

12 May 2017

ASIC Enforcement Review
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: ASICenforcementreview@treasury.gov.au

SELF REPORTING OF CONTRAVENTIONS BY FINANCIAL SERVICES AND CREDIT LICENSEES

SUBMISSION BY THE ASSOCIATION OF SECURITIES AND DERIVATIVES ADVISERS OF AUSTRALIA – ASDAA

The Association of Securities and Derivatives Advisers of Australia (ASDAA) appreciates the opportunity to provide these comments to Treasury in respect of the proposed Self Reporting of Contraventions by Financial Services and Credit Licensees.

ASDAA represents the interests of its members, who are from the Securities and Derivatives advisory profession. Its members are comprised of individuals who are either directors, or employees, of small to medium sized firms which hold an Australian Financial Services Licence (AFSL), but are not a Participant Member of the Australian Stock Exchange.

ASDAA has a strong desire to see that investor's receive sound investment advice and the appropriate investor protection. ASDAA members rely on the ongoing trust of their clients and on the integrity of the Australian financial markets, for their livelihood. Without both, clients wouldn't participate in the markets and trade in shares, exchange traded options and other listed financial products.

Generally speaking we agree that the current Self Reporting requirements applicable to AFS Licensees require clarification and refinement and that the same regime should apply to Credit Licensees.

We must bear in mind that industry has gone through some major reforms over the last 12 months some of which are yet to be implemented.

One of the major reforms is the ASIC Industry funding model which will result in substantial increased costs for most licensees taking into consideration the size, scale and nature of their business. So bearing this in mind if the industry is paying ASIC to conduct the regulatory function then due consideration needs to be given to the costs associated with self-reporting and effectively transferring the regulatory function from ASIC to the licensee, ie. thus creating a self regulatory environment.

Is this what the focus should be or should the self-reporting regime be structured more as intelligence unit to enhance ASIC's regulatory function.

POSITION 1: The 'Significance Test' in Section 912D of the Corporations Act should be retained but clarified to ensure that the significance of breaches is determined objectively

ASDAA agrees that further clarity is required surrounding the significance test in Section 912D of the Corporations Act. It appears that there is a preference to add objectivity to the 'Significance Test' and that currently the test itself is too subjective.

Generally speaking a subjective test is evaluated by giving an opinion whilst an objective test has a right or wrong answer. In evaluating the significance of a breach the end result will always be subjective as there is no right or wrong answer when it comes to determining significance. Every person will have a different opinion and generally it will be difficult to determine what a reasonably minded person will think as that itself is subjective.

Question	ASDA Response
1.1 Would a requirement to report breaches that a reasonable person would regard as significant be an appropriate trigger for the breach reporting obligation?	We feel that this would help. However, maybe applying some form of quantitative and/or qualitative analysis to the circumstances relating to the breach could add some objectivity to the process.
1.2 Would such a test reduce ambiguity around the triggering of the obligation to report?	Possibly, however we note that a reasonable person (ie. experienced person) in the finance industry would form a very different opinion to a reasonable person of the general population. People's demographics, experience, frame of mind, background and knowledge all play a role in the opinion they would form. The biggest challenge would be to determine who is considered to be a reasonable person and how do you prove that.

POSITION 2: The obligation for licensees to report should expressly include significant breaches or other significant misconduct by an employee or representative

We agree with this requirement provided ASIC utilises such data from an intelligence point of view and that such data not be used by ASIC to prevent or hinder a person's or firm's ability to apply or be granted an AFS Licence or to apply or be granted a variation to an AFS Licence until such allegations have been put to the accused person in writing.

Question	ASDA Response
2.1 What would be the implications of this extension of the obligation of licensee's to report?	The requirement to report is currently triggered by the existence of a breach or likely breach. One of the implications of the proposal is that it could create an environment whereby Licensees intentionally submit reports of likely breaches to ASIC relating to ex-employees in order to tarnish a person's reputation and prevent them from moving on and taking their client base with them. This is a real issue for a lot of advisers and financial planners that choose to move on so ASIC should ensure that it does not create an environment which gives further powers to the larger institutions.

POSITION 3: Breach to be reported within 10 Business Days from the time the obligation to report arises

We agree that a breach should be reported within 10 business days from the time the obligation to report arises however do not feel that using the wording ‘from the time the obligation to report arises’ provides the clarity sought by industry.

The proposal that a breach be reportable from when the AFS licensee becomes aware or has reason to suspect that a breach has occurred, may have occurred or may occur provides the clarity sought and would be the preferred wording.

Question	ASDA Response
3.1 Would the threshold for the obligation to report outlined above be appropriate?	If ASIC were to take on an Intelligence Unit approach to breach reporting then the threshold for the obligation to report could be appropriate. However, we have concerns with the requirement to report breaches that may occur as there is no certainty that a breach has occurred or will occur so the reporting requirements should be designed to promote early reporting and regular updates. This could be achieved by having different reporting forms for actual versus potential breaches thus giving licensees the comfort that they can continue their investigations if they report potential breaches early.
3.2 Should the threshold extend to broader circumstances such as where a licensee “has information that reasonably suggests” a breach has or may have occurred, as in the United Kingdom?	At this point in time we do not believe it should be extended to broaden the circumstances.
3.3 Is 10 business days from the time the obligation to report arises an appropriate limit? Or should the period be shorter or longer than 10 days?	10 business days is appropriate on the condition that there is an understanding that ASIC will work with licensee to achieve the best outcome for affected parties and that: <ul style="list-style-type: none"> • in the case of potential breaches the licensee can continue its investigations whilst giving ASIC updates; and • in the case of actual breaches the licensee can provide further information as and when it comes to light.
3.4 Would the adoption of such a regime have a cost impact, either positive or negative, for business?	The regime would have a cost impact as licensees would most likely report more breaches or potential breaches thus requiring additional resources to support the licensee’s internal compliance function.

POSITION 4: Increase penalties for failure to report as and when required

We feel that the clear objective of the self-reporting regime should be

‘Having a self-reporting system that encourages licensees to notify ASIC early of issues and a co-operative approach is more likely to yield quicker, more durable outcomes for consumers and the industry generally’

Therefore, we do not feel that the use of penalties would encourage licensees to notify ASIC early of issues.

The only message this would send is that ASIC and government have no trust in the industry and that they feel that industry generally will not comply with the self-reporting requirements.

POSITION 5: Introduce a civil penalty in addition to the criminal offence for failure to report as and when required

Failing to self-report a breach or failing to self-report a breach on time should not be deemed a criminal offence.

Criminal law is there to regulate the social conduct and proscribes whatever is threatening, harmful or otherwise endangering to the property, health, safety, moral welfare of people.

Generally, we fail to see how a criminal offence arises when a licensee fails to self-report or fails to self-report on time.

We acknowledge that a civil penalty may result in better outcomes.

POSITION 6: Introduce an infringement notice regime for failure to report breaches as and when required

We fail to see how this will achieve a better outcome for industry.

The objective is to encourage industry to self-report. If ASIC has the ability to issue infringement notices then how will ASIC be able to encourage licensees to co-operate when licensees know that they may receive an infringement notice at any time for allegedly not self-reporting. We also note that ASIC has no need to meet any burden of proof to issue an infringement notice, which would not provide any encouragement to industry to work with ASIC.

POSITION 7: Encourage a co-operative approach where licensees report breaches, suspected or potential breaches or employee or representative misconduct at the earliest opportunity

For the self-reporting regime to work in ASIC's favour, ASIC needs to take more of an Intelligence Unit approach, thus encouraging licensees to self-report actual breaches, suspected breaches and potential breaches.

Some of the proposals outlined in the paper under Position 7 work towards encouraging a collaborative approach between the regulated population and the regulator.

Question	ASDA Response
4.1 What is the appropriate consequence for a failure to report breaches to ASIC?	The appropriate action would be for ASIC to instigate a review of the licensee's internal controls and processes as a failure to self-report would indicate a failure in the internal controls adopted by the licensee. The prospect for a licensee being subject to an ASIC review or a review by an external independent third party which is required to report to ASIC would be more effective in encouraging licensees to

Question	ASDA Response
	self-report than the imposition of a financial penalty.
4.2 Should a failure to report be a criminal offence? Are the current maximum prison term and monetary penalty sufficient deterrents?	No, as failing to self-report does not threaten, harm or endanger the property, health, safety or moral welfare of people. The reportable breach may meet these requirements but the act of failing to self-report does not.
4.3 Should a civil penalty regime be introduced?	We believe that the regime outlined in 4.1 would better serve the objective to encourage licensees to self-report. However, failing that a civil penalty regime seems more appropriate than a criminal penalty regime.
4.4 Should an infringement notice regime be introduced?	We do not believe that an infringement notice regime would achieve or create an environment whereby licensees will want to self-report or co-operate with ASIC.
4.5 Should the self-reporting regime include incentives such as that outlined above? What will be effective to achieve this? What will be the practical implications for ASIC and licensees?	The self-reporting regime should include incentives to encourage licensees to self-report and to continue to co-operate with ASIC so that the best outcome can be achieved for affected parties.

POSITION 8: Prescribe the required content of reports under section 912D and require them to be delivered electronically

We believe that industry would benefit from the use of prescribed forms.

We feel that the following forms should be created as the data that needs to be collected and the manner in which such notifications should be treated vary:

- form for self-reporting actual breaches;
- form for self-reporting potential breaches; and
- form for providing updates to ASIC regarding matters previously self-reported.

Question	ASDA Response
5.1 Is there a need to prescribe the form in which AFS licensees report breaches to ASIC?	Industry would benefit from the use of prescribed forms provided that there is a provision to provide additional information.
5.2 What impact would this have on AFS licensees?	This should make it easier for licensees to report breaches as it would create a standardised approach.

POSITION 9: Introduce a self-reporting regime for credit licensees equivalent to the regime for AFS licensees under Section 912D of the Corporations Act

We agree that a self-reporting regime for Credit Licensees equivalent to the regime for AFS Licensees should be introduced. This will make it easier for those entities that hold both an AFS Licence and a Credit Licence.

Question	ASDA Response
6.1 Should the self-reporting regime for credit licensees and AFS licensees be aligned?	Yes as this will create uniformity across both industries especially considering that a lot of people operate in both spaces.

Question	ASDA Response
6.2 What will be the impact on industry?	The main impact on the credit industry will be transitioning to a regime which requires regular reporting.

POSITION 10: Ensure qualified privilege continues to apply to licensees reporting under Section 912D

We agree with the proposal and believe that the same rules relating to qualified privilege should apply to Credit Licensees if the self-reporting requirements are imposed on Credit Licensees.

POSITION 11: Remove the additional reporting requirement for responsible entities

We have no objections with these proposals.

Question	ASDA Response
7.1 Should the self-reporting regime for responsible entities be streamlined?	Yes the self-reporting regime for responsible entities should be streamlined.
7.2 Is it appropriate to remove the separate self-reporting obligation in section 601FC? If so, should the threshold for reporting be incorporated in the factors for assessing significance in section 912D?	Yes it is appropriate to remove the separate self-reporting obligations and for the thresholds to be incorporated in the factors for assessing significance.

POSITION 12: Require annual publication by ASIC, of breach report data for licensees

Publication by ASIC, of breach report data for licensees should be limited to actual breaches only as such breaches would generally be supported by factual information and evidence.

Potential or likely breaches should remain confidential until the breach is determined to be actual.

Question	ASDA Response
8.1 What would be the implications for licensees of a requirement for ASIC to report breach data at the licensee level?	ASIC currently has the ability to report breaches at the licensee level. The reporting of such data as a result of information received through the self-reporting regime should be limited to actual breaches only.
8.2 Should ASIC reporting on breaches at a licensee level be subject to a threshold? If so, what should that threshold be?	Without any indication as to what the threshold could be means it is difficult to respond to this question. However, we feel that ASIC could adopt the same standards it currently uses to publicly report breaches by AFS Licensees that have been determined by ASIC.
8.3 Should annual reports by ASIC on breaches include, in addition to the name of the licensee, the name of the relevant operational unit within the licensee's organisation? Or any other information?	We do not see the benefit of including the actual operational unit within the licensee's organisation. We feel that reporting at the licensee level is sufficient.

ASDAA appreciates the opportunity to provide this Submission to Treasury on these significant proposals.

We would be happy to discuss any issues arising from our submissions on this issue, or to provide any further material that may assist.

Should you require any further information, please contact Brad Smoling, Communications Executive, on (07) 5532 3930 or email brad@asdaa.com.au

Yours sincerely,

Marija Pajeska
Compliance Director