



**ASIC**

Australian Securities & Investments Commission

CONSULTATION PAPER 247

# Client review and remediation programs and update to record-keeping requirements

December 2015

## About this paper

This consultation paper sets out ASIC's proposed guidance on review and remediation programs conducted by Australian financial services (AFS) licensees who provide personal advice to retail clients.

It also sets out our proposed amendments to the AFS licensee record-keeping requirements when providing personal advice to retail clients.

We are seeking feedback on our proposals from AFS licensees and their representatives, external dispute resolution (EDR) schemes 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 16 December 2015 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.

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## 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.

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 review and remediation programs. 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 I, 'Regulatory and financial impact'.

### Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

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

Please refer to our privacy policy at [www.asic.gov.au/privacy](http://www.asic.gov.au/privacy) for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 26 February 2016 to:

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## What will happen next?

<b>Stage 1</b>	16 December 2015	ASIC consultation paper released
<b>Stage 2</b>	26 February 2016	Comments due on the consultation paper
	February to May 2016	Drafting of regulatory guide and amended class order
<b>Stage 3</b>	May 2016	Regulatory guide and amended class order released

## A Background to the proposals

### Key points

This consultation paper sets out ASIC's proposed guidance on client review and remediation programs (review and remediation programs) that:

- are conducted by Australian financial services (AFS) licensees who provide personal advice to retail clients (advice licensees); and
- remediate clients who have suffered loss as a result of the decisions and behaviour of the advice licensee, or an individual adviser or advisers, in relation to the provision of personal advice.

Such programs, which can be large or small-scale exercises, aim to place affected clients in the position they would have been in had the misconduct not occurred.

Key considerations for advice licensees include:

- when to establish a review and remediation program;
- the scope of the program;
- designing a comprehensive and effective program;
- communicating effectively with clients; and
- ensuring access to the external review of decisions.

This paper also seeks feedback on our proposals to amend the general record-keeping requirements for advice licensees to place beyond doubt that licensees must have access to records during the period in which they are required to be retained.

### Review and remediation programs

- 1 Over the past few years, ASIC has been involved in a number of client review and remediation programs (review and remediation programs) conducted by Australian financial services (AFS) licensees who provide personal advice to retail clients (advice licensees). Some of these programs have been initiated voluntarily by the advice licensee and some have been required by ASIC as part of our enforcement action.
- 2 Advice licensees have been conducting review and remediation programs for some time, and we are seeing a growing trend in these programs being conducted proactively to address issues that advice licensees have identified within their business.
- 3 The recent public review and remediation programs have been large-scale exercises to review personal advice provided to retail clients and to remediate clients who have suffered loss as a result of the decisions and

behaviour of the advice licensee, or an individual adviser or advisers, in relation to the provision of personal advice.<sup>1</sup> A number of other advice licensees have also identified instances of deficient advice and have initiated smaller, more targeted review and remediation programs in response.

- 4 In light of our experience and the growing trend of these programs, ASIC announced on 6 May 2015 that we would develop a regulatory guide incorporating our guidance on review and remediation programs conducted by AFS licensees that provide personal advice to retail clients.<sup>2</sup>
- 5 This consultation paper sets out our proposed guidance and asks a series of questions to assist us in developing a final regulatory guide.

### **What is a review and remediation program?**

- 6 Generally, a review and remediation program is a project set up within an advice licensee to review personal advice, where a systemic issue in relation to the advice has been identified, and then to remediate those clients who have suffered loss as a result.
- 7 A review and remediation program can be a large-scale exercise, where the advice licensee sets up a separate project team and recruits additional staff, or it can be a small-scale project operated by existing staff and resources. The aim of the program is to place affected clients in the position they would have been in had the misconduct not occurred.
- 8 A systemic issue is an issue that may have implications beyond the immediate rights of the parties to a complaint or dispute, or that may have implications for more than one client: see Section B.

### **Objectives of the proposed guidance**

- 9 It is important that all review and remediation programs are conducted in a way that is efficient, honest and fair. Consumers should have confidence that any program in which they are involved is fair, consistent and transparent. This is regardless of the size of a program or the size of the advice licensee.
- 10 More specifically, the proposed guidance aims to:
- (a) improve outcomes for consumers;

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<sup>1</sup> In this consultation paper, we use the term ‘personal advice’ or ‘advice’ to mean ‘personal advice provided to retail clients’.

<sup>2</sup> Media Release (15-101MR) *ASIC to give guidance on review and remediation in the financial advice industry* (6 May 2015).

- (b) provide a streamlined and well-understood review and remediation framework; and
- (c) set out the key principles against which we will assess whether a review and remediation program is operating efficiently, honestly and fairly, in line with the general AFS licensee obligations.

11 The proposed guidance is intended to apply to advice licensees conducting a program to address systemic issues that are a result of the decisions and behaviour of the licensee (or its representatives) in relation to personal advice.

12 Not all review and remediation programs are conducted in relation to personal advice. Programs are also conducted to remediate retail clients for losses suffered in areas such as superannuation or credit, or programs are conducted by advice licensees not relating to personal advice. The principles in the proposed guidance should be applied to these other review and remediation programs, to the extent relevant. The implementation of these principles, however, may differ between the various types of program: see Section B.

#### **Small programs and small licensees**

13 The proposed guidance is intended to apply to all advice licensees that conduct a review and remediation program in relation to personal advice. This is regardless of the licensee's size or the size of the review and remediation program.

14 The intention of the guidance is that the principles can be scaled up or down, depending on the size of a program, and can be adapted to suit advice licensees of different sizes with different internal structures.

#### **Key considerations when establishing, designing and operating a review and remediation program**

15 There are a range of principles that advice licensees should consider when designing and operating a review and remediation program. These principles are detailed in the proposed guidance; key principles are set out below.

##### **Establishing a program**

16 Advice licensees should consider a range of factors, including whether the nature of the misconduct warrants the establishment of a program, who to engage with as part of the process, and how a program will interact with other AFS licensee obligations.

17 A review and remediation program is more likely to be appropriate where a systemic issue has occurred that may have caused a loss to the affected



clients. Not all systemic issues will require a review and remediation program: see Section C.

### **Scope of the program**

18 The scope of a review and remediation program will often depend on the type of misconduct, the size and structure of the advice licensee, and the size of the licensee's client base. There is no one-size-fits-all approach to determining the scope of a program.

19 The scope of a review and remediation program should be determined in a way that ensures it covers the right advisers, the right clients and the right timeframe: see Section D.

### **Design and implementation of the program**

20 The process of review and remediation needs to be comprehensive, timely, fair, and transparent. There should be clearly defined principles to guide the process and an appropriate governance structure (including appropriate involvement at a senior management level). The process should be simple for the client.

21 All review and remediation programs should have some level of independent oversight in developing and operating the program: see Section E.

### **Communicating with clients**

22 Effective, timely and targeted communication is key to ensuring that clients understand the review and remediation program and how it will affect them.

23 Advice licensees should proactively contact potentially affected clients, and consider the best way to do this in light of their client base and appropriate methods of communication: see Section F.

### **External review of decisions**

24 It is important that clients have access to an advice licensee's external dispute resolution (EDR) scheme if they are not satisfied with an aspect of the review and remediation program or the decision of the licensee about whether misconduct has occurred and remediation is appropriate.

25 Advice licensees should engage with their EDR scheme when establishing a review and remediation program so that relevant documentation, timelines and other arrangements are agreed upfront between the licensee and its EDR scheme. This will facilitate the streamlined consideration, review and decision by the EDR scheme when necessary.

- 26 Where appropriate, advice licensees should offer assistance to clients who wish to seek their own professional advice to assist their response to a review and remediation program: see Section G.

## Proposed amendments to the record-keeping requirements

- 27 Advice licensees are currently required to ensure that client records are retained that show how the licensee has complied with the best interests duty and related obligations when personal advice is provided: s961B, 961G and 961J of the *Corporations Act 2001* (Corporations Act). The records must be kept for at least seven years.

Note: This requirement was implemented by Class Order [CO 14/923] *Record-keeping obligations for Australian financial services licensees when giving personal advice* following Consultation Paper 214 *Updated record-keeping obligations for AFS licensees* (CP 214). The class order reflects the previous AFS licence condition in Pro Forma 209 *Australian financial services licence conditions* (PF 209).

- 28 However, our regulatory experience has highlighted difficulties in recent review and remediation programs where the advice licensee no longer has access to client records to determine whether or not affected clients have suffered a loss. This means that many clients are disadvantaged because the advice licensee does not have access to records to enable them to review the advice given to these clients.
- 29 The obligation to retain records remains with the advice licensee. For the avoidance of doubt, we propose to amend [CO 14/923] to clarify that licensees must have access to the records during the period in which they are required to be retained—even if the records are retained by another person and that person is no longer authorised by, or related to, the licensee: see Section H.

## B Overview

### Key points

This section provides definitions of the key terms used in the proposed guidance and a description of when the guidance will apply.

Our proposed guidance includes that:

- a ‘review and remediation program’ is generally a project set up within an advice licensee to remediate clients for losses suffered as a result of a systemic issue in relation to the advice;
- a ‘systemic issue’ is an issue that may have implications beyond the immediate rights of the parties to a complaint or dispute, or may have implications for more than one client; and
- the types of systemic issues covered by the proposed guidance are those where clients may have suffered loss as a result of the decisions and behaviour of the advice licensee, or an individual adviser or advisers, in relation to the provision of personal advice.

The proposed guidance is intended to apply to advice licensees conducting review and remediation programs in relation to personal advice. The principles in the guidance should also be applied to other review and remediation programs to the extent relevant.

- 30 Advice licensees should consider when a review and remediation would be appropriate and how the program will interact with the general AFS licensee obligations.

### Proposal

- B1** We propose the guidance set out in paragraphs 31–35 on how we will define a ‘review and remediation program’.

#### *Your feedback*

- B1Q1** Have we appropriately defined a ‘review and remediation program’ for the purposes of this guidance? If not, please give details. Please also provide alternatives.

## What is a review and remediation program?

- 31 All AFS licensees have an obligation to operate their financial services business efficiently, honestly and fairly: s912A(1)(a) of the Corporations Act. Complying with this obligation includes taking responsibility for the consequences of the licensee’s actions and remediating clients who have suffered loss as a result of the actions of the licensee or its representatives.

- 32 Generally, a review and remediation program is a project set up within an advice licensee to review personal advice, where a systemic issue in relation to the advice has been identified, and then to remediate those clients who have suffered loss as a result.
- 33 A review and remediation program can be a large-scale exercise, where the advice licensee sets up a separate project team and recruits additional staff, or it can be a small-scale project operated by existing staff and resources.
- 34 A review and remediation program is one way to address consumer losses caused by systemic issues. The aim of the program is to place affected clients in the position they would have been in had the misconduct not occurred.
- 35 Remediation of clients can be monetary (e.g. compensation), non-monetary (e.g. providing disclosure not previously given, or moving clients into more appropriate products), or a combination of both.

## What is a systemic issue?

### Proposal

- B2 We propose the guidance set out in paragraphs 36–41 on how we will define a ‘systemic issue’.

#### Your feedback

- B2Q1 Have we appropriately defined a ‘systemic issue’ for the purposes of this guidance? If not, please give details. Please also provide alternatives.

- 36 For the purposes of our proposed guidance, we define a ‘systemic issue’ as an issue that may have implications beyond the immediate rights of the parties to a complaint or dispute, or that may have implications for more than one client. This is consistent with ASIC’s policies on dispute resolution.
- 37 ASIC-approved EDR schemes are required to seek appropriate remedial action from an AFS licensee and report to ASIC any systemic issues. Regulatory Guide 139 *Approval and oversight of dispute resolution schemes* (RG 139) broadly defines a ‘systemic issue’ as one that relates to an issue that has implications beyond the immediate actions and rights of the parties to a complaint or dispute.
- Note: See RG 139.116–RG 139.146 for further information on the obligation for EDR schemes to report systemic issues.
- 38 AFS licensees are also required under Class Order [CO 09/339] *Internal dispute resolution procedures* to assess the nature of complaints received through internal dispute resolution (IDR) procedures to determine whether

any systemic issues are present. The definition of a ‘systemic issue’ in RG 139 is equally applicable when a licensee is assessing the nature of its IDR complaints.

Note: [CO 09/330] requires AFS licensees, as part of their IDR procedures, to adopt specific sections of Australian Standard 10002-2006 *Customer satisfaction—Guidelines for complaints handling in organizations* (AS ISO 10002-2006). Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165) gives guidance on the obligations of AFS licensees in operating IDR processes.

- 39 Systemic issues, however, are not always identified through IDR and EDR trends. An advice licensee may identify concerns about an adviser as part of a regular compliance check or audit of the adviser.
- 40 A systemic issue, however identified, could include, for example:
- (a) misconduct by one adviser that may affect several clients;
  - (b) misconduct by several advisers in relation to the process of giving advice (e.g. disclosure or record keeping);
  - (c) a problem with several advisers in how they give advice about a particular class of products; or
  - (d) the advice licensee not having sufficient processes in place to identify and address misconduct in a timely way.
- 41 While consideration of the nature of complaints can assist an advice licensee in determining whether a review and remediation program is appropriate, programs are not solely driven by complaints; they require the licensee to seek out all clients that may have suffered loss as a result of the misconduct identified.

## When will this guidance apply?

### Proposal

- B3** We propose the guidance set out in paragraphs 42–45 on when our proposed guidance will apply.

#### *Your feedback*

- B3Q1 Do you agree with how we have described the application of the proposed guidance? If not, why not?
- B3Q2 Do you agree that the principles in this guidance should apply to programs not relating to personal advice? If not, why not?
- B3Q3 Are there circumstances when the principles should not apply? If so, please give details. Please also specify whether, and how, these principles could apply with alterations.

- 42 The types of systemic issues covered by the proposed guidance are those where clients may have suffered loss as a result of the decisions and behaviour of the advice licensee, or an individual adviser or advisers, in relation to the provision of personal advice. This includes, for example:
- (a) failure to provide advice in the best interests of the client (or without a reasonable basis for the advice, if advice was given before the Future of Financial Advice reforms);
  - (b) failure to provide appropriate advice;
  - (c) failure to give priority to the interests of the client;
  - (d) fraud;
  - (e) failure to provide key disclosure documents (e.g. Financial Services Guide, Statement of Advice, fee disclosure statement or renewal notice), or providing disclosure documents that fail to comply with the requirements under the law; or
  - (f) providing false or misleading statements.
- 43 Not all review and remediation programs are conducted in relation to personal advice. Other examples include programs to remediate clients for:
- (a) administrative errors;  
Note: An administrative error is one that results from an error in an electronic system or an unintentional human error (e.g. unit pricing error, overcharging of fees or miscalculation of interest).
  - (b) misconduct by a licensee (or its representatives) other than advice licensees (e.g. other AFS licensees, credit licensees or financial product providers); or
  - (c) misconduct by advice licensees that does not relate to personal advice.
- 44 These programs may be conducted by persons other than advice licensees, such as superannuation trustees, credit providers or financial product providers. Many of the principles in the proposed guidance are applicable to these other review and remediation programs. Review and remediation programs will generally follow the same steps:
- (a) determining who are the potentially affected clients;
  - (b) designing and implementing the program;
  - (c) communicating with clients; and
  - (d) providing for external review if the client is not satisfied with the operation of the program or the result.
- 45 Persons conducting these other review and remediation programs should apply the principles in the proposed guidance to the extent relevant. Implementation of the principles may differ between the various types of programs.

## C Establishing a program

### Key points

Advice licensees should consider a range of factors when establishing a review and remediation program. Our proposed guidance includes that:

- a review and remediation program is generally appropriate where a systemic issue has been identified that may have caused losses to clients;
- a review and remediation program operates alongside the advice licensee's dispute resolution obligations; and
- IDR obligations will still apply to complaints from clients that fall within the scope of a review and remediation program.

We also propose guidance on how a review and remediation program interacts with the advice licensee's general AFS licensing obligations.

We may encourage an advice licensee to establish a review and remediation program, or we may require this as part of our enforcement activities.

- 46 There are a range of issues for advice licensees to consider when establishing a review and remediation program. These include:
- (a) whether the establishment of a program is appropriate in the circumstances;
  - (b) who to engage with as part of the process; and
  - (c) how a program interacts with the licensee's dispute resolution obligations and its general AFS licence obligations.
- 47 This section contains our proposed guidance on these issues. We are seeking your general feedback on the proposed guidance, as well as your response to the specific feedback questions provided. We also invite you to identify whether there are other areas on which you would like guidance in relation to establishing a review and remediation program.

### When to establish a review and remediation program

#### Proposal

- c1 We propose the guidance set out in paragraphs 48–51 on when it is appropriate to establish a review and remediation program.

*Your feedback*

- C1Q1 Have we appropriately defined the threshold when a review and remediation program may be appropriate? If not, please give details. Please also provide alternatives.
- C1Q2 Are there circumstances, other than those set out at paragraphs 50–51, when a review and remediation program would not be appropriate? Please specify examples.
- C1Q3 Are there other factors that advice licensees should consider when deciding whether to establish a review and remediation program?
- C1Q4 Please provide feedback on any costs or savings to your business as a result of the threshold at which a review and remediation program would be appropriate.

- 48 Generally, a review and remediation program of the type covered in our proposed guidance will be appropriate when:
- (a) a systemic issue has been identified that is a result of the decisions and behaviour of the advice licensee, or an individual adviser or advisers (as representatives of the licensee), in relation to the provision of personal advice; and
  - (b) the affected clients are likely to have suffered a loss (whether monetary or non-monetary).
- 49 A review and remediation program is not appropriate in all circumstances. The aim of a review and remediation program is for advice licensees to seek out clients who have potentially been affected by misconduct, and to remediate those clients for any losses suffered.
- 50 There may be times, for example, when a systemic issue only affects a small number of clients and these clients have all made a complaint to the licensee. In these circumstances, a review and remediation program would be unnecessary as all affected clients are aware that they may have suffered loss as a result of misconduct, and will receive consideration of their complaint and be remediated through IDR (and EDR if required).
- 51 Advice licensees may also be subject to a systemic issue investigation by an EDR scheme seeking remediation for affected clients. Depending on the scope of the systemic issue investigation, a separate review and remediation program may not be necessary.



## Interaction with IDR and EDR obligations

### Proposal

- c2 We propose the guidance set out in paragraphs 52–57 on how a review and remediation program interacts with the advice licensee’s IDR and EDR obligations.

#### *Your feedback*

- C2Q1 Do you agree with the way we have described the relationship between a review and remediation program and the advice licensee’s IDR and EDR obligations? If not, why not?
- C2Q2 Will advice licensees have difficulty in meeting their IDR obligations if complaints are included as part of a review and remediation program? If so, what could be done to assist licensees?
- C2Q3 Are there any barriers to advice licensees directing clients to an EDR scheme if they have a complaint about the program or a decision of the licensee? If so, what could be done to assist licensees?

52 A review and remediation program operates alongside the advice licensee’s dispute resolution obligations, rather than under the IDR or EDR framework. Interactions between a review and remediation program and the licensee’s IDR processes and EDR scheme include that:

- (a) systemic issues are often identified through trends in IDR complaints and where the licensee’s EDR scheme identifies an issue based on dispute trends;
- (b) review and remediation programs will, in many cases, use the licensee’s IDR resources (e.g. human resources, procedures for reviewing advice and calculating loss, and record-keeping systems); and
- (c) the external review of decisions from a review and remediation program will generally be carried out by the licensee’s EDR scheme.

53 While there are interactions between the advice licensee’s dispute resolution obligations and a review and remediation program, each also has a distinct purpose:

- (a) Complaints initiated by the advice licensee’s clients are reviewed as part of *IDR processes*.
- (b) *Review and remediation programs* review the advice of a selection of clients determined by the advice licensee to have potentially been affected by a systemic issue (i.e. they are not ‘complaints driven’).
- (c) *EDR schemes* review complaints by the advice licensee’s clients if they are not satisfied with the licensee’s decision following IDR, or

following a review and remediation program. EDR schemes also identify systemic issues and serious misconduct, and seek action from the licensee.

### When do the IDR obligations apply?

54 When a review and remediation program is being conducted, the IDR obligations will not apply to many of the clients within the scope of the program. This is because many of the clients that have their advice reviewed as part of the program will have been selected by the advice licensee and will not have made a complaint about the potential misconduct.

55 However, where a client has made a complaint to the advice licensee and that complaint is within the scope of the program, the IDR obligations (including the timeframes) will apply to that matter. To ensure licensees deal with these matters in a simple and efficient way, complaints received from clients deemed to be within the scope of a review and remediation program should be reviewed as part of the program. A final response must still be provided to these clients within 45 days. If a final response is not provided, clients must be informed of their EDR rights. Including a complaint in a review and remediation program does not exempt a licensee from its IDR obligations.

Note: These complaints may need to be prioritised over the review of advice of other clients: see paragraph 118.

56 If a client makes a complaint about an advice licensee's decision following a review of their advice as part of a review and remediation program (or makes a complaint about the program itself), the client should be directed to the licensee's EDR scheme and not to the licensee's IDR processes. As clients have already had their advice reviewed by the licensee, in most cases, there would be little value in the licensee re-examining the advice provided to the client. Doing so is likely to add an unnecessary layer of complexity for the client.

57 Complaints outside the scope of a program will continue to be dealt with through the advice licensee's normal IDR processes.

## Interaction with AFS licensing obligations

### Proposal

c3 We propose the guidance set out in paragraphs 58–73 (including Example 1) on how a review and remediation program interacts with an advice licensee's general AFS licensing obligations.

*Your feedback*

- C3Q1 Do you agree with how we have described a program's interaction with the AFS licensee obligations? If not, why not?
- C3Q2 Will the establishment of a review and remediation program, and a subsequent decision to remediate clients, affect an advice licensee's ability to make claims under its professional indemnity (PI) insurance? If so, please explain how.
- C3Q3 If your answer to C3Q2 is yes, what alternatives or alterations to a review and remediation program, as described in this consultation paper, could be adopted by advice licensees that hold PI insurance to enable claims to continue to be made?

- 58 Advice licensees must consider a range of AFS licensing obligations that will interact with a review and remediation program.

**Operating efficiently, honestly and fairly**

- 59 As noted in paragraph 31, all AFS licensees have an obligation to operate their financial services business efficiently, honestly and fairly: s912A(1)(a) of the Corporations Act.

- 60 Complying with this obligation includes taking responsibility for the consequences of the licensee's actions, such as by remediating clients who have suffered loss as a result of the actions of the licensee or its representatives.

Note: See Regulatory Guide 104 *Licensing: Meeting the general obligations* (RG 104) for further information.

- 61 Advice licensees should give priority to review and remediation programs and not unnecessarily delay this process.

**Example 1: Giving priority to the remediation of clients**

Advice licensee XYZ Advisers detected a systemic issue with a number of its advisers and submitted a breach report to ASIC in response.

The breach report stated that the licensee was putting in place a review and remediation program. The licensee set out a timeline for the program that involved communicating with the affected clients in a phased approach. According to the timeline, the last of the affected clients would receive a letter 15 months after the issue was detected.

The timeline for this review and remediation program was too long and did not demonstrate that the advice licensee was prioritising the remediation of clients and acting efficiently, honestly and fairly.

*In this example, the advice licensee unnecessarily delayed the remediation of its clients.*

## Adequate resources

- 62 AFS licensees (other than bodies regulated by the Australian Prudential Regulation Authority) are required to have adequate resources to provide financial services covered by the AFS licence: s912A(1)(d) of the Corporations Act.
- 63 Advice licensees that do not have adequate resources, when appropriate, to conduct a review and remediation program, and remediate clients, may be in breach of this obligation.

## Monitoring and supervision

- 64 An AFS licensee is required to:
- (a) take reasonable steps to ensure that its representatives comply with the financial services laws (s912A(1)(ca) of the Corporations Act); and
  - (b) ensure its representatives are adequately trained, and competent, to provide the financial services authorised by the licensee (s912A(1)(f) of the Corporations Act).
- 65 Where a systemic issue is identified in relation to an existing representative, the licensee has an obligation to take steps to rectify any deficiencies in the representative's behaviour.

Note: See RG 104 for further information.

## Breach reporting

- 66 AFS licensees must notify ASIC in writing of any 'significant' breach (or likely breach) of their obligations under s912A (including licence conditions), s912B (compensation arrangements) or financial services laws, as soon as practicable, and in any event within 10 business days of becoming aware of the breach (or likely breach).
- 67 Licensees need to consider whether the breach (or likely breach) is significant and, if so, provide timely notification to ASIC. Whether a breach is significant will depend on individual circumstances.
- 68 In many cases, a systemic issue that triggers the establishment of a review and remediation program will also be a significant breach for the purposes of the breach reporting obligations. However, licensees need to make this assessment on a case-by-case basis.

Note: See Regulatory Guide 78 *Breach reporting by AFS licensees* (RG 78) for further information.

## Compensation arrangements

- 69 Under s912B of the Corporations Act, AFS licensees must have arrangements for compensating retail clients for losses they suffer as a result of a breach by the licensee or its representatives of their obligations in Ch 7 of the Corporations Act.
- 70 These arrangements must:
- (a) satisfy the requirements in the Corporations Regulations 2001 (Corporations Regulations), which are that licensees must obtain professional indemnity (PI) insurance cover that is adequate, considering the nature of the licensee’s business and its potential liability for compensation claims (reg 7.6.02AAA); or
  - (b) be approved by ASIC as alternative arrangements.
- 71 Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees* (RG 126) sets out what ASIC regards as the minimum requirements for adequate PI insurance. RG 126 also provides information about when we will approve alternative arrangements.
- 72 The Corporations Regulations also provide exemptions from the requirements for some licensees that are regulated by the Australian Prudential Regulation Authority (APRA) or are related to an entity regulated by APRA: reg 7.06.02AAA(3).
- 73 Whether remediating clients in a single instance of client loss or as part of a broader client remediation program, advice licensees will often consider how their compensation arrangements can assist in providing remediation to clients.

## ASIC’s role

### Proposal

- c4 We propose the guidance set out in paragraphs 74–76 on ASIC’s role in review and remediation programs.

#### *Your feedback*

- C4Q1 Do you require further guidance on ASIC’s role in relation to review and remediation programs? If so, please specify what guidance you would like.

- 74 ASIC often becomes aware of an advice licensee’s systemic issues through breach reports, proactive surveillance, reports of misconduct from the public and reports of systemic issues from EDR schemes.

- 75            There may be times when we will encourage an advice licensee to establish a review and remediation program, or we may require this as part of our enforcement activities. In these instances, and when a licensee voluntarily commences a program that ASIC is aware of, we may be involved in reviewing the design and implementation of the program.
- 76            The extent of our involvement will depend on a range of factors—for example:
- (a)    the size of the program;
  - (b)    the licensee’s past conduct and its conduct in response to the systemic issue;
  - (c)    the nature of the misconduct involved;
  - (d)    the licensee’s experience in past review and remediation programs, or similar activities; and
  - (e)    ASIC’s available resources.

## D Determining the scope of a program

### Key points

The scope of a review and remediation program will depend on the type of misconduct, the size and structure of the advice licensee, and the size and nature of the licensee's client base. There is no one-size-fits-all approach to determining the scope of a program.

Our proposed guidance includes that:

- the scope of a review and remediation program should be determined in a way that ensures it covers the right advisers, the right clients and the right timeframe;
- while an advice licensee will need to seek out potentially affected clients, there may also be limited times when a licensee needs to invite additional clients to participate in the program (e.g. where there is doubt about whether all potentially affected clients have been included in the scope); and
- the scope of a program should be flexible enough to allow for revisions if more information becomes available about other misconduct of an adviser.

77 There are a range of factors for advice licensees to consider when determining the scope of a review and remediation program to ensure that it achieves its purpose. This includes determining the type of misconduct that has occurred and which clients may have been affected, and testing whether the scope is appropriate.

78 This section contains our proposed guidance on how to determine the scope of a review and remediation program. We are seeking your general feedback on the proposals, as well as your response to the specific feedback questions provided. We also invite you to identify whether there are other areas on which you would like guidance in relation to the scope of a program.

## Identifying the scope of a program

### Proposal

- D1 We propose the guidance set out in paragraphs 79–89 on how to identify the scope of a review and remediation program.

#### *Your feedback*

- D1Q1 What are some examples of how an advice licensee can determine the scope of a program?

- D1Q2 Do you agree with our proposed factors for consideration? Are there others? If so, please specify.
- D1Q3 Do you agree that advice licensees should review advice as far back as the licensee has retained records? If not, what is a reasonable timeframe?
- D1Q4 How can advice licensees test the appropriateness of the criteria used to determine the scope of a program?
- D1Q5 Are there any types of retail clients that should be excluded from a review and remediation program? If so, please specify.
- D1Q6 Are there any circumstances where wholesale clients should be included in a review and remediation program? If so, please specify.
- D1Q7 Please provide feedback on any costs or savings to your business as a result of the proposed guidance on determining the scope of a review and remediation program.

79 Identifying the scope of a review and remediation program is an important step to ensure that all potentially affected clients are captured by the program.

### **Type of misconduct and relevant advisers**

80 Generally, the first step in identifying potentially affected clients is to identify the type of misconduct that may have caused loss, and which advisers may have engaged in that misconduct. An advice licensee will then need to assess which clients may have received advice from those advisers and may have suffered a loss.

81 The processes an advice licensee will undertake to determine the scope of a program will depend on the type of misconduct, the size and structure of the licensee, and the size and nature of the licensee's client base. There is no one-size-fits-all approach when determining the scope of a program and licensees may need to adopt more than one approach.

82 The type of misconduct and the relevant advisers could be identified, for example, by:

- (a) assessing the nature of all complaints received through IDR;
- (b) reviewing a broad selection of advice provided;
- (c) examining any trends in the advice given to clients that may indicate advisers have given non-compliant advice (e.g. advice that generated higher than average commissions). One way this can be done is by analysing the data held about advisers, the advice they give and/or their client base;



- (d) assessing the results of regular compliance audits of advisers, and the action taken as a result of those audits; and
- (e) reviewing the results of an ASIC surveillance.

### **Type of clients**

- 83 An advice licensee will need to consider which of its current and past clients received the type of advice that is within the scope of the program and which of these clients may have suffered loss as a result. Large multi-licensee groups will also need to consider whether the scope of the program should be extended to cover other advice licensees within the group.
- 84 There may be times when a client who has previously had their advice reviewed by the advice licensee's IDR process or by an EDR scheme should still be included in the scope of a review and remediation program. This is likely to be the case if the licensee becomes aware of information that would change the result of these matters in favour of the client.
- 85 It is important that the scope is not too narrow to exclude clients that could have suffered loss as a result of other related misconduct by advisers. For example, if the program is targeted at reviewing insurance advice given by an adviser, but it is known to the advice licensee that the adviser has in several instances provided non-compliant advice in other product areas, those other product areas should be included in the program. Both relate to misconduct by the adviser in giving personal advice.

### **Timeframe**

- 86 An advice licensee will need to consider the appropriate time period for the scope of the review and remediation program. This should involve a licensee considering over what period of time the relevant misconduct may have occurred and the length of time that clients have potentially been affected.
- 87 We would expect an advice licensee to review advice as far back as the licensee has retained records. This includes where a licensee has retained records for longer than the minimum seven years.

Note: Condition 57 of PF 209 and [CO 14/923] requires AFS licensees to keep records relating to Financial Services Guides, Statements of Advice and compliance with the best interests and related obligations for at least seven years.

### **Testing the scope**

- 88 An advice licensee should be satisfied to a reasonable level of certainty that the scope properly captures all potentially affected clients. One way this could be achieved is by documenting and applying an appropriate

methodology when conducting a review of a random selection of advice. This random selection could test the appropriateness of the filters used and whether the scope should be expanded to include additional clients or additional forms of misconduct.

- 89 An advice licensee should be able to clearly articulate and record how they determined the scope of the review and remediation program.

## Inviting clients to participate in a program

### Proposal

- D2 We propose the guidance set out in paragraphs 90–92 (including Example 2) on when it is appropriate to invite other clients to participate in a review and remediation program.

#### *Your feedback*

- D2Q1 Do you agree that advice licensees should identify a group of clients that are within the scope of a program and, only in limited circumstances, seek interest from other clients in participating in the program? Please provide reasons for your answer.
- D2Q2 Are there any other instances when it would be appropriate to invite additional clients to participate in the program? If so, please specify.

- 90 An advice licensee should identify a group of clients that are within the scope of a review and remediation program. These clients will have their advice reviewed to determine whether any misconduct has caused loss and, if so, be remediated for those losses. This is regardless of whether those clients have made a complaint about the advice they received or whether they have expressed an interest in participating in the program.

- 91 In addition, there may be times when it is appropriate for an advice licensee to invite other clients outside the original scope to participate in a review and remediation program. For example, this is likely when:

- (a) it appears that a particular adviser may have engaged in several types of misconduct and the exact scope of the misconduct is not clear; or
- (b) the licensee cannot determine, with a reasonable level of certainty, that the scope of the program will capture all potentially affected clients.

- 92 In general, however, advice licensees cannot merely rely on inviting clients to express interest in having their advice reviewed. We expect licensees to take reasonable steps to determine the group of clients that may have suffered a loss as a result of misconduct. Inviting clients to participate in a

review and remediation program should only be necessary in limited circumstances.

### Example 2: Inviting clients to participate in a program

ABC Financial Services (ABC) is a large financial services group. It provides personal advice to retail clients under three AFS licences. A review and remediation program was established to review the advice of 10 advisers across all licensees within the group.

ABC determines that a group of 800 clients should form part of the scope of the program. However, record keeping across the group was very poor, which meant it was difficult for ABC and the licensees to determine whether any of the remaining clients received advice from the 10 advisers.

ABC decided to write to all of the remaining clients to provide them with an opportunity to advise ABC if they had received advice from one of the 10 advisers and to request having their advice reviewed as part of the program. The 800 clients originally chosen received a different letter, notifying them that they already formed part of the program, rather than inviting them to participate.

*In this example, it was appropriate for the advice licensee to invite the remaining clients to participate in the review and remediation program.*

## Revising the scope

### Proposal

D3 We propose the guidance set out in paragraphs 93–96 (including Example 3) on when it is appropriate to revise the scope of a review and remediation program.

#### Your feedback

D3Q1 Do you agree that the scope of a program may need to be revised when new information becomes available? If not, why not?

93 Other misconduct can often be identified throughout the review and remediation program that was not originally anticipated when determining the scope of the program. There are a range of instances in which the scope may need to be revised. Some examples include non-compliant advice in product areas not originally anticipated or clients incorrectly classified as wholesale clients.

94 To ensure the process is fair for all potentially affected clients, the scope of the program should be flexible enough to allow for revisions if more information becomes available about other misconduct of an adviser or about other advisers that may have engaged in misconduct.

- 95 When this occurs, advice licensees will in most cases need to revise the scope of the program to include the additional clients that may have suffered a loss as a result of the further misconduct. Licensees should also consider whether closed matters under the program need to be re-examined if those clients also received advice that falls within the revised scope of the program.
- 96 Advice licensees should always adopt the approach of being inclusive rather than exclusive in determining the scope of the program.

### Example 3: Revising the scope of a program

XYZ Advisers is an AFS licensee that has established a review and remediation program after becoming aware that three of its advisers have regularly been giving inappropriate insurance advice.

After conducting a review of a random selection of advice by the three advisers, XYZ Advisers felt certain that the deficiencies in the advice related only to insurance advice.

After commencing a review of all clients that received insurance advice by the three advisers in the past four years (the length of the advisers' employment), it became apparent that one of the advisers was also giving superannuation advice that was inappropriate. This was discovered when reviewing advice that combined both insurance and superannuation advice. This problem was not evident with the other two advisers.

XYZ Advisers conducted a review of a random selection of the adviser's superannuation advice over the past four years and found further instances of inappropriate superannuation advice. As a result, XYZ Advisers decided to expand the scope of its review and remediation program to include superannuation advice given by that adviser.

*In this example, it was appropriate for the advice licensee to revise the scope of the review and remediation program.*

## E Design and implementation

### Key points

A well-designed review and remediation program is easy for clients to understand and avoids unnecessary complexity.

Our proposed guidance includes that:

- the process of review and remediation needs to be comprehensive, timely, fair, and transparent. There should be clearly defined principles to guide the process and an appropriate governance structure (including appropriate senior management involvement);
- all review and remediation programs should have some level of independent oversight in developing and operating the program;
- there needs to be proper record keeping of the work that is done and the conclusions reached; and
- advice licensees should consider whether it would be in the public interest to report publicly on the program and its progress.

97 The processes that each advice licensee establishes for a review and remediation program will be different; however, each licensee will need to consider similar factors when developing these processes, including:

- (a) the resources required;
- (b) who is to review the advice;
- (c) how to review the advice;
- (d) what form of independent oversight is needed;
- (e) what governance arrangements would be appropriate;
- (f) how to keep records; and
- (g) whether to report publicly on the program.

98 This section contains our proposed guidance on designing a review and remediation program and the processes for conducting the program. We are seeking your general feedback on our proposals, as well as your response to the specific feedback questions provided. We also invite you to identify whether there are other relevant areas you would like guidance on.

### Designing a review and remediation program

#### Proposal

E1 We propose the guidance set out in paragraphs 99–104 on how to design a review and remediation program.

*Your feedback*

E1Q1 Are there any other key factors an advice licensee should consider when designing a program? If so, please specify.

99 A well-designed program avoids unnecessary complexity. If clients can understand a program easily, they are more likely to have confidence that it will produce consistent, timely and fair outcomes.

100 All review and remediation programs should:

(a) adopt a consumer-focused approach;

Note: This includes being helpful, communicating in plain English, showing commitment to remediating any losses suffered by a client and giving the client the benefit of the doubt where there is missing information.

(b) be free of charge to clients;

(c) be objective, unbiased and equitable in its dealings with clients;

(d) have commitment from senior management; and

(e) be operated efficiently, honestly and fairly.

Note: These principles are consistent with the principles set out in RG 165. Advice licensees may wish to also consider the principles in RG 165 when designing and operating a review and remediation program.

101 It is important that advice licensees engage with their EDR scheme when designing a review and remediation program to determine whether certain processes should be put in place to better facilitate clients making a complaint to the EDR scheme about the program.

102 Engagement with ASIC about the review and remediation program may be required during the design phase and throughout the program: see paragraphs 74–76.

### **Continual improvement**

103 Feedback is an important part of improving practices in all businesses. Continual improvement is also a key aspect of IDR and should similarly apply to a review and remediation program.

104 Advice licensees should build into the design of their review and remediation program the ability to assess their own performance during the program. This will enable licensees to determine whether improvements can be made to the program, or to their ongoing IDR processes and general risk assessment procedures.

## Developing the processes for a program

### Proposal

E2 We propose the guidance set out in paragraph 105–111 (including our proposed key principles) on developing the processes for a review and remediation program.

#### *Your feedback*

- E2Q1 Are there any other key principles an advice licensee should consider when developing the processes for a program? If so, please specify.
- E2Q2 Please provide feedback on any costs or savings to your business as a result of the proposed guidance on the processes for a review and remediation program.
- E2Q3 Are there other areas we should give guidance on? If so, please specify.

105 The appropriate processes to ensure an advice licensee’s review and remediation program is being operated fairly, honestly and efficiently will depend on the scope of the program and the circumstances of the licensee.

106 How an advice licensee structures a review and remediation program and who in its business is involved is generally a decision for the licensee, taking into account the principles set out in this proposed guidance. The licensee could establish a new team to operate the program, or operate the program within existing teams and resources. However, ASIC may at times provide feedback to, or direct, a licensee on the appropriateness of how it has structured its review and remediation program in light of the principles in the proposed guidance.

### Key principles when developing the processes for a program

When developing the processes for a review and remediation program, advice licensees should consider the following principles:

- The process of a review and remediation program needs to be fair, comprehensive, timely and transparent.
- Adequate resources should be allocated to the program to ensure it is conducted in an efficient and timely way, and has involvement at a senior management level.
- There need to be clearly defined principles to guide the process. Factors considered in reviewing advice and any calculation of loss should be consistent with the principles of the ASIC-approved EDR scheme of which the advice licensee is a member.
- Reviewers should adopt a consumer-focused approach, be open to feedback and show commitment to understanding any concerns about the advice a client has received.
- Reviewers and managers should be competent in reviewing advice.

- Conflicts of interest should be avoided.
- There should be independent oversight of the program (e.g. to review the design and implementation of the program).
- There should be appropriate governance processes in place.
- Adequate records should be maintained throughout the program.
- It may be appropriate, in some circumstances, to report publicly on the program and its progress.

### **Allocating adequate resources**

- 107 Adequate resources should be allocated to a review and remediation program to ensure it is conducted in an efficient and timely way.
- 108 Adequate resources could include, but are not limited to, the following:
- (a) appropriately qualified advice reviewers;
  - (b) training and support for less experienced advice reviewers;
  - (c) appropriate record-keeping systems;
  - (d) technological resources; and
  - (e) resources to operate the program and remediate clients for any loss suffered.
- 109 Senior management should assess the need for resources and provide them without undue delay. The selection, support and training of personnel involved in a review and remediation program are particularly important.
- 110 What are adequate resources will depend on the size of the program. For example, larger programs operated by multi-licensee groups will need to allocate more resources than a smaller program operated by a single advice licensee. This is because smaller programs generally do not require the same number of reviewers, decision makers and resources for remediating clients compared with larger programs that need to review a higher number of clients and advice.
- 111 Advice licensees may outsource all or parts of the review and remediation program—however, the licensee is ultimately responsible for the operation of the program.

### **Reviewing advice**

#### **Proposal**

- E3 We propose the guidance set out in paragraphs 112–131 (including Example 4) on how advice should be reviewed for a review and remediation program.



*Your feedback*

- E3Q1 Is it reasonable for advice licensees to make a decision on whether to remediate a client within 90 days of the client being notified that they are within the scope of the program? If not, what other timeframe would be appropriate? If a timeframe is not appropriate, are there other ways to ensure advice is reviewed in a timely way (e.g. regular reporting to the public or clients)?
- E3Q2 What types of remediation (monetary or non-monetary) should advice licensees provide to clients? Are there any types of remediation licenses should not provide?
- E3Q3 Should advice licensees apply the interest rate (to calculate monetary loss) used by their relevant EDR scheme? If not, please provide alternatives.
- E3Q4 Are there any circumstances, other than those listed at paragraph 129, when it would or would not be appropriate to have advice peer reviewed? If so, please specify.

- 112 Clear principles and guidance should be established for reviewers to ensure advice is reviewed consistently and fairly. However, the process should still be flexible enough to make changes where lessons are learned throughout the process.
- 113 Consistency across reviewers and throughout the program is essential. Each piece of advice should be reviewed in a fair, objective and unbiased manner.
- 114 The processes to review advice should not be unnecessarily complex, which will assist reviewers in ensuring that advice is reviewed consistently and fairly. The review process should also be simple for clients.
- 115 Templates are a useful way to guide advice reviewers (particularly those who are less experienced) and assist in record keeping; however, the review process should not be a ‘tick-a-box’ exercise. We expect advice reviewers, in each case, to assess all the information, obtain any missing information and use their judgement in forming a view on whether misconduct has occurred and whether a client has suffered loss as a result.
- 116 Advice should be reviewed in a timely way and as quickly as possible without compromising the quality of the review. As a guide, advice licensees should make a decision about whether to remediate an affected client within 90 days of notifying the client that they are within the scope of the program.
- 117 Advice should be reviewed according to the principles of the EDR scheme of which the licensee is a member: see Table 1.

**Table 1: How ASIC-approved EDR schemes review advice and determine appropriate remedies**

<b>Reviewing disputes</b>	<p>EDR schemes are not bound by the rules of evidence that apply to court proceedings. This means that the schemes have some flexibility in how they handle a dispute, the evidence they will consider and the weight they place on that evidence.</p> <p>The Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO) provide information on their websites setting out their rules or terms of reference, with relevant guidance on how each specifically deals with advice disputes.</p>
<b>Determining whether misconduct has occurred</b>	<p>When determining whether misconduct has occurred, EDR schemes will take into account a range of factors (e.g. legal principles, industry codes, practice guides and good industry practice), and previous decisions they have made.</p> <p>EDR schemes consider all the evidence and assess the alleged misconduct based on the balance of probabilities.</p>
<b>Determining an appropriate remedy</b>	<p>EDR schemes can order a range of remedies for complainants. These include: compensation for direct financial loss, or other indirect or non-financial loss (e.g. inconvenience suffered by the client), and ordering the financial services provider to undertake a specific course of action to remediate the client.</p> <p>EDR schemes may also award interest in addition to any monetary remediation ordered.</p> <p>The aim is to place clients in the position they would have been in, had it not been for the misconduct. RG 139 allows EDR schemes to impose compensation caps provided that these are consistent with the objectives in RG 139.164.</p>

- 118 The review of some advice may need to be prioritised over others, including when:
- (a) the advice licensee is aware that a client may be suffering hardship (e.g. a recent death in the family) or has special circumstances (e.g. on entering retirement); and
- Note: See Regulatory Guide 209 *Credit licensing: Responsible lending conduct* (RG 209) for further information on determining whether a client is suffering hardship.
- (b) a particular matter is subject to IDR timeframes because a client has made a complaint that is within the scope of the program.
- 119 In operating the program, reviewers must be consumer focused by being flexible and helpful, and showing commitment to rectifying potential misconduct.
- 120 Where an advice licensee's advice records are incomplete, additional information should be sought from the client. This can include any records the client has in writing or the client's recollection of events. Only relevant information should be sought from clients, and the process should not be onerous for the client. Clients should be given the benefit of any doubt where the licensee's records are incomplete or insufficient.

### Determining remediation

- 121 Client remediation can be monetary or non-monetary, or a combination of both. The aim is to place the client in the position they would have been in had it not been for the misconduct.
- 122 Compensation should be calculated in line with relevant EDR scheme principles: see Table 1 above. This includes the payment of interest for monetary loss in line with the form in which it is calculated by the advice licensee's EDR scheme. Advice licensees should consult with their relevant EDR scheme to seek guidance on methods of calculating compensation and interest.
- 123 Non-monetary client remediation may be appropriate in some circumstances when clients have received non-compliant advice, or were subject to other misconduct, but did not suffer a monetary loss. Remediation may, for example, include recommending that a client acquires a product that more appropriately reflects their risk profile, and assisting them to do so.

#### Example 4: Non-monetary remediation of clients

David is 42 years old, has no dependants and owns a house with a mortgage of \$550,000. He recently inherited \$100,000 following the death of a relative.

David sought advice from Harvey, an adviser at Green and Brown Advisory Services, about what to do with the inheritance. David was asked to answer a series of questions which were designed to assist Harvey in determining David's personal circumstances, priorities and risk profile. The results of the questionnaire showed that David had a conservative risk profile and his priorities included reducing debt and saving for retirement. Despite this, Harvey recommended that David invest all of his inheritance in a high-risk managed investment scheme.

Two years later, the firm established a review and remediation program in response to a number of complaints received about 10 of its advisers, including Harvey, giving inappropriate advice across a range of product areas. All advice given by the 10 advisers in the past five years was being reviewed as part of the program.

When the firm reviewed the advice given to David, it was determined that David received advice that did not address his personal circumstances and risk profile. However, the managed investment scheme that was recommended to David had performed well over the past two years and had resulted in a gain that outweighed the benefit David would have received if he had been advised to pay the inheritance into his mortgage or superannuation fund.

David did not suffer a monetary loss; however, Green and Brown Advisory Services explained to David that he had not received appropriate advice and that an alternative strategy would be more appropriate for him, assuming his circumstances and risk profile had not

changed. David was offered a free review by one of Green and Brown's advisers, or a reimbursement of fees if David chose to see an adviser from another firm.

*In this example, non-monetary remediation was appropriate for the client.*

### **Advice reviewers**

124 Advice should be reviewed by persons that meet the training and competence requirements to provide personal advice on the relevant type of advice in the relevant product area that is being reviewed (e.g. superannuation, insurance, investments).

Note: The training and competence requirements to provide personal advice are currently set out in Regulatory Guide 146 *Licensing: Training of financial product advisers* (RG 146). The Government is consulting on proposals to amend the current training and competence requirements.

125 Controls should be in place to ensure there are no conflicts of interest and there is no influence from the advisers who are the subject of the review on the reviewers and decision makers. Persons who are the subject of the review and remediation program should not be involved in the program.

### **Peer review of advice**

126 After advice is reviewed initially by a person who forms a view on whether misconduct has occurred that has caused a loss to the client, that advice may then be 'peer reviewed' by another person who conducts the same assessment. Peer reviews can be conducted by persons who are internal or external to the advice licensee.

127 Peer review of advice is a useful way to ensure advice is being reviewed consistently and fairly. There will be many instances in which peer reviewing will be appropriate. However, we do not expect that peer reviewing, or regular peer reviewing, will be required in all review and remediation programs.

128 Whether peer reviewing is appropriate will depend on the nature of the misconduct involved, the scope of the program, the experience of the reviewers and the stage the program is at.

#### *Circumstances when peer reviewing may be required*

129 Some examples of circumstances when peer reviewing may be required include, but are not limited to, the following:

- (a) the advice involves complex investment strategies or the client has unusual circumstances;
- (b) there are a large number of clients within the scope of the program and there are many advice reviewers; or

- (c) the program is at its early stages and reviewers are still developing ways to ensure reviews are conducted consistently.

130 When peer reviews are conducted, we expect the peer reviewer to be appropriately qualified and experienced in reviewing advice.

131 If peer reviews are appropriate but there are a small number of reviewers, which would make conducting peer reviews more difficult, managers or decision makers should be closely involved in reviewing the file before endorsing a file reviewer’s recommendation.

## Independent oversight

### Proposal

- E4 We propose the guidance set out in paragraphs 132–138 on the level of independent oversight required for a review and remediation program.

#### *Your feedback*

- E4Q1 Should all review and remediation programs involve a level of independent oversight? If not, in what circumstances would independent oversight be unnecessary?
- E4Q2 Do you agree that persons who are internal or external to the advice licensee are appropriate to provide independent oversight, depending on the circumstances? If not, why not?
- E4Q3 Do you think an independent person will have a conflict of interest in assisting in the design of a program as well as having a general oversight role of the program? If so, how could this conflict be managed?
- E4Q4 When should a review and remediation program involve independent oversight that is external to the licensee (i.e. an ‘independent expert’)?

132 All review and remediation programs should have some level of independent oversight in developing and operating the program.

133 ‘Independent oversight’ could be provided by:

- (a) a person or firm external to the advice licensee, and any related entities, that has expertise in overseeing review and remediation programs (i.e. an ‘independent expert’); or
- (b) a person internal to the licensee who is sufficiently independent from the operation of the review and remediation program and holds a senior position within the business (e.g. a licensee’s internal audit team).

- 134 An advice licensee’s EDR scheme may also provide a level of independent oversight to a review and remediation program. This will occur when the scheme identifies trends in the disputes received by the scheme and the scheme commences a systemic issue investigation. A licensee may also self-report systemic issues to its EDR scheme.
- 135 The factors to consider when determining the type of independent oversight that is appropriate to each review and remediation program includes, but is not limited to, the following:
- (a) the size of the program;
  - (b) the size of the advice licensee;
  - (c) the competence of those involved in the program;
  - (d) the nature of the misconduct; and
  - (e) whether the advice licensee’s EDR scheme is conducting a separate systemic issue investigation in relation to the same or similar scope.
- 136 The type of involvement of an independent person overseeing the program (whether it is someone internal or external to the advice licensee) could include:
- (a) assistance in the design of the program and testing its design;
  - (b) general oversight of the program and checking operational effectiveness; and
  - (c) reviewing a selection of advice to ensure assessments are being undertaken consistently and fairly.
- 137 The roles and responsibilities of each party should be clearly understood by the advice licensee and the person providing the independent oversight.

**When engaging an independent expert may be appropriate**

- 138 Examples of when engaging an independent expert may be appropriate include, but are not limited to:
- (a) large review and remediation programs;
  - (b) the program includes complex issues;
  - (c) the program forms part of an enforceable undertaking or ASIC-imposed licence condition(s);
  - (d) when reporting to the public would be appropriate; and
  - (e) where a licensee has little or no experience designing or implementing review and remediation programs, or similar activities.

## Governance arrangements

### Proposal

**E5** We propose the guidance set out in paragraphs 139–142 on the governance arrangements of a review and remediation program.

#### *Your feedback*

**E5Q1** Is there more detailed guidance we can provide on who should be the decision maker in a review and remediation program and who should be overseeing a program? If so, please specify.

- 139 The governance arrangements required as part of a review and remediation program will depend on the size of the advice licensee and the scope of the program.
- 140 There can be one or more decision makers or the decision maker may also be the file reviewer in some circumstances. Whoever the decision maker is, they should be a person that holds a senior position with the licensee’s business and be experienced in making decisions for the business on a day-to-day basis.
- 141 All programs should also have senior management overseeing the program and should receive regular and direct reporting on the progress of the program. For incorporated advice licensees, this may include reporting to the Board or appointing a Director or Senior Executive as the person responsible for the program. For other types of advice licensee, this may require the Principal of the firm or another senior person involved to oversee the program.
- 142 The roles and responsibilities of each party involved should be clearly understood.

## Record keeping

### Proposal

**E6** We propose the guidance set out in paragraphs 143–146 on record keeping in relation to review and remediation programs.

#### *Your feedback*

**E6Q1** Are there any other types of records that an advice licensee should keep in relation to a review and remediation program?

- 143 Specific record-keeping obligations are imposed on advice licensees under the AFS licence conditions in PF 209, and under [CO 14/923]. Record-keeping requirements are also implied by the general duties imposed under

s912A of the Corporations Act. 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));
- (b) the duties to comply with the financial services laws and to take all reasonable steps to ensure its representatives comply with these laws (s912A(1)(c)–(ca));
- (c) the duty to have an adequate dispute resolution system (s912A(1)(g)); and
- (d) the duty to have adequate risk management systems in place (s912A(1)(h)).

144 Good record keeping is an important part of any review and remediation program to ensure compliance with these obligations. Records may include, but are not limited to, records of:

- (a) the steps taken to develop the program (including, for example, how the scope and design were determined and the decisions made as part of these processes);
- (b) client communication (including in writing, by telephone and in person);
- (c) communications internally and with other external parties in reviewing the file;
- (d) the assessment of the file;
- (e) peer review outcomes;
- (f) recommendations made by file reviewers and reasons for those recommendations;
- (g) decisions and reasons for those decisions, particularly where the decision is different to a file reviewer’s recommendation;
- (h) how the type of remediation is determined; and
- (i) the timeframes in reviewing a file.

145 Good records are useful for advice licensees in monitoring the progress of the program, understanding the nature of the misconduct, and reporting to senior staff, ASIC and the licensee’s EDR scheme (where required) or to the public (where appropriate): see paragraph 147.

146 As mentioned in paragraph 141, regular reporting should be provided to the Board and other relevant persons or areas within the advice licensee.



## Reporting publicly

### Proposal

E7 We propose the guidance set out in paragraphs 147–149 on public reporting in relation to review and remediation programs.

#### *Your feedback*

E7Q1 Do you agree that advice licensees should consider reporting publicly on review and remediation programs? If not, why not?

147 Advice licensees should consider whether it would be in the public interest to report publicly on the program and its progress. In general, we believe advice licensees should be transparent about review and remediation programs. Public reporting will be especially important for larger review and remediation programs or programs that follow public reports of client losses or alleged misconduct.

### ASIC reporting publicly

148 Where ASIC is overseeing the design and implementation of a program where public reporting is appropriate, ASIC may also make public statements in relation to the advice licensee's program and ASIC's involvement.

149 Where ASIC has entered into an enforceable undertaking that requires reporting by an independent expert, our policy is that we will make publicly available a summary of the final report or a statement that refers to the content of the report on our enforceable undertakings register on ASIC's website and we may also make reference to the contents of the report publicly: Regulatory Guide 100 *Enforceable undertakings* (RG 100) at RG 100.78–RG 100.85.

## F Communicating with clients

### Key points

Effective, timely and targeted communication that is informed by behavioural insights is key to ensuring that clients understand the review and remediation program and how it will affect them.

Our proposed guidance includes that:

- advice licensees should proactively contact potentially affected clients, and consider the best way to do this in light of their client base and their available methods of communication;
- communication should be simple and remove complexity where possible;
- communication that is well timed in relation to a client's decisions will be the most effective; and
- advice licensees should be reasonable and flexible when requesting a response from a client.

150 There are a range of factors for advice licensees to consider when communicating with clients about a review and remediation program, including when and how it is appropriate to communicate with potentially affected clients. This is important to ensure that clients understand the review and remediation program and how it will affect them.

151 This section contains our proposed guidance on communicating with clients as part of a review and remediation program. We are seeking your general feedback on the proposals, as well as your response to the specific feedback questions provided. We also invite you to identify whether there are other areas on which you would like guidance in relation to communicating with clients.

### Communicating generally with clients about a program

#### Proposal

F1 We propose the general guidance set out in paragraphs 152–154 (including our proposed key principles) on the factors advice licensees should consider when communicating with clients as part of a review and remediation program.

#### *Your feedback*

F1Q1 Do you agree with our general proposed guidance on what advice licensees should consider when communicating with clients as part of a review and remediation program? If not, why not? Please provide alternatives.

F1Q2 Please provide feedback on any costs or savings to your business as a result of this proposed guidance.

F1Q3 Are there other areas on which you would like guidance about communication? If so, please specify.

152 Advice licensees should proactively contact clients who have potentially been affected by misconduct. Licensees should consider the appropriate way to do this, taking into account the nature of their client base, the methods of communication available to clients, and any preferences expressed previously by clients.

153 In some circumstances, an advice licensee might need to review the specific advice provided before contacting clients so that it can give the clients sufficient and meaningful information about the potential problems with their advice.

154 Communication with clients is important at the beginning and end of a review and remediation program. Advice licensees should consider the appropriateness of ongoing communication throughout the program.

### Key principles when communicating with clients

When communicating with clients about a review and remediation program, advice licensees should consider the following principles:

- First impressions are important—if correspondence looks dense or complex, clients may not read it.
- Think about the appropriate method and tone for communicating in light of the client's circumstances (e.g. their financial literacy, language skills and age) and the client's agreed forms of communication or access to different communication channels.
- Be clear and direct by using simple language, avoiding legal jargon and omitting unnecessary information.
- Break down multiple or complex tasks into simple steps.
- Use short and simple sentences and paragraphs.
- Avoid lengthy letters—consider moving additional information into supplementary material to accompany the letter (e.g. a brochure).
- Prominently highlight, at the top of any communications, the actions the client is required to take and the key messages.
- Where possible, remove uncertainty about the process and give people an idea of what to expect (e.g. how long a step may take).
- Consider when it is the best time to contact clients throughout the process.

## When and how to communicate with clients

### Proposal

- F2 We propose the guidance set out in paragraphs 155–176 on what advice licensees should consider when determining when and how to communicate with clients as part of a review and remediation program.

#### *Your feedback*

- F2Q1 Do you agree that the initial and final communication with a client should always be in writing (see paragraph 161)? If not, why not? Please provide alternative suggestions.
- F2Q2 Is 10 working days an appropriate timeframe for advice licensees to follow up in writing any verbal communication of key information to clients (see paragraph 161)? If not, please specify what an appropriate timeframe is.
- F2Q3 Is there any information other than in paragraphs 165 and 170 that should be included in communication with clients? If so, please specify.
- F2Q4 When an advice licensee is seeking interest from a broader group of clients, what additional guidance, if any, could we give at paragraph 167 on what clients should be required to do in order to participate in the program?
- F2Q5 Is 30 days an appropriate timeframe when requesting that clients respond to communication (see paragraph 173)? If not, please specify what you consider is an appropriate timeframe.
- F2Q6 Are there other reasonable efforts, in addition to the examples in paragraph 174, that an advice licensee could make to contact a client who has not responded?

### When to communicate with clients

- 155 Communication that is well timed in relation to a client’s decisions will be the most effective.
- 156 In many cases, advice licensees communicate with clients at the following stages of a review and remediation program:
- (a) to inform the client that they are included in the scope of the program; and
  - (b) after the client’s advice has been reviewed, to inform the client of the final decision and how the client will be remediated, if applicable.
- 157 However, advice licensees should consider when it is best to communicate with clients, taking into account the nature of their client base, the progress of the program, what is expected of clients at each stage of the program and the type of misconduct. This may be at the initial and final stages described in paragraph 156, or at other times.

## How to communicate with clients

- 158 Evidence from behavioural sciences shows that effective, timely and targeted communication is key to ensuring that clients understand the review and remediation program and how it affects them. Small details in how communication is framed can affect whether and how a consumer understands and responds to information.
- 159 Advice licensees engage with clients in various different forms, including by mail, telephone, email, SMS, secure online facilities and in person.
- 160 Subject to paragraph 161, contact with a client throughout the review and remediation program should be in a form that is appropriate to the client given their circumstances (e.g. client's financial literacy, language skills and age) and any previously agreed form of communication with the client.
- 161 When notifying a client initially about a program, or informing them of a decision made following a review of the client's advice, this information should be communicated in writing. If this information is communicated verbally (e.g. by telephone or in person), licensees should follow this up in writing to the client within 10 business days.
- 162 At each of these stages, clients need to consider what the program and the advice licensee's decisions mean for their individual circumstances. While licensees can initially communicate this information with clients verbally, to ensure that clients properly understand the nature of the information they are receiving, it is important that they also receive these communications in writing. This will give clients the opportunity to review the information, seek advice (either from family and friends or professional advice) and ask the licensee additional questions.
- 163 Advice licensees should consider testing the effectiveness of their communication with specialists. User testing is another useful way to ensure that communication is effective. ASIC may also give feedback or directions about how we think consumer communications should be drafted.
- 164 Where clients have particular needs (e.g. poor English skills or low financial literacy), interpreters and staff who are trained cross-culturally or trained to cater for clients with particular needs should be provided.

### Initial communication with clients

- 165 When communicating with clients that their advice will be reviewed as part of a program—but before a decision is made on whether remediation is appropriate—advice licensees should clearly set out in writing:
- (a) that potential misconduct has been identified and the nature of the misconduct;
  - (b) that the advice licensee is operating a review and remediation program and what steps that involves;

- (c) if the licensee has decided the client is within the scope of the program, what this means for the client;
- (d) the client's rights (e.g. the right to submit a dispute to the licensee's EDR scheme);
- (e) a central contact point if the client wishes to discuss the communication further; and
- (f) the next steps.

166 Taking into account the principles set out below paragraph 154, this information may be presented in different forms. For example, it may be appropriate to provide a client with a brief letter containing key information, and attach a short brochure setting out additional information.

167 As noted in paragraph 90, an advice licensee should identify a group of clients that are within the scope of a review and remediation program without these clients needing to express an interest in participating in the program. Where the licensee seeks interest from a wider group of clients, there should be a clear and simple process for these clients to follow to indicate their interest.

#### **Ongoing communication**

168 The level of ongoing communication with clients will depend on the advice licensee's existing communication strategies, the progress of the program against the expectations initially communicated to clients and the client's preferences.

169 Clients should at least have an opportunity to obtain updates on the progress of their advice review. This could be done, for example, by:

- (a) providing a direct telephone number or email that the client may contact to obtain this information;
- (b) providing access to a secure electronic facility that includes information on the progress of the review of the client's file; or
- (c) communicating in a way that is agreed with the client.

#### **Final communication with clients**

170 When communicating a decision to a client, the advice licensee should clearly set out in writing:

- (a) what the decision is;
- (b) the reasons for the decision;
- (c) the circumstances of the advice and what factors the licensee took into account in forming the decision;

- (d) if remediation is offered, its components and how it was calculated; and, if not offered, the reasons why;
- (e) the client's rights if they are unhappy with the decision (e.g. lodging a dispute with the licensee's EDR scheme); and
- (f) contact details if the client wishes to discuss the decision further.

171 Advice licensees should consider the principles set out below paragraph 154.

### **Requesting a response from clients**

172 Advice licensees may request that clients respond within a specified timeframe—for example, when seeking additional information from a client or requesting a client's acceptance of an offer of remediation.

173 This timeframe should be prominently disclosed and must be reasonable and flexible, taking into account that clients will require time to consider the letter, review past advice they have received and collect any information required. As a minimum, licensees should give clients 30 days to respond to any requests.

174 Where a client does not respond to the advice licensee's communication, the licensee should make reasonable efforts to contact the client. This may include:

- (a) searching the licensee's records for alternative contact details; or
- (b) searching through publicly available information (e.g. the White Pages or other digitally available information).

175 If a response is required from the client within a specified period of time, licensees should be flexible in allowing clients additional time for a response. Whatever timeframe is provided, clients should not be excluded from the program or be denied remediation on the basis of not responding within the specified timeframe. Advice licensees should have processes in place to review the advice of clients who respond after a review and remediation program has been concluded (e.g. by reviewing advice through the licensee's IDR processes).

176 Advice licensees should also consider what assistance could be provided to clients to generate responses—for example, providing a checklist of simple tasks that a client is required to complete in order to accept an offer of remediation.

## G Ensuring clients have access to external review of decisions

### Key points

Clients must have free access to external dispute resolution processes to review an advice licensee's assessment of their advice. This will generally be through normal review by an EDR scheme but licensees may need to consider waiving any monetary or time limit, or other limits that may constrain an EDR scheme's jurisdiction.

Our proposed guidance includes that advice licensees should:

- engage with their EDR scheme when establishing a review and remediation program, so that relevant documentation, timelines and other arrangements are agreed upfront. This will facilitate the streamlined consideration, review and decision by the EDR scheme when necessary; and
- offer assistance to clients who wish to seek their own independent professional advice to assist their response to a review and remediation program.

177 Advice licensees will need to consider a range of factors to facilitate clients seeking external review of the licensee's decision on whether remediation is appropriate. This includes:

- (a) whether EDR scheme monetary and time limits should be waived;
- (b) whether assistance should be provided to clients who wish to seek professional advice; and
- (c) what processes are required to facilitate clients seeking external review of the licensee's decision.

178 This section contains our proposed guidance on the external review of licensee decisions following a review and remediation program. We invite your general feedback on the proposed guidance, as well as feedback on the specific questions provided.

### Proposal

G1 We propose the guidance set out in paragraphs 179–184 on the external review of decisions following a review and remediation program.

#### *Your feedback*

G1Q1 When would it be appropriate for advice licensees to waive an EDR scheme's monetary, time or other limits?



- G1Q2 Should the limits on some forms of compensation not be waived? If so, please specify what limits should not be waived and in what circumstances.
- G1Q3 Is assistance to clients wishing to seek professional advice required in all circumstances? If not, when would it be required?
- G1Q4 Are there other types of assistance that advice licensees could offer clients? Please specify.
- G1Q5 Please provide feedback on any costs or savings to your business as a result of the proposed guidance on the external review of decisions of review and remediation programs.
- G1Q6 Are there other areas on which you would like guidance in relation to the external review of licensee decisions? If so, what should that guidance include?

- 179 It is important that clients have access to an advice licensee's EDR scheme if they are not satisfied with an aspect of the review and remediation program, or about the decision the licensee has made in relation to whether misconduct has occurred and remediation is appropriate. Depending on the nature of the advice, advice licensees may need to consider waiving any monetary or time limit, or other limits that may constrain the EDR scheme's jurisdiction.
- 180 Advice licensees should adopt a facilitative approach in providing clients with information and documents that were used to form the decision following review of the client's advice.
- 181 It is important that advice licensees engage with their EDR scheme when establishing a review and remediation program so that relevant documentation, timelines and other arrangements are agreed upfront between the licensee and its EDR scheme. This will facilitate the streamlined consideration, review and decision by the EDR scheme when necessary.
- 182 Clients should receive clear communication about their EDR options.
- 183 Advice licensees should consider whether it is appropriate to offer assistance to clients who wish to seek their own professional advice about the licensee's decision on whether remediation is appropriate. Assistance could come in different forms—for example:
- (a) offering to reimburse the client (e.g. up to a limit of \$5,000) for professional advice sought by the client (e.g. advice from a lawyer, accountant or financial adviser);
  - (b) offering the services of a group of professionals independent of the licensee to provide advice to the client, free of charge; and

- (c) directing the client to a range of free services (e.g. pro bono professional advice services or free legal centres).

184 Guidance on the interaction of review and remediation programs and IDR and EDR obligations is provided at paragraphs 52–57.

## Settlement deeds

### Proposal

- G2 We propose the guidance set out in paragraphs 185–186 on settlement deeds.

#### *Your feedback*

- G2Q1 Should further guidance be provided on settlement deeds? If so, what should that guidance include?

185 Settlement deeds, or contracts, are an important part of the remediation process for advice licensees. However, deeds should only be relevant to the conduct being remediated.

186 Settlement deeds should also not restrict a client’s ability to speak to ASIC (or other Commonwealth, state or territory agencies), an EDR scheme, an adviser’s professional association or legal representation about a matter if the client has concerns, for example, about the operation of a review and remediation program, or the way in which their matter has been reviewed.

## H Proposed amendments to the record-keeping requirements

### Key points

Advice licensees are currently required to ensure that client records are retained that show how the licensee has complied with the best interests duty and related obligations. Licensees must be able to access these records even if a person other than the licensee retains the records.

Our regulatory experience has highlighted some uncertainty in these record-keeping requirements. We propose to amend [CO 14/923] to clarify that an advice licensee must ensure not only that client records are kept, but also that the licensee continues to have access to these records during the period in which they are required to be retained.

### General record-keeping obligations for advice licensees

#### Proposal

- H1 We propose to amend [CO 14/923] to clarify that, when an advice licensee or one of its representatives provides personal advice, the licensee must ensure not only that client records are kept, but also that the licensee continues to have access to these records during the period in which they are required to be retained.

#### *Your feedback*

- H1Q1 Do you agree with our proposed amendment to [CO 14/923]? If not, why not?
- H1Q2 Will our proposed amendment change existing record-keeping practices? If so, please describe the changes involved.
- H1Q3 Please provide feedback on any costs or savings to your business as a result of the proposed amendment.

#### Rationale

- 187 Advice licensees are currently required to ensure that client records are retained that show how the licensee has complied with the best interests duty and related obligations: s961B, 961G and 961J of the Corporations Act. This requirement applies when personal advice is provided by the licensee or one of its representatives. The records must be kept for at least seven years.

Note: This requirement was implemented by [CO 14/923] following CP 214 and reflects the previous licence condition in PF 209.

- 188 In Report 409 *Response to submissions on CP 214 Updated record-keeping obligations for AFS licensees* (REP 409), we stated that because the obligation to retain records remains with the advice licensee, licensees will need to assess their ability to satisfactorily access client records under their contractual arrangements with authorised representatives to ensure they can meet their regulatory obligations.
- 189 We understand that, under current arrangements, many authorised representatives are contracted to retain client records on behalf of the advice licensee, and licensees may have access to the records when needed—for example, to ensure the authorised representative is complying with the financial services law.
- 190 However, our regulatory experience has highlighted difficulties in recent review and remediation programs where advice licensees have been unable to review the personal advice given to some clients because the licensee no longer has access to client records to determine whether or not the clients suffered a loss.
- 191 Feedback we have received from industry is that when an authorised representative moves to another advice licensee, the first licensee may lose access to those records under the contract. If a review and remediation program is later established involving that authorised representative, the licensee would not have access to the relevant records to determine whether or not the client suffered a loss as a result of the authorised representative’s conduct. This means that many clients would be disadvantaged because the licensee is unable to review the advice they received.
- 192 As noted above, the obligation to ‘ensure records are retained’ remains with the advice licensee. Meeting this obligation means that licensees must still have access to client records even if these are kept by another person.
- 193 For the avoidance of doubt, we propose to amend [CO 14/923] to clarify that advice licensees must have access to client records during the period in which they are required to be retained—even if the records are retained by another person, and even if that person is no longer authorised by, or related to, the licensee.
- 194 We will also make technical changes to Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* (RG 175), where appropriate, to reflect any changes to [CO 14/923].

## I Regulatory and financial impact

195 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) providing a streamlined and well-understood review and remediation framework for advice licensees; and
- (b) ensuring that all review and remediation programs are conducted in a way that is efficient, honest and fair for clients.

196 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).

197 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.

198 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	Personal advice provided to retail clients
advice licensee	An AFS licensee who provides personal advice to retail clients
AFS licence	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  Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act  Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
client	retail client
[CO 09/339] (for example)	An ASIC class order (in this example numbered 09/339)
credit licensee	Holder of an Australian credit licence
EDR	External dispute resolution
financial product advice	A recommendation or a statement of opinion, or a report of either of these things, that: <ul style="list-style-type: none"> <li>• 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 class of financial product; or</li> <li>• could reasonably be regarded as being intended to have such an influence.</li> </ul> This does not include anything in an exempt document  Note: This is the definition contained in s766B of the Corporations Act.
IDR	Internal dispute resolution
licensee	An AFS licensee who provides personal advice to retail clients

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"> <li>• the person giving the advice has considered one or more of the client's objectives, financial situation and needs; or</li> <li>• a reasonable person might expect the person giving the advice to have considered one or more of these matters</li> </ul> <p>Note: This is the definition contained in s766B(3) of the Corporations Act.</p>
PI insurance	Professional indemnity insurance
reg 7.6.02AAA (for example)	A regulation of the Corporations Regulations (in this example numbered 7.6.02AAA), unless otherwise specified
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations 2001
review and remediation program	Client review and remediation program—a project set up within an advice licensee to review personal advice, where a systemic issue in relation to the advice has been identified, and then to remediate those clients who have suffered loss as a result
RG 104 (for example)	An ASIC regulatory guide (in this example numbered 104)
s912A (for example)	A section of the Corporations Act (in this example numbered 912A), unless otherwise specified
systemic issue	An issue that may have implications beyond the immediate rights of the parties to a complaint or dispute, or that may have implications for more than one client

## List of proposals and questions

Proposal	Your feedback
B1 We propose the guidance set out in paragraphs 31–35 on how we will define a ‘review and remediation program’.	B1Q1 Have we appropriately defined a ‘review and remediation program’ for the purposes of this guidance? If not, please give details. Please also provide alternatives.
B2 We propose the guidance set out in paragraphs 36–41 on how we will define a ‘systemic issue’.	B2Q1 Have we appropriately defined a ‘systemic issue’ for the purposes of this guidance? If not, please give details. Please also provide alternatives.
B3 We propose the guidance set out in paragraphs 42–45 on when our proposed guidance will apply.	<p>B3Q1 Do you agree with how we have described the application of the proposed guidance? If not, why not?</p> <p>B3Q2 Do you agree that the principles in this guidance should apply to programs not relating to personal advice? If not, why not?</p> <p>B3Q3 Are there circumstances when the principles should not apply? If so, please give details. Please also specify whether, and how, these principles could apply with alterations.</p>
C1 We propose the guidance set out in paragraphs 48–51 on when it is appropriate to establish a review and remediation program.	<p>C1Q1 Have we appropriately defined the threshold when a review and remediation program may be appropriate? If not, please give details. Please also provide alternatives.</p> <p>C1Q2 Are there circumstances, other than those set out at paragraphs 50–51, when a review and remediation program would not be appropriate? Please specify examples.</p> <p>C1Q3 Are there other factors that advice licensees should consider when deciding whether to establish a review and remediation program?</p> <p>C1Q4 Please provide feedback on any costs or savings to your business as a result of the threshold at which a review and remediation program would be appropriate.</p>
C2 We propose the guidance set out in paragraphs 52–57 on how a review and remediation program interacts with the advice licensee’s IDR and EDR obligations.	<p>C2Q1 Do you agree with the way we have described the relationship between a review and remediation program and the advice licensee’s IDR and EDR obligations? If not, why not?</p> <p>C2Q2 Will advice licensees have difficulty in meeting their IDR obligations if complaints are included as part of a review and remediation program? If so, what could be done to assist licensees?</p> <p>C2Q3 Are there any barriers to advice licensees directing clients to an EDR scheme if they have a complaint about the program or a decision of the licensee? If so, what could be done to assist licensees?</p>



Proposal	Your feedback
<p>C3 We propose the guidance set out in paragraphs 58–73 (including Example 1) on how a review and remediation program interacts with an advice licensee’s general AFS licensing obligations.</p>	<p>C3Q1 Do you agree with how we have described a program’s interaction with the AFS licensee obligations? If not, why not?</p> <p>C3Q2 Will the establishment of a review and remediation program, and a subsequent decision to remediate clients, affect an advice licensee’s ability to make claims under its professional indemnity (PI) insurance? If so, please explain how.</p> <p>C3Q3 If your answer to C3Q2 is yes, what alternatives or alterations to a review and remediation program, as described in this consultation paper, could be adopted by advice licensees that hold PI insurance to enable claims to continue to be made?</p>
<p>C4 We propose the guidance set out in paragraphs 74–76 on ASIC’s role in review and remediation programs.</p>	<p>C4Q1 Do you require further guidance on ASIC’s role in relation to review and remediation programs? If so, please specify what guidance you would like.</p>
<p>D1 We propose the guidance set out in paragraphs 79–89 on how to identify the scope of a review and remediation program.</p>	<p>D1Q1 What are some examples of how an advice licensee can determine the scope of a program?</p> <p>D1Q2 Do you agree with our proposed factors for consideration? Are there others? If so, please specify.</p> <p>D1Q3 Do you agree that advice licensees should review advice as far back as the licensee has retained records? If not, what is a reasonable timeframe?</p> <p>D1Q4 How can advice licensees test the appropriateness of the criteria used to determine the scope of a program?</p> <p>D1Q5 Are there any types of retail clients that should be excluded from a review and remediation program? If so, please specify.</p> <p>D1Q6 Are there any circumstances where wholesale clients should be included in a review and remediation program? If so, please specify.</p> <p>D1Q7 Please provide feedback on any costs or savings to your business as a result of the proposed guidance on determining the scope of a review and remediation program.</p>
<p>D2 We propose the guidance set out in paragraphs 90–92 (including Example 2) on when it is appropriate to invite other clients to participate in a review and remediation program.</p>	<p>D2Q1 Do you agree that advice licensees should identify a group of clients that are within the scope of a program and, only in limited circumstances, seek interest from other clients in participating in the program? Please provide reasons for your answer.</p> <p>D2Q2 Are there any other instances when it would be appropriate to invite additional clients to participate in the program? If so, please specify.</p>

Proposal	Your feedback
<p>D3 We propose the guidance set out in paragraphs 93–96 (including Example 3) on when it is appropriate to revise the scope of a review and remediation program.</p>	<p>D3Q1 Do you agree that the scope of a program may need to be revised when new information becomes available? If not, why not?</p>
<p>E1 We propose the guidance set out in paragraphs 99–104 on how to design a review and remediation program.</p>	<p>E1Q1 Are there any other key factors an advice licensee should consider when designing a program? If so, please specify.</p>
<p>E2 We propose the guidance set out in paragraph 105–111 (including our proposed key principles) on developing the processes for a review and remediation program.</p>	<p>E2Q1 Are there any other key principles an advice licensee should consider when developing the processes for a program? If so, please specify.</p> <p>E2Q2 Please provide feedback on any costs or savings to your business as a result of the proposed guidance on the processes for a review and remediation program.</p> <p>E2Q3 Are there other areas we should give guidance on? If so, please specify.</p>
<p>E3 We propose the guidance set out in paragraphs 112–131 (including Example 4) on how advice should be reviewed for a review and remediation program.</p>	<p>E3Q1 Is it reasonable for advice licensees to make a decision on whether to remediate a client within 90 days of the client being notified that they are within the scope of the program? If not, what other timeframe would be appropriate? If a timeframe is not appropriate, are there other ways to ensure advice is reviewed in a timely way (e.g. regular reporting to the public)?</p> <p>E3Q2 What types of remediation (monetary or non-monetary) should advice licensees provide to clients? Are there any types of remediation licenses should not provide?</p> <p>E3Q3 Should advice licensees apply the interest rate (to calculate monetary loss) used by their relevant EDR scheme? If not, please provide alternatives.</p> <p>E3Q4 Are there any circumstances, other than those listed at paragraph 129, when it would or would not be appropriate to have advice peer reviewed? If so, please specify.</p>

Proposal	Your feedback
<p>E4 We propose the guidance set out in paragraphs 132–138 on the level of independent oversight required for a review and remediation program.</p>	<p>E4Q1 Should all review and remediation programs involve a level of independent oversight? If not, in what circumstances would independent oversight be unnecessary?</p> <p>E4Q2 Do you agree that persons who are internal or external to the advice licensee are appropriate to provide independent oversight, depending on the circumstances? If not, why not?</p> <p>E4Q3 Do you think an independent person will have a conflict of interest in assisting in the design of a program as well as having a general oversight role of the program? If so, how could this conflict be managed?</p> <p>E4Q4 When should a review and remediation program involve independent oversight that is external to the licensee (i.e. an ‘independent expert’)?</p>
<p>E5 We propose the guidance set out in paragraphs 139–142 on the governance arrangements of a review and remediation program.</p>	<p>E5Q1 Is there more detailed guidance we can provide on who should be the decision maker in a review and remediation program and who should be overseeing a program? If so, please specify.</p>
<p>E6 We propose the guidance set out in paragraphs 143–146 on record keeping in relation to review and remediation programs.</p>	<p>E6Q1 Are there any other types of records that an advice licensee should keep in relation to a review and remediation program?</p>
<p>E7 We propose the guidance set out in paragraphs 147–149 on public reporting in relation to review and remediation programs.</p>	<p>E7Q1 Do you agree that advice licensees should consider reporting publicly on review and remediation programs? If not, why not?</p>
<p>F1 We propose the general guidance set out in paragraphs 152–154 (including our proposed key principles) on the factors advice licensees should consider when communicating with clients as part of a review and remediation program.</p>	<p>F1Q1 Do you agree with our general proposed guidance on what advice licensees should consider when communicating with clients as part of a review and remediation program? If not, why not? Please provide alternatives.</p> <p>F1Q2 Please provide feedback on any costs or savings to your business as a result of this proposed guidance.</p> <p>F1Q3 Are there other areas on which you would like guidance about communication? If so, please specify.</p>

Proposal	Your feedback
<p>F2 We propose the guidance set out in paragraphs 155–176 on what advice licensees should consider when determining when and how to communicate with clients as part of a review and remediation program.</p>	<p>F2Q1 Do you agree that the initial and final communication with a client should always be in writing (see paragraph 161)? If not, why not? Please provide alternative suggestions.</p> <p>F2Q2 Is 10 working days an appropriate timeframe for advice licensees to follow up in writing any verbal communication of key information to clients (see paragraph 161)? If not, please specify what an appropriate timeframe is.</p> <p>F2Q3 Is there any information other than in paragraphs 165 and 170 that should be included in communication with clients? If so, please specify.</p> <p>F2Q4 When an advice licensee is seeking interest from a broader group of clients, what additional guidance, if any, could we give at paragraph 167 on what clients should be required to do in order to participate in the program?</p> <p>F2Q5 Is 30 days an appropriate timeframe when requesting that clients respond to communication (see paragraph 173)? If not, please specify what you consider is an appropriate timeframe.</p> <p>F2Q6 Are there other reasonable efforts, in addition to the examples in paragraph 174, that an advice licensee could make to contact a client who has not responded?</p>
<p>G1 We propose the guidance set out in paragraphs 179–184 on the external review of decisions following a review and remediation program.</p>	<p>G1Q1 When would it be appropriate for advice licensees to waive an EDR scheme’s monetary, time or other limits?</p> <p>G1Q2 Should the limits on some forms of compensation not be waived? If so, please specify what limits should not be waived and in what circumstances.</p> <p>G1Q3 Is assistance to clients wishing to seek professional advice required in all circumstances? If not, when would it be required?</p> <p>G1Q4 Are there other types of assistance that advice licensees could offer clients? Please specify.</p> <p>G1Q5 Please provide feedback on any costs or savings to your business as a result of the proposed guidance on the external review of decisions of review and remediation programs.</p> <p>G1Q6 Are there other areas on which you would like guidance in relation to the external review of licensee decisions? If so, what should that guidance include?</p>
<p>G2 We propose the guidance set out in paragraphs 185–186 on settlement deeds.</p>	<p>G2Q1 Should further guidance be provided on settlement deeds? If so, what should that guidance include?</p>

Proposal	Your feedback
<p>H1 We propose to amend [CO 14/923] to clarify that, when an advice licensee or one of its representatives provides personal advice, the licensee must ensure not only that client records are kept, but also that the licensee continues to have access to these records during the period in which they are required to be retained.</p>	<p>H1Q1 Do you agree with our proposed amendment to [CO 14/923]? If not, why not?</p> <p>H1Q2 Will our proposed amendment change existing record-keeping practices? If so, please describe the changes involved.</p> <p>H1Q3 Please provide feedback on any costs or savings to your business as a result of the proposed amendment.</p>