



ASIC
Australian Securities &
Investments Commission

CONSULTATION PAPER 350

Consumer remediation: Further consultation

November 2021

About this paper

This consultation paper is about our updated draft guidance on consumer remediation conducted by:

- Australian financial services (AFS) licensees;
- Australian credit licensees (credit licensees); and
- retirement savings account (RSA) providers.

We are seeking feedback from these stakeholders, and also consumers and consumer representatives who have participated in a remediation.

This further consultation follows [Consultation Paper 335](#) *Consumer remediation: Update to RG 256*.

Note: The updated draft Regulatory Guide 000 *Consumer remediation*, which is attached to this paper, is available on our website at www.asic.gov.au/cp under CP 350. [Regulatory Guide 256](#) *Client review and remediation conducted by advice licensees* continues to apply to remediations initiated before final updated guidance is published.

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.

Document history

This paper was issued on 17 November 2021 and is based on the legislation as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

This is the second round of a two-part consultation process.

You are invited to comment on the proposal in this paper and the draft regulatory guidance attached, which is only an indication of the approach we may take and are not our final policy.

As well as responding to the questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposal and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on consumer remediation. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section B, 'Regulatory and financial impact'.

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information on how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 11 February 2022 to:

Amanda Fairbairn, Policy Lawyer
The Behavioural Research and Policy Unit
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001
email: remediation@asic.gov.au

What will happen next?

Stage 1	17 November 2021	ASIC consultation paper released
Stage 2	11 February 2022	Comments due on the consultation paper
Stage 3	To be confirmed	Regulatory guide released

A Further consultation on consumer remediation

Key points

In [Consultation Paper 335](#) *Consumer remediation: Update to RG 256* (CP 335) we consulted on the key issues we identified for updating in [Regulatory Guide 256](#) *Client review and remediations conducted by advice licensees* (RG 256).

We have now prepared an updated draft regulatory guide on consumer remediation for further consultation: see draft Regulatory Guide 000 *Consumer remediation* (draft RG 000), which is attached to this paper.

Draft RG 000 sets out the key principles and guidance for licensees conducting a consumer remediation. This has been directly informed by the responses to CP 335 and the insights obtained during our extensive consultation process.

Draft RG 000 is available on our website at www.asic.gov.au/cp under CP 350.

Note: See the ‘Key terms’ in draft RG 000 for a list of terms and definitions used in this paper.

Background to the second round of consultation

- 1 On 3 December 2020, we published [CP 335](#). This consultation signalled our intention to release consumer remediation guidance that would clearly apply to all Australian financial services (AFS) licensees, Australian credit licensees (credit licensees) and retirement savings account (RSA) providers. The new guidance would replace [RG 256](#).

Note: In this consultation paper, we use ‘licensees’ to refer to AFS licensees, credit licensees and RSA providers.

- 2 CP 335 outlined the key issues for consultation and addressed some common industry questions and challenges that we understand licensees face when conducting remediations. The specific goals of CP 335 were to:
 - (a) clarify and seek feedback on when a remediation should be initiated;
 - (b) understand if and when assumptions can be relied on in a remediation;
 - (c) understand barriers and opportunities in effectively returning money to affected consumers; and
 - (d) identify any gaps in the current RG 256 and deliver the guidance necessary to empower all licensees to remediate consumers efficiently, honestly and fairly.

- 3 We also signalled that CP 335 was the first round of a two-part consultation process, and that the second round would involve the release of draft regulatory guidance for further consultation: see draft RG 000, which is attached to this paper.

Feedback on proposals in CP 335

- 4 We received 7 confidential and 31 non-confidential responses to [CP 335](#). For a summary of the key issues that arose out of the submissions and details of our responses, see [Report 707 Response to submissions on CP 335 Consumer remediation: Update to RG 256 \(REP 707\)](#).

Our proposed draft guidance

- 5 We have now prepared a draft regulatory guide for consultation: see draft RG 000, which is attached to this paper. This has been directly informed by the responses to CP 335 and the insights obtained during our first, extensive consultation process. The objectives underlying the draft guidance have not substantially changed from [RG 256](#).
- 6 The final guidance will apply to all remediations initiated on or after the date that it is released, which will be after the second round of consultation. For remediations that pre-date the issue of the final guide, RG 256 will continue to apply.

Proposal

- A1** In our final guidance, we propose to make the following key updates and/or clarifications about:
- (a) who the guide applies to;
 - (b) when to initiate a remediation;
 - (c) the key principles for conducting remediations;
 - (d) the remediation review period;
 - (e) the use of beneficial assumptions;
 - (f) determining appropriate remedies, including calculating foregone returns and interest;
 - (g) making remediation payments, and what to do when money cannot be returned;
 - (h) the low-value compensation threshold;
 - (i) other remediation outcomes to consider, including the use of settlement deeds;
 - (j) engagement with external stakeholders, such as the Australian Financial Complaints Authority, Australian Prudential Regulation Authority and Australian Taxation Office;

- (k) the interaction between remediation and a licensee's legal duties and obligations, including (but not limited to):
 - (i) breach reporting;
 - (ii) internal dispute resolution;
 - (iii) design and distribution obligations; and
 - (iv) the new notify, investigate and remediate obligations on certain licensees; and
- (l) our role in remediations.

Your feedback

- A1Q1 Do you agree with our proposed updates and/or clarifications in draft RG 000? For example, our proposal to introduce a \$5 low-value compensation threshold. Feedback may be provided with reference to REP 707 or relate to issues not previously addressed.
- A1Q2 Are there any practical challenges associated with applying the draft RG 000? Please provide details, including relevant data and documentation.

Rationale

- 7 In [CP 335](#) we indicated that we would release draft regulatory guidance for a second round of consultation. Draft RG 000 has been informed by the responses to CP 335, where appropriate and relevant. We have also been informed by our broader experience regarding the conduct of remediations, and by case studies or examples shared with us by licensees.
- 8 Please see [REP 707](#) for explanations of how we have responded to the submissions, including references to draft RG 000.

Our proposed examples of our guidance in practice

Proposal

- A2 We propose to include 25 examples in draft RG 000 to illustrate our expectations for how our guidance can be applied in practice.

Your feedback

- A2Q1 Do you agree with our examples? If not, why not?
- A2Q2 Do you think there should be fewer examples in the draft RG 000? If so, which of the examples should be removed?
- A2Q3 Can you provide any other examples of a 'fair and reasonable rate' when calculating foregone returns or interest? If so, please provide reasons and any relevant data.

Rationale

- 9 In [CP 335](#), many respondents requested that we provide more examples to illustrate our expectations. Respondents also wanted clarity on how the guidance may operate in practice in the different financial services and wealth sectors.
- 10 We have retained five examples from [RG 256](#). Over 80% of the new examples are based on our direct experience in overseeing remediations, or have been provided by licensees as case studies in response to [CP 335](#).

B Regulatory and financial impact

11 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:

- (a) promoting confident participation in the financial system; and
- (b) improving the performance of the financial system and licensees in it.

12 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options that could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
- (c) if our proposed option has more than a minor or machinery impact on business or on the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

13 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

14 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

List of proposals and questions

Proposal	Your feedback
<p>A1 In our final guidance, we propose to make the following key updates and/or clarifications about:</p> <ul style="list-style-type: none"> (a) who the guide applies to; (b) when to initiate a remediation; (c) the key principles for conducting remediations; (d) the remediation review period; (e) the use of beneficial assumptions; (f) determining appropriate remedies, including calculating foregone returns and interest; (g) making remediation payments, and what to do when money cannot be returned; (h) the low-value compensation threshold; (i) other remediation outcomes to consider, including the use of settlement deeds; (j) engagement with external stakeholders, such as the Australian Financial Complaints Authority, Australian Prudential Regulation Authority and Australian Taxation Office; (k) the interaction between remediation and a licensee's legal duties and obligations, including (but not limited to): <ul style="list-style-type: none"> (i) breach reporting; (ii) internal dispute resolution; (iii) design and distribution obligations; and (iv) the new notify, investigate and remediate obligations on certain licensees; and (l) our role in remediations. 	<p>A1Q1 Do you agree with our proposed updates and/or clarifications in draft RG 000? For example, our proposal to introduce a \$5 low-value compensation threshold. Feedback may be provided with reference to REP 707 or relate to issues not previously addressed.</p> <p>A1Q2 Are there any practical challenges associated with applying the draft RG 000? Please provide details, including relevant data and documentation.</p>
<p>A2 We propose to include 25 examples in draft RG 000 to illustrate our expectations for how our guidance can be applied in practice.</p>	<p>A2Q1 Do you agree with our examples? If not, why not?</p> <p>A2Q2 Do you think there should be fewer examples in the draft RG 000? If so, which of the examples should be removed?</p> <p>A2Q3 Can you provide any other examples of a 'fair and reasonable rate' when calculating foregone returns or interest? If so, please provide reasons and any relevant data.</p>