

9 March 2021

Ms Amanda Fairbairn
Policy Lawyer
The Behavioural Unit
Australian Securities and Investments Commission
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Brisbane QLD 4001

via email: remediation@asic.gov.au

Dear Ms Fairbairn

Consumer Remediation: Update to Regulatory Guide 256

My Office welcomes the opportunity to comment on potential changes to Regulatory Guide (RG) 256 regarding consumer remediation. We have had many interactions with small financial advice businesses since RG 256 was introduced in 2016, including through our ongoing work on AMP's treatment of its financial planners. We acknowledge the importance of client remediation programs and provide the following feedback.

Small businesses need certainty

ASIC should ensure that its guidance provides certainty to businesses about their obligations. Small businesses in the financial advice sector arguably face the highest regulatory burden of any small business in Australia. Vague guidance or expectations means small businesses have to make more decisions in their compliance efforts, which takes more time. It also creates risk for small businesses around retrospective action in the future should interpretations about appropriate action change.

A key aspect of certainty is the value of the remediation owed to the client. Our Office notes that the *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* will amend the *Corporations Act 2001* to require licensees take reasonable steps to pay an affected client an amount 'equal to the loss or damage' within 30 days of completing an investigation. However, Consultation Paper 335 states remediation should return clients 'to the position they would have otherwise been in, as closely as possible'. We recommend that any changes to RG 256 should reflect the approach used in the legislation to avoid confusion.

Regulatory burden hurts access to affordable advice

A high regulatory burden hurts the viability of small financial advice and brokerage businesses and reduces access to affordable advice, which is one of ASIC's policy goals. ASIC should minimise the regulatory burden associated with consumer remediation, particularly on small businesses who face a higher regulatory burden impact than larger operators. If certain licensees make commercial decisions to remediate further than required, including default remediating all low value accounts, this should not set a new industry standard.

Who is actually paying for client remediation?

In addition to extra remediation being a commercial decision, it is our understanding that certain financial services licensees, such as AMP, are pushing the client remediation cost onto individual financial planners. This is manifestly unfair where those planners were complying with the licensee's guidance, or where the licensee failed to provide adequate guidance or training to planners. In cases

where the licensee's guidance or training has led the individual advisor to breach standards, the costs should not rest with the individual advisor.

ASIC should ensure that licensees, as part of their reporting requirements on consumer remediation, must report on the proportion of remediation costs that the licensee is bearing and the proportion that individual planners are bearing. ASIC should also closely scrutinise where licensees push consumer remediation costs onto individual planners, noting the power imbalance that often exists between large licensees and their planners.

Comments on specific proposals in Consultation Paper 335

Section B: We do not support the proposal for a two tier remediation model. Licensees have existing and extensive duties to their clients, including to act efficiently, honestly and fairly and the duty to act in their client's best interests. These legislated duties should underpin remediation. The introduction of further non-binding, undefined and changeable 'standards, expectations and/or values' as a trigger for remediation would create an unacceptable level of uncertainty for businesses.

Section C: We suggest that the proposed expansion of the remediation period in C1 should only go as far back as reasonable with regards to document availability, resources of the licensees involved and scope of the remediation needed. Importantly, records destroyed in accordance with the law should not be required to be recreated or, in the absence of other indications, be subject to beneficial assumptions in favor of the client. It is vital that small operators are not required to exhaust disproportionate resources on this process.

Section F: While we understand the need for licensees to find and pay consumers remediation where possible, the blanket inclusion of 'best endeavors' creates uncertainty for businesses. We recommend that this guidance include a list of suggested activities for businesses to undertake to show these 'best endeavors' and that the list take into account the value of remediation. This list should serve as a non-prescriptive guide to aid businesses in fulfilling their regulatory obligations. ASIC should view a business's reasonable implementation of some of the listed activities as evidence of best endeavors.

Should the low-value compensation threshold be removed it is up to individual licensees if they want to pursue consumer remediation for low-value amounts. However, to support certainty we suggest ASIC produces a threshold guide for licensees that supports their decision making.

We look forward to providing comment at a later stage on the relevant Regulatory Impact Statement for any proposed changes.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact _____ on _____ or at _____.

Yours sincerely

Australian Small Business and Family Enterprise Ombudsman