



Australian Government

Takeovers Panel

MEDIA RELEASE

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Panel Amends Guidance Note 13 Broker Handling Fees

The Takeovers Panel today amended Guidance Note 13 on broker handling fees, to note that such fees appear to fall under the definition of 'conflicted remuneration' in the *Corporations Act 2001* (Cth) (the *Act*) and are therefore prohibited unless an exception applies. This follows the conclusion to the Australian Government's Future of Financial Advice reforms with the passage of the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 on 24 November 2015. Further information regarding the Panel's decision is included below.

More information about the conflicted remuneration prohibition can be obtained by seeking professional advice.

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Background

On 24 November 2015, the Senate passed the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (*Bill*), completing the Future of Financial Advice reforms (*FOFA*).

FOFA was the result of the 2009 Parliamentary Joint Committee on Corporations and Financial Services' Inquiry into financial products and services in Australia

(Inquiry).¹ FOFA was developed to improve the quality of financial advice in Australia and enhance retail investor protection.

The Inquiry suggested in its final report, among other things, that remuneration structures which were incompatible with a financial adviser's proposed fiduciary duty (Recommendation 1 of the Inquiry) should be removed.² Prohibitions on conflicted remuneration were introduced in 2012 as Div 4 of Part 7.7A of the Corporations Act. Following the passage of the Bill, the Hon Kelly O'Dwyer MP said "FOFA should now be considered settled and given time to work."³

Ban on conflicted remuneration

The prohibitions on conflicted remuneration apply to Australian financial services licensees and their representatives (including authorised representatives). They prohibit licensees and representatives from accepting conflicted remuneration (s963E, 963G and 963H⁴). The prohibitions also apply to product issuers and sellers. They prohibit them from giving conflicted remuneration to licensees and representatives (s963K).

Section 963A defines conflicted remuneration as:

***Conflicted remuneration** means any benefit, whether monetary or non-monetary, given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients that, because of the nature of the benefit or the circumstances in which it is given:*

- (a) could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or*
- (b) could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.*

'Financial product advice' is defined in s766B(1) as a recommendation or a statement of opinion, or a report of either of those things, that:

- (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or*

¹ See for more information:

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2008-10/fps/index

² Final report of Parliamentary Joint Committee on Corporations and Financial Services, 'Financial products and services in Australia', at [6.100]

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2008-10/fps/report/c06#anc3

³ Media release, 'FOFA Bill passes the Senate' dated 24 November 2015,

<http://kmo.ministers.treasury.gov.au/media-release/027-2015/>

⁴ References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

- (b) *could reasonably be regarded as being intended to have such an influence.*

BROKER HANDLING FEES

Broker handling fees are defined in GN 13 as “*fees offered by bidders to brokers who solicit acceptances of a bid from their clients. The broker either stamps the acceptance form or initiates the message in CHESSE.*”⁵

It appears that that broker handling fees fall within the definition of conflicted remuneration under s963A for a number of reasons, including:

- (a) ‘Financial product advice’ relates to advice which is intended to influence another to make a decision regarding a financial product (s766B). There is no indication that this financial product has to be one which the person does not own. In the case of broker handling fees, the financial products are the shares held by the target shareholders who consider advice regarding the takeover and make decisions on whether to hold their shares or sell into the bid.
- (b) Considering the factors in ASIC Regulatory Guide 246 *Conflicted remuneration (RG 246)*, broker handling fees appear to fall within the definition of conflicted remuneration as a benefit which is likely to influence the licensee’s advice to its client.⁶
- (c) Broker handling fees appear to fit within the policy basis for prohibiting conflicted remuneration. GN 13 recognises that, while broker handling fees may have a beneficial impact on the market, they may also result in target shareholders being pressured to accept a bid or accept prematurely.⁷ The Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (**2012 Bill**) considered that commissions may encourage advisers to sell products rather than give unbiased advice.⁸ The Inquiry also considered that the most effective way to improve the quality of financial advice was to remove the conflicts altogether. This was adopted by the Government in the 2012 Bill.⁹
- (d) It appears from s963L and the guidance in RG 246.85 that broker handling fees are likely to be volume-based benefits which are presumed to be conflicted remuneration.

⁵ GN 13 at [4]

⁶ See RG 246 for further information, in particular paragraph 51-55

⁷ GN 13 at [5]

⁸ Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012, at [3.27]

⁹ Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012, at [2.6]

There are exemptions to the conflicted remuneration prohibitions in sections 963B-963D. Broker handling fees are not specified.

AMENDMENTS TO GN 13

The Panel has amended GN 13 to note that broker handling fees appear to fall under the definition of 'conflicted remuneration' and are therefore prohibited unless an exception applies.

The Panel will monitor market developments following the FOFA reforms and may withdraw GN 13 if it becomes market practice not to offer broker handling fees.