have complied with their obligations in s99F of the SIS Act. Adequate records also help us to monitor and assess whether the superannuation trustee or its representatives are complying with the requirements in the law, as well as our guidance.

We expect records to be kept in a way that enables the information to be readily provided if requested to do so by ASIC for a particular period.

DRAFT