



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 300

Approval and oversight of compliance schemes for financial advisers

May 2018

About this paper

From 1 January 2020, each individual who is authorised to provide personal advice to retail clients about relevant financial products (financial advisers) must comply with a code of ethics and be covered by a scheme under which their compliance with the code of ethics will be monitored and enforced (compliance scheme). Compliance schemes must be approved by ASIC.

This consultation paper is primarily for applicants for compliance scheme approval, but it may also be of interest to financial advisers and Australian financial services (AFS) licensees who authorise financial advisers. It seeks feedback on our proposed process and criteria for determining whether to grant approval to a compliance scheme and our proposed oversight of compliance schemes on an ongoing basis.

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 15 May 2018 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 the criteria we will take into account when determining whether to grant approval to a compliance scheme and our oversight of these schemes. 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 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 28 June 2018 to:

Kelly Fung
Lawyer
Financial Advisers
Australian Securities and Investments Commission
GPO Box 9827
Sydney NSW 2000
Email: policy.submissions@asic.gov.au

What will happen next?

Stage 1	15 May 2018	ASIC consultation paper released
Stage 2	28 June 2018	Comments due on the consultation paper
Stage 3	June to September 2018	Drafting of regulatory guide
Stage 4	September 2018	Regulatory guide released

A Background to and overview of the proposals

Key points

The Australian Government introduced reforms to raise the professional, ethical and educational standards of financial advisers in response to widespread concerns that current standards are too low.

As part of the reforms, financial advisers will be required to comply with a code of ethics and have their compliance with the code monitored and enforced under compliance schemes approved by ASIC.

This paper sets out our proposed approach to approving and overseeing compliance schemes and how we will expect them to operate.

Reforms to raise professional, ethical and educational standards of financial advisers

- 1 We, among many others, have raised concerns over a number of years that the professional, ethical and educational standards of financial advisers are too low. We have voiced these concerns in submissions to Government inquiries¹ and they were also noted in:
 - (a) [Inquiry into proposals to lift the professional, ethical and education standards in the financial services industry](#) (December 2014), the final report of the inquiry conducted by the Parliamentary Joint Committee on Corporations and Financial Services; and
 - (b) [Financial System Inquiry: Final report](#) (December 2014). The inquiry was chaired by David Murray AO.
- 2 In response to those concerns, the Australian Government introduced the Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016 to Parliament in November 2016. Its aim was to raise the professional, ethical and educational standards of financial advisers. In her second reading speech on the Bill on 23 November 2016, the Hon. Kelly O'Dwyer, Minister for Revenue and Financial Services, stated that:

Raising the professional standards of financial advisers will play a significant role in improving consumer trust in the financial advice industry, which has had repeated instances of inappropriate behaviour.
- 3 The Bill passed Parliament on 9 February 2017. The adviser professionalism reforms, introduced by the *Corporations Amendment (Professional*

¹ See, for example, our submissions to the [Parliamentary Joint Committee on Corporations and Financial Services inquiry into proposals to lift the professional, ethical and educational standards in the financial services industry](#) (September 2014) and to the [Financial System Inquiry](#) (August 2014).

Standards of Financial Advisers) Act 2017, commenced on 15 March 2017, but many of the obligations will be phased in over time.

- 4 The reforms include:
- (a) new education and training requirements (s921B and 921C), including requirements for financial advisers to:
 - (i) hold a degree;
 - (ii) pass an exam;
 - (iii) undertake continuing professional development; and
 - (iv) undertake a professional year;
 - (b) a requirement for financial advisers to comply with a code of ethics and be covered by a compliance scheme (s921E and 921H); and
 - (c) a restriction on the use of the terms ‘financial adviser’ and ‘financial planner’ (s923C).

Note: In this paper, references to sections (s) are to the *Corporations Act 2001* (Corporations Act), unless otherwise specified.

Code of ethics

- 5 A key element of the reforms is the requirement for all financial advisers to comply with a single uniform code of ethics (code) from 1 January 2020. The code is being developed by the Financial Adviser Standards and Ethics Authority (FASEA).
- 6 As noted in paragraph 3.5 of the Explanatory Memorandum to the Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016 (Explanatory Memorandum):
- The code sets out the ethical obligations that apply to relevant providers. These ethical obligations go above the legal requirements in the law and are designed to encourage higher standards of behaviour and professionalism in the financial services industry.
- 7 A [draft version of the code of ethics](#) was released by FASEA on 19 March 2018. The code is open for consultation until 1 June 2018, following which FASEA will release a final version.
- 8 The proposals in this paper are based on the draft version of the code and may change depending on the final version.

Compliance schemes

- 9 Financial advisers’ compliance with the code will be monitored and enforced by monitoring bodies in accordance with compliance schemes approved by ASIC. Monitoring bodies may be any entity other than an AFS licensee or an associate of an AFS licensee: s921G(3). Financial advice professional

associations and professional services firms are examples of the kinds of entities that may wish to have a compliance scheme, but there may be others.

- 10 In this consultation paper we refer to these entities, in the context of their role in operating a compliance scheme, as ‘monitoring bodies’. However, the same entity may carry out other functions—for example, it may also be a professional association. We refer to the body, in the context of its broader role beyond just acting as a monitoring body, as the ‘entity acting as the monitoring body’.
- 11 Australian financial services (AFS) licensees must, from 15 November 2019, ensure that all financial advisers authorised under their AFS licence are covered by a compliance scheme that is approved by ASIC: s921H.

ASIC’s power to approve compliance schemes

- 12 We may approve a compliance scheme if we are satisfied that:
- (a) compliance with the code will be appropriately monitored and enforced under the scheme; and
 - (b) the monitoring body has sufficient resources and expertise to appropriately monitor and enforce compliance with the code under the scheme.
- Note: See s921K(4).
- 13 In assessing whether a compliance scheme meets these criteria, we will take into account a number of factors—including those set out at paragraph 3.24 of the Explanatory Memorandum:
- (a) the financial, technological and human resources of the monitoring body and where those resources are situated;
 - (b) the number of advisers that the scheme is designed to cover;
 - (c) whether the location of the advisers that are designed to be covered by the scheme matches the location of the monitoring body’s resources;
 - (d) the consultation procedures that the monitoring body intends to use before making any changes to the scheme;
 - (e) the processes and resources that the monitoring body intends to use for administration, data management and reporting (including its capacity to appropriately handle personal information), and to fairly and effectively monitor compliance with the code and the scheme’s rules and decisions;
 - (f) whether the monitoring body outsources any of its functions and how responsibility for these functions is maintained; and
 - (g) the competence of the monitoring body’s existing staff and its intended training procedures.

We have set out our proposed expectations in more detail in Sections C, D and E of this consultation paper.

- 14 In approving a compliance scheme, we may also impose conditions on the approval: see Section F.

Our approach to compliance scheme approval and oversight

- 15 Monitoring and enforcing compliance with the code is a significant responsibility and we will therefore expect monitoring bodies to meet very high standards.

Key principles informing our approach

- 16 In developing the proposals set out in this paper, we have been guided by three key principles:
- (a) *Behavioural change*—One of the key aims of the code and the associated compliance scheme framework is to encourage higher standards of behaviour and professionalism among financial advisers, thereby improving consumer trust in the financial advice industry. This requires financial advisers to:
 - (i) feel personally and intrinsically supported and motivated to act in an ethical manner, and in accordance with the code specifically; and
 - (ii) have a genuine belief that if they do not comply with the code, that behaviour may be identified and acted on by monitoring bodies.

This has informed the expectations we propose for robust governance and administration, and effective monitoring and enforcement.
 - (b) *Transparency*—Activities of monitoring bodies should be transparent (through public reporting) and subject to regular external review. This will:
 - (i) educate financial advisers and AFS licensees on conduct that does and does not comply with the code and the emerging risks of non-compliance;
 - (ii) help keep monitoring bodies accountable for the operations of the compliance scheme; and
 - (iii) help achieve the reforms' aim of improving consumer trust in the financial advice industry.
 - (c) *Consistency and fairness*—Because financial advisers and AFS licensees may be able to select from a number of different compliance schemes, it is important that there is consistency in the approach to monitoring and enforcement across the schemes. Financial advisers,

those who make complaints about them and all other stakeholders should be able to expect issues to be addressed fairly, competently and with an appropriate level of independence, regardless of which compliance scheme covers the adviser.

- 17 The proposals have also been informed by our existing guidance on:
- (a) approving financial services sector codes of conduct, as set out in [Regulatory Guide 183](#) *Approval of financial services sector codes of conduct* (RG 183); and
 - (b) approving and overseeing external dispute resolution (EDR) schemes, as set out in [Regulatory Guide 139](#) *Approval and oversight of external dispute resolution schemes* (RG 139).

Note: We are updating RG 139 to reflect the introduction of the new, single EDR body, the Australian Financial Complaints Authority (AFCA): see [Consultation Paper 298](#) *Oversight of the Australian Financial Complaints Authority: Update to RG 139* (CP 298). However, we are proposing to retain key policy positions relating to ASIC's oversight of EDR schemes, which have informed proposals in this consultation paper.

Possible alternative approaches

- 18 We recognise that the existence of multiple approved compliance schemes has the potential to result in duplication of work and additional costs for industry. We are open to considering alternative approaches that minimise these outcomes. For example, should prospective monitoring bodies wish to work together to develop best practice standards for code monitoring and enforcement, or pool resources to minimise the costs of monitoring and enforcement, we are open to considering these proposals.

Note: Monitoring bodies should consider any potential competition law implications of these proposals and seek legal advice.

- 19 We encourage prospective monitoring bodies to provide details of any alternative proposals they might have that address these issues, but remain consistent with the three key principles we have outlined in paragraph 16.

Compliance scheme approval application process

- 20 We want to ensure that the compliance scheme approval process:
- (a) does not put any compliance scheme at a competitive advantage or disadvantage compared to any others (e.g. by announcing the approval of one compliance scheme before another);
 - (b) allows AFS licensees sufficient time to ensure that all of their existing financial advisers are covered by a compliance scheme by 1 January 2020;

- (c) gives enough certainty to ASIC and to monitoring bodies to allow them to devote appropriate resources to the approval process and the establishment of compliance schemes and their operations; and
 - (d) ensures that all approved compliance schemes operate in a consistent way.
- 21 Accordingly, for the initial compliance scheme approval process (i.e. those compliance schemes intending to operate from 1 January 2020), we are proposing a three-stage application process, which will require monitoring bodies to submit:
- (a) an expression of interest in seeking approval of a compliance scheme during September 2018;
 - (b) a draft application for compliance scheme approval between 1 November 2018 and 31 December 2018, which we will aim to provide feedback on by 31 March 2019; and
 - (c) the final application for compliance scheme approval between 1 June 2019 and 30 June 2019, which must address any feedback that we have provided on the draft application.
- 22 We will aim to then announce all approvals for compliance schemes that have complied with this process on the same date, which we expect to be in early October 2019.
- 23 We are also proposing to standardise the content of compliance scheme approval applications to contain:
- (a) a letter of application, which sets out certain key information about the applicant (a proposed list of this key information is set out in Appendix 1);
 - (b) a completed 'if not, why not' checklist, based on our proposed guidance in Sections C, D and E of this paper. This will require the monitoring body to either confirm that it will comply with the expectations in our guidance or, if not, explain why this is the case and the alternative approach the monitoring body will take (a proposed draft 'if not, why not' checklist is set out in Appendix 2);
 - (c) a draft compliance scheme document (see our proposal B3 for more information about what this should include); and
 - (d) further supporting documentation requested by ASIC and specified throughout Sections C, D and E (such as particular statements, internal policies and procedures, or template agreements that are referred to elsewhere in the application).
- 24 The proposed process for compliance scheme approval is set out in more detail in Section B.

Compliance scheme governance and administration

- 25 The governance and administration of a compliance scheme is important, because it determines how effectively the monitoring body will be able to carry out its operations.
- 26 Key aspects of a compliance scheme's governance and administration include:
- (a) the role and composition of the monitoring body's governing body;
 - (b) the expertise of the monitoring body and the measures in place to ensure that the expertise is maintained on an ongoing basis; and
 - (c) the resources of the monitoring body and the measures in place to ensure those resources are maintained on an ongoing basis.
- 27 We are proposing to gather information about how monitoring bodies will meet these and our other expectations through the compliance scheme approval application process. Our expectations are set out in Section C and summarised in the draft 'if not, why not' checklist in Table 6 of Appendix 2.

Compliance scheme monitoring and enforcement

- 28 The primary role of a monitoring body is to monitor and enforce compliance with the code. A monitoring body's processes for monitoring and enforcing compliance with the code under its compliance scheme will therefore be very important to our decision to approve the compliance scheme.
- 29 Key aspects of a compliance scheme's monitoring and enforcement procedures include the monitoring body's approach to:
- (a) carrying out proactive monitoring activities;
 - (b) carrying out reactive monitoring activities, including its processes for soliciting, accepting and carrying out an initial assessment of reports of possible failures to comply with the code and for investigating possible failures to comply with the code;
 - (c) making determinations about whether a financial adviser has failed to comply with the code and, if so, imposing sanctions;
 - (d) ensuring that its determinations are enforceable on financial advisers; and
 - (e) resolving disputes with financial advisers.
- 30 Our expectations for monitoring and enforcement are set out in Section D and summarised in the draft 'if not, why not' checklist set out in Table 7 of Appendix 2.

Compliance schemes' ongoing operation

- 31 Ongoing review of and reporting on the work of compliance schemes is important. Among other things, this can provide assurance that the scheme is operating effectively and allow for the identification of areas where the performance of the scheme can be improved.
- 32 In Section E, we set out our expectations for ongoing review of and reporting on compliance schemes; in particular, our expectations for:
- (a) the data collection, analysis and reporting that monitoring bodies should carry out; and
 - (b) the independent review of the compliance scheme that the monitoring body must, under s921S, arrange every five years.
- 33 We have also set expectations about:
- (a) the consultation that the monitoring body must undertake on its compliance scheme while it is being developed and if it plans to make changes to it;
 - (b) the consultation and information sharing that should occur between monitoring bodies; and
 - (c) the ongoing support and education that monitoring bodies may provide to financial advisers to support and encourage them to act in accordance with their ethical obligations.
- 34 Our expectations for compliance schemes' ongoing operation are set out in Section E and summarised in the draft 'if not, why not' checklist set out in Table 8 of Appendix 2.

Revocation of and conditions on compliance scheme approval

- 35 We may revoke our approval of a compliance scheme, vary any conditions on it or impose new conditions (s921K(7)) if the monitoring body for the scheme:
- (a) does not comply with a request from ASIC to provide information;
 - (b) fails to notify ASIC of a significant change to the monitoring body's resources or expertise; or
 - (c) fails to notify ASIC or the relevant AFS licensee of a financial adviser's failure to comply with the code or a sanction imposed.
- 36 Section F of this consultation paper sets out our proposals for exercising these powers, including the information that we would expect to take into account in deciding whether to exercise them and the threshold for doing so.

Requiring AFS licensees and authorised representatives to provide information to monitoring bodies

- 37 We consider it important to the success of the compliance scheme framework that monitoring bodies carry out both proactive and reactive monitoring activities. However, the reforms only require AFS licensees, authorised representatives and financial advisers to provide monitoring bodies with information, documents or other reasonable assistance required to investigate matters if the monitoring body is carrying out reactive monitoring activities: s921L(3) and 921M(2).
- 38 To enable monitoring bodies to also gather information for the purposes of their proactive monitoring activities (where they may not yet be aware of an actual or possible failure to comply with the code), we are proposing to amend the law to confer a power on a monitoring body to request information from AFS licensees and authorised representatives in order to carry out its proactive monitoring activities.
- 39 This proposal is explained further in Section G.

Notifications to ASIC

- 40 Failures to comply with the code and any consequent sanctions will be made public on the financial advisers register, administered by ASIC. This is an important element of the reforms because it allows consumers to find out whether a financial adviser whose services they have engaged, or intend to engage, has failed to comply with the code in the past. Monitoring bodies must provide this information to ASIC for the information to be displayed on the financial advisers register.
- 41 Monitoring bodies must also provide notifications to ASIC about:
- (a) significant changes to the monitoring body's resources or expertise; and
 - (b) proposed modifications to their compliance scheme.
- 42 We summarise these notification obligations and our proposed guidance on them in Section H.

B Compliance scheme approval application process

Key points

This section sets out our proposals for reviewing applications and approving compliance schemes.

We are proposing that applicants who wish to operate an approved compliance scheme from 1 January 2020 will be required to undergo a three-stage application process, completing each step within particular timeframes, in order to be approved by that time.

We are also proposing that applications for compliance scheme approval should comprise:

- a letter of application;
- a completed 'if not, why not' checklist; and
- supporting documentation (including a draft compliance scheme document).

Three-stage application process for initial applicants

Proposal

B1 We propose to conduct a three-stage application process for initial applications. We have set out the proposed process in more detail at paragraphs 43–46.

Your feedback

B1Q1 Are there better ways for ASIC to run the application process that will help to give certainty about resources required and enable all approvals to be announced at the same time? If so, please provide details.

B1Q2 Does our proposed process create any particular risks that we will need to manage? If so, please provide details.

Proposed process

- 43 Only those monitoring bodies that meet certain criteria (the timeline is set out in more detail in Table 1) will be eligible to have their compliance scheme approval announced on the proposed initial approval date, which we expect to be in early October 2019. In particular, the monitoring body must:
- (a) register an expression of interest with ASIC during September 2018;
 - (b) submit a draft application for compliance scheme approval between 1 November and 31 December 2018; and

- (c) submit a final application for compliance scheme approval between 1 June 2019 and 30 June 2019, which must address any feedback that we provided on the draft application.

Table 1: Proposed timeline for initial compliance scheme approvals

Key stage	Proposed timing
We release our regulatory guide on our approval and oversight of compliance schemes for financial advisers	September 2018
Entities that wish to become monitoring bodies submit expressions of interest to ASIC	September 2018
Applicants submit draft applications for compliance scheme approval to ASIC	1 November 2018 to 31 December 2018
We provide feedback on draft applications to applicants	1 January 2019 to 31 March 2019
Applicants submit final applications for compliance scheme approval to ASIC	1 June 2019 to 30 June 2019
We announce approvals	Early October 2019

44 While we will consider applications for compliance scheme approval that do not meet the criteria set out above, we:

- (a) will give priority to those that meet these criteria; and
 (b) may not announce approval on the same date as applications that did meet the criteria.

45 We will approve compliance schemes in a formal approval letter, which will be a public document. This letter will set out any conditions on which we have approved the compliance scheme (in accordance with s921K(5) and our proposed guidance in Section F).

46 Paragraph 43 and Table 1 set out the process for initial applications for approval. Monitoring bodies who wish to apply for approval of a compliance scheme after this period should consult with ASIC on an individual basis.

Rationale

47 The obligation for AFS licensees to ensure that all new financial advisers who operate under their licence are covered by a compliance scheme commences on 15 November 2019. Existing advisers must be covered by 1 January 2020.

48 To ensure that AFS licensees and financial advisers know which compliance schemes they may select from, and to avoid giving a competitive advantage

to any compliance scheme by announcing its approval before others, we aim to announce all of the initial compliance scheme approvals (i.e. approvals for those monitoring bodies that wish to operate compliance schemes from 1 January 2020) on the same date, which we expect to be in early October 2019. We consider that this will leave sufficient time for AFS licensees and financial advisers to select a compliance scheme.

- 49 We also consider the proposed process, set out at paragraph 43 and Table 1, will help ensure:
- (a) quality and consistency in the applications received for compliance scheme approval;
 - (b) fairness in our approach to announcing approvals; and
 - (c) certainty for ASIC and the applicants about the compliance scheme approval process, which will allow us to allocate our resources appropriately.

Content of application

Proposal

- B2** We propose to standardise the content of compliance scheme approval applications to require them to contain the information set out at paragraphs 50–53.

Your feedback

- B2Q1 Do you agree with the information we will require as part of the application? If not, why not?

Proposed content of application

- 50 We will require monitoring bodies applying for approval of a compliance scheme to submit:
- (a) a letter of application, which sets out key information about the applicant (such as the name of the monitoring body and compliance scheme). A proposed list of the key information we will expect to see in the application is set out in Appendix 1;
 - (b) a completed ‘if not, why not’ checklist, which will be based on our proposed guidance in Sections C, D and E of this consultation paper. A draft ‘if not, why not’ checklist is set out in Appendix 2;
 - (c) a draft compliance scheme document (see our proposal B3 for more information about what this should include); and
 - (d) further supporting documentation mentioned throughout Sections C, D and E of this paper (such as particular statements, internal policies and

procedures, or template agreements that are referred to elsewhere in the application).

- 51 The completed 'if not, why not' checklist should either:
- (a) confirm that the compliance scheme will include the measures set out in the checklist and summarise the supporting evidence for this (e.g. by pointing to the relevant provision in the compliance scheme document or an internal policy or procedure of the monitoring body); or
 - (b) if the compliance scheme will not include those measures, explain why this is the case and the alternative approach the monitoring body will take to satisfying ASIC of the matter to which the checklist item relates.
- 52 Monitoring bodies applying for approval of a compliance scheme must also provide any additional information that we reasonably request during the application process if they wish to continue to have their application considered.
- 53 Some applicants to be a monitoring body (e.g. industry associations) may administer their own code that they require members to adhere to. In these circumstances:
- (a) the association's own ethical code must not be inconsistent with the code or the compliance scheme should provide that, in the event of an inconsistency between FASEA's code and their own ethical code, FASEA's code prevails (the monitoring body must confirm this in the letter of application); and
 - (b) the information in the application must relate only to the measures (e.g. resources, policies and procedures) used for monitoring and enforcing compliance with the code under the compliance scheme. Where these overlap with the measures applied to monitor and enforce compliance with the association's own ethical (or other conduct or practice) code, the monitoring body should make clear the extent to which this will be the case.

Rationale

- 54 We are proposing this standardised content because we want to ensure that the content of each compliance scheme approval application balances the need for:
- (a) consistency in the information monitoring bodies provide to ASIC and the approach that monitoring bodies take to monitoring and enforcing the code under the compliance scheme; and
 - (b) flexibility so that different monitoring bodies can tailor their approach to monitoring and enforcement to the cohort of financial advisers their compliance scheme covers.

Content of compliance scheme document

Proposal

- B3** We propose that a compliance scheme document should cover the matters set out in paragraph 55.

Your feedback

- B3Q1** Are there any matters other than those in paragraph 55 that should be included in the compliance scheme document? If so, please provide details.
- B3Q2** Are there any matters in paragraph 55 that should not be included in the compliance scheme document? If so, please give details. Please also suggest alternative places for this information.

Proposed compliance scheme document content

55

A compliance scheme document should set out:

- (a) the name of the compliance scheme and the name of the monitoring body for the scheme;
- (b) the core functions of the compliance scheme, which should be, at a minimum, to:
 - (i) carry out reactive monitoring activities by investigating and making determinations about any allegations from any person that a covered financial adviser has breached the code;

Note: We use the term ‘covered financial advisers’ to refer to financial advisers covered by a particular compliance scheme.

 - (ii) proactively monitor covered financial advisers’ compliance with the code; and
 - (iii) impose and enforce sanctions on covered financial advisers where appropriate;
- (c) a general statement of the arrangements for carrying out these core functions. More detail about how the monitoring body will carry out these core functions will also be set out in various other documents (e.g. the annual work plan described in proposal D2);
- (d) sanctions for failures to comply with the code by covered financial advisers (see proposal D8 for more information on our expectations for sanctions);
- (e) how a dispute between the monitoring body and a covered financial adviser is to be resolved (see proposal D9 for more information on our expectations for dispute resolution); and
- (f) how a person may make a report to the monitoring body about a failure, or a possible failure, to comply with the code by a covered financial adviser (see paragraphs 120–124 for more information on our expectations for accepting reports of failures to comply with the code).

- 56 While we recognise that monitoring bodies may not have finalised their compliance scheme before applying to have it approved, we expect them to submit a draft version of the compliance scheme document with the application for scheme approval.

Rationale

- 57 While a compliance scheme comprises all processes, resources, expertise and arrangements used to monitor and enforce compliance with the code, it should also be expressed, at a high level, in a single document that is made public: s921P.
- 58 This single document should enable financial advisers, AFS licensees and consumers to understand the scheme's role and how it carries that out. We consider that the matters set out in paragraph 55 include all of this key information.

C Compliance scheme governance and administration

Key points

This section sets out our proposals for the governance and administration of a compliance scheme. These proposals include that:

- each monitoring body should have an independent governing body that makes determinations about code non-compliance and sanctions, sets the strategic direction for the monitoring body and oversees its operations;
- we will carefully assess the expertise of the proposed initial governing body and the systems and controls to maintain the expertise of the monitoring body more broadly;
- the governing body will be responsible for ensuring the staff of the monitoring body have the appropriate expertise to carry out their roles on an ongoing basis; and
- the monitoring body should explain to ASIC, in its application for compliance scheme approval, the basis on which it considers it has appropriate human, financial and technological resources to carry out its activities.

Governance

- 59 The way a monitoring body is governed is critical to how effectively it can carry out its role of monitoring and enforcing compliance with the code, and will therefore be relevant to our decision whether or not to approve a compliance scheme.
- 60 We are proposing that each monitoring body should have a non-executive governing body that:
- (a) makes determinations about whether there has been non-compliance with the code and imposes sanctions and oversees and sets the strategic direction for the monitoring body's operations under the compliance scheme, as explained in proposal C1;
 - (b) is independent, in the manner outlined in proposal C2; and
 - (c) is made up of members with appropriate expertise, as explained in proposal C3.

Responsibilities of governing body and staff of monitoring body

Proposal

- c1 We propose that the governing body and the staff of the monitoring body should have the responsibilities outlined in Table 2 and that the governing body's responsibilities should be set out in a charter or terms of reference.

Your feedback

- C1Q1 Do you agree that the governing body should be permitted to delegate all of its responsibilities described in Table 2, other than the responsibilities described in paragraphs 63(a)–63(b)? If not, please give details.
- C1Q2 Are there any matters other than those set out in paragraph 64 that should be addressed in the charter or terms of reference for the governing body? Please give details.

Proposed delineation of responsibilities

- 61 The governing body will be made up of non-executives (see proposal C2). It is therefore the staff of the monitoring body who will be responsible for carrying out the day-to-day activities required to give effect to the compliance scheme.
- 62 While the delineation of responsibilities between the governing body and the staff of the monitoring body may differ between compliance schemes, we have set out what we expect would be typical in Table 2.

Table 2: Expected responsibilities of governing body and staff of monitoring body

Topic	Governing body responsibility	Monitoring body staff responsibility
Failure to comply with code	<p>Making a determination about whether a financial adviser has failed to comply with the code (including holding hearings) and imposing sanctions as appropriate.</p> <p>Note: For more information on this role, see proposal D7.</p>	<p>Receiving a report of a possible failure to comply with the code (e.g. through an external complaint or internal referral), assessing it, investigating it and making recommendations to the governing body following the investigation.</p> <p>Note: For more information on this role, see proposals D4–D6.</p>

Topic	Governing body responsibility	Monitoring body staff responsibility
Operations	<p>Overseeing the operations of the monitoring body under the compliance scheme, including by:</p> <ul style="list-style-type: none"> ensuring that staff of the monitoring body are appropriately trained and have appropriate expertise to carry out their roles under the compliance scheme; ensuring that the monitoring body is appropriately resourced to carry out its role in accordance with the compliance scheme and the expectations set out in this paper (e.g. by monitoring the monitoring body's ability to manage its workload); and ensuring that the required independent review of the compliance scheme takes place at least every five years. 	<p>Carrying out the day-to-day work of the compliance scheme and reporting to the governing body.</p>
Proactive monitoring activities	<p>Approving the annual work plan for the compliance scheme, which sets out the proactive monitoring activities that the monitoring body will carry out regarding compliance with the code each year.</p> <p>Note: For more information on the annual work plan, see proposal D2.</p>	<p>Developing and giving effect to the annual work plan.</p>
External reporting	<p>Approving annual public reporting and quarterly reporting to ASIC about the operations of the monitoring body under the compliance scheme.</p>	<p>Preparing reports for approval by the governing body.</p>
Systemic issues or serious contraventions	<p>Approving recommendations on whether a matter reveals a systemic issue or represents a serious contravention of the law that should be reported to ASIC, to the relevant AFS licensee, or in the compliance scheme's annual or quarterly reports.</p> <p>Note: For more information on our expectations about reporting systemic issues or serious contraventions, see proposal E1.</p>	<p>Making recommendations about whether a matter should be reported to ASIC or the relevant AFS licensee as a systemic issue or serious contravention.</p>
General monitoring	<p>Receiving reports on general trends and issues arising from the matters considered under the compliance scheme and approving recommendations to:</p> <ul style="list-style-type: none"> amend the compliance scheme; and suggest amendments to the code. 	<p>Producing reports on those trends and issues and, if appropriate, recommending amendments to:</p> <ul style="list-style-type: none"> the compliance scheme; and the code.

Topic	Governing body responsibility	Monitoring body staff responsibility
Internal reporting	<p>Determining the reporting that must be provided to the governing body on an ongoing basis. At a minimum, we would expect this to include reporting on all of the following, but governing bodies should consider whether they need further reporting to carry out their oversight role:</p> <ul style="list-style-type: none"> • the progress of proactive monitoring activities (e.g. whether they are progressing in line with the annual work plan); • the progress of particular investigations (e.g. how long they have been open for); • reports received of possible failures to comply with the code (including who they are from, who they relate to and their nature); and • analysis about closed matters (e.g. how long investigations are taking from start to finish and what issues are recurring in the investigations). 	<p>Preparing the reports requested by the governing body.</p>
Notifications	<p>Notifying ASIC:</p> <ul style="list-style-type: none"> • if there is a significant reduction to the resources or expertise the monitoring body uses to enforce compliance with the code under the scheme (under s921T); and • about any proposed modification to the compliance scheme (under s921R). 	<p>Reporting to the governing body about the resources and expertise within the monitoring body.</p> <p>Preparing draft notifications to ASIC.</p>

Delegation of responsibilities

- 63 We envisage that the governing body may delegate any of its responsibilities to staff of the monitoring body, provided they have the appropriate expertise (e.g. to the chief executive officer of the monitoring body). The only exceptions are the following responsibilities, which must be retained by the governing body:
- (a) responsibility for overseeing the operation of the compliance scheme; and
 - (b) responsibility for making an ultimate determination about whether a covered financial adviser has failed to comply with the code.

Proposed governing body charter or terms of reference

- 64 The governing body should have a charter or terms of reference that sets out:
- (a) the body’s functions and responsibilities;
 - (b) the responsibilities of the individual members of the governing body (e.g. their duties in the event they have a conflict of interest);

- (c) the rules for membership of the governing body (e.g. composition, tenure and termination); and
- (d) the rules for meetings of the governing body (e.g. quorum requirements, notice of meetings, voting requirements).

Note: See also proposal C3, which covers the expertise we expect the governing body to have.

Rationale

65 The members of the governing body will be non-executives and will therefore be unable to carry out the day-to-day tasks required to give effect to the compliance scheme.

66 However, it is important that persons with the appropriate level of expertise and impartiality carry out certain activities under the compliance scheme. This is why we are proposing that the governing body may delegate its responsibilities to a person with the appropriate expertise, but we are not proposing to allow it to delegate responsibility for:

- (a) making determinations about whether a financial adviser has failed to comply with the code; or
- (b) overseeing the operation of a compliance scheme.

67 It is also important that the responsibilities and the rules for the operation of the governing body are clear and that is why we propose that the governing body should have a charter or terms of reference.

Independence and impartiality

Proposal

- c2** We propose that monitoring bodies should have appropriate measures, as outlined in paragraphs 68–73, to ensure independence from the financial advice industry whose conduct they regulate.

Your feedback

- C2Q1 Do you agree that the governing body should be comprised only of non-executive members? If not, please give details and provide alternatives.
- C2Q2 Do you agree that the governing body should include an independent chair and a balance of industry and consumer representatives? If not, please give details and provide alternatives.
- C2Q3 Do you agree that the criteria listed at paragraph 70 should be applied to determine the chair's independence? If not, please give details and provide alternatives.
- C2Q4 Do you think that the existence of an independent governing body and role separation will be effective to minimise the potential for conflicts of interest in the monitoring body? If not, please give details and provide alternatives.

Proposed measures for ensuring independence and impartiality

68 It is important that the potential conflicts of interest that an entity acting as a monitoring body may have are managed, both at the level of the governing body and the monitoring body staff.

Governing body independence

69 The governing body for a monitoring body should be independent from the financial advice industry that it seeks to regulate. Accordingly, we propose that the governing body should:

- (a) be made up of non-executive members (i.e. they may not be employed by the entity acting as the monitoring body); and
- (b) have a minimum of three members, including an independent chair and an equal balance of members with:
 - (i) industry representative experience; and
 - (ii) consumer representative experience.

70 In order to be classified as independent, the chair must not:

- (a) be a member of any financial advice industry association; or
- (b) currently be a financial adviser (i.e. an individual who is authorised to give personal advice to retail clients on relevant financial products).

Monitoring body staff impartiality

71 We also propose that the potential for conflicts of interest at the monitoring body staff level should be addressed by:

- (a) ensuring that the staff responsible for carrying out monitoring and enforcement activities for the compliance scheme do not also have other conflicting roles within the entity acting as the monitoring body; and
- (b) the monitoring body having a policy for identifying and preventing such conflicting roles.

72 For example, persons responsible for carrying out monitoring and enforcement activities for the compliance scheme should not also be responsible for:

- (a) attracting and retaining members of the industry association (if relevant); or
- (b) carrying out lobbying on behalf of covered financial advisers.

73 There may also be other roles which could lead to similar conflicts, depending on the particular circumstances of the monitoring body and the entity acting as the monitoring body. The monitoring body's policy for identifying and preventing conflicts should include measures to identify and address such conflicting roles.

Rationale

- 74 Conflicts of interest can arise in the various roles that an entity acting as a monitoring body may carry out. For example, their interest in attracting and retaining financial advisers to their compliance scheme (or to the membership of their professional association) could discourage them from fully and robustly pursuing instances of possible non-compliance with the code and imposing appropriate sanctions. This is particularly acute where the entity acting as the monitoring body also carries out other functions, such as lobbying and industry representative work.
- 75 We therefore consider it important that there is some degree of independence and impartiality within monitoring bodies at both the governing and operational levels.

Expertise

Proposal

- c3 We propose to assess the expertise of monitoring bodies by reviewing:
- (a) the expertise of the proposed initial governing body and the procedures for maintaining the expertise of the governing body; and
 - (b) the job descriptions for the broader staff of the monitoring body and the procedures for maintaining the expertise of the broader staff.

We have outlined our expectations in more detail in paragraphs 76–83.

Your feedback

- C3Q1 Do you agree with our proposed approach of assessing the expertise of monitoring bodies by assessing the matters outlined in paragraph 76? If not, please give details and provide alternatives.
- C3Q2 Will it be practical to provide information about the members of the proposed initial governing body in an application for approval of a compliance scheme? If not, please give details and provide alternative methods we may use to assess the expertise of the governing body.
- C3Q3 Do you agree that there should always be one member of the governing body who, at some point in the five years before being appointed to the governing body, met the training and competence standards that would have allowed them to give personal advice to retail clients on 'Tier 1' or relevant financial products? If not, please give details and provide alternatives.
- C3Q4 Do you agree that there should always be one member of the governing body who has experience in and knowledge of the principles of procedural fairness and administrative law? If not, please give details and suggest alternative ways that the governing body may be able to access this expertise.

C3Q5 Are there other aspects of a monitoring body's expertise that we should assess before granting approval for a compliance scheme? If so, please provide details.

C4 We propose that it will be the responsibility of the governing body to ensure that the monitoring body has the appropriate expertise to carry out its responsibilities on an ongoing basis. We have outlined our expectations in more detail in paragraphs 84–85.

Your feedback

C4Q1 Do you agree with this proposal? If not, please provide details and alternatives.

Proposed expectations for expertise

- 76 To assess the expertise of the monitoring body before approving a compliance scheme, we will review:
- (a) the expertise of the members of the proposed initial governing body (see paragraphs 78–79);
 - (b) the processes and criteria for appointing new members of the governing body on an ongoing basis (see paragraphs 80–81);
 - (c) the job descriptions for the monitoring body staff who will carry out the day-to-day work of the compliance scheme (see paragraphs 82–83); and
 - (d) the intended procedures for maintaining the expertise of the entire staff of the monitoring body (see paragraphs 84–85).

77 It will then be the responsibility of the governing body to ensure that the staff of the monitoring body has the appropriate expertise to carry out their roles on an ongoing basis.

Note: The monitoring body also has an obligation to notify ASIC if it significantly reduces the expertise it uses to monitor or enforce compliance with the code (s921T).

Expertise of the proposed initial governing body

- 78 At a minimum, we expect there to be:
- (a) one member of the governing body who, at some point in the five years before being appointed to the governing body, met the training and competence standards that would have allowed them to give personal advice to retail clients on 'Tier 1' or relevant financial products. Depending on when the standards were met, these could be the standards in [Regulatory Guide 146](#) *Licensing: Training of financial product advisers* (RG 146) or the new standards set by FASEA (when they begin to apply); and
 - (b) one member of the governing body who has experience in and knowledge of the principles of procedural fairness and administrative

law (see proposal D7, which explains the importance of these principles in the context of the compliance scheme).

This should be the case for the initial governing body, but also on an ongoing basis.

79 We expect that the monitoring body will include the proposed composition of its governing body in its application for approval of the compliance scheme, meaning it should have arranged to appoint the members of the governing body before applying. We also expect that the monitoring body will provide, with its application:

- (a) a curriculum vitae for each proposed member of the proposed initial governing body; and
- (b) an explanation of why the member was chosen, in light of the criteria that its policy says it will consider when selecting a member of the governing body (see paragraphs 80–81).

Appointing new members of the governing body

80 We expect that the monitoring body will have a policy or procedure that documents:

- (a) how the members of the governing body are appointed and replaced; and
- (b) what criteria are used to determine whether a person should be appointed to the governing body.

81 The policy or procedure documenting how the members of the governing body are appointed should, at a minimum, require the following matters to be considered before appointing a member of the governing body:

- (a) how the person's skills and knowledge will fit with those of the other members of the governing body, including whether the governing body will have the necessary independence (as set out in paragraphs 69–70) and expertise (as set out in paragraph 78);
- (b) whether the person is of good fame and character. This assessment may be based on the matters set out in s913B(4) (i.e. whether the person has been convicted of serious fraud within the last 10 years, held an AFS licence that was suspended or cancelled, or had a banning or disqualification order made against them);
- (c) the person's knowledge of issues relevant to the financial advice industry;
- (d) the person's ability to exercise sound and fair judgement;
- (e) the person's capacity and willingness to consult with a broad range of stakeholders; and
- (f) any other matter thought relevant to the person's ability to carry out a role as a member of the governing body.

Job descriptions for monitoring body staff

82 We expect that the monitoring body will develop, and submit with their compliance scheme approval application, job descriptions for each role with responsibility for carrying out the core functions of the compliance scheme.

83 The job descriptions should set out:

- (a) the responsibilities of the person; and
- (b) the skills, qualifications and knowledge that are required of the person.

Maintaining the expertise of the staff of the monitoring body

84 We expect that the governing body will have a policy or procedure covering the maintenance of the expertise of the monitoring body's staff, and that the monitoring body will include this proposed policy or procedure with its application for compliance scheme approval.

85 Some controls that these procedures may set out include:

- (a) training procedures;
- (b) performance review processes; and
- (c) disciplinary processes.

Rationale

86 Before approving a compliance scheme, we must be satisfied that the monitoring body has sufficient expertise to appropriately monitor and enforce compliance with the code. We consider that a very important element of this is the expertise of the governing body and the measures to ensure they are maintained on an ongoing basis.

87 The monitoring body staff will clearly also play an important role in the administration of compliance schemes and their competence is also important: see paragraph 3.24 of the Explanatory Memorandum. However, monitoring bodies may not have hired all their staff by the time they submit their scheme approval applications. Accordingly, we are proposing to rely on job descriptions and training procedures to assess their expertise.

Resources**Proposal**

c5 We propose that:

- (a) we will make an initial assessment of the adequacy of the resources of the monitoring body, based on a statement that the monitoring body provides with its application; and

- (b) it will be the governing body's responsibility to ensure the monitoring body is adequately resourced on an ongoing basis.

Our expectations are outlined in more detail in paragraphs 88–90.

Your feedback

- C5Q1 Are there factors, other than those listed at paragraph 88, that would affect the human, financial and technological resources required for the monitoring body to effectively carry out its role? If so, please provide details.
- C5Q2 Do you agree with our proposed approach of asking the monitoring body to set out in a statement to ASIC the basis on which it considers its resources to be adequate? If not, please give details and provide alternatives.
- C5Q3 Should we set a specific benchmark for the financial resources that monitoring bodies should have initially (e.g. that monitoring bodies should have at least 12 months cash against an outlined program of work)? If so, please provide details.

Proposed resource requirements

88 The resources required to effectively carry out a monitoring body's activities under a compliance scheme will depend on a number of factors, including:

- (a) the number of covered financial advisers;
- (b) the homogeneity (or otherwise) of the covered financial advisers (e.g. whether their AFS licence authorisations and client bases are similar, whether the advisers are from a small or varied group of AFS licensees);
- (c) whether the financial advisers are primarily located close to the monitoring body (i.e. the geographical distribution of the advisers);
- (d) the extent to which the monitoring body relies on outsourced service providers to carry out its activities; and
- (e) whether, for the purposes of monitoring and enforcing the code, the monitoring body relies on processes and resources used by the entity acting as the monitoring body for monitoring its own code or ethical obligations.

89 These matters will differ greatly between compliance schemes, so we will not set specific expectations about what resources the monitoring body should have. Instead, we will ask the monitoring body, as part of its compliance scheme approval application, to provide a statement that sets out the basis on which the monitoring body considers its financial, human and technological resources to be adequate to allow it to appropriately monitor and enforce compliance with the code, given:

- (a) the factors outlined in paragraph 88;

- (b) the financial resources that the monitoring body has and needs to carry out its functions under the compliance scheme (e.g. according to the business plan for the compliance scheme, which sets out the projections of the number and locations of advisers the scheme will cover and the expected fee revenue);
- (c) the human resources that the monitoring body has and needs to carry out its functions under the compliance scheme (e.g. according to the business plan for the compliance scheme, its organisational chart and job descriptions for the roles set out in the chart);
- (d) the technological resources that the monitoring body has and needs to carry out its functions under the compliance scheme (e.g. according to the business plan for the compliance scheme, its information technology (IT) strategy, disaster recovery plan, and data back-up and recovery plans); and
- (e) any policies or procedures for ensuring the maintenance of appropriate financial, human and technological resources on an ongoing basis, which should cover, at a minimum:
 - (i) the key indicators that might show the monitoring body does not have enough resources; and
 - (ii) what reporting is provided to the governing body to allow it to monitor the adequacy of the resources.

90 While we will make an assessment of the monitoring body's resources on the basis of the statement it provides as part of its compliance scheme approval application, the governing body will be responsible for overseeing whether the monitoring body is adequately resourced on an ongoing basis. The adequacy of the monitoring body's resources will also be discussed between ASIC and the monitoring body during quarterly meetings: see paragraph 171 for more information.

Note: The monitoring body also has an obligation to notify ASIC if it significantly reduces the resources it uses to monitor or enforce compliance with the code (s921T).

Rationale

91 Having adequate resources (including financial, human and technological resources) is crucial to the ability of the monitoring body to effectively monitor and enforce compliance with the code.

92 The governing body will be in the best position to assess and oversee this on an ongoing basis.

Outsourcing

Proposal

- c6 We propose to set the expectations regarding outsourcing by monitoring bodies outlined in paragraphs 93–97.

Your feedback

- C6Q1 Is the definition of ‘core function of the compliance scheme’ set out in paragraph 93 appropriate? If so, please provide details.
- C6Q2 Are there key matters, other than those listed in paragraph 97, that monitoring bodies who outsource their activities should address in their contractual arrangements with outsourced service providers? If so, please provide details.

Core functions of the compliance scheme

93 An activity will be a core function of the compliance scheme if it is carried out for the purpose of monitoring or enforcing compliance with the code. For example:

- (a) A monitoring body’s proactive monitoring activities and investigation of potential breaches of the code are activities that constitute the core functions of a compliance scheme.
- (b) Data hosting and marketing activities related to the business operations of the entity acting as the monitoring body more generally are not the core functions of a compliance scheme, even though these services may be relied on for the monitoring body to carry out its activities.

94 There are certain functions that must not be outsourced to a third party. These include the responsibilities of the governing body to:

- (a) oversee the operation of the compliance scheme; and
- (b) apply independent judgement to make determinations about whether a financial adviser has failed to comply with the code, and what sanctions should be imposed.

Controls on outsourcing

95 When there is any outsourcing by a monitoring body of the core functions of the compliance scheme, we expect that the monitoring body should conduct due diligence on:

- (a) whether it is appropriate to outsource the proposed activity (including considering the costs of outsourcing against carrying out the activities internally, and what contingency plans it needs if the outsourcing agreement is terminated); and
- (b) the outsourced service provider before appointing it.

- 96 The monitoring body should keep records of its due diligence and reasons for deciding to proceed with appointing an outsourced service provider.
- 97 We also expect that the monitoring body will enter into a binding contractual arrangement with the outsourced service provider for core functions. That contract should set out the terms on which the outsourced service provider will provide the outsourced services and address, at a minimum:
- (a) how the monitoring body ensures that the outsourced service provider remains accountable for performing the activities to a high standard (e.g. service-level agreements and/or regular reporting by the outsourced service provider to the monitoring body may be appropriate);
 - (b) confidentiality of the information the outsourced service provider gathers and uses in carrying out its activities; and
 - (c) in what circumstances the agreement will terminate and how much notice the monitoring body may have of such termination (which may be relevant to the contingency plan that will need to be in place).

Rationale

- 98 Outsourcing may be a feature of monitoring bodies' operations and it can be an important way to access resources that the monitoring body does not have internally. If the activities carried out under these outsourcing arrangements are the core functions of a compliance scheme (i.e. monitoring and enforcement of the code), they are relevant to our decision about whether to approve the compliance scheme: see paragraph 3.24 of the Explanatory Memorandum.
- 99 If a monitoring body outsources core functions of the compliance scheme, it still maintains responsibility for the activities; it cannot outsource this responsibility. It is therefore important that the monitoring body puts in place appropriate measures to ensure that it has confidence in and oversight of the activities being provided by the outsourced service provider.

D Compliance scheme monitoring and enforcement

Key points

This section sets out our proposed expectations for the monitoring and enforcement activities carried out under compliance schemes.

We consider that monitoring bodies should carry out both proactive and reactive monitoring activities:

- proactive monitoring activities should be determined each year in a risk-based annual work plan and should comprise, at a minimum, one thematic ‘own-motion’ inquiry and one compliance statement process; and
- reactive monitoring activities should be carried out in accordance with defined processes for receiving and making an initial assessment of reports of potential failures to comply, investigating those reports, making a decision and, if necessary, determining any sanctions.

We also consider that monitoring bodies should make the compliance scheme enforceable by entering into legally binding agreements with all covered financial advisers and should have processes for resolving disputes with those financial advisers.

Monitoring and enforcement

Proposal

- D1 We propose that monitoring bodies should carry out monitoring and enforcement activities in accordance with proposals D2–D10 from 1 January 2020.

Your feedback

- D1Q1 Should monitoring bodies carry out both proactive and reactive monitoring? Please provide reasons for your response.
- D1Q2 Would it be preferable to delay any aspect of the monitoring and enforcement requirements to facilitate transition to the new regime (e.g. should we delay the requirement that the monitoring body conduct proactive monitoring activities)? If so, please explain why and provide details.
- D1Q3 Could monitoring bodies work together to develop a uniform approach to monitoring and enforcement, and would this be appropriate? If so, please explain why and provide details of how this could occur.
- D1Q4 Could a single body carry out these activities for all or a number of compliance schemes and would it be appropriate? If so, please provide details.

Rationale

100 Reports that monitoring bodies receive about possible failures to comply with the code will assist in identifying breaches. However, to achieve the objective of encouraging higher standards of ethical behaviour and professionalism among financial advisers:

- (a) monitoring bodies need to have a way to uncover examples of both ethical and unethical behaviour that they can highlight and use to educate covered financial advisers; and
- (b) financial advisers need to know that any conduct they engage in which is inconsistent with the code may be detected and acted on.

We do not consider monitoring carried out in response to reports of possible code breaches alone will be sufficient to achieve these objectives.

101 Accordingly, we expect monitoring bodies to carry out two kinds of monitoring under their compliance scheme:

- (a) *reactive monitoring activities*—those carried out in response to a report of a possible failure by a financial adviser to comply with the code (e.g. from consumers who have engaged the services of the financial adviser, from other members of the financial advice profession, or from AFS licensees who have observed a financial adviser’s conduct); and
- (b) *proactive monitoring activities*—those that the monitoring body undertakes based on the risks of non-compliance and the compliance objectives it has identified in its annual work plan.

Annual work plan

Proposal

D2 We propose that monitoring bodies should, each year, develop a risk-based annual work plan, provide it to ASIC and make it public, as outlined in paragraphs 102–104.

Your feedback

- D2Q1 Do you agree that a monitoring body should prepare a risk-based annual work plan? If not, please give details and provide alternatives.
- D2Q2 Do you agree that the annual work plan should be provided to ASIC each year, from 1 January 2020? If not, please give details.
- D2Q3 Do you agree that the annual work plan should be made public? If not, please give details.

Requirements for an annual work plan

102 The compliance scheme will set out the administration, monitoring and enforcement framework under which the monitoring activities will be carried out. However, we expect the specific proactive monitoring activities carried out by the monitoring body to change each year, depending on the key risks to non-compliance identified by the monitoring body in that year. These risks, and the proactive monitoring activities designed to address them, should be set out in an annual work plan. This annual work plan should be made public and provided to ASIC each year.

Developing the annual work plan

103 In order to prepare its annual work plan, the monitoring body should:

- (a) identify the key risks to compliance with the code in the forthcoming year by using sources such as:
 - (i) publicly available information about improper conduct by financial advisers (such as in media releases concerning enforcement outcomes achieved by ASIC, ASIC reports or publications raising concerns about particular trends or conduct, and publicly available information from AFCA or in the media);
 - (ii) information from the monitoring and enforcement activities that the monitoring body has carried out in previous years; and
 - (iii) reports of possible failures to comply with the code received by the monitoring body;
- (b) evaluate the key risks to compliance to prioritise those that should be the key areas of focus for the annual work plan; and
- (c) design the proactive monitoring activities (the minimum activities are described in proposal D3) to address these compliance risks.

Content of the annual work plan

104 The annual work plan should then set out what the monitoring body will be focusing on as a result of the risk identification, evaluation and monitoring process carried out, including:

- (a) the compliance risks and objectives that the annual work plan will focus on;
- (b) a description of the scope and focus of the proactive monitoring activities that the monitoring body will carry out in the year (i.e. the thematic own-motion inquiry and the compliance statement process—see proposal D3);
- (c) a detailed explanation of the work involved in carrying out the proactive monitoring activities, including what information the monitoring body proposes to gather to carry out the activities (e.g. policies and

procedures of AFS licensees, performance reviews for financial advisers or complaints data); and

- (d) when the activities will be carried out and what resources will be used to carry them out.

Rationale

105 We consider that maintaining an annual work plan for a compliance scheme is important to the scheme's effectiveness.

106 In our opinion, it is important that each annual work plan is risk based and updated each year; this allows monitoring bodies to focus on the issues that are most relevant to the financial advisers their compliance scheme covers at that time and to tailor the activities to that population.

107 We consider that publication of the annual work plan will help to instil public confidence in the operation of the compliance scheme as well as provide some transparency to financial advisers, AFS licensees and consumers about its operations.

Proactive monitoring activities

Proposal

D3 We propose that the following proactive monitoring activities should be carried out under a compliance scheme each year, at a minimum:

- (a) one thematic 'own-motion' inquiry; and
- (b) one compliance statement process, with associated verification activities.

We set out our expectations for these activities in more detail in paragraphs 108–115.

Your feedback

D3Q1 Will a minimum of one thematic own-motion inquiry and one compliance statement process each year, with associated verification activities, be sufficient proactive monitoring activities to ensure that compliance with the code is appropriately monitored and enforced under a compliance scheme? If not, please give details and provide alternatives.

D3Q2 Are the proposed proactive monitoring activities appropriate for monitoring compliance with the standards set out in the draft code? If not, please give details and provide alternatives.

Proposed proactive monitoring activities

108 Monitoring bodies should carry out, at a minimum, the following proactive monitoring activities each year:

- (a) one thematic own-motion inquiry; and
- (b) one compliance statement process, with associated verification activities.

Note: These are the minimum proactive monitoring activities that we expect monitoring bodies to carry out each year. Additional activities should be carried out where it is necessary or appropriate.

109 We envisage that the focus of the thematic own-motion inquiry and annual compliance statement process is likely to change each year. The focus and scope of these activities will be identified in the annual work plan, as detailed in proposal D2.

110 The thematic own-motion inquiry should result in a report that explains:

- (a) the scope of the inquiry and why the monitoring body chose that particular topic as the focus of the inquiry (this should be consistent with the annual work plan);
- (b) the information-gathering activities the monitoring body conducted, including what it asked for and received;
- (c) how the monitoring body analysed the information and what the findings were;
- (d) any recommendations that the monitoring body has for financial advisers to improve their behaviour and compliance with the code, based on examples of good and ethical behaviour it has identified as well as poor behaviour (where appropriate); and
- (e) any recommendations that the monitoring body has for AFS licensees under whose licences financial advisers operate, to improve compliance with the code. While AFS licensees are not directly subject to the code, they must still take reasonable steps to ensure that their representatives comply with their obligations in relation to it (s912A(1)(ca)).

111 Our expectation that monitoring bodies should carry out at least one thematic own-motion inquiry each year does not preclude them from having to investigate individual covered financial advisers if they become aware of a particular failure or possible failure to comply with the code. We expect that this would be done in accordance with the typical monitoring and enforcement process outlined in Table 3.

112 The annual compliance statement process might entail sending a questionnaire to financial advisers covered by the compliance scheme, the theme and content of which is based on the identified compliance risks set out in the annual work plan, to give the financial advisers the chance to:

- (a) self-report any non-compliance with the code and how that non-compliance was remedied;

Note: If a financial adviser reports that they have failed to comply with the code, the monitoring body should make a written determination about this and notify ASIC of the failure for it to be displayed on the financial advisers register (s922HD).

- (b) identify any emerging or significant risks to financial advisers' compliance with the code; and
- (c) share information about good practice they engage in or have seen in the areas covered by the questionnaire.

113 We would expect the monitoring body to carry out some verification activities of the responses to the questionnaire that financial advisers submit. These verification activities might include, for example:

- (a) follow-up interviews, workshops or focus groups to discuss responses to the questionnaire; and
- (b) sampling and integrity testing (e.g. shadow shopping or desk-based or on-site reviews).

114 The proactive monitoring activities should focus not only on uncovering failures to comply with the code, but should also seek to identify examples of good practice that can be used to educate and inform financial advisers about how to improve their behaviour.

115 We also encourage monitoring bodies to consult with financial advisers who are to receive the questionnaire before sending it, to ensure they understand the questions it poses in a consistent manner.

Rationale

116 The Explanatory Memorandum contemplates monitoring bodies carrying out proactive monitoring: see paragraph 3.46 of the Explanatory Memorandum.

117 It is important to the success of the compliance scheme framework that each monitoring body has a relatively consistent approach to monitoring compliance with the code.

118 We are setting specific expectations about the nature and extent of proactive monitoring activities that monitoring bodies must carry out, with the aim of ensuring an appropriate degree of consistency to these activities.

Reactive monitoring activities

119 We expect that allegations of particular failures to comply with the code received by monitoring bodies will usually be dealt with in the manner set out in Table 3. See paragraphs 120–147 for our specific proposals for each stage.

Table 3: Typical monitoring and enforcement process

<p>Stage 1: Report received</p> <p>See paragraphs 120–121</p>	<p>The monitoring body receives a report about a particular financial adviser's conduct. This report may be from a member of the public, a peer, an AFS licensee, or AFCA, or may be an internal report, based on conduct identified during the course of the monitoring body's proactive monitoring activities.</p>
<p>Stage 2: Initial assessment of report</p> <p>See paragraphs 122–124</p>	<p>The monitoring body makes an initial assessment of the report to identify whether:</p> <ul style="list-style-type: none"> • the financial adviser is covered by the compliance scheme; and • the report indicates a possible failure by the financial adviser to comply with the code. <p>If the report indicates a possible failure to comply with the code, the monitoring body refers the matter for further investigation. If not, the monitoring body could refer the reporter to the relevant AFS licensee or AFCA, or could refer the matter to ASIC (if it indicates a possible breach of legal requirements).</p> <p>As a guide, we expect the initial assessment to be completed within 28 days of the report being received.</p>
<p>Stage 3: Investigation</p> <p>See paragraphs 127-134</p>	<p>The monitoring body carries out an investigation to form a view on whether the financial adviser breached the code.</p> <p>As a guide, we expect the investigation to be completed within 90 days of the matter being referred for further investigation.</p>
<p>Stage 4: Determination</p> <p>See paragraphs 137–139 and paragraphs 145–147</p>	<p>The monitoring body refers the matter to the governing body to:</p> <ul style="list-style-type: none"> • make a determination, in writing, about whether the financial adviser breached the code; and • determine an appropriate sanction (if relevant). <p>As a guide, we expect the determination to be made within 45 days of the matter being referred to the governing body. A decision on the appropriate sanction may follow.</p>

Receipt and initial assessment of reports

Proposal

- D4** We propose that monitoring bodies should have a process for receiving and conducting an initial assessment of reports of failures to comply with the code, as described in paragraphs 120–123.

Your feedback

D4Q1 Is it reasonable for monitoring body staff to complete their initial assessment of the report within 28 days of receiving a report? If not, what other timeframe would be appropriate?

- D5** We also propose that monitoring bodies should have a communications strategy, as described in paragraph 124.

Your feedback

D5Q1 Do you agree with the proposal for monitoring bodies to have a communications strategy? If not, please give details and provide alternatives.

Proposed process for receiving and assessing reports

- 120 A monitoring body should offer a mechanism by which:
- (a) anyone can make a report of a possible failure by a financial adviser to comply with the code; and
 - (b) the information about these reports, which the monitoring body must report annually and to ASIC (as set out in proposal E1), is captured.
- 121 This mechanism may be an online form or email inbox, a phone line that is answered during business hours, or a combination of these things. The mechanism must be specified in the compliance scheme document: s921G(6).
- 122 Because not all reports relating to financial advisers' conduct will fall within the compliance scheme's monitoring and enforcement remit, monitoring bodies should also have a process for conducting an initial assessment of all reports to:
- (a) identify whether:
 - (i) the financial adviser that is the subject of the report is covered by the compliance scheme; and
 - (ii) the conduct that the reporter identifies would constitute a breach of the code; and
 - (b) if these criteria are met, recommend that further investigations be carried out.
- 123 The monitoring body's resources should be sufficient to enable it to conduct this assessment and refer it for further investigation if warranted. A reasonable timeframe for conducting this initial assessment would be within 28 days of receiving the report in most cases; however, a longer timeframe may be appropriate if the matter is more complex.
- 124 We will expect monitoring bodies to develop and implement a communications strategy to improve the public's knowledge of the scheme's role and what consumers' options are. For instance, the communications strategy should cover how the monitoring body will provide clear public messaging about:
- (a) how members of the public (including consumers and other financial advisers) can make a report alleging that a particular financial adviser may not have complied with the code;
 - (b) the role of compliance schemes and the fact that consumer outcomes or redress are not provided under the scheme; and
 - (c) where consumers can go if they would like to seek redress.

Note: External dispute resolution may be an appropriate option for consumers seeking redress. AFCA will replace existing EDR schemes and is proposed to start accepting complaints no later than 1 November 2018.

Rationale

- 125 Reports indicating that particular financial advisers may have breached the code may come from a number of sources, including consumers who have engaged the services of the financial adviser, other members of the financial advice profession, AFS licensees who have observed a financial adviser's conduct or AFCA. They may also arise internally, such as from the proactive monitoring activities that a monitoring body has carried out in accordance with its annual work plan. It is important that monitoring bodies have mechanisms that enable them to gather all the information they need from these various sources.
- 126 Because compliance schemes do not provide consumer redress, it may be less likely that consumers will be aware of their ability to, or motivated to, notify monitoring bodies of complaints that they have about particular financial advisers. Accordingly, we are proposing that monitoring bodies develop and implement a communications strategy to raise consumer knowledge and understanding of compliance schemes.

Investigation process

Proposal

- D6 We propose that compliance schemes should have a process for investigating possible failures to comply with the code, as described in paragraphs 127–134.

Your feedback

- D6Q1 Is it reasonable for investigations to be completed within 90 days of the initial assessment recommending that further investigations should take place? If not, what other timeframe would be appropriate?
- D6Q2 Should the governing body regularly review a random sample of matters that were investigated but not referred to it, as proposed in paragraph 134? If not, please give details and suggest alternative measures that can be used to ensure consistency and quality in the investigation and referral process.

Proposed investigation process

- 127 When a monitoring body becomes aware of a failure or possible failure by a covered financial adviser to comply with the code (e.g. the initial assessment of the report indicates that there is a possible failure to comply with the code by a covered financial adviser), it is required to:
- (a) notify the financial adviser that it:
 - (i) is aware of the possible failure; and

- (ii) will make a determination about whether the financial adviser complied with the code (s921L(2)); and
- (b) make a determination in writing (within a reasonable period of becoming aware of the possible failure) whether the financial adviser has failed to comply with the code (s921L(1) and (5)).

128 To make the required determination, monitoring body staff must first carry out an investigation and, if the investigation suggests that a code breach has occurred, refer the matter for a decision by the governing body.

129 The Corporations Act gives the monitoring body power to require AFS licensees, authorised representatives and financial advisers to provide the monitoring body with information, documents or other reasonable assistance it requests in writing: s921L(3). Examples of the information that could be gathered include:

- (a) documents;
- (b) written responses to questions posed by the monitoring body; and
- (c) verbal evidence given in interviews carried out by the monitoring body.

Note: See Section G for an explanation of our proposed broadening of this power.

130 The staff of the monitoring body should carry out the investigation using the information-gathering powers referred to in paragraph 129 and by reviewing and assessing the information gathered through this process.

131 We expect that the monitoring body would typically then prepare a report about the investigation it has conducted, which sets out its views on whether the financial adviser has complied with the code. If the report concludes that a code breach has occurred, the matter should be referred to the governing body, which will make a determination on the matter.

132 Whether or not the investigator forms the view that a code breach has occurred, we expect that the report would detail the following issues at a minimum:

- (a) background information about the covered financial adviser to which the matter relates (we expect all of the information on the financial advisers register for the financial adviser to be relevant, as well as whether the financial adviser's conduct has previously been investigated under the compliance scheme and what the outcomes were of that investigation);
- (b) a description of the alleged failure to comply with the code;
- (c) the background to the matter (e.g. how it came to the monitoring body's attention);
- (d) what actions the monitoring body has undertaken and what findings it has uncovered in the investigation (e.g. information gathered, inquiries undertaken, persons interviewed and other relevant persons contacted); and

- (e) a recommendation about whether a finding should be made that the financial adviser did or did not comply with the code and the reasons for this.

The report may also include other information.

- 133 As a guide, monitoring body staff should complete their investigation within 90 days of the initial assessment of the matter recommending that further investigation should take place.

Note: While we will use the timeframes we propose in our guidance when assessing whether a monitoring body has failed to make a determination in a reasonable period under s921L(5), a failure to meet the benchmarks we set in our guidance does not necessarily indicate that a monitoring body has not complied with its obligation to make a determination within a reasonable period. There may be good reasons for the delay.

- 134 To help to ensure that appropriate standards are being applied at the investigation stage, we expect governing bodies to regularly review a random sample of matters that were investigated but not referred to the governing body for decision.

Rationale

- 135 We consider that this investigation process should result in the governing body having a sound basis on which to make a determination.

- 136 We expect that in most cases a 90-day period would be sufficient to complete an investigation into whether a financial adviser has failed to comply with the code. However, we are proposing that this will be a ‘soft’ benchmark only, given that the scope and nature of investigations may vary.

Decision-making process

Proposal

- D7 We propose that monitoring bodies should have a process for making determinations about whether a financial adviser has failed to comply with the code, which is consistent with the principles in paragraphs 137–139 and Table 4.

Your feedback

- D7Q1 Do you agree that the governing body should be responsible for making the final determination about whether a financial adviser has failed to comply with the code? If not, please give details and provide alternatives that address the need to ensure that the decision maker is impartial.
- D7Q2 Is it reasonable to expect the governing body to make a determination within 45 days of a matter being referred to it? If not, what other timeframe would be appropriate?

D7Q3 Do you agree that the governing body should comply with the principles set out in Table 4 in carrying out its decision-making activities? If not, please give details and provide alternatives.

Proposed decision-making process

- 137 We propose that the governing body should be responsible for making a determination about whether a financial adviser has failed to comply with the code and imposing any sanctions. This determination must be made in writing: s921L(1).
- 138 As a guide, we expect the governing body to make its determination within 45 days of receiving a referral from monitoring body staff.
- 139 We consider that governing bodies should apply principles consistent with procedural fairness in their decision-making process. In particular, we propose that governing bodies adopt the principles set out in Table 4.

Table 4: Key principles for making decisions about failures to comply with the code

Principle	Explanation
The opportunity to be heard	<p>Generally, the financial adviser should have the opportunity to be heard before the governing body makes a decision that may be adverse to their interests (such as a decision that they have failed to comply with the code or a decision to impose a sanction). The opportunity should include a right for them to appear before the governing body and present:</p> <ul style="list-style-type: none"> • submissions, either in writing or verbally; and • material that addresses the issues of significance or concern to the governing body.
The entitlement to a notice	<p>The financial adviser should be entitled to:</p> <ul style="list-style-type: none"> • know the subject matter of the hearing and, in particular, the issues that are of concern to the governing body and for which there is a risk of an adverse finding; • know the circumstances that may cause the governing body to make a decision against them; and • have reasonable time to prepare their response.

Principle	Explanation
The right to an impartial decision maker	<p>The financial adviser should have the right to have the decision made by a person who has an open mind on the matter.</p> <p>We expect monitoring bodies to address this by:</p> <ul style="list-style-type: none"> • having an independent governing body with the composition explained in proposal C2; and • ensuring that persons who sit on the governing body do not have responsibility for investigating and gathering information and evidence about their possible failure to comply, as explained in proposal C1.
Findings of fact to be made on a sound basis	Any findings of fact that the governing body is required to make in a hearing must be based on material that is relevant, credible and probative, but the rules of evidence need not apply.

Rationale

- 140 There is the potential for a conflict of interest or a perceived lack of impartiality where the same person is responsible for:
- (a) investigating whether a particular financial adviser has failed to comply with the code; and
 - (b) making a determination about whether the financial adviser has failed to comply with the code.
- 141 That is why we are proposing that the governing body should be responsible for making the determination and imposing any sanctions, with monitoring body staff responsible for carrying out investigations.
- 142 Monitoring bodies (and their governing bodies) are not courts and are not vested with judicial power in order to carry out their functions. The same high standards of proof and rules of evidence that apply to court proceedings would not apply to the deliberations of the governing body.
- 143 However, because these determinations can have a significant impact the financial advisers affected by them, it is important that the governing body complies with the principles of procedural fairness. This is to give financial advisers confidence in the fairness and soundness of the decision-making process and to give credibility to the decisions of the governing body.
- 144 We consider it is likely that governing bodies will meet on at least a monthly basis. The 45-day timeframe will therefore ensure determinations are made as quickly as practicable.

Sanctions

Proposal

D8 We propose that monitoring bodies should have access to a range of sanctions and should have guiding principles about when each will be applied. We have set out our expectations for these sanctions and associated guiding principles in paragraphs 145–147 and Table 5.

Your feedback

- D8Q1 Does the list at paragraph 145 capture all of the sanctions that might be appropriate to impose? If not, please give details.
- D8Q2 Are there matters other than those listed in Table 5 that a governing body should take into account when determining which sanctions to apply? If so, please provide details.

Proposed sanctions and guiding principles

- 145 We expect that the range of sanctions governing bodies may select from would include:
- (a) a warning or reprimand;
 - (b) additional training or counselling;
 - (c) additional supervision;
 - (d) corrective action (e.g. requiring the financial adviser to undertake rectification or implementation of directives within a reasonable period of time determined by the monitoring body);
 - (e) requiring an independent compliance audit of the financial adviser;
 - (f) ordering the financial adviser to provide the services to the consumer again at no cost, or to reduce or waive the costs for its work; or
 - (g) in extreme circumstances, revocation of the financial adviser's membership of the industry association and/or coverage by the compliance scheme.

Note: AFS licensees must ensure all of their financial advisers are covered by a compliance scheme within 30 business days of ceasing to be covered by another scheme (s921H). If a monitoring body is considering revoking a financial adviser's coverage by the compliance scheme, we would expect it to work with the financial adviser's AFS licensee(s) to ensure that they are aware of and can manage the risk of potentially breaching this obligation.

- 146 We will not set strict guidelines about which sanction(s) should be imposed for which kind of failure to comply with the code, but we will expect that governing bodies will have a sanctions guide or policy that requires them to consider the factors set out in Table 5 when making these decisions. This should ensure some degree of consistency.

Table 5: Key factors that should be considered in deciding on sanctions to impose

Factors	Relevant considerations
Nature and seriousness of the failure to comply with the code	<ul style="list-style-type: none"> • Whether the failure to comply was simply a mistake, or whether it involved dishonesty or recklessness • The amount of any benefit gained as a result of the financial advisers' failure to comply • The amount of any loss caused to consumers • The impact of the misconduct on the market, including potential loss of public confidence • Whether the financial adviser has a poor compliance record • The duration of the failure to comply
Conduct after the failure to comply with the code occurred	<ul style="list-style-type: none"> • How the failure to comply came to the attention of the monitoring body (e.g. whether it was self-identified) • The extent to which the financial adviser has been cooperative with the monitoring body during the course of the investigation
Likelihood of behaviour change	<ul style="list-style-type: none"> • Whether the behaviour of the particular financial adviser is likely to change in response to imposition of the sanction • Whether other covered financial advisers are likely to be generally deterred from similar conduct by the sanction
Mitigating factors	<ul style="list-style-type: none"> • Whether there would be any personal hardship as a result of imposing the sanction • Whether the misconduct was inadvertent and the financial adviser undertakes to cease or correct the misconduct

- 147 The sanctions guide or sanctions policy monitoring bodies must submit with their application should set out:
- how the monitoring body will determine sanctions, including considering the factors in Table 5;
 - some hypothetical situations in which each sanction would be imposed (e.g. in the case of sanctions that require the cooperation of a covered financial adviser's AFS licensee, a relevant circumstance might be whether the AFS licensee has agreed to cooperate to impose the sanction); and
 - the monitoring body's process for informing ASIC of sanctions it imposes for failures to comply with the code (as required under s922HD).

Rationale

- 148 The sanctions imposed by monitoring bodies are not intended to provide redress to consumers; that is the role of internal dispute resolution processes, AFCA or AFS licensee remediation programs.
- 149 However, appropriate sanctions have the potential to deter financial advisers from breaching the code, and develop their ability and willingness to comply with the code in future. They are therefore an important tool that can be used to improve the ethical behaviour of financial advisers.

- 150 We consider that it is important for there to be some consistency in the approach to applying sanctions:
- (a) within a compliance scheme, to ensure that covered financial advisers have confidence that they are being treated fairly; and
 - (b) between different compliance schemes. The imposition of sanctions is an area where we see a particular risk of ‘scheme shopping’ and potential for a ‘race to the bottom’. Monitoring bodies may be motivated to impose sanctions as loosely or weakly as possible to attract and retain financial advisers.

Appeals and dispute resolution

Proposal

- D9 We propose that a monitoring body must have a documented process, consistent with paragraphs 151–156, for dealing with appeals and other disputes from covered financial advisers.

Your feedback

- D9Q1 Are there matters, other than those listed in paragraph 152, that should be covered in a monitoring body’s documented appeals process? If so, please provide details.
- D9Q2 Should there be another party, aside from the governing body, that can hear appeals from covered financial advisers? If so, please give details.
- D9Q3 Is it reasonable for a final response to be provided to a covered financial adviser about their dispute within 45 days? If not, what other timeframe would be appropriate?

Proposed appeal process

- 151 A compliance scheme document must set out how a dispute will be resolved between a monitoring body and a covered financial adviser: s921G(5). We expect that the disputes that would most likely be raised would concern an adviser’s disagreement with:
- (a) a determination made by the governing body that the financial adviser has failed to comply with the code; or
 - (b) a sanction that a governing body has imposed on the financial adviser.
- 152 The monitoring body must therefore have a documented appeals process that sets out how it will:
- (a) accept a complaint from a financial adviser about either of these matters (similar to a right of appeal);
 - (b) gather information from the financial adviser about the basis for its complaint; and

- (c) allow the governing body another opportunity to consider the matters raised by the financial adviser in its complaint. We expect the governing body to be empowered to resolve the financial adviser's complaint by either amending the determination or sanction it has imposed, or upholding it.

153 The monitoring body should consider preparing a guide for covered financial advisers that summarises the appeal process and sets out the reasons and information that are and are not likely to lead to a governing body amending its previous decision.

Proposed process for dealing with other disputes

154 Other disputes may also arise between a covered financial adviser and the monitoring body that operates their compliance scheme. For instance, a financial adviser may object to a request for information made by the monitoring body.

155 We propose that the monitoring body should also have a documented process for dealing with these other kinds of disputes. We would expect the monitoring body to provide a final response to the financial adviser within a maximum of 45 days.

156 We do not propose to prescribe this process in any more detail, but the process should be specified in the compliance scheme document, along with the appeals process: s921G(5).

Rationale

157 A compliance scheme document must set out how a dispute is to be resolved between the monitoring body and a covered financial adviser: s921G(5). We have set out a suggested high-level process to allow each monitoring body to determine its own, more detailed appeal and dispute resolution procedures.

158 The proposed guide to the appeals process should enhance covered financial advisers' understanding of, and confidence in, the appeals process.

Enforceability

Proposal

D10 We propose that financial advisers should be contractually bound to share materials with the monitoring body and to comply with the terms of the compliance scheme and the decisions made under it. We have set out our expectations in more detail in paragraphs 159–162.

Your feedback

D10Q1 Is a legally binding agreement an appropriate way to make the compliance scheme enforceable between the monitoring body and financial advisers? If not, please give details and provide alternatives.

D10Q2 Do you agree with the proposed process for dealing with non-compliance by a covered financial adviser outlined in paragraph 161? If not, please give details and provide alternatives.

Proposed enforceability measures

- 159 It is crucial that a monitoring body ensures that financial advisers comply with its decisions and the requirements of the compliance scheme.
- 160 Monitoring bodies should enter into a legally binding agreement with each covered financial adviser in which the adviser:
- (a) agrees to share all information and documents and provide such reasonable assistance as the monitoring body reasonably requests (e.g. those required for proactive monitoring);
 - (b) agrees to report any significant breaches of the code by them;
 - (c) agrees to comply with the terms of the compliance scheme;
 - (d) agrees to be bound by the decisions made under the compliance scheme; and
 - (e) consents to the monitoring body sharing any information about them with:
 - (i) ASIC;
 - (ii) the monitoring body for any compliance scheme that they move to;
 - (iii) AFCA; and
 - (iv) their authorising AFS licensee.
- 161 The monitoring body should also have procedures in place for dealing with a financial adviser's non-compliance with a decision or request of the monitoring body. These procedures should be detailed in the compliance scheme document itself; but we propose that, if a financial adviser has failed to comply with the agreement it has entered into with the monitoring body, the monitoring body should issue a 'notice to comply', which:
- (a) describes the financial adviser's act of non-compliance;
 - (b) allows the financial adviser a reasonable time (e.g. of 10 business days) to comply; and
 - (c) notifies the financial adviser of the implications if they fail to comply within that time period.

Note: These procedures would only apply where the financial adviser has not raised a dispute about the matter. If the financial adviser has raised a dispute, this would be dealt

with in accordance with the dispute resolution procedures for the compliance scheme (see proposal D9).

- 162 If a financial adviser fails to comply with the notice to comply, the monitoring body may consider revoking a financial adviser's coverage by the compliance scheme. However, as noted at paragraph 145, we would expect a monitoring body that is considering doing so to work with the financial adviser's AFS licensee(s) to ensure that they are aware of and can manage the risk of potentially breaching their obligation to ensure all of their financial advisers are covered by a compliance scheme within 30 business days of ceasing to be covered by another scheme: s921H.

Rationale

- 163 The law does not compel financial advisers to comply with the directions of a monitoring body (aside from an obligation to provide information, documents or other reasonable assistance to the monitoring body on request when it is carrying out its reactive monitoring activities). Accordingly, we are proposing that monitoring bodies should enter into a legally binding agreement with covered financial advisers to ensure each adviser's compliance with the reasonable directions of the monitoring body.
- 164 By obtaining financial advisers' consent to sharing information with other bodies, monitoring bodies should be able to provide personal information about those financial advisers in accordance with any privacy law obligations they have.
- 165 In addition to ensuring that financial advisers' obligations are legally enforceable, it is also important that there is a process for dealing with situations where a covered financial adviser breaches those legal obligations.

E Compliance schemes' ongoing operation

Key points

This section sets out our proposed expectations of the ongoing operation of compliance schemes, including measures for review, reporting and consultation and the ongoing support and education that may be offered to covered financial advisers.

Our proposals include that monitoring bodies should:

- produce annual public reports and quarterly reports to ASIC using the data they capture, store and analyse;
- consult broadly about their compliance scheme; and
- consider how they can best support and encourage covered financial advisers to behave ethically and in accordance with the code.

Data collection, analysis and reporting

Proposal

- E1 We propose that monitoring bodies must report on the data they collect and analyse, as set out in paragraphs 166–172.

Your feedback

- E1Q1 Do you agree that monitoring bodies should produce public annual reports covering the matters outlined in paragraph 167? If not, please give details (e.g. about which data in particular should not be made public) and provide alternatives.
- E1Q2 Do you agree that monitoring bodies should produce quarterly reports for ASIC and meet with ASIC on a quarterly basis to discuss the matters outlined in paragraph 167? If not, please give details and provide alternatives.
- E1Q3 Do you agree with our proposed 45-day timeframe for monitoring bodies to report serious contraventions or systemic issues to ASIC? If not, please give details and provide alternatives.
- E1Q4 Would it be preferable to delay the commencement of some or all of the data collection, analysis and reporting expectations? If so, please explain why and provide details.
- E1Q5 Would it be appropriate to reduce, or consider reducing, the proposed requirements for reporting to ASIC over time? If so, please explain why and provide details.
- E1Q6 Would it be feasible for monitoring bodies to work together to develop a reporting standard and would this be appropriate? If so, please explain why and provide details of how this could occur.

Proposed data collection, analysis and reporting measures

- 166 Monitoring bodies should have measures in place to ensure that they can effectively collect, store and analyse:
- (a) data collected in the course of the proactive monitoring activities carried out by the monitoring body under its annual work plan (including responses to annual compliance statement questionnaires and data collected in the course of conducting thematic own-motion inquiries, as well as insights gleaned from analysing that data);
 - (b) reports of potential failures to comply with the code received by the monitoring body (including, for example, the nature of the reports, when they are made and details about the persons making the reports);
 - (c) information gathered in the course of investigations carried out into whether a particular financial adviser has failed to comply with the code (i.e. reactive monitoring activities);
 - (d) the results of the investigations carried out by the monitoring body (including, for instance, the sanctions imposed on financial advisers and financial advisers' compliance with those sanctions); and
 - (e) the results of independent reviews conducted of the compliance scheme's operations in accordance with s921S.
- 167 This data should be able to be analysed to provide insights about:
- (a) the proactive monitoring activities carried out under the compliance scheme—including the results and findings from those activities;
 - (b) the reports received of potential failures to comply with the code—including:
 - (i) their type and frequency;
 - (ii) the characteristics of the reporters (e.g. whether they are consumers, peer financial advisers or AFS licensees);
 - (iii) the time taken to assess and refer them; and
 - (iv) the information provided by the reporter;
 - (c) investigations into possible failures to comply with the code—including:
 - (i) the number of investigations conducted, their subject, the timeframes in which they were conducted;
 - (ii) whether and how often the benchmark timeframes set out in this consultation paper and, ultimately, our guidance are being met; and
 - (iii) the outcomes of the investigations, such as how often investigations are resulting in a finding that a covered financial adviser has breached the code;
 - (d) serious contraventions of the code and systemic issues identified with compliance with the code by covered financial advisers;

- (e) trends and emerging issues with compliance with the code by covered financial advisers; and
- (f) good practice that the monitoring body observes regarding compliance with the code.

168 We expect monitoring bodies to report on the data they have collected and analysed:

- (a) *to the public*—monitoring bodies should produce an annual report on their operations under the compliance scheme. This should be made publicly available (e.g. on the website for the compliance scheme) and should set out the results of the data analysis it has undertaken in accordance with paragraph 167 (although we do not expect monitoring bodies to include all information in the report (e.g. all information about the systemic issues and serious contraventions the monitoring body has found need not be made public)).
- (b) *to ASIC*—the monitoring body should report to ASIC on a quarterly basis on:
 - (i) the matters that would be covered in its annual report (adjusted for a quarterly timeframe);
 - (ii) the resources and expertise of the monitoring body and any expected future changes to this (this is in addition to the formal notification that monitoring bodies must make about significant reductions to resources and expertise under s921T, which is discussed further in Section H); and
 - (iii) any future proposed changes to the compliance scheme (again, in addition to the formal notification that we must receive under s921R, discussed further in Section H).

169 We will also expect monitoring bodies to report to ASIC serious contraventions or systemic issues that they identify with compliance with the code by covered financial advisers, within 45 days of becoming aware that the issue is serious or systemic.

170 We propose that the definitions of ‘systemic issue’ and ‘serious contraventions’ will be substantially similar to those that will be set out in the new Regulatory Guide 139 *Oversight of the Australian Financial Complaints Authority*, which is currently being consulted on: see [CP 298](#). Our final regulatory guide will specify these definitions.

171 We plan to have a quarterly meeting with each monitoring body that has an approved compliance scheme at which the quarterly reports can be discussed, as well as other matters relevant to the operations of the monitoring body under the compliance scheme. We may reconsider the need for quarterly reporting to ASIC and quarterly meetings with ASIC after a compliance scheme has been operating for a few years and its processes are embedded.

172 Monitoring bodies will also have record-keeping obligations under general law that they must comply with (e.g. under corporations law or the rules governing associations). Regardless, we expect monitoring bodies to keep all records relevant to the operation of their compliance schemes for a minimum of seven years.

Rationale

173 By reporting publicly on the various data it collects and analyses, the monitoring body can help to improve the behaviour of financial advisers by:

- (a) highlighting examples of good and ethical conduct by financial advisers;
- (b) drawing their attention to conduct that may not comply with the code (and the sanctions that might be imposed for it); and
- (c) drawing AFS licensees' attention to conduct that is occurring or trends that are emerging across the population of covered financial advisers, and enabling them to target their supervision and monitoring procedures, training, and prevention measures to address that conduct.

Note: Monitoring bodies must also notify AFS licensees of any failure to comply with the code by the financial advisers authorised by them and associated sanctions within 30 days after making the determination or imposing the sanction (s921N).

174 We also consider it important for the transparency of a compliance scheme's operations that monitoring bodies report on the activities they undertake.

175 Our ongoing meetings with monitoring bodies, and the reports they provide, will be a key oversight mechanism to help ASIC oversee compliance schemes. For this reason, our expectations for data collection, analysis and reporting are high.

176 However, we consider that the compliance scheme framework is intended to be primarily operated and governed by the industry. While we think it will be important for ASIC to have a more detailed level of oversight of compliance schemes initially (e.g. in the first few years after they are approved), this may not be needed on an ongoing basis and we may be able to revise our expectations for reporting to ASIC over time.

Independent review

177 A monitoring body must cause its approved compliance scheme to be reviewed by an independent person at least every five years: s921S. This review must be made public, and a copy must be given to ASIC as soon as reasonably practical after the review has been completed.

Proposal

E2 We propose to give guidance that we expect monitoring bodies to consult with us about the terms of the independent review they propose to commission and the appointment of the independent reviewer.

Your feedback

E2Q1 Do you agree with this proposal? If not, please provide details.

Rationale

178 We have proposed this guidance because the independent reviews will be a valuable source of information for ASIC in our oversight of compliance schemes. Accordingly, we would like to have the opportunity to shape these reviews.

179 We will monitor industry's implementation of the compliance scheme framework and will consider whether more guidance about the independent review is needed.

Consultation

Proposal

E3 We propose to give guidance on our expectations for consultation by monitoring bodies, as set out in paragraphs 180–185.

Your feedback

E3Q1 Do you agree with our proposed expectations for consulting about the compliance scheme? If not, please provide details.

E3Q2 Are our expectations for consultation and information sharing between monitoring bodies appropriate? If not, please give details and suggest alternatives.

Proposed expectations for consultation on compliance schemes

180 We will expect monitoring bodies to undertake consultation with a range of stakeholders when they are:

- (a) developing their compliance scheme; and
- (b) proposing to make changes to their compliance scheme.

Note: Monitoring bodies also have an obligation to notify ASIC of any proposed modifications to their compliance scheme (s921R). Our expectations are explained further in Section H.

- 181 Stakeholders that may be affected by the content of a compliance scheme document and the way the compliance scheme operates in practice include:
- (a) financial advisers who are or who may become covered by the compliance scheme;
 - (b) AFS licensees under whose licences those financial advisers operate;
 - (c) consumers who may use the services of financial advisers (and who may be consulted through associations representing consumers of financial services);
 - (d) AFCA, to which consumers may be referred when they contact the monitoring body and are seeking redress; and
 - (e) other monitoring bodies who may be affected by the monitoring body's processes (e.g. for transferring financial advisers between compliance schemes).

182 Monitoring bodies should consult with representatives of these groups when they are developing or proposing changes to their compliance schemes.

183 We recognise that it may not be possible to identify some of the parties listed above when the monitoring body is initially developing its compliance scheme (e.g. the financial advisers who will be covered by the scheme and their AFS licensees because no financial advisers will have yet signed up to the compliance scheme). However, we consider that it is still worthwhile for the monitoring body to consult with some financial advisers and AFS licensees. For example, in the case of a monitoring body that is a professional association, it could consult with its members who are financial advisers and their AFS licensees (even though some of them may elect not to be covered by that monitoring body's compliance scheme).

Proposed expectations for consultation and information sharing between monitoring bodies

184 Financial advisers are prevented from moving compliance schemes while they are under investigation: s921J, 921L(4) and 921M(3).

185 To support this prohibition, if a financial adviser seeks to be covered by a compliance scheme, we expect the scheme's monitoring body to:

- (a) confirm that the financial adviser is not currently under investigation; and
- (b) request information about the financial adviser's compliance history under their previous compliance scheme(s) (e.g. information about any investigations that were conducted into the financial adviser and the outcomes of those investigations).

Note: The financial adviser will have consented to the sharing of this information when they signed up to the previous compliance scheme: see paragraph 160(e).

Rationale

- 186 We have proposed this guidance because the parties listed in paragraph 181 will all be affected by the content of a compliance scheme document and the way the compliance scheme operates in practice. The parties should therefore have the opportunity to comment on these matters.
- 187 The consultation procedures will also be relevant to our decision whether to approve a compliance scheme: see paragraph 3.24 of the Explanatory Memorandum. Accordingly, it is appropriate to give guidance on our expectations.
- 188 Our proposals for consultation and information sharing between monitoring bodies will enable a new monitoring body to:
- (a) make an informed decision about whether to cover a financial adviser and, when the entity acting as the monitoring body is a professional association, whether to admit them as a member; and
 - (b) carry out additional monitoring of that financial adviser if necessary.

Ongoing support and education for advisers

Proposal

- E4 We propose that monitoring bodies should offer support, as set out in paragraphs 189–190, to covered financial advisers to help them comply with the code.

Your feedback

- E4Q1 Do you agree that monitoring bodies should offer support to covered financial advisers to help them comply with their ethical obligations? If not, please give details.
- E4Q2 Are there any forms of support not listed in paragraph 189 that we should suggest? If so, please provide details.

Measures to support compliance with the code

- 189 Monitoring bodies should consider how they can encourage and develop covered financial advisers' ethical decision-making skills. For example, we would encourage monitoring bodies to offer the following support to covered financial advisers:
- (a) an ethics assistance line or online support service that can provide financial advisers with practical and confidential guidance to deal with ethical issues that arise in their dealings with clients; and
 - (b) face-to-face seminars where examples of good and poor ethical behaviour are discussed, and financial advisers can discuss how best to approach similar issues.

190 These services should be designed in light of the key risks to ethical behaviour that monitoring bodies have identified.

Rationale

191 A key part of improving the ethical behaviour of financial advisers is supporting and motivating financial advisers to act in an ethical manner and in accordance with the code specifically. This complements the primary role of a monitoring body, which is to monitor and enforce the code of ethics.

192 These ongoing support and education measures will also complement:

- (a) the public annual reporting, through which monitoring bodies will highlight examples of good and ethical conduct as well as conduct that does not comply with the code; and
- (b) the training and education standards that FASEA will set for financial advisers, which are proposed to include education on ethical issues and the code in particular—see FASEA’s [Proposed guidance on education pathways for existing advisers](#) (PDF 304 KB).

F Revocation of and conditions on compliance scheme approval

Key points

ASIC has the power to revoke the approval of a compliance scheme, or to vary or impose conditions on a compliance scheme's approval, in various circumstances.

This section sets out our proposals for exercising these powers, including the information we propose to rely on and how we will assess whether it is appropriate to use these powers.

Information we will use to make a decision

Proposal

- F1 We propose to provide guidance about the information we will look at to decide whether to revoke approval of a compliance scheme, or vary or impose a condition on approval, as set out in paragraph 193.

Your feedback

- F1Q1 Is there information other than that set out in paragraph 193, that we should take into account when deciding whether to exercise ASIC's powers to revoke approval of a compliance scheme or vary or impose a condition on approval? If so, please provide details.

Information we propose to use

- 193 To make a decision to revoke approval or vary or impose a condition on the approval of a compliance scheme, we expect to rely primarily on:
- (a) the information that the monitoring body must provide to ASIC about the compliance scheme on an ongoing basis. This includes notifications about:
 - (i) significant reductions to the resources or expertise it uses to monitor or enforce compliance with the code under the scheme (s921T); and
 - (ii) any proposed modifications to the compliance scheme (s921R). While we are not required to approve changes to a compliance scheme, ASIC has the power to disallow a change if we are not satisfied that compliance with the code will continue to be monitored and enforced under the modified scheme;

- (b) the annual public reports and quarterly reports to ASIC that the monitoring body prepares in accordance with our proposed expectations (set out in proposal E1);
- (c) the information that the monitoring body provides during the course of our quarterly meetings about the operations of the monitoring body under the compliance scheme;
- (d) the independent reviews of the compliance scheme that must be carried out every five years (s921S);
- (e) any complaints that we have received about the scheme;
- (f) the monitoring body's responses to any requests for information that we make under s921Q; and
- (g) in the case of conditions that we may impose on the approval of a compliance scheme at its commencement, the information provided in the monitoring body's application for compliance scheme approval.

Rationale

- 194 ASIC has the power, under s921K, to revoke our approval of a compliance scheme, vary any conditions on the approval or impose new conditions if we are satisfied that the monitoring body:
- (a) is not appropriately monitoring or enforcing compliance with the code under the scheme;
 - (b) does not have sufficient resources or expertise to appropriately monitor or enforce compliance with the code under the scheme;
 - (c) fails to notify ASIC of a significant change to the monitoring body's resources or expertise;
 - (d) has not complied with a request from ASIC to provide it with information; or
 - (e) fails to notify ASIC or the relevant AFS licensee of a financial adviser's failure to comply with the code.
- 195 To revoke approval or vary or impose a condition, we must provide the monitoring body with a written notice that:
- (a) provides reasons why we are considering taking that action; and
 - (b) states that the monitoring body has 90 business days to make submissions to ASIC, in accordance with the notice, about the possible action.

We must then consider any submissions made by the monitoring body before revoking approval or varying or imposing a condition.

196 We consider that the matters set out in paragraph 193 will give a clear picture about whether we can be satisfied any of the issues in paragraph 194 exist.

Threshold for making decision

Proposal

F2 We propose to provide the guidance, set out in paragraph 197–199, about when we will revoke approval of a compliance scheme, or vary or impose conditions on that approval.

Your feedback

- F2Q1 Are there matters other than those set out in paragraphs 197 and 198 that we should take into account when deciding whether to exercise ASIC’s powers to revoke approval of a compliance scheme or vary or impose a condition on approval? If so, please provide details.
- F2Q2 In what circumstances should we exercise ASIC’s power to revoke a compliance scheme’s approval or impose conditions on our approval? What conditions should be imposed?

Proposed threshold

197 Using the information detailed at paragraph 193, we will assess the following to decide whether to exercise ASIC’s power to revoke the approval of a compliance scheme or whether and how to vary or impose a condition on the approval of a compliance scheme:

- (a) whether the monitoring body and compliance scheme meet the criteria for approval set out in the Corporations Act and our expectations (as set out in Sections C, D and E and summarised in the ‘if not, why not’ checklist);
- (b) if they do not meet those criteria and expectations, how serious the failures to meet them are. For instance:
 - (i) whether the failure to meet them has had a direct effect on the ability of the monitoring body under the compliance scheme to identify failures to comply with the code and deal with them within a reasonable time;
 - (ii) the period for which the failure will persist or has persisted;
 - (iii) whether the failure reveals serious or systemic weaknesses in the monitoring body’s procedures for monitoring and enforcing compliance with the code; and
 - (iv) whether the failure was deliberate or reckless.

- 198 In the case of conditions that we may impose on the approval of a compliance scheme when initially approving it, we will consider:
- (a) whether the monitoring body and compliance scheme are likely to meet the criteria for approval set out in the Corporations Act and our expectations; and
 - (b) whether a condition we are proposing to impose would give us more confidence that these criteria and expectations will be met.

199 A situation in which we may wish to impose a condition on a compliance scheme's approval initially is where the members of the governing body have not yet been selected or appointed, and we are therefore not confident that the monitoring body has sufficient expertise to appropriately monitor or enforce compliance with the code under the scheme. In this case, we may impose a condition that specifies who should be appointed, or the attributes of the persons who should be appointed, to the governing body.

Rationale

200 The criteria for approval in the Corporations Act and our expectations of compliance schemes—set out in Sections C, D and E and summarised in our draft 'if not, why not' checklist—include all of the key matters that we need to be satisfied of to be confident that the monitoring body is effectively carrying out its role under the compliance scheme. It is therefore appropriate to consider a failure to comply with these requirements as potential grounds for taking action to revoke the approval of a compliance scheme or deciding to vary or impose a condition on the approval of a compliance scheme.

201 However, taking this action is potentially serious—particularly in the case of revocation of approval, which would affect financial advisers covered by the compliance scheme and their authorising AFS licensees. Accordingly, we will also look at the seriousness of the failure to comply with the criteria or expectations (as described in paragraph 197(b)) before exercising ASIC's powers.

G Requiring AFS licensees and authorised representatives to provide information to monitoring bodies

Key points

We are proposing to amend s921L(3) and s921M(2) to require AFS licensees and authorised representatives to comply with a request for information, documents or other reasonable assistance from a monitoring body made before a failure to comply with the code, or possible failure, has been identified.

This will enable monitoring bodies to carry out their proactive monitoring activities.

Declaration to require AFS licensees and authorised representatives to provide information to monitoring bodies

Proposal

- G1 We propose to amend the law to declare that:
- (a) monitoring bodies may request information, documents or other reasonable assistance from an AFS licensee or authorised representative to help the bodies carry out their proactive monitoring activities; and
 - (b) AFS licensees and authorised representatives must comply with these requests.

We have set out our proposed amendments in more detail in paragraph 202.

Your feedback

- G1Q1 Do you agree with our proposed amendments to s921L(3) and s921M(2)? If not, why not?
- G1Q2 Will our proposed amendments be sufficient to enable monitoring bodies to carry out the activities we are proposing to expect? If not, please give details and provide alternatives.
- G1Q3 Please give details of any additional costs to AFS licensees, authorised representatives or monitoring bodies associated with monitoring bodies gathering information in reliance on a modified s921L(3) and s921M(2), as opposed to some other mechanism. If possible, please quantify these costs.

Proposed amendments

- 202 We propose to use ASIC's declaration power in s926A(2)(c) to:
- (a) amend s921L(3) to confer a power on a monitoring body to request the information, documents or other reasonable assistance from AFS licensees and authorised representatives the body needs to carry out its proactive monitoring activities; and
 - (b) amend s921M(2) with the consequence that failure by an AFS licensee or authorised representative to comply with the request is a criminal offence.

This would mirror the obligation on AFS licensees and authorised representatives to provide assistance to monitoring bodies for their reactive monitoring activities.

Rationale

- 203 AFS licensees under whose licences financial advisers operate, and authorised representatives (if relevant), will be a very valuable source of information for monitoring bodies who want to find out more about the conduct of covered financial advisers.
- 204 Monitoring bodies have been given the power to request, and AFS licensees and authorised representatives are required to provide, information, documents or other reasonable assistance after the monitoring body has become aware of a failure, or possible failure, by a financial adviser to comply with the code: s921L(3) and s921M(1). However, as this only applies when the monitoring body has become aware of a failure, or possible failure, it may not allow the monitoring body to request information from AFS licensees or authorised representatives to carry out their proactive monitoring activities where a monitoring body has not yet become aware of a possible failure to comply with the code.
- 205 As well as giving monitoring bodies the power to request this information, we consider that amending the law in this way will address any concerns that AFS licensees or authorised representatives may have, from a privacy law perspective, about providing information, documents and other reasonable assistance to the monitoring body on request.

H Notifications to ASIC

Key points

Monitoring bodies must make formal notifications to ASIC about various matters.

This section summarises the notifications that must be made and sets out how we propose monitoring bodies should determine whether a reduction in their resources or expertise is significant for the purposes of s921T.

Notification requirements

- 206 Monitoring bodies must notify ASIC about:
- (a) failures by covered financial advisers to comply with the code, where the monitoring body has made a determination that there has been a failure to comply or imposed a sanction (s922HD);
 - (b) significant reductions to the resources or expertise they use to monitor or enforce compliance with the code under the compliance scheme (s921T); and
 - (c) modifications to a compliance scheme (s921R).

Note: These notifications are in addition to the less formal reporting expectations proposed throughout this paper.

Significant reductions in resources and expertise

Proposal

- H1 We propose to provide guidance, as set out in paragraphs 207–212, on a monitoring body's obligation to notify ASIC of a 'significant' reduction in the resources or expertise it uses to monitor and enforce compliance with the code.

Your feedback

- H1Q1 Is it reasonable for the monitoring body to notify ASIC of a 'significant' reduction in the resources or expertise it uses to monitor and enforce compliance with the code within 45 days of becoming aware of the reduction? If not, what other timeframe would be appropriate?
- H1Q2 Are there any matters, other than those set out in paragraphs 209–210, that monitoring bodies should be required to consider when deciding whether a reduction is significant? If so, please provide details.

Proposed expectations for notifying ASIC of significant reductions

- 207 Monitoring bodies need only notify ASIC of reductions in resources or expertise that are ‘significant’: s921T. We propose that this notification should be made within 45 days of the monitoring body becoming aware that such a reduction is likely.
- 208 We expect that a determination about whether a reduction to the resources or expertise that a monitoring body uses to monitor or enforce compliance with the code under the scheme is ‘significant’ should be made by the governing body. We expect the governing body to be responsible for ensuring that the monitoring body remains adequately resourced on an ongoing basis (see proposal C5) and it is therefore in the best position to be able to make this determination.
- 209 When the governing body undertakes an assessment as to whether a reduction is significant, we expect it to:
- (a) consider the circumstances and likely impact of the reduction;
 - (b) decide if the reduction is significant; and
 - (c) document the reasons for its decision.
- 210 In determining whether the reduction is significant, the governing body should consider:
- (a) the monitoring body’s existing level of resources and expertise (e.g. in the case of a reduction in human resources, whether there are already a number of existing vacant roles or whether there are other staff members who can take on the role of a departing staff member);
 - (b) the monitoring body’s workload and any changes in its workload (e.g. whether the monitoring body appears to be managing its workload before the reduction); and
 - (c) the size of the reduction in the monitoring body’s resources or expertise (e.g. in the case of a reduction in fee revenue and financial resources available to the monitoring body, due to financial advisers no longer being covered by the scheme, what percentage the reduction represents to the revenue used to run the operations under the compliance scheme).
- 211 An example of a matter we would expect to be notified about is the governing body deciding to outsource a core function of the compliance scheme that the monitoring body previously carried out internally.
- 212 If a governing body is not sure whether the reduction in resources or expertise is significant, we encourage them to notify ASIC of the reduction.

Rationale

- 213 Providing a notification about a significant reduction to the resources or expertise that a monitoring body uses to monitor or enforce compliance with the code is important, because we may revoke the approval of the scheme, or impose or vary conditions on the approval, if we are not notified of such a reduction: s921K.
- 214 We may also revoke the scheme’s approval, or impose or vary conditions on the approval, if the monitoring body notifies ASIC of a reduction to the body’s resources and expertise and we form the view that the monitoring body is no longer able to appropriately monitor and enforce compliance with the code. For more information on our proposed use of these powers, see Section F.
- 215 We consider that the matters set out in paragraph 209 will allow the governing body to reach an appropriate conclusion about whether a reduction in resources and/or expertise is significant.

Notifications about proposed modifications to a compliance scheme

Proposal

- H2 We propose to provide guidance, as set out in paragraphs 216–219, on notifications about proposed modifications to a compliance scheme.

Your feedback

- H2Q1 Do you agree with our proposed guidance? If not, please provide details.

Proposed expectations for notifications about proposed modifications

- 216 A monitoring body may propose to modify an approved compliance scheme by giving a written notice to the ASIC contact with whom its quarterly meetings are held. The notice must:
- (a) set out the text of any proposed modification to the compliance scheme document;
 - (b) contain an explanation of the purpose of the proposed modification (s921R(1) and (2)); and
 - (c) explain any consultation the monitoring body has carried out on the proposed modification of the compliance scheme. For more information about our expectations for consultation, see paragraphs 180–183.

- 217 ASIC has the power to disallow a proposed modification if we are satisfied on reasonable grounds that:
- (a) compliance with the code will not be appropriately monitored or enforced under the scheme as modified; or
 - (b) if the proposed modification is a new monitoring body for the scheme, the new monitoring body does not have sufficient resources or expertise to appropriately monitor or enforce compliance with the code under the scheme.
- 218 We have a 28-day period, beginning on the day we receive the notice, in which to disallow the modification. If we exercise that power within the 28-day period, the part of the proposed modification that is disallowed will not come into effect.
- 219 As well as consulting with stakeholders, in line with our proposed guidance in paragraphs 180–183, monitoring bodies should engage with us early about any proposed modifications to their compliance scheme.

Rationale

- 220 Consulting early with ASIC about a proposed modification to a compliance scheme should ensure that any concerns we have about the modification can be addressed before a formal modification notification being made, thereby reducing the likelihood that we will disallow a modification.

I Regulatory and financial impact

221 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) encouraging higher standards of behaviour and professionalism among financial advisers;
- (b) ensuring that there is transparency surrounding the activities of monitoring bodies; and
- (c) maintaining consistency and fairness, regardless of which compliance scheme covers a financial adviser.

222 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).

223 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.

224 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.

Appendix 1: Key information to be included in application

- 225 Potential monitoring bodies that wish to have their compliance scheme approved should provide the following information in their application:
- Name of monitoring body
 - ABN of monitoring body
 - Name of compliance scheme
 - Does the monitoring body hold an AFS licence or is it an associate of an AFS licensee?
 - Does the monitoring body administer its own ethical code?
 - If the answer to the above is yes, please confirm that this ethical code is not inconsistent with the FASEA-drafted code
 - Contact person for application

Appendix 2: Draft ‘if not, why not’ checklist

Table 6: Compliance scheme governance and administration—Section C

Expectation	Confirmation	Explanation	Reference
Responsibilities of governing body and staff of monitoring body			
The governing body is responsible for the matters identified in the ‘Governing body responsibility’ column of Table 2	<i>[Does the governing body have those responsibilities?]</i>	<i>[Explain the responsibilities of the governing body]</i> <i>[If this is not does not meet our expectations, explain why not]</i>	<i>[Add references to the charter, terms of reference or any other documents that set out the responsibilities of the governing body. Attach these documents]</i>
The staff of the monitoring body is responsible for the matters identified in the ‘Monitoring body staff responsibility’ column of Table 2	<i>[Does the monitoring body staff have those responsibilities?]</i>	<i>[Explain the responsibilities of the monitoring body staff]</i> <i>[If this is not does not meet our expectations, explain why not]</i>	<i>[Add references to any documents that set out the responsibilities of the monitoring body staff. Attach these documents]</i>
The governing body has not and will not delegate responsibility for: <ul style="list-style-type: none"> overseeing the operation of the compliance scheme; or making the ultimate determination about whether a covered financial adviser has failed to comply with the code 	<i>[Has the governing body retained responsibility for these matters and will it?]</i>	<i>[Explain how the governing body will retain these responsibilities]</i> <i>[If this is not does not meet our expectations, explain why not]</i>	<i>[Add references to any documents that set out the responsibilities. Attach these documents]</i>
The governing body has a charter or terms of reference that sets out the matters in paragraph 64	<i>[Does the governing body have a charter or terms of reference that sets out the matters in paragraph 64?]</i>	<i>[Explain the charter or terms of reference]</i> <i>[If this is not does not meet our expectations, explain why not]</i>	<i>[Add references to the charter or terms of reference that sets out the matters in paragraph 64. Attach the charter or terms of reference]</i>

Expectation	Confirmation	Explanation	Reference
Independence and impartiality			
<p>The governing body:</p> <ul style="list-style-type: none"> • is made up of non-executive members; • has an independent chair within the meaning of paragraph 70; and • an equal balance of members with industry representative experience and consumer representative experience 	<i>[Is the governing body independent in this manner?]</i>	<p><i>[Explain the profile of the governing body]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<i>[Refer to any documents that set out the composition of the governing body. Attach these documents]</i>
<p>Staff responsible for carrying out monitoring and enforcement activities for the compliance scheme do not also have other conflicting roles within the entity acting as the monitoring body</p>	<i>[Are staff prevented from having conflicting roles?]</i>	<p><i>[Explain the extent to which and how this is prevented (e.g. which roles are separated)]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<i>[Refer to any documents that set out this role separation. Attach these documents]</i>
<p>The monitoring body has a policy for identifying and preventing such conflicting roles</p>	<i>[Does the monitoring body have a policy for identifying and preventing conflicting roles?]</i>	<p><i>[Explain the policy]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<i>[Attach the policy]</i>
Expertise			
<p>There is, and will continue to be, a member of the governing body who, at some point in the five years prior to being appointed to the governing body, met the training and competence standards that would have allowed them to give personal advice to retail clients on 'Tier 1' or relevant financial products</p>	<i>[Is there a member of the governing body who has this attribute?]</i>	<p><i>[Explain who the member is and their professional background]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<i>[Refer to any documents that set this out (e.g. a rule in the compliance scheme document)]</i>

Expectation	Confirmation	Explanation	Reference
There is, and will continue to be, a member of the governing body who has experience in and knowledge of the principles of procedural fairness and administrative law	<i>[Is there a member of the governing body who has this attribute?]</i>	<i>[Explain who the member is and their professional background]</i> <i>[If this does not meet our expectations, explain why not]</i>	<i>[Refer to any documents that set this out (e.g. a rule in the compliance scheme document)]</i>
The monitoring body has provided with its application for compliance scheme approval: <ul style="list-style-type: none"> a curriculum vitae for each member of the proposed initial governing body; and an explanation of why the member was chosen, taking into account the criteria that its policy says it will take into account when selecting a member of the governing body 	<i>[Has the monitoring body provided the relevant information to ASIC?]</i>	<i>[Explain the composition of the initial proposed governing body, and why the members of the proposed initial governing body were chosen, taking into account the criteria in the policy]</i> <i>[If this does not meet our expectations, explain why not]</i>	<i>[Attach the curriculum vitae for each proposed member of the governing body]</i>
The monitoring body has a policy or procedure that documents: <ul style="list-style-type: none"> how the members of the governing body are appointed and replaced; and what criteria are used to determine whether a person should be appointed to the governing body (the criteria specified in paragraph 81 should be included at a minimum). 	<i>[Does the monitoring body have a policy or procedure which documents these matters?]</i>	<i>[Explain what the policy says about these matters]</i> <i>[If this does not meet our expectations, explain why not]</i>	<i>[Attach the policy or procedure and include references to these matters]</i>
The monitoring body has job descriptions (covering, at a minimum, the matters in paragraph 83) for each role with responsibility for carrying out the core functions of the compliance scheme	<i>[Has the monitoring body developed such job descriptions?]</i>	<i>[Explain the basis upon which the job descriptions are developed]</i> <i>[If this does not meet our expectations, explain why not]</i>	<i>[Attach the job descriptions]</i>

Expectation	Confirmation	Explanation	Reference
The governing body has a policy or procedure covering maintenance of the expertise of the monitoring body's staff	<i>[Is there a policy or procedure covering maintenance of the expertise of the monitoring body's staff?]</i>	<i>[Explain what the policy or procedure provides and requires]</i> <i>[If this does not meet our expectations, explain why not]</i>	<i>[Attach the policy or procedure]</i>
Resources			
The monitoring body has provided, with its application for compliance scheme approval, a statement setting out the basis on which it considers that its financial, human and technological resources are, and will continue to be, adequate to allow it to appropriately monitor and enforce compliance with the code under the compliance scheme	<i>[Has the monitoring body provided such a statement?]</i>	<i>[Explain the basis on which the monitoring body considers that its financial, human and technological resources are, and will continue to be, adequate]</i> <i>[If this does not meet our expectations, explain why not]</i>	<i>[Attach any documents that form the basis on which the monitoring body has reached this conclusion—for example, a business plan including projections of the number of advisers the scheme will cover, fee revenue, the scope of the scheme (e.g. what kind of advisers), organisational chart, role descriptions]</i>
The governing body is responsible for overseeing on an ongoing basis whether the monitoring body is adequately resourced to carry out its functions under the compliance scheme	<i>[Does the governing body have this responsibility?]</i>	<i>[Explain how the governing body will discharge this responsibility]</i> <i>[If this does not meet our expectations, explain why not]</i>	<i>[Add references to any policy, procedure or other document that sets out this responsibility. Attach these documents]</i>
Outsourcing			
The monitoring body has not and will not outsource its responsibility to oversee the operation of the compliance scheme or make determinations about code non-compliance and sanctions	<i>[Has or will the monitoring body outsource these responsibilities?]</i>	<i>[If this does not meet our expectations, explain why not]</i>	<i>[Add references to any policy, procedure or other document that sets out this restriction on outsourcing. Attach these documents]</i>

Expectation	Confirmation	Explanation	Reference
<p>The monitoring body has conducted and will conduct due diligence on:</p> <ul style="list-style-type: none"> • whether it is appropriate to outsource any activity that is proposed to be outsourced; and • the outsourced service provider before appointing it. <p>The monitoring body will also keep appropriate records of its consideration and reasons for deciding to proceed with appointing the outsourced service provider.</p>	<p><i>[Has the monitoring body carried out, and will the body continue to carry out, the due diligence expected and keep records of that?]</i></p>	<p><i>[Explain any due diligence that has been undertaken and/or the scope of due diligence that will be undertaken]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Attach any policy or procedure that sets this out and any records of due diligence already carried out]</i></p>
<p>The monitoring body has entered, or will enter, into a binding contractual arrangement with the outsourced service provider that:</p> <ul style="list-style-type: none"> • sets out the terms on which it will provide the outsourced services; and • addresses the matters set out in paragraph 97. 	<p><i>[Has the monitoring body entered, or will the body enter, into such contractual arrangements?]</i></p>	<p><i>[Explain the basis on which the monitoring body gives this confirmation (e.g. is there any policy, procedure or template agreement that makes this likely?)]</i></p> <p><i>[Explain any services that the monitoring body has outsourced or will outsource, the reason for doing so, and the due diligence that was undertaken]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Attach any policy or procedure that sets this out and any agreements or template agreements already prepared]</i></p>

Table 7: Compliance scheme monitoring and enforcement—Section D

Expectation	Confirmation	Explanation	Reference
Annual work plan			
<p>The monitoring body has prepared, and will continue to prepare each year, an annual work plan which details:</p> <ul style="list-style-type: none"> the compliance risks and objectives that the annual work plan will focus on; the scope and focus of the proactive monitoring activities that the monitoring body will carry out in the following year; the work involved in carrying out the proactive monitoring activities; and when the activities will be carried out and the resources that will be used to carry them out. 	<p><i>[Has the monitoring body prepared an annual work plan, and will it continue to do so each year and provide it to ASIC as expected?]</i></p>	<p><i>[Explain the process and requirements that relate to this]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Refer to any documents that set this out and attach them, attach the draft inaugural annual work plan]</i></p>
<p>The monitoring body has and will continue to provide its annual work plan to ASIC each year</p>	<p><i>[Will the monitoring body provide its annual work plan to ASIC?]</i></p>	<p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Attach any policies, procedures or other documents that set this out]</i></p>
<p>The monitoring body will make its annual work plan public each year</p>	<p><i>[Will the monitoring body make its annual work plan public?]</i></p>	<p><i>[Explain how the monitoring body will make its annual work plan public (e.g. on its website)]</i></p> <p><i>[If this is not as per ASIC's expectations, why not]</i></p>	<p><i>[Attach any policies, procedures or other documents that set this out]</i></p>

Expectation	Confirmation	Explanation	Reference
Proactive monitoring activities			
<p>The monitoring body will carry out, at a minimum, the following proactive monitoring activities each year:</p> <ul style="list-style-type: none"> • one thematic own-motion inquiry (which results in a report covering the matters ASIC expects); and • one compliance statement process, with associated verification activities (carried out in accordance with our expectations) 	<p><i>[Will the monitoring body carry out these activities each year?]</i></p>	<p><i>[Explain the process and requirements that relate to this (e.g. how the topic and scope of the activities is decided)]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Refer to any documents that set this out and attach them]</i></p>
Receipt and initial assessment of reports			
<p>The monitoring body offers a mechanism by which:</p> <ul style="list-style-type: none"> • reports can be made and recorded; and • the monitoring body can capture the necessary information from these reports. 	<p><i>[Does the monitoring body have such a mechanism?]</i></p>	<p><i>[Explain what the mechanism is and how it works]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Refer to any documents that set this out (if relevant) and attach them]</i></p>
<p>The monitoring body has sufficient resources to enable the reports to be initially assessed (for whether the financial adviser the subject of the report is covered by the compliance scheme and whether the report indicates a possible failure to comply with the code) and, if so, to refer them for further investigation, generally within 28 days of first being notified</p>	<p><i>[Does the monitoring body have sufficient resources to allow this to occur?]</i></p>	<p><i>[Explain what resources will be devoted to the receipt and initial assessment of reports]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Refer to any documents that set this out (if relevant) and attach them]</i></p>

Expectation	Confirmation	Explanation	Reference
<p>The monitoring body has a communications strategy that covers how it will provide clear public messaging about:</p> <ul style="list-style-type: none"> • how members of the public can make reports; • the role of compliance schemes; and • where consumers can go if they want to seek redress 	<p><i>[Does the monitoring body have a communications strategy that covers these matters?]</i></p>	<p><i>[Explain what the communications strategy says about and requires for those three matters]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Attach the communications strategy]</i></p>
Investigation process			
<p>Monitoring body staff will carry out an investigation and produce a report about the investigation, generally within 90 days of the matter being referred for further investigation</p>	<p><i>[Will monitoring body staff produce a report of the investigation they have carried out?]</i></p>	<p><i>[Explain what the investigation and report might entail]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Refer to any documents that set this out (if relevant) and attach them]</i></p>
<p>The governing body will regularly review a random sample of matters that were investigated but not referred to the governing body</p>	<p><i>[Will the governing body carry out such reviews?]</i></p>	<p><i>[Explain the kind and frequency of reviews that the governing body will carry out]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Refer to any documents that set this out (if relevant) and attach them]</i></p>
Decision-making process			
<p>The governing body will comply with the following principles in making determinations about whether a financial adviser failed to comply with the code:</p> <ul style="list-style-type: none"> • the opportunity to be heard; • the entitlement to a notice; • the right to an impartial decision maker; and • findings of fact to be made on a sound basis 	<p><i>[Will the governing body comply with such principles?]</i></p>	<p><i>[Explain the governing body's process for decision making]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Refer to any documents that set this out (if relevant) and attach them]</i></p>

Expectation	Confirmation	Explanation	Reference
The governing body will generally make a determination about whether a financial adviser failed to comply with the code within 45 days of receiving a report from the monitoring body staff	<i>[Will this timeframe be met in most cases?]</i>	<i>[Explain the basis on which the monitoring body believes this timeframe will be met]</i> <i>[If this does not meet our expectations, explain why not]</i>	<i>[Refer to any documents that set this out (if relevant) and attach them]</i>
Sanctions			
The monitoring body has access to a range of sanctions	<i>[Does the monitoring body have access to a range of sanctions?]</i>	<i>[Explain what sanctions may be applied]</i> <i>[If this does not meet our expectations, explain why not]</i>	<i>[Include a compliance scheme document reference for the list of sanctions]</i>
The monitoring body has a sanctions guide or policy that covers: <ul style="list-style-type: none"> • how the monitoring body will determine sanctions; • some hypothetical situations in which each sanction would be imposed; and • the monitoring body's process for informing ASIC of sanctions it does impose for failures to comply with the code 	<i>[Does the monitoring body have a sanctions guide or policy covering those matters?]</i>	<i>[Explain what the sanctions guide or policy says about those matters]</i> <i>[If this does not meet our expectations, explain why not]</i>	<i>[Refer to relevant sections in the sanctions guide or policy and attach it]</i>
Appeals and dispute resolution			
The compliance scheme document sets out how disputes will be resolved between a monitoring body and a financial adviser	<i>[Does the compliance scheme document set out how a dispute will be resolved?]</i>	<i>[If this does not meet our expectations, explain why not]</i>	<i>[Include a compliance scheme document reference for the dispute resolution process]</i>

Expectation	Confirmation	Explanation	Reference
<p>The monitoring body has a documented appeal process setting out how it will:</p> <ul style="list-style-type: none"> • accept a complaint from an adviser; • gather information about the complaint; and • allow the governing body another opportunity to consider the matter 	<p><i>[Does the monitoring body have a documented appeal process setting out these matters?]</i></p>	<p><i>[Explain the appeals process]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Attach the documented process]</i></p>
<p>The monitoring body has considered preparing a guide summarising the appeals process</p>	<p><i>[Has the monitoring body considered preparing such a guide?]</i></p>	<p><i>[Explain whether a guide has been prepared and, if so, what it says]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Attach the guide if relevant]</i></p>
<p>The monitoring body has a documented process for dealing with non-appeal disputes that allows the monitoring body to provide a final response to the financial adviser within 45 days</p>	<p><i>[Does the monitoring body have such a documented process?]</i></p>	<p><i>[Explain the dispute resolution process]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Attach the documented process]</i></p>

Expectation	Confirmation	Explanation	Reference
Enforceability			
<p>The monitoring body will enter into legally binding agreements with each covered financial adviser in which they:</p> <ul style="list-style-type: none"> • agree to share all information and documents and provide such reasonable assistance as the monitoring body reasonably requests from it; • agree to report their significant breaches of the code; • agree to comply with the terms of the compliance scheme; • agree to be bound by the decisions made under the compliance scheme; and • consent to the monitoring body sharing information about them. 	<p><i>[Will all covered financial advisers enter into such an agreement?]</i></p>	<p><i>[How will the monitoring body ensure that each covered financial adviser enters into such an agreement?]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Attach the template agreement]</i></p>
<p>The compliance scheme document details procedures for dealing with the non-compliance by a financial adviser with a decision or request of the monitoring body under which the monitoring body issues a 'notice to comply', which:</p> <ul style="list-style-type: none"> • describes the financial adviser's act of non-compliance; • allows the financial adviser a reasonable time to comply; and • notifies the financial adviser of the implications if they fail to comply within that time period 	<p><i>[Does the compliance scheme document detail a similar procedure?]</i></p>	<p><i>[Explain the procedure that will be applied]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Include references to the compliance scheme document and any other document that details this procedure]</i></p>

Table 8: Compliance schemes' ongoing operation—Section E

Expectation	Confirmation	Explanation	Reference
Data collection, analysis and reporting			
<p>The monitoring body has measures in place to ensure that it can effectively collect, store and analyse:</p> <ul style="list-style-type: none"> • data collected in the course of its proactive monitoring activities; • reports of potential failures to comply with the code; • information gathered in the course of investigations; • the results of the investigations; and • the results of independent reviews conducted of the compliance scheme's operations 	<p><i>[Does the monitoring body have measures to ensure that it captures, stores and analyses this information?]</i></p>	<p><i>[Explain how the data is captured, stored and analysed]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Refer to any documents that set this out (if relevant) and attach them]</i></p>
<p>The monitoring body will report publicly on the matters it analyses from its data on an annual basis</p>	<p><i>[Will the monitoring body prepare a public annual report covering those matters?]</i></p>	<p><i>[Explain what the annual report will cover and any processes or procedures for preparing it]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Attach any processes or procedures for preparing the annual report]</i></p>
<p>The monitoring body will prepare a quarterly report covering the specified matters and provide it to ASIC</p>	<p><i>[Will the monitoring body prepare a quarterly report to ASIC covering those matters?]</i></p>	<p><i>[Explain what the quarterly report will cover and any processes or procedures for preparing it]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Attach any processes or procedures for preparing the quarterly report]</i></p>
<p>The monitoring body will report to ASIC serious contraventions and systemic issues with code compliance within 45 days of becoming aware that the matter is serious or systemic</p>	<p><i>[Will the monitoring body report such matters to ASIC within 45 days?]</i></p>	<p><i>[Explain how the monitoring body will ensure that this occurs]</i></p> <p><i>[If this does not meet our expectations, explain why not]</i></p>	<p><i>[Attach any processes or procedures for reporting on serious contraventions and systemic issues]</i></p>

Expectation	Confirmation	Explanation	Reference
The monitoring body will keep records relevant to the operation of their compliance scheme for a minimum of seven years	<i>[Will the monitoring body maintain such records for a minimum of seven years?]</i>	<i>[Explain how the monitoring body will ensure that this occurs]</i> <i>[If this does not meet our expectations, explain why not]</i>	<i>[Attach any record-keeping policies and procedures]</i>
Consultation			
The monitoring body has consulted on the content of the compliance scheme with: <ul style="list-style-type: none"> • financial advisers • AFS licensees • consumers • AFCA; and • other monitoring bodies 	<i>[Has the monitoring body consulted with these stakeholders?]</i>	<i>[Explain the consultation that has been undertaken with stakeholders regarding the compliance scheme during its development]</i> <i>[If this does not meet our expectations, explain why not]</i>	<i>[Add references to the compliance scheme document or policies and procedures that support this. Attach any documents referred to]</i>
The monitoring body will consult with the above stakeholders when changes are made to the compliance scheme	<i>[Will the monitoring body consult with these stakeholders when changes are made to the compliance scheme?]</i>	<i>[Explain any proposed measures for consulting with stakeholders on subsequent modifications to the compliance scheme]</i> <i>[If this does not meet our expectations, explain why not]</i>	<i>[Add references to the compliance scheme document or policies and procedures that support this. Attach any documents referred to]</i>
If a financial adviser seeks to be covered by a new compliance scheme, the scheme's monitoring body will: <ul style="list-style-type: none"> • confirm that the financial adviser is not currently under investigation; and • request information about the financial adviser's compliance history under their previous compliance scheme(s). 	<i>[Does the monitoring body have such processes?]</i>	<i>[Explain the process]</i> <i>[If this does not meet our expectations, explain why not]</i>	<i>[Add references to the compliance scheme document or policies and procedures that support this. Attach any documents referred to]</i>

Expectation	Confirmation	Explanation	Reference
Ongoing support and education for advisers			
The monitoring body has considered how it can encourage and develop covered financial advisers' ethical decision-making skills	<i>[Has the monitoring body considered offering such support?]</i>	<i>[Explain what support was considered and what will be provided]</i> <i>[If this does not meet our expectations, explain why not]</i>	<i>[Attach any documents setting out the support that will be provided]</i>

Key terms

Term	Meaning in this document
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
AFCA	Australian Financial Complaints Authority—The EDR scheme for which an authorisation under Pt 7.10A of the Corporations Act is in force.
code	The code of ethics developed and published by FASEA with which financial advisers must comply under s921E
compliance scheme	A scheme under which compliance with the code is monitored and enforced
compliance scheme document	A single, high-level document that expresses how the compliance scheme operates
compliance statement	A statement given by financial advisers in response to a questionnaire sent, in accordance with a monitoring body's annual work plan, for the purposes of monitoring compliance with one or more aspects of the code by its covered financial advisers
covered financial adviser	A financial adviser covered by a particular compliance scheme
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
EDR	External dispute resolution
entity acting as the monitoring body	An entity which has an approved compliance scheme, in the context of their broader role beyond just acting as a monitoring body
Explanatory Memorandum	Explanatory Memorandum to the Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016
FASEA	Financial Advisers Standards and Ethics Authority
financial adviser	An individual that is authorised to give personal advice to retail clients on relevant financial products
governing body	The internal governance body that is responsible for oversight of the monitoring body
monitoring body	A body that operates a compliance scheme, in the context of their administration of the scheme

Term	Meaning in this document
s921B (for example)	A section of the Corporations Act (in this example numbered 921B), unless otherwise specified
thematic own-motion inquiry	An inquiry carried out by a monitoring body, in accordance with its annual work plan, for the purposes of monitoring compliance with one or more aspects of the code by its covered financial advisers

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to conduct a three-stage application process for initial applications. We have set out the proposed process in more detail at paragraphs 43–46.</p>	<p>B1Q1 Are there better ways for ASIC to run the application process that will help to give certainty about resources required and enable all approvals to be announced at the same time? If so, please provide details.</p> <p>B1Q2 Does our proposed process create any particular risks that we will need to manage? If so, please provide details.</p>
<p>B2 We propose to standardise the content of compliance scheme approval applications to require them to contain the information set out at paragraphs 50–53.</p>	<p>B2Q1 Do you agree with the information we will require as part of the application? If not, why not?</p>
<p>B3 We propose that a compliance scheme document should cover the matters set out in paragraph 55.</p>	<p>B3Q1 Are there any matters other than those in paragraph 55 that should be included in the compliance scheme document? If so, please provide details.</p> <p>B3Q2 Are there any matters in paragraph 55 that should not be included in the compliance scheme document? If so, please give details. Please also suggest alternative places for this information.</p>
<p>C1 We propose that the governing body and the staff of the monitoring body should have the responsibilities outlined in Table 2 and that the governing body's responsibilities should be set out in a charter or terms of reference.</p>	<p>C1Q1 Do you agree that the governing body should be permitted to delegate all of its responsibilities described in Table 2, other than the responsibilities described in paragraphs 63(a)–63(b)? If not, please give details.</p> <p>C1Q2 Are there any matters other than those set out in paragraph 64 that should be addressed in the charter or terms of reference for the governing body? Please give details.</p>

Proposal	Your feedback
<p>C2 We propose that monitoring bodies should have appropriate measures, as outlined in paragraphs 68–73, to ensure independence from the financial advice industry whose conduct they regulate.</p>	<p>C2Q1 Do you agree that the governing body should be comprised only of non-executive members? If not, please give details and provide alternatives.</p> <p>C2Q2 Do you agree that the governing body should include an independent chair and a balance of industry and consumer representatives? If not, please give details and provide alternatives.</p> <p>C2Q3 Do you agree that the criteria listed at paragraph 70 should be applied to determine the chair’s independence? If not, please give details and provide alternatives.</p> <p>C2Q4 Do you think that the existence of an independent governing body and role separation will be effective to minimise the potential for conflicts of interest in the monitoring body? If not, please give details and provide alternatives.</p>
<p>C3 We propose to assess the expertise of monitoring bodies by reviewing:</p> <ul style="list-style-type: none"> (a) the expertise of the proposed initial governing body and the procedures for maintaining the expertise of the governing body; and (b) the job descriptions for the broader staff of the monitoring body and the procedures for maintaining the expertise of the broader staff. <p>We have outlined our expectations in more detail in paragraphs 76–83.</p>	<p>C3Q1 Do you agree with our proposed approach of assessing the expertise of monitoring bodies by assessing the matters outlined in paragraph 76? If not, please give details and provide alternatives.</p> <p>C3Q2 Will it be practical to provide information about the members of the proposed initial governing body in an application for approval of a compliance scheme? If not, please give details and provide alternative methods we may use to assess the expertise of the governing body.</p> <p>C3Q3 Do you agree that there should always be one member of the governing body who, at some point in the five years before being appointed to the governing body, met the training and competence standards that would have allowed them to give personal advice to retail clients on ‘Tier 1’ or relevant financial products? If not, please give details and provide alternatives.</p> <p>C3Q4 Do you agree that there should always be one member of the governing body who has experience in and knowledge of the principles of procedural fairness and administrative law? If not, please give details and suggest alternative ways that the governing body may be able to access this expertise.</p> <p>C3Q5 Are there other aspects of a monitoring body’s expertise that we should assess before granting approval for a compliance scheme? If so, please provide details.</p>

Proposal	Your feedback
<p>C4 We propose that it will be the responsibility of the governing body to ensure that the monitoring body has the appropriate expertise to carry out its responsibilities on an ongoing basis. We have outlined our expectations in more detail in paragraphs 84–85.</p>	<p>C4Q1 Do you agree with this proposal? If not, please provide details and alternatives.</p>
<p>C5 We propose that:</p> <p>(a) we will make an initial assessment of the adequacy of the resources of the monitoring body, based on a statement that the monitoring body provides with its application; and</p> <p>(b) it will be the governing body's responsibility to ensure the monitoring body is adequately resourced on an ongoing basis.</p> <p>Our expectations are outlined in more detail in paragraphs 88–90.</p>	<p>C5Q1 Are there factors, other than those listed at paragraph 88, that would affect the human, financial and technological resources required for the monitoring body to effectively carry out its role? If so, please provide details.</p> <p>C5Q2 Do you agree with our proposed approach of asking the monitoring body to set out in a statement to ASIC the basis on which it considers its resources to be adequate? If not, please give details and provide alternatives.</p> <p>C5Q3 Should we set a specific benchmark for the financial resources that monitoring bodies should have initially (e.g. that monitoring bodies should have at least 12 months cash against an outlined program of work)? If so, please provide details.</p>
<p>C6 We propose to set the expectations regarding outsourcing by monitoring bodies outlined in paragraphs 93–97.</p>	<p>C6Q1 Is the definition of 'core function of the compliance scheme' set out in paragraph 93 appropriate? If so, please provide details.</p> <p>C6Q2 Are there key matters, other than those listed in paragraph 97, that monitoring bodies who outsource their activities should address in their contractual arrangements with outsourced service providers? If so, please provide details.</p>

Proposal	Your feedback
<p>D1 We propose that monitoring bodies should carry out monitoring and enforcement activities in accordance with proposals D2–D10 from 1 January 2020.</p>	<p>D1Q1 Should monitoring bodies carry out both proactive and reactive monitoring? Please provide reasons for your response.</p> <p>D1Q2 Would it be preferable to delay any aspect of the monitoring and enforcement requirements to facilitate transition to the new regime (e.g. should we delay the requirement that the monitoring body conduct proactive monitoring activities)? If so, please explain why and provide details.</p> <p>D1Q3 Could monitoring bodies work together to develop a uniform approach to monitoring and enforcement, and would this be appropriate? If so, please explain why and provide details of how this could occur.</p> <p>D1Q4 Could a single body carry out these activities for all or a number of compliance schemes and would it be appropriate? If so, please provide details.</p>
<p>D2 We propose that monitoring bodies should, each year, develop a risk-based annual work plan, provide it to ASIC and make it public, as outlined in paragraphs 102–104.</p>	<p>D2Q1 Do you agree that a monitoring body should prepare a risk-based annual work plan? If not, please give details and provide alternatives.</p> <p>D2Q2 Do you agree that the annual work plan should be provided to ASIC each year, from 1 January 2020? If not, please give details.</p> <p>D2Q3 Do you agree that the annual work plan should be made public? If not, please give details.</p>
<p>D3 We propose that the following proactive monitoring activities should be carried out under a compliance scheme each year, at a minimum:</p> <ul style="list-style-type: none"> (a) one thematic ‘own-motion’ inquiry; and (b) one compliance statement process, with associated verification activities. <p>We set out our expectations for these activities in more detail in paragraphs 108–115.</p>	<p>D3Q1 Will a minimum of one thematic own-motion inquiry and one compliance statement process each year, with associated verification activities, be sufficient proactive monitoring activities to ensure that compliance with the code is appropriately monitored and enforced under a compliance scheme? If not, please give details and provide alternatives.</p> <p>D3Q2 Are the proposed proactive monitoring activities appropriate for monitoring compliance with the standards set out in the draft code? If not, please give details and provide alternatives.</p>
<p>D4 We propose that monitoring bodies should have a process for receiving and conducting an initial assessment of reports of failures to comply with the code, as described in paragraphs 120–123.</p>	<p>D4Q1 Is it reasonable for monitoring body staff to complete their initial assessment of the report within 28 days of receiving a report? If not, what other timeframe would be appropriate?</p>

Proposal	Your feedback
D5 We also propose that monitoring bodies should have a communications strategy, as described in paragraph 124.	D5Q1 Do you agree with the proposal for monitoring bodies to have a communications strategy? If not, please give details and provide alternatives.
D6 We propose that compliance schemes should have a process for investigating possible failures to comply with the code, as described in paragraphs 127–134.	<p>D6Q1 Is it reasonable for investigations to be completed within 90 days of the initial assessment recommending that further investigations should take place? If not, what other timeframe would be appropriate?</p> <p>D6Q2 Should the governing body regularly review a random sample of matters that were investigated but not referred to it, as proposed in paragraph 134? If not, please give details and suggest alternative measures that can be used to ensure consistency and quality in the investigation and referral process.</p>
D7 We propose that monitoring bodies should have a process for making determinations about whether a financial adviser has failed to comply with the code, which is consistent with the principles in paragraphs 137–139 and Table 4.	<p>D7Q1 Do you agree that the governing body should be responsible for making the final determination about whether a financial adviser has failed to comply with the code? If not, please give details and provide alternatives that address the need to ensure that the decision maker is impartial.</p> <p>D7Q2 Is it reasonable to expect the governing body to make a determination within 45 days of a matter being referred to it? If not, what other timeframe would be appropriate?</p> <p>D7Q3 Do you agree that the governing body should comply with the principles set out in Table 4 in carrying out its decision-making activities? If not, please give details and provide alternatives.</p>
D8 We propose that monitoring bodies should have access to a range of sanctions and should have guiding principles about when each will be applied. We have set out our expectations for these sanctions and associated guiding principles in paragraphs 145–147 and Table 5.	<p>D8Q1 Does the list at paragraph 145 capture all of the sanctions that might be appropriate to impose? If not, please give details.</p> <p>D8Q2 Are there matters other than those listed in Table 5 that a governing body should take into account when determining which sanctions to apply? If so, please provide details.</p>

Proposal	Your feedback
<p>D9 We propose that a monitoring body must have a documented process, consistent with paragraphs 151–156, for dealing with appeals and other disputes from covered financial advisers.</p>	<p>D9Q1 Are there matters, other than those listed in paragraph 152, that should be covered in a monitoring body’s documented appeals process? If so, please provide details.</p> <p>D9Q2 Should there be another party, aside from the governing body, that can hear appeals from covered financial advisers? If so, please give details.</p> <p>D9Q3 Is it reasonable for a final response to be provided to a covered financial adviser about their dispute within 45 days? If not, what other timeframe would be appropriate?</p>
<p>D10 We propose that financial advisers should be contractually bound to share materials with the monitoring body and to comply with the terms of the compliance scheme and the decisions made under it. We have set out our expectations in more detail in paragraphs 159–162.</p>	<p>D10Q1 Is a legally binding agreement an appropriate way to make the compliance scheme enforceable between the monitoring body and financial advisers? If not, please give details and provide alternatives.</p> <p>D10Q2 Do you agree with the proposed process for dealing with non-compliance by a covered financial adviser outlined in paragraph 161? If not, please give details and provide alternatives.</p>

Proposal	Your feedback
<p>E1 We propose that monitoring bodies must report on the data they collect and analyse, as set out in paragraphs 166–172.</p>	<p>E1Q1 Do you agree that monitoring bodies should produce public annual reports covering the matters outlined in paragraph 167? If not, please give details (e.g. about which data in particular should not be made public) and provide alternatives.</p> <p>E1Q2 Do you agree that monitoring bodies should produce quarterly reports for ASIC and meet with ASIC on a quarterly basis to discuss the matters outlined in paragraph 167? If not, please give details and provide alternatives.</p> <p>E1Q3 Do you agree with our proposed 45-day timeframe for monitoring bodies to report serious contraventions or systemic issues to ASIC? If not, please give details and provide alternatives.</p> <p>E1Q4 Would it be preferable to delay the commencement of some or all of the data collection, analysis and reporting expectations? If so, please explain why and provide details.</p> <p>E1Q5 Would it be appropriate to reduce, or consider reducing, the proposed requirements for reporting to ASIC over time? If so, please explain why and provide details.</p> <p>E1Q6 Would it be feasible for monitoring bodies to work together to develop a reporting standard and would this be appropriate? If so, please explain why and provide details of how this could occur.</p>
<p>E2 We propose to give guidance that we expect monitoring bodies to consult with us about the terms of the independent review they propose to commission and the appointment of the independent reviewer.</p>	<p>E2Q1 Do you agree with this proposal? If not, please provide details.</p>
<p>E3 We propose to give guidance on our expectations for consultation by monitoring bodies, as set out in paragraphs 180–185.</p>	<p>E3Q1 Do you agree with our proposed expectations for consulting about the compliance scheme? If not, please provide details.</p> <p>E3Q2 Are our expectations for consultation and information sharing between monitoring bodies appropriate? If not, please give details and suggest alternatives.</p>

Proposal	Your feedback
<p>E4 We propose that monitoring bodies should offer support, as set out in paragraphs 189–190, to covered financial advisers to help them comply with the code.</p>	<p>E4Q1 Do you agree that monitoring bodies should offer support to covered financial advisers to help them comply with their ethical obligations? If not, please give details.</p> <p>E4Q2 Are there any forms of support not listed in paragraph 189 that we should suggest? If so, please provide details.</p>
<p>F1 We propose to provide guidance about the information we will look at to decide whether to revoke approval of a compliance scheme, or vary or impose a condition on approval, as set out in paragraph 193.</p>	<p>F1Q1 Is there information other than that set out in paragraph 193, that we should take into account when deciding whether to exercise ASIC's powers to revoke approval of a compliance scheme or vary or impose a condition on approval? If so, please provide details.</p>
<p>F2 We propose to provide the guidance, set out in paragraph 197–199, about when we will revoke approval of a compliance scheme, or vary or impose conditions on that approval.</p>	<p>F2Q1 Are there matters other than those set out in paragraphs 197 and 198 that we should take into account when deciding whether to exercise ASIC's powers to revoke approval of a compliance scheme or vary or impose a condition on approval? If so, please provide details.</p> <p>F2Q2 In what circumstances should we exercise ASIC's power to revoke a compliance scheme's approval or impose conditions on our approval? What conditions should be imposed?</p>
<p>G1 We propose to amend the law to declare that:</p> <ul style="list-style-type: none"> (a) monitoring bodies may request information, documents or other reasonable assistance from an AFS licensee or authorised representative to help the bodies carry out their proactive monitoring activities; and (b) AFS licensees and authorised representatives must comply with these requests. <p>We have set out our proposed amendments in more detail in paragraph 202.</p>	<p>G1Q1 Do you agree with our proposed amendments to s921L(3) and s921M(2)? If not, why not?</p> <p>G1Q2 Will our proposed amendments be sufficient to enable monitoring bodies to carry out the activities we are proposing to expect? If not, please give details and provide alternatives.</p> <p>G1Q3 Please give details of any additional costs to AFS licensees, authorised representatives or monitoring bodies associated with monitoring bodies gathering information in reliance on a modified s921L(3) and s921M(2), as opposed to some other mechanism. If possible, please quantify these costs.</p>

Proposal	Your feedback
<p>H1 We propose to provide guidance, as set out in paragraphs 207–212, on a monitoring body’s obligation to notify ASIC of a ‘significant’ reduction in the resources or expertise it uses to monitor and enforce compliance with the code.</p>	<p>H1Q1 Is it reasonable for the monitoring body to notify ASIC of a ‘significant’ reduction in the resources or expertise it uses to monitor and enforce compliance with the code within 45 days of becoming aware of the reduction? If not, what other timeframe would be appropriate?</p> <p>H1Q2 Are there any matters, other than those set out in paragraphs 209–210, that monitoring bodies should be required to consider when deciding whether a reduction is significant? If so, please provide details.</p>
<p>H2 We propose to provide guidance, as set out in paragraphs 216–219, on notifications about proposed modifications to a compliance scheme.</p>	<p>H2Q1 Do you agree with our proposed guidance? If not, please provide details.</p>