

From the Desk of Director Marija Pajeska



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By email: BR.submissions@asic.gov.au

Response to Consultation Paper 340 – Breach reporting and related obligations

The Association of Securities and Derivatives Advisers of Australia (ASDAA) appreciates the opportunity to provide these comments to ASIC in respect of Consultation Paper (CP) 340 – Breach reporting and related obligations.

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.

We do not agree with some of the matters that have been defined as a reportable situation, most importantly matters relating to financial advisers of other AFS Licensees. We understand that this is not the forum to discuss or comment on this matter as the laws will come into effect in October 2021 that supports these requirements.

However, we wish to take this opportunity to say that for these laws to work effectively there is an onus on ASIC to also share information with licensees when they submit an application to appoint a person as a financial adviser.

If the basis of these requirements is to protect clients then the responsibility lies both with the AFS Licensee and ASIC. ASIC receives so much information in the course of its work and laws currently exist which allow ASIC to provide information to an AFS Licensee about persons it is seeking to appoint as a financial adviser.

So, when ASIC is privy to information that could alter an AFS Licensee's decision to appoint a person as a financial adviser then ASIC should have a legal obligation to share that information with the AFS Licensee. If it does not, the AFS Licensee should have recourse against ASIC as ASIC failed to meet one of its primary

responsibilities, ie. promote confident and informed participation by investors and consumers in the financial system.

Our specific comments to each of ASIC's proposals in the Consultation Paper are detailed in Annexure A of this letter.

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, Director of Communications, on (07) 5532 3930 or email brad@asdaa.com.au.

Yours Sincerely

A handwritten signature in black ink, appearing to read "M. Pajeska". The signature is written in a cursive, flowing style.

Marija Pajeska
Compliance Director

ANNEXURE A: RESPONSE TO ASIC QUESTIONS

B. BREACH REPORTING BY AFS LICENSEES AND CREDIT LICENSEES

ASIC's proposed approach to guidance

B1 proposal: ASIC proposes to give consistent guidance for AFS licensees and credit licensees on how they can comply with the breach reporting obligation, with examples of how the obligation applies in particular situations.

ASIC Question		Response
B1Q1	Do you agree with our proposed approach? If not, why not?	We agree with ASIC's proposed approach.
B1Q2	Are there differences in the structure or operation of credit licensees that require specific guidance on how the breach reporting obligation applies?	We believe the structure and operations of credit licensees are very similar to those of financial planners and therefore don't feel any specific guidance is required. We acknowledge that this is a new framework that credit licensees will need to become accustomed to however see the long term benefits for clients.

B2 proposal: ASIC proposes to include case studies and scenarios to supplement our general guidance and help illustrate key principles as they might apply to different licensees, industries and business models.

ASIC Question		Response
B2Q1	Are there any specific issues, incidents, challenges or areas of concern you think we should include as examples, case studies or scenarios? If so, please provide details and explain why they should be included.	We believe the structure and operations of credit licensees are very similar to those of financial planners and therefore don't feel any specific guidance is required. We acknowledge that this is a new framework that credit licensees will need to become accustomed to however see the long term benefits for clients.

How ASIC guidance applies

B3 proposal: ASIC proposes Draft RG 78 identifies where the existing breach reporting obligation (as in force immediately before 1 October 2021) continues to apply to AFS licensees: see draft RG 78.14–RG 78.18.

ASIC Question		Response
B3Q1	Should we include further guidance to help AFS licensees understand how the existing breach reporting obligation under s912D of the Corporations Act (as in force before 1 October 2021) applies? If so, please provide details.	<p>We are of the view that ASIC needs to provide further guidance regarding the transitional provisions as the new RG78 will replace the old RG78 such that it is highly likely that the old RG78 will no longer be available on the ASIC website.</p> <p>We feel that it is important that ASIC include in the new RG78 details of the previous breach reporting obligations that will apply to situations where RG78.15 is satisfied. This could be done within the section titled 'How our guidance applies: transitional provisions' or by way of Appendix to the new RG78.</p>

What must be reported to ASIC

B1 proposal: ASIC proposes to provide high-level guidance to help AFS licensees and credit licensees identify what they must report to ASIC, including guidance on:

- (a) what is a 'reportable situation' (see draft RG 78.19–RG 78.25);*
- (b) whether a breach or likely breach of a core obligation is significant (see draft RG 78.26–RG78.45);*
- (c) when an investigation is a reportable situation (see draft RG 78.46–RG 78.57);*
- (d) what are 'additional reportable situations' (see draft RG 78.58–RG 78.60); and*
- (e) what are reportable situations about other licensees (see draft RG 78.61–RG 78.67).*

ASIC Question		Response
B4Q1	Do you agree with our proposed approach? If not, why not?	<p>We feel that industry would benefit from more guidance in relation to how the breach reporting requirements will interact with other reporting obligations to ASIC and other ASIC regulatory guides that contain and/ or will contain reporting requirements such as:</p> <ul style="list-style-type: none"> • RG256 – Client review and remediation conducted by advice licensees • RG271 – Internal dispute resolution <p>As one of the government's objectives is to reduce red tape ASIC needs to consider the breach reporting obligations in light of the governments' objectives and at a minimum streamline the reporting obligations to ensure that a licensee does not need to submit multiple reports relating to the same issue.</p>

ASIC Question		Response
B4Q2	Should we include further guidance on what constitutes a 'core obligation'? If so, please provide details.	At this stage we feel that the explanation is adequate however feel that ASIC has a duty to review and assess the information reported over the next 12 months or so to determine whether there is a consistency in the understanding of core obligations across industry and provide further guidance if necessary.
B4Q3	Should we include further guidance on how to determine whether a breach or likely breach of a core obligation is 'significant'? If so, please provide details.	Industry would benefit from further guidance relating to RG78.37(a) which deals with offences that carry a penalty that may include imprisonment. In this regard we recommend that ASIC include examples of offences that carry such a penalty including details of where such information can be located so that licensees can make an appropriate assessment.
B4Q4	Should we include further guidance on reporting an 'investigation' to ASIC? If so, what should be clarified? Please provide examples of scenarios (where relevant).	At this stage we feel that the draft guidance provided is adequate however feel that ASIC has a duty to review and assess the information reported over the next 12 months or so to determine whether there is a consistency across industry and provide further guidance if necessary.
B4Q5	Should we include further guidance on what constitutes 'material loss or damage'? If so, what are the challenges licensees face in determining whether loss or damage is material? Please provide examples of how you consider questions of material loss or damage.	<p>We do not agree with ASIC's interpretation of 'material' in draft RG78.39, in particular the statement relating to people experiencing vulnerability. This statement should be conditional on the nature of the vulnerability and the circumstances under which the vulnerabilities arose. Investors and clients should not be given the right to use 'experiencing a vulnerability' as a basis for a claim unless the cause of the vulnerability is directly linked to the actions of the licensee.</p> <p>This is important because there are circumstances outside of the licensees control or even consideration that can cause people to experience vulnerability and if the licensee's actions did not cause these people to experience vulnerability then people experiencing vulnerability should not be a consideration used to determine material loss or damage.</p> <p>Example: People experience vulnerability resulting from job losses from COVID 19 shutdowns and restrictions. These people are experiencing vulnerabilities however, through no fault of the licensee so if a breach is identified these vulnerabilities should not be considered as part of what constitutes 'material loss or damage'.</p>

ASIC Question		Response
B4Q6	Should we include further guidance on reportable situations involving serious fraud or gross negligence? If so, what are the challenges licensees face in identifying when serious fraud or gross negligence has occurred?	We note that ASIC provides its guidance relating to reportable situations involving serious fraud or gross negligence in draft RG78.58 to RG78.60. However, we note that these paragraphs outline the requirements to report and provide no guidance regarding what is deemed serious fraud or gross negligence. On the basis that not all industry participants hold a legal degree, industry would benefit from some guidance from ASIC as to what is deemed serious fraud or gross negligence and factors to be considered to determine whether serious fraud or gross negligence has arisen.
B4Q7	Should we include further guidance on reportable situations about other licensees? If so, please provide details.	At this stage we feel that the draft guidance provided is adequate however feel that ASIC has a duty to review and assess the information reported over the next 12 months or so to determine whether there is a consistency across industry and provide further guidance if necessary.

When to report a reportable situation

B5 proposal: ASIC proposes to include guidance in draft RG 78 about the obligation for licensees to report to ASIC within 30 days after they first know that, or are reckless with respect to whether, there are reasonable grounds to believe a reportable situation has arisen: see draft RG 78.68–RG 78.81.

ASIC Question		Response
B5Q1	Should we include further guidance to help licensees understand when to report to ASIC? If so, please provide details, including what guidance would be helpful and why.	At this stage we feel that the draft guidance provided is adequate however feel that ASIC has a duty to review and assess the information reported over the next 12 months or so to determine whether there is a consistency across industry and provide further guidance if necessary.
B5Q2	Should we include further guidance on what may amount to 'knowledge', 'recklessness' and 'reasonable grounds'? If so, please explain what specific guidance would be helpful and why.	
B5Q3	Should we include any additional or alternative guidance to help licensees provide reports to ASIC in a timely manner? If so, please give details.	

How to report a reportable situation

B6 proposal: ASIC proposes to provide general guidance on the types of information we will include in the prescribed form that licensees must use to provide reports to ASIC: see Table 8 in draft RG 78.

ASIC Question		Response
B6Q1	Do you have any feedback about the types of information we propose must be included in the prescribed form? If so, please provide details, and identify any issues.	We are of the view that the information to be provided as outlined in Table 8 is similar to what is currently reportable to ASIC in the prescribed form.
B6Q2	Should we include any other information in the prescribed form? If so, please provide details.	We do not have any recommendations on additional information that should be included in the report.
B6Q3	Do you have any concerns about the types of information in the prescribed form and whether this information can be provided within the prescribed 30-day time period? If so, please provide details.	We are of the understanding that what needs to be provided in the prescribed form is information that is known at the time the form is submitted. So maybe it would be beneficial to clarify in the RG78 that known information should be reported.

How licensees can demonstrate compliance

B7 proposal: ASIC proposes to provide high-level guidance on compliance systems for breach reporting to help licensees comply with the breach reporting obligation: see Section D of draft RG 78..

ASIC Question		Response
B7Q1	Do you agree with our proposed approach? If not, why not?	<p>We agree with the approach to provide high-level guidance on compliance systems for breach reporting however do not feel that the guidance provided by ASIC in Section D of draft RG78 has achieved this considering ASIC implies that all licensees will need a breach register that at a minimum records the information included in Table 8 of draft RG78.</p> <p>The problem lies in the fact that ASIC has taken a report issued in 2018 based on data collected in 2017/2018 from large financial services firms and provided guidance on the back of assumptions that all licensees:</p> <ul style="list-style-type: none"> • have access to the same resources (ie. Human, technological and financial) that the firms have that were the subject matter of the report. • have complex operational structures which require equally complex frameworks in order to manage, record and report on issues. <p>The guidance provided by ASIC should be scalable guidance that a licensee can use to define compliance systems that suit its operations.</p>
B7Q2	Are there any other specific areas that we should consider including in our guidance? If so, please provide details.	
B7Q3	Are there any challenges that you would face in applying our guidance to your specific circumstances (i.e. the nature, scale or type of your business)? If so, please provide details.	

C. NOTIFYING, INVESTIGATING AND REMEDIATING BREACHES OF THE LAW

ASIC's proposed approach to guidance

C1 proposal: ASIC proposes to provide guidance for AFS licensees who are financial advisers and credit licensees who are mortgage brokers. The new obligations require these licensees to notify, investigate and remediate affected clients in certain circumstances. ASIC has set out its proposed guidance in an information sheet: see draft INFO 000 in Attachment 2 to this paper.

ASIC Question		Response
C1Q1	Do you agree with our proposed approach? If not, why not?	<p>Generally, the guidance provided in the draft information memorandum is reasonable however could benefit from further clarity in relation to the following areas:</p> <ul style="list-style-type: none"> • Application of the Information Sheet – The 1st paragraph states that the information sheet is for Australian financial services (AFS) licensees who are financial advisers. This in itself is a little misleading as a financial adviser is an individual who is authorised to provide personal advice to retail clients whilst an AFS Licensee is usually a corporation. So it does not make sense to say AFS licensees who are financial advisers as that will exclude a large part of the industry to whom the Information Sheet applies. • Action 4 – It is our understanding that remediation applies if both conditions are met within the listed bullet points in this section. At the moment the second paragraph in the section does not read as such and should be clarified.
C1Q2	Should the guidance we provide on the new obligations be provided in the form of a separate information sheet, or be incorporated into RG 256? Please provide details.	The information sheet is beneficial as it provides a simple overview of the requirements. It is our view that RG256 should be updated to reflect the requirements relating to remediation resulting from the changes to the Breach Reporting requirements.
C1Q3	<p>Should we include further or more specific guidance on the circumstances in which licensees must:</p> <p>(a) notify affected clients of a breach of the law;</p> <p>(b) investigate the full extent of that breach; or</p> <p>(c) remediate affected clients?</p> <p>If so, what other information would be helpful in determining how these obligations apply?</p>	<p>We do not believe further guidance is required as the Information Sheet is supposed to provide a high level simple overview of the requirements.</p> <p>Any additional guidance should be incorporated into either RG78 or RG256 such that the Information Sheet refers to the relevant section of the Regulatory Guide which the reader can refer to if they need more information.</p>

What should be included in notices to affected clients

C2 proposal: ASIC proposes to give high-level guidance to AFS licensees and credit licensees about the types of information we consider should be included in the notices that must be given to affected clients: see in Actions 1 and 3 of draft INFO 000 in Attachment 2 to this paper.

ASIC Question		Response
C2Q1	Do you agree with our proposed approach? If not, why not?	We have no objections to ASIC's proposal.
C2Q2	Should the form of the notices referred to in Actions 1 and 3 of the information sheet be approved by ASIC? If so, what information, or types of information, should be mandatory, and what should be left to the discretion of the licensee?	No, they should not be approved by ASIC as each matter will arise from different considerations and issues and how and what information is communicated should be relevant to the circumstances at hand.