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ASIC CP 247 Client review and remediation programs and update to record-keeping requirements

Thank you for the opportunity to respond to ASIC CP 247.

In this submission:

- The FPA Supports the underlying principle in ASIC's proposed guidance that AFS licensees have a moral duty to actively seek out and fairly compensate clients who have suffered material losses as a consequence of licensee or representative acts or omissions in breach of financial services laws;
- The FPA believes that getting remediation right where serious breaches of financial services laws have occurred is an important element in rebuilding public trust and confidence in financial advice;
- We identify that it is the events involving serious breaches of financial services laws, and which contribute to material client loss that deserve the community's moral opprobrium and warrant significantly escalated AFS licensee response;
- Subject to the governance frameworks proposed in the guidance, the FPA supports the related principle that in complying with this moral duty, it is in the interests of consumers, the profession, and the wealth management industry for licensees to be free to act commercially in the review, remediation and compensation of such clients;
- The FPA has concerns that the threshold proposed in ASIC's guidance requiring a licensee to introduce a review and remediation program is set too low and will require licensees to incur significant costs to implement, with such costs likely to be passed back to some consumers as higher charges;

- We recommend ASIC clarify the intent of the proposed guidance is to ensure serious breaches of financial services laws causing material loss to consumers receives the desired licensee escalation and response;
- We have incorporated some feedback from the FPA's member committees. Owing to the timing and size of the consultation paper, it has not been possible to seek direct feedback from members generally.

General comments

Committee members in practice expressed general concerns:

- That ASIC's proposed guidance will potentially increase costs and have adverse consequences on professional indemnity insurance for small licensees and small businesses;
- There are pejorative references to adviser 'misconduct' peppered through the proposed guidance;
- The length and complexity of the guidance, make it difficult in parts to understand ASIC's intent.

Clarifying the problem the guidance is intended to solve

We believe the proposed guidance could be enhanced with a clear statement of the problem the guidance is intended to address. The persistent inability of some large institutions to identify and promptly remedy serious breaches of financial services laws to the satisfaction of impacted consumers risks undermining public trust and confidence in financial advice. Issuing guidance can be an effective means for ASIC to clarify AFS licensee obligations if it is clear and precise.

We make specific comment below about the desirability of improving the language and definitions of key terms in the guidance. This task will be assisted if ASIC gives greater clarity about the intent of the guidance.

We think paragraph 49 captures ASIC's intent. It states:

A review and remediation program is not appropriate in all circumstances. The aim of a review and remediation program is for advice licensees to seek out clients who have potentially been affected by misconduct, and to remediate those clients for any losses suffered.

We recommend ASIC's proposed guidance gives greater prominence to this intent.

We also recommend that ASIC identify that in most circumstances the problem of not being able to identify clients who may have been affected by 'misconduct' is an issue related to the scale of the licensee's operation. FPA Committee members in small



practices provided feedback that they felt the guidance is probably directed towards the historical conduct of large institutions and would have little practical relevance to them as it is highly unlikely they would identify a 'systemic issue' of misconduct in their own businesses. Whereas it is conceivable that large licensees with tens of thousands of clients serviced by large numbers of representatives over many years may have difficulty identifying some impacted clients, small licensees with smaller client books are likely to be closer to their clients, and in a position to directly manage the impact of any issue.

Clearly and prominently identifying the problem the guidance is intended to solve in this way will also assist to provide assurance to small licensees and their professional indemnity insurers that they are unlikely in most circumstances to be required to build a review and remediation program.

Trigger for a review and remediation program

ASIC states the trigger for a remediation in paragraph 48 of the proposed guidance:

Generally, a review and remediation program of the type covered in our proposed guidance will be appropriate when:

- (a) a systemic issue has been identified that is a result of the decisions and behaviour of the advice licensee, or an individual adviser or advisers (as representatives of the licensee), in relation to the provision of personal advice; and*
- (b) the affected clients are likely to have suffered a loss (whether monetary or non-monetary).*

We recommend that the trigger is too imprecisely cast to be effective. Whilst 'systemic issues' are important to address, it is the events involving serious breaches of financial services laws, and which contribute to material client loss that is deserving of the community's moral opprobrium and warrants significantly escalated AFS licensee response.

We recommend ASIC communicate its focus on the real issue to ensure that licensees will devote the right resources and attention to the big events that undermine public trust and confidence in advice. Financial services laws already establish obligations on licensees for handling and compensating consumers for the more mundane mistakes that are sometimes inevitable when products and services are provided to large numbers of consumers by large commercial operations. The industry already has generally sound arrangements through existing IDR and EDR schemes to manage the mundane, and to identify and escalate 'systemic' complaints and breaches when required and to report 'serious misconduct'. This guidance should be simplified and clarified to call out the real issue.

‘Systemic issue’ –v- serious breach of financial services laws?

In our view the guidance should be simplified and clarified to focus on the extraordinary. Systemic issues are already well defined in RG 139 and well catered for in existing requirements. What should make licensees boards sit up and take notice and devote special resources to the problem? In our view, it is serious breaches of financial services laws by the licensee or their representative causing material losses to consumers.

‘client loss (including monetary and non-monetary loss) –v-material client loss

We recommend the actual or potential consumer loss has to be ‘material to the impacted consumers’ to be deserving of (ASIC mandated) escalation beyond existing licensee obligations.

‘Misconduct’ terminology is not helpful and should be left to professional bodies

We note that the term ‘misconduct’ is not defined in the proposed guidance and could include anything from a serious breach of financial services laws including fraud, to mere negligence causing client loss. As a consequence the rationale for extending requirements beyond existing complaint handling obligations on AFS licensees in the Corporations Act may be lost. In our view the use of the term ‘misconduct’ will create confusion in the context ASIC is seeking to apply it and is more appropriately left to the field of professional regulation.

ASIC RG 78 is organized around the requirement to report ‘significant breaches’ of financial services laws. It identifies breaches of financial services obligations which cause loss to clients as a potentially serious and therefore ‘reportable’ breaches, yet manages to avoid potential confusion with the terms ‘misconduct’ or ‘serious misconduct’.

The proposed guidance adopts the term ‘systemic issue’ from ASIC RG 139 i.e. ‘*A systemic issue is 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*’ [paragraph 8 of the proposed guidance].

RG 139 requires approved EDR schemes to report both ‘systemic issues’ and ‘serious misconduct’ to ASIC, where ‘*Serious misconduct may include fraudulent conduct, grossly negligent or inefficient conduct, and wilful or flagrant breaches of relevant laws*’ [RG 139.124].

In contrast to RG 139, the proposed guidance states that a systemic issue ‘*could include misconduct*’ [paragraph 40]. This would appear to include mere negligence



where it includes a breach of a financial services law resulting in client loss and sets a very low threshold at which ASIC potentially requires a licensee to undertake a program or review and remediation.

It is unclear whether ASIC is intending to set up a distinction between 'serious misconduct' and 'misconduct' and if so, whether this distinction is to apply to licensee conduct or adviser conduct, or to both. In our view this language is more appropriately left to the field of professional regulation of individual conduct.

The use of the terms 'systemic issue' and 'misconduct' is therefore potentially at odds with other ASIC guidance and may add unnecessarily to the complexity and confusion for licensees when applying the guidance.

We make specific comments to the questions in the attached document.

We would be happy discuss further with you any of the recommendations made in this submission.

Sincerely

John Bacon
General Manager Professional Standards

Specific Feedback by FPA to ASIC CP 247	
ASIC Proposal B1	We propose the guidance set out in paragraphs 31–35 on how we will define a ‘review and remediation program’.
ASIC Feedback Question B1Q1	Have we appropriately defined a ‘review and remediation program’ for the purposes of this guidance? If not, please give details. Please also provide alternatives.
FPA Response	<p>No. ASIC has not appropriately defined a ‘review and remediation program’ for the purposes of the guidance. The guidance seeks to rely on the general license obligation in s.912A (1)(a) and specific requirement on licensees to have <i>compensation</i> arrangements for retail clients in s.912B to provide authority for the guidance. We note the statute refers to ‘compensation’.</p> <p>We note that it is not clear whether ASIC’s guidance is seeking to impose any additional requirements on AFS licensees to the requirement to have compensation arrangements, and if so. We would recommend that if ASIC is seeking to extend the law it should say so in the guidance and indicate its authority to do so to provide certainty and avoid possible challenges to the proposed regulatory guidance.</p> <p>We recommend a clear statement that it is ASIC’s intention that the guidance only apply where:</p> <ol style="list-style-type: none"> a) client losses have occurred on a ‘systemic’ scale; b) the loss is material; c) the loss is caused by (or materially contributed to) the act or omission of an AFS (advice) licensee, or a representative of the licensee; d) the act or omission is ‘serious misconduct’¹; e) there is uncertainty identifying clients who have <i>actually</i> suffered loss²; f) in order to treat those clients ‘efficiently, honestly and fairly’ for the purposes of compensation, the licensee wishes to adopt a scaled response (ie the response will involve ‘one-to- many’ communications); in addition to or in substitution for an individually tailored response. <p>The word ‘review’ in the phrase ‘review and remediation’ does not appear to add anything, and therefore if ASIC has a specific meaning of this term it needs to be more clearly defined.</p> <p>Lastly we note, there does not appear to be any specific statutory authority for ASIC’s concept (however desirable or otherwise) of ‘non-monetary remediation’ in paragraph 35. We recommend ASIC adopt the phrase material loss and recognise that what is immaterial to one client may well be material to</p>

¹ There are 56 uses of the term ‘misconduct’ in the paper. It is used liberally in the paper to pathologize adviser conduct. The term is not defined in the document. It is not clear in the paper whether ASIC intends that ‘review and remediation’ programs be limited in application to conduct in breach of the Corporations Act or ASIC Act (i.e. *misconduct*), or whether it would extend to merely negligent conduct causing or contributing to client loss. ASIC appears to mean something less than the term ‘serious misconduct’ which it defines in RG 139.24 ‘*Serious misconduct may include fraudulent conduct, grossly negligent or inefficient conduct, and wilful or flagrant breaches of relevant laws.*’.

² Cf paragraph 49: ‘... The aim of a review and remediation program is for advice licensees to seek out clients who have potentially been affected by misconduct, and to remediate those client for any losses suffered.’

	another because of their particular circumstances, (where known to the licensee or representative).
ASIC Proposal B2	We propose the guidance set out in paragraphs 36–41 on how we will define a ‘systemic issue’
ASIC Feedback Question B2Q1	Have we appropriately defined a ‘systemic issue’ for the purposes of this guidance? If not, please give details. Please also provide alternatives
FPA Response	<p>No. ASIC conflates its requirement in RG 139.116 – RG139.146 on EDR schemes to report systemic issues and serious misconduct.</p> <p>CO 09/339 adopting parts of AS ISO 10002-2006 provides only tenuous authority for the proposition in paragraph 38 that licensees are required through IDR procedures to determine whether any systemic issues are present. Clause 8.2 in AS ISO 10002-2006 simply states:</p> <p>8.2 Analysis and evaluation of complaints All complaints should be classified and then analysed to identify systematic, recurring and single incident problems and trends, and to help eliminate the underlying causes of complaints.</p> <p>AS ISO 10002-2006 qualifies its application for small businesses, recognising <i>‘many smaller businesses will have limited resources to dedicate to setting up and maintaining a complaints-handling process’</i> and the Analysis and clause 8.2 evaluation of complaints is not identified as a particular area of focus for small business [Annex A]. ASIC does not adopt the qualification in CO 09/339. Misconduct is not defined in paragraph 40 and the non-exclusive list of examples provided seem unduly limited to adviser conduct when the recent history of ‘systemic’ advice failure in the industry have been widely attributed to AFS licensees failing to comply with their general obligations.</p> <p>We also have some concern that definition of ‘systemic issue’ is not adequately aligned to other ASIC regulatory guidance to licensees and that this will make compliance complex and more costly and unfair to small licensees. For example, ASIC has not linked (or explained) the notion of ‘systemic issue’ in the paper to the concept of ‘significant breach’ used in RG 78 Breach Reporting by AFS licensees.</p> <p>It is not clear that the introduction of the concept ‘systemic issue’ assists an AFS licensee with the task at hand, namely to recognise that there may be unidentified clients who have suffered material loss as a consequence of action or inaction by the licensee or its representatives that the licensee is already legally required to identify and compensate.</p>
ASIC Proposal B3	We propose the guidance set out in paragraphs 42–45 on when our proposed guidance will apply
ASIC Feedback Question B3Q1	Do you agree with how we have described the application of the proposed guidance? If not, why not?
FPA Response	No. The non-exclusive list of examples provided in clause 42 seem unduly limited to adviser conduct when the recent history of ‘systemic’ advice failure in the industry have been widely attributed to AFS licensees failing to comply with their general obligations. For example the failure of a licensee to recruit competent advisers, the failure of a licensee to provide adequate on-going training to maintain and develop adviser competency, and the failure of a

	<p>licensee to adequately monitor and supervise its representatives would appear to be the fundamental causes of systemic client losses.</p> <p>We have identified when the guidance should apply in our response to B1Q1 above.</p>
ASIC Feedback Question B3Q2	Do you agree that the principles in this guidance should apply to programs not relating to personal advice? If not, why not?
FPA Response	Yes. However we also think ASIC's guidance should specifically call out misconduct in: product design and disclosure; product rating, product research and by product auditors; product training; and product marketing and distribution as examples where licensees other than the advice licensee would have obligations to identify clients who suffer losses as a consequence of the misconduct by a licensee and to compensate them. Ensuring that the right 'gatekeepers' are held accountable for client losses makes it more likely underlying systemic issues causing client losses will be addressed and the risk of consumer detriment reduced in the future.
ASIC Feedback Question B3Q3	Are there circumstances when the principles should not apply? If so, please give details. Please also specify whether, and how, these principles could apply with alterations.
FPA Response	Yes. Where the act(s) or omission(s) of multiple AFS licensees 'gatekeepers' or their representatives have caused or contributed to client loss, and attribution of liability between them is not settled, or is subject to litigation, or review and remediation would void, or potentially breach an advice licensee's professional indemnity insurance and therefore adversely impact the availability of insurance to respond to retail client losses.
ASIC Proposal C1	We propose the guidance set out in paragraphs 48–51 on when it is appropriate to establish a review and remediation program.
ASIC Feedback Question C1Q1	Have we appropriately defined the threshold when a review and remediation program may be appropriate? If not, please give details. Please also provide alternatives.
FPA Response	No. The aim of the establishing a remediation program expressed in paragraph 49 is ' <i>...for advice licensees to seek out clients who have potentially been affected by misconduct, and to remediate those clients for any losses suffered.</i> ' The FPA is concerned that the threshold on licensees to establish a review and remediation program is expressed too broadly and has the potential to adversely impact small licensees' professional indemnity insurance. We recommend that ASIC's guidance should identify that the inability to identify impacted clients is typically an issue attributable to the AFS licensee's scale in delivering financial services and will therefore only rarely be an issue for small licensees, and that the requirements on small licensees when required to implement a program are scalable. For example, only a small number of clients are likely to be impacted by a 'systemic issue' in a small licensee. Even where all the clients of a single adviser within a small firm suffer losses as a result of misconduct, a review and remediation program is unlikely to be necessary where all the clients of the adviser are able to be identified and most of their losses readily identified through existing compensation arrangements (e.g. IDR and EDR).
ASIC Feedback Question C1Q2	Are there circumstances, other than those set out at paragraphs 50–51, when a review and remediation program would not be appropriate? Please specify examples

FPA Response	We have set out in our response to B1Q1 the limited circumstances in which we think a ‘review and remediation program’ should apply.
ASIC Feedback Question C1Q3	Are there other factors that advice licensees should consider when deciding whether to establish a review and remediation program?
FPA Response	Where an advice licensee wishes to assist its clients to make claims against other gatekeepers [see our response to B3Q2 above].
ASIC Feedback Question C1Q4	Please provide feedback on any costs or savings to your business as a result of the threshold at which a review and remediation program would be appropriate.
FPA Response	As drafted the guidance is likely to have a significant impact on the costs of Professional Indemnity Insurance for small licensees and may prevent small licensees from operating. This would have significant adverse impacts on small businesses across Australia with flow on impacts to local communities.
ASIC Proposal C2	We propose the guidance set out in paragraphs 52–57 on how a review and remediation program interacts with the advice licensee’s IDR and EDR obligations
ASIC Feedback Question C2Q1	Do you agree with the way we have described the relationship between a review and remediation program and the advice licensee’s IDR and EDR obligations? If not, why not?
FPA Response	No. As drafted, ASIC’s proposal will require some duplication and/or overlap with licensee IDR and EDR scheme resources. This may cause confusion for licensees and for clients. Clients may find they are required to repeat their claims to multiple schemes for little net benefit.
ASIC Feedback Question C2Q2	Will advice licensees have difficulty in meeting their IDR obligations if complaints are included as part of a review and remediation program? If so, what could be done to assist licensees?
FPA Response	ASIC could allow that a consumer’s participation in a review and remediation program suspends a consumers rights to access IDR and EDR during the review of the consumer’s issue. The consumer would retain their right to exit the review and lift the suspension of IDR/EDR at any time, or use EDR to review the review and remediation program outcome. This could assist to avoid unnecessary duplication and confusion for licensees and consumers.
ASIC Feedback Question C2Q3	Are there any barriers to advice licensees directing clients to an EDR scheme if they have a complaint about the program or a decision of the licensee? If so, what could be done to assist licensees?
FPA Response	It may not be helpful to consumers to have to set in motion a secondary set of complaints about a review and remediation program. This could be avoided by a simple mechanism that enables the client’s access to IDR and EDR complaints to be suspended whilst the matter proceeds under a review and remediation program, but with access restored if the consumer opts out of the program in favour of resuming an IDR or EDR complaint.
ASIC Proposal C3	We propose the guidance set out in paragraphs 58–73 (including Example 1) on how a review and remediation program interacts with an advice licensee’s general AFS licensing obligations.
ASIC Feedback Question C3Q1	Do you agree with how we have described a program’s interaction with the AFS licensee obligations? If not, why not?
FPA Response	Yes, however in some circumstances, given the nature and complexity of financial advice relationships that have continued for many years over multiple pieces of advice, it can be difficult to quickly establish entitlement to

	compensation for client loss. By lowering the test for participation from serious misconduct to misconduct, liability for client loss may become a matter of (expert) opinion in a given case, complicating a resolution. Similarly the contribution of consumers and other parties to loss, the need to compromise a claim may make loss claims difficult to speedily assess in practice.
ASIC Feedback Question C3Q2	Will the establishment of a review and remediation program, and a subsequent decision to remediate clients, affect an advice licensee's ability to make claims under its professional indemnity (PI) insurance? If so, please explain how
FPA Response	Yes. In our view a factor in underwriting existing professional indemnity arrangements is the risk that latent claims civil liability is translated to an actual claim. Ultimately this risk impacts underwriter profitability and is priced into premium collected. Small businesses typically find it more difficult to pass on increased premium costs to clients as higher fees. At the extreme, should ASIC's proposals manage to establish perfect adviser liability for consumer losses (i.e. latent claims liability for every incident of misconduct causing loss, is translated into an actual claim), professional indemnity insurance for small licensees would theoretically become unsustainable.
ASIC Feedback Question C3Q3	If your answer to C3Q2 is yes, what alternatives or alterations to a review and remediation program, as described in this consultation paper, could be adopted by advice licensees that hold PI insurance to enable claims to continue to be made?
FPA Response	As indicated in our response to C3Q1, ASIC should limit the threshold for establishing a review and remediation program so that it is very clear that small licensees will almost always not be required to establish a program, but would instead rely on existing compensation arrangements. ASIC should also actively support the establishment of an approved professional standards scheme for small licensees.
ASIC Proposal C4	We propose the guidance set out in paragraphs 74–76 on ASIC's role in review and remediation programs.
ASIC Feedback Question C4Q1	Do you require further guidance on ASIC's role in relation to review and remediation programs? If so, please specify what guidance you would like.
FPA Response	No.
ASIC Proposal D1	We propose the guidance set out in paragraphs 79–89 on how to identify the scope of a review and remediation program
ASIC Feedback Question D1Q1	What are some examples of how an advice licensee can determine the scope of a program?
FPA Response	In our view it would be very difficult for an advice licensee to credibly and effectively test the scope of a program without resort to an entirely independent expert. Even where misconduct sourced to the acts or omissions of a single 'bad apple', it is likely to implicate a licensee's systems of recruitment, training, monitoring and supervision, and in turn these systems will have been applied to other representatives, and their clients. We would also expect that the need for the scope to expand in response to further evidence uncovered in the course of a review and remediation program is a live issue warranting independent supervision and monitoring to support the credibility of a program.
ASIC Feedback Question D1Q2	Do you agree with our proposed factors for consideration? Are there others? If so, please specify

FPA Response	We think the guidance on scope should extend to include the advice consequences where a licensee has failed to adequately recruit, train, monitor and supervise its advisers etc.
ASIC Feedback Question D1Q3	Do you agree that advice licensees should review advice as far back as the licensee has retained records? If not, what is a reasonable timeframe?
FPA Response	ASIC should consider allowing licensees the flexibility in managing review and remediation to trade-off of the timeframe reviewed against the speed of resolution. The long term nature of financial advice engagements can mean that documentation extends back over many years and current issues may be attributable to advice errors made by multiple advisers stemming back over many years. This can significantly complicate and delay the assessment of liability and loss. In such circumstances, justice delayed may be justice denied for some clients. ASIC should permit licensees under supervision of an independent expert to compromise how far back an advice review goes in the interests of most clients obtaining a speedy resolution. For example, setting a 3 year limitation period on access to review and remediation in return for say a 90 day resolution target could be an acceptable trade-off if 90% of clients had their issues fully resolved in the timeframe.
ASIC Feedback Question D1Q4	How can advice licensees test the appropriateness of the criteria used to determine the scope of a program?
FPA Response	By sample reviewing files which are nominally outside the scope of the program for the same misconduct.
ASIC Feedback Question D1Q5	Are there any types of retail clients that should be excluded from a review and remediation program? If so, please specify.
FPA Response	Save for our comments about the interaction of IDR and EDR complaints schemes with a remediation program, we are not aware of any types of retail clients that should be excluded.
ASIC Feedback Question D1Q6	Are there any circumstances where wholesale clients should be included in a review and remediation program? If so, please specify.
FPA Response	We don't see any logical basis to exclude wholesale clients as we don't generally support a retail/wholesale client distinction in the provision of professional services. While disclosure obligations are different for wholesale clients, conduct requirements do not differ. However, given the distinction maintained in the law, access for wholesale clients to review and remediation programs could be built around the definition of misconduct. Wholesale clients should at least be entitled to have access in the event of serious misconduct as defined in RG 139.
ASIC Feedback Question D1Q7	Please provide feedback on any costs or savings to your business as a result of the proposed guidance on determining the scope of a review and remediation program.
FPA Response	We don't have a basis on which to respond other than to note that this requirement is likely to add to compliance costs and complexity and small businesses are likely to bear a disproportionate impact because are less likely to be in a position to pass on the cost to consumers in the form of additional charges.

ASIC Proposal D2	We propose the guidance set out in paragraphs 90–92 (including Example 2) on when it is appropriate to invite other clients to participate in a review and remediation program.
ASIC Feedback Question D2Q1	Do you agree that advice licensees should identify a group of clients that are within the scope of a program and, only in limited circumstances, seek interest from other clients in participating in the program? Please provide reasons for your answer.
FPA Response	In principle we agree. However we think licensees will find it difficult to credibly limit the scope in practice.
ASIC Feedback Question D2Q2	Are there any other instances when it would be appropriate to invite additional clients to participate in the program? If so, please specify.
FPA Response	We are not in a position to comment.
ASIC Proposal D3	We propose the guidance set out in paragraphs 93–96 (including Example 3) on when it is appropriate to revise the scope of a review and remediation program.
ASIC Feedback Question D3Q1	Do you agree that the scope of a program may need to be revised when new information becomes available? If not, why not?
FPA Response	Yes
ASIC Proposal E1	We propose the guidance set out in paragraphs 99–104 on how to design a review and remediation program.
ASIC Feedback Question E1Q1	Are there any other key factors an advice licensee should consider when designing a program? If so, please specify.
FPA Response	We are not in a position to comment.
ASIC Proposal E2	We propose the guidance set out in paragraph 105–111 (including our proposed key principles) on developing the processes for a review and remediation program.
ASIC Feedback Question E2Q1	Are there any other key principles an advice licensee should consider when developing the processes for a program? If so, please specify.
FPA Response	We are not in a position to comment.
ASIC Feedback Question E2Q2	Please provide feedback on any costs or savings to your business as a result of the proposed guidance on the processes for a review and remediation program
FPA Response	We don't have a basis on which to respond other than to note that this requirement is likely to add to compliance costs and complexity and small businesses are likely to bear a disproportionate impact because are less likely to be in a position to pass on the cost to consumers in the form of additional charges.
ASIC Feedback Question E2Q3	Are there other areas we should give guidance on? If so, please specify.
FPA Response	We are not in a position to comment.
ASIC Proposal E3	We propose the guidance set out in paragraphs 112–131 (including Example 4) on how advice should be reviewed for a review and remediation program.
ASIC Feedback Question E3Q1	Is it reasonable for advice licensees to make a decision on whether to remediate a client within 90 days of the client being notified that they are within the scope of the program? If not, what other timeframe would be

	appropriate? If a timeframe is not appropriate, are there other ways to ensure advice is reviewed in a timely way (e.g. regular reporting to the public)?
FPA Response	See our earlier proposal for the need to trade off timeliness with scope.
ASIC Feedback Question E3Q2	What types of remediation (monetary or nonmonetary) should advice licensees provide to clients? Are there any types of remediation licenses should not provide?
FPA Response	No comment.
ASIC Feedback Question E3Q3	Should advice licensees apply the interest rate (to calculate monetary loss) used by their relevant EDR scheme? If not, please provide alternatives
FPA Response	No comment.
ASIC Feedback Question E3Q4	Are there any circumstances, other than those listed at paragraph 129, when it would or would not be appropriate to have advice peer reviewed? If so, please specify.
FPA Response	When there is a need to independently review the advice. This would occur when the misconduct is attributable to deficiencies in the licensee's recruitment, training, monitoring or supervision of one or more advisers and reviewers are not independent of that training, monitoring or supervision.
ASIC Proposal E4	We propose the guidance set out in paragraphs 132–138 on the level of independent oversight required for a review and remediation program.
ASIC Question E4Q1	Should all review and remediation programs involve a level of independent oversight? If not, in what circumstances would independent oversight be unnecessary?
FPA Response	Yes.
ASIC Question E4Q2	Do you agree that persons who are internal or external to the advice licensee are appropriate to provide independent oversight, depending on the circumstances? If not, why not?
FPA Response	Where the licensee's own recruitment, training, monitoring and supervision systems have contributed to the misconduct, internal audit teams will not generally be sufficiently independent. We also have some concern about what if any standards are being applied to the review of advice and claimed independent 'expertise'.
ASIC Question E4Q3	Do you think an independent person will have a conflict of interest in assisting in the design of a program as well as having a general oversight role of the program? If so, how could this conflict be managed?
FPA Response	Potentially yes. The roles could be separated or, where the independent designs and participates, the work could be independently audited.
ASIC Question E4Q4	When should a review and remediation program involve independent oversight that is external to the licensee (i.e. an 'independent expert')?
FPA Response	Where the licensee's own recruitment, training, monitoring and supervision systems have contributed to the misconduct, internal audit teams will not generally be sufficiently independent.
ASIC Proposal E5	We propose the guidance set out in paragraphs 139–142 on the governance arrangements of a review and remediation program.
ASIC Question E5Q1	Is there more detailed guidance we can provide on who should be the decision maker in a review and remediation program and who should be overseeing a program? If so, please specify.
FPA Response	The person should have sufficient standing, and hold sufficient educational qualifications, expertise and experience in providing and supervising advice, and be a member of a recognised professional body.

ASIC Proposal E6	We propose the guidance set out in paragraphs 143–146 on record keeping in relation to review and remediation programs.
ASIC Question E6Q1	Are there any other types of records that an advice licensee should keep in relation to a review and remediation program?
FPA Response	Sufficient data to enable trend analysis of any identified misconduct and its underlying causes.
ASIC Proposal E7	We propose the guidance set out in paragraphs 147–149 on public reporting in relation to review and remediation programs. Do you agree that advice licensees should consider reporting publicly on review and remediation programs? If not, why not?
ASIC Question E7Q1	Do you agree that advice licensees should consider reporting publicly on review and remediation programs? If not, why not?
FPA Response	Public reporting should be mandatory.
ASIC Proposal F1	We propose the general guidance set out in paragraphs 152–154 (including our proposed key principles) on the factors advice licensees should consider when communicating with clients as part of a review and remediation program
ASIC Question F1Q1	Do you agree with our general proposed guidance on what advice licensees should consider when communicating with clients as part of a review and remediation program? If not, why not? Please provide alternatives.
FPA Response	Yes
ASIC Question F1Q2	Please provide feedback on any costs or savings to your business as a result of this proposed guidance
FPA Response	See our earlier comments on the potential costs impacts on small advice businesses.
ASIC Question F1Q3	Are there other areas on which you would like guidance about communication? If so, please specify.
FPA Response	No
ASIC Proposal F2	We propose the guidance set out in paragraphs 155–176 on what advice licensees should consider when determining when and how to communicate with clients as part of a review and remediation program.
ASIC Question F2Q1	Do you agree that the initial and final communication with a client should always be in writing (see paragraph 161)? If not, why not? Please provide alternative suggestions
FPA Response	Yes
ASIC Question F2Q2	Is 10 working days an appropriate timeframe for advice licensees to follow up in writing any verbal communication of key information to clients (see paragraph 161)? If not, please specify what an appropriate timeframe is
FPA Response	Not in a position to comment
ASIC Question F2Q3	Is there any information other than in paragraphs 165 and 170 that should be included in communication with clients? If so, please specify
FPA Response	We strongly disagree with the use of the term misconduct in this context. Clients should be advised that they may have received advice that is not in their best interests or may not be appropriate for their circumstances. We have a difficulty with pathologising advisers in this context when the licensee’s recruitment, training, monitoring and supervision of the relevant adviser may have materially contributed to or constitute misconduct in its own right.
ASIC Question F2Q4	When an advice licensee is seeking interest from a broader group of clients, what additional guidance, if any, could we give at paragraph 167 on what clients should be required to do in order to participate in the program?
FPA Response	Not in a position to comment.

ASIC Question F2Q5	Is 30 days an appropriate timeframe when requesting that clients respond to communication (see paragraph 173)? If not, please specify what you consider is an appropriate timeframe.
FPA Response	Not in a position to comment. However, where there are extenuating circumstances as to why the client was unable to respond (e.g. out of contact with mail, ill health etc.), they should not be limited by a 30 day time frame.
ASIC Question F2Q6	Are there other reasonable efforts, in addition to the examples in paragraph 174, that an advice licensee could make to contact a client who has not responded?
FPA Response	Not in a position to comment.
ASIC Proposal G1	We propose the guidance set out in paragraphs 179–184 on the external review of decisions following a review and remediation program.
ASIC Question G1Q1	When would it be appropriate for advice licensees to waive an EDR scheme’s monetary, time or other limits?
FPA Response	Not in a position to comment directly, save that we are concerned on the potential to breach professional indemnity insurance conditions.
ASIC Question G1Q2	Should the limits on some forms of compensation not be waived? If so, please specify what limits should not be waived and in what circumstances
FPA Response	Not in a position to comment directly, save that we are concerned on the potential to breach professional indemnity insurance conditions.
ASIC Question G1Q3	Is assistance to clients wishing to seek professional advice required in all circumstances? If not, when would it be required?
FPA Response	Not in a position to comment directly, save that we are concerned on the potential to breach professional indemnity insurance conditions, and the potential cost implications for small businesses.
ASIC Question G1Q4	Are there other types of assistance that advice licensees could offer clients? Please specify
FPA Response	Not in a position to comment.
ASIC Question G1Q5	Are there other types of assistance that advice licensees could offer clients? Please specify Please provide feedback on any costs or savings to your business as a result of the proposed guidance on the external review of decisions of review and remediation programs
FPA Response	Not in a position to comment directly, save that we are concerned on the potential to breach professional indemnity insurance conditions, and the potential cost implications for small businesses.
ASIC Question G1Q6	Are there other areas on which you would like guidance in relation to the external review of licensee decisions? If so, what should that guidance include?
FPA Response	No specific comment. We have commented earlier that it may be preferable to allow review and remediation schemes to operate to suspend the operation of IDR and EDR
ASIC Proposal G2	We propose the guidance set out in paragraphs 185–186 on settlement deeds.
ASIC Question G2Q1	Should further guidance be provided on settlement deeds? If so, what should that guidance include?
FPA Response	No comment.
ASIC Proposal H1	We propose to amend [CO 14/923] to clarify that, when an advice licensee or one of its representatives provides personal advice, the licensee must ensure not only that client records are kept, but also that the licensee continues to have access to these records during the period in which they are required to be retained.

ASIC Question H1Q1	Do you agree with our proposed amendment to [CO 14/923]? If not, why not?
FPA Response	We agree in principle however, we are concerned about potential restrictions on adviser and client access to licensee retained client files preventing a new, or transferring adviser from being able to access client information that may be critical to the provision of advice in the client's best interest. We are also concerned about the potential for these record retention requirements to conflict with the TPB's requirements on Tax (financial) Advisers to protect client confidentiality (see TPB consultation on Exposure draft to TPB Information Sheet TPB(I) D31/2015) and to conflict with Privacy laws and to generate multiple copies of client files across multiple licensees, magnifying the risk of unauthorised access and disclosure of client personal information.
ASIC Question H1Q2	Will our proposed amendment change existing record-keeping practices? If so, please describe the changes involved.
FPA Response	See response to H1Q1.
ASIC Question H1Q3	Please provide feedback on any costs or savings to your business as a result of the proposed amendment.
FPA Response	These changes appear to add to the costs of record keeping and will likely disproportionately adversely impact small businesses.