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26 February 2016

Our Ref CWS/MLR

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Dear Ms Quinn

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

Henry Davis York's Risk + Regulatory Strategy Team has experience in advising Australian financial service license holders (**Licensees**) on regulatory issues and responses. Over the last two years, our lawyers have worked within regulatory teams with Licensees, including within some of Australia's largest financial institutions.

Many of our lawyers have worked, and are continuing to work, as part of remediation teams. Our lawyers have experienced first-hand how complex, time-consuming and demanding a remediation program can be for all parties involved.

We therefore welcome ASIC's Consultation Paper 247: Client review and remediation programs and update to record-keeping requirements (**Consultation Paper**) and the opportunity to provide feedback based on our experiences. We agree that guidance to ensure that review and remediation programs are fair, transparent and consistent will assist both Licensees and clients.

Our initial and overriding comments in respect of the Consultation Paper are that:

1. it provides a single 'one-size fits all' approach to review and remediation programs and does not appear to allow for flexibility for scaling up/down depending on the nature, scale and complexity of the Licensee or the conduct being remediated; and
2. it is too prescriptive, providing timeframes and compulsory requirements, rather than guidance.

Our further more specific comments follow.

1. Definition of systemic Issue

In paragraph 36 of the Consultation Paper, a 'systemic issue' is defined 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.***

When using the same words but formatted differently, the definition of systemic issue would read:

an issue that:

a) may have implications beyond the immediate rights of the parties to a complaint or dispute, ***or***

b) that may have implications for more than one client.

If it is correct that ASIC intends one definition of a systemic issue to be "an issue that may have implications for more than one client" (**Extended Definition**), ASIC appears to have intentionally extended the concept and lowered the threshold of a systemic issue. Defining as a systemic issue one requiring no more than two clients to be affected, without any other threshold requirement (such as the impact or value of the conduct), may in some cases be disproportionate to the cost, time and resources required to design and implement a review and remediation program.

The concept of a systemic issue both as defined by ASIC in Regulatory Guide 139¹ and by the Financial Ombudsman Service (**FOS**)² embody the concept of the extension of an issue beyond the immediate rights of the affected party (as described in (a)), but do not include a complaints quantum requirement (as described in (b)). In fact, in contrast to the Extended Definition, RG 139 specifically states that a systemic issue cannot be defined or classified by reference only to the number of complaints received³.

We also note that the Extended Definition appears to be inconsistent with the types of matters that Licensees are required to report to ASIC under the Corporations Act. Section 912D(1)(b) requires Licensees to notify ASIC of **significant** breaches or likely breaches of the obligations of Licensees detailed in the Corporations Act. Whilst 'significant breaches' are not defined in the Corporations Act, Regulatory Guide 78⁴ makes it clear that consideration of the nature, scale and complexity of a Licensee's business may affect whether a particular breach is significant or not⁵. The Extended Definition does not allow for any such qualitative assessment of what would be considered a systemic issue and is therefore inconsistent with, and broader than, the existing statutory obligations of Licensees.

¹ Regulatory Guide 139 Approval and oversight of external complaints resolution schemes defines systemic issues as "those that relate to issues that have implications beyond the immediate actions and rights of the parties to the complaint or dispute" [RG 139:199].

² FOS Terms of Reference define systemic issues as "an issue that will have an effect on people beyond the parties to a dispute."

³ At RG 139:200.

⁴ Regulatory Guide 78: Breach reporting by AFS licensees.

⁵ RG 78:12.

2. Timeframe

The following two timeframes are prescribed in the Consultation Paper:

- (a) where client complaints have been received by a Licensee via an IDR program and the complaints are within the scope of a review and remediation program, a final response must be provided to clients by the Licensee within 45 days⁶ of receiving the complaint; and
- (b) where an affected client is identified via a review and remediation program, Licensees should make a decision about whether to remediate that affected client within 90 days of notifying the client that they are within the scope of the program⁷.

First we note that there is inconsistency in the treatment of clients, dependent on the mechanism by which they join a review and remediation program.

Secondly, these prescribed and definitive timeframes are not achievable in all circumstances. Many factors, individually and cumulatively, could cause the time period for review, investigation and response to extend beyond these timeframes. Those factors are numerous and include the complexity and extent of the conduct in question, whether additional documents are required from clients or advisors, the requirement for an independent appeal process, a client's desire to seek independent financial or legal advice and the involvement of any independent experts. The time taken in respect of some of these issues, for example engagement with clients for information, is often out of the control of the Licensee.

In particular, we note ASIC's comments in the Consultation Paper regarding the allocation of adequate resources for a review and remediation program⁸. We agree that successful programs require both appropriately qualified advice reviewers, together with training and support for less experienced advice reviewers. However, we are aware that the selection of appropriately experienced teams is often a difficult and time-consuming task. Training and support for future advice reviewers can often add to the delay in the commencement and implementation of a proposed program, yet training is important.

The timeframes prescribed fail to accommodate the potential delay factors described in the paragraph above, or any flexibility in consideration of the nature, scale and complexity of the Licensee's business and operations.

Instead of the definitive timeframes for the required conclusion of remediated matters that are currently included in the Consultation Paper, ASIC might consider timeframes for regular communication (or touchpoints) with clients. For example, those communications could be on a timed basis (eg monthly) or at defined points in the process (eg at the conclusion of the information gathering process).

⁶ Consultation Paper paragraph 55.

⁷ Consultation Paper paragraph 116.

⁸ Consultation Paper paragraph 108.

3. **Retention of Records**

Paragraph 87 of the Consultation Paper notes ASIC's expectation that a Licensee review advice as far back as the Licensee has retained records.

By not providing a definitive time period for record retention and review for remediation programs, this may cause inequities in the treatment of clients both across and within Licensee organisations. For example, if the record-keeping requirement is 7 years and, within an organisation some records have been routinely destroyed after that time but some have not, some clients would have the benefit of a review of files for an extended period of time while others will not.

4. **Compensation**

Paragraph 121 of the Consultation Paper indicates that client remediation can be monetary or non-monetary or a combination of both.

We consider that the inclusion of non-monetary compensation adds a complexity to proposed remediation outcomes that is difficult to quantify and may be counter-productive to clients being treated fairly and consistently. Determination of non-monetary compensation may require expert assistance, including hindsight review and analysis, which will unnecessarily add cost and delay to the remediation process.

We note that in its approach to calculating loss in Financial Advice Disputes, FOS operates with capped limits on compensation for "direct financial loss" and "consequential financial loss". FOS does not consider or require non-monetary compensation.

We also note that in calculating loss, FOS also takes into account the contributory negligence and mitigation of loss by clients. If FOS considers that a client has failed to take care of his or her own interests and that failure is a cause of the loss suffered, it will reduce the amount of compensation it will award.

We encourage ASIC to consider the approach taken by FOS in assessing and calculating compensation to clients.

5. **Reimbursement to client for independent advice**

In paragraph 183 of the Consultation Paper, Licensees are encouraged to consider offering reimbursement to clients, up to a limit of \$5,000, for professional advice sought by the client from a lawyer, accountant or financial adviser.

We are concerned that the provision of reimbursement for independent third party advice will undermine the veracity of a well designed and robust remediation program designed by Licensees. Mechanisms such as IDR and EDR, which are free of charge to the client, can act as an independent review of remediation programs and remediation outcomes and clients should be encouraged to utilise those during the remediation process.

We would however certainly encourage a case-by-case assessment of the need to provide a client with reimbursement or other assistance to obtain professional advice if that client had a certain disadvantage (eg hardship).

6. **Incomplete Records**

Paragraph 120 of the Consultation Paper notes that:

Where an advice licensee's advice records are incomplete, additional information should be sought from the client... clients should be given the ***benefit of any doubt*** where the licensee's records are incomplete or insufficient.

In circumstances where there is missing or incomplete information, rather than providing a presumption in favour of the client there should be no presumption in favour of either party. Rather, there should be consideration of all of the surrounding facts and circumstances in order to determine whether there is a valid claim for remediation.

7. **Public Reporting**

In paragraph 147 of the Consultation Paper, it is noted that:

public reporting will be especially important for larger review and remediation programs or programs that follow public reports of client losses or alleged misconduct.

We note that in ASIC's Corporate Plan 2015-16 to 2018-19, one of its primary strategic priorities for the period was to promote investor and financial consumer trust and confidence in the market. We are concerned that a requirement for public reporting may cause significant and unnecessary concern amongst the public, undermine trust and confidence in the market. We are also concerned that public reporting may give rise to vexatious and unfounded claims that unnecessarily extend the time, scope and cost of review and remediation programs.

In circumstances where Licensees have designed and executed successful review and remediation programs with affected clients, we consider it unnecessary to require public reporting unless the individual circumstances warrant it.

8. **Retrospective Effect**

Finally, we note that the Consultation Paper does not give any indication as to when the guidance will take effect and whether it will have retrospective effect.

We would encourage ASIC to indicate that the guidance, once finalised, will only operate prospectively, with an appropriate transition period for Licensees to make the necessary arrangements to implement ASIC's requirements.

We would be pleased to address ASIC further on any of the points raised in our submissions or on any other issues that ASIC is considering during the consultation process.

Yours faithfully
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