

ASIC improvements to the regulation of financial services

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The Australian Securities and Investments Commission (ASIC) has recently announced improvements to the regulation of financial services in Australia, including reforms to dispute resolution schemes, and consolidating guidance on conduct and disclosure obligations for financial advisers. These reforms are explored, in the context of increased scrutiny of the financial services industry and, in particular, the role of financial advisers resulting from the changing market conditions and legal developments following the global economic slowdown.

Key points

- Financial services licensees will have to adopt the definition of “complaint” from the new Australian Standard in their internal dispute resolution (IDR) processes.
- An IDR scheme should normally provide a final response to the complaint within a maximum of 45 days.
- The financial limits of external dispute resolution (EDR) schemes are to be increased, bringing more complaints within their jurisdiction.
- ASIC has consolidated its guidance on conduct and disclosure obligations for financial advisers, including in relation to disclosure of remuneration. Although no changes to remuneration models are proposed by ASIC, they may be in the future in response to developments in Australia and overseas.

Changes to dispute resolution schemes

On 18 May 2009, ASIC released Regulatory Guide 139 *Approval and Oversight of External Dispute Resolution Schemes* (RG 139) and Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165).

Background

Under s 912A of the Corporations Act 2001 (Cth), financial services businesses that do business with retail clients are required to have a dispute resolution system that consists of an IDR process and membership in one or more EDR schemes approved by ASIC.

On 8 September 2008, ASIC released Consultation Paper 102 *Dispute resolution — review of RG 139 and RG 165* (Consultation Paper). RG 139 sets out ASIC’s approval guidelines for EDR schemes. RG 165 sets out how ASIC administers the dispute resolution requirements for Australian financial services licensees and unlicensed secondary sellers.

The objectives of this review included revising these guidelines to reflect the introduction of the new Australian Standard on complaints handling (AS ISO 10002 — 2006) (Australian Standard), as well as taking into account the recommendations made by the Productivity Commission in its final report into Australia’s consumer policy framework, dated 30 April 2008. ASIC sought submissions on its proposals and has now released the revised regulatory guides.

Internal dispute resolution

ASIC’s policy is that, wherever possible, financial services providers should seek to resolve disputes with consumers and investors through IDR, as ASIC considers that the timely resolution of complaints can be instrumental in consumers and investors being satisfied with the complaints handling process. ASIC has identified a need to ensure that financial services providers, regardless of their size or business, are able to handle complaints internally, in an efficient, timely and effective manner. The new requirements apply from 1 January 2010.

ASIC has reviewed the requirements in relation to IDR, and has issued various new requirements, as well as updating some of the ongoing requirements for financial services providers.

New and updated IDR requirements

Outsourcing

A financial services provider that outsources its IDR procedures to a third-party service provider remains responsible for ensuring that its IDR procedures comply with the requirements in RG 165.

New definition of “complaint”

RG 165 will include a definition of “complaint” to prevent what are really complaints from falling through

the cracks because they are not identified as complaints, and to remove the onus from investors and consumers to state explicitly that something is a complaint.

The definition of “complaint” has been adopted from the Australian Standard, and is as follows:

Complaint is — an expression of dissatisfaction made to an organisation, related to its products or services, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected.

ASIC states that this definition of complaint will promote consistent treatment of complaints, and will promote the identification of complaints earlier in the complaints-handling process. Although this definition may result in increased administrative burdens and compliance costs as more complaints are identified as such, where a complaint is resolved to the consumer’s satisfaction by the end of the next business day from when the complaint was received, financial services providers will not be required to apply the full IDR process.

IDR timeframes

The reforms include new timeframes for the resolution of complaints, in response to feedback suggesting that the timely resolution of complaints at IDR is important to consumer satisfaction.

Under these reforms, financial services providers should immediately acknowledge the receipt of complaints and address complaints promptly, in accordance with their degree of urgency. Where they are required to be a member of an ASIC-approved EDR scheme, they must provide a final response to a complainant within a maximum of 45 days.

If a financial services provider is unable to comply with the 45-day timeframe, they should inform the complainant of the reasons for the delay, and advise them of their right to complain to the EDR and provide the name and contact details of the relevant EDR scheme to which they can complain.

In the Consultation Paper, ASIC stressed that the target response time was 30 days, noting that some industry codes of practice impose shorter timeframes which makes the 30-day target a reasonable expectation and not unduly onerous. The revised RG 165 states that the pursuit of “best practice” procedures should result in timeframes shorter than 45 days being regularly achieved.

Multi-tiered IDR procedures

During the consultation process, ASIC received feedback that multi-tiered IDR procedures can increase the time taken to resolve complaints and can deter complainants from pursuing complaints.

The revised RG 165 states that the 45-day timeframe also applies to financial services providers that operate multi-tiered IDR procedures, ie, IDR procedures that

include internal appeals or escalation mechanisms. This reform will confirm that consumers have the same rights to access EDR whether or not their financial services provider uses a multi-tiered IDR.

External dispute resolution

Financial services providers are required to be a member of one or more ASIC-approved EDR schemes that cover, or together cover, complaints made by retail clients in relation to the financial services provided. The key changes to ASIC oversight of EDR schemes are as follows.

- With effect from 1 January 2010, all schemes will be required to deal with claims worth up to \$500,000, even though they will be allowed to limit the maximum amount of compensation payable per claim to less than that amount, in accordance with their consumer roles. Currently, EDR scheme rules bar a complaint involving more than the applicable compensation limit.
- With effect from 1 January 2012, EDR schemes will only be allowed to limit (cap) the maximum amount of compensation payable per claim to a minimum of \$280,000 (or \$150,000 if the claim relates to an insurance broker), with the ability to opt for a higher figure in the rules of the scheme.
- The terms of reference of an EDR scheme must require that legal proceedings by scheme members should not be commenced where a complaint has been lodged with the scheme unless the legal limitation period is about to expire, or in test case situations. In test case situations, the scheme member should pay the complainant’s legal costs.

A decision by an EDR scheme does not bind the consumer or investor who made the complaint. If they do not accept the EDR outcome, they are free to pursue their claim in another forum, such as through the courts. However, if the complainant accepts the EDR outcome, the scheme or member may require the complainant to accept that outcome as an end of the matter — that is, the complainant cannot pursue the balance of its claim above the compensation cap in the courts. Scheme members are bound by the EDR outcome.

The increased compensation ceiling is clearly designed to promote the resolution of more claims by EDR.

Other reforms include the following.

- EDR schemes will have a discretion whether or not to cancel a member’s membership and/or to continue to handle a complaint where a member ceases to carry on business. This change will improve complainants’ access to EDR, in light of difficulties some investors have had in the wake of recent corporate collapses.

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- EDR schemes will be required to publish statistics about the number of complaints received and resolved against individual EDR scheme members.

These measures are a response to public concerns about the transparency of the financial services industry and how it is regulated, and will likely be welcomed by consumers.

Guidance on conduct and disclosure obligations for financial advisers

Background

ASIC has also released an updated RG 175 *Licensing: Financial product advisers — Conduct and disclosure*, which is a consolidation of guidelines previously provided by ASIC, including guidance through ASIC's frequently asked questions about financial services and media advisories.

RG 175 provides details about financial services providers' disclosure conduct and disclosure obligations under Pt 7.7 of the Corporations Act. The obligations under the Corporations Act are designed to ensure that retail clients receive professional and reliable advice about financial products and vary depending on whether the advice is personal advice or general advice.

The revised RG 175 provides details about the conduct and disclosure obligations, including providing financial product advice, preparing and providing a financial services guide (FSG), suitable personal advice and a statement of advice (SOA). It also contains detailed descriptions of the various obligations of financial advisers under the Corporations Act, as well as providing guidance in relation to the type of information that must be included with FSGs and SOAs, specific examples of what constitutes personal advice and general advice and the information that must be disclosed to clients.

Personal advice versus general advice

RG 175 provides some examples where personal advice may be given, even though it might initially appear unlikely that personal advice is being given. Examples of this include where:

- the advice is not given during a face-to-face meeting (eg, where advice is given by telephone, in writing or by electronic means);
- the providing entity has not had direct contact with the client (eg, where the advice is based on information supplied by a third person, or the advice is given in a seminar);
- the person to whom the advice is given is not a natural person (eg, where the client is a body corporate); or

- the providing entity did not (subjectively) intend to provide financial advice.

The guide also includes an appendix with examples that illustrate the difference between personal and general advice.

Remuneration, commissions and other benefits

RG 175 contains guidelines about the publication of any information regarding any remuneration, commissions or benefits that are received by the financial services adviser or the providing entity.

The practice of financial advisers receiving commissions for their recommendations in relation to financial services has come under increasing scrutiny due to the increased number of claims against financial advisers following the global economic slowdown. While RG 175 provides details about the information that should be disclosed by financial advisers in relation to any commissions that they receive, but does not propose any changes, it is apparent that there is increasing public concern about the way in which financial advisers are remunerated for the services they provide, with suggestions for change from others. For example, the Financial Planning Association of Australia (FPA) released its *Financial Planner Remuneration Consultation Paper* on 1 May 2009, in which it recommended a transition away from commission-based remuneration towards constructing new client-directed remuneration models (although the FPA accepts that commission-based models may continue to exist, in particular in relation to risk products). The FPA is currently in a consultation period with members and stakeholders. Its proposal is consistent with plans by the UK Financial Services Authority to ban commission payments from fund managers and life insurers.

ASIC has stated that it will keep its policy under review, so there may be further changes in the future.



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