ASIC WEBSITE PREVIEW

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Breach reporting by AFS licensees and credit licensees

Regulatory guide – 78

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This regulatory guide is for Australian financial services licensees and credit licensees

Licensees must report certain breaches of the law to ASIC, known as 'reportable situations'. The law describes what a reportable situation is and when you must report it to ASIC.

To help you meet your breach reporting obligations, you should have processes and documentation in place that enables you to identify, record and report breaches to ASIC.

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Licensees must report to ASIC a range of conduct that the law describes as 'reportable situations'

The term 'reportable situations' has a specific meaning under the law. RG 78 refers to four types of reportable situations:

- breaches or 'likely breaches' of core obligations that are significant
- investigations into breaches or likely breaches of core obligations that are significant
- additional reportable situations, and
- reportable situations about other licensees.

A ‘likely breach’ is when a licensee is unable to comply with a core obligation and if a breach occurs it will be significant. For example, if your professional indemnity insurance is lapsing and you are unable to find new insurance, you will become uninsured and you will no longer be able to comply with your licence conditions - this must be reported to ASIC.

You must report significant breaches or likely breaches of your core obligations to ASIC

The core obligations for AFS licensees are defined in the Corporations Act. They cover a broad range of behaviours, systems and processes, including:

- compliance with licence conditions and the financial services laws
- competency to provide those financial services
- risk management
- dispute resolution, and
- oversight of the licensee’s representatives.

The core obligations for credit licensees are defined in the National Credit Act. See Appendix 1 of RG 78 for a summary of these core obligations.

Only significant breaches must be reported

Not all breaches (or likely breaches) are significant enough to require reporting. There are two ways to determine if a breach is significant.

The first is if the breach is taken to be significant in the Corporations Act, known as a ‘deemed significant breach’. A ‘deemed significant breach’ includes breaches that:

- amount to commission of certain offences
- contravene certain civil penalty provisions
- result in, or are likely to result in, material loss or damage to a client, and
- amount to misleading or deceptive conduct.

The second is if you assess the breach against a factors outlined in the law and you make a judgement that it is significant. These factors are:

- the number or frequency of similar breaches
- the impact on your ability to provide financial services or engage in credit activities, and
- if the breach indicates that your compliance arrangements are inadequate, and
- any other matters prescribed by regulations.

You may need to report to ASIC an investigation into a breach, regardless of the outcome

Investigations into a potential breach that continue for more than 60 days must be reported to ASIC.

What constitutes an 'investigation' is not defined in the law. See RG 78.48 - RG 78.56 and Table 6 of RG 78 for further guidance and examples on this.

Additional reportable situations

Serious compliance concerns such as gross negligence and serious fraud must be reported to ASIC regardless of whether they are otherwise significant or not. These are referred to as 'additional reportable situations'.

You may be required to lodge a breach report about another licensee

You must report to ASIC if you have reasonable grounds to believe that another licensee's conduct amounts to a reportable situation. This applies to licensees that provide personal advice to retail clients about relevant financial products or licensees that are mortgage brokers.

You should have processes in place for identifying, recording and reporting breaches to ASIC

Under your general obligations as a licensee, you must maintain adequate risk management systems and resources to ensure you comply with your licensee obligations. To ensure compliance with your breach reporting obligations we expect you to have clear, well-understood and documented processes in place for things like:

- identifying and recording incidents
- assessing and determining if an identified incident is a reportable situation
- reporting to ASIC all reporting situations within the required time period.

See Section D of RG 78 for some examples of what we consider good practice for identifying, recording and reporting breaches.

In most circumstances, you must tell ASIC in writing within 30 days after a reportable situation has arisen

The 30-day reporting period starts on the day you first know that, or are reckless with respect to whether, there are reasonable grounds to believe that a reportable situation has arisen.

See Section C of RG 78 for more information.

You must report to ASIC using the prescribed form, through the ASIC Regulatory Portal

If you are a licensee regulated by APRA, you may also comply with your obligation by lodging a report with APRA. Visit the ASIC website for more information on how to lodge a report.

Where to find more information

- Regulatory Guide 104 *AFS licensing: Meeting the general obligations* (RG 104)
- Regulatory Guide 105 *AFS licensing: Organisational competence* (RG 105)
- Regulatory Guide 205 *Credit licensing: General conduct obligations* (RG 205)

Important notice

Please note that the above overview is intended to give you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional legal advice. We encourage you to seek your own professional advice to find out how the applicable laws apply to you, as it is your responsibility to determine your obligations.