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Complaints handling: a board responsibility

ASIC's updated complaints handling guidance

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Following consultation, the Australian Securities and Investments Commission (ASIC) has released updated internal dispute resolution guidance for financial firms (*Regulatory Guide 271 Internal Dispute Resolution* (RG 271)) and registered a legislative instrument (ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98), clarifying new enforceable standards and requirements for internal dispute resolution (IDR) procedures.

Among other things, the guidance:

- adopts a new broader definition of complaints and amends the definition of small business
- stipulates shorter maximum timeframes for responding to IDR complaints
- outlines requirements for the content of the complaint responses
- provides guidance on the identification and management of systemic issues (including the role of boards and 'front line' staff in this process).

Certain standards and requirements in the guidance (eg. the maximum time frames for providing an IDR response) are enforceable through obligations under section 912A of the *Corporations Act 2001* and section 47 of the *National Consumer Credit Protection Act 2009*. ASIC has highlighted these in the guidance.

RG 271 will apply to complaints received by financial firms on or after 5 October 2021. Until that date, *Regulatory Guide 165 Licensing: Internal and external dispute resolution* (RG 165) continues to apply.

The revised guidance and accompanying legislative instrument are intended to 'drive fair and timely complaint outcomes for consumers and sharpen industry's focus on systemic issues'.

ASIC has also released a report, ASIC Report 665 Response to submissions on CP 311 Internal dispute resolution: update to RG 165, outlining the key issues raised during the consultation on proposed changes to existing guidance and its response to these issues.

An opportunity for financial firms?

Announcing the release of the updated guidance, ASIC Deputy

Chair Karen Chester suggested that strengthening complaints handling processes, oversight and reporting will not only help firms to build trust, but support them in staying connected to customers' experience. Ms Chester said:

"Complaints handling is the first step in the dispute resolution framework and plays a critical role for firms to restore consumer trust when things have gone wrong. A financial firm's approach to complaints handling is a meaningful measure of how it treats its customers and listens to their voice ... Better IDR not only benefits consumers and small business, it arms the boards of financial firms with rich and real time data on the customer experience and whether their needs are being met or not."

A snapshot of some key changes

The revised RG 271 includes a number of standards and requirements that are enforceable obligations, as well as other guidance to assist financial firms to comply with their legal obligations. Enforceable obligations are clearly marked in the guidance.

Changes to the definitions of 'a complaint' and 'small business'

The guide provides a broader definition of what constitutes a complaint, and states that financial firms are required to deal with complaints under their IDR processes. The guide adopts the definition of 'complaint' set out in AS/NZS 10002:2014:

"[An expression] of dissatisfaction made to or about an organisation, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required."

The guidance makes clear that firms are expected not to seek to avoid dealing with complaints that meet this broader definition by categorising them under another category of communication, eg. as an inquiry. In particular, the guidance states that firms should not seek to exclude complaints from the IDR process because they are: delivered verbally; or on the basis that the firm considers that the communication 'does not have merit'; or because a 'goodwill payment is made to the complainant to resolve the matter without any admission of error'.

When is a response implicitly or explicitly expected?

The guide states that:

"A response or resolution is 'explicitly expected' if a consumer clearly requests it. It is 'implicitly expected' if the consumer raises the expression of dissatisfaction in a way that implies the consumer reasonably expects the firm to respond and/or take specific action. A consumer or small business is not required to expressly state the word 'complaint' or 'dispute', or put their complaint in writing, to trigger a financial firm's obligation to deal with a matter according to our IDR requirements."

Examples of what constitutes a complaint

The guide includes a list of expressions of dissatisfaction

that are complaints within the meaning of the guide. The list includes (among other examples) posts on a social media channel or account 'owned or controlled by the financial firm that is the subject of the post, where the author is both identifiable and contactable' (where the post meets the definition of complaint in the guidance).

The guide also provides two examples of communications that would fall outside the definition. ASIC states that the guidance is not intended to capture: employment-related complaints raised by financial firm staff; or comments made about a firm where a response is not expected, eg. through feedback surveys; or through 'reports intended solely to bring a matter to a financial firm's attention', eg. notification that a firm's ATM is damaged.

Concerns raised about the expanded definition

In its response to the consultation, ASIC states that the most significant change to the existing definition was the inclusion of complaints 'about' an organisation, and comments that a number of submissions raised concerns that the broadening of the definition in this way would 'capture public complaints, such as those in letters to the editor or complaints made during protests'.

In response, ASIC states that, "In our view, letters to the editor or complaints made during protests are unlikely to be covered by this expanded definition. In RG 271 we note that we interpret the words 'or about an organisation' in the definition to cover expressions of dissatisfaction made via social media: see RG 271.28. We do not require these words to be read any more broadly than this".

Ensuring small business can access AFCA and IDR

The guidance aligns the definition of small business with the Australian Financial Complaints Authority's (AFCA) definition, which broadly defines a small business as a business with less than 100 employees. The guidance states that:

"... any IDR process for financial service providers must be able to deal, at a minimum, with complaints made by 'retail clients', as defined by s 761G of the Corporations Act and its related regulations."

"The AFCA Rules define 'small business' as a business that had less than 100 employees at the time of the act or omission by the financial firm that gave rise to the complaint: see Section E.1 of the AFCA Rules. A small business includes a primary producer, if that primary producer is also a small business. The guidance aligns the definition of small business with AFCA's definition, which defines a small business as a 'primary producer or other business with less than 100 employees'."

ASIC states that the purpose of the change is to ensure that all small businesses that are entitled to access AFCA are also entitled to IDR. The proposal was broadly supported by both industry and consumer groups.



The quote

The revised guidance ... is intended to drive fair and timely complaint outcomes for consumers and sharpen industry's focus on systemic issues'.



The quote

Revised RG 271 includes standards and requirements that are enforceable obligations, as well as other guidance to assist financial firms to comply with their legal obligations.

Shorter response time frames

Section C of the guidance sets out the time frames for:

- when financial firms should acknowledge a complaint
- the maximum time frame to provide an IDR response and the information that should be included in a response
- the circumstances in which a firm does not need to provide an IDR response within the maximum time frame.

Acknowledgement of a complaint

ASIC expects firms to provide acknowledgement of a complaint verbally or in writing (email, post or social media channels) within 24 hours (or one business day) of receiving it, or as soon as practicable. This is not an enforceable requirement.

Maximum time frames for a response

The guidance specifies different maximum time frames for firms to provide a response to a complaint according to the type and complexity of the complaint. The guidance summarises the time frames for responding to various forms of complaint. These are enforceable requirements.

Broadly speaking, the time frame for providing a response to superannuation-related complaints (excluding complaints about death benefit distributions) has been shortened from 90 calendar days to 45 calendar days. The deadline for providing a response to complaints about death benefit distributions remains unchanged at 90 days.

ASIC comments that the reduction in the time to respond to complaints was generally supported in submissions to the consultation.

The time frame for providing a response to (almost all) other complaints has been shortened from 45 calendar days to 30 calendar days.

Submissions from industry generally opposed this change, while submissions from consumer groups universally supported it. ASIC explains that it considers that a 45-day time frame is no longer acceptable for a number of reasons, including that based on ASIC's observations from IDR on-site visits, the vast majority of total complaints were resolved in less than 30 calendar days.

Customer advocate

The total time to respond to the complaint includes both the IDR process and the customer advocate review. The guide makes clear that the maximum time frames for providing a response apply to all IDR processes including internal appeals, escalation mechanisms and any customer advocate review.

The guidance states that:

“If a complainant chooses to escalate their complaint to the customer advocate, the total time spent dealing with the complaint must not exceed the relevant maximum IDR timeframe set out at Table 2. The total time includes both the IDR process and the customer advocate review.”

ASIC's response to the consultation explains that this clarification was included because ASIC considers 'that the underlying intention of the dispute resolution framework is that an unresolved complaint will make a timely transition from IDR to AFCA. We are concerned that the customer advocate model will undermine this intention by creating a delay between the two steps'.

Having said this, ASIC does not suggest that the customer advocate has no role to play. ASIC's response acknowledges the significant investments in their customer advocate function that the banking sector has made, and calls on firms to retain but re-focus these resources on:

- increasing the underlying performance/quality of IDR systems
- improving the identification/handling of systemic issues
- supporting vulnerable customers
- assisting in consumer centric culture change within their firms.

ASIC adds that it 'strongly support[s] the establishment of effective feedback loops between customer advocates and the relevant business units. To be effective, customer advocates need the right degree of organisational support and appropriate reporting lines'.

Exceptions

The guidance specifies the circumstances in which firms are not required to provide a response within the maximum IDR time frame and outlines requirements for notifying complainants of the delay (IDR delay notification requirements) where this is the case.

Broadly speaking, financial firms may take longer than 30 calendar days (and 45 calendar days for superannuation complaints) to respond where there is 'no reasonable opportunity for the financial firm to provide the IDR response within the relevant maximum IDR time frame' because:

- the resolution of the individual complaint is particularly complex; and/or
- circumstances beyond the financial firm's control are causing complaint management delays.

In its response to the consultation, ASIC states that it considers that these 'categories provide an appropriate safeguard for when financial firms reasonably need more time to resolve a consumer complaint'.

The response to submissions document makes clear that ASIC does not accept that complaints related to a particular kind of product/serve should always be considered complex. 'Even the most complex products or services will give rise to some complaints that are simple; financial firms should respond to these complaints as quickly as possible and certainly within IDR time frames', ASIC states.

Complaints resolved within five days of receipt

Where a complaint is resolved within five days, firms are not required to provide an IDR response provided that the firm has:

- a. resolved the complaint to the complainant's satisfaction; or
- b. provided an explanation and/or apology 'when the firm can take no further action to reasonably address the complaint'.

Managing systemic issues

The guide includes enforceable requirements for boards, executives and front line staff around how systemic issues should be managed, and makes clear that setting the accountabilities for complaints handling and the management of systemic issues is a board responsibility.

The guide states that:

- "Boards must set clear accountabilities for complaints handling functions, including the management of systemic issues identified through consumer complaints.
- Reports to the board/executive committees 'must include metrics and analysis of consumer complaints including about systemic issues identified through those complaints'.
- Firms are also required to 'encourage and enable staff to escalate possible systemic issues they identify from individual complaints; regularly analyse complaint data sets to identify systemic issues; promptly escalate possible systemic issues to appropriate areas within the firm for investigation and action; and report internally on the outcome of investigations, including actions taken, in a timely manner'.

ASIC says that the requirements for boards to set accountabilities and the inclusion of metrics in board reports was broadly supported in submissions to the consultation.

ASIC states that the changes are justified on the basis that there is a need for firms to strengthen oversight/management of non-financial risk. ASIC notes that the Hayne Commission highlighted 'significant shortcomings in the corporate governance practices of many large financial services firms including in relation to the oversight and management of non-financial risk'. This was also confirmed by the findings in *ASIC Report 631 Director and officer oversight of non-financial risk* (REP 631), which found that oversight and management of non-financial risks 'has generally not received sufficient attention until recent times—in stark contrast to the focus on financial risk and financial returns'.

Concerns raised about the role of front line staff

In its response to the consultation, ASIC comments that a number of submissions did not agree with the requirement for front line staff to have a role in identifying systemic issues.

However, ASIC's view is that 'front line staff and staff in specialist IDR teams provide a valuable source of information on systemic issues that should not be ignored. The ability of all staff dealing with complaints to at least 'flag' potential systemic issues allows for the matter to be subject to further analysis within the firm.

Ensuring accessibility

In terms of dealing with an 'authorised representative', the guidance states that 'firms should train staff to proactively identify, support and assist people who need help to make a complaint' and that in the interests of optimising accessibility, 'firms should allow representatives to lodge complaints on behalf of complainants'.

The guide states that once notified that an authorised representative has been appointed, firms should not contact the complainant directly, except where:

- a. the complainant specifically requests direct communication with the firm
- b. the firm reasonably believes that the representative is acting against the complainant's best interests
- c. the firm reasonably believes that the representative is acting in a deceptive or misleading manner with the complainant and/or the firm
- d. the firm reasonably believes that the representative is not authorised to represent the complainant; or
- e. at the time the firm is dealing with the complaint, the representative has been excluded by AFCA from representing complainants in relation to any complaint lodged with AFCA.

Timing

RG 271 will apply to complaints received by financial firms on or after 5 October 2021 to enable sufficient time for firms to 'undertake internal capacity building, establish clear lines of reporting and accountability, develop processes and systems, and upskill staff who are responsible for dealing with complaints'. Until that date, RG 165 continues to apply.

In a statement, AFCA CEO and Chief Ombudsman David Locke said that, "AFCA strongly supports measures such as the RG 271 to ensure internal dispute resolution (IDR) is made as fair, accessible and timely as possible. AFCA firmly believes that IDR plays a crucial role in the framework to resolve complaints about financial services. We welcome ASIC's updated standards and requirements".

He added that effective IDR processes provide an opportunity for firms to resolve complaints before they are lodged with AFCA.

"IDR is the key to early resolution, which benefits consumers, financial firms and the financial sector broadly. In our view, IDR should focus on helping financial firms to improve internal practices to avoid and resolve disputes. The updated guide will not only improve the quality of internal complaint resolution, but will enable financial firms to deliver better outcomes for consumers and reduce the need to escalate complaints to external dispute resolution", he said. **FS**