



ASIC
Australian Securities &
Investments Commission

REPORT 698

Response to submissions on CP 340 Breach reporting and related obligations

September 2021

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 340 *Breach reporting and related obligations* (CP 340) and details our responses to those issues.

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 (primarily the Corporations Act)
- 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.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the *Corporations Act 2001* (Corporations Act) and the *National Consumer Credit Protection Act 2009* (National Credit Act) and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see [Regulatory Guide 78](#) *Breach reporting by AFS licensees and credit licensees* (RG 78) and [Information Sheet 259](#) *Complying with the notify, investigate and remediate obligations* (INFO 259).

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A Overview of consultation

1 Schedule 11 of the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Financial Sector Reform Act):

- (a) revised the breach reporting obligation that currently applies to Australian financial services (AFS) licensees, and extended its application to Australian credit licensees (credit licensees); and
- (b) introduced new requirements for licensees to notify, investigate and remediate breaches of the law in certain specified circumstances.

Note 1: In this paper, we refer collectively to AFS licensees and credit licensees as ‘licensees’.

Note 2: The Financial Sector Reform Act inserted obligations into Div 3 of Pt 7.6 of the *Corporations Act 2001* (Corporations Act) and Div 5 of Pt 2 of the *National Consumer Protection Credit Act 2009* (National Credit Act).

2 The legislation implements Recommendations 1.6, 2.8, 2.9 and 7.2 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission).

3 These obligations take effect from 1 October 2021.

4 On 22 April 2021, ASIC sought feedback on new proposed guidance on ASIC’s approach to the reforms, and released for consultation:

- (a) [Consultation Paper 340](#) *Breach reporting and related obligations* (CP 340);
- (b) Draft Regulatory Guide 78 *Breach reporting by AFS licensees and credit licensees* (Draft RG 78); and
- (c) Draft Information Sheet 000 *Complying with the notify, investigate and remediate obligations* (Draft INFO 000).

Note: Draft RG 78 and Draft INFO 000 were released as attachments to [CP 340](#).

5 The consultation on CP 340, Draft RG 78 and Draft INFO 000 was open for a period of six weeks, between 22 April 2021 and 3 June 2021.

6 We received four confidential and 26 non-confidential submissions to CP 340. Respondents represented a diverse range of stakeholders, including banks; financial management firms; superannuation trustees; a broad range of industry groups and associations covering large sections of the finance, credit, superannuation and insurance industries; some professional services industries; a law firm; and a law society.

7 As well as receiving written submissions, we met informally with a number of stakeholders to give them the opportunity to share their questions and feedback before making a written submission.

8 We are grateful to respondents for taking the time to send us their comments.

Note: For a list of the non-confidential respondents to [CP 340](#), see the appendix to this report. Copies of these submissions are currently on the ASIC website at www.asic.gov.au/cp under CP 340.

9 This report highlights the key issues that arose out of the submissions received on CP 340, Draft RG 78 and Draft INFO 000 and our responses to those issues. This report is not meant to be a comprehensive summary of all the feedback received. It is also not meant to be a detailed report on every question from CP 340. We have limited this report to the key issues raised and a summary of significant changes made to Draft RG 78 and Draft INFO 000.

10 In addition, our final guidance reflects the following changes to the law that occurred (or were announced) after our consultation closed on 3 June 2021:

- (a) The *Financial Sector Reform (Hayne Royal Commission Response—Breach Reporting and Remediation) Regulations 2021* were made on 5 August 2021. They specify the civil penalty provisions excluded from ‘deemed significance’ under s912D(4)(b) of the Corporations Act and s50A(4)(b) of the National Credit Act, as well as the key contraventions exempted under s50A(4)(c) of the National Credit Act.
- (b) The [ASIC Corporations and Credit \(Breach Reporting—Reportable Situations\) Instrument 2021/716](#) (ASIC Instrument 2021/716) was made on 13 August 2021 to provide relief from the requirement to report breaches of enforceable internal dispute resolution (IDR) standards as ‘deemed significant breaches’.

Note: See [Explanatory Statement](#) to ASIC Instrument 2021/716.

- (c) The Government announced that it intends to amend the National Credit Act to limit the reporting of breaches under other laws related to credit activities, and that ASIC will consult to consider providing temporary interim breach reporting relief in this regard.

Note: See Treasury, [Update on the breach reporting regime](#), media release, 6 September 2021.

Responses to consultation

11 The main issues raised by respondents in the written submissions and informal meetings are summarised in Table 1.

Table 1: Main issues raised in feedback

Topic	Key issue	Where to find our response
Our approach to guidance	Proposed approach to guidance and our use—or possible further use—of case studies and examples	Section B, paragraphs 15–20
Transitional periods and commencement of reforms	How the commencement provisions apply for AFS licensees and credit licensees Clarity on transitional provisions for AFS licensees	Section B, paragraphs 24–28
Further guidance on various reportable situations	Requests for further guidance on certain types of reportable situations: <ul style="list-style-type: none"> • investigations • additional reportable situations (e.g. gross negligence and serious fraud) • reportable situations about other licensees • material loss or damage as a deemed significant breach 	Section C <ul style="list-style-type: none"> • paragraphs 33–35 (investigations) • paragraphs 36–39 (additional reportable situations) • paragraphs 40–45 (reportable situations about other licensees) • paragraphs 46–50 (material loss or damage)
When and how to report to ASIC	Requests for further clarification on: <ul style="list-style-type: none"> • when licensees need to report to ASIC • how licensees need to report 	Section C <ul style="list-style-type: none"> • paragraphs 51–55 (when to report to us) • paragraphs 56–60 (lodging a report)
Guidance on the ‘notify, investigate and remediate’ obligations	Identifying the preferred format of guidance Requests for minor additional guidance	Section D, paragraphs 67–72

- 12 Respondents also commented on the design and complexity of the new law, including the ambiguity of some of its definitions and concepts and the intended goals of the reforms. ASIC guidance must be consistent with the law and explain how we interpret the breach reporting provisions.
- 13 A number of submissions included feedback on what provisions should be exempted from the operation of deemed significance. As stated at paragraph 10 of this report, exempting regulations have been made following a separate consultation and process by Government.
- 14 Some respondents raised concerns about the increased volumes of reports and suggested possible enhancements to the [ASIC Regulatory Portal](#) for the breach reporting transaction. While we have considered this feedback separately to this consultation, we incorporated some aspects in our guidance on reporting multiple reportable situations, as discussed in paragraph 54.

B General feedback on our approach to guidance in Draft RG 78

Key points

This section outlines the feedback we received about:

- our proposed approach to guidance in Draft RG 78;
- credit-specific issues identified with Draft RG 78 and the application of the breach reporting regime; and
- our proposed guidance on the transitional provisions of the breach reporting regime.

Our proposed approach to guidance

- 15 Our guidance in Draft RG 78 explained how we proposed to interpret key concepts of the breach reporting obligation, our general approach to administering the obligations, and how licensees can demonstrate compliance with the obligations. It also included examples and case studies to help licensees understand how the principles will apply in practice.
- 16 In [CP 340](#), we sought feedback on our approach of providing guidance that is consistent for both AFS licensees and credit licensees on how they can comply with the breach reporting obligation. We also asked respondents to tell us whether they would benefit from any other specific examples.

Stakeholder feedback

Application to AFS and credit regimes

- 17 Our proposed approach to provide broad, consistent, principles-based guidance was strongly supported.
- 18 Most respondents agreed that it was appropriate for Draft RG 78 to encompass both the credit licence and AFS licence regimes because this approach would provide consistent guidance. Some respondents noted that this approach had additional benefits for entities that hold both an AFS licence and a credit licence. A small number of respondents who only operate credit businesses considered that it would be more appropriate and helpful for credit licensees to have separate guidance.
- 19 Respondents provided positive feedback to our use of examples to illustrate how key principles might apply to different licensees, industries and business models. We also received strong support for the use of case study examples.

Scope of examples

- 20 Several respondents indicated areas where they considered further examples may be appropriate. They asked for more examples applicable to small and medium sized business, some examples with a wholesale focus, and further examples illustrating various legal concepts in the breach reporting reforms such as ‘recklessness’, ‘reasonable grounds’ and ‘investigations’.

ASIC’s response

As respondents were broadly in favour of uniform guidance for credit licensees and AFS licensees, we have maintained this approach.

We have considered the specific submission feedback, and amended the guidance to help ensure it has broadly uniform application to licensees irrespective of their size, licence type or industry, including that it is applicable in both a wholesale and retail context.

We have also added new credit examples, and modified existing examples—including to ensure that they can apply to small and medium sized businesses.

In response to requests for specific examples to help illustrate legal concepts, we have added a number of new examples (e.g. about investigations, and reportable situations about other licensees).

Credit-specific issues

- 21 In [CP 340](#), we asked for feedback on whether the different structures and operations of credit licensees meant that specific guidance would be required on how the breach reporting obligation will apply.

Stakeholder feedback

- 22 Respondents that operate credit businesses generally considered that the guidance should include more information specific to credit licensees. Six respondents asked for credit-specific examples to demonstrate how the obligations would apply to mortgage brokers and consumer credit providers, including how credit providers would quantify material loss or damage, or determine serious fraud and gross negligence. Some respondents also asked for further guidance on the mortgage broker’s best interests duty and how this interacts with the breach reporting obligation.
- 23 Respondents also raised the structural differences that affect credit providers—namely, the operation of aggregators—and asked for further guidance on how the obligation to provide a copy of the report to other licensees will operate in this context.

ASIC's response

We have reviewed and updated our guidance to ensure that, where appropriate, it applies to both AFS and credit licensees.

Where there are differences, we have added credit-specific guidance to help credit licensees, including:

- clarification of whether a licensee must provide a copy of a report of a reportable situation about another licensee to an aggregator; and
- new examples, including a new example of gross negligence.

Regarding the requests for further clarity on the interaction of the mortgage broker's best interests duty and the breach reporting obligation, we consider that [Regulatory Guide 273 *Mortgage brokers: Best interests duty*](#) (RG 273) is a more appropriate source for guidance on the scope of this duty, including what may be considered a contravention of the duty.

Transitional provisions and commencement of reforms

- 24 The breach reporting reforms include a transitional period for AFS licensees with regard to their existing breach reporting obligations.
- 25 In [CP 340](#), we consulted on whether AFS licensees required further guidance to understand how the breach reporting obligation as in force *before* 1 October 2021 (when the breach reporting reforms come into effect) would continue to apply to them after 1 October 2021.

Stakeholder feedback

- 26 Some respondents asked for further guidance on:
- (a) how the breach reporting obligations as in force before 1 October 2021 would apply to them after 1 October 2021; and
 - (b) the continued applicability and availability of Regulatory Guide 78 *Breach reporting by AFS licensees* (as it was then).
- 27 Several respondents, including credit licensees, asked us to clarify how the law applies to both credit licensees and AFS licensees with regard to investigations that commenced before 1 October 2021 but were ongoing after 1 October 2021.
- 28 Some credit licensees also asked about the applicability of the reforms on 1 October 2021 to incidents that arose before 1 October 2021 but were ongoing after that date.

ASIC's response

In response to feedback from both AFS and credit licensees, we have supplemented our guidance to distinguish between:

- our general guidance on the commencement provisions for both AFS licensees and credit licensees;
- the application of the transitional provisions for AFS licensees; and
- guidance for credit licensees that they do not need to report breaches of the National Credit Act that occurred wholly before 1 October 2021, even if the breaches are identified on or after this date.

See [RG 78](#) at RG 78.18–78.23.

We have included a new example which demonstrates how an investigation that commenced before 1 October 2021 but that remains ongoing after that date should be handled by both credit licensees and AFS licensees: see Example 1 in RG 78.

In Draft RG 78 we stated that the existing RG 78 *Breach reporting by AFS licensees* (as it was then) would remain available for AFS licensees during the transitional period. In response to feedback, our guidance now states this more clearly, noting that the existing RG 78 will be maintained on our website but relabelled as *Superseded Regulatory Guide 78 Breach reporting by AFS licensees* (SRG 78).

SRG 78 will continue to provide guidance for AFS licensees on the transitional provisions in s1671A and 1671B of the Corporations Act.

C Feedback on Draft RG 78

Key points

In [CP 340](#), we asked for feedback on our proposed approach to guidance about what must be reported to ASIC and how and when it should be reported.

Issues raised in response to Draft RG 78 related to:

- what must be reported ('reportable situations');
- investigations;
- additional reportable situations;
- reportable situations about other licensees;
- material loss or damage;
- when to report to us;
- lodging a report; and
- compliance systems.

What must be reported: 'Reportable situations'

- 29 In CP 340, we proposed to provide high-level guidance in Draft RG 78 on the range of reportable situations which licensees must report to ASIC (as defined in s912D(3) of the Corporations Act for AFS licensees and s50A(3) of the National Credit Act for credit licensees): see Proposal B4 in CP 340.
- 30 The draft guidance covered:
- (a) whether a breach or likely breach of a core obligation is significant;
 - (b) when an investigation is a reportable situation;
 - (c) what are the 'additional reportable situations'; and
 - (d) what are reportable situations about other licensees.

Stakeholder feedback

- 31 The majority of respondents who gave feedback on Proposal B4 supported our proposed approach to guidance. However, respondents did:
- (a) raise the need for further clarification of 'core obligations' and ask for an exhaustive list of core obligations;
 - (b) ask for further clarity on deemed significant breaches, including several requests for ASIC to provide a list of the civil penalty provisions that

constitute a significant breach under s912D(4)(b) of the Corporations Act and s50A(4)(b) of the National Credit Act; and

- (c) ask for further examples clarifying when certain conduct would amount to a ‘significant’ breach of a core obligation, including when the duty to provide services ‘efficiently, honestly and fairly’ in s912A(1)(a) of the Corporations Act may or may not have been breached.

32 The *Financial Sector Reform (Hayne Royal Commission Response—Breach Reporting and Remediation) Regulations 2021*, which exempt certain civil penalty provisions from deemed significance, had not yet been made when Draft RG 78 was being consulted on. As a result, a number of submissions asked ASIC to update its guidance once the regulations had been made.

ASIC’s response

We have clarified in our guidance that the appendix of [RG 78](#) now has a detailed summary of core obligations for both AFS licensees and credit licensees.

We have included further examples in Tables 3–5 in RG 78 to help licensees determine whether a breach may or may not be a ‘significant’ breach of a core obligation, including:

- an example of a breach of the licensee’s duty to provide services ‘efficiently, honestly and fairly’ (Example 3(g) in Table 2 in RG 78);
- an example of a breach of the ASIC market integrity rules (Example 4(d) in Table 4 in RG 78); and
- an example regarding the provision of key factsheets (Example 4(f) in Table 4 in RG 78).

We have made changes to guidance and to both existing and new examples to reflect the changes to the law following the release of the *Financial Sector Reform (Hayne Royal Commission Response—Breach Reporting and Remediation) Regulations 2021*.

We have also included:

- new guidance to clarify when a breach of the IDR requirements may need to be reported to us under [ASIC Instrument 2021/716](#); and
- a new example of a breach of the IDR requirements that we consider to be significant and reportable.

Civil penalty provisions

Regarding the requests for ASIC to identify and maintain a list of civil penalty provisions, we do not consider that a regulatory guide—which provides information current at the point of publication—is an appropriate place for an exhaustive list of civil penalty provisions.

We note also that regulations have exempted a number of provisions from being deemed significant, and have exempted all relevant Commonwealth legislation from being subject to deemed significance, reducing the number of relevant civil penalty provisions for licensee consideration under the 'deeming' provisions: see reg 7.6.02A(2)(b) of the *Corporations Regulations 2001*, reg 12A(c) of the *National Consumer Credit Protection Regulations 2010*.

Investigations

- 33 Under the reforms, investigations into whether a significant breach (or likely significant breach) of a core obligation that continues for more than 30 days must be reported to ASIC as a 'reportable situation': s912D(1)(c) of the Corporations Act, s50A(1)(c) of the National Credit Act. In [CP 340](#), we sought feedback on how our guidance on this type of reportable situation could be clarified.

Stakeholder feedback

- 34 Almost half of all respondents provided feedback on our proposed guidance in Draft RG 78 about the new obligation to report on investigations. While some respondents were satisfied that the guidance was sufficient, several submissions raised questions about the definition of 'investigation', as well as questions around when such an investigation commences for the purposes of reportability.
- 35 Several submissions sought clarity in the guidance on whether activities such as preliminary fact-finding activities, the receipt of a complaint, or regular business functions (e.g. internal or external audits) constitute an 'investigation' or the commencement of a relevant reportable investigation. Some submissions raised specific fact scenarios for our consideration, and some put forward more general suggestions around appropriate stages of the inquiry of investigations as they operate in their specific context.

ASIC's response

The obligation to report on investigations is a new aspect of the reforms. Draft RG 78 closely reflected the legislation. In proposing guidance for licensees on when investigations must be reported to ASIC under the legislation, it relied on the stated legislative intent in the Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020.

In response to the feedback, we have made significant updates to our guidance to include further information on what we consider to be an 'investigation'.

This includes:

- more clarity on when we consider investigations will commence for the purposes of the 30-day period; and
- guidance that directly responds to the questions raised, and context provided, in the submissions about how investigations occur in practice ([RG 78](#) at RG 78.50–78.58).

In recognising, however, that investigations will vary significantly across licensees, our guidance remains principles based, and is supplemented with three new examples, covering:

- an annual compliance audit (Example 6(a) in Table 6 in RG 78);
- receipt of a customer complaint (Example 6(d) in Table 6 in RG 78); and
- commencement of an investigation in a large licensee with a Line 1 and Line 2 compliance and risk function (Example 10 in RG 78).

Additional reportable situations

- 36 Under the breach reporting reforms, licensees must also report additional reportable situations, including when a licensee or its representative:
- engaged in conduct constituting gross negligence in the course of providing a financial service or engaging in a credit activity; or
 - committed serious fraud.
- 37 In [CP 340](#), we sought feedback about whether further guidance on additional reportable situations was required.

Stakeholder feedback

- 38 Almost half of all respondents asked us to provide further detail in our guidance about what would constitute gross negligence or serious fraud.
- 39 Respondents recommended that we clearly define both serious fraud and gross negligence, and provide examples to demonstrate how these events would be determined. While most feedback asked for general additional guidance, some respondents advised that it would be difficult to know how to differentiate negligence or from ‘gross’ negligence, or fraud from ‘serious’ fraud.

ASIC’s response

We have provided some context on the legislative intent in including this type of reportable situation, drawing from the Explanatory Memorandum to the Financial Sector Reform (Hayne

Royal Commission Response) Bill 2020. We have also provided additional context from the Financial Services Royal Commission on the underlying intent in requiring licensees to report 'serious compliance concerns'.

We have included a new example on gross negligence: see Example 7 in [RG 78](#).

Regarding serious fraud, while we acknowledge the requests for further guidance (and have added in statutory definitions), we note that this is an existing concept in the legislation. For example, serious fraud is grounds for:

- immediate suspension or cancellation of an AFS licence (s915B(1)(c) of the Corporations Act, s54(2)(b)(i) of the National Credit Act); and
- the making of a banning order without a hearing (s920A(3)(b) of the Corporations Act).

Reportable situations about other licensees

- 40 Under the reforms, licensees may be required to lodge a breach report about other licensees in certain circumstances. In [CP 340](#), we sought feedback on our proposed approach to give high-level guidance and provide examples of when a licensee is required to report on reportable situations about other licensees.

Stakeholder feedback

- 41 We received substantial feedback on this new category of reportable situation, and respondents generally agreed that further guidance from ASIC was required.

'Reasonable grounds to believe'

- 42 Many requests for further guidance focused on further clarity about what would constitute 'reasonable grounds to believe', as reflected in s912DAB(1) and (4) of the Corporations Act, and s50C(1) and (4) of the National Credit Act. Some respondents also sought clarity on the level of investigation that is required before reaching this threshold.

Industry practice examples

- 43 There were a number of requests for examples on specific situations outlined by respondents, such as when a licensee takes over a portfolio and becomes aware of breaches by the previous licensee or when a lender suspects misconduct by an adviser or broker.

Reporting to ASIC

- 44 We also received some feedback asking for further clarity on:
- (a) when licensees do not need to report a reportable situation about other licensees if the situation has already been reported to ASIC; and
 - (b) the interaction of the new reporting obligation with suspicious matter reports made to the Australian Transaction Reports and Analysis Centre (AUSTRAC).
- 45 Some respondents also raised questions about the level of legal protection available when reporting a breach relating to another licensee.

ASIC's response

We have added new guidance in response to the feedback received about this new category of reporting obligation. We have also provided:

- further guidance on when we consider a licensee will have 'reasonable grounds to believe' there is a reportable situation about another licensee, including a new example; and
- new guidance on our expectations with regard to investigating misconduct of other licensees: see [RG 78](#) at RG 78.75.

We received requests for further clarity on the applicability of s912DAB(4) of the Corporations Act and s50C(4) of the Credit Act ('if the reportable situation is already reported to ASIC').

In response, we have added information from the Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 about when a licensee may have reasonable grounds to believe that ASIC is already aware of the reportable situation, clarifying that it is a 'high threshold': see [RG 78](#) at RG 78.82–78.83.

We have also added new guidance to identify how licensees report this category of reportable situation through the [ASIC Regulatory Portal](#). This includes guidance on:

- how to comply with the obligation to share a copy of the report with the other licensee; and
- the interaction of this reporting obligation with the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* and reporting to AUSTRAC.

We note that Draft RG 78 provided information to licensees about qualified privilege. We have made this information more prominent in our guidance, in response to the submissions requesting further clarity.

Material loss or damage

- 46 Under the revised breach reporting regime, certain breaches of core obligations are taken to be significant ('deemed significant breaches'). There are a number of categories for deemed significance, one of which is material loss or damage: s912D(4)(d) of the Corporations Act, s50A(4)(e) of the National Credit Act.
- 47 In Draft RG 78, we proposed high-level guidance on whether a breach or likely breach of a core obligation is significant. In [CP 340](#), we sought feedback on the challenges that licensees face in determining whether loss or damage is material.

Stakeholder feedback

- 48 We received substantial feedback asking for:
- (a) further guidance and examples explaining how 'material loss or damage' should be assessed by licensees; and
 - (b) information about when a loss would be considered immaterial.
- 49 Several respondents, in both written submissions and informal discussions, called for thresholds (including monetary thresholds) to be established to help identify what is 'material'. Respondents also sought clarity on how to determine whether an individual client (or, using an aggregate amount, multiple clients) had suffered 'material loss or damage'.
- 50 A number of respondents asked for the guidance to outline how ASIC expected licensees to identify the 'particular client's circumstance', and whether:
- (a) this could be assessed using information already held by the licensee, or
 - (b) additional fact-finding activities would be required to assess the 'materiality' of the impact on the client.

ASIC's response

Draft RG 78 contained detailed guidance from the Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 on material loss or damage, which we have retained. Although this concept is not defined in the legislation itself, we consider it to be well established in law.

For AFS licensees, the breach reporting obligation as in force before 1 October 2021 requires licensees to have regard to 'the actual or potential financial loss to clients of the licensee' when considering the significance of a breach or likely breach: see s912D(1)(b)(iv) of the Corporations Act.

While we acknowledge the certainty that some submissions seek in asking ASIC to provide monetary thresholds or criteria for

assessment, we do not consider this is appropriate in the circumstances. Our guidance must be applicable to a broad range of licensees across a number of industries.

As materiality is an inquiry driven by the facts of each case, we consider that our principles-based guidance for licensees to consider and apply to their own individual circumstances is consistent with the legislative intent.

We have further clarified our guidance, in [RG 78](#) at RG 78.46, to state that:

- we expect a licensee that is considering the circumstances of a client or customer to consider only information within the licensee's knowledge; and
- this principle is particularly relevant where there is a small number of clients who have suffered loss.

When to report to us

- 51 In Draft RG 78, we included guidance 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.
- 52 In [CP 340](#), we sought feedback on our proposed approach and what further guidance, if any, should be included.

Stakeholder feedback

- 53 A third of respondents to this part of CP 340 were satisfied with the guidance provided in Draft RG 78. Some asked for further guidance on the terms 'reasonable grounds' and 'knowledge' and further examples of when the reporting period commences, including some suggestions for possible changes to the existing example provided on 'recklessness'.
- 54 Some respondents asked for clarity on whether the previous concept of a 'person responsible for compliance' (in what is now SRG 78) continues to apply.
- 55 Several respondents raised concerns with the proposed guidance in Draft RG 78.78(b) that a licensee should not delay lodging a breach report because they are waiting for the reportable situation to be considered by internal or external legal advisors.

ASIC's response

We have amended our guidance and clarified how we consider the legal concepts underlying s912DAA(3) of the Corporations Act and s50B(4) of the National Credit Act to apply (i.e. when a

licensee first knows or is reckless as to whether there are reasonable grounds to believe a reportable situation has arisen).

We have given further guidance in RG 78 on 'reasonable grounds', including under the heading 'When does the licensee first know that a reportable situation has arisen?'.

In reliance on suggestions made in the submissions, we have also amended the recklessness example (Example 9 in RG 78), and added a new example on how we consider this provision applies in the context of an investigation.

Our previous guidance in SRG 78

We have intentionally moved away from the phrase 'a person responsible for compliance' (used in SRG 78.28). We have set out how we consider the law to apply under the new legislation in [RG 78](#) under the heading, 'When does the licensee first know that a reportable situation has arisen?'.

This includes clarifying at RG 78.96: 'If an employee knows (or is reckless) that there are reasonable grounds to believe a reportable situation has arisen, provided that they acquire this knowledge within the scope of their apparent authority within their employment, the 30-day reporting timeframe in s912DAA(3) of the Corporations Act or s50B(4) of the Credit Act will commence.'

Seeking legal advice

We acknowledge the concerns raised in some submissions about the opportunity to obtain legal advice. We have clarified our guidance on this point at RG 78.100–78.101, but maintain our expectation that licensees should not delay reporting to us beyond 30 days while seeking legal advice.

Lodging a report

- 56 As part of the breach reporting reforms, licensees must now report to us using the prescribed form. In [CP 340](#), we sought feedback on whether respondents need more guidance on, or have any concerns with, the prescribed form.
- 57 In Table 8 of Draft RG 78, we provided general guidance on the types of information that would be included in the prescribed form that licensees are required to lodge with us through the [ASIC Regulatory Portal](#): see s912DAB(2) of the Corporations Act, s50B(3) of the National Credit Act.

Stakeholder feedback

- 58 Respondents asked whether licensees could provide estimates in response to certain questions, and asked for clarity about which fields were optional and

which were mandatory. Some submissions sought further clarity on the use of the ‘reportable situation form’ and the ‘update form’.

Grouping multiple reportable situations

- 59 Submissions, both in writing and in discussions throughout the consultation process, asked for guidance on when and if it would be appropriate to group ‘reportable situations’ in one report.

Wireframes of the approved form

- 60 We also received feedback following the release of the wireframes of the approved form, and through a targeted consultation conducted by our Regulatory Portal team.

ASIC’s response

The prescribed form on the [ASIC Regulatory Portal](#) uses conditional logic which prompts licensees to give appropriate information depending on their responses. The fields are mandatory unless otherwise indicated, and the form itself will indicate where and how ‘estimates’ may be provided. Following ASIC’s investment in the Regulatory Portal to reflect the breach reporting reforms, information about using the Regulatory Portal for breach reporting has been updated on our website, including with a new FAQ section: see the link [RG 78](#) at RG 78.109.

Grouping multiple reportable situations

In response to feedback, we have included a new section in RG 78 on the circumstances in which a licensee may report multiple reportable situations to us in one report and meet their reporting obligations: see RG 78 at RG 78.112–RG 78.117 and Table 9. Licensees can lodge one report where the reportable situations arise from a single, specific root cause.

The new section includes a number of illustrative examples which were shared with us through the consultation process. In this section, we also clarify how licensees may use the update functionality available on the Regulatory Portal.

Wireframes

We have only made minor amendments to the guidance that was proposed in Table 8 of Draft RG 78. However, following the release and consultation on the wireframes of the approved form, feedback has been appropriately reflected in the final format and sequencing of questions in the approved form.

Compliance systems

- 61 In Draft RG 78, we proposed to give high-level guidance on compliance systems for breach reporting, including some practical insights into how licensees can develop their approach to the breach reporting obligation, some helpful practices, and our high-level expectations.
- 62 In [CP 340](#), we asked for feedback on whether any other specific areas should be included in our guidance, and whether licensees would face any challenges in applying our guidance to their specific circumstances.

Stakeholder feedback

- 63 All feedback on this question agreed with our approach to including this guidance. A small number of respondents raised concerns about the applicability of our guidance to smaller licensees, and the need to emphasise ‘effectiveness’ of the system as the main consideration, rather than any specific type of compliance system or process.

ASIC’s response

We have not made any changes to the compliance section of the guidance as it was set out in Draft RG 78, since the majority of respondents were satisfied with the guidance provided.

We agree with submissions that observed that a one-size-fits-all approach is not appropriate, and we note [RG 78](#) at RG 78.140 which states that what is effective in order to comply will vary according to the nature, scale and complexity of licensees’ businesses.

Other issues identified

- 64 Some respondents raised discrete issues for consideration, some of which we had not directly consulted on.

Stakeholder feedback

Intersection of obligations

- 65 Some respondents asked us to address the intersection of the breach reporting regime with other new or current regimes, the most common request relating to the intersection with the design and distribution obligations, and the IDR regime.

ASIC data publishing

- 66 Some respondents raised concerns about the information that ASIC will be required to publish under s912DAD of the Corporations Act and s50D of the National Credit Act, and recommended that we provide guidance on what would be included in our publication of data.

*ASIC's response**Intersection of obligations*

We have added to the guidance information about product design and distribution obligations and IDR data reporting (see [RG 78](#) at RG 78.13) as well as new examples about where a breach of the IDR standards may be reportable to us.

ASIC data reporting

We acknowledge stakeholders' interest in what ASIC will be publishing on our website in accordance with our obligations under s912DAD of the Corporations Act and s50D(1) of the National Credit Act. We intend to consult on our data publishing requirement before the first publication of the data on our website, which must be within four months after the end of the 2021–22 financial year.

D Feedback on Draft INFO 000

Key points

In [CP 340](#), we sought feedback from respondents about our approach to guidance for the ‘notify, investigate and remediate’ obligations. Specifically, we wanted to know if licensees would find an information sheet the most useful method of guidance, or if this guidance should be contained in a regulatory guide.

This section details the feedback we received on Draft INFO 000 and whether a form of notice should be approved.

Preferred format of guidance

- 67 In Section C of CP 340, we proposed to give guidance by way of Draft INFO 000 on the ‘notify, investigate and remediate’ obligations for:
- (a) AFS licensees that provide retail clients with personal advice on relevant financial products; and
 - (b) credit licensees that are mortgage brokers.
- 68 We asked for feedback on whether the guidance we provided in Draft INFO 000 would be better suited to [Regulatory Guide 256](#) *Client review and remediation conducted by advice licensees* (RG 256).

Stakeholder feedback

The need for guidance

- 69 While there was no clear consensus on the preferred format of the guidance (whether an information sheet or RG 256 or both), respondents generally agreed with our proposal to publish an information sheet because this format generally is accessible and provides a simple overview of the obligations.
- 70 Respondents also considered that a regulatory guide would be appropriate for more detailed information.
- 71 One respondent noted that incorporating the guidance into RG 256 may have the benefit of providing licensees with a consolidated document on remediation, which would offer licensees clarity and certainty about the requirements.

Additional guidance

- 72 Several respondents asked for further guidance (in either an information sheet, RG 256 or RG 78) on matters such as:
- (a) what would satisfy the obligation to take ‘reasonable steps’ to notify or remediate a client;
 - (b) how to define ‘affected client’; and
 - (c) how to calculate the loss or damage to a client.

ASIC’s response

The submissions indicate there may be some benefit in providing guidance on the notify, investigate and remediate obligations.

As to the format of this guidance, we acknowledge the preferences expressed in some submissions to have this guidance incorporated into [RG 256](#).

However, as the obligations come into effect on 1 October 2021, and the upcoming consultation on RG 256 is likely to occur after this date, ASIC has prepared [Information Sheet 259 Complying with the notify, investigate and remediate obligations](#) (INFO 259) to provide licensees with a concise overview of the ‘notify, investigate, remediate’ obligations.

We have made some minor amendments to the guidance to address the concerns raised. These amendments include:

- clarification that ‘reasonable steps’ must be taken within the relevant timeframes;
- further guidance on the intended meaning of ‘reasonable grounds to suspect’; and
- some structural amendments to enhance clarity.

A number of the issues raised in the submissions relate to the interaction between the ‘notify, investigate and remediate’ obligations and ASIC’s broader remediation policy as set out in RG 256.

We will consider these requests in more detail as part of our upcoming review of and consultation on RG 256, before reaching a final policy position.

Approved form for notices

- 73 The ‘notify, investigate and remediate obligations’ require licensees to take reasonable steps to provide notices to affected clients of certain reportable situations, as well as the outcome of investigations: see s912EA(1) and 912EB(5) of the Corporations Act. The legislation provides that ASIC can approve the form in which the notice must be given.

- 74 In Section C of [CP 340](#), we asked for feedback on whether the form of the notices should be approved by ASIC, noting that we had provided high-level guidance about what to include in notices to affected clients in Draft INFO 000.

Stakeholder feedback

- 75 While a small number of respondents suggested that we set out some minimum standards to be contained in notices, almost all respondents agreed with our proposed approach not to approve a form for notices at this time.

ASIC's response

Given the feedback we received, we have not exercised our powers to approve a form of notice at this time. However, we may do so in future if we become aware of deficiencies in the approach taken by licensees.

We have included in [INFO 259](#) high-level guidance on what licensees should include in notices to affected clients that we consulted on in Draft INFO 000.

Appendix: List of non-confidential respondents

- Association of Financial Advisers
- Association of Securities & Derivatives Advisers of Australia
- Australian Banking Association
- Australian Collectors & Debt Buyers Association
- Australian Finance Group Limited
- Australian Finance Industry Association Limited
- Australian Financial Markets Association
- Australian Institute of Superannuation Trustees
- Bendigo and Adelaide Bank Limited
- CPA Australia
- Customer Owned Banking Association
- Finance Brokers Association of Australia Limited
- Financial Planning Association of Australia
- Financial Services Council
- Herbert Smith Freehills
- IG Australia Pty Ltd
- Institute of Public Accountants
- Insurance Council of Australia
- Loan Market Group
- Mortgage & Finance Association of Australia
- MSC Trustees
- Property Council of Australia
- SMSF Association
- Stockbrokers and Financial Advisers Association
- The Law Society of New South Wales
- WT Financial Group Ltd