

# ASIC UPDATES REGULATORY GUIDANCE ON CONFLICTED REMUNERATION

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Legal Briefings - By **Michael Vrisakis** and **Claire Machin**

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ASIC has released the long awaited update to ASIC Regulatory Guide 246<sup>1</sup> – now retitled: *Conflicted and other banned remuneration* (previously *Conflicted remuneration*).

The changes primarily cover the new conflicted remuneration provisions for life risk insurance products that take effect from 1 January 2018 with the details set out in a new Appendix 2. However, there are some other changes that should be noted.

## CONFLICTED REMUNERATION BAN EXTENDS TO LIFE RISK INSURANCE PRODUCTS

The changes that will come into effect from 1 January 2018 in relation to life risk insurance products are significant in two respects:

- the general exemption for life risk insurance products (other than group life within super or life insurance in a MySuper product) will fall away and the ban on conflicted remuneration will apply to benefits for advice given in relation to a life risk insurance product unless an exclusion applies; and
- the ban on conflicted remuneration will apply to benefits that are volume based and given in relation to information or dealing in respect of life risk insurance products.

Appendix 2 to the Regulatory Guide sets out the manner in which the conflicted remuneration provisions will apply to those benefits. As a general observation, the Regulatory Guide largely paraphrases the legislative provisions (including the ASIC Instrument dealing with acceptable benefit ratios and claw back amounts) and does not provide any significant insight as to how ASIC will administer those provisions – particularly where there is some ambiguity.

## **BALANCED SCORECARDS**

ASIC has made some additional comments in relation to the payment of performance benefits for life risk insurance products.<sup>2</sup> The Regulatory Guide at least clarifies that ASIC considers that the recipient of the benefit and the person carrying out the giving of information and dealing activities should be the same person for the ban on conflicted remuneration to apply.<sup>3</sup>

The update to the Regulatory Guide does not provide any greater insight into ASIC's attitude as to what might be an acceptable balanced scorecard. In example 15 of the Regulatory Guide, ASIC indicates that if "*significant*" weight is placed on volume based criteria, then it is likely that the benefit will be conflicted remuneration however if the weighting on the balanced scorecard '*predominantly*' favours non-volume based criteria then it is more likely that the bonus will not be conflicted remuneration. This does leave us having to continue to grapple with what might be the acceptable ratio between the number of volume based and non-volume based performance criteria in a score card for it to be balanced. This is a live issue across the industry given the ban on payment of conflicted remuneration to employees of financial services licensees and representatives.

## **EXEMPTIONS - CLIENT INITIATED BENEFIT**

As a final note, the Regulatory Guide provides further coverage on how the exclusion for client initiated benefits is expected to apply. This exclusion is relevant so that the ban on conflicted remuneration will not apply to a monetary or non-monetary benefit that is given by a client in relation to:

- the issue or sale of a financial product;
- advice given to the client;
- information given to a client in relation to a life risk insurance product; or
- dealing in a life risk insurance product.

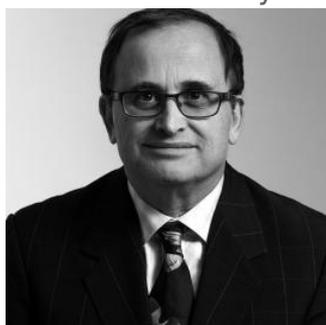
ASIC clarifies that for the exclusion to apply, the benefit must be borne out of the client's own funds ie, money of the client or funds to which the client is beneficially entitled to. The earlier Regulatory Guide had emphasised the significance of the client's consent to the payment of the benefit being genuine, express and specific. This further clarifies that consent to the payment of a benefit does not mean that the benefit is authorised by the client and it is necessary for the benefit to be actually borne by the client - whether directly or from funds that the client is beneficially entitled to, (e.g. superannuation monies).

## ENDNOTES

- ASIC RG 246 was first released in March 2013.
- See paragraphs 246.166 to 246.168.
- The Regulations could be interpreted more broadly to suggest that there did not need to be a link between the recipient of the benefit and the licensee or representative undertaking the dealing activity. However we expect that this was not what was intended.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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