

Article Information

Authors: Andrea Beatty, Chelsea Payne, Gabor Papdi
Service: Banking & Finance, Corporate & Commercial
Sector: Financial Services

ASIC consulting on RG 209 update

ASIC has announced that it is reviewing and updating the Regulatory Guide 209 which has not been revised in four years.

On 14 February 2019, ASIC announced that it is reviewing and planning on updating Regulatory Guide 209: Credit licensing: Responsible lending conduct (**RG 209**). ASIC published Consultation Paper 309: Update to RG 209: Credit licensing: Responsible lending conduct (**CP 309**) on 14 February 2019.^[1] RG 209 has not been revised in four years, with a number of judicial decisions, ASIC issue-specific reviews, non-judicial enforcement action and the Banking Royal Commission occurring in the interim.

CP 309 suggests, and requests feedback on, the following matters referred to below.

Reasonable inquiries and verification

ASIC is considering whether to identify particular inquiries and verification steps that would apply generally to consumer contracts as a minimum level of inquiry required.^[2] ASIC notes the uncertainty surrounding its guidance on the issue in RG 209 and will remain open to licensees performing a lower level of inquiry and verification if they can demonstrate that it is reasonable in the circumstances to do so.^[3]

Verification sources

ASIC proposes to clarify its guidance about the kinds of information that can be used to verify a consumer's financial situation and provide a more expansive list of forms of verification that it considers to be readily available to licensees in most circumstances.^[4] CP 309 includes a list of sources from which information about a consumer's financial information can be verified.^[5]

The updated sources, which is more extensive than Table 4 in the current RG 209, has a greater focus on a consumer's expenses and their balance sheet, rather than just their income.

CP 309 also expresses ASIC's view that what amounts to 'reasonable steps' to verify information will change over time, as new forms or sources of information become available to licensees. It flags incoming mandatory comprehensive credit reporting and open banking (i.e. the consumer data right) as affecting what will constitute reasonable inquiries in future. If a form of verification is reasonably available to a licensee, ASIC will expect them to have regard to it.^[6]

Benchmarks

The proposed updated guidance to benchmarks would stress that benchmark values do not provide any positive confirmation about a consumer's actual income or expenses, but can be a useful tool to help determine whether information provided by the consumer is plausible.^[7] The updated guidance is influenced significantly by ASIC's reviews into home loan markets, which found that some credit providers used benchmark values in place of consumers' actual expenses and that a significant number of broker-originated home loans had the consumer's declared expenses equal to the benchmark amount used by the lender.^[8]

Updating the guidance on benchmarks will hopefully confirm that they may be legitimately relied on however, only for the purpose of ascertaining the reliability of information provided by consumers.

Inquiring into consumers' requirements and objectives

ASIC has shown an intention to update what constitutes reasonable inquiries into the consumer's requirements and objectives to reflect its findings in Report 493: Review of interest-only home loans: Mortgage brokers' inquiries into consumers' requirements and objectives. The proposed updated guidance will require licensees to make sufficient inquiries into a consumer's specific requirements and objectives to enable them to demonstrate how the specific features of a loan or lease meet those requirements and objectives. The proposed updated guidance will also require licensees to clearly document the steps that they take to inquire into a consumer's requirements and objectives and to reconcile the loan/lease product features against those requirements and objectives.

When responsible lending obligations do not apply

ASIC proposes to include guidance on situations where the responsible lending obligations do not apply, particularly in relation to small business lending.

Fraud risk and responsible lending obligations

It appears ASIC intends to include updated guidance on dealing with the risk of loan fraud in performing responsible lending obligations, including risk factors that would provide cause for further verification.

Using repayment history information

ASIC proposes to include guidance discouraging licensees from using negative credit history too harshly, emphasising that past repayment difficulties on one product do not necessarily mean that a consumer will be unable to meet their obligations on a new credit product.^[9] ASIC wishes for licensees to perform additional inquiries to understand the cause of the past repayment difficulties and how they have been managed.^[10]

Record keeping and written assessments

Finally, ASIC proposes new 'best practice' guidance about the kinds of information licensees should record for the purpose of enabling them to demonstrate, if required, compliance with inquiry, verification and assessment obligations. The proposed guidance mirrors ASIC's recommendations in REP 493 namely:

- with licensees to record to a consumer's file all information collected that is material to unsuitability
- develop tools to guide information collection and verification
- to prepare concise narrative summaries about a consumer's requirements and objectives, and
- how the credit product recommended or entered into meets those requirements and objectives.

In relation to written assessments, which a licensee may be required to give to a consumer under section 120 or 133 of the NCCP Act, ASIC proposes to include in the updated RG 209 additional, specific guidance about what they should contain. CP 309 contains a sample written assessment template setting out the kinds of information that ASIC expects to be collected and the way in which the assessment can be structured.^[11]

The purpose is so that:

- a consumer can understand why the loan or lease has been assessed as not unsuitable for them, and
- the licensee can demonstrate compliance with the obligation to assess whether or not the contract is unsuitable.

^[1] ASIC, '19-028MR ASIC consults on updated its responsible lending guidance', media release, 14 February 2019, <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-028mr-asic-consults-on-updating-its-responsible-lending-guidance/>.

^[2] CP 309, Proposal B1.

^[3] CP 309, [15].

^[4] CP 309, Proposal C1.

^[5] CP 309, Appendix 1.

^[6] CP 309, [20]-[21], [28].

^[7] CP 309, Proposal C3.

^[8] CP 309, [32]-[36].

[\[9\]](#) CP 309, Proposal D3.

[\[10\]](#) CP 309, [79]-[81].

[\[11\]](#) CP 309, Appendix 2.