Funds Management & Financial Services Alert

Fund managers and the ban on commissions

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ASIC releases guidance on conflicted remuneration

As part of its roll out of policy on the Future of Financial Advice (**FOFA**) reforms, the Australian Securities and Investments Commission (**ASIC**) has recently released its guidance on how it will regulate the ban on conflicted remuneration in Regulatory Guide 246: *Conflicted remuneration.*

The policy contains important guidance about the circumstances in which ASIC considers a fee will be conflicted remuneration. In particular, it addresses common fee structures between fund managers, dealer groups and platforms. Set out below are some examples of common fee structures and how ASIC is going to apply the ban on the payment of conflicted remuneration.

Commissions paid through application forms with consent (not banned)

One of the key FOFA reforms was to ban commissions paid by fund managers to financial advisers for the distribution of the fund manager's products. However, ASIC considers that where a commission has been authorised by the client, then such a payment will be excluded from the ban.

Therefore, with the following adjustments, the practice of fund managers collecting commission payments from investors and paying those to financial advisers can continue:

- The fund manager and the financial adviser should formally agree that any fee the client agrees to pay the adviser for advice is collected by the fund manager as the adviser's agent. An agency agreement would be an appropriate legal mechanism to enshrine this arrangement.
- Before the investor signs the application form, the adviser must make it clear to the investor that the investor is authorising the adviser to receive the fees set out in the application form. It should also disclose to the investor that it has a formal arrangement with the fund manager to collect the payment and to pay it to the adviser.
- The application form should be amended to include the following:
  - provision for the investor, or the adviser on behalf of the investor and with its specific authority, to nominate the fee to be paid to the adviser from the investment money;
  - a statement that the fee paid by the investor will be collected by the fund manager as agent for the adviser and paid to the adviser; and
  - a section for the adviser to consent to the arrangement.

Volume-based fees paid under white label arrangements (banned)

ASIC considers that fees accessed by a dealer group in the following circumstances would contravene the ban on conflicted remuneration (unless the fund manager can prove to the contrary):

- The fund manager provides a white label managed investment scheme to a dealer group to brand as its own.
- Investors in the white label fund pay the fund manager a bundled fee (management fee) for administration services provide by the fund manager and promotion and distribution services provided by the dealer group.
- The management fee is collected by the fund manager but a portion of it is paid to the dealer group depending on the proportion of funds under management sourced by the dealer group.

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Preferred marketing payments to platform operators or dealer groups (banned)

Where a funds manager makes a payment (either volume-based or a flat fee) to a licensed dealer group that is also a platform operator to get preferred marketing access to the licensed dealer group's adviser, then ASIC considers the payment will be conflicted remuneration and subject to the ban. This is the case because ASIC believes the dealer group's advisers are more likely to recommend that a retail client acquire the funds manager's products through the platform.

Volume bonuses paid to dealer groups (banned)

Where a funds manager makes a payment to a licensed dealer group that is also a platform operator and the payment is based on the volume of the fund manager's products acquired by clients of the dealer group's advisers, then ASIC considers the payment will be conflicted remuneration and subject to the ban. This is the case because ASIC believes that such a payment is likely to influence the dealer group's advisers to recommend the funds manager's products to retail clients.

Management fees (banned, but no action position issued)

ASIC considers that the ban on conflicted remuneration may prevent fund managers from giving advice to their clients to increase or maintain their investment in the fund managers' products. However, ASIC states that it will not take any action against a fund manager for accepting management fees provided it does not provide *personal* financial product advice about its products.

Commissions rebated to clients (not banned)

In the circumstances where a volume-based benefit paid by a fund manager to an adviser is passed on in whole to the adviser's clients, then it is unlikely that ASIC will consider the benefit to be conflicted. The conditions the fund manager must satisfy in order to satisfy itself that it will not be giving conflicted remuneration if it makes such payments are that:

- the benefit is given on the condition it is passed on in its entirety to the client; and
- the fund manager reasonably believes the benefit will be passed on.

Volume-based shelf-space fees rebated to clients (not banned)

ASIC states that it will not take action against a platform operator that accepts a volume-based shelf space fee if that fee is passed on to its clients as soon as reasonably practicable (and not later than three months) after it is received. This is the case because ASIC considers such a fee is unlikely to influence how platform operators select which products are available on the platform or the prominence they are given.

Principles-based policy

ASIC's approach to the ban on conflicted remuneration is principles-based: if a benefit is likely to influence the advice given then it will fall within the ban. This policy means that in certain circumstances, volume-based remuneration may be acceptable where it does not influence advice.

If you need assistance determining whether your remuneration structures are likely to fall within the ban, then please contact Chris Mee.

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