ASIC
Australian Securities & Investments Commission

REPORT 500

Response to submissions on CP 247 Client review and remediation programs and update to record-keeping requirements

October 2016

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 247 *Client review and remediation programs and update to record-keeping requirements* (CP 247) 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

1 In Consultation Paper 247 *Client review and remediation programs and update to record-keeping requirements* (CP 247), we consulted on our proposed guidance on client review and remediation conducted by Australian financial services (AFS) licensees who provide personal advice to retail clients (advice licensees).

2 We also sought feedback on our proposal to amend the general record-keeping requirements for advice licensees in Class Order [CO 14/923] *Record-keeping obligations for Australian financial services licensees when giving personal advice* to place beyond doubt that advice licensees must have access to records during the period in which they are required to be retained.

3 This report highlights the key feedback received on CP 247, and our response to that feedback.

4 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 247. We have limited this report to the key issues.

5 For a list of the non-confidential respondents to CP 247, see the appendix. Copies of these submissions are currently on the ASIC website at www.asic.gov.au/cp under CP 247.

Feedback received

6 We received 17 submissions on CP 247 including from industry associations and one consumer organisation. We are grateful to respondents for taking the time to send us their comments.

7 The majority of respondents expressed support for ASIC issuing guidance on client review and remediation.

8 Respondents were also generally supportive of our proposed amendments to the AFS licensee record-keeping requirements when providing personal advice to retail clients.

9 We continued to engage with stakeholders after the close of the consultation period in finalising our regulatory guidance on client review and remediation. This included consulting with those who sent us a submission on CP 247 on our further proposed guidance on:

(a) the calculation of foregone returns or interest; and

(b) low-value compensation.

10 After the close of the consultation period for CP 247, we also continued to consult with stakeholders on amendments to our class order on record-keeping requirements for advice licensees. In particular, we consulted on a further proposal to impose a direct obligation in relation to advice records on authorised representatives who are advisers.

11 Sections B–D of this report set out in more detail the issues raised during consultation, and our responses to those issues.

ASIC's response

12 We have issued Regulatory Guide 256 *Client review and remediation conducted by advice licensees* (RG 256), which sets out our guidance on client review and remediation conducted by advice licensees.

13 Providing a streamlined and well-understood review and remediation framework will help advice licensees conduct the process of review and remediation in a way that is efficient, honest and fair. It will also give consumers confidence that any review and remediation in which they are involved is conducted in this way, regardless of the size of the review and remediation or the size of the advice licensee.

14 Our guidance applies to review and remediation processes established on or after 15 September 2016.

15 We have also amended [CO 14/923] to clarify that, when an advice licensee or one of its representatives provides personal advice, the advice licensee must ensure not only that client records are kept, but also that the advice licensee continues to have access to these records during the period in which they are required to be retained.

16 Advice licensees will need to assess their ability to satisfactorily access client records during the period they are required to be retained—even if the records are retained by another person, and even if that person is no longer authorised by, or related to, the advice licensee.

17 We have also amended [CO 14/923] to place a direct obligation on authorised representatives who are advisers to keep records in relation to the personal advice they provide to clients, and to give these records to the advice licensee if the licensee requests the records, provided that the request is made in connection with the advice licensee's obligations in Ch 7 of the *Corporations Act 2001* (Corporations Act).

B Definition of 'systemic issue' and the scope of our guidance

Key points

This section outlines the feedback we received on our proposed definition of 'systemic issue' and the proposed scope of our guidance.

We summarise our responses to that feedback.

Definition of 'systemic issue'

18 In CP 247, we said that, generally, a review and remediation program is a project set up within an advice licensee to review personal advice, where a systemic issue in relation to the advice has been identified, and then to remediate those clients who have suffered loss as a result.

19 For the purposes of our guidance on review and remediation, we proposed to define 'systemic issue' 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.

20 There was little support from respondents for the proposed definition of 'systemic issue', as outlined below.

Threshold for triggering a review and remediation would be too low

21 A large number of respondents were concerned that the threshold for triggering the review and remediation process in the proposed definition of 'systemic issue' was too low, and would capture insignificant errors or breaches.

22 A number of respondents expressed the view, for example, that where an advice licensee sent a template letter to clients containing an error where there had been no financial loss, it would be excessive to require the advice licensee to set up a separate, large-scale review and remediation. They argued that such an error could simply be resolved by sending an updated letter to affected clients as part of business-as-usual processes.

23 The respondents considered that adopting a pragmatic approach for less material issues would ensure that clients who suffered loss as a result of adviser misconduct were remediated in the shortest possible time.

24 Some respondents expressed the view that the requirement to set up and conduct a review and remediation program would be particularly onerous for smaller advice licensees, especially given the low threshold for triggering review and remediation and the expectation of external oversight.

25 One respondent suggested that ASIC should, instead, adopt a principles-based, scalable approach. This was despite the fact that, in CP 247, we explained that:

(a) review and remediation could be a large-scale exercise or a small-scale project operated by existing staff and resources; and

(b) the principles could be scaled up or down, depending on the size of the review and remediation, and could be adapted to suit advice licensees of different sizes with different internal structures.

26 A number of respondents suggested that we should apply a materiality threshold to ensure that only serious and material issues were captured under the definition of 'systemic issue'. This would minimise unnecessary compliance costs of establishing a client review and remediation process for non-material breaches and errors.

Advice licensees would be obliged to conduct a review and remediation where few clients are affected

27 Two submissions suggested that we include wording in our guidance referring to the pattern or volume of cases. They were concerned that the proposed definition of 'systemic issue' could result in a situation where an advice licensee was obliged to conduct a review and remediation exercise as a result of an adviser having provided inappropriate advice to as few as two clients.

28 In such circumstances, the advice licensee would need to set up a review and remediation process with multiple layers of review and oversight, resulting in significant compliance costs.

29 The respondents suggested that advice licensees should determine whether an issue was 'systemic' by reference to a number of factors, including:

(a) whether there was a pattern of similar disputes or incidents;

(b) the volume of incidents;

(c) the number of clients potentially affected; and

(d) the number of advisers potentially involved.

Definition of 'systemic issue' should refer to the impact of the misconduct or compliance failure on clients

30 One submission thought that the definition of 'systemic issue' should more generally refer to the impact of the conduct on clients rather than the way in which such conduct may be identified.

31 They noted that, in the context of review and remediation, a systemic issue may not always be identified through complaints-handling processes. An advice licensee may identify concerns about an adviser as part of a regular compliance check or audit of the adviser.

32 They suggested that ASIC should, instead, define 'systemic issue' along the lines of actual or potential detriment to a number of clients as a result of the misconduct or other compliance failure by an advice licensee.

ASIC's response

Based on the feedback received, we have modified the definition of 'systemic issue' in RG 256 to refer to an issue causing actual or potential detriment to a number of clients as a result of the misconduct or other compliance failure by an advice licensee or its current or former representatives.

We consider that the principles in our guidance will be of value regardless of the severity of the issue or the number of clients affected.

We think that, even if only a small number of clients suffer loss as a result of misconduct or other compliance failure by an advice licensee, it will still be appropriate for the advice licensee to seek these clients out and remediate them.

To address concerns that our guidance would not be scalable and that advice licensees would be required to set up a separate large-scale exercise in all circumstances, we have given further guidance to clarify that advice licensees have flexibility in tailoring a proportionate approach to review and remediation.

This will take into consideration a range of factors such as:

- the number of clients affected;
- the number of advisers involved; and
- the nature of the misconduct or other compliance failure.

For systemic issues that affect only a few clients, this could just mean remediating clients using a business's existing resources.

Scope of our guidance

Application of our guidance to general advice and all financial products

33 In CP 247, we stated that our proposed guidance would apply to review and remediation conducted by advice licensees. We did not distinguish between the provision of advice in relation to Tier 1 and Tier 2 products.

34 One respondent considered that our guidance should apply to all financial advice (i.e. general and personal advice) provided to retail clients in relation to all financial products (i.e. both Tier 1 and Tier 2 products). They thought that, where clients were affected by a systemic issue, they should be treated consistently, irrespective of the type of advice received or the financial product involved.

ASIC's response

Based on the feedback received, we have clarified that our guidance applies to both Tier 1 and Tier 2 products.

As stated above, we have maintained the position that our guidance should be applied to review and remediation that is not related to personal advice, to the extent relevant.

We have clarified in RG 256 that this includes remediating clients who have suffered loss or detriment as a result of misconduct or other compliance failure relating to general advice.

Application of our guidance to non-advice licensees

35 In CP 247, we stated that, although the proposed guidance was intended to apply to advice licensees, the principles should be applied to other persons conducting review and remediation—such as superannuation trustees, credit providers or financial product providers—to the extent relevant.

36 Submissions on this issue were divided. Half of the submissions agreed that our guidance should also apply to review and remediation conducted by persons other than advice licensees.

37 The other half of the submissions thought it would not be appropriate to extend our guidance beyond advice licensees. They thought that ASIC should consult separately on how the principles in our guidance should apply to other programs to avoid unintended consequences.

ASIC's response

We have maintained the position that persons conducting review and remediation, other than advice licensees—for example, superannuation trustees, credit providers or financial product providers—should apply the principles in our guidance to the extent relevant.

However, on the basis of the feedback received, we have modified RG 256 to state that licensees may need to consider any specific legislative requirements or other guidance on client review and remediation.

We recognise that some licensees may be subject to legislative requirements (or other guidance) that would be likely to cover the same ground as our guidance in RG 256. It may therefore not be appropriate to superimpose the principles set out in RG 256 on these licensees.

C Other issues relating to review and remediation

Key points

This section outlines the feedback we received on the following aspects of our proposed guidance:

- the application of internal dispute resolution (IDR) timeframes to clients that have made a complaint to an advice licensee and that complaint is within the scope of the licensee's review and remediation;
- how far back an advice licensee should review advice;
- the timeframe for advice licensees to review advice; and
- the provision of assistance to clients who wish to seek professional advice.

This section also outlines the feedback on:

- whether conducting a review and remediation, and a subsequent decision to remediate clients, would affect an advice licensee's ability to make claims under its professional indemnity (PI) insurance;
- the calculation of foregone returns or interest; and
- low-value compensation.

We summarise our responses to the feedback received.

Interaction with IDR obligations

38 In CP 247, we proposed to issue guidance that, where a client has made a complaint to an advice licensee and that complaint is within the scope of the licensee's review and remediation, the IDR obligations (including the timeframes) will apply to that matter. A final response must still be provided to the client within 45 days.

39 The majority of respondents were concerned that it would be difficult for advice licensees to provide a response to clients within 45 days.

40 Respondents said that, if advice licensees were required to review advice within 45 days, where a client made a complaint to a licensee and that complaint fell within the scope of the licensee's review and remediation, this would prevent the licensee from adopting a consistent methodology in systematically reviewing advice, and would result in inconsistencies in advice reviews. It could be seen as unfair if clients were subject to different processes depending on whether they had made a complaint.

41 One respondent thought that requiring advice licensees to apply the IDR timeframes could lead to vexatious complaints because clients who were

already within the scope of the licensee's review and remediation may try to expedite the review of their advice by making a complaint.

42 Another respondent said that it could be difficult, in the context of a review and remediation, to identify what constitutes a 'complaint'.

ASIC's response

We have decided to maintain our position that, where a client has made a complaint to an advice licensee and that complaint is within the scope of the licensee's review and remediation, the IDR obligations (including the 45-day timeframe) will apply to the matter.

We acknowledge the feedback from the majority of submissions that it may be difficult for advice licensees to provide a response to clients within 45 days.

To address these concerns we have modified the guidance so that, if an advice licensee believes that it cannot comply with the IDR timeframes, it should submit a breach report to ASIC. This will enable ASIC to have some oversight of when the review and remediation process is leading to decisions that are slower than the normal IDR timeframe.

How far back advice should be reviewed

43 In CP 247, we proposed that an advice licensee should review advice as far back as the licensee has retained records. This includes where the licensee has retained records for longer than the minimum requirement of seven years.

44 There was little support from respondents for this proposal.

45 The majority of respondents considered that advice licensees should only be required to review advice going back seven years, which would be consistent with the record-keeping requirements. They thought that requiring advice licensees to review advice as far back as the licensee had retained records would result in clients being treated differently, depending on whether their records had been retained beyond the minimum timeframe required for record-keeping.

46 One respondent thought that it would create a significant financial and administrative burden on advice licensees where the licensees had retained records for more than seven years.

47 Another respondent thought that this requirement could encourage advice licensees to destroy records immediately after the expiry of the minimum seven-year record-keeping period.

ASIC's response

On the basis of the feedback received, we have modified RG 256 to state that we will not generally expect an advice licensee to review advice given to clients more than seven years before they become aware of the misconduct or other compliance failure.

However, in certain circumstances—such as where the client has held the product about which advice was given for a long period of time—it may be appropriate to review records going back further than the minimum seven years. We expect that advice licensees will act in a way that prioritises the interests of their clients when deciding how far back to review the advice given to them.

Appropriate timeframe for advice licensees to review advice

48 In CP 247, we proposed that, as a guide, advice 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 review and remediation.

49 The majority of respondents thought that 90 days for making a decision was too short, too prescriptive and unrealistic—especially for a large-scale, complex review and remediation.

50 Respondents were concerned that the requirement to review advice within 90 days would compromise the quality of advice reviews and, consequently, result in poor outcomes for clients.

51 One respondent thought that prescribing a 90-day decision-making period could also drive undesirable behaviours, such as encouraging advice licensees to delay notifying clients that they were within the scope of a review and remediation to enable the licensee to meet the required timeframe.

52 Respondents said that the ability to make a decision about remediation often depended on a number of factors outside an advice licensee's control. These may include delays resulting from:

(a) the difficulty and delay in gathering information (including locating and corresponding with clients);

(b) the time required to review multiple pieces of complex advice, or to clarify ambiguities with clients and obtain additional information;

(c) the time required to access historical records or to obtain documents from third-party providers such as lenders or insurers; or

(d) the time required to perform often difficult loss calculations.

53 There could be further delays where the review and remediation involved external oversight. A number of respondents thought that, due to these factors, it would be difficult to prescribe standard timeframes.

54 One respondent thought that advice licensees would benefit from principles-based guidance in relation to timeframes rather than a prescribed period of time for making a decision.

55 Other respondents suggested that:

(a) we should give guidance on timeframes for different phases of the review and remediation process;

(b) our guidance should include a mechanism for timeframes to be extended by ASIC or by an advice licensee with ASIC's agreement; and

(c) the timeframes should be set as touch points for proactively contacting clients to update them on the progress of the review and remediation.

ASIC's response

On the basis of the feedback received, we have not set a specific timeframe that advice licensees should aspire to when reviewing personal advice and deciding whether to remediate clients.

Although we do not accept that all of the factors identified by respondents in paragraph 52 are outside an advice licensee's control, we recognise that the time taken to review advice can vary widely.

Even if we were to set a much longer timeframe than the 90 days we proposed in CP 247—to accommodate complex matters that typically require longer timeframes—the time period may still be too short to properly review advice and make a decision in certain types of matters. On the other hand, setting a longer timeframe may result in unnecessary delays in simpler matters.

Instead, we have issued guidance that advice should be reviewed in a timely manner and as quickly as possible without compromising the quality of the review. What is a reasonable timeframe will depend on the nature of the matter.

We recognise that, for larger, more complex matters, a longer timeframe may be required to review advice and make a decision about whether to remediate an affected client. However, for smaller, less complex matters, we would expect advice licensees to make a decision about whether to remediate an affected client in a much shorter timeframe. We have provided some examples to illustrate this point.

We have also given guidance that, at any time an advice licensee is communicating with clients, it will be helpful for the licensee to give them an indication of the timeframe in which a decision will be made or compensation received.

Advice licensees should act in the best interests of their clients by ensuring that advice is reviewed in a timely manner. We are likely to look more closely at an advice licensee if the timeframe for remediating clients is lengthy, taking into account the nature of the misconduct or other compliance failure and the number of affected clients.

Failure to make a decision about whether to remediate an affected client within a reasonable timeframe may indicate that an advice licensee does not have adequate resources to conduct the review and remediation, or that they are not prioritising the remediation of clients and acting efficiently, honestly and fairly. This means that they may be in breach of their AFS licensing obligations.

There is also a risk that advice licensees may be subject to public scrutiny if they fail to make a decision about whether to remediate an affected client within a reasonable timeframe.

Assistance to clients who wish to seek professional advice

56 In CP 247, we proposed to issue guidance that advice licensees should consider whether it is appropriate to offer assistance to clients who wish to seek their own professional advice about the licensee's decision on whether remediation is appropriate. We said that assistance could come in different forms—for example:

(a) offering to reimburse the client (e.g. up to a limit of $5,000) for professional advice sought by the client;

(b) offering the services of a group of professionals independent of the advice licensee to provide advice to the client, free of charge; and

(c) directing the clients to a range of free services (e.g. pro bono professional advice services or free legal centres).

57 The majority of respondents expressed the view that assistance to clients who wish to seek professional advice about an advice licensee's decision should not be provided in all cases.

58 Only two respondents thought that advice licensees should always provide assistance to clients. One of these respondents thought that assistance should not include referring clients on to a range of free services because this implied that it would be equivalent to other forms of assistance. They noted that legal centres could also be overwhelmed if clients in a large review and remediation were directed to a centre.

ASIC's response

On the basis of the feedback received, we have adopted our proposed guidance that advice licensees should consider whether it is appropriate to offer assistance to clients who wish to seek professional advice about an advice licensee's decision.

We have removed the suggestion that clients should be directed to a range of free services, given that free legal centres may not have the resources to deal with an influx of referrals.

PI insurance

59 In CP 247, we sought feedback on whether conducting a review and remediation, and a subsequent decision to remediate clients, would affect an advice licensee's ability to make claims under its PI insurance. We also sought feedback on what alternative options or alterations to review and remediation processes could be adopted by advice licensees that hold PI insurance to enable claims to be made.

60 Respondents thought it would be likely that conducting a review and remediation would void the terms of a PI insurance policy in a range of circumstances, including where:

(a) clients have not made a claim against an advice licensee and have not indicated that they wish to participate in a review and remediation;

(b) the advice licensee has waived monetary, time or other limits that may constrain an external dispute resolution (EDR) scheme's jurisdiction;

(c) the advice licensee has responded to a client or admitted to fault without consulting with its PI insurer;

(d) factual evidence is missing and conclusions are based on assumptions; or

(e) loss has been calculated using a non-standard or novel method.

61 Respondents expressed the view that it would be difficult for advice licensees to negotiate the terms of a PI insurance policy to accommodate review and remediation programs, particularly for small advice licensees who have little bargaining power.

62 Respondents also thought that an advice licensee who initiates and conducts a review and remediation would be likely to face upward pressure on premiums.

63 We did not receive feedback on what alternative options or alterations to review and remediation processes could be adopted by advice licensees that hold PI insurance to enable claims to continue to be made.

ASIC's response

Given the concerns expressed by respondents to CP 247, we consulted with an insurance industry association about the issue of PI insurance after the consultation period had ended.

The association thought that initiating and conducting a review and remediation would not necessarily void the terms of a PI insurance policy. The association suggested that advice licensees should involve insurers as early as possible in the review and remediation process—at least from the time at which it becomes clear that a review and remediation will be undertaken.

The association also suggested that advice licensees should obtain approval from their PI insurer for any communications with clients in order to reduce the risk that the review and remediation could prejudice the insurer due to an admission of liability, and result in a reduction in the amount payable under the licensee's PI insurance policy.

In addition, the association recommended that advice licensees should obtain approval from their PI insurer before waiving EDR scheme limits.

We have modified our guidance in RG 256 to incorporate these suggestions and to enable advice licensees to reduce the risk that their actions may result in a reduction in the amount payable under their PI insurance policy.

Determining remediation

64 One respondent suggested that ASIC should also provide guidance on the calculation of foregone returns or interest, and on low-value compensation, for remediation purposes.

Calculation of foregone returns or interest

65 On the basis of this feedback, we consulted further on this issue—following the end of the consultation period—with those respondents who sent us a submission on CP 247.

66 We asked for respondents' views on whether advice licensees should use a fair and reasonable rate, such as the Federal Court of Australia's post-judgement interest rate (post-judgement rate) to calculate the foregone returns or interest, where it was not possible or reasonably practicable to find out the actual investment returns or interest that the client would have received. This was effectively the cash rate set by the Reserve Bank of Australia (RBA) plus 6%.

67 We said that, generally, in this situation, the post-judgement rate would be fair and reasonable because it was:

(a) reasonably high (which reduced the likelihood that a client would be disadvantaged by an advice licensee's inability to determine the actual investment returns or interest);

(b) relatively stable; and

(c) objectively set by an independent body.

68 There was little support from respondents for the use of the post-judgement rate as a default rate to calculate foregone returns or interest.

69 Most respondents considered that it would be overly generous to compensate clients using the post-judgement rate, as it was significantly higher than most investors would be likely to earn in any economic environment, and did not take into consideration the different risk profiles of clients. One of these respondents said that the post-judgement rate more closely approximated the kinds of returns more commonly seen in aggressive investment funds, and would not be appropriate for clients who were invested in lower-risk investments.

70 Some respondents also considered that the application of the post-judgement rate would be punitive to advice licensees, and would not be fair or reasonable, especially where the need for remediation had arisen from a genuine error.

71 Alternative options that were suggested by respondents included:

(a) the highest 'at call' rate offered by an advice licensee at the relevant point in time;

(b) the Financial Ombudsman Service's (FOS) approach to calculating interest for disputes relating to contracts of insurance;

(c) the cash rate set by the RBA;

(d) a rate of 6% per year compounding daily; and

(e) the historical rate of return for the relevant risk profile of the client for the period during which the breach or non-compliance occurred.

72 One respondent thought that it should be up to the advice licensee to decide on an appropriate default rate to use as a proxy.

73 Another respondent considered that, where an appropriate reference product or portfolio could be identified, it would be preferable to use this rather than a default interest rate to calculate foregone returns or interest, because it would be more likely to place the client in the position they would have been in if the misconduct or other compliance failure had not occurred.

74 The respondent acknowledged, however, that there would be situations where an advice licensee would not hold any information about where a client would have invested their money if the misconduct or compliance

failure had not occurred. In these circumstances, it would be appropriate for a default interest rate to be applied.

ASIC's response

On the basis of the feedback received, we have not specified, in RG 256, that the post-judgement rate should be used as the default rate in calculating foregone returns or interest where it is not possible or reasonably practicable to find out the actual investment returns or interest that the client would have received.

Instead, we have issued guidance that advice licensees should use a fair and reasonable rate to calculate the foregone returns or interest that is consistent with the principles we proposed (i.e. it is reasonably high, relatively stable, and is objectively set by an independent body).

We expect that, in most situations, advice licensees should be able to determine the actual investment returns or interest that a client would have received. As such, the circumstances in which a licensee would need to use a proxy to determine foregone returns or interest should be limited.

We consider that, in the exceptional circumstances where it is not possible or reasonably practicable to find out the actual investment returns or interest that a client would have received, it would still be fair and reasonable to use the RBA cash rate plus 6% as the default rate. This is because it is reasonably high, relatively stable, and the RBA cash rate is objectively set by an independent body.

However, we recognise that, in some circumstances, it may be appropriate to use a different interest rate to calculate foregone returns or interest. Therefore, we have given flexibility in our guidance to advice licensees to choose a default rate that they consider is appropriate, provided that this is a fair and reasonable rate that satisfies the principles set out in our guidance.

Whichever rate an advice licensee chooses to use to calculate the foregone returns or interest, the licensee should record its reasons for using this rate.

Low-value compensation

75 We also consulted with respondents to CP 247 on our proposal to issue guidance that, where the amount of compensation to be paid to a client was below $20 and the client could not be compensated without significant effort on the part of the advice licensee, the licensee may instead make a community service payment by paying the amount to an appropriate organisation (which would generally be not-for-profit) to fund activities that could be characterised as a community service. The advice licensee must not profit from the misconduct or other compliance failure.

76 Respondents generally agreed with this proposal.

ASIC's response

On the basis of the feedback received, we have adopted our proposed guidance on low-value compensation. This is also consistent with our guidance in Regulatory Guide 94 *Unit pricing: Guide to good practice* (RG 94).

Advice licensees may wish to consult ASIC on appropriate organisations to which they may direct their community service payment.

D Amending the record-keeping requirements

Key points

This section outlines the feedback we received on our proposal to amend [CO 14/923] to clarify that advice licensees must ensure not only that client records are kept, but also that the licensee continues to have access to client records during the period in which they are required to be retained.

We summarise our responses to that feedback.

77 In CP 247, we proposed 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.

78 The majority of submissions supported our proposed amendment to the record-keeping requirements.

79 However, respondents were concerned that they would still encounter difficulties with advisers who moved to a different advice licensee and who did not cooperate with a request to access documents, even where contractual arrangements existed.

80 These respondents suggested that ASIC should place a direct obligation on advisers to provide client records to their past licensees when requested to do so.

81 Two respondents raised concerns about the potential conflict between the proposed amendment to the record-keeping requirements and the Tax Practitioners Board's (TPB) position—as set out in its exposure draft Information Sheet TPB(I) 31/2015 *Code of professional conduct—Confidentiality of client information for tax (financial) advisers*, released in December 2015—which could create a barrier to authorised representatives who are advisers giving client records to their current or former licensee.

Costs for industry

82 A few submissions were concerned that the proposed amendment to the record-keeping requirements would impose significant costs on industry, because advice licensees would need to implement new systems to enable advisers to upload records so that their licensees could access the records.

83 One respondent estimated that the initial compliance costs associated with the amended record-keeping requirements could range from $3 million for a medium-sized advice licensee to $8–10 million for a large advice licensee.

However, the majority of the small advice licensees and corporate authorised representative practices surveyed by the respondent estimated that they would only incur initial compliance costs of up to $10,000 and the same amount for annual ongoing compliance costs.

84 Another respondent estimated that the initial compliance costs associated with the amended record-keeping requirements would be $30–40 million in aggregate across all major banks. However, the respondent said that there would not be any additional compliance costs for advice licensees that currently retained records electronically.

85 One respondent, whose original view was that the proposed amendment to the record-keeping requirements would impose significant costs on advice licensees, subsequently advised that the amendment would not impose significant costs on their members because all of their members currently retained client records on centralised software systems.

ASIC's response

On the basis of the feedback received, we have modified [CO 14/923] to place beyond doubt that advice licensees must have access to client records in relation to personal advice during the period in which the records are required to be kept.

We acknowledge that, for some advice licensees, there may be an increase in compliance costs as the amendment will entail a shift in existing record-keeping practices. However, we note that these should not be new costs since we are only seeking to clarify an existing obligation.

On the basis of the feedback received, we have also modified [CO 14/923] to place a direct obligation on authorised representatives who are advisers to:

- keep records for a period of seven years after the day on which the personal advice was provided to the client, unless the records have been given by the adviser to their licensee; and
- give records to their licensee, if the licensee requests the records, provided that the request is made within seven years after the day on which the personal advice was provided to the client and the request is made in connection with the obligations imposed on the licensee in Ch 7 of the Corporations Act.

This will be in addition to the obligation for advice licensees to ensure that they have access to client records.

We think that placing a direct obligation on authorised representatives who are advisers should also address respondents' concerns about the potential conflict with the TPB's position, and would remove any barriers to advice licensees being able to gain access to advice records held by authorised representatives who are advisers.

Finally, we have modified [CO 14/923] to restore the original policy intent of the class order so that the exemption to the record-keeping obligation in s912G(4) of the Corporations Act only applies where the modified best interests duty applies.

Advice licensees will need to take steps to assess their existing arrangements to determine whether they have access to client records that are kept by their advisers.

Transition period

86 One respondent supported the proposed amendment to the record-keeping requirements to clarify that advice licensees must have access to client records in relation to personal advice during the period in which the records are required to be kept, provided that there was a transition period to enable advice licensees to make changes to their systems and amend exit arrangements.

ASIC's response

We will take a facilitative compliance approach to the obligation for advice licensees to ensure that they have access to client records for the first six months after the amendment to [CO 14/923] comes into effect.

Although we consider that we are merely clarifying an existing obligation in [CO 14/923], we recognise that some advice licensees may need to make changes to their record-keeping systems to ensure they have access to client records.

We will therefore adopt a measured approach where inadvertent breaches arise while system changes are under way, provided that advice licensees are making reasonable efforts to comply.

However, where we find deliberate and systemic breaches of the record-keeping requirements, we will take stronger regulatory action.

Appendix: List of non-confidential respondents

- Association of Financial Advisers
- Association of Securities and Derivatives Advisers of Australia
- Australian Bankers' Association
- Australian Institute of Superannuation Trustees
- Consumer Action Law Centre
- Deloitte
- Financial Ombudsman Service
- Financial Planning Association
- Financial Services Council
- Henry Davis York
- Industry Super Australia
- McKean, Glenn
- Westpac Group