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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

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