



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 205

Credit licensing: General conduct obligations

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About this guide

This is a guide for Australian credit licensees (credit licensees) and licence applicants.

This guide describes what we look for when we assess compliance with most of the general conduct obligations under s47(1) of the *National Consumer Credit Protection Act 2009* (National Credit Act).

The general conduct obligations not covered in this guide are covered in separate guides: see Table 1 in Section A.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This guide was issued on 18 December 2009 and is based on the credit legislation and regulations as at 18 December 2009.

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the credit legislation and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

At the date of issue of this guide, the regulations proposed to be made under the National Credit Act and the Transitional Act are in exposure draft form and therefore subject to change before being made final. Once the regulations are made final, we will update our guidance if necessary.

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A Overview

Key points

Credit licensees must comply with general conduct obligations: see RG 205.1.

Licence applicants must be able to demonstrate in their licence application that they can comply with these general conduct obligations: see RG 205.2–RG 205.6.

As a credit licensee or licence applicant, you are responsible for deciding how to comply with the general conduct obligations: see RG 205.7–RG 205.9.

To help you comply, this regulatory guide:

- outlines key compliance concepts that apply to all of the general conduct obligations (see Section B);
- describes what we look for when we assess compliance with various general conduct obligations (see Sections C to F); and
- includes questions to help you design and test your measures for complying with the general conduct obligations (see Appendix).

What are the general conduct obligations?

RG 205.1 Credit licensees have general conduct obligations under s47(1) of the National Credit Act. This guide does not cover all of the general conduct obligations. Some general conduct obligations are covered in separate guides: see Table 1.

Note 1: All section references in this guide are to the National Credit Act unless otherwise specified.

Note 2: Credit licensees must also comply with the responsible lending obligations in Ch 3 of the National Credit Act. We will be releasing guidance about our expectations for compliance with these obligations in early 2010: see Consultation Paper 115 *Responsible lending* (CP 115).

Note 3: For information specific to the needs of small business: see Information Sheet 97 *Guidance for small credit businesses* (INFO 97).

Table 1: General conduct obligations of credit licensees

Obligation	Description/section	Where to find our guidance
Your broad compliance obligations		
Engaging in credit activities efficiently, honestly, fairly	You must do all things necessary to ensure that the credit activities authorised by your licence are engaged in efficiently, honestly and fairly (s47(1)(a))	Section C of this guide
Complying with the conditions on your licence	You must comply with the conditions on your licence (s47(1)(c))	Section C of this guide
Complying with relevant laws	You must comply with the credit legislation (s47(1)(d)) You must comply with any other obligations that are prescribed by the regulations (s47(1)(m))	Section C of this guide

Obligation	Description/section	Where to find our guidance
Your internal systems		
Risk management systems	Unless you are a body regulated by APRA, you must have adequate risk management systems (s47(1)(l)(ii))	Section D of this guide
Conflicts of interest	You must have in place adequate arrangements to ensure that your clients are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by you or your representatives (s47(1)(b))	Section D of this guide
Dispute resolution	<p>You must have an internal dispute resolution procedure that:</p> <ul style="list-style-type: none"> • complies with standards and requirements made or approved by ASIC in accordance with the regulations (s47(1)(h)(i)); and • covers disputes in relation to credit activities engaged in by you or your representatives (s47(1)(h)(ii)) <p>You must be a member of an approved external dispute resolution scheme (s47(1)(i))</p>	<p>Regulatory Guide 165 <i>Licensing: Internal and external dispute resolution</i> (RG 165)</p> <p>Note: We will release an updated version of RG 165 in early 2010: see Consultation Paper 112 <i>Dispute resolution requirements for consumer credit and margin lending</i> (CP 112).</p>
Your people		
Ensuring your representatives comply	You must take reasonable steps to ensure that your representatives comply with the credit legislation (s47(1)(e))	Section E of this guide
Training and individual competence	You must ensure that your representatives are adequately trained, and are competent, to engage in the credit activities authorised by your licence (s47(1)(g))	Regulatory Guide 206 <i>Credit licensing: Competence and training</i> (RG 206)
Organisational competence	You must maintain the competence to engage in the credit activities authorised by your licence (s47(f))	RG 206
Your resources		
Adequate resources	Unless you are a body regulated by APRA, you must have available adequate resources (including financial, technological and human resources) to engage in the credit activities authorised by your licence and to carry out supervisory arrangements (s47(1)(l)(i))	<p>Section F of this guide</p> <p>Regulatory Guide 207 <i>Credit licensing: Financial requirements</i> (RG 207)</p>
Compensation arrangements	You must have compensation arrangements in accordance with s48 (s47(1)(j))	<p>Consultation Paper 125 <i>Compensation requirements for credit licensees: Further consultation</i> (CP 125)</p> <p>Note: We aim to release our final guidance in early 2010.</p>
Ensuring compliance with the general conduct obligations	You must have adequate arrangements and systems to ensure compliance with your obligations under s47(1), and a written plan that documents those arrangements and systems (s47(1)(k))	Section B of this guide and Appendix

When do you need to comply with the general conduct obligations?

- RG 205.2 You must comply with the general conduct obligations from the time your credit licence is granted and on an ongoing basis. If we have reason to believe that you are not complying with your obligations, we may take administrative action, which could include suspending or cancelling your licence, or imposing additional licence conditions: s45(1) and 55.
- RG 205.3 If we conduct a surveillance visit on your business, we may check your ongoing compliance with the general conduct obligations, including the measures you have for ensuring compliance.

Applying for a licence

- RG 205.4 If you are applying for a credit licence, you must be able to show that you can comply with the general conduct obligations from the time you are granted a licence, and on an ongoing basis: s47(1)(k).

Note: If you are also an Australian financial services (AFS) licensee, you must be able to show that you can comply with the general obligations from the time you are granted a licence, and on an ongoing basis: see reg 7.6.03(g) of the Corporations Regulations 2009. Our expectations for compliance with reg 7.6.03(g) are equivalent to our expectations for compliance with s47(1)(k).

- RG 205.5 We cannot grant you a credit licence if we have any reason to believe you are likely to contravene the general conduct obligations: s37(1)(b).

Note: If you are applying for a credit licence, you should read Regulatory Guide 204 *Applying for and varying a credit licence* (RG 204). It explains the licence application process and the documents you may need to provide to support your application. Section 47(1)(k) of the National Credit Act requires that you have adequate arrangements and systems to ensure compliance with your obligations under s47(1), and a written plan that documents those arrangements and systems.

- RG 205.6 We do not expect your business to be fully operational at the time you apply for a licence. However, when you apply, you must be able to show that you have arrangements in place to ensure compliance once you are granted a licence.

What do you need to do to comply?

- RG 205.7 The general conduct obligations are principles-based and designed to apply in a flexible way. For this reason, we do not think we can or should give prescriptive guidance on what you need to do to comply with them. The National Credit Act places responsibility on you to decide how to comply.
- RG 205.8 However, to help you comply, this guide:
- (a) outlines key compliance concepts that apply to all of the general conduct obligations (see Section B);

- (b) describes what we look for when we assess compliance with various general conduct obligations (see Sections C to F); and
- (c) includes questions to help you design and test your measures for complying with the general conduct obligations covered in Sections C to F (see Appendix).

RG 205.9 In this guide, we often use the phrase ‘we expect’. In using this phrase, we are describing what we look for when we assess compliance with the general conduct obligations, consistent with our approach to other conduct obligations we enforce. Our expectations are not intended to limit the ways in which you can comply. It is up to you to decide how best to comply with the general conduct obligations.

Application of general conduct obligations to carried over instruments

RG 205.10 People who engage in credit activities only in relation to ‘carried over instruments’ and who are granted a credit licence must comply with a subset of the general conduct obligations in s47(1) for carried over instruments: reg 10, Transitional Regulations.

Note: In general, the requirement to hold a credit licence does not apply to credit activities (other than providing credit services) that are engaged in by or on behalf of credit providers or lessors after 1 July 2010 only in relation to ‘carried over instruments’: see Div 1 and 3 of Pt 3 of the Transitional Regulations. A ‘carried over instrument’ is a contract or other instrument that was made and in force, and to which an old Credit Code applied, immediately before 1 July 2010. However, people who engage in credit activities in relation to ‘carried over instruments’ may be registered or granted a credit licence. For more details, see Regulatory Guide 203 *Do I need a credit licence?* (RG 203).

Bodies regulated by APRA

RG 205.11 If you are a body regulated by APRA, you do not need to read the paragraphs in Section D relating to risk management or Section F relating to adequate resources. You only need to read the paragraphs in Section D relating to conflicts of interest: see RG 205.72–RG 205.78.

RG 205.12 This is because the general conduct obligations to have risk management systems and adequate resources do not apply to you: s47(1)(l). This is the case even if only a part of your credit business is an activity that APRA regulates. APRA, not ASIC, imposes any requirements for risk management and resources that apply to you.

Note: The term ‘body regulated by APRA’ has the meaning given in s3(2) of the *Australian Prudential Regulation Authority Act 1998*.

RG 205.13 In administering the other general conduct obligations, we will take into account that you are regulated by APRA and we will aim to minimise regulatory duplication. We regularly communicate with APRA and coordinate regulatory activities where we share an interest.

Our regulatory approach

- RG 205.14 This guide aims to strike a balance between certainty and flexibility for credit licensees, while furthering the primary goals of the licensing regime and the general conduct obligations. At the broadest level, these regulatory goals are to promote:
- (a) consumer confidence in using credit; and
 - (b) the undertaking of efficient, honest and fair credit activities by all licensees and their representatives.

Standards and international principles

- RG 205.15 In thinking about how to comply with your obligations, you might find it helpful to look at good industry practice as captured in standards. Industry and Australian standards are relevant to most licensees because these have been drafted with the Australian regulatory environment in mind. For licensees with larger or more complex businesses, or licensees that are part of a global business, international principles might also be relevant.
- RG 205.16 We also use standards in a similar way—that is, as a guide to good industry practice. However, we check compliance with the law and licence conditions, not with standards—unless, the law or your licence conditions require you to comply with a particular standard.
- RG 205.17 We aim to work with industry, consumer groups and Standards Australia to develop standards as a means of setting good practice. We will also approve codes of conduct where we have a regulatory responsibility to do so: s241–241.

B Key compliance concepts

Key points

What you need to do depends on the nature, scale and complexity of your business: see RG 205.19–RG 205.22.

You must have measures for ensuring you comply with your obligations as a credit licensee: see RG 205.23–RG 205.34.

You can outsource functions, but not your responsibility as a credit licensee: see RG 205.35–RG 205.39.

RG 205.18 This section outlines key compliance concepts that underpin what we look for when we assess compliance with the general conduct obligations. You need to bear these key concepts in mind when reading Sections C to F.

What you need to do depends on the nature, scale and complexity of your business

RG 205.19 There are many different kinds of licensees engaging in a range of credit activities. We do not take a ‘one-size-fits-all’ approach to regulation. Rather, we acknowledge that what you need to do to comply with your obligations will vary according to the ‘nature, scale and complexity’ of your business.

RG 205.20 ‘Nature, scale and complexity’ includes factors such as:

- (a) the credit activities you engage in;
- (b) the diversity and structure of your operations (including the geographical spread of your operations and the extent to which you outsource any of your functions);
- (c) the volume and size of the transactions you are responsible for;
- (d) whether you provide credit assistance;
- (e) whether your main business is undertaking credit activities; and
- (f) the number of people in your organisation.

RG 205.21 The National Credit Act (s47(2)) states that when considering whether compliance is adequate, the nature, scale and complexity of the credit activities that are engaged in by the licensee must be taken into account in relation to four of the general conduct obligations in s47(1):

- (a) ensuring that clients are not disadvantaged by a conflict of interest (s47(1)(b));

- (b) training representatives (s47(1)(g));
- (c) having adequate compliance arrangements (s47(1)(k)); and
- (d) for licensees that are not regulated by APRA, having adequate resources and risk management systems (s47(1)(l)).

RG 205.22 We will also take into account the nature scale and complexity of your credit business when assessing compliance with the other general conduct obligations.

You must have measures for ensuring you comply with your obligations

RG 205.23 We use the expression ‘measures’ or ‘compliance measures’ in this guide to refer to your processes, procedures or arrangements for ensuring that, as far as reasonably practicable, you comply with your obligations as a credit licensee, including the general conduct obligations.

RG 205.24 We expect you to:

- (a) document your measures in some form (see RG 205.26–RG 205.27);
- (b) fully implement them and monitor and report on their use (see RG 205.28–RG 205.32); and
- (c) regularly review the effectiveness of your measures and ensure they are up-to-date (see RG 205.33–RG 205.34).

If you do not do this, we think you will find it more difficult to show you are complying with the general conduct obligations.

RG 205.25 Your measures will be affected by the nature, scale and complexity of your business: see RG 205.19–RG 205.22.

Documenting your measures

RG 205.26 The National Credit Act requires credit licensees to have adequate arrangements and systems to ensure compliance with their obligations under s47(1), and a written plan that documents those arrangements and systems: s47(1)(k). We will take into account the nature, scale and complexity of a credit licensee’s credit activities when assessing compliance with this obligation: s47(2).

RG 205.27 Documentation helps you demonstrate that you are complying with the general conduct obligations. When you document your measures, we expect this will include details of who is responsible for compliance, the time frames involved and associated record-keeping and reporting.

Implementing, monitoring and reporting on your measures

- RG 205.28 It is not enough just to document your measures. You also need to implement them fully. This means you need to put them into practice and integrate them into the day-to-day conduct of your business.
- RG 205.29 For measures to work effectively in practice, you need people at all levels of your business, including your senior management, to understand them and be committed to their success. Integrating your measures into the culture of your business helps ensure they are effective on an ongoing basis.
- RG 205.30 You also need to monitor your compliance.
- RG 205.31 Credit licensees are required to lodge with us a compliance certificate on an annual basis: s53. To comply with this obligation, we expect that you will need to keep records of your monitoring and reporting, including records of reports on compliance and non-compliance.

Note: We will release an approved form for credit licensees to lodge their compliance certificates.

- RG 205.32 We understand that, in some instances, your monitoring and reporting will be built into your business processes. We also acknowledge that your compliance measures might reflect your business's overall approach to compliance. Whatever the case, you need to be able to show us how you are able to monitor your compliance and appropriately address any compliance breaches.

Reviewing your measures

- RG 205.33 Regularly reviewing your measures will help to ensure they remain effective. In some cases, it may be sensible for you to consider external review. Where compliance issues have arisen (such as major breaches or repeated compliance failures), an external compliance review is particularly appropriate.
- RG 205.34 You need to review your measures when there are changes to your obligations, your business or the environment in which you operate. We expect that you will have a process for identifying changes that may impact on the effectiveness of your measures.

You can outsource functions, but not your responsibility as a licensee

Outsourcing functions that relate to your licence

- RG 205.35 We recognise that many licensees outsource functions that relate to their licence, including administrative or operational functions. Outsourcing might

be to external parties or other entities within a corporate group. Functions that are commonly outsourced include:

- (a) information technology (IT) systems for storing records in relation to engaging in credit activities;
- (b) recruitment and training of representatives;
- (c) research on credit products for which credit activities are undertaken;
- (d) the operation of call centres (including customer inquiries);
- (e) periodic compliance reviews of representatives;
- (f) sales; and
- (g) debt collection.

You remain responsible for outsourced functions

RG 205.36 If you outsource functions that relate to your credit licence, you remain responsible for complying with your obligations as a licensee: s324 and 325. For example, if you outsource the training of your representatives, you will still be responsible for ensuring that your representatives are competent and adequately trained.

Third parties undertaking credit activities on your behalf

RG 205.37 If a third party undertakes credit activities on your behalf, they will generally need to be your credit representative or a licensee: see s29(1) and (3).

RG 205.38 You can only authorise a person to be your credit representative for a credit activity that is authorised by your licence: s64(5)(a). You cannot authorise another licensee to engage in credit activities as your credit representative if the other licensee is authorised to engage in that credit activity under their own licence: s67(1).

Complying with your obligations

RG 205.39 If you outsource functions that relate to your credit licence, we expect that you:

- (a) will have measures in place to ensure that due skill and care is taken in choosing suitable service providers;
- (b) can and will monitor the ongoing performance of service providers; and
- (c) will appropriately deal with any actions by service providers that breach service-level agreements or your obligations as a licensee.

Note: If you are also regulated by APRA, see APRA's prudential standards and guidance notes on outsourcing (e.g. Prudential Standard APS 231 *Outsourcing*), available from www.apra.gov.au.

C Your broad compliance obligations

Key points

You must have measures in place for ensuring you comply with your licensee obligations on an ongoing basis: see RG 205.42–RG 205.52.

We expect your compliance measures to cover all of your obligations as a credit licensee: see RG 205.53–RG 205.58.

We expect your compliance area to have adequate resources to do its job properly: see RG 205.59–RG 205.62.

- RG 205.40 You must:
- (a) do all things necessary to ensure that you engage in credit activities efficiently, honestly and fairly (s47(1)(a));
 - (b) comply with the credit legislation (s47(1)(d)); and
 - (c) comply with the conditions on your credit licence (s47(1)(k)).
- RG 205.41 In this guide, we refer to these obligations as the ‘broad compliance obligations’: see RG 205.53–RG 205.58.
- RG 205.42 You must have measures in place for ensuring you comply with your obligations as a licensee, including the broad compliance obligations, on an ongoing basis: see s47(1)(k). We expect you will document your measures: RG 205.26–RG 205.27
- RG 205.43 This section explains what we look for when we assess the adequacy of your compliance measures. When reading this section, you need to bear in mind the key concepts in Section B. For more help in designing and testing your measures, see Appendix.

Your compliance measures

- RG 205.44 Compliance with your obligations as a credit licensee is central to the protection of consumers and the promotion of market integrity. Having effective compliance measures is a way for you to ensure you comply with your obligations as a licensee, including identifying and appropriately dealing with instances of non-compliance. Compliance measures also help you demonstrate to us that you can comply and are complying with your obligations.

What your compliance measures need to cover

RG 205.45 We consider that the broad compliance obligations are both stand-alone obligations and obligations that encompass the other general conduct obligations: see RG 205.53–RG 205.58. For this reason, we expect your measures for ensuring compliance with the broad compliance obligations will cover all of your obligations as a licensee including:

- (a) the rest of the general conduct obligations (including those covered in Sections D, E and F of this guide);
- (b) your licence conditions; and
- (c) any other credit legislation that applies to you.

RG 205.46 We also expect that your compliance measures will:

- (a) take into account the specific compliance risks of your business, especially those that may materially affect consumers or market integrity; and
- (b) enable you to:
 - (i) communicate to your representatives what they need to do to comply;
 - (ii) monitor compliance with all of your licensee obligations; and
 - (iii) address any compliance breaches.

Note: In thinking through your compliance obligations, you might find it helpful to look at Australian Standard AS 3806–2006 *Compliance Programs*, available for purchase from www.saiglobal.com/shop.

Nature, scale and complexity of your business

RG 205.47 Your compliance measures might include one or a number of different documents and any of a variety of stand-alone or integrated IT systems. As a general rule, the smaller and simpler your business, the smaller and simpler we expect your measures to be.

RG 205.48 For example, if you engage in limited credit activities as an incidental part of your main business or you are a very small business, you might meet your compliance obligations by having a checklist focusing on compliance risks that would adversely affect consumers and the provision of efficient, honest and fair credit activities.

RG 205.49 On the other hand, if your main business is to engage in credit activities, you deal in a broad range of products and you have numerous staff that are spread out geographically, you are more likely to meet your compliance obligations by having compliance measures that involve the use of manuals, programs and dedicated compliance staff.

RG 205.50 If you use external providers to provide functions that relate to your credit licence, we think your compliance measures will need to be different from those you would need if you performed those functions in-house.

Compliance measures and risk management systems

- RG 205.51 From our experience, it is common for some licensees' compliance measures to be integrated into their risk management systems. Compliance measures can be one of several controls you can use to address or mitigate risks to your business (including the risk of non-compliance with your obligations under the National Credit Act). The general conduct obligation to maintain adequate risk management systems is explained in Section D.
- RG 205.52 If you are regulated by APRA, the general conduct obligation to have adequate risk management systems does not apply to you: see RG 205.11–RG 205.13. However, this does not affect the need for you to meet our requirements on compliance measures, even if your compliance measures are integrated into your risk management systems.

Our approach to the broad compliance obligations

- RG 205.53 The broad compliance obligations are both stand-alone obligations and obligations that encompass the other general conduct obligations. This means that:
- (a) if you fail to comply with one or more of the other general conduct obligations, you are also likely to breach the broad compliance obligations; and
 - (b) even though you may be complying with all of the other general conduct obligations, you may still be in breach of the broad compliance obligations. This is because the broad compliance obligations are also stand-alone obligations.

Engaging in credit activities efficiently, honestly and fairly

- RG 205.54 Credit licensees need to do all things necessary to ensure that they engage in their credit activities in a way that meets all of the elements of the phrase 'efficiently, honestly and fairly'.
- RG 205.55 If you fail to comply with the other general conduct obligations, it is unlikely that you will be complying with the 'efficiently, honestly and fairly' obligation.
- RG 205.56 However, the 'efficiently, honestly and fairly' obligation is also a stand-alone obligation that operates separately from the other general conduct obligations. For example, if you have contractual obligations to clients and breach them, this might not be a breach of the other general conduct obligations, but it could amount to a failure to engage in credit activities efficiently, honestly and fairly.

Complying with other relevant laws

- RG 205.57 If you are a credit licensee, the obligation to comply with the credit legislation encompasses the other general conduct obligations. However, it also includes an obligation to comply with:
- (a) the National Credit Act (including the National Credit Code); and
 - (b) the provisions of the *Australian Securities and Investments Commission Act 2001* and other Commonwealth, state and territory legislation dealing with credit activities.

Note: See the definition of 'credit legislation' in s5 of the National Credit Act.

Complying with your licence conditions

- RG 205.58 You must comply with any licence conditions that we impose: s47(1)(c). In addition, you must also comply with the licence conditions set out in reg 10 of the National Consumer Credit Protection Regulations 2010 (National Credit Regulations). The conditions on your credit licence reinforce some of the general conduct obligations, so breaching a licence condition will sometimes also be a breach of the general conduct obligation to which the condition relates.

Responsibility for compliance

- RG 205.59 We expect that you will allocate to a director or senior manager responsibility for:
- (a) overseeing your compliance measures; and
 - (b) reporting to the governing body (including having ready access to the governing body).
- RG 205.60 You need to ensure that the area responsible for compliance:
- (a) is independent enough to do its job properly (particularly for larger or more complex credit businesses);
 - (b) has adequate staff, resources and systems; and
 - (c) has access to relevant records.
- RG 205.61 We expect your compliance area to have adequate resources to do its job properly. In the case of some credit businesses (e.g. larger, more complex businesses, including corporate groups), it may be appropriate for you to have a separate compliance function (which might be outsourced to a third party). For credit licensees whose business is small or whose main business is not engaging in credit activities, we expect that a person or persons will have responsibility for overseeing compliance, and that they will spend an appropriate amount of time on compliance.

The role of senior management

RG 205.62 The level of senior management involvement in overseeing your compliance measures might extend to:

- (a) communicating the measures to those responsible for implementing them and other stakeholders;
- (b) ensuring that your business has adequate staff and resources to undertake required compliance functions;
- (c) ensuring staff education and awareness of the measures;
- (d) implementing clear reporting lines for the manager(s) responsible for the measures; and
- (e) receiving regular reports on the measures.

Note: If you have a small credit or finance broking business, see Information Sheet 97 *Guidance for small credit businesses* (INFO 97) for further guidance on this issue. Note that our expectations about how you structure your compliance measures relate to the nature, scale and complexity of your business.

D Your internal systems

Note: If you are regulated by APRA, you only need to read the paragraphs relating to conflicts of interest (i.e. RG 205.72–RG 205.78): see RG 205.11–RG 205.13.

Key points

Unless you are regulated by APRA, you must have measures in place to ensure you comply with the obligation to have adequate risk management systems on an ongoing basis.

We expect you to have a structured and systematic process for identifying, evaluating and managing risks faced by your business: see RG 205.66–RG 205.71.

All licensees must have adequate arrangements in place to ensure clients are not disadvantaged by any conflict of interest: see RG 205.72–RG 205.11.

- RG 205.63 You must have adequate risk management systems: s47(1)(i)(ii). You must also have measures in place to ensure that you comply with this obligation on an ongoing basis: see RG 205.42.
- RG 205.64 You must have adequate arrangements in place to ensure that your clients are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by you or your representatives: s47(1)(b).
- RG 205.65 This section explains what we look for when we assess the adequacy of your risk management systems and conflict of interest arrangements. When reading this section, you need to bear in mind the key concepts in Section B. For more help in designing and testing your measures, see Appendix.

Risk management systems

Note: This requirement does not apply to you if you are regulated by APRA.

- RG 205.66 The requirement for risk management systems ensures that you explicitly identify the risks you face and have measures in place to keep those risks to an acceptable minimum.
- RG 205.67 We expect your risk management systems will:
- (a) be based on a structured and systematic process that takes into account your obligations under the National Credit Act;

- (b) identify and evaluate risks faced by your business, focusing on risks that adversely affect consumers or market integrity (this includes risks of non-compliance with the credit legislation as relevant);
- (c) establish and maintain controls designed to manage or mitigate those risks; and
- (d) fully implement and monitor those controls to ensure they are effective.

Note: In thinking through your risk management obligations, you might find it helpful to look at:

- (a) Australian and New Zealand Standard AS/NZS 4360:2004 *Risk Management* and the related handbook, HB 436:2004 *Risk Management Guidelines—Companion to AS/NZS 4360:2004*, available for purchase from www.saiglobal.com/shop; and
- (b) Joint Forum *High-level principles for business continuity* (August 2006), available from IOSCO (www.iosco.org), IAIS (www.iaisweb.org) and BIS (www.bis.org).

Nature, scale and complexity of your business

- RG 205.68 Your risk management systems will depend on the nature, scale and complexity of your business and your risk profile. They will be different for each credit licensee.
- RG 205.69 Your risk management systems will need to adapt as your business develops and your business risk profile changes over time.
- RG 205.70 If you use external providers to provide functions that relate to your credit licence, we think your risk management measures will need to be different from those you would need if you performed those functions in-house.

Note: We will take into account the nature, scale and complexity of your credit activities when assessing compliance with this obligation: s47(2).

Financial risks

- RG 205.71 Your risk management systems will normally need to address the risk that your financial resources will not be adequate.

Note: For further guidance see Regulatory Guide 207 *Credit licensing: Financial requirements* (RG 207)

Conflicts of interest

- RG 205.72 All credit licensees have a general conduct obligation in relation to conflicts of interest: s47(1)(b).
- RG 205.73 This obligation is to have adequate arrangements in place to ensure that your clients are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by you or your representatives. We think that this obligation also includes the obligation to

manage and monitor any conflicts that arise in relation to any credit activities in which you engage.

Note: This obligation is different from the obligation under s912A(1)(aa) of the *Corporations Act 2001* that applies to AFS licensees in relation to conflicts of interest. We think that the conflicts obligation for credit licensees is more explicit about the required outcomes for the consumer.

RG 205.74 The obligation arises where an interest of the licensee conflicts with a legal obligation that the licensee owes to the client, including one that arises under the credit legislation or at law (whether through statute, common law or contractual arrangements between the licensee and the client).

Note: See Explanatory Memorandum, paragraph 2.117.

RG 205.75 Whether arrangements are 'adequate' will depend on the particular circumstances in each case. For example, if a credit provider pays a licensee providing credit assistance a higher rate of commission for achieving certain volumes of sales, the licensee would need to adopt adequate arrangements to ensure that consumers are not disadvantaged by the possible conflict of interest that arises.

RG 205.76 These arrangements would need to ensure that staff or representatives of the licensee are not favouring the achievement of volume targets over the interests of the client. Such arrangements could include compliance procedures designed to ensure that the licensee does not suggest a credit contract that is unsuitable for the consumer so that consumers are not disadvantaged by the incentive offered to the licensee who is providing the credit assistance.

Note: We will take into account the nature, scale and complexity of your credit activities when assessing compliance with this obligation: s47(2).

RG 205.77 Generally, we expect that licensees providing credit assistance in relation to third party loans should have a suitably comprehensive product list. We expect that this list will be thoroughly researched and reasonably representative of the products available on the market (being the market available to your clients).

RG 205.78 For example, a mortgage broker has reviewed the home loan market and has a comprehensive list of the products on which it can advise and arrange, which is well researched so that it is representative of the credit market available to its clients. The broker can offer borrowers access to products that will be competitive in price, although not necessarily the cheapest available. The list needs to be sufficiently comprehensive to ensure that the broker has made adequate arrangements.

E Your people

Key points

You must have measures for monitoring and supervising your representatives (i.e. the people who act on your behalf). We expect these measures will allow you to determine whether your representatives are complying with the credit legislation: see RG 205.83–RG 205.89.

You must also have measures to ensure that your representatives who engage in credit activities have, and maintain, the necessary knowledge and skills to engage in those credit activities competently: see Regulatory Guide 206 *Credit licensing: Competence and training* (RG 206).

- RG 205.79 You must:
- (a) take reasonable steps to ensure that your representatives comply with the credit legislation (s47(1)(e)); and
 - (b) if they engage in credit activities (as relevant), ensure they are trained and competent to do so (s47(1)(g)).
- RG 205.80 You must also have measures in place to ensure that you comply with these obligations on an ongoing basis: see RG 205.42.
- RG 205.81 This section explains what we look for when we assess compliance with these obligations. When reading this section, you need to bear in mind the key concepts in Section B. For more help in designing and testing your measures, see Appendix.
- RG 205.82 You must also have adequate resources, including people, to engage in credit activities and carry out supervision: s47(1)(l)(i). This particular obligation is covered in Section F.

Monitoring and supervision of your representatives

- RG 205.83 To ensure your representatives comply with the credit legislation, we consider that you need to monitor and supervise them.

Who do you need to monitor and supervise?

- RG 205.84 Any person who acts on your behalf is your ‘representative’: see s5. Under s5, ‘representatives’ refers to the following classes of persons:
- (a) your employees and directors, or the employees and directors of a body corporate related to you;

- (b) your credit representatives; and
- (c) any other person acting on your behalf.

How closely do you need to supervise your representatives?

- RG 205.85 The level of monitoring and supervision your representatives need will depend on the functions your representatives perform and the nature, scale and complexity of your business (e.g. whether your business operates from one or a number of locations).
- RG 205.86 We do not think that you need to scrutinise every activity of your representatives. However, we expect you will have measures that:
- (a) allow you to determine whether your representatives are complying with the credit legislation (including your licence conditions); and
 - (b) include a robust mechanism for remedying any breaches.
- RG 205.87 We also expect that you will have measures in place for complying with new requirements as they arise. For example, for authorised deposit-taking institutions and registered financial corporations, the responsible lending obligations will apply from 1 January 2011.

Employment screening

- RG 205.88 We expect your measures for monitoring and supervision will include carrying out appropriate background checks before you appoint new representatives. These checks could include referee reports, searches of ASIC's register of banned and disqualified persons and police checks.

Note: In thinking through your monitoring and supervision obligations, you might find it helpful to look at:

- (a) Australian Standard AS 4811–2006 *Employment Screening* and the related *Employment Screening Handbook* (HB 323–2007), available for purchase from www.saiglobal.com/shop; and
- (b) *Reference Checking in the Financial Services Industry* (HB 322–2007), available free from www.asic.gov.au. Standards Australia developed HB 322–2007 in conjunction with ASIC. Although this handbook was originally prepared for AFS licensees, it also provides useful guidance for credit licensees.

Measures for monitoring and supervision

- RG 205.89 Your measures for monitoring and supervision will normally show how you:
- (a) keep track of who your representatives are, what role they perform and whether they are appropriately authorised;
 - (b) ensure your representatives (including your credit representatives) act within the scope of what you have authorised them to do;

- (c) ensure your representatives understand your compliance arrangements;
- (d) monitor your representatives' compliance; and
- (e) respond to compliance failures.

Knowledge and skills

RG 205.90 We have provided separate guidance about meeting your obligations for training representatives: see RG 206 *Credit licensing: Competence and training* (RG 206)

F Your resources

Note: If you are regulated by APRA, you do not need to read this section: see RG 205.11–RG 205.13.

Key points

Unless you are regulated by APRA, you must have measures in place for ensuring you have adequate resources to engage in the credit activities covered by your licence and to carry out supervisory arrangements: see RG 205.91–RG 205.95.

You at least need to have enough resources to enable you to comply with all of your obligations under the law and meet your current and anticipated future operational needs: see RG 205.96–RG 205.103.

- RG 205.91 You must have adequate financial, technological and human resources to engage in the credit activities covered by your licence and to carry out supervisory arrangements: s47(1)(1)(i). You must also have measures to ensure that you have adequate resources on an ongoing basis: see RG 205.42.
- RG 205.92 This section explains what we look for when we assess the adequacy of your human and technological resources. When reading this section, you need to bear in mind the key concepts in Section B. For more help in designing and testing your measures, see Appendix.
- RG 205.93 We have provided separate guidance about meeting your obligation to have adequate financial resources: see Regulatory Guide 207 *Credit licensing: Financial requirements* (RG 207).
- RG 205.94 Whether your resources are adequate will depend on the nature, scale and complexity of your business: see RG 205.20.

Having adequate resources

- RG 205.95 Having adequate technological and human resources is crucial to your ability to demonstrate that you have the capacity to carry on your credit business in full compliance with the law and to supervise your representatives. Failure to have enough resources may create an unacceptable risk that you may not comply with all of your obligations as a credit licensee.

Human resources

RG 205.96 Whether your human resources are adequate will depend on the nature, scale and complexity of your business: see RG 205.20. However, you need to have enough people to enable you to:

- (a) comply with all of your obligations under the law;
- (b) carry out monitoring and supervision; and
- (c) meet your current and anticipated future operational needs.

RG 205.97 Your measures for ensuring that you have enough people will normally include:

- (a) recruitment processes and succession planning;
- (b) systems for inducting and training new staff;
- (c) performance management systems; and
- (d) processes for staff retrenchment and redundancy.

Reviewing your human resources

RG 205.98 You need to review the adequacy of your human resources regularly.

RG 205.99 We expect that you will identify key indicators that your human resources are inadequate. These key indicators are likely to include:

- (a) customer complaints about the quality of customer service;
- (b) a low ratio of compliance staff to representatives;
- (c) client accounts and interests not being monitored when staff are absent;
- (d) a large number of inexperienced staff (e.g. staff who have been in your business less than six months); and
- (e) a large number of vacant positions.

Technological resources

RG 205.100 Whether your technological resources are adequate will depend on the nature, scale and complexity of your business: see RG 205.20. However, you need to have enough technological resources to enable you to:

- (a) comply with all of your obligations under the law;
- (b) maintain client records and data integrity;
- (c) protect confidential and other information; and
- (d) meet your current and anticipated future operational needs.

RG 205.101 We know that the credit industry uses a variety of technological resources, ranging from phones, faxes and personal computers to sophisticated networks and/or customised IT systems. We do not think you need to have sophisticated IT systems if simpler systems enable you to meet the criteria in RG 205.100.

Reviewing your IT systems

RG 205.102 You need to review the adequacy of your technological resources regularly.

RG 205.103 When reviewing your IT systems, you need to consider:

- (a) your IT system security;
- (b) the currency of your hardware and software;
- (c) the quality and relevance of the applications you use;
- (d) your disaster recovery systems and business resumption capacity;
- (e) the number of users;
- (f) the ongoing viability of software, and any service providers;
- (g) the response times of your IT systems;
- (h) the down times of your IT systems;
- (i) your use of legacy IT systems; and
- (j) complaints (e.g. from staff, clients or service providers) about your IT systems.

Appendix: Designing and testing your measures

- RG 205.104 This appendix sets out questions to consider when designing and testing your measures for ensuring you comply with the general conduct obligations covered in Sections C to F of this guide. You need to read this appendix in conjunction with the corresponding section of this guide.
- RG 205.105 This appendix is not intended as a compliance checklist—it does not cover everything you need to consider, and it may cover some things that do not apply to you. You still need to consider your individual circumstances, including the nature, scale and complexity of your business: see RG 205.20.
- RG 205.106 We will continue to review and update this appendix in light of our regulatory experience.

Your broad compliance obligations (Section C)

Compliance framework	<ul style="list-style-type: none"> • Have you documented your compliance measures? • Has your governing body signed off on them? • How do you monitor whether your compliance measures are being followed? Who is responsible? • How do you review your compliance arrangements to ensure they remain effective and up-to-date (e.g. to deal with new products)? • Do you undertake regular external reviews of your compliance measures and their monitoring? • How do you assess the impact of outsourcing on your compliance measures?
Implementing compliance measures	<ul style="list-style-type: none"> • How do you communicate your compliance measures to your staff? • Are your compliance measures integrated into relevant operational processes? • How do you promote a culture of compliance within your organisation?
Compliance function	<ul style="list-style-type: none"> • Have you set up a separate compliance function within your organisation? Is it independent? • Do you have a compliance manager? Do they report to the governing body (or its delegate)? • Are compliance staff adequately trained and qualified in compliance responsibilities? • Are the responsibilities of compliance staff clearly defined and understood? • Do compliance staff have access to the information they need to perform their role?
Responding to compliance failures	<ul style="list-style-type: none"> • How do you ensure that you identify and take action to remedy compliance failures and other compliance issues, including action to prevent their recurrence? • How do you identify and address systemic compliance failures or other trends in compliance issues?
Record-keeping	<ul style="list-style-type: none"> • How do you ensure that you keep adequate accounting, business and compliance monitoring records? • How do you ensure that you retain records for the statutory period?
Conduct and disclosure obligations	<ul style="list-style-type: none"> • How do you ensure that you comply with your conduct obligations under the National Credit Act? For example, licensees have to meet responsible lending requirements. • How do you ensure that you comply with your disclosure obligations? For example, licensees will have obligations in relation to providing a Credit Guide to the consumer.

Your internal systems (Section D)

RISK MANAGEMENT SYSTEMS

Risk management framework

- Have you documented your risk management systems?
- Do your documented measures show who is responsible for risk management?
- Has your governing body signed off on your risk management measures and made a commitment to ongoing risk management?
- Have you appointed senior managers to oversee risk management measures?
- Are there clear risk management reporting lines? Do your staff understand what they are required to report on, and when?
- Do you annually review your risk management measures to ensure they are effective? Does this include external review?
- Do you have a business continuity plan?

Implementing risk management

- How do you ensure that staff understand and comply with risk management measures?
- Are risk management staff adequately trained and qualified in risk management responsibilities?

Identifying risks

- How do you identify risks to your business?
- How do you identify risks to consumers and market integrity?
- Have you considered all your obligations under the National Credit Act (including the regulations and licence conditions) and identified the risks of non-compliance with them?
- How do you ensure you identify new risks as they arise (e.g. because of new products or technology)?
- Do you document the risks you identify?

Evaluating risks

- How do you establish the probability of a risk event occurring and the impact of the problem if the risk occurs?
- How do you combine the probability and impact factors to determine overall risk?
- How do you prioritise the risks and establish which ones need to be addressed?
- Do you document the risks you evaluate and your evaluation methods?

Addressing risks

- How do you address those risks with appropriate measures and controls?
- Do you document your measures and controls for addressing risk and the reasons behind them?

CONFLICTS OF INTEREST

Ensuring your clients are not disadvantaged

- Do you have adequate arrangements in place to ensure that your clients are not disadvantaged by any conflict that may arise in relation to your or your representatives' credit activities (including managing and monitoring any conflicts that arise)?
- For example, do your arrangements include compliance procedures to ensure that neither you nor your representatives suggest a credit contract that is unsuitable for a consumer if a higher rate of commission is involved?

Product list

- How comprehensive is your product list?
- Have you thoroughly researched the products on your list and are they reasonably representative of the products available on the market (being the market available to your clients)?

Your people (Section E)

MONITORING AND SUPERVISION

Appointing representatives

- What background checks (e.g. referee reports) do you do before you appoint representatives? How do you check the person's identity?
- How do you ensure that you comply with your notification obligations under s71 in relation to your credit representatives?

Monitoring and supervision framework

- Have you established a clear reporting and supervisory structure covering all your representatives? How do you ensure that you are receiving accurate information?
- Who is responsible for monitoring and supervision? To whom do they report?
- Do you have representatives who operate from locations other than your principal place of business? How do you monitor and supervise them?
- How do you ensure your representatives understand your compliance measures? How do you monitor that they are complying with your compliance measures?
- How do you identify and address higher-risk activities of your representatives (e.g. providing credit assistance to consumers, handling client money)?
- Do you have a policy on disciplinary action for compliance failures or other compliance issues? Has it been clearly communicated to your representatives?

KNOWLEDGE AND SKILLS: see Regulatory Guide 206 *Credit licensing: Competence and training* (RG 206)

Your resources (Section F)

TECHNOLOGICAL RESOURCES

- | | |
|-------------------------------------|---|
| Adequacy of resources | <ul style="list-style-type: none"> • What technological resources (e.g. communications, IT) do you need to carry out your business? • Have you identified key indicators that might show you do not have enough technological resources? How do you monitor these key indicators? |
| IT framework | <ul style="list-style-type: none"> • Do you have an IT strategy to support your current and future operational needs? • Do you have a disaster recovery plan and do you test it regularly? • Do you have in-house IT staff to provide and/or manage the delivery of IT services? If not, how are your IT services managed and delivered? • Do you have outsourcing arrangements with third parties for the development and maintenance of your IT systems? • Do you have contracts with third parties that include service-level agreements? If so, how often do you review levels of service delivery under those agreements? |
| Data back-up and IT security | <ul style="list-style-type: none"> • Do you have data back-up and recovery plans? • How regularly do you back up your data and how are back-ups stored (e.g. are they stored offsite)? • Do you have network security controls in place? How do you keep viruses out of your system? • How do you protect confidential and other sensitive information? • Is access to physical IT infrastructure restricted? |

HUMAN RESOURCES

- | | |
|----------------------------------|--|
| Adequacy of resources | <ul style="list-style-type: none"> • What human resources do you need for each of your business activities (e.g. compliance, monitoring and supervision, complaints handling)? • Have you identified key indicators that might show you do not have enough human resources? How do you monitor these key indicators? • How do you ensure extra staff are available when they are needed (e.g. to supervise staff who have been involved in compliance failures)? • How do you ensure client accounts and interests are monitored while staff are absent? |
| Human resources framework | <ul style="list-style-type: none"> • Do you have a recruitment process? • Do you have systems for inducting and training new staff? • Do you have a performance management process? • Do you have a succession planning process? • Do you have in-house human resources staff to provide and/or manage the delivery of your human resources needs? If not, how are your human resources needs managed and delivered? • Do you have outsourcing arrangements with third parties for the development and maintenance of your human resources needs? • Do you have contracts with third parties that include service-level agreements? If so, how often do you review levels of service delivery under those agreements? |

FINANCIAL RESOURCES: see Regulatory Guide 207 *Credit licensing: Financial requirements* (RG 207)

Key terms

Term	Meaning in this document
AFS licensee	A person who holds an Australian financial services licence under s913B of the <i>Corporations Act 2001</i> Note: This is a definition contained in s761A of the Corporations Act.
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
BIS	Bank for International Settlements
body regulated by APRA	Has the meaning given in s3(2) of the <i>Australian Prudential Regulation Authority Act 1998</i>
broad compliance obligations	Means the obligations discussed in Section C of this guide
credit legislation	Has the meaning given in s5 of the National Credit Act
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
Explanatory Memorandum	Explanatory Memorandum to the National Consumer Credit Protection Bill 2009
general conduct obligations	The obligations under s47(1) of the National Credit Act
governing body	The board of directors, committee of management or other governing body of the licensee (including, in relation to a licensee who is a natural person, that person)
IAIS	International Association of Insurance Supervisors
IOSCO	International Organization of Securities Commissions
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
National Credit Code	National Credit Code at Schedule 1 of the National Credit Act
National Credit Regulations	Either: <ul style="list-style-type: none"> • National Consumer Credit Protection Regulations 2010; or • before these regulations are made final—Exposure Draft National Consumer Credit Protection Regulations released by Treasury in November 2009

Term	Meaning in this document
reg 2.2 (for example)	A regulation of the National Credit Regulations (in this example numbered 2.2), unless otherwise specified
representative	Has the meaning given in s5 of the National Credit Act
RG 166 (for example)	An ASIC regulatory guide (in this example numbered 166)
s47(1) (for example)	A section of the National Credit Act (in this example numbered 47(1)), unless otherwise specified
Transitional Act	<i>National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009</i>
Transitional Regulations	Either: <ul style="list-style-type: none"> • National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010; or • before these regulations are made final—Exposure Draft National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations released by Treasury in November 2009

Related information

Headnotes

broad compliance obligations, conflicts of interest, credit licensees, financial, technological and human resources, general conduct obligations, key compliance concepts, monitoring and supervision of representatives, risk management

Regulatory guides

RG 165 *Licensing: Internal and external dispute resolution*

RG 203 *Do I need a credit licence?*

RG 204 *Applying for and varying a credit licence*

RG 206 *Credit licensing: Competence and training*

RG 207 *Credit licensing: Financial requirements*

Legislation

Australian Prudential Regulation Authority Act 1998, s3(2)

Australian Securities and Investments Commission Act 2001

Corporations Act 2001, s912A(1)(aa), 913B; *Corporations Regulations 2001*, reg 7.6.03(g)

National Credit Act, s5, 29, 35, 37, 45, 47, 48, 53, 55, 64, 67, 71, 324, 325; National Credit Regulations, reg 2.2; Transitional Regulations, Part 3 Divs 1 & 3, reg 10

Consultation papers and reports

CP 110 *General conduct obligations of credit licensees* (July 2009)

CP 115 *Responsible lending* (September 2009)

CP 125 *Compensation requirements for credit licensees: Further consultation* (November 2009)

Information releases

INFO 97 *Guidance for small credit businesses*

Australian standards and handbooks

AS 3806–2006 *Compliance programs*

AS/NZS 4360:2004 *Risk management* and HB 436:2004 *Risk management guidelines—Companion to AS/NZS 4360:2004*

AS 4811–2006 *Employment screening* and HB 323–2007 *Employment screening handbook*

HB 322–2007 *Reference checking in the financial services industry*

Other publications

Joint Forum (IOSCO/IAIS/BIS), *High-level principles for business continuity* (August 2006)