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Dear Xenia

ASIC Consultation Paper 247, Client review and remediation programs and update to record-keeping requirements

Westpac Group (**Westpac**) appreciates the opportunity to provide comments to the Australian Securities and Investments Commission (**ASIC**) on ASIC's *Consultation Paper 247, Client review and remediation programs and update to record-keeping requirements (CP 247)*.

A. INTRODUCTORY COMMENTS

Westpac supports a principles-based approach to guidelines in relation to the design and operation of client review and remediation programs, along with calls for a streamlined, consistent and well-understood approach to remediation. In this regard, Westpac is supportive of ASIC's proposal to issue a regulatory guide that is directed at Australian Financial Services (**AFS**) Licensees who provide personal advice to retail clients (**Advice Licensees**) to provide guidance in circumstances where there is a need to remediate clients who have suffered loss as a result of the decisions or behaviours of the Advice Licensee (or an individual adviser or advisers).

However, we believe it is critical that any such approach is flexible and adaptable taking into account the nature, scale and complexity of each individual licensee and the specific circumstances that the remediation program seeks to address. We encourage ASIC to adopt a proportionate approach to the nature, reach and governance of such remediation programs and to recognise that the appropriate governance and reporting associated with such programs will depend on the type and scale of the Advice Licensee, the scale of the program and the nature of the circumstances subject of remediation.

Westpac endorses a view that while this guidance will target Advice Licensees, it will be formative to the remediation programs undertaken by other AFS Licensees, such as

superannuation trustees, credit providers or financial service and product providers. In this regard, Westpac agrees that principles-based, scalable guidance could be applied across all AFS Licensees in regards to determining the potentially impacted client cohort, noting there will (and should) be differences depending on the relationship between the AFS Licensee and the client.

B. SPECIFIC COMMENTS

(a) Timeframe

At CP 247.87, ASIC indicates an expectation that Advice Licensees review advice as far back as the licensee has retained records, including where a licensee has retained records for longer than the minimum 7 years.

While the applicable timeframe should be reasonable and flexibly applied taking into account applicable facts and circumstances, it is equally necessary to have regard to statutory limitation periods, as well as record retention obligations. Extending a requirement beyond statutory limitation periods and record retention requirements abrogates normal legal protections of licensees and also risks:

- setting unreasonable client expectations (for example, by those clients whose records have not been retained beyond 7 years),
- inequitable treatment between clients (such as between clients where records have been retained beyond 7 years, versus where they have not),
- establishing precedents that cannot be consistently applied by each licensee (for example, where different record retention practices have been applied by different offices), and/or
- inequitable obligations across different licensees (that will all have differing record retention policies).

The potentially extended timeframe also adds regulatory complexity to the remediation process as the file review must be based on the law at the time, which in the financial services context, has undergone significant and progressive reforms over the past 10-15 years.

(b) Definition of Systemic Issue

CP 247 is intended to apply to Advice Licensees conducting a program to address systemic issues that are a result of the decisions and behaviour of the licensee (or its representatives) in relation to personal advice.¹ A 'systemic issue' is defined as an issue that may have implications beyond the immediate rights of the parties to a complaint or dispute, or that may have implications for more than one client.²

¹ CP 247 paragraph 11

² CP 247 paragraph 8

It may be appropriate to characterise as systemic a matter that impacts more than one client, however this will necessarily depend on the specific circumstances. Further, the use of differing definitions in different ASIC Regulatory Guides will potentially lead to confusion amongst licensees and clients. In this regard, we suggest that the definition of systemic issue should be aligned with the existing definition used in *ASIC Regulatory Guide 139 Approval and Oversight of External Dispute Resolution Schemes (RG 139)*, which states at RG 139.119 "At a broad level, systemic issues relate to issues that have implications beyond the immediate actions and rights of the parties to the complaint or dispute." RG 139.120 continues to recognise that "while several complaints or disputes of the same type may indicate a systemic problem, we do not believe that it is sufficient to define or classify a systemic issue by reference only to the number of complaints or disputes a scheme may have received."

Westpac also suggests that a materiality threshold is also appropriate to allow for proportionate application of ASIC's guidance to the scale and significance of the matters subject to remediation.

(c) Governance Arrangements

At CP 247.139, ASIC's guidance notes that the governance arrangements required as part of a review and remediation program will depend on the size of the licensee and the scope of the program.

Westpac supports this acknowledgement of the need to consider nature, scale and complexity of both the licensee and the remediation program in determining the appropriate governance arrangements for the program. It is important that this guidance flows through all aspects of ASIC's guidance, including for example to any guidance around management reporting acknowledging that board-level reporting would ordinarily only apply for programs which are material in the context of the licensee.

(d) Completion Times

At CP 247.116 ASIC states advice should be reviewed in a timely way and as quickly as possible without compromising the quality of the review, and that licensees should make a decision about whether to remediate an affected client within 90 days of notifying the client that they are within the scope of the program.

Westpac agrees that remediation programs should be completed expeditiously and prescribing timeframes can provide clients with a degree of certainty. However, often the ability to make a decision regarding remediation depends on a number of external factors beyond the licensee's control. Importantly, the client plays a critical role in determining an appropriate remediation outcome and often it is necessary to obtain further information or feedback from the client. The remediation program should be flexible to allow both the client and the licensee appropriate time

to consider facts, exchange correspondence and respond accordingly. Given such circumstances, it would not be appropriate to set prescriptive timeframes on the completion of customer outcomes.

As an alternative, we suggest it may be appropriate to provide guidance that timeframes should be fair and reasonable having regard to the specific circumstances of each client.

(e) Interaction with Internal Dispute Resolution Obligations

CP 247.55 states that where a client that is within the scope of the remediation program makes a complaint, Internal Dispute Resolution (**IDR**) obligations will apply to that matter, including the IDR timeframes. This means that a final response regarding remediation must be provided to the complainants within 45 days, or the client must be informed of their External Dispute Resolution (**EDR**) rights. As described at (d) above, we do not believe that setting prescriptive timeframes are appropriate in this case.

The suggested approach provides an unfair advantage to clients that complain and may potentially lead to vexatious complaints. There also appears to be limited benefit to mandating this approach when in reality, given the substantive and likely complex nature of any material remediation (particularly in a large remediation program), there is limited likelihood that the complaint can be resolved within 45 days.

(f) Public Disclosure and Reporting

At CP 247.147 ASIC suggests public reporting by the Advice Licensee is especially important for larger remediation programs, particularly where they follow public reports of customer losses or alleged misconduct.

This proposition appears to amount to a public interest test arising each time a remediation program is underway. Westpac considers that it is appropriate to have regard to existing public disclosure obligations, where such obligations arise. However, where there is no such obligation, public disclosure should be considered and assessed so as to enable appropriate engagement with clients within the scope of the remediation³ or as part of the licensee's decisions on its corporate affairs approach, not by any broader "public interest test".

(g) Independent Review/Assurance

At CP 247.132, ASIC proposes that all remedial programs have some level of independent oversight in developing and operating the program. Such oversight can be provided by an external party, an independent internal party or the licensee's EDR scheme.

³ For example, a separate public interest may arise if potentially impacted clients would otherwise not be contacted directly by the licensee and in that case, it may be appropriate for the licensee to make a public disclosure regarding the remediation program.

Westpac supports this approach and agrees that there is significant value in independent oversight of remediation programs and welcomes the recognition of independent internal functions in providing this assurance. In this regard, Westpac operates a three-lines-of-defence model with roles played by internal Audit, internal Risk, Compliance and Legal teams, amongst others, in providing review and assurance over all activities conducted by our business units. These second and third-line functions operate independently of the business and could indeed provide appropriate independent assurance (particularly in “business as usual” remediation programs).

(h) Independent Support for Customers

At CP 247.183, ASIC has proposed Advice Licensees should consider whether it is appropriate to offer assistance to clients who wish to seek professional advice (legal or financial) about whether the licensee’s decision (and presumably the value of the offer) to remediate (or not) is appropriate, and proposes as an example, licensees could offer to reimburse clients up to \$5,000 to cover costs of professional advice sought.

Where the remediation program sets out in a transparent way the reasons for any decision made around remedial activity, including considerations around impacts and compensation, the need to provide for further professional services should not be mandatory in all cases. Westpac considers that such decision should depend on the individual circumstances (considered on a case-by-case basis), for example assistance may be appropriate for customers whose personal circumstances suggest a special vulnerability.

In ASIC’s guidance, we suggest that it will be important that any such proposal is regarded as a matter for consideration in the design and implementation of the remediation program, rather than being a prescribed expectation that such offers will always be necessary or appropriate. We consider this is particularly appropriate given where a client is unhappy with, or uncertain about, a remediation outcome, the client has access to the licensee’s IDR scheme, and ultimately the licensee’s EDR scheme, both of which can provide an independent review of the outcome free of charge.

(i) Allocating Adequate Resources

At CP 247.107, ASIC’s guidance is that adequate resources should be allocated to a review and remediation program to ensure it is conducted in an efficient and timely way. Further, at CP 247.109, ASIC states senior management should assess the need for resources and provide them without undue delay.

Westpac supports this prioritisation in principle, however we note the preparation and sequencing of a remediation program, particularly one also involving other parties (such as external assurance, independent legal or financial advisers) will need to be carefully managed.

Moreover, remediation needs may arise in the context of other concurrent remedial activities (of different scales) requiring careful and considered deliberations around whether prioritisation is required and if so, how priorities should be determined.

Further, it is necessary to acknowledge the existing scarcity of human resources with the relevant skills that are typically required during a remediation program – specifically those with specialist skills in reviewing client files or engaging with advice clients. Access to suitable specialists may be additionally challenging in the current environment where there is a drive to increase the standard and professional skills of advisers and the industry is in transition.

These challenges also impact the timeframes in which a remediation program can be completed.

(j) Compensation

At CP 247.122, ASIC's guidance notes that compensation should be calculated in line with relevant EDR scheme principles.

While we would support a principles-based approach to determining the appropriate compensation, Westpac considers any guidance should be flexible to allow for compromise, where appropriate, and to provide for the licensee and client to agree an outcome that is appropriate for their particular circumstances.

In most cases, adviser conduct breaches will involve a breach of the Corporations Act (the **Act**) or breach of common law (for example, tort law) and in such cases compensation will need to have regard to what the customer is entitled to under the Act or at law. Given each case will be unique, a prescriptive approach to compensation would likely result in inequitable outcomes.

(k) Transition period

We understand that ASIC proposes to finalise its Regulatory Guide following this consultation in approximately May 2016. Following release of ASIC's guidance, some time will be needed for licensees to assess the impact of the final guidance, identify and implement the necessary internal policy changes, perform the required system and process updates, recruit resources (if necessary) and train staff. To ensure a smooth and efficient implementation of the guidance, we suggest that an appropriate transition period, of at least 12 months, should be allowed.

Further, some licensees, including Westpac, have existing remediation programs underway which have been developed in line with current industry standards and best practice. To allow these programs to continue without undue delay or potential confusion to clients, we suggest that ASIC's guidance should apply only to remediation programs commenced after ASIC's guidance is issued.

Should you require any further information or to respond to this letter, please contact Josh Moyes on (02) 8253 3445 or by email at jmoyes@westpac.com.au.

Yours sincerely



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