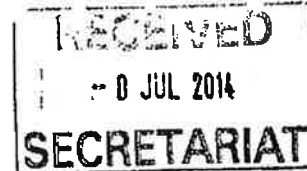


3 July 2014



ABN 80 001 797 557
PO Box A2311
Sydney South NSW 1235
T +61 2 9267 9155
F +61 2 9264 9210
enquiry@iia.org.au
www.iia.org.au
Level 7, 133 Castlereagh Street
Sydney NSW 2000

Mr Greg Medcraft
Chairman
Australian Securities & Investments Commission
Level 5
100 Market Street
Sydney NSW 2000



Dear Mr Medcraft

ADI Breach Reporting to ASIC

Many members of the Institute of Internal Auditors–Australia (IIA–Australia) are employed with Authorised Deposit–taking Institutions (ADIs) in the Financial Services industry.

The IIA–Australia has received enquiries about interpretation of Section 912D of the 'Corporations Act 2001' when read in conjunction with ASIC Regulatory Guide (RG) 78 'Breach reporting by Australian Financial Services (AFS) licensees'.

This has been a topic of conversation with some of our members in the Financial Services industry and we have become aware of two interpretations which are included in Attachment 1 to this correspondence. The IIA–Australia agreed to approach ASIC rather than our members sending multiple submissions.

The IIA–Australia would therefore appreciate the ASIC interpretation so our members can be informed accordingly.

Should ASIC wish to discuss this matter further, please contact our Manager of Quality Services Andrew Cox on 0421 915 354 or at andrew.cox@iia.org.au

We look forward to hearing from ASIC.

Yours sincerely

A handwritten signature in black ink, appearing to read "Julie Young".

Julie Young
Executive Officer & Company Secretary

Attachments

1. Interpretations
2. Section 912D of Corporations Act 2001



Attachment 1 – Interpretations

Interpretation 1

As soon the ADI business unit responsible for ensuring compliance becomes aware of a breach/likely breach, it is necessary to determine within 10 business days whether the breach/likely breach is significant, and if so determined, inform the breach/likely breach to ASIC within the time limit of 10 business days from when the breach was first noted.

If for any reason the details of the breach/likely breach will require more time to investigate, because of the impact and scope of the breach/likely breach, in order to determine whether it is significant or not, or if it cannot be decided whether the breach/likely breach is significant, the breach/likely breach must be reported to ASIC within 10 business days of first becoming aware of the breach/likely breach.

When further results of the investigation are available, it can be reported to ASIC as a follow-up to the initial report. The limit of 10 business days from the day the breach/likely breach was first noted cannot be bypassed due to the time taken to investigate and/or determine whether the breach/likely breach is significant.

Interpretation 2

When a breach/likely breach is informed to the ADI Compliance Department, an investigation is conducted to determine whether it is significant.

There is no time limit set for this investigation in the Corporations Act 2001 or ASIC RG 78, and the ADI could set a time limit of up to 20 business days to complete the investigation according to the scope of the breach/likely breach and its impact.

When the investigation is complete, the results are informed to the Compliance Department which may take up to another 5–10 working days to determine whether the breach/likely breach is significant, and if so determined, the Compliance Department can recommend to a Senior Executive/Company Secretary the issue be reported to ASIC.

The ADI then has another 5 business days to reconfirm the recommendation to its Chief Executive Officer (CEO).

When the CEO finally confirms/accepts the recommendation of the Compliance Department and the Senior Executive/Company Secretary, the time limit of 10 days to report the breach/likely breach to ASIC commences.

This approach is based on the premise that only a significant breach/likely breach is required under the Corporations Act and ASIC RG 78 to be reported to ASIC, and the time taken to arrive at the determination whether the breach/likely breach is significant is not considered within the time limit of 10 business days prescribed in the Corporations Act and ASIC RG 78.

Attachment 2 – Section 912D of Corporations Act 2001

912D Obligation to notify ASIC of certain matters

- (1) A financial services licensee must comply with subsection (1B) if:
- (a) the licensee breaches, or is likely to breach:
 - (i) any of the obligations under section 912A or 912B, other than the obligation under paragraph 912A(1)(c); or
 - (ii) the obligation under paragraph 912A(1)(c), so far as it relates to provisions of this Act or the ASIC Act referred to in paragraphs (a), (b) and (c) of the definition of financial services law in section 761A; or
 - (iii) in relation to financial services, other than traditional trustee company services provided by a licensed trustee company—the obligation under paragraph 912A(1)(c), so far as it relates to Commonwealth legislation that is covered by paragraph (d) of that definition and that is specified in regulations made for the purposes of this subparagraph; or
 - (iv) in relation to traditional trustee company services provided by a licensed trustee company—the obligation under paragraph 912A(1)(c), so far as it relates to Commonwealth, State or Territory legislation, or a rule of common law or equity, that is covered by paragraph (d) or (e) of that definition; and
 - (b) the breach, or likely breach, is significant, having regard to the following:
 - (i) the number or frequency of similar previous breaches;
 - (ii) the impact of the breach or likely breach on the licensee's ability to provide the financial services covered by the licence;
 - (iii) the extent to which the breach or likely breach indicates that the licensee's arrangements to ensure compliance with those obligations is inadequate;
 - (iv) the actual or potential financial loss to clients of the licensee, or the licensee itself, arising from the breach or likely breach;
 - (v) any other matters prescribed by regulations made for the purposes of this paragraph.
- (1A) For the purposes of subsection (1), a financial services licensee is likely to breach an obligation referred to in that subsection if, and only if, the person is no longer able to comply with the obligation.
- (1B) The financial services licensee must, as soon as practicable and in any case within 10 business days after becoming aware of the breach or likely breach mentioned in subsection (1), lodge a written report on the matter with ASIC.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (1C) A report that a licensee is required to lodge under subsection (1B) is taken to have been lodged with ASIC if:
- (a) the licensee is a body regulated by APRA; and
 - (b) the report is received by APRA in accordance with the terms of an agreement between APRA and ASIC under which APRA is to act as ASIC's agent in relation to such reports.
- (1D) Subsection (1B) does not apply to a financial services licensee that is a body regulated by APRA in relation to a breach if:

- (a) the auditor or actuary of the licensee gives APRA a written report about the breach; and
 - (b) the report is given before, or within 10 business days after, the licensee becomes aware of the breach.
- (2) A financial services licensee must give written notice to ASIC, as soon as practicable, if the licensee becomes a participant in a licensed market or a licensed CS facility, or ceases to be such a participant. The notice must say when this happened and identify the market or facility.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).