

Regulatory regimes guide: Customer Remediation

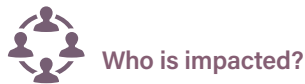
March 2021

Snapshot

At a glance...



Introduction of prescriptive obligations and strict timeframes to notify clients of actual or potential misconduct engaged in by financial advisers or mortgage brokers, investigate the nature and extent of the misconduct (and the loss to clients) and remediate clients. Significant civil penalties apply for failing to comply with the new requirements, as well as criminal penalties for record keeping failures.



AFSL and ACL holders.



1 October 2021.

Considerations

Proactive monitoring

The new obligations for notifying, investigating and remediating misconduct by financial advisers and mortgage brokers will require heightened proactivity: more rigorous monitoring for misconduct, prompt escalation of potential issues, robust assessment processes and diligent record keeping by licensees.

Licensees must urgently consider their processes, policies and risk settings, and upskill compliance teams, to ensure they are equipped to detect and manage reportable situations consistently with the new requirements.



Efficient IT solutions

Prescribed timeframes apply to the new obligations to notify (within 30 days), investigate (within a reasonable time) and inform the outcome (within 10 days) and remediate (within 30 days).

Licensees should be assessing existing compliance systems and incident and issue management protocols, determining what system and technology uplift is required and ensuring the necessary changes are implemented promptly, and tested, ahead of the 1 October 2021 commencement date.



Interconnected regulatory reform

The implications of the new obligations should be carefully considered in the context of other incoming regulation: the expanded complaints handling expectations under RG 271, the enhanced breach reporting regime and the new design and distribution obligations. A complaint may be the initial cause for an investigation, which may lead to the need to remediate, and may also trigger breach reporting obligations. In some circumstances, an investigation may itself constitute a reportable situation. Complaints, internal investigations and remediation programs will, in turn, be critical 'flags' for the legal, risk and compliance teams to review product governance.

Licensees should plan ahead to ensure a consistent and customer-centric approach to meeting these obligations.



Customer transparency and fairness

While there are existing standards for remediation (including RG265 and the broad obligation for licensees to treat customers in a fair, honest and efficient manner), the changes 'up the ante' on ensuing fair treatment, keeping customers informed and expediting outcomes.

ASIC are currently consulting on a revamped RG256 so it's not yet clear how these new obligations will be integrated. What is clear, however, is that ASIC is keen to speed up remediation through prescribing timeframes for remediation which licensees may struggle to meet given the volume and complexity of some issues they are trying to resolve.



Customer Remediation: What's new?

Overview

The Financial Sector Reform (Hayne Royal Commission Response) Act 2020 implements Recommendations 1.6 and 2.9 of the Hayne Royal Commission, with the enactment of prescriptive obligations and strict timeframes for AFSL and ACL holders to notify clients of misconduct by financial advisers and mortgage brokers, investigate the nature and full extent of the misconduct (and loss to clients) and remediate clients. Significant civil penalties apply for failing to comply with the new requirements, together with criminal penalties for record keeping breaches.

Significantly, the legislation introduces for the first time specific standards for remediation on ACL holders in respect of misconduct by mortgage brokers. For AFSL holders, existing RG 265 provides guidance on remediation, building on the expectations under licensees' general obligations to ensure clients impacted by misconduct are remediated in a fair, honest and efficient manner (and returned to the equivalent position had the misconduct not occurred). The new obligations (under new provisions in section 912 of the Corporations Act and in the Credit Act) are to operate concurrently with existing guidance although RG256 is currently under consultation with significant changes expected later in the year.

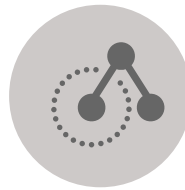
Details



Timeframes

Under the new requirements, when a licensee detects misconduct by a financial adviser or mortgage broker it is required to notify potentially affected customers (within 30 days), and then investigate the nature and full extent of the conduct (within a reasonable time).

Once the investigation is complete, the licensee is required to inform the affected customers of the outcome (within 10 days) and remediate for the loss (within 30 days). The objective of the new regime is to ensure licensees more promptly uncover the extent of the impact of misconduct and more proactively provide a remedy to customers affected by the misconduct, without requiring a court process.



Triggers

The trigger for the obligations is a 'reportable situation,' which is a significant breach of a core obligation, gross negligence, serious fraud or another designated reportable situation. The definitions of the key terms are consistent with corresponding terms under ASIC's new breach reporting regime (which is also covered in this update).

For the obligations to arise, the licensee need only have reasonable grounds to believe a reportable situation has occurred and a reasonable basis to suspect a person may suffer loss or damage from the reportable situation (not necessarily from the specific advice provided) and that person has a right to recover for the loss. Importantly, even if the right is statute barred, a person may be considered to have a legally enforceable right to recover by virtue of having remedies through AFCA or an IDR process. Prompt notification allows clients the opportunity to attempt to mitigate loss.



Penalties

The penalties for failure to comply with the new requirements to notify, investigate or remediate mirror the significant penalties under the new breach reporting regime and for breaches of general obligations (civil penalties: 5,000 penalty units (individual) 50,000 penalty units, 3 times the benefit derived or 10% of annual turnover to a maximum of 2.5 million penalty units (corporation)). Licensees are also required to keep adequate records to demonstrate compliance with the requirements, with penalties applying for failure to do so (criminal penalty: 5 years imprisonment).



Scope

For financial advisers, the obligations arise in respect of 'personal advice' provided to a 'retail client' in relation to a 'relevant financial product'. For mortgage brokers, the obligations arise in respect of 'credit assistance' to consumers relating to a 'credit contract' secured by a residential mortgage.



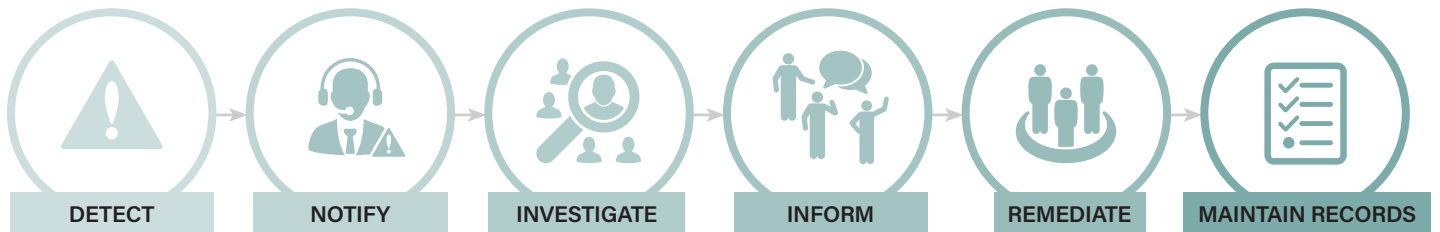
Notification and investigation

Licenses are initially required to provide sufficient information to affected customers to enable them to understand the nature of the reportable situation, how the customer may be affected and the proposed investigation. Following the investigation, the notice must provide detail on the nature and full extent of the misconduct, how it affected the customer and the assessment of the loss. It is considered prudent for licenses to keep customers informed as the investigation progresses, and customers may consider and continue to pursue all other options for redress.



Remediation

Licenses are expected to return affected persons to the position had the misconduct not occurred, (but not required to account for profits or provide other damages) and non-monetary measures may be contemplated and appropriate. This may include terminating a contract, forbearance on debt, or transferring the affected customer to a more suitable product.



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