



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 104

# Licensing: Meeting the general obligations

October 2007

### About this guide

This is a guide for Australian financial services (AFS) licensees and licence applicants.

This guide describes what we look for when we assess compliance with most of the general obligations under s912A(1) of the *Corporations Act 2001*.

The general obligations not covered in this guide are covered in separate guides: see Table 1 in Section A.

### 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 regulatory guide was issued on 11 October 2007 and is based on legislation and regulations as at 11 October 2007.

This guide replaces:

- Sections A–D and F–G of Regulatory Guide 164 *Licensing: Organisational capacities* (RG 164), issued 28 November 2001, updated 8 November 2002
- parts of Regulatory Guide 130 *Managed investments: Licensing* (RG 130), issued 3 August 1998, updated 4 November 1998, 2 June 1999 and 4 October 1999

### Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview

### Key points

Licensees must comply with the general obligations under s912A(1) and licence applicants must be able to demonstrate in their licence application that they can comply with them: see RG 104.2–RG 104.6.

As a licensee or licence applicant, you are responsible for deciding how to comply with the general obligations: see RG 104.7–RG 104.9.

To help you comply, this regulatory guide:

- outlines key compliance concepts that apply to all of the general obligations (see Section B);
- describes what we look for when we assess compliance with various general obligations (see Sections C to F); and
- includes questions to help you design and test your measures for complying with the general obligations (see Appendix 1).

## The general obligations

- RG 104.1 If you are an AFS licensee, you have general obligations under s912A(1) of the *Corporations Act 2001* (Corporations Act) to:
- (a) do all things necessary to ensure that the financial services covered by your licence are provided efficiently, honestly and fairly (s912A(1)(a));
  - (b) have adequate arrangements in place for managing conflicts of interest (s912A(1)(aa));
  - (c) comply with the conditions on your licence (s912A(1)(b));
  - (d) comply with the financial services laws (s912A(1)(c));
  - (e) take reasonable steps to ensure that your representatives comply with the financial services laws (s912A(1)(ca));
  - (f) unless you are regulated by APRA, have adequate financial, technological and human resources to provide the financial services covered by your licence and to carry out supervisory arrangements (s912A(1)(d));
  - (g) maintain the competence to provide the financial services covered by your licence (s912A(1)(e));
  - (h) ensure that your representatives are adequately trained and competent to provide those financial services (s912A(1)(f));

- (i) if you provide financial services to retail clients, have a dispute resolution system (s912A(1)(g)); and
- (j) unless you are regulated by APRA, establish and maintain adequate risk management systems (s912A(1)(h)).

## When you need to comply with the general obligations

RG 104.2 You must comply with the general obligations from the time your AFS licence is granted and on an ongoing basis. If we have reason to believe that you are not complying with your obligations, we may take administrative action, which could include suspending or cancelling your licence, or imposing additional licence conditions: s915C(1) and 914A(1).

Note: For guidance on our administrative powers, see Regulatory Guide 98 *Licensing: Administrative action against financial services providers* (RG 98).

RG 104.3 If we conduct a surveillance visit on your business, we may check your ongoing compliance with the general obligations, including the measures you have for ensuring compliance.

RG 104.4 If you breach or are likely to breach your general obligations, you may need to notify us of that breach: s912D.

Note: For guidance on breach reporting, see Regulatory Guide 78 *Breach reporting by AFS licensees* (RG 78).

## Applying for an AFS licence

RG 104.5 If you are applying for an AFS licence, you must be able to show that you can comply with the general obligations from the time you are granted a licence, and on an ongoing basis: reg 7.6.03(g). We cannot grant you a licence if we have any reason to believe you will not be able to comply with your general obligations once you have a licence: s913B(1)(b).

Note: If you are applying for an AFS licence, you should read the *AFS Licensing Kit* (RG 1–RG 3). The *AFS Licensing Kit* explains the licence application process and the ‘proof’ documents you may need to provide to support your application.

RG 104.6 We do not expect your business to be fully operational at the time you apply for an AFS licence. However, when you apply, you must be able to show that you have arrangements in place to ensure compliance once you are granted a licence.

## What you need to do to comply

- RG 104.7 The general obligations are principles-based and designed to apply in a flexible way. For this reason, we do not think we can or should give prescriptive guidance on what you need to do to comply with them. The Corporations Act places responsibility on you to decide how to comply.
- RG 104.8 However, to help you comply, this guide:
- (a) outlines key compliance concepts that apply to all of the general obligations (see Section B);
  - (b) describes what we look for when we assess compliance with various general obligations (see Sections C to F); and
  - (c) includes questions to help you design and test your measures for complying with the general obligations covered in Sections C to F (see Appendix 1).
- RG 104.9 Throughout this guide we often use the phrase ‘we expect’. In using this phrase, we are describing what we look for when we assess compliance with the general obligations, based on our experience as a regulator of financial services providers and our knowledge of regulatory regimes in other countries. Our expectations are not intended to limit the ways in which you can comply. It is up to you to decide how best to comply with the general obligations.
- RG 104.10 This guide does not cover all of the general obligations. Some general obligations are covered in separate guides: see Table 1.

**Table 1: Where to find our guidance on the general obligations**

Type of obligation	General obligation	Where to find our guidance
Your broad compliance obligations	Providing your financial services efficiently, honestly and fairly: s912A(1)(a)	Section C
	Complying with the conditions on your licence: s912A(1)(b)	Section C
	Complying with the financial services laws: s912A(1)(c)	Section C
Your internal systems	Risk management systems (if you are not regulated by APRA): s912A(1)(h)	Section D
	Arrangements for managing conflicts of interest: s912A(1)(aa)	RG 181 <i>Licensing: Managing conflicts of interest</i>
	Dispute resolution system (if you provide services to retail clients): s912A(1)(g)	RG 165 <i>Licensing: Internal and external dispute resolution</i>
Your people	Ensuring your representatives comply with the financial services laws: s912A(1)(ca)	Section E
	Ensuring your representatives are adequately trained and competent: s912A(1)(f)	Section E and, if you provide financial product advice to retail clients, also RG 146 <i>Licensing: Training of financial product advisers</i>
	Maintaining the competence to provide your financial services: s912A(1)(e)	RG 105 <i>Licensing: Organisational competence</i>
Your resources	Adequate human and technological resources (if you are not regulated by APRA): s912A(1)(d)	Section F
	Adequate financial resources (if you are not regulated by APRA): s912A(1)(d)	RG 166 <i>Licensing: Financial requirements</i>

## Underlying principles

- RG 104.11 This guide aims to strike a balance between certainty and flexibility for licensees, while furthering the primary goals of the licensing regime and the general obligations. At the broadest level, these regulatory goals are to promote:
- (a) consumer confidence in using financial services; and
  - (b) the provision of efficient, honest and fair financial services by all licensees and their representatives.

## Our regulatory approach

### What if you are also regulated by APRA?

- RG 104.12 If you are a body regulated by APRA, you do not have to read Sections D and F of this guide. This is because the general obligations to have adequate resources and risk management systems do not apply to you: s912A(1)(d) and (h). This is the case even if only a part of your financial services business is an activity that APRA regulates. APRA, not ASIC, imposes any requirements for risk management and resources that apply to you.

Note: The term 'body regulated by APRA' has the meaning given in s3(2) of the *Australian Prudential Regulation Authority Act 1998*.

- RG 104.13 In administering the other general obligations, we will take into account that you are regulated by APRA and we will aim to minimise regulatory duplication. When you apply for an AFS licence, we will accept copies of relevant documents you have provided to APRA. In some areas, you may not need to provide particular supporting 'proof' documents. We regularly communicate with APRA and coordinate regulatory activities where we share an interest.

### Standards and international principles

- RG 104.14 In thinking about how to comply with your obligations, you might find it helpful to look at good industry practice as captured in standards. Industry and Australian standards are relevant to most licensees because these have been drafted with the Australian regulatory environment in mind. For licensees with larger or more complex businesses, or licensees that are part of a global business, international principles might also be relevant.
- RG 104.15 We also use standards in a similar way, i.e. as a guide to good industry practice. However, we check compliance with the law and licence conditions, not with standards—unless, the law or your licence conditions require you to comply with a particular standard.
- RG 104.16 We aim to work with industry, consumer groups and Standards Australia to develop standards as a means of setting good practice. We will also approve codes of conduct where we have a regulatory responsibility to do so.

Note: Our guidance on approving codes of conduct under s1101A of the Corporations Act is set out in Regulatory Guide 183 *Approval of financial services sector codes of conduct* (RG 183).



## Transitional issues

- RG 104.17 This guide, RG 104, replaces:
- (a) Sections A–D and F–G of Regulatory Guide 164 *Licensing: Organisational capacities* (RG 164); and
  - (b) parts of Regulatory Guide 130 *Managed investments: Licensing* (RG 130).
- RG 104.18 While RG 104 comes into effect immediately, we accept that you might not immediately update your internal policies and procedures to refer to RG 104 and the guidance it contains. However, we expect that you will update your references to our guidance the next time you amend your internal policies and procedures.
- RG 104.19 If, at October 2007, you have already started or lodged an AFS licence application or a variation application, we will not refuse your application simply because it refers to RG 164 or RG 130. However, if you are only beginning to prepare your application, we expect that your application and supporting ‘proof’ documents will take into account the guidance in RG 104, not that in RG 164 or RG 130.

## B Key compliance concepts

### Key points

What you need to do depends on the nature, scale and complexity of your business: see RG 104.21–RG 104.22.

You must have measures for ensuring you comply with your obligations as a licensee: see RG 104.23–RG 104.32.

You can outsource functions, but not your responsibility as a licensee: see RG 104.33–RG 104.36.

- RG 104.20 This section outlines key compliance concepts that underpin what we look for when we assess compliance with the general obligations. You need to bear these key concepts in mind when reading Sections C to F.

### What you need to do depends on the nature, scale and complexity of your business

- RG 104.21 There are many different kinds of licensees providing a diverse range of financial services. We do not take a ‘one-size-fits-all’ approach to regulation. Rather, we acknowledge that what you need to do to comply with your obligations will vary according to the ‘nature, scale and complexity’ of your business.
- RG 104.22 ‘Nature, scale and complexity’ includes factors such as:
- (a) the products and services you offer;
  - (b) the diversity and structure of your operations (including the geographical spread of your operations and the extent to which you outsource any of your functions);
  - (c) the volume and size of the transactions you are responsible for;
  - (d) how many of your clients are retail and how many wholesale;
  - (e) whether you give financial product advice and, if so, whether it is personal or general advice;
  - (f) whether your main business is the provision of financial services; and
  - (g) the number of people in your organisation.

## You must have measures for ensuring you comply with your obligations

RG 104.23 We use the expression ‘measures’ or ‘compliance measures’ in this guide to refer to your processes, procedures or arrangements for ensuring that, as far as reasonably practicable, you comply with your obligations as a licensee, including the general obligations.

RG 104.24 We expect you to:

- (a) document your measures in some form (see RG 104.26);
- (b) fully implement them and monitor and report on their use (see RG 104.27–RG 104.30); and
- (c) regularly review the effectiveness of your measures and ensure they are up-to-date (see RG 104.31–RG 104.32).

If you do not do this, we think you will find it more difficult to comply with the general obligations, and to show you are complying with them.

RG 104.25 Your measures will be affected by the nature, scale and complexity of your business: see RG 104.21–RG 104.22.

### Documenting your measures

RG 104.26 Documentation helps you demonstrate whether or not you are complying with the general obligations. When you document your measures, we expect this will include details of who is responsible, the time frames involved and associated record-keeping and reporting.

### Implementing, monitoring and reporting on your measures

RG 104.27 It is not enough just to document your measures. You also need to fully implement them. This means you need to put them into practice and integrate them into the day-to-day conduct of your business.

RG 104.28 For measures to work effectively in practice, you need people at all levels of your business, including your senior management, to understand them and be committed to their success. Integrating your measures into the culture of your business helps ensure they are effective on an ongoing basis.

RG 104.29 You also need to monitor and report on your compliance, including reporting relevant breaches to us under s912D. We expect that you will keep records of your monitoring and reporting, including records of reports on compliance and breach notifications.

RG 104.30 We understand that, in some instances, your monitoring and reporting will be built into your business processes. We also acknowledge that your compliance measures might reflect your corporate group’s overall approach

to compliance. Whatever the case, you need to be able to show us how you are able to monitor your compliance and appropriately address any compliance breaches.

### Reviewing your measures

- RG 104.31 Regularly reviewing your measures will help to ensure they remain effective. In some cases, it may be sensible for you to consider external review. Where compliance issues have arisen (such as major breaches or repeated compliance failures), external compliance review is particularly appropriate.
- RG 104.32 You need to review your measures when there are changes to your obligations, your business or the environment in which you operate. We expect that you will have a process for identifying changes that may impact on the effectiveness of your measures.

## You can outsource functions, but not your responsibility as a licensee

### Outsourcing functions that relate to your licence

- RG 104.33 We recognise that many licensees outsource functions that relate to their AFS licence, including administrative or operational functions. Outsourcing might be to external parties or other entities within a corporate group. Functions that are commonly outsourced include:
- (a) IT systems for storing records in relation to the provision of financial services;
  - (b) recruitment and training of representatives;
  - (c) research on financial products in relation to which financial services are provided;
  - (d) the operation of call centres;
  - (e) periodic compliance reviews of representatives; and
  - (f) unit pricing.

Note: For guidance on outsourcing of unit pricing functions, see Regulatory Guide 94 *Unit pricing: Guide to good practice* (joint publication with APRA) (RG 94).

### You remain responsible for outsourced functions

- RG 104.34 If you outsource functions that relate to your AFS licence, you remain responsible for complying with your obligations as a licensee: see s769B. Under the *Superannuation (Industry) Supervision Act 1993*, superannuation trustees retain ultimate responsibility for the operation of the superannuation

fund. Under s601FB(1) of the Corporations Act, responsible entities retain ultimate responsibility for the operation of a managed investment scheme.

### Third parties providing financial services on your behalf

RG 104.35 If a third party provides financial services to clients on your behalf, they will generally need to be your authorised representative or hold their own AFS licence: see s911B(1). If they are a licensee, they will generally be taken to be the provider of the financial services and will be responsible for complying with the general obligations in relation to the provision of those services: see s911B(3).

### Complying with your obligations

RG 104.36 If you outsource functions that relate to your AFS licence, we expect that you:

- (a) will have measures in place to ensure that due skill and care is taken in choosing suitable service providers;
- (b) can and will monitor the ongoing performance of service providers; and
- (c) will appropriately deal with any actions by service providers that breach service level agreements or your obligations as a licensee.

Note: In thinking through your obligations when you outsource functions, you might find it helpful to look at:

- International Organization of Securities Commissions (IOSCO) *Principles on Outsourcing of Financial Services for Market Intermediaries* (February 2005), available from [www.iosco.org](http://www.iosco.org);
- Joint Forum *Outsourcing in Financial Services* (February 2005), available from IOSCO ([www.iosco.org](http://www.iosco.org)), the International Association of Insurance Supervisors ([www.iaisweb.org](http://www.iaisweb.org)) and the Bank for International Settlements ([www.bis.org](http://www.bis.org)); and
- if you are also regulated by APRA, APRA's prudential standards and guidance notes on outsourcing (e.g. for ADIs, Prudential Standard APS 231 *Outsourcing*), available from [www.apra.gov.au](http://www.apra.gov.au).

## C Your broad compliance obligations

### Key points

You must have measures in place for ensuring you comply with your licensee obligations on an ongoing basis: see RG 104.38–RG 104.48.

We expect your compliance measures to cover all of your obligations as a licensee: see RG 104.53–RG 104.57.

We expect your compliance area to be independent enough and have adequate resources to do its job properly: see RG 104.49–RG 104.52.

- RG 104.37 You must:
- (a) do all things necessary to ensure your financial services are provided efficiently, honestly and fairly: s912A(1)(a);
  - (b) comply with the financial services laws: s912A(1)(c); and
  - (c) comply with the conditions on your AFS licence: s912A(1)(b).

In this guide, we refer to these obligations as the ‘broad compliance obligations’: see RG 104.53–RG 104.57.

- RG 104.38 You must have measures in place for ensuring you comply with your obligations as a licensee, including the broad compliance obligations, on an ongoing basis: see condition 4 of the standard licence conditions in Pro Forma 209 *Australian financial services licence conditions* [PF 209]. We expect you will document your measures: see RG 104.26.
- RG 104.39 This section explains what we look for when we assess the adequacy of your compliance measures. When reading this section, you need to bear in mind the key concepts in Section B. For more help in designing and testing your measures, see Appendix 1.

Note: For guidance on compliance plans and measures for managed investments, see Regulatory Guide 132 *Managed investments: Compliance plans* (RG 132).

### Your compliance measures

- RG 104.40 Compliance with your obligations as a licensee is central to the protection of consumers and the promotion of market integrity. Having effective compliance measures is a way for you to ensure you comply with your obligations as a licensee, including identifying and appropriately dealing with instances of non-compliance. Compliance measures also help you demonstrate to us that you can comply and are complying with your obligations.

## What your compliance measures need to cover

- RG 104.41 We consider that the broad compliance obligations are both stand-alone obligations and obligations that encompass the other general obligations: see RG 104.53–RG 104.57. For this reason, we expect your measures for ensuring compliance with the broad compliance obligations will cover all of your obligations as a licensee including:
- (a) the rest of the general obligations (including those covered in Sections D, E and F of this guide);
  - (b) your licence conditions; and
  - (c) any other financial services laws that apply to you.

- RG 104.42 We also expect that your compliance measures will:
- (a) take into account the specific compliance risks of your business, especially those that may materially affect consumers or market integrity; and
  - (b) enable you to:
    - (i) communicate to your representatives what they need to do to comply;
    - (ii) monitor compliance with all of your licensee obligations; and
    - (iii) address and report any compliance breaches.

Note: In thinking through your compliance obligations, you might find it helpful to look at:

- Australian Standard AS 3806–2006 *Compliance Programs*, available for purchase from [www.saiglobal.com/shop](http://www.saiglobal.com/shop); and
- the principles set out in the IOSCO report *Compliance Function at Market Intermediaries* (March 2006), available from [www.iosco.org](http://www.iosco.org).

## Nature, scale and complexity of your business

- RG 104.43 Your compliance measures might include one or a number of different documents and any of a variety of stand-alone or integrated information technology (IT) systems. As a general rule, the smaller and simpler your business, the smaller and simpler we expect your measures to be.
- RG 104.44 For example, if you deal in a narrow range of simple products as an incidental part of your main business or you are a very small business, you might meet your compliance obligations by having a checklist focusing on compliance risks that would adversely affect consumers and the provision of efficient, honest and fair financial services.
- RG 104.45 On the other hand, if your main business is to provide financial services and products, you deal in a broad range of products and you have numerous staff that are spread out geographically, you are more likely to meet your

compliance obligations by having compliance measures that involve the use of manuals, programs and dedicated compliance staff.

- RG 104.46 If you use external providers to provide functions that relate to your AFS licence, we think your compliance measures will need to be different from those you would need if you performed those functions in-house.

### **Compliance measures and risk management systems**

- RG 104.47 From our experience, it is common for some licensees' compliance measures to be integrated into their risk management systems. Compliance measures can be one of several controls you can use to address or mitigate risks to your business (including the risk of non-compliance with your obligations under the Corporations Act). The general obligation to maintain adequate risk management systems is explained in Section D.
- RG 104.48 If you are also regulated by APRA, the general obligation to have adequate risk management systems does not apply to you: see RG 104.12. However, this does not affect the need for you to meet our requirements on compliance measures, even if your compliance measures are integrated into your risk management systems.

## **Responsibility for compliance**

- RG 104.49 We expect that you will allocate to a director or senior manager responsibility for:
- (a) overseeing your compliance measures; and
  - (b) reporting to the governing body (including having ready access to the governing body).
- RG 104.50 You need to ensure that the area responsible for compliance:
- (a) is independent enough to do its job properly;
  - (b) has adequate staff, resources and systems; and
  - (c) has access to relevant records.
- RG 104.51 It may be appropriate for you to have a separate compliance function (which might be outsourced to a third party). This is likely to be the case for larger, more complex businesses (including a corporate group), but not for licensees whose business is small or whose main business is not the provision of financial services.



## The role of senior management

- RG 104.52 The level of senior management involvement in overseeing your compliance measures might extend to:
- (a) communicating the measures to those responsible for implementing them and other stakeholders;
  - (b) ensuring that the area responsible for the measures has adequate staff and resources;
  - (c) ensuring staff education and awareness of the measures;
  - (d) implementing clear reporting lines for the manager(s) responsible for the measures; and
  - (e) receiving regular reports on the measures.

## Our approach to the broad compliance obligations

- RG 104.53 The broad compliance obligations are both stand-alone obligations and obligations that encompass the other general obligations. This means that:
- (a) if you fail to comply with one or more of the other general obligations, you are also likely to breach the broad compliance obligations; and
  - (b) even though you may be complying with all of the other general obligations, you may still be in breach of the broad compliance obligations. This is because the broad compliance obligations are also stand-alone obligations.

## Providing financial services efficiently, honestly and fairly

- RG 104.54 You need to do all things necessary to ensure your financial services are provided in a way that meets all of the elements of 'efficiently, honestly and fairly'. If you fail to comply with the other general obligations, it is unlikely that you will be complying with the 'efficiently, honestly and fairly' obligation.
- RG 104.55 However, the 'efficiently, honestly and fairly' obligation is also a stand-alone obligation that operates separately from the other general obligations. For example, if you have contractual obligations to clients and breach them, this might not be a breach of the other general obligations, but it could amount to a failure to provide your financial services efficiently, honestly and fairly.

### **Complying with the financial services laws**

- RG 104.56 The obligation to comply with the financial services laws encompasses the other general obligations. However, it also includes an obligation to comply with:
- (a) Chapter 7 or other Chapters of the Corporations Act that may apply to you (e.g. the disclosure requirements); and
  - (b) provisions of the *Australian Securities and Investments Commission Act 2001* and other Commonwealth, state and territory legislation dealing with financial services: see s761A.

### **Complying with your licence conditions**

- RG 104.57 The conditions on your AFS licence reinforce some of the general obligations, so breaching a licence condition will sometimes also be a breach of the general obligation that the condition relates to.

Note: The standard licence conditions are set out in [PF 209]. For our guidance on licence conditions, see Section C of Regulatory Guide 167 *Licensing: Discretionary powers* (RG 167).

## D Your risk management systems

### Key points

You must have measures in place to ensure you comply with the obligation to have adequate risk management systems on an ongoing basis.

We expect you to have a structured and systematic process for identifying, evaluating and managing risks faced by your business: see RG 104.61–RG 104.66.

- RG 104.58 You must have adequate risk management systems: s912A(1)(h). You must also have measures in place to ensure that you comply with this obligation on an ongoing basis: RG 104.38.
- RG 104.59 This section explains what we look for when we assess the adequacy of your risk management systems. When reading this section, you need to bear in mind the key concepts in Section B. For more help in designing and testing your measures, see Appendix 1.
- RG 104.60 If you are regulated by APRA, you do not need to read this section: see RG 104.12.

### Risk management systems

- RG 104.61 The requirement for risk management systems ensures that you explicitly identify the risks you face and have measures in place to keep those risks to an acceptable minimum.
- RG 104.62 We expect your risk management systems will:
- (a) be based on a structured and systematic process that takes into account your obligations under the Corporations Act;
  - (b) identify and evaluate risks faced by your business, focusing on risks that adversely affect consumers or market integrity (this includes risks of non-compliance with the financial services laws);
  - (c) establish and maintain controls designed to manage or mitigate those risks; and
  - (d) fully implement and monitor those controls to ensure they are effective.

Note: In thinking through your risk management obligations, you might find it helpful to look at:

- Australian and New Zealand Standard AS/NZS 4360:2004 *Risk Management Systems* and the related handbook, HB 436:2004 *Risk Management Guidelines—Companion to AS/NZS 4360:2004*, available for purchase from [www.saiglobal.com/shop](http://www.saiglobal.com/shop); and
- Joint Forum *High-Level Principles for Business Continuity* (August 2006), available from IOSCO ([www.iosco.org](http://www.iosco.org)), IAIS ([www.iaisweb.org](http://www.iaisweb.org)) and BIS ([www.bis.org](http://www.bis.org)).

### **Nature, scale and complexity of your business**

- RG 104.63 Your risk management systems will depend on the nature, scale and complexity of your business and your risk profile. They will be different for each licensee.
- RG 104.64 Your risk management systems will need to adapt as your business develops and your business risk profile changes over time.
- RG 104.65 If you use external providers to provide functions that relate to your AFS licence, we think your risk management measures will need to be different from those you would need if you performed those functions in-house.

### **Financial risks**

- RG 104.66 Your risk management systems will normally need to address the risk that your financial resources will not be adequate. We have set out the financial requirements for licensees not regulated by APRA in Regulatory Guide 166 *Licensing: Financial requirements* (RG 166).

## E Your people

### Key points

You must have measures for monitoring and supervising your representatives (i.e. the people who act on your behalf). We expect these measures will allow you to determine whether your representatives are complying with the financial services laws: see RG 104.70–RG 104.75.

You must also have measures to ensure that your representatives who provide financial services have, and maintain, the necessary knowledge and skills to competently provide those services: see RG 104.76–RG 104.83.

- RG 104.67 You must:
- (a) take reasonable steps to ensure that your representatives comply with the financial services laws (s912A(1)(ca)); and
  - (b) if they provide financial services, ensure they are trained and competent to do so (s912A(1)(f)).

You must also have measures in place to ensure that you comply with these obligations on an ongoing basis: RG 104.38.

- RG 104.68 This section explains what we look for when we assess compliance with these obligations. When reading this section, you need to bear in mind the key concepts in Section B. For more help in designing and testing your measures, see Appendix 1.

- RG 104.69 You must also have adequate resources, including people, to provide your financial services and carry out supervision: s912A(1)(d). This particular obligation is covered in Section F.

## Monitoring and supervision

- RG 104.70 To ensure your representatives comply with the financial services laws, we consider that you need to monitor and supervise them.

### Who do you need to monitor and supervise?

- RG 104.71 Any person who acts on your behalf is your ‘representative’: see s910A. Your representatives include:
- (a) your employees and directors;
  - (b) your authorised representatives; and

- (c) any third party service providers you use to provide functions relating to your licence.

### How closely do you need to supervise them?

RG 104.72 The level of monitoring and supervision your representatives need will depend on the nature, scale and complexity of your business (e.g. the function your representatives perform, whether your business operates from one or a number of locations etc.).

RG 104.73 We do not think that you need to scrutinise every activity of your representatives. However, we expect you will have measures that:

- (a) allow you to determine whether your representatives are complying with the financial services laws (including your licence conditions); and
- (b) include a robust mechanism for remedying any breaches.

### Employment screening

RG 104.74 We expect your measures for monitoring and supervision will include carrying out appropriate background checks before you appoint new representatives. These checks could include referee reports, searches of ASIC's Register of Banned and Disqualified Persons, police checks etc.

Note: In thinking through your monitoring and supervision obligations, you might find it helpful to look at:

- Australian Standard AS 4811–2006 *Employment Screening* and the related *Employment Screening Handbook* (HB 323–2007), available for purchase from [www.saiglobal.com/shop](http://www.saiglobal.com/shop); and
- *Reference Checking in the Financial Services Industry Handbook* (HB 322–2007), available for free from [www.asic.gov.au](http://www.asic.gov.au). Standards Australia developed HB 322–2007 in conjunction with ASIC.

### Measures for monitoring and supervision

RG 104.75 Your measures for monitoring and supervision will normally show how you:

- (a) keep track of who your representatives are, what role they perform and whether they are appropriately authorised;
- (b) ensure your representatives (including your authorised representatives) act within the scope of what you have authorised them to do;
- (c) ensure your representatives understand your compliance arrangements;
- (d) monitor your representatives' compliance; and
- (e) respond to compliance failures.

## Training and competence

- RG 104.76 The obligation to ensure your representatives are trained and competent applies only in relation to your representatives who provide financial services.
- RG 104.77 We expect you to:
- (a) identify the knowledge and skills your representatives need to competently provide your financial services;
  - (b) ensure that they have the necessary knowledge and skills;
  - (c) ensure that they undertake continuing training programs to maintain and update their knowledge and skills; and
  - (d) maintain a record of the training they have undertaken (this is required under reg 7.6.04(1)(d)).

### Training standards for financial product advice to retail clients

- RG 104.78 We have specified minimum training standards for representatives (and natural person licensees) who provide financial product advice to retail clients. These are set out in Regulatory Guide 146 *Licensing: Training of financial product advisers* (RG 146). The training standards are knowledge and skills requirements that can generally be met by completing appropriate training courses on the ASIC Training Register or being individually assessed as competent by an authorised assessor listed on the ASIC Training Register.
- RG 104.79 The RG 146 training standards are minimum standards that apply to all representatives (and natural person licensees) who provide financial product advice to retail clients: see licence conditions 6 and 7 in [PF 209]. However, there are special rules for customer service representatives, para-planners and trainee advisers.

### Customer service representatives, para-planners and trainee advisers

- RG 104.80 You remain responsible for all of the financial services provided under your licence, regardless of how, or by whom, those services are provided. If you, or any of your representatives, use customer service representatives, para-planners and/or trainee advisers who do not meet the RG 146 training standards, you must ensure that they are:
- (a) trained and competent to perform their role and functions; and
  - (b) supervised by representatives who:
    - (i) meet the RG 146 training standards; and
    - (ii) play a material role in the provision of any advice to retail clients.

RG 104.81 As a general rule, if you use a disproportionately high number of para-planners who do not meet the RG 146 training standards compared with the number of your representatives who do meet the training standards, we believe there is an increased risk that you will not be satisfying your obligations.

### **Representatives providing other financial services**

RG 104.82 We have not specified training standards for representatives (and natural person licensees) providing services other than financial advice to retail clients. However, you must still ensure that your representatives providing other services are trained and competent to perform their role and functions.

RG 104.83 You may be able to adapt the training standards in RG 146 to help you determine the appropriate knowledge and skills needed by your representatives providing other financial services.



## F Your resources

### Key points

You must have measures in place for ensuring you have adequate resources to provide the financial services covered by your licence and to carry out supervisory arrangements: see RG 104.84–RG 104.87.

Whether your resources are adequate will depend on the nature, scale and complexity of your business: see RG 104.22.

You at least need to have enough resources to enable you to comply with all of your obligations under the law and meet your current and anticipated future operational needs: see RG 104.89–RG 104.96.

- RG 104.84 You must have adequate financial, technological and human resources to provide the financial services covered by your licence and to carry out supervisory arrangements: s912A(1)(d). You must also have measures to ensure that you have adequate resources on an ongoing basis: RG 104.38.
- RG 104.85 This section explains what we look for when we assess the adequacy of your human and technological resources. When reading this section, you need to bear in mind the key concepts in Section B. For more help in designing and testing your measures, see Appendix 1.
- RG 104.86 The financial resources part of this obligation is covered in Regulatory Guide 166 *Licensing: Financial requirements* (RG 166).
- RG 104.87 If you are regulated by APRA, you do not need to read this section: see RG 104.12.

### Having adequate resources

- RG 104.88 Having adequate technological and human resources is crucial to your ability to demonstrate that you have the capacity to carry on your financial services business in full compliance with the law and to supervise your representatives. Failure to have enough resources may create an unacceptable risk that you may not comply with all of your obligations as a licensee.

## Human resources

- RG 104.89 Whether your human resources are adequate will depend on the nature, scale and complexity of your business: see RG 104.22. However, you need to have enough people to enable you to:
- (a) comply with all of your obligations under the law;
  - (b) carry out monitoring and supervision; and
  - (c) meet your current and anticipated future operational needs.
- RG 104.90 Your measures for ensuring that you have enough people will normally include:
- (a) recruitment processes and succession planning;
  - (b) systems for inducting and training new staff;
  - (c) performance management systems; and
  - (d) processes for staff retrenchment and redundancy.

### Reviewing your human resources

- RG 104.91 You need to regularly review the adequacy of your human resources.
- RG 104.92 We expect that you will identify key indicators that your human resources are inadequate. These key indicators are likely to include:
- (a) customer complaints about the quality of customer service or financial product advice;
  - (b) a low ratio of compliance staff to representatives;
  - (c) not enough compliance staff to conduct a periodic (e.g. annual) review of representatives who give personal advice to retail clients;
  - (d) client accounts and interests not being monitored when staff are absent;
  - (e) a large number of inexperienced staff (e.g. staff who have been in your business less than six months); and
  - (f) a large number of vacant positions.

## Technological resources

- RG 104.93 Whether your technological resources are adequate will depend on the nature, scale and complexity of your business: see RG 104.22. However, you need to have enough technological resources to enable you to:
- (a) comply with all of your obligations under the law;
  - (b) maintain client records and data integrity;
  - (c) protect confidential and other information; and

(d) meet your current and anticipated future operational needs.

RG 104.94 We know that the financial services industry uses a variety of technological resources, ranging from phones, faxes and personal computers to sophisticated networks and/or customised IT systems. We do not think you need to have sophisticated IT systems if simpler systems enable you to meet the criteria in RG 104.93.

### **Reviewing your IT systems**

RG 104.95 You need to regularly review the adequacy of your technological resources.

RG 104.96 When reviewing your IT systems, you need to consider:

- (a) your IT system security;
- (b) the currency of your hardware and software;
- (c) the quality and relevance of the applications you use;
- (d) your disaster recovery systems and business resumption capacity;
- (e) the number of users;
- (f) the ongoing viability of software and other service providers;
- (g) the response times of your IT systems;
- (h) the down times of your IT systems;
- (i) your use of legacy IT systems; and
- (j) complaints (e.g. from staff, clients or service providers) about your IT systems.

## Appendix 1: Designing and testing your measures

- RG 104.97 Appendix 1 sets out questions to consider when designing and testing your measures for ensuring you comply with the general obligations covered in Sections C to F of this guide. You need to read this appendix in conjunction with the corresponding section of this guide.
- RG 104.98 This appendix is not intended as a compliance checklist—it does not cover everything you need to consider, and it may cover some things that do not apply to you. You still need to consider your individual circumstances, including the nature, scale and complexity of your business.
- RG 104.99 We will continue to review and update this appendix in light of our regulatory experience.

## Your broad compliance obligations

<b>Compliance framework</b>	<ul style="list-style-type: none"> <li>• Have you documented your compliance measures?</li> <li>• Has your governing body signed off on them?</li> <li>• How do you monitor whether your compliance measures are being followed? Who is responsible?</li> <li>• How do you review your compliance arrangements to ensure they remain effective and up-to-date (e.g. to deal with new products)?</li> <li>• Do you undertake regular external reviews of your compliance measures and their monitoring?</li> <li>• How do you assess the impact of outsourcing on your compliance measures?</li> </ul>
<b>Implementing compliance measures</b>	<ul style="list-style-type: none"> <li>• How do you communicate your compliance measures to your staff?</li> <li>• Are your compliance measures integrated into relevant operational processes?</li> <li>• How do you promote a culture of compliance within your organisation?</li> </ul>
<b>Compliance function</b>	<ul style="list-style-type: none"> <li>• Have you set up a separate compliance function within your organisation?</li> <li>• Do you have a compliance manager? Do they report to the governing body (or its delegate)?</li> <li>• Are compliance staff adequately trained and qualified in compliance responsibilities?</li> <li>• Are the responsibilities of compliance staff clearly defined and understood?</li> <li>• Do compliance staff have access to the information they need to perform their role?</li> </ul>
<b>Responding to compliance failures</b>	<ul style="list-style-type: none"> <li>• How do you ensure that you identify and take action to remedy compliance failures and other compliance issues, including action to prevent their recurrence?</li> <li>• How do you identify and address systemic compliance failures or other trends in compliance issues?</li> </ul>
<b>Breach reporting</b>	<ul style="list-style-type: none"> <li>• Is there a clear, well-understood and documented process for reporting compliance breaches (including to the governing body or its delegate)?</li> <li>• How do you ensure that relevant breaches are reported to ASIC under s912D? Who is responsible for reporting to ASIC?</li> <li>• What records do you keep of compliance breaches (e.g. a breach register)?</li> <li>• Do you regularly review your compliance measures to take into account past breaches?</li> </ul>
<b>Safeguarding client money and assets</b>	<ul style="list-style-type: none"> <li>• How do you ensure that client money and assets are separated from your money and assets?</li> </ul>
<b>Record-keeping</b>	<ul style="list-style-type: none"> <li>• How do you ensure that you keep adequate accounting, business and compliance monitoring records?</li> <li>• How do you ensure that you retain records for the statutory period?</li> </ul>
<b>Conduct and disclosure obligations</b>	<ul style="list-style-type: none"> <li>• How do you ensure that you comply with your conduct obligations under the Corporations Act, e.g. requirements about giving personal advice to retail clients?</li> <li>• How do you ensure that you comply with your disclosure obligations, e.g. obligations relating to advertising, Product Disclosure Statements and Financial Services Guides?</li> </ul>

## Your risk management systems

### Risk management framework

- Have you documented your risk management systems?
- Do your documented measures show who is responsible for risk management?
- Has your governing body signed off on your risk management measures and made a commitment to ongoing risk management?
- Have you appointed senior managers to oversee risk management measures?
- Are there clear risk management reporting lines? Do your staff understand what they are required to report on, and when?
- Do you annually review your risk management measures to ensure they are effective? Does this include external review?
- Do you have a business continuity plan?

### Implementing risk management

- How do you ensure that staff understand and comply with risk management measures?
- Are risk management staff adequately trained and qualified in risk management responsibilities?

### Identifying risks

- How do you identify risks to your business?
- How do you identify risks to consumers and market integrity?
- Have you considered all your obligations under the Corporations Act (including the regulations and licence conditions) and identified the risks of non-compliance with them?
- How do you ensure you identify new risks as they arise (e.g. because of new products or technology)?
- Do you document the risks you identify?

### Evaluating risks

- How do you establish the probability of a risk event occurring and the impact of the problem if the risk occurs?
- How do you combine the probability and impact factors to determine the overall risk?
- How do you prioritise the risks and establish which ones need to be addressed?
- Do you document the risks you evaluate and how you arrive at your evaluation?

### Addressing risks

- How do you address those risks with appropriate measures and controls?
- Do you document your measures and controls for addressing risk and the reasons behind them?

## Your people

### MONITORING AND SUPERVISION

#### Appointing representatives

- What background checks (e.g. referee reports) do you do before you appoint representatives? How do you check the person's identity?
- How do you ensure that you comply with your notification obligations under s916F in relation to your authorised representatives?

#### Monitoring and supervision framework

- Have you established a clear reporting and supervisory structure covering all your representatives? How do you ensure that you are receiving accurate information?
- Who is responsible for monitoring and supervision? To whom do they report?
- Do you have representatives who operate from locations other than your principal place of business? How do you monitor and supervise them?
- How do you ensure your representatives understand your compliance measures? How do you monitor that they are complying with your compliance measures?
- How do you identify and address higher risk activities of your representatives, e.g. providing financial product advice to retail clients, handling client money?
- Do you have a policy on disciplinary action for compliance failures or other compliance issues? Has it been clearly communicated to your representatives?

### TRAINING AND COMPETENCE

#### Training responsibilities

- How do you identify which of your representatives provide financial services?
- How do you identify and keep records of the training they complete: see reg 7.6.04(1)(d)?
- How do you identify the knowledge and skills they need?
- How do you ensure they have the necessary knowledge and skills to provide financial services?
- How do you ensure that your representatives who provide financial product advice to retail clients meet the training standards in RG 146?

#### Continuing training

- How do you ensure that your representatives who provide financial services maintain and update their knowledge and skills?
- Have you determined how much ongoing training they need?
- Do you have a regular (e.g. annual) training program for them? Who is responsible for this?
- How do you ensure your training program continues to meet the needs of your representatives?

## Your resources

### TECHNOLOGICAL RESOURCES

- |                                     |   |
|-------------------------------------|---|
| <b>Adequacy of resources</b>        | <ul style="list-style-type: none"> <li>• What technological resources (e.g. communications, IT) do you need to carry out your business?</li> <li>• Have you identified key indicators that might show you do not have enough technological resources? How do you monitor these key indicators?</li> </ul>   |
| <b>IT framework</b>                 | <ul style="list-style-type: none"> <li>• Do you have an IT strategy to support your current and future operational needs?</li> <li>• Do you have a disaster recovery plan and do you test it regularly?</li> <li>• Do you have in-house IT staff to provide and/or manage the delivery of IT services? If not, how are your IT services managed and delivered?</li> <li>• Do you have outsourcing arrangements with third parties for the development and maintenance of your IT systems?</li> <li>• Do you have contracts with third parties that include service level agreements? If so, how often do you review delivery of service levels under those agreements?</li> </ul> |
| <b>Data back-up and IT security</b> | <ul style="list-style-type: none"> <li>• Do you have data back-up and recovery plans?</li> <li>• How regularly do you back up your data and how are back-ups stored (e.g. are they stored offsite)?</li> <li>• Do you have network security controls in place? How do you keep viruses out of your system?</li> <li>• How do you protect confidential and other sensitive information?</li> <li>• Is access to physical IT infrastructure restricted?</li> </ul>  |

### HUMAN RESOURCES

- |                                  |  |
|----------------------------------|--|
| <b>Adequacy of resources</b>     | <ul style="list-style-type: none"> <li>• What human resources do you need for each of your business activities, e.g. compliance, monitoring and supervision, complaints handling?</li> <li>• Have you identified key indicators that might show you do not have enough human resources? How do you monitor these key indicators?</li> <li>• How do you ensure extra staff are available when they are needed (e.g. to supervise staff who have been involved in compliance failures)?</li> <li>• How do you ensure client accounts and interests are monitored while staff are absent?</li> </ul>  |
| <b>Human resources framework</b> | <ul style="list-style-type: none"> <li>• Do you have a recruitment process?</li> <li>• Do you have systems for inducting and training new staff?</li> <li>• Do you have a performance management process?</li> <li>• Do you have a succession planning process?</li> <li>• Do you have in-house human resources staff to provide and/or manage the delivery of your human resources needs? If not, how are your human resources needs managed and delivered?</li> <li>• Do you have outsourcing arrangements with third parties for the development and maintenance of your human resources needs?</li> <li>• Do you have contracts with third parties that include service level agreements? If so, how often do you review delivery of service levels under those agreements?</li> </ul> |



## Key terms

Term	Meaning in this document
AFS licence	Australian financial services licence granted under s913B of the Corporations Act
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
body regulated by APRA	Has the meaning given in s3(2) of the <i>Australian Prudential Regulation Authority Act 1998</i>
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of this Act
financial services laws	Has the meaning given in s761 of the Corporations Act
general obligations	The obligations of a licensee under s912A(1) of the Corporations Act
governing body	The board of directors, committee of management or other governing body of the licensee (including, in relation to a licensee who is a natural person, that person)
licensee	A person who holds an AFS licence
[PF 209] (for example)	An ASIC pro forma (in this example numbered 209)
reg 7.6.04 (for example)	A regulation of the Corporations Regulations 2001 (in this example numbered 7.6.04)
representative	Has the meaning given in s910A of the Corporations Act
RG 166 (for example)	An ASIC regulatory guide (in this example numbered 166)
you	Licensee or applicant for an AFS licence

## Related information

### Headnotes

general obligations; nature, scale and complexity; compliance measures; outsourcing; efficiently, honestly and fairly; risk management systems; monitoring, supervision and training of representatives; human resources; technological resources

### Pro formas

Pro Forma 209 *Australian financial services licence conditions* [PF 209]

### Regulatory guides

RG 1–3 *AFS Licensing Kit*

RG 105 *Licensing: Organisational competence*

RG 146 *Licensing: Training of financial product advisers*

RG 165 *Licensing: Internal and external dispute resolution*

RG 166 *Licensing: Financial requirements*

RG 167 *Licensing: Discretionary powers*

RG 181 *Licensing: Managing conflicts of interest*

### Legislation

Corporations Act Chapter 7, s9, 601FB, 761A, 769B, 910A, 911B, 912A, 912D, 913B, 914A, 915C, Corporations Regulations 2001 reg 7.6.03, *Australian Prudential Regulation Authority Act 1998* s3(2)

### Consultation papers

CP 75 *Updating [PS 164]: Organisational competence*

CP 76 *Updating [PS 164]: Meeting the general obligations*

### ASIC forms

FS01 *Australian Financial Services licence application*