



**ASIC**

Australian Securities & Investments Commission

## REPORT 409

# Response to submissions on CP 214 Updated record- keeping obligations for AFS licensees

September 2014

### **About this report**

This report highlights the key issues that arose out of the submissions received on Consultation Paper 214 *Updated record-keeping obligations for AFS licensees* (CP 214), and details our responses to those issues.

### 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.

### Disclaimer

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

This report does not contain ASIC policy.

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## A Overview/Consultation process

- 1 In Consultation Paper 214 *Updated record-keeping obligations for AFS licensees* (CP 214), we set out our proposals to update the record-keeping obligations for Australian financial services (AFS) licensees when giving financial product advice.
- 2 Specifically, we invited feedback on the proposals in CP 214 to update the record-keeping obligations for AFS licensees when the licensee or its representatives provide financial product advice to retail clients to demonstrate they have complied with:
  - (a) the conduct obligations in Div 2 of Pt 7.7A of the *Corporations Act 2001* (Corporations Act) when giving personal advice—collectively referred to in this report as the ‘best interests duty and related obligations’;
  - (b) the obligations relating to ongoing fee arrangements and fee disclosure statements in Div 3 of Pt 7.7A of the Corporations Act; and
  - (c) the ban on conflicted and other remuneration in Divs 4 and 5 of Pt 7.7A of the Corporations Act—collectively referred to in this report as the ‘conflicted remuneration provisions’.
- 3 We also sought feedback on the proposal to impose a record-keeping obligation on trustees of regulated superannuation funds (as AFS licensees) when the trustee gives personal advice to a member, for which they are not permitted to collectively charge the member as intra-fund advice under s99F of the *Superannuation Industry (Supervision) Act 1993* (SIS Act).
- 4 This report highlights the feedback received on CP 214, and our responses to that feedback.
- 5 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 214. We have limited this report to the key issues.
- 6 For a list of the non-confidential respondents to CP 214, see the appendix. Copies of the submissions are on the ASIC website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 214.

### Feedback received

- 7 We received eight submissions on CP 214—from industry associations and one industry compliance specialist. We are grateful to respondents for taking the time to send us their comments.

- 8 We met with a number of industry associations during the consultation period to discuss our proposals. We also continued to engage with stakeholders after the close of the consultation period in finalising our new class order, and to further discuss our proposed updated regulatory guidance.
- 9 The submissions received acknowledged the importance of AFS licensees keeping records to demonstrate their compliance with the law and to help ensure that retail clients continue to receive good quality advice from advisers.
- 10 A majority of respondents expressed support for the record-keeping proposal relating to the best interests duty and related obligations—that is, that ASIC should issue a class order to update the existing record-keeping obligations for personal advice so that they refer to the new conduct obligations in Div 2 of Pt 7.7A of the Corporations Act, rather than the previous advice obligation in s945A which was repealed under the Future of Financial Advice (FOFA) reforms.
- 11 Respondents were less supportive of ASIC introducing the proposed record-keeping obligations in relation to:
- (a) ongoing fee arrangements and fee disclosure statements;
  - (b) conflicted remuneration; and
  - (c) intra-fund advice.
- 12 A few submissions expressed concern that the additional record-keeping obligations would impose substantial compliance costs for AFS licensees and their representatives, and have significant implications for their existing record-keeping systems and practices.
- 13 Sections B–E of this report set out in more detail the issues raised during consultation, and our responses to those issues.

## ASIC's response

- 14 We have issued Class Order [CO 14/923] *Record-keeping obligations for Australian financial services licensees when giving personal advice* to give effect to the updated record-keeping obligations for AFS licensees and their representatives when giving personal advice to retail clients so that these refer to the best interests duty and related obligations in Div 2 of Pt 7.7A.
- 15 Having good record-keeping systems in place will support the ongoing provision of quality advice to clients. Keeping records will also help AFS licensees to supervise their representatives, including advice providers, when they provide advice to retail clients. We consider that the ongoing supervision by a licensee of its representatives is critical to ensure that they continue to comply with the requirements in the law.

16 Where AFS licensees do not have reliable records demonstrating compliance with the best interests duty and related obligations, ASIC may need to interview clients to assess whether an adviser has complied with these obligations. Where licensees have these records available, it is less likely that we will need to interview clients.

17 We will give AFS licensees a transitional period of six months from the date the class order is made for licensees to comply with the updated record-keeping obligations.

18 On the basis of the feedback received, we have decided not to proceed at this stage with the record-keeping proposals in CP 214 for ongoing fee arrangements and fee disclosure statements, conflicted remuneration and intra-fund advice.

19 We also encourage industry to take the initiative and ensure that records are kept to demonstrate that the AFS licensee and its representatives have complied with the provisions on ongoing fee arrangements and fee disclosure statements, conflicted remuneration and intra-fund advice. The requirement for AFS licensees to keep records is implied by the general duties imposed under s912A of the Corporations Act. The relevant duties of a licensee that imply such a record-keeping obligation include:

- (a) the duty to ‘do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly’ (s912A(1)(a));
- (b) the duties to comply with the financial services laws and to take all reasonable steps to ensure its representatives comply with these laws (s912A(1)(c)–(ca));
- (c) the duty to have an adequate dispute resolution system (s912A(1)(g)); and
- (d) the duty to have adequate risk management systems in place (s912A(1)(h)).

Note: In this report, s912A (for example) refers to a section of the Corporations Act, unless otherwise specified.

20 Our response takes into account:

- (a) the Government’s objective of reducing the regulatory burden for individuals and businesses; and
- (b) the current moratorium on new financial services regulation.

21 Our response also takes account of the Government’s amendments under the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 to streamline the FOFA conduct obligations in Pt 7.7A of the Corporations Act. These amendments include the removal of the ‘catch-all’ provision in s961B(2)(g) of the safe harbour, and the introduction of a new provision to remove any doubt that the client can seek scaled advice. In

drafting the class order, we have taken care to ensure that we have only referred to the high-level obligation under the law.

Note: The Government introduced the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 into Parliament on 19 March 2014. Those regulations that replicate provisions in the Bill will be repealed after the Bill is passed in the Parliament.

- 22 We consulted in CP 214 on our proposed update to Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* (RG 175) to reflect the record-keeping obligations in [CO 14/923]. However, we have decided to delay publishing the revised RG 175 so that we can also incorporate updated guidance on the legislative amendments to the FOFA conduct obligations. This will be done as part of a single update to the regulatory guide, after the Government’s reforms are settled and when we have available resources.

## B Record-keeping obligations when giving personal advice to retail clients

### Key points

This section outlines the feedback received on our proposals to update the record-keeping obligations for AFS licensees when the licensee or its representatives give personal advice to retail clients, and summarises our response to that feedback.

It covers our proposals to update the record-keeping obligations for AFS licensees in relation to:

- the best interests duty and related obligations in Div 2 of Pt 7.7A of the Corporations Act; and
- the obligations relating to ongoing fee arrangements and fee disclosure statements in Div 3 of Pt 7.7A of the Corporations Act.

### Best interests duty and related obligations

23 In CP 214, we proposed to modify the law, by way of class order, to update the record-keeping obligations for AFS licensees when the licensee or its representatives give personal advice to retail clients, to demonstrate that they have complied with the best interests duty and related obligations.

- 24 Specifically, we proposed to require AFS licensees to keep a record of the following matters:
- (a) the information relied on and the action taken by the advice provider that show the advice provider has acted in the best interests of the client for the purposes of s961B(1);
  - (b) if s961B(2) is being relied on to show that s961B(1) has been complied with, the information relied on and the action taken by the advice provider that satisfy the safe harbour steps in s961B(2);
  - (c) the advice, including reasons why advice is considered to be ‘appropriate’ within the meaning of s961G; and

Note: Our proposal also stated that the requirements in paragraphs 24(a)–24(c) would not apply to personal advice for which a Statement of Advice (SOA) is not required, or to personal advice for which a record of the advice is kept in accordance with s946B(3A), as modified by regs 7.7.09 and 7.7.10AE of the Corporations Regulations 2001.

- (d) where an advice provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the advice provider, or one of their specified related parties, the information relied on and the action taken by the advice provider that show the advice



provider has given priority to the client's interests when giving the advice for the purposes of s961J.

- 25 We proposed that AFS licensees would be required to keep a record of these matters—whether in a material, electronic or other form—for a period of at least seven years from the date the advice is provided.

### Stakeholder feedback

- 26 A majority of the submissions expressed support for ASIC issuing a class order to update the existing record-keeping obligations so that they refer to the new best interests duty and related obligations, rather than the previous advice obligation in s945A which was repealed under the FOFA reforms.

#### *ASIC's response*

Based on the feedback received, we have issued [CO 14/923], which imposes a record-keeping obligation on AFS licensees in relation to the best interests duty and related obligations.

We consider this to be a technical update rather than a substantive new obligation. The effect of the class order is to update the previous record-keeping licence condition for personal advice so that it refers to the new best interests duty and related obligations under FOFA.

Note: ASIC will update the AFS licence condition in Pro Forma 209 *Australian financial services licence conditions* (PF 209) in late 2014 to reflect the requirements in [CO 14/923].

We will update our guidance in RG 175 to reflect the record-keeping obligations in [CO 14/923], and provide some additional guidance to industry.

In our view, it is important that AFS licensees continue to ensure that records are kept of personal advice, and that the substance of the AFS licence condition be retained so that it applies to new records created by licensees.

Where AFS licensees do not have reliable records demonstrating compliance with the best interests duty and related obligations, ASIC may need to interview clients to assess whether an adviser has complied with these obligations. Where licensees have these records available, it is less likely that we will need to interview clients.

- 27 In CP 214, we proposed that 'the licensee must retain a record' of the matters listed in paragraphs 24(a)–24(d). A few respondents expressed concern that this phrase does not provide any flexibility to accommodate existing industry arrangements, where authorised representatives have traditionally maintained client files and AFS licensees have a contractual right to access those files when required. According to the submissions, such arrangements minimise any duplication of compliance obligations and

thereby reduce business inefficiencies. Some respondents believed that the proposal, as drafted in the consultation paper, implied that the records must be kept on the licensee's premises.

- 28 These respondents also recommended that we should provide guidance on the use of contractual arrangements by AFS licensees to meet their record-keeping obligations.
- 29 One respondent suggested that, if AFS licensees are not allowed to continue to contract out their record-keeping obligations to authorised representatives, the compliance costs arising from the proposals would be more substantial. According to this respondent, these compliance costs would include copying records; transporting records across Australia; providing resources to despatch, receive and store records; and/or investment in information technology infrastructure to enable the process to be electronic.

*ASIC's response*

Based on the feedback received, [CO 14/923] has been drafted so that the requirement states that: '[t]he financial services licensee must ensure that records of the following matters are kept in relation to the provision of personal advice...'.

It is not our intention for the proposed record-keeping obligations to change longstanding industry practices in relation to the retention of records between AFS licensees and their authorised representatives.

We will update our guidance in RG 175 to clarify that we do not expect the record-keeping obligations to require AFS licensees to change existing arrangements with authorised representatives for keeping records.

At the same time, we remind AFS licensees that, because the obligation to retain records remains with them, licensees will need to assess their ability to satisfactorily access client records under their contractual arrangements to ensure that they can meet their regulatory obligations.

- 30 A few respondents also expressed support for our proposal not to extend the proposed record-keeping obligations to personal advice where the modified best interests duty applies to specific products under s961B(3)–(4) and the Corporations Regulations 2001.

*ASIC's response*

We confirm that the record-keeping obligations in [CO 14/923] do not extend to personal advice where the modified best interests duty applies.

## Ongoing fee arrangements and fee disclosure statements

- 31 In CP 214, we proposed to modify the law, by way of class order, to require that, when an AFS licensee or its representatives provide personal advice to retail clients, the licensee must retain records of:
- (a) any ongoing fee arrangement entered into with the client within the meaning of s962A, or any assignment of an ongoing fee arrangement;
  - (b) a fee disclosure statement or a renewal notice given to the client;
  - (c) a notification given by the client that they elect to renew their ongoing fee arrangement; and
  - (d) any fees charged after the termination of an ongoing fee arrangement.
- 32 We proposed that AFS licensees would be required to keep a record of these matters—whether in a material, electronic or other form—for a period of at least seven years from the date the advice is provided.

### Stakeholder feedback

- 33 There was little support from respondents for the proposed record-keeping obligations relating to ongoing fee arrangements and fee disclosure statements.

#### *ASIC's response*

On the basis of the feedback received, we have decided not to proceed at this stage to modify the law to impose a specific record-keeping obligation relating to the provisions on ongoing fee arrangements and fee disclosure statements in Div 3 of Pt 7.7A of the Corporations Act.

Our response takes into account the Government's current objective of reducing the regulatory burden for individuals and businesses, the current moratorium on new financial services regulation and the recent amendments to streamline the FOFA conduct obligations.

We will further consider whether to give industry guidance on what records AFS licensees should keep to demonstrate that they have complied with these provisions.

We may also revisit the need to impose specific record-keeping obligations in relation to ongoing fee arrangements and fee disclosure statements in light of our regulatory experience.

In the meantime, we strongly encourage industry to take the initiative and ensure that records are kept to demonstrate that the AFS licensee and its representatives have complied with the provisions on ongoing fee arrangements and fee disclosure statements.

## C Record-keeping obligations in relation to conflicted remuneration

### Key points

This section outlines the feedback received on our proposal to update the record-keeping obligations for AFS licensees in relation to the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A of the Corporations Act, and summarises our response to that feedback.

- 34 In CP 214, we proposed to modify the law, by way of class order, to require that, when an AFS licensee or its representatives give financial product advice to retail clients, the licensee must retain records of the following matters:
- (a) any arrangement (or any change to an arrangement), and any payments made or accepted under such arrangements, on the basis of which the licensee considers that the conflicted remuneration provisions do not apply to the licensee or its representatives because of the relevant transitional provisions in the Corporations Act; and
  - (b) records demonstrating the circumstances in which the licensee or its representatives rely on the exemptions from the conflicted remuneration provisions in s963B or 963C for monetary and non-monetary benefits.
- 35 We proposed that AFS licensees would be required to keep a record of these matters—whether in a material, electronic or other form—for a period of at least seven years from the date the advice is provided.

### Stakeholder feedback

- 36 Three submissions supported the proposed record-keeping obligations in relation to conflicted remuneration, with one respondent highlighting that, despite the additional compliance costs that may be incurred, the requirements would be a reasonable extension of existing obligations.
- 37 However, a majority of respondents did not support the record-keeping proposal in relation to conflicted remuneration.
- 38 While recognising that AFS licensees will need to keep sufficient documents to support the position they have taken to comply with the conflicted remuneration provisions, a few respondents expressed concern about the practicality of what was being proposed. They did not think it would be efficient to require licensees to maintain records of all arrangements and individual payments (or determinations in relation to those arrangements). One submission said that it should be sufficient for licensees to keep copies

of policy documents, compliance standards, agreements and contracts to demonstrate compliance with the conflicted remuneration provisions, rather than requiring licensees to keep records relating to individual payments and transactions.

- 39 Respondents were also concerned that it would not be practical to require AFS licensees to keep records demonstrating the circumstances in which the licensee or its representatives rely on the exemptions to form the view that the benefit is not conflicted. They suggested that, in practice, the proposed obligation was likely to mean that, annually, thousands of additional individual records relating to such benefits would need to be separately justified as each benefit could be slightly different.

*ASIC's response*

On the basis of the feedback received, we have decided not to modify the law at this stage to impose a specific obligation on AFS licensees to keep records to demonstrate that the licensee and its representatives have complied with the conflicted remuneration provisions.

Our response takes into account the Government's current objective of reducing the regulatory burden for individuals and businesses, the current moratorium on new financial services regulation and the recent amendments to streamline the FOFA conduct obligations.

We will further consider whether to give industry guidance on what records AFS licensees should keep to demonstrate that they have complied with the conflicted remuneration provisions.

We may also revisit the need to impose specific record-keeping obligations in relation to conflicted remuneration in light of our regulatory experience.

In the meantime, we strongly encourage industry to take the initiative and ensure that records are kept to demonstrate that the AFS licensee and its representatives have complied with the conflicted remuneration provisions.

## D Record-keeping obligations in relation to intra-fund advice

### Key points

This section outlines the feedback received on our proposal to update the record-keeping obligations for AFS licensees in relation to the intra-fund advice provisions, and summarises our response to that feedback.

- 40 In CP 214, we proposed to modify the law, by way of class order, to introduce a record-keeping obligation for trustees of regulated superannuation funds (as AFS licensees) that provide members of the fund with personal advice for which the trustees are not permitted to collectively charge members as intra-fund advice in accordance with s99F of the SIS Act.
- 41 Under the proposal, trustees would be required to keep a record of certain matters—whether in a material, electronic or other form—for a period of at least seven years from the date the advice is provided. These matters are:
- (a) the advice, including a note to identify whether the cost of the advice is allowed to be charged to a member or members other than the recipient and, if so, on what basis—unless the cost is in fact wholly charged or borne in certain circumstances; and
  - (b) if the cost of the personal advice is not allowed to be charged to members (other than the recipient), a record of how much the advice cost to provide, and how much the member receiving the advice was charged.

### Stakeholder feedback

- 42 Three respondents supported the proposal for trustees to keep a record of the intra-fund advice provided to members. They recognised that, despite the additional costs that may be incurred, this would be a reasonable extension of existing obligations that would help to meet the underlying objectives of the FOFA provisions.
- 43 There was mixed feedback from some respondents about the proposed requirement for trustees to calculate and keep records of how much the advice cost to provide and, specifically, the requirement that trustees record details about the method of calculation and why the estimation applied was reasonable. Respondents expressed concern that it would not be practical to require trustees to separately cost each piece of intra-fund advice provided.
- 44 The concern expressed by some respondents was at a general level, in that the proposals would be impractical to implement, given that this would be a

new obligation for trustees. However, this concern was not supported by specific arguments and estimates about additional costs and burdens that would result from the proposals.

- 45 On the other hand, one respondent fully supported all of the proposed obligations for keeping records of the charging for intra-fund advice.

*ASIC's response*

We have decided not to modify the law at this stage to impose a record-keeping obligation on the trustees of regulated superannuation funds (as AFS licensees) in relation to providing intra-fund advice, because to do so would impose new regulation that would be inconsistent with the Government's current moratorium on new financial services regulation.

However, we will give further consideration to what guidance we can give to industry about the records that trustees should keep to demonstrate that they have complied with s99F of the SIS Act.

We may also revisit the need to impose specific record-keeping obligations in relation to providing intra-fund advice in light of our regulatory experience.

In the meantime, we expect that superannuation trustees, under their general duties (including their general obligations as an AFS licensee), will ensure that adequate records are kept of the intra-fund advice provided, the charging decision and the reasoning for this decision in order to justify how trustees charge for this advice directly or indirectly: see Information Sheet 168 *Giving and collectively charging for intra-fund advice* (INFO 168).

If a trustee is an AFS licensee, the trustee must also ensure that records are kept of any personal advice that is provided—including SOAs and the information required under [CO 14/923]—for a period of seven years from the date that advice is provided.

## E Other issues

### Key points

This section outlines the feedback we received about:

- the commencement of the proposed record-keeping obligations;
- the need for an appropriate transitional period; and
- the compliance costs associated with the record-keeping obligations.

This section summarises our response to that feedback.

### Transitional period

- 46 Some submissions raised the issue of an appropriate transitional period. We received feedback from a few respondents that the industry would need additional time and resources to make any necessary changes to their existing record-keeping systems and processes, and the substantive nature of the proposed requirements would mean that it would be difficult for industry to comply by 1 July 2014.
- 47 Three submissions expressed support for a transitional period of at least 12 months to comply with the proposed record-keeping obligations for personal advice, conflicted remuneration and intra-fund advice.

#### *ASIC's response*

Based on the feedback received, we have given AFS licensees a transitional period of six months from the date that [CO 14/923] is made in order to comply with the record-keeping obligations for personal advice.

We have decided not to give AFS licensees a longer transitional period, given that we are limiting the scope of the updated record-keeping obligations to apply only to records of personal advice that demonstrate that the licensee and its representatives have complied with the best interests duty and related obligations.

We do not think that industry will need to make substantive adjustments to existing compliance systems and processes. As discussed in Section B, we consider that the class order requirements are only a technical update of the previous record-keeping licence condition and, in practice, we do not expect the documents that need to be kept will change as a result.



## Commencement

- 48 Some respondents submitted that the record-keeping obligations should not apply retrospectively. Instead, the requirements should commence from the date the class order is made, and allow for a reasonable transitional period for AFS licensees to comply.

### *ASIC's response*

We confirm that the record-keeping obligations will commence from the date that [CO 14/923] is made.

## Compliance costs

- 49 In CP 214, we sought feedback on whether the record-keeping proposals would require AFS licensees (including trustees of regulated superannuation funds) to significantly change their existing record-keeping practices, and what the likely compliance costs would involve.
- 50 A few submissions expressed concern that the proposed record-keeping obligations in CP 214 could impose substantial initial and ongoing compliance costs on industry, and would require all AFS licensees and their advisers to implement new policies and procedures, as well as significant changes to internal and external technology, document management systems, and industry arrangements.
- 51 Two respondents estimated that the costs of the technology upgrade and implementation associated with the record-keeping proposals in CP 214 could be in excess of \$100 million across the industry.

### *ASIC's response*

We acknowledge concerns about the compliance costs associated with the proposals in CP 214, and have taken these into account when making our decision to proceed only with the record-keeping obligation in relation to the best interests duty and related obligations. As discussed above, we consider that this is only a technical update to the previous record-keeping obligation that applied to AFS licensees before the FOFA reforms commenced on 1 July 2013.

While the information that AFS licensees will be required to record is different because of the change in the substantive obligations (i.e. from the appropriate advice obligation in s945A to the new best interests duty and related obligations), the requirement for licensees to keep records—and the associated processes, procedures and compliance tasks—are unlikely to require significant, if any, changes under [CO 14/923].

In practice, we also expect the documents that need to be kept will not generally change under the class order. For example, licensees can continue to keep the following documents to demonstrate that the licensee and its representatives have complied with the best interests duty and related obligations:

- the advice document;
- fact-finding documents used when making inquiries into the client's relevant circumstances; and
- file notes, including records of conversations and records of research or analysis of financial products.

At the same time, we encourage industry, when making future submissions to ASIC on the potential compliance costs associated with the implementation of a policy proposal, to ensure that their estimates of compliance costs are adequately substantiated and clearly demonstrate how our proposals would cause unreasonable burdens for industry. Compliance cost estimates should adequately differentiate the costs resulting from a specific proposal from those that would otherwise arise. This will help ASIC, in future, to better assess the likely impacts on industry of our regulatory policy proposals, and determine whether there are other feasible options that could meet our policy objectives.

## Appendix: List of non-confidential respondents

- 
- Australian Bankers' Association
  - Association of Financial Advisers
  - Association of Superannuation Funds of Australia
  - Financial Services Council
  - Industry Super Australia / Australian Institute of Superannuation Trustees
  - National Insurance Brokers Association
  - Pajeska Group Pty Ltd
  - Stockbrokers Association of Australia
-