

# Attachment 1 to CP 340: Draft regulatory guide



**ASIC**  
Australian Securities &  
Investments Commission

## REGULATORY GUIDE 78

# Breach reporting by AFS licensees and credit licensees

April 2021

### About this guide

This guide is for Australian financial services (AFS) licensees and Australian credit licensees (credit licensees).

It gives guidance on your obligation to report to ASIC certain breaches of the law under Div 3 of Pt 7.6 of the *Corporations Act 2001* (Corporations Act) and Div 5 of Pt 2-2 of the *National Consumer Credit Protection Act 2009* (National Credit Act).

Note: This guide does not cover certain reporting obligations: see RG 78.12.

### 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.

### Document history

This draft guide was issued in April 2021 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 78, issued September 2008, reissued February 2014 and March 2020
- Superseded *Breach reporting by AFS licensees: An ASIC guide*, issued October 2004, reissued May 2006, and known in the *ASIC Digest* as [SGD 190]; rebadged as a regulatory guide 5 July 2007

### Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview

### Key points

If you are an Australian financial services (AFS) or Australian credit licensee (credit licensee), you must comply with your obligation to report certain breaches of the law to ASIC.

This guide explains:

- what you must report to ASIC (see Section B);
- when and how you must report to ASIC, including information about how we deal with the reports we receive and the information we will publish about your reports (see Section C); and
- our expectations and guidance about your compliance systems (see Section D).

### Who this guide applies to

RG 78.1 This guidance applies to AFS licensees and credit licensees and their representatives.

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

RG 78.2 A breach reporting obligation for credit licensees was introduced into Div 5 of Pt 2-2 of the *National Consumer Credit Protection Act 2009* (National Credit Act) by the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Financial Sector Reform Act). This obligation mirrors the breach reporting obligation for AFS licensees in Subdiv B, Div 3, Pt 7.6 of Ch 7 of the *Corporations Act 2001* (Corporations Act) as reformed by the Financial Sector Reform Act. Specific credit guidance is provided throughout this guide where relevant.

### What is the breach reporting obligation?

RG 78.3 The breach reporting obligation requires licensees to self-report specified matters to ASIC. As stated in the [Explanatory Memorandum to the Financial Sector Reform \(Hayne Royal Commission Response\) Bill 2020](#) (Explanatory Memorandum):

Breach reporting is a cornerstone of Australia's financial services regulatory structure. Breach reports allow ASIC to detect significant non-compliant behaviours early and take action where appropriate. It also allows ASIC to identify and address emerging trends of non-compliance in the industry.

Note: See Explanatory Memorandum, paragraph 11.3.

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- RG 78.4 Early detection and reporting of misconduct and breaches of regulatory requirements allow ASIC to:
- (a) monitor the extent and severity of non-compliance and commence surveillance and investigation where necessary;
  - (b) take law enforcement and regulatory action where warranted, including administrative action to protect consumers of financial products and services; and
  - (c) identify and respond to emerging threats, harms and trends within the financial services industry, detect significant non-compliant behaviours early and take the appropriate regulatory response.
- RG 78.5 The regulatory regime acknowledges that, despite an expectation of compliance, breaches will occur and licensees then have an obligation to report these to ASIC. Licensees have a clear role in lifting industry standards as a whole, and part of this is timely identification of their own problems.
- RG 78.6 We consider that a licensee's experience with incident and issues management, including breaches, should be a vital source of learning to both reinforce and improve an entity's compliance framework and overall function. Instances of non-compliance highlight a weakness to be understood, so improvements can be made to prevent the recurrence of the breach in the future.
- RG 78.7 Due to the importance of breach reporting in our regulatory regime, it has been considered by:
- (a) the ASIC Enforcement Review Taskforce, which made several recommendations for strengthening and clarifying the breach reporting requirements in the Corporations Act and recommended that a comparable breach reporting regime for credit licensees be introduced (Recommendation 2);
  - (b) the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission), which recommended that the Taskforce recommendations should be carried into effect (Recommendation 7.2) and that serious compliance concerns be reported (Recommendations 2.8 and 1.6); and
  - (c) [Report 594](#) *Review of selected financial services groups' compliance with the breach reporting obligation* (REP 594), which sets out the findings of ASIC's review of AFS licensees' compliance with their breach reporting obligation under s912D of the Corporations Act.

Note: See Treasury, [ASIC enforcement review: Taskforce report](#), December 2017; Financial Services Royal Commission, [Final report](#), February 2019.

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## Our approach to guidance

- RG 78.8 In this guide, we give guidance on your obligation as an AFS or credit licensee to report to ASIC certain breaches of the law. We explain what information must be provided when reporting to ASIC, and what happens after you report, including what information we will publish as required by law. By explaining how we deal with these breach reports, we seek to enhance the transparency of our processes.
- RG 78.9 To help you understand your obligations and how they might apply in different factual circumstances, this guide contains a number of examples and historical case studies drawn from REP 594. These examples and case studies are for illustrative purposes only, and do not purport to limit the types of reportable situations that must be reported to ASIC or the reasons why a particular breach may or may not be considered significant.
- RG 78.10 Rather, we provide these examples and case studies to help provide clarity and promote the delivery of consistent and high-quality reports. Ultimately, it is your responsibility to decide whether you must report to ASIC under the law, taking into account the particular circumstances of your case.
- RG 78.11 This guide should be read in conjunction with our regulatory guides on how we administer Ch 7 of the Corporations Act and Ch 2 of the National Credit Act, including [Regulatory Guide 104](#) *AFS licensing: Meeting the general obligations* (RG 104), [Regulatory Guide 105](#) *AFS licensing: Organisational competence* (RG 105) and [Regulatory Guide 205](#) *Credit licensing: General conduct obligations* (RG 205).

## What this guide does not cover

- RG 78.12 This guide does not cover the following obligations to report matters to ASIC:
- (a) if you are a body regulated by the Australian Prudential Regulation Authority (APRA) and you cease to hold that status—for example, if you are a superannuation trustee and you have your approval as a trustee revoked by APRA (see [Pro Forma 209](#) *Australian financial services licence conditions* (PF 209), condition 9);
  - (b) if you become aware of a change in control of the licensee (see reg 7.6.04(1)(i) of the Corporations Regulations 2001 (Corporations Regulations) or reg 9(10) of the National Consumer Credit Protection Regulations 2010 (National Credit Regulations));

Note: In this guide, we use the term ‘regulations’ when referring collectively to the Corporations Regulations and National Credit Regulations.

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- (c) if you are an auditor whose breach reporting obligations are imposed by s311, 601HG or 990K of the Corporations Act (see [Regulatory Guide 34 Auditor's obligations: Reporting to ASIC](#) (RG 34)); or
- (d) if you are a credit licensee, the obligation imposed by s53 of the National Credit Act to lodge an annual compliance certificate in an approved form (see [Information Sheet 135 Annual compliance certificates for credit licensees](#) (INFO 135)).

RG 78.13 You may also have separate obligations to report in addition to the breach reporting obligation. For example:

- (a) under Rule 5.11.1 of the ASIC Market Integrity Rules (Securities Markets) 2017, a market participant must notify ASIC of certain suspicious activities (see [Regulatory Guide 265 Guidance on ASIC market integrity rules for participants of securities markets](#) (RG 265)); and
- (b) under s12 of the Corporations (Passport) Rules 2018, Australian passport fund operators must notify ASIC of specified changes and certain breaches of these rules, or of the passport rules of an applicable host economy of the fund (see [Regulatory Guide 132 Funds management: Compliance and oversight](#) (RG 132)).

## How our guidance applies: transitional provisions

RG 78.14 The breach reporting obligation under the Financial Sector Reform Act as discussed in this guide applies to reportable situations that arise on or after 1 October 2021.

RG 78.15 For AFS licensees, as set out in s1671A of the Corporations Act, the previous breach reporting obligation (as in force immediately before 1 October 2021) applies if:

- (a) the obligation is breached or is likely to be breached before 1 October 2021; and
- (b) before 1 October 2021, the licensee knows that the obligation has been breached or is likely to be breached.

### Example 1: How the breach reporting obligation applies (AFS licensees)

In March 2021, an AFS licensee becomes aware of an incident that occurred in December 2020 and commences an investigation into that incident.

If the licensee determines before 1 October 2021 that a breach of an obligation under s912D(1)(a) of the Corporations Act as in force before 1 October 2021 has occurred, it must apply the breach reporting framework in s912D of that Act as in force before 1 October 2021.

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If the licensee determines on or after 1 October 2021 that a breach or likely breach has occurred, the licensee must follow the breach reporting framework set out in this guide, regardless of whether or not the licensee has determined that the breach is significant.

- RG 78.16 For AFS licensees that are responsible entities of a registered managed investment scheme (registered scheme), where a breach of the Corporations Act that relates to the scheme occurs before 1 October 2021 and the responsible entity knows before 1 October 2021 that the breach has occurred, the breach reporting framework in s601FC(1)(l) of the Corporations Act as in force before 1 October 2021 continues to apply.
- RG 78.17 The previous version of this guide, dated March 2020, will continue to be available on ASIC's website to provide guidance for AFS licensees on the breach reporting framework in s912D of the Corporations Act.
- RG 78.18 The requirement for ASIC to annually publish data on breach reports applies from the 2021–22 financial year onwards.

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## B What you must report to ASIC

### Key points

As an AFS or credit licensee, you must report to ASIC a range of conduct that the law describes as ‘reportable situations’.

The types of reportable situations that you must report include:

- significant breaches or likely significant breaches of ‘core obligations’;
- investigations into whether there is a significant breach or likely breach of a ‘core obligation’ if the investigation continues for more than 30 days;
- the outcome of such an investigation if it discloses there is no significant breach or likely breach of a core obligation;
- conduct that constitutes gross negligence or serious fraud; and
- conduct of financial advisers and mortgage brokers who are representatives of other licensees in certain prescribed circumstances.

### What is a ‘reportable situation’?

- RG 78.19 You must report to ASIC all ‘reportable situations’: s912DAA of the Corporations Act, s50B of the National Credit Act. This term has a specific meaning under the law and includes a range of conduct.
- RG 78.20 In this guide, we refer to four types of reportable situations (see Table 1):
- (a) breaches or ‘likely breaches’ of core obligations that are significant;
  - (b) investigations into breaches or likely breaches of core obligations that are significant;
  - (c) additional reportable situations; and
  - (d) reportable situations about other licensees.
- RG 78.21 When we refer to a ‘likely breach’ we are referring to the reportable situation that a licensee is no longer able to comply with a core obligation and the breach, if it occurs, will be significant: s912D(1)(b) of the Corporations Act, s50A(1)(b) of the National Credit Act. The Explanatory Memorandum states:
- When is a licensee no longer able to comply with a core obligation?*
- The reportable situation that a licensee is no longer able to comply with a core obligation reflects the existing meaning of a ‘likely breach’ in section 912D of the Corporations Act.
- Note: See [Explanatory Memorandum](#), paragraph 11.41.
- RG 78.22 For example, you may become aware that on a future date your overdraft facility will be closed and you will no longer be able to comply with your base level financial requirements. If you do not have other means of meeting the financial requirements at this time, you will no longer be able to comply with your obligations and must report to ASIC.

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**Table 1: Types of reportable situations**

Type of situation	Description	Guidance and examples
Breaches or 'likely' breaches of core obligations that are significant	<p>These situations include:</p> <ul style="list-style-type: none"> <li>any breach of a 'core obligation' where the breach is significant; and</li> <li>any 'likely' breach of a 'core obligation' where the licensee or a representative of the licensee is no longer able to comply with a core obligation and the breach, if it occurs, will be significant.</li> </ul>	<p>See RG 78.27–RG 78.45</p> <p>Note: For guidance on determining whether or not a breach is significant, see RG 78.32–RG 78.45.</p>
Investigations into breaches or likely breaches of core obligations that are significant	<p>This include:</p> <ul style="list-style-type: none"> <li>investigations that continue for more than 30 days into whether there is a breach or likely breach of a core obligation that is significant; and</li> <li>the outcome of such an investigation if it discloses there is no breach or likely breach of a core obligation that is significant.</li> </ul>	<p>See RG 78.46–RG 78.57</p> <p>Note: For guidance on determining whether or not a breach is significant, see RG 78.32–RG 78.45.</p>
Additional reportable situations	<p>These situations include:</p> <ul style="list-style-type: none"> <li>conduct constituting gross negligence;</li> <li>conduct constituting serious fraud; and</li> <li>other circumstances prescribed by the regulations.</li> </ul>	See RG 78.58–RG 78.60
Reportable situations about other licensees	These situations relate to conduct in certain prescribed circumstances of individual financial advisers and mortgage brokers of other licensees.	See RG 78.61–RG 78.67

RG 78.23 You must lodge a report with ASIC within 30 days after you first know that, or are reckless with respect to whether, there are reasonable grounds to believe a reportable situation has arisen: see s912DAA(3) of the Corporations Act, s50B(4) of the National Credit Act.

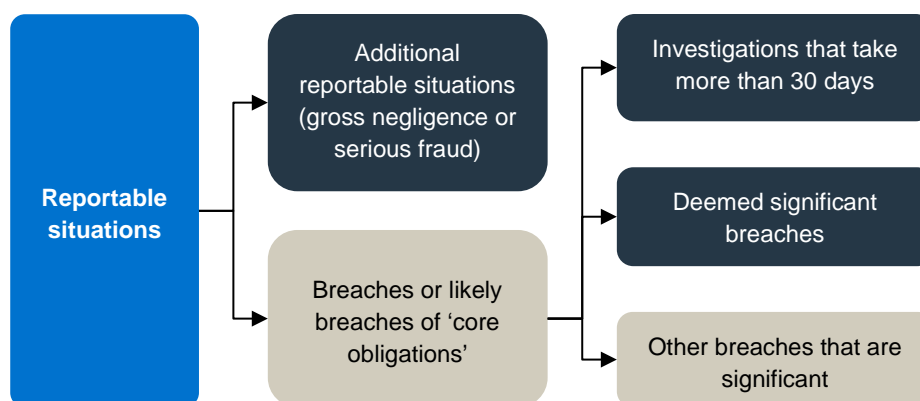
Note: For guidance on when reasonable grounds might arise, and the required timeframes for reporting, see RG 78.68–RG 78.80.

RG 78.24 If a reportable situation arises, failure to report to ASIC in accordance with your obligations is an offence and can lead to criminal or civil penalties: see s912DAA of the Corporations Act, s50B of the National Credit Act.

Note: For guidance on the consequences of failing to report, see RG 78.95–RG 78.98.

RG 78.25 Reportable situations, core obligations and objective determinations of 'significance' are important and interrelated concepts underlying the breach reporting obligation: see Figure 1. We provide guidance on these terms throughout this guide.

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**Figure 1: Reportable situation, core obligations and objective determinations of ‘significance’****Note: Applicability of ‘significance’ (accessible version)**

*Reportable situations that do not require a determination of significance before being reported to ASIC (shaded dark blue) include:*

- additional reportable situations (gross negligence or serious fraud), which must be reported to ASIC and require no determination of significance;
- deemed significant breaches, which are automatically taken to be significant by operation of law; and
- investigations that continue for more than 30 days, which require consideration of whether there may be a breach (or likely) breach of a core obligation that is significant, but do not require determination of significance before being reported to ASIC.

*Other breaches or likely breaches of core obligations require a determination of significance before being reported to ASIC.*

**Breaches by representatives**

RG 78.26 Licensees must report breaches committed by the licensee and by its representatives, as this term is defined in the Corporations Act and the National Credit Act:

- for AFS licensees*—representatives include authorised representatives, an employee or director of the licensee or related body corporate, or any other person acting on behalf of the licensee (see s910A of the Corporations Act); and
- for credit licensees*—representatives include an employee or director of the licensee or related body corporate of the licensee, credit representatives of the licensee or any other person acting on behalf of the licensee (see s5 of the National Credit Act).

Note: See RG 78.104–RG 78.118 for guidance on compliance systems, and monitoring and supervision of representatives (including authorised representatives).

**What is a breach or likely breach of your core obligations?**

RG 78.27 You must report to ASIC any significant breach (or likely significant breach) of your ‘core obligations’, as defined in s912D(3) of the Corporations Act for AFS licensees or s50A(3) of the National Credit Act for credit licensees.

You are only required to report breaches (or likely breaches) of core obligations that are ‘significant’: see RG 78.32.

Note: See the appendix for a more detailed summary of the core obligations in s912D(3) of the Corporations Act (for AFS licensees) or s50A(3) of the National Credit Act (for credit licensees).

RG 78.28 If you are an AFS licensee, your ‘core obligations’ include:

- (a) your general obligations under s912A of the Corporations Act, other than the obligation under s912A(1)(c);
- (b) the obligation under s912A(1)(c) to comply with ‘financial services laws’ as defined in s761A, but only those parts of the definition set out in s912D(3)(b);
- (d) in relation to traditional trustee company services provided by a licensed trustee company—the obligation under s912A(1)(c) of the Corporations Act to comply with financial services laws, but only Commonwealth, state or territory legislation or a rule of common law or equity that relates to provision of financial services and traditional trustee company services; and
- (e) your general obligations under s912B of the Corporations Act.

RG 78.29 If you are a credit licensee, your ‘core obligations’ include:

- (a) your general obligations under s47 of the National Credit Act, other than the obligation under s47(1)(d); and
- (b) your obligation under s47(1)(d) to comply with credit legislation, but only the legislation set out in s50A(3)(b) and (c).

### **Bodies regulated by APRA**

RG 78.30 If you are a body regulated by APRA, there is no obligation under s912A to have adequate resources or risk management systems. Similarly, these obligations are not included as AFS licence conditions for bodies regulated by APRA. However, there are similar obligations in Commonwealth legislation regulated by APRA and in prudential standards and rules determined by APRA under that legislation.

RG 78.31 The obligation to comply with the Commonwealth legislation specified in reg 7.6.02A(1) of the Corporations Regulations including legislation administered by APRA constitutes a core obligation insofar as it covers conduct relating to the provision of financial services: s912D(3)(c) of the Corporations Act. This is part of your obligation to comply with a financial services law: s912A(3)(c).

Note: See RG 78.120(c) for the Commonwealth legislation specified in reg 7.6.02A of the Corporations Regulations. The Corporations Regulations will be amended by the [Financial Sector Reform \(Hayne Royal Commission Response—Protecting Consumers \(2020 Measures\)\) Regulations 2021 \(exposure draft\)](#). These regulations are currently the subject of a separate Treasury consultation, which closed on 9 April 2021.

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## What does ‘significant breach’ mean?

- RG 78.32 You must report any breach or likely breach of a core obligation if the breach is ‘significant’. There are two ways to determine whether a breach is significant:
- (a) *Deemed significant breaches*—In certain situations, a breach or likely breach of a core obligation is taken to be significant: see RG 78.36–RG 78.41.
  - (b) *Other breaches that may be significant*—In other situations, a breach or likely breach of a core obligation will need to be considered against the factors in s912D(5) of the Corporations Act or s50A(5) of the National Credit Act to determine whether it is significant: see RG 78.42–RG 78.45.
- RG 78.33 In determining whether a breach is significant, you should first consider whether a breach is a deemed significant breach—only if it is not such a breach should you then proceed to determine whether it is significant having regard to the factors in s912D(5) of the Corporations Act or s50A(5) of the National Credit Act.
- RG 78.34 Whether or not an individual breach is significant, you must have adequate incident and issues management systems in place to properly deal with each breach.
- RG 78.35 An accurate and complete breach register can help with timely identification and adequate reporting. For example, if you identify a single, isolated breach which is not significant, it should be recorded in your breach register or risk management system. Although a single breach may not be significant, multiple breaches of the same kind may result in a later breach being considered significant, particularly for breaches of s912D(5)(a) of the Corporations Act or s50A(5)(a) of the National Credit Act (which relate to the number or frequency of similar breaches).

Note: For more information on breach registers and how you can demonstrate compliance with your obligations, see Section D. For guidance on breaches of s912D(5) of the Corporations Act or s50A(5) of the National Credit Act, see RG 78.43–RG 78.45

## What are ‘deemed significant breaches’?

- RG 78.36 Under s912D(4) of the Corporations Act or s50A(4) of the National Credit Act, certain breaches of core obligations are taken to be significant (‘deemed significant breaches’). If a breach is a ‘deemed significant breach’, you must not take additional steps to determine whether the breach is ‘significant’ before reporting to ASIC. As stated in the Explanatory Memorandum:

The purpose of the deemed significance test is to provide greater certainty for industry and to ensure significant breaches are reported to ASIC in a timely manner. For example, where a breach constitutes a contravention of

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a relevant civil penalty provision or the commission of a relevant offence, the significance of the breach is immediately taken to be satisfied.

Note: See [Explanatory Memorandum](#), paragraph 11.37.

RG 78.37 Deemed significant breaches include breaches:

- (a) that constitute the commission of an offence and the commission of the offence is punishable on conviction by a penalty that may include imprisonment for:
  - (i) three months or more if the offence involves dishonesty; or
  - (ii) 12 months or more in any other case;
- (b) of a civil penalty provision (except where excluded by the regulations) or for credit licensees constitute a contravention of a key requirement under s111 of the National Credit Code (Sch 1 to the National Credit Act);
- (c) of s1041H(1) of the Corporations Act or s12DA(1) of the *Australian Securities and Investments Act 2001* (ASIC Act) (misleading or deceptive conduct); or
- (d) that result, or are likely to result, in material loss or damage to clients, or to members of a managed investment scheme or superannuation entity (see Table 2 for examples).

RG 78.38 The term ‘material loss or damage’ is not defined. However, in determining whether there is material loss or damage, licensees should be guided by the Parliamentary intent in the Explanatory Memorandum (as it applies to both the Corporations Act and National Credit Act provisions):

‘Loss or damage’ in the context of the deemed significance test has its ordinary meaning, which is extensive. The term includes financial and non-financial loss or damage.

Whether a breach results or is likely to result in *material* loss or damage to a person will depend on the person’s circumstances. For example, a relevant circumstance may include the person’s financial situation.

If a breach affects a number of people, it is sufficient for significance to be established if the breach is likely to result in material loss or damage to one person. Additionally, where the breach affects a number of people, licensees should consider the total loss or damage resulting from the breach. For example, even if the breach does not result in a material loss or damage to individual persons, the total loss or damage to persons resulting from the breach may, when aggregated, amount to material loss or damage to persons, thereby satisfying the significance requirement.

Consistent with the common law position, ‘likely to result in material loss or damage’ is intended to mean that there is a real and not remote possibility that loss or damage will occur as a result of the breach.

Note: See [Explanatory Memorandum](#), paragraphs 11.30–11.33.

RG 78.39 You should consider the financial circumstances of clients affected by a breach in considering whether loss or damage suffered is material. This does not mean

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you should delay reporting a breach while the specific financial circumstances of each affected client are determined. However, the circumstances of clients who suffer loss or damage as a result of a breach are relevant to determining whether that loss is material, for example, in circumstances where the cohort of affected consumers may include people experiencing vulnerability.

- RG 78.40 Certain breaches of civil penalty provisions are excluded from being deemed significant breaches under s912D(4)(b) of the Corporations Act or s50A(4)(b) of the National Credit Act and by operation of the regulations. Regulation 7.6.02A(2) of the Corporations Regulations (AFS licensees) and reg 12A of the National Credit Regulations (credit licensees) specify civil penalty provisions for breaches that do not need to be reported solely because the breach is a contravention of a civil penalty provision.
- RG 78.41 Where the civil penalty provision that has been breached is excluded under the regulations, you must still consider:
- (a) whether it is a deemed significant breach under the other criteria in s912D(4) of the Corporations Act or s50A(4) of the National Credit Act; and
  - (b) if you determine that none of those criteria apply—whether it is significant in light of the factors in s912D(5) of the Corporations Act or s50A(5) of the National Credit Act (see RG 78.42–RG 78.45).

**Table 2: Examples of deemed significant breaches**

<b>Example 2(a): Material loss or damage to clients</b>	<p><i>Material loss or damage to members of a superannuation fund</i></p> <p>A superannuation fund trustee deducts advice service fees from the accounts of a group of fund members in a corporate plan where the members were never given access to an adviser or provided with advice.</p> <p>The trustee may have breached s912A, 1017D and 1041H of the Corporations Act and s12CA, 12CB, 12DA, 12DB, 12DF and 12DI of the ASIC Act. Any loss a member suffers in this regard may be material <i>for that member</i>, and taken together may constitute a material loss.</p> <p><i>Material loss or damage to a debtor</i></p> <p>If a debtor with a credit contract surrenders goods to a credit provider under s85 of the National Credit Code and the credit provider fails to comply with their obligations to sell those goods as soon as reasonably practicable to a purchaser nominated by the debtor (or, where a purchaser is not nominated by a debtor, for the best price reasonably obtainable), the debtor may suffer loss or damage.</p> <p>The breach may need to be reported to ASIC where the loss or damage to the debtor is material given:</p> <ul style="list-style-type: none"> <li>• the value of the goods surrendered;</li> <li>• the length of any delay in the sale of the goods to a purchaser nominated by the debtor (or, where a purchaser is not nominated by the debtor, the difference between the amount the goods are sold for and the best price that could have been reasonably obtained); and</li> <li>• the financial situation of the debtor.</li> </ul>
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<p><b>Example 2(a) (cont.)</b></p>	<p><i>Material loss or damage to consumer credit insurance clients</i></p> <p>Over a four-year period, an insurer allowed consumer credit insurance (CCI) to be sold to clients who the insurer knew, or should have known, at the time of the sale were not eligible to claim for unemployment or temporary or permanent disability cover provided by the CCI. While on average the breach meant that the general insurer had collected \$153 in unsuitable premiums per client, collectively the breach may amount to material loss, with the insurer refunding over 65,000 clients around \$10 million. Separately, consideration of materiality also included the affected clients' financial situation, as they were mostly low income students or people who were unemployed.</p>
<p><b>Example 2(b): Dishonestly obtaining client funds (criminal offence)</b></p>	<p>If you or one of your representatives breaches a core obligation by engaging in conduct that constitutes a criminal offence, you must report this to ASIC.</p> <p>For example, if you identify, after complaints have been lodged by clients, that an authorised representative has given advice to clients to dishonestly obtain client funds and use them for personal expenses or other purposes, you must report that breach to us.</p>
<p><b>Example 2(c): Failure to maintain professional indemnity (PI) insurance, or an appropriate level of PI insurance (civil penalty provision)</b></p>	<p>Unless you are an exempt licensee, failure to maintain adequate PI insurance will be a breach of your obligation to have adequate compensation arrangements under s912B of the Corporations Act or s48 of the National Credit Act.</p> <p>Because the requirement to have adequate compensation arrangements is a civil penalty provision, you must report to ASIC if you determine that you have failed to maintain PI insurance (or to maintain an appropriate level of PI insurance).</p> <p>Note: See reg 12(3) of the National Credit Regulations for details of licensees that are exempt from the requirement to hold PI insurance.</p>
<p><b>Example 2(d): Governance failures in a responsible entity (civil penalty provision)</b></p>	<p>If you are a licensee that is a responsible entity of a registered scheme and you become aware that in exercising your powers and carrying out your duties as responsible entity you have not complied with the compliance plan for the registered scheme, you will be in breach of the obligations under s601FC(1)(h) of the Corporations Act (duties of responsible entity) and must report this to ASIC.</p> <p>Because a breach of s601FC(1)(h) contravenes s601FC(5) and incurs a civil penalty under s1317E, such a breach is deemed to be significant and must be reported to ASIC.</p>
<p><b>Example 2(e): Quality of advice and failure to act in interests of the client (civil penalty provision)</b></p>	<p>If you identify conduct by financial advisers acting as your authorised representatives that indicates they have failed to comply with their duty to act in the best interests of clients (in breach of s961B of the Corporations Act) or provide appropriate advice (in breach of s961G of the Corporations Act), you must report those breaches to ASIC as those obligations are civil penalty provisions.</p> <p>For example, if ASIC identifies non-compliant advice by your authorised representatives, and, after you undertake an investigation, you determine that those representatives have breached the best interests duty and related obligations, you are required to report those breaches to ASIC.</p> <p>If your investigation identifies systemic issues with the conduct of your authorised representatives that indicate you have not taken reasonable steps to ensure these representatives comply with their obligations (in breach of s912A(1)(ca) of the Corporations Act), or that you do not have adequate risk management systems in place (in breach of s912(1)(h) of the Corporations Act), those contraventions must be reported to ASIC. If the investigation continues for more than 30 days, this is a 'reportable situation' and must also be reported to ASIC: see RG 78.46–RG 78.57 for guidance on investigations.</p>

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<p><b>Example 2(f): Misleading or deceptive statements in relation to a financial product or service or credit activity</b></p>	<p>If you or your representatives engage in misleading or deceptive conduct, even where that conduct does not result in material loss or damage to clients, you are required to report this to ASIC.</p> <p>For example, as an AFS licensee, if you identify that an authorised representative has engaged in deceptive conduct by backdating client file notes, falsely declaring to have witnessed binding nomination forms, or otherwise falsifying documents, you must report this to ASIC, irrespective of whether the conduct is likely to cause loss or damage to clients.</p> <p>Similarly, as a credit licensee, if you or your representative advertises a product that is promoted as being ‘fee free’ when in fact fees may be payable by the client (e.g. where fees apply to the product but are waived if the client meets certain qualifying criteria), you must report this to ASIC irrespective of whether the conduct is likely to cause loss or damage to clients.</p>
<p><b>Example 2(g): Breach of a key requirement under the National Credit Code</b></p>	<p>A contravention of a key requirement, as defined for the purposes of the National Credit Code, must be reported to ASIC in the same way as contraventions of a civil penalty provision: s50(4)(c) of the National Credit Act.</p> <p>For example, if you conduct a review of your credit contracts and identify a failure to include relevant information about calculation of interest charges or total interest payable under the contract, even in isolated circumstances where there is no identifiable loss or damage to the client, you must report this to ASIC.</p>

### Other breaches that are significant

- RG 78.42 Except for deemed significant breaches and additional reportable situations, a breach (or likely breach) of a core obligation needs to be assessed to determine whether it is significant having regard to certain factors in s912D(5) of the Corporations Act or s50A(5) of the National Credit Act.
- RG 78.43 These factors, as listed in s912D(5) of the Corporations Act or s50A(5) of the National Credit Act are:
- (a) the number or frequency of similar breaches;
  - (b) the impact of the breach or likely breach on the licensee’s ability to supply the financial services or engage in credit activities covered by your licence;
  - (c) the extent to which the breach or likely breach indicates that the licensee’s arrangements to ensure compliance with those obligations are inadequate;
  - (d) any other matters prescribed by the regulations.
- RG 78.44 Whether a particular breach is significant should be determined objectively:
- (a) Table 3 explains how each of these factors may be applied to determine whether a breach is significant;
  - (b) Table 4 gives examples of breaches we consider may be significant; and
  - (c) Table 5 gives examples of breaches we consider may not be significant.
- Note: As noted earlier, these examples are for illustrative purposes only; a determination of significance for a particular breach or likely breach will depend on your individual circumstances: see RG 78.8–RG 78.10.

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RG 78.45 You must have regard to all of the factors in RG 78.43 when determining whether a breach (or likely breach) is significant. A breach may be significant even if only one of the factors applies to your circumstances, or where there is a combination of factors.

**Table 3: Factors that determine whether a breach (or likely breach) is ‘significant’**

Factor	How it may be applied to determine whether a breach is significant
<p>The number or frequency of similar breaches: s912D(5)(a) of the Corporations Act, s50A(5)(a) of the National Credit Act</p>	<p>The greater the number or frequency of similar breaches, the more likely the new breach will be significant. The repeat of a breach may also indicate a continuing underlying systemic problem.</p> <p>If minor breaches of a technical or administrative nature repeatedly occur, you may become aware that you can no longer comply with your obligations under the financial services laws (e.g. because you have inadequate compliance arrangements, risk management systems or technological or human resources). This may be a reportable situation under s912D(1)(b) of the Corporations Act or s50A(3)(a) of the National Credit Act.</p> <p>It would also amount to a deemed significant breach, as the following sections are civil penalty provisions:</p> <ul style="list-style-type: none"> <li>• s912A(1)(d) of the Corporations Act (obligation to have adequate resources to provide financial services covered by your licence)</li> <li>• s912A(1)(h) of the Corporations Act (obligation to have adequate risk management systems);</li> <li>• s47(1)(k) of the National Credit Act (obligation to have adequate arrangements to ensure compliance with the general obligations under s47); and</li> <li>• s47(1)(l) of the National Credit Act (the equivalent of s912A(1)(d) of the Corporations Act).</li> </ul>
<p>The impact of the breach on your ability to supply the financial services or engage in credit activities covered by your licence: s912D(5)(b) of the Corporations Act, s50A(5)(b) of the National Credit Act</p>	<p>If a breach (or likely breach) reduces your ability or capacity to supply the financial services or engage in the credit activities covered by your licence, it is likely to be significant. For example, we consider that a breach of the financial requirements of your licence conditions may be significant. If these minimum requirements are not met, you may not have the financial ability or capacity to supply the financial services covered by your licence.</p> <p>If the breach (or likely breach) will not affect your ability or capacity to supply the financial services covered by your licence, it may still be significant having regard to one or more of the other factors.</p>

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Factor	How it may be applied to determine whether a breach is significant
<p>The extent to which the breach indicates that the licensee's arrangements to ensure compliance with those obligations are inadequate: s912D(5)(c) of the Corporations Act, s50A(5)(c) of the National Credit Act</p>	<p>If the breach (or likely breach) indicates that your arrangements to ensure compliance failed to prevent the breach in an isolated and specific instance, it may not be significant. However, if the breach (or likely breach) indicates broader inadequacies in your compliance arrangements, it is more likely to be significant and, if so, you should report it to ASIC.</p> <p>We recognise that compliance arrangements are unlikely to ensure full compliance with every aspect of the law at all times, and occasional and minor breaches do not of themselves mean that your compliance arrangements are inadequate.</p> <p>However, this factor requires you to consider whether a breach (or likely breach) indicates that your compliance arrangements are inadequate. We expect that under this factor you would ask yourself questions such as the length of time the incident went undetected, to what extent the compliance arrangements helped in identifying the breach and the timeframe it took to investigate and assess the incident as a breach. We consider that, when systems are appropriately resourced, used and audited, they should identify instances of non-compliance in a timely manner.</p>
<p>Any other matters prescribed by regulations: s912D(5)(d) of the Corporations Act, s50A(5)(d) of the National Credit Act</p>	<p>At the date of publication of this guide, there were no relevant regulations. You should check to see whether the regulations have specified any further factors.</p>

**Table 4: Examples of breaches that may be significant under s912D(5) or s50A(5)**

<p><b>Example 3(a): Failure to notify ASIC of changes in key persons</b></p>	<p>If you are required as a condition of your licence to report to ASIC where a person ceases to be an officer or perform duties on behalf of the licensee, and you fail to inform ASIC within the required time period and lodge information in relation to the replacement of that key person, there may be a significant breach.</p> <p>If the departure of one or more key persons will impact on your ability to provide the financial services or credit activities covered by your licence, that is a breach of s912A(1)(b) of the Corporations Act or s47(1)(c) of the National Credit Act, and a failure to inform ASIC and appoint an appropriate replacement person should be reported to ASIC if the breach is significant under s912D(5) or s50A(5).</p>
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<p><b>Example 3(b): Failure to follow disclosed investment mandates</b></p>	<p>If a fund is promoted as following a particular investment mandate or as having particular characteristics, we would expect a failure of the responsible entity to ensure the scheme complies with the mandate or has the promoted characteristic (which in certain circumstances will be a breach of s601FC(1)(c) of the Corporations Act) to be a significant breach even where the breach may not have resulted in material loss or damage to members.</p> <p>For example, if a scheme is promoted as having an investment mandate which compels the scheme to invest in certain ethical investments (e.g. 'green energy') or investment types and to avoid others (e.g. tobacco, fossil fuels), a failure to comply with this would adversely affect the interests of members and may mean the promotional material issued to investors is misleading. It may not cause material loss and damage if the returns generated by the scheme were the same or higher than would have been achieved under the disclosed mandate. This would nevertheless be morally unacceptable to many of them.</p> <p>Note: If you identify that the promotional material in relation to the scheme is potentially misleading, this may constitute misleading or deceptive conduct and therefore be a deemed significant breach.</p>
<p><b>Example 3(c): Recurring failure to lodge statutory reports</b></p>	<p>Failure by a licensee to lodge financial reports and compliance plan audit reports on time may be a significant breach where the delay is substantial or where failure to lodge occurs on multiple occasions.</p> <p>Significant delays in lodgement or failure to lodge multiple documents within the required period may indicate compliance failures, financial difficulties or unresolved issues identified in the audit process such as failure to maintain proper books and records, or improper transactions.</p>

**Table 5: Examples of breaches that may not be significant**

<p><b>Example 4(a): Isolated failure to give a disclosure document (Financial Services Guide (FSG) or Credit Guide)</b></p>	<p>If you identify an isolated instance of an authorised representative or credit representative failing to give a client a copy of an FSG or Credit Guide (in contravention of s941B of the Corporations Act or s113(1) of the National Credit Act), this may be a deemed significant breach. Although this provision is a civil penalty provision, it is not a deemed significant breach because of reg 7.6.02A(2) of the Corporations Regulations and reg 12A of the National Credit Regulations. This means you must consider whether the breach is otherwise significant: see RG 78.41.</p> <p>If, for example, you determine that there are no further contraventions or losses arising from the contravention, you are unlikely to be required to report to ASIC. However, if you identify multiple breaches of the same nature, or issues surrounding the contravention that suggest that there are deficiencies in your compliance systems, you may be required to report the breach to ASIC.</p> <p>Note: The inclusion of s941B of the Corporations Act and s113(1) of the National Credit Act reflects proposed amendments to reg 7.6.02A(2) of the Corporations Regulations and reg 12A of the National Credit Regulations. These proposed amendments are open for consultation—see <a href="#">Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Regulations 2021 (exposure draft)</a>.</p>
<p><b>Example 4(b): Isolated failure to provide a statement of account</b></p>	<p>If you fail to give a periodic statement of account to an individual client in the time period required by the National Credit Code in an isolated instance, the breach is not likely to be significant and you are unlikely to be required to report to ASIC.</p> <p>However, if you identify that the breach relates to multiple clients or you identify multiple breaches that relate to individual clients, the breach will likely be significant and must be reported to ASIC.</p>

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## When is an investigation a reportable situation?

RG 78.46 Investigations into whether a significant breach (or likely significant breach) of a core obligation has occurred, and that continue 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.

RG 78.47 If the investigation commences and concludes within 30 days and there are no reasonable grounds to believe that a reportable situation has arisen, the investigation is not a ‘reportable situation’. If an investigation that concludes within 30 days identifies reasonable grounds to believe that a reportable situation has arisen, you must report to ASIC notifying us of the reportable situation that has arisen within 30 calendar days.

Note: See RG 78.68–RG 78.85 for guidance on when you must report a reportable situation to ASIC.

RG 78.48 The term ‘investigation’ is not defined. As stated in the Explanatory Memorandum:

The term ‘investigation’ is not defined in the legislation and has its ordinary meaning. What constitutes an investigation is likely to vary significantly depending on the size of the licensee’s business, their internal systems and processes, and the type of breach.

The Macquarie Dictionary defines ‘investigation’ as ‘a searching inquiry in order to ascertain facts.’ Accordingly, if a... licensee is considering whether it has conducted an investigation, a relevant factor would be whether there has been some information gathering or human effort applied by the licensee to determine whether a breach has occurred or will occur. Examples of information gathering may include:

- communicating with representatives or staff of the licensee who may have been involved in the relevant conduct;
- communicating with potentially affected clients; or
- seeking specialist or technical advice.

Note: See [Explanatory Memorandum](#), paragraphs 11.43–11.44.

RG 78.49 Licensees must also have regard to the guidance set out in the Explanatory Memorandum as follows:

(a) *Entry into risk management systems:*

Merely entering a suspected compliance issue into a risk management system is unlikely to amount to a searching inquiry to ascertain facts, although this will depend on the circumstances in each case.

Note: See [Explanatory Memorandum](#), paragraph 11.45.

(b) *Description of investigation:*

The intention is that the term ‘investigation’ applies irrespective of how the licensee describes an investigation in its internal processes, as long as it satisfies the ordinary meaning of the term.

Note: See [Explanatory Memorandum](#), paragraph 11.46.

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(c) *Outsourcing investigations:*

[A] licensee is also considered to have conducted an investigation if it outsources the investigation, or if a related entity (such as a parent company) conducts the investigation.

Note: See [Explanatory Memorandum](#), paragraph 11.48.

RG 78.50 Table 6 sets out some examples of investigations that must be reported to ASIC as reportable situations.

RG 78.51 The time at which an investigation commences is a matter of fact and is not a matter for subjective determination by the licensee.

For example, after receiving a complaint from a client, if the licensee begins to look into the matter or take steps towards ascertaining whether a significant breach has occurred, this would generally be considered to be when the investigation has commenced for the purposes of s912D(1)(c) of the Corporations Act or s50A(1)(c) of the National Credit Act.

Note: See [Explanatory Memorandum](#), paragraph 11.47.

RG 78.52 We expect that investigations into whether a reportable situation has arisen will be commenced in a timely manner and without unreasonable delay. Further, while there is no statutory timeframe for completion of an investigation, we expect that investigations will be conducted in a timely way. Delays in initiating, recording, escalating or conducting an investigation may suggest inadequacies of a licensee's compliance arrangements (s912D(5)(c) of the Corporations Act, s50A(5)(c) of the National Credit Act), and may constitute a breach of s912A of the Corporations Act or s47 of the National Credit Act.

RG 78.53 Timely investigations reduce the risk of continuing breaches or breaches that reoccur by helping to identify the root or systemic cause of the breach. If a deficiency in a system or process is identified before the investigation is completed, you should not wait for it to be completed to implement steps to rectify the deficiency and limit its adverse impact: see Case study 1.

#### Case study 1: Remedying a breach prior to the completion of an investigation

A licensee identified that nearly 200 consumer complaints received within one year through their IDR process were about home loan offset arrangements within the broker channel.

During the investigation, the licensee identified approximately 2,000 active accounts with offset account linkage errors, resulting in a number of these consumers not receiving the benefits of an offset account and paying too much interest on their home loan.

While the investigation of the offset account linkage error was ongoing, system enhancements were implemented to improve the overall consumer experience, and show all consumers details of their linked offset account and the amount of interest saved on their home loan via the offset arrangement.

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- RG 78.54 Your policies and procedures should set out expectations in relation to the completion of investigations and circumstances where additional reporting or oversight is required for ongoing investigations to ensure that they are progressing and being appropriately prioritised.

Note: See Section D for guidance on compliance systems and identifying, recording and reporting breaches.

- RG 78.55 If, before the end of an investigation, you are satisfied, or have reasonable grounds to believe, based on the information at hand, that the breach was significant and a reportable situation, you must not wait until the investigation is complete to report the matter to ASIC: see Case study 2.

#### Case study 2: Unreasonable delay in reporting

An AFS licensee reported a significant breach relating to account opening errors that occurred over an eight-year period. This systemic issue affected over 100,000 clients who could not access the full benefits of their account.

The licensee had been receiving complaints for four years before making the breach report to ASIC. An initial investigation identified only part of the root causes and the complaints continued.

A second investigation revealed more, and led to the breach report to ASIC. However, by this stage the licensee had received over 120 complaints.

The licensee's decision to report to ASIC should not have been delayed while awaiting completion of the second investigation, as there were reasonable grounds to believe that a reportable situation had arisen after the initial investigation.

As the two investigations had the same subject matter, the investigation effectively commenced at the start of the initial investigation, and became a reportable situation after 30 consecutive days.

- RG 78.56 In certain prescribed situations, you must commence an investigation into the nature and extent of certain breaches and loss arising from a reportable situation within set timeframes: see s912EB of the Corporations Act (financial advisers), s51B of the National Credit Act (mortgage brokers).

Note: For information about the investigation, notification and remediation obligations that apply to AFS licensees and credit licensees, see draft Information Sheet 000 *Complying with the notify, investigate and remediate obligations* (draft INFO 000) at Attachment 2 to Consultation Paper 340 *Breach reporting and related obligations* (CP 340).

- RG 78.57 Except for the circumstances set out in RG 78.56, there is no express requirement to conduct an investigation, and not all circumstances will require an investigation before reporting to ASIC. In some cases, a reportable situation should be clear to you without an investigation.

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**Table 6: Examples of investigations that are reportable situations**

<p><b>Example 5(a): Internal audit of unit pricing</b></p>	<p>A routine internal audit of unit pricing functions identifies that there is a risk that unit pricing errors have occurred as a result of inadequate manual systems being used for calculation of unit prices. After the potential pricing errors are identified by the internal audit team, a separate investigation is undertaken into the extent and cause of the pricing errors and potentially affected clients.</p> <p>The licensee must report the investigation into the nature and extent of the unit pricing errors if it has continued for 30 days. If the investigation concludes in less than 30 days and there are no reasonable grounds to believe that a reportable situation has arisen, the investigation does not need to be reported to ASIC.</p> <p>As the internal audit itself is routine and not directed at identifying whether a significant breach of a core obligation has arisen, it does not constitute an investigation.</p>
<p><b>Example 5(b): Client complaints about fees for no service</b></p>	<p>A licensee receives several client complaints about fees the clients have been charged for financial advice without having received any advice. In light of those complaints, the licensee reviews their client books and fee arrangements and identifies a large number of additional clients who are being charged ongoing advice fees but who are not attached to a financial adviser.</p> <p>From the initial review, which has now been ongoing for longer than 30 days, it appears that the issue is likely to be systemic and impacting a large number of clients. It also appears that it may involve multiple breaches of the licensee's obligations under s12DI(3) of the ASIC Act (accepting payment without being able to supply services), and possible breaches of the licensee's obligation to provide financial services efficiently, honestly and fairly.</p> <p>The licensee is required to report the review of fee arrangements to ASIC as an investigation after the review has continued for more than 30 days. The investigation commenced when the licensee conducted a review of their client books. Once the investigation identifies reasonable grounds to believe that a reportable situation has arisen (i.e. that there are reasonable grounds to believe a contravention of a relevant civil penalty provision has occurred), this must also be reported to ASIC as a reportable situation.</p> <p>If the investigation identifies this reportable situation within 30 days, the investigation does not need to be reported at this time. However, if the investigation is ongoing in regard to possible additional breaches, the licensee is required to report the investigation once it continues for more than 30 days, as well as any further reportable situations revealed by the ongoing investigation.</p>

## What are additional reportable situations?

- RG 78.58 You must also report to ASIC certain additional reportable situations: s912D(2) of the Corporations Act, s50A(2) of the National Credit Act. This includes where you or your representative:
- (a) engage in conduct constituting gross negligence in the course of providing a financial service or engaging in a credit activity; or
  - (b) commit serious fraud.
- RG 78.59 If an additional reportable situation arises, you must report it to ASIC: you do not need to determine whether or not it is 'significant'.

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RG 78.60 Additional reportable situations may also arise in other circumstances as prescribed by the regulations: s912D(2)(c) of the Corporations Act, s50A(2)(c) of the National Credit Act. At the date of the publication of this guide, there were no relevant regulations. You should check to see whether the regulations have specified any further additional reportable situations.

## Reportable situations about other licensees: financial advisers and mortgage brokers

RG 78.61 In certain circumstances, under s912DAB of the Corporations Act or s50C of the National Credit Act, you may be required to lodge a breach report in relation to a reportable situation about another licensee. This category of reportable situation relates to individuals who provide personal advice to retail clients about relevant financial products (as defined in the Corporations Act) or who are mortgage brokers.

RG 78.62 You must report to ASIC if you have reasonable grounds to believe that a reportable situation, other than a reportable situation involving an investigation, has arisen in relation to an individual who:

- (a) provides personal advice to retail clients about relevant financial products (as defined in the Corporations Act) or is a mortgage broker; and
- (b) is any of the following:
  - (i) another AFS or credit licensee;
  - (ii) an employee of another AFS or credit licensee (or a related body corporate of another licensee), acting within the scope of the employee's employment;
  - (iii) a director of another AFS or credit licensee (or a related body corporate of another licensee), acting within the scope of the director's duties as director; or
  - (iv) a representative of another AFS or credit licensee, acting within the scope of the representative's authority given by the licensee.

RG 78.63 You must lodge a report with ASIC within 30 days after you first know that, or are reckless with respect to whether, there are reasonable grounds to believe such a reportable situation has arisen.

RG 78.64 You must also provide a copy of the report to the other licensee within 30 days after you first know that, or are reckless with respect to whether, there are reasonable grounds to believe such a reportable situation has arisen.

Note: For example, if a financial adviser who is the subject of your report operates under their own AFS licence, you must give a copy of the report directly to the financial adviser. If the financial adviser is a representative or employee of an AFS licensee, you should give a copy of the report to the licensee even if that financial adviser is no longer involved with the licensee (e.g. previous employer).

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RG 78.65 When the other licensee receives a copy of the report, we expect they will make inquiries into whether a reportable situation has arisen, unless they have already commenced an investigation. If that investigation continues for 30 days or more, or reveals that there are reasonable grounds to believe a reportable situation has arisen, the other licensee will be required to report to ASIC.

Note: Depending on the nature of the reportable situation, a licensee who is a financial adviser or mortgage broker and who receives the report may also have to consider their obligations to notify, investigate and remediate clients: see draft INFO 000 at Attachment 2 to CP 340.

RG 78.66 Failure to lodge a report with ASIC in the circumstances set out in RG 78.62 and provide a copy to the other licensee can attract civil penalties: see s912DAB(8) of the Corporations Act, s50C(1) and 50C(5) of the National Credit Act. However, if there are reasonable grounds to believe that ASIC is aware of the reportable situation *and* all of the information that is required in a report, you do not need to lodge a report.

Note: For example, if you know that the other licensee or another third-party licensee has lodged a breach report with ASIC in relation to the reportable situation, you are not required to lodge a further report with ASIC.

RG 78.67 In providing a copy of the report to ASIC or the other licensee as required, you may have the benefit of qualified privilege under s1100A or s912DAB(6) of the Corporations Act or s50C(6) of the National Credit Act in an action for defamation if you had no malice. You may also not be liable for an action based on breach of confidence in relation to that conduct: s912DAB(7) and s1100A of the Corporations Act, s50C(7) of the National Credit Act.

Note: If you lodge a false report about another licensee with ASIC with ill will or an improper motive (e.g. to undermine a competitor), you will not have the benefit of qualified privilege in an action for defamation.

**Table 7: Examples of reportable situations about other licensees**

**Example 6(a):  
Falsification of loan  
application documents**

A lender becomes aware of an individual mortgage broker falsifying information in their loan application documents after seeking to verify income statements used to support a client's loan application. The client provides the lender with a copy of the income statement they had provided to the mortgage broker which contains a lower figure than that provided by the mortgage broker to the lender.

The lender conducts an audit of documents submitted by the same mortgage broker for a number of clients that identifies additional instances of falsified documents. On that basis, the lender has reasonable grounds to believe that a reportable situation has arisen as the mortgage broker has engaged in conduct that is likely to contravene s12DA of the ASIC Act (misleading or deceptive conduct). Further, the mortgage broker may have engaged in serious fraud, which of itself is a reportable situation for the purposes of s50A(2)(b) of the National Credit Act. The licensee must lodge a report with ASIC and with the licensee of the individual mortgage broker within 30 days.

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**Example 6(b): Client received inappropriate advice from previous financial adviser who was authorised by another licensee**

A client is seeing a new financial adviser and provides the new adviser with the Statement of Advice (SOA) received from a financial adviser that the client had previously engaged. The SOA demonstrates that the previous adviser provided inappropriate advice to the client that resulted in material loss or damage for that client.

The new adviser brings the SOA to the attention of their authorising licensee. The new licensee has reasonable grounds to believe that a reportable situation has arisen in relation to the previous adviser, on the basis that they have contravened their obligation to give advice that is appropriate to the client and act in the best interests of the client.

The new licensee must lodge a report with ASIC and provide a copy to the previous adviser's licensee.

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## C How to report to ASIC

### Key points

As an AFS or credit licensee, you must tell ASIC in writing, within 30 calendar days after a reportable situation has arisen.

The 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.

You must report to ASIC in the prescribed form and through the ASIC Regulatory Portal.

Failing to report to ASIC when a reportable situation has arisen can attract both civil and criminal penalties.

### When must you report a reportable situation?

- RG 78.68 You must report to ASIC if there are reasonable grounds to believe that a reportable situation has arisen, within 30 days after you first know of, or are reckless about whether, there are reasonable grounds to believe a reportable situation has arisen: s912DAA of the Corporations Act, s50B of the National Credit Act.

Note: For guidance about what is a reportable situation, see RG 78.19–RG 78.26. See also [Regulatory Guide 7](#) *Calculating time periods* (RG 7).

- RG 78.69 ‘Reasonable grounds’ to believe that a reportable situation has arisen exist where there are facts to induce, in a reasonable person, a belief that a reportable situation has arisen: see Case study 3.

#### Case study 3: Reasonable grounds for a reportable situation

A licensee produced a progress report that was created during the course of its investigation into whether a breach was significant.

The report noted that while the root causes of the breach were still being determined, they included poor detective controls (lack of exception reporting), multiple manual processes, multiple hand-off points, grandfathered packages, complicated product design and staff oversight and error.

The report also noted the licensee was ‘currently sizing up the number of affected clients and the dollar value of any remediation’—preliminary estimates indicated that affected clients made up 20% of all packages distributed, with around \$5 million overcharged.

In these circumstances, despite the fact that the licensee had not yet finally determined the number of clients affected and the calculation of total loss, a reasonable person would be satisfied that a reportable situation had arisen and must be reported to ASIC.

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RG 78.70 Section 910A of the Corporations Act and s5(1) of the National Credit Act apply the Criminal Code definitions of ‘recklessness’ (see s5.4 of the Criminal Code) and ‘knowledge’ (see s5.3 of the Criminal Code) to the breach reporting provisions.

Note: The Criminal Code is at the Schedule to the *Criminal Code Act 1995*.

RG 78.71 The Explanatory Memorandum states:

A licensee knows of reasonable grounds to believe a reportable situation has arisen if the licensee knows of facts and/or evidence sufficient to induce in a reasonable person a belief that a reportable situation has arisen. The term ‘reckless’ is intended to capture circumstances where the licensee does not know that there are reasonable grounds to believe a reportable situation has arisen, but:

- is aware of a substantial risk that there are reasonable grounds to believe a reportable situation has arisen; and
- having regard to the circumstances known to the licensee, it is unjustifiable to take the risk that there are reasonable grounds to believe a reportable situation has arisen.

While the licensee must have knowledge of, or be reckless with respect to whether, there are reasonable grounds to believe that a reportable situation has arisen for the reporting timeframe to commence, the question of whether those reasonable grounds exist remains objective.

Note: See [Explanatory Memorandum](#), paragraphs 11.61–11.62.

RG 78.72 Example 7 provides an example of how we consider ‘recklessness’ to apply:

#### Example 7: Recklessness

A licensee’s Executive Committee issues a directive to its business units. The directive informs these areas not to escalate any matters to the Legal and Compliance areas (such as incidents and potential breaches of the law) over the next six months, so that Legal and Compliance can deal with a significant backlog of work.

A scheduled software review of a new underwriting software finds a technical error. A draft report is prepared, identifying significant overcharging of some clients. It also finds that the full extent and impact of the error (including total number of clients affected and amount of overcharging per client) is unclear. The draft report is reviewed by the Head of Retail Underwriting business unit. Because of the directive, they do not escalate the report (or its findings) to the Legal or Compliance areas, and no investigative action is taken.

Such conduct amounts to recklessness on the part of the licensee as to whether there are reasonable grounds to believe that the reportable situation has arisen.

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## When does the licensee first know that a reportable situation has arisen?

- RG 78.73 The issue arises when the licensee first knows or is reckless to whether there are reasonable grounds to believe a reportable situation has arisen and whose knowledge is attributable to the licensee for the purposes of s912DAA(3) of the Corporations Act or s50B(4) of the National Credit Act.
- RG 78.74 If a licensee delegates the decision whether to lodge a breach report to a particular person or committee as part of its breach reporting process, in determining who within the licensee ‘first knows’ (or is reckless as to) whether there are reasonable grounds to believe a reportable situation has arisen, the licensee must consider s769B of the Corporations Act or s324 of the National Credit Act.
- RG 78.75 Section 769B(3) of the Corporations Act states:
- If, in a proceeding under this Chapter in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body, it is sufficient to show that a director, employee or agent of the body, being a director, employee or agent by whom the conduct was engaged in within the scope of the person’s actual or apparent authority, had that state of mind. For this purpose, a person acting as mentioned in paragraph (1)(b) is taken to be an agent of the body corporate concerned.
- RG 78.76 Section 324(3) of the National Credit Act states:
- If, for the purposes of this Act (other than the National Credit Code), it is necessary to establish the state of mind of the body corporate in relation to particular conduct, it is enough to show:
- (a) that the conduct was engaged in by a person referred to in paragraph (1)(a) or (b); and
  - (b) that the person had that state of mind.
- RG 78.77 Where an employee (or agent) may not have been granted actual authority within their employment by the licensee to make a decision to lodge a breach report, s769B of the Corporations Act or s324 of the National Credit Act can still apply. The employee can be shown to possess knowledge 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.
- Note: The Explanatory Memorandum, at paragraph 11.81 states: ‘In accordance with section 769B(3) of the Corporations Act, for a licensee that is a body corporate, the state of mind of a director, employee or agent of the licensee (or certain other persons) will be attributed to the licensee where that person was engaged in the relevant conduct within the scope of their actual or apparent authority.’
- RG 78.78 Case study 4 demonstrates delays in escalating or reporting breaches due to internal breach reporting processes that may lead to a contravention of s912DAA(1) or (7) of the Corporations Act or s50B(1) or (2) of the National

Credit Act, especially when considered alongside s769B of the Corporations Act or s324 of the National Credit Act.

#### Case study 4: Unreasonable delays due to inadequate processes

An AFS licensee had a three-step process that delayed reporting a breach to ASIC until the chief executive level had been advised of the breach.

After the compliance area submits an interim or final report:

- the matter is considered at a meeting of the licensee's breach committee, which makes a recommendation;
- the recommendation is put to an email vote via a 'circular resolution'. Each committee member is required to vote on whether they agree or disagree with the recommendation; and
- if the vote passes, an email is sent to the licensee's CEO seeking confirmation that they are comfortable to confirm the recommendation.

The 30 day reporting timeframe commences when the compliance area first knows that there are reasonable grounds to believe a reportable situation has arisen in relation to the licensee, not from when the CEO confirms the recommendation.

RG 78.79 In providing up to 30 calendar days to report after you first know of, or are reckless about whether, there are reasonable grounds to believe a reportable situation has arisen, the law allows you more time than the previous law (10 business days) to complete any internal governance processes and lodge the breach report.

RG 78.80 To ensure you comply with s912DAA(3) of the Corporations Act or s50B(4) of the National Credit Act, you should *not* wait until after the following events to lodge your report:

- (a) the reportable situation has been considered by your board of directors;
- (b) the reportable situation has been considered by your internal or external legal advisers;
- (c) you have rectified (when appropriate), or you have taken steps to rectify, the breach (or likely breach) of a core obligation or additional reportable situation; or
- (d) in the case of a likely breach, the breach has in fact occurred.

RG 78.81 Avoiding delays is consistent with the concerns referred to in paragraph 11.5 of the Explanatory Memorandum, that breach reporting is largely inconsistent among licensees in terms of the timeliness of reports.

#### Reporting investigations

RG 78.82 In the case of investigations, you must lodge a report only in relation to investigations that have continued for more than 30 days. The investigation becomes a reportable situation on Day 31 of the investigation and you must

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lodge a report with 30 days of this date: s912DAA(3) of the Corporations Act, s50B(4) of the National Credit Act.

- RG 78.83 As noted at paragraph RG 78.51, the time at which an investigation commences is not a subjective determination, but rather, a matter of fact in all the circumstances. At any stage, if the investigation discloses that a reportable situation has arisen, you must report this to ASIC.
- RG 78.84 If the outcome of an investigation that continues for more than 30 days is that there are no reasonable grounds to believe a reportable situation has arisen, you must report this to ASIC: s912D(1)(d) of the Corporations Act, s50A(1)(d) of the National Credit Act. You must report to ASIC within 30 days after you are first aware of, or reckless with respect to whether there are reasonable grounds to believe that the investigation disclosed there is no breach (or likely breach) of a core obligation.

#### Example 8: Investigation that continues for more than 30 days

Licensee A suspects a reportable situation may have arisen in relation to conduct by one of its authorised representatives. Licensee A commences an investigation on 1 August 2023. On 31 August 2023 (30 days later) the investigation is still ongoing.

On 21 September 2023, the investigation concludes and on that day Licensee A determines that there is no reportable situation.

The investigation became a reportable situation on 1 September 2023. Licensee A must lodge a report about the investigation within 30 calendar days (i.e. by 1 October 2023). The outcome of the investigation that there is no significant breach of a core obligation must also be reported to ASIC. Licensee A must report this within 30 calendar days (i.e. by 21 October 2023).

Licensee A may notify ASIC of the commencement and outcome of the investigation concurrently between 21 and 30 September 2023.

- RG 78.85 As noted at paragraph RG 78.55, if before the end of an investigation, you are satisfied, or have reasonable grounds to believe, based on the information at hand, that the breach was significant and a reportable situation, you must not wait until the investigation is complete to report the matter to ASIC.

## How do you report a reportable situation?

- RG 78.86 You must report to ASIC using the prescribed form (the reportable situation form), through the [ASIC Regulatory Portal](#): s912DAA(2) of the Corporations Act, s50C(2) of the National Credit Act). See Table 8 for an overview of the content of the reportable situation form).

Note: For more details on the information you must provide and how the breach report transaction works, see [Submitting breach reports on the portal](#) on ASIC's website (this site is in the process of being updated).

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- RG 78.87 If you are a licensee regulated by APRA, you may comply with your obligation by lodging a report with APRA: s912DAA(5) of the Corporations Act, s50B(6) of the National Credit Act). Your report must:
- (a) be lodged in accordance with the required timeframes in RG 78.68–RG 78.85; and
  - (b) contains all of the information required in ASIC’s prescribed form.

RG 78.88 After you report an ongoing investigation to us, we expect you to update us if before the investigation is completed you become aware of a material change—for example, where the investigation reveals further information about the scope, nature or cause of a possible breach.

Note: You can use the update form that is available on the Regulatory Portal to notify ASIC of changes.

**Table 8: Overview of content of the reportable situation form**

What to include	Description of content
Date of the reportable situation	<p>You must include:</p> <ul style="list-style-type: none"> <li>• the date that the reportable situation arose or the date you anticipate that you will no longer be able to comply with your obligations; and</li> <li>• the date you first knew that there were reasonable grounds to believe that a reportable situation had arisen.</li> </ul> <p>Note 1: If there is a reportable situation, you must report it to ASIC within 30 calendar days of the date you first know of, or are reckless with respect to whether, there are reasonable grounds to believe a reportable situation arose. You will need to have a record of that date to ensure timely reporting.</p> <p>Note 2: Your breach register might also include the date that the breach was reported to ASIC and rectified.</p>
Nature of the reportable situation	<p>You must state whether the report relates to:</p> <ul style="list-style-type: none"> <li>• a significant breach of a core obligation;</li> <li>• a likely significant breach of a core obligation;</li> <li>• an additional reportable situation (serious fraud or gross negligence);</li> <li>• an investigation into whether a breach (or likely breach) of a core obligation has occurred that has continued for more than 30 days;</li> <li>• an investigation into whether a breach (or likely breach) of a core obligation has occurred that has continued for more than 30 days that discloses that no reportable situation has occurred; or</li> <li>• a reportable situation about another licensee.</li> </ul>
Description of the reportable situation	<p>You must describe the reportable situation, including the section of the Corporations Act or National Credit Act that sets out the relevant obligation, including any relevant financial services law and any relevant AFS or credit licence condition.</p>
Why the breach is significant (if relevant)	<p>Where relevant, you must identify why the breach is significant. This may involve:</p> <ul style="list-style-type: none"> <li>• identifying that the reportable situation relates to a deemed significant breach; or</li> <li>• identifying the factors in s912D(5) of the Corporations Act or s50A(5) of the National Credit Act that you consider apply in determining whether the breach (or likely breach) is significant and required to be reported to ASIC.</li> </ul>

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What to include	Description of content
How the reportable situation was identified	You must provide details of how you found out about the reportable situation. For example, the reportable situation may have been identified through your compliance arrangements, an audit or review, or as a result of a client complaint.
How long the breach lasted	You will need to include details as relevant, including whether the breach is still continuing.
Information about representatives	If an authorised representative or credit representative is involved, you must include: <ul style="list-style-type: none"> <li>• that representative's name and number;</li> <li>• if the representative's authorisation has been revoked or suspended; and</li> <li>• if the representative's work is being monitored or supervised.</li> </ul>
Whether and how the reportable situation has been rectified	Where relevant, you must provide details of plans to rectify the breach (or likely breach). This includes: <ul style="list-style-type: none"> <li>• when you expect to complete the rectification (or complete a plan for rectifying the breach); and</li> <li>• how the rectification will be achieved.</li> </ul> <p>If ongoing steps are being taken to rectify the breach (or likely breach), indicate when you expect to send ASIC a report on your progress in rectifying it, as well as a notification that rectification is complete.</p>
Whether and when affected clients have been compensated— Remediation	You must provide details of any remediation program (including preventative measures) that has been or is being developed to compensate clients that have suffered a loss. Include relevant dates or expected dates for the start and conclusion of the remediation program.
	You should also provide information about completion of remediation.
Future compliance	You must describe any steps that have been, or will be, taken to ensure future compliance with the obligation.

## What will ASIC do after we receive your report?

- RG 78.89 Generally, we will take the following steps when we receive a report:
- Acknowledgement*—When you lodge the report, you will receive confirmation of your submission.
  - Request for more information*—We may contact you if we need further information about the report that you have lodged. We will generally contact you through the [ASIC Regulatory Portal](#).
  - Next steps*—After we receive all the information we need, we will only contact you if we consider it necessary to do so.
- RG 78.90 We do not take action on all matters reported to ASIC. We will only contact you if we consider it necessary to do so. While we may decide not to take action in response to a single report, we may decide to take action in circumstances where multiple reports lodged over a period of time suggest more significant or systemic compliance issues.

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## Our regulatory and enforcement response to reports

- RG 78.91 We may contact you to discuss how to improve your compliance systems or determine how to remedy or minimise any damage resulting from the breach. In appropriate circumstances, we may resolve outstanding compliance concerns by conducting a formal surveillance to test your compliance procedures or check whether there is a systemic compliance problem.
- RG 78.92 The legislation for which we have jurisdiction sets out the remedies available to us, including criminal action, civil action and administrative action. We can use these remedies in combination. Guidance about factors underlying our decisions about whether to take enforcement action are set out in [Information Sheet 151](#) *ASIC's approach to enforcement* (INFO 151).
- RG 78.93 Reporting to ASIC in accordance with your legal obligations will not influence the action we may take. However, we may take into account a situation where a report should have been made to ASIC and you failed to do so, as this is a further contravention and may indicate your general approach to compliance.
- RG 78.94 We may make further inquiries to ensure there is ongoing compliance with your licence obligations and that you take reasonable steps to ensure that you comply with laws. Depending on the outcome of any inquiries, we may take administrative action. For example, we may seek to address any issues identified by imposing additional conditions on your licence.

Note: For guidance on procedures for monitoring, supervision and training of representatives, see [RG 104](#) and [RG 105](#) for AFS licensees and [RG 205](#) for credit licensees. For further guidance about our approach to taking administrative action against financial services industry participants, see [Regulatory Guide 98](#) *ASIC's powers to suspend, cancel and vary AFS licences and make banning orders* (RG 98) and [Regulatory Guide 218](#) *Licensing: Administrative action against persons engaging in credit activities* (RG 218).

## What are the consequences of failing to report to ASIC?

- RG 78.95 If there are reasonable grounds to believe that a reportable situation has arisen, you must lodge a report with ASIC. This is a legal obligation. Failing to report to ASIC when a reportable situation has arisen can attract both civil and criminal penalties.
- RG 78.96 The maximum civil penalty for not reporting a reportable situation in accordance with your obligation as an AFS or credit licensee is:
- (a) *for an individual*—the greater of 5,000 penalty units, and three times the benefit derived and detriment avoided; and
  - (b) *for a body corporate*—the greatest of 50,000 penalty units, three times the benefit derived and detriment avoided, and 10% of the annual

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turnover for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene (capped at 2.5 million penalty units).

Note: See [www.asic.gov.au/penalties](http://www.asic.gov.au/penalties) for more information about penalties, including the value of a penalty unit.

RG 78.97 Failure to report to ASIC in accordance with your obligation (except for the obligation to notify ASIC of a reportable situation about another licensee) is also a criminal offence.

RG 78.98 The maximum penalties are:

- (a) a fine of 240 penalty units for an individual or 2,400 penalty units for a body corporate;
- (b) two years' imprisonment; or
- (c) both (a) and (b).

## What information will ASIC publish?

RG 78.99 We have a statutory obligation to publish information about reports lodged with ASIC each financial year. We must publish the information on our website within four months after the end of the financial year: s912DAD of the Corporations Act, s50D of the National Credit Act.

RG 78.100 In our publication, we must include information about breaches and likely breaches of core obligations reported to ASIC and APRA for the financial year: s912DAD(1) of the Corporations Act, s50D(1) of the National Credit Act. Our publication may also include the kinds of information stated in the Explanatory Memorandum—for example, the name of the licensee and the volume of reported breaches.

Note: See [Explanatory Memorandum](#), paragraph 11.225.

RG 78.101 The information we publish may include or exclude information as prescribed by the regulations from time to time. As at the date of publication of this guide, there were no relevant regulations. You should check to see whether the regulations have specified any further factors.

RG 78.102 In identifying the information we publish, we will take into consideration the Parliamentary intent set out in Explanatory Memorandum:

This supplements ASIC's existing reporting framework to enhance accountability and provide an incentive for improved behaviour. It will also assist industry and consumers to identify areas where significant numbers of breaches or likely breaches are occurring, and allow licensees to target their efforts to improve their compliance outcomes in those areas.

Note: See [Explanatory Memorandum](#), paragraph 11.233.

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RG 78.103 In publishing this information, we will include any important context to understanding the data—for example, acknowledging that a large number of reports does not necessarily suggest a higher incidence of non-compliance (rather, it may reflect stronger compliance systems).

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## D Compliance systems and identifying, recording and reporting breaches

### Key points

You should have a clear, well-understood and documented process for identifying, recording and reporting breaches to ASIC in a timely manner.

Based on our experience, we have set out some examples of what we consider is good practice for licensees in identifying, recording and reporting breaches.

### What arrangements should you have in place for recording and reporting breaches?

- RG 78.104 Under your general obligations as an AFS or credit licensee you are required to maintain adequate risk management systems and have available adequate resources (including financial, technological and human resources) to ensure compliance with your licensee obligations: see s912A(1) of the Corporations Act, s47(1) of the National Credit Act.

Note: For further information on compliance with your general obligations, see [RG 104](#) for AFS licensees and [RG 205](#) for credit licensees. If you are a body regulated by APRA, you are not required to comply with these general obligations for licensees. However, there are similar obligations in legislation administered by APRA and in prudential standards and rules determined by APRA under that legislation: see RG 78.30–RG 78.31.

- RG 78.105 Having robust breach reporting systems, processes and procedures in place to meet the breach reporting obligation is a critical element of a licensee's compliance and risk management framework. We consider that failure to report a significant breach (or likely breach) is likely, in itself, to be a significant breach of your obligation to comply with the financial services laws or credit legislation. This is because it indicates that your arrangements to ensure compliance with your obligations may be inadequate: see s912D(5)(c) of the Corporations Act, s50A(5)(c) of the National Credit Act.

- RG 78.106 In the case studies it considered, the Financial Services Royal Commission found licensees did not always report within the time required, there were failures to report issues, inadequate records of consideration whether to report and broader concerns about the adequacy of systems to ensure compliance with breach reporting. In the final report, Commissioner Hayne stated:

Unwillingness to recognise and to accept responsibility for misconduct explains the prolonged and repeated failures by large entities to make breach reports required by the law.

Note: See Financial Services Royal Commission, [Final report](#), vol. 1, p. 409.

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- RG 78.107 To ensure compliance with the breach reporting obligation, you should have a clear, well-understood and documented process for:
- (a) identifying and recording incidents (e.g. suspected or possible reportable situations);
  - (b) assessing and determining whether an identified incident is a reportable situation, including timely and appropriately resourced investigations as required;
  - (c) reporting to ASIC all incidents identified as reportable situations within 30 calendar days in the form prescribed;
  - (d) when appropriate, rectifying loss or damage as required; and
  - (e) ensuring that arrangements are in place to prevent the recurrence of the breach (or likely breach).

RG 78.108 AFS licensees must have robust arrangements in place with authorised representatives and persons acting on behalf of the licensee that are effective in identifying, recording and escalating possible breaches by an authorised representative, and ensure appropriate supervision of the authorised representatives in respect of these arrangements.

Note 1: See Appendix 4 of [Report 515](#) *Financial advice: Review of how large institutions oversee their advisers* (REP 515), which provides practical guidance on ‘key risk indicators’ for monitoring advisers (including authorised representatives) in the personal advice context. We consider that these indicators are relevant for consideration by credit and AFS licensees. As stated in REP 515, we expect that using these key risk indicators will help licensees to identify potentially high-risk advisers and non-compliant advice.

Note 2: [Class Order \[CO 14/923\]](#) *Record-keeping obligations for Australian financial services licensees when giving personal advice* clarifies record-keeping obligations for AFS licensees in the context of personal advice. Authorised representatives who are advisers must keep records, and give the records to their authorising licensee if the licensee requests the records for the purposes of complying with financial services laws.

RG 78.109 Whatever processes you adopt, you must ensure that breaches are escalated promptly. To meet your obligations to report all reportable situations when there are reasonable grounds to believe they have arisen, we expect that your internal systems ensure that incidents, the findings of an investigation into whether a breach has occurred, and reporting to ASIC, are all escalated to the relevant people in a timely and efficient manner. Unreasonable delays may be an indicator that you do not have adequate compliance processes, systems and resources in place and may suggest a breach of your obligations under s912A of the Corporations Act or s47 of the National Credit Act.

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## Developing your approach to the breach reporting obligation: some practical insights

RG 78.110 [REP 594](#) sets out the findings of ASIC's review of AFS licensees' compliance with their breach reporting obligations, and some high-level expectations in relation to your breach reporting obligation.

RG 78.111 What you need to do to comply with your obligations will vary according to the nature, scale and complexity of your business. We consider that the high-level expectations outlined in [REP 594](#) remain relevant and should be considered by all licensees (including credit licensees) as you develop or improve your approach to the breach reporting obligation.

RG 78.112 This includes that you:

- (a) fully comply with the breach reporting obligation;
- (b) have capacity and speed in identifying and investigating incidents, and reporting to ASIC;
- (c) demonstrate a sound breach management culture that makes reporting a priority;
- (d) demonstrate a sound breach management culture that makes consumer remediation a priority; and
- (e) make the most of the lessons learned and opportunities that each breach presents.

Note: For more information, see [REP 594](#), Table 4.

RG 78.113 In relation to RG 78.107(c), and as stated in [REP 594](#), this includes an approach that will:

- (a) prioritise and support the ability of licensees to meet their breach reporting obligations including clear end-to-end senior accountability of breach reporting processes and procedures; and
- (b) provide an environment where:
  - (i) staff can raise concerns about risks, including incidents (and are vigilant about these);
  - (ii) investigations, rectification and remediation are prioritised—and overseen and championed by senior management; and
  - (iii) transparent communication about breaches and incidents promotes identification, rectification and reporting.

RG 78.114 In relation to RG 78.107(d), we consider that ensuring fair consumer outcomes for consumers should be a priority across the organisation. When something goes wrong, licensees should take responsibility for their actions: treating consumers in a manner that is consistent with the licensee's stated values and legal requirements. The importance of remediation therefore should not *only*

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be a consideration within a licensee's breach management culture, but across various aspects of a licensee's business and compliance processes.

Note: See [Regulatory Guide 256](#) *Client review and remediation conducted by advice licensees* (RG 256) (currently under review) for further guidance on remediation.

RG 78.115 Some other practices that we consider will help licensees in meeting the breach reporting obligation are set out in Table 9.

**Table 9: Other helpful practices**

Practice	Description
Review	A regular review or audit of breach reporting processes including the operation of the breach reporting process and internal benchmarking on: <ul style="list-style-type: none"> <li>• number of incidents assessed and their outcomes;</li> <li>• any trends; and</li> <li>• timeliness, including for ongoing investigations, remediation and incident identification.</li> </ul>
Oversight of lengthy investigations	A process for oversight of lengthy investigations that enables: <ul style="list-style-type: none"> <li>• an understanding of the investigation to date;</li> <li>• reasons for any current delays, if applicable;</li> <li>• appropriate management of the investigation moving forward; and</li> <li>• consideration of the significance of the breach.</li> </ul>
Analysis	Robust systems and processes for analysing root causes and systemic issues to proactively detect significant or emerging issues and ensure existing issues are adequately addressed.
Accountability	Appropriate accountability checks after a significant breach is recorded and reported to ASIC, including: <ul style="list-style-type: none"> <li>• considering appropriate 'consequence management' (i.e. learning opportunities to stop a breach continuing or recurring, involving real and meaningful consequences for staff and management responsible for oversight); and</li> <li>• prioritising the mitigation of consumer detriment once a breach is identified.</li> </ul>
Governance structures	Robust governance and accountability structures around the breach reporting obligation, including (where relevant), harmonised breach reporting practices and procedures across the organisation to mitigate institutional silos and promote information and intelligence sharing across the whole organisation.
Resourcing	Sound resourcing forecasts for the breach reporting framework including consideration of the adequacy of IT platforms and where relevant, challenges associated with legacy systems.

## Do you need a breach register?

RG 78.116 A breach register records actions in identifying, reporting and resolving breaches. As a licensee, you are not expressly required to maintain a breach register under the Corporations Act or National Credit. However, we

consider that, in practice, you will need a breach register to ensure that you have adequate arrangements in place to comply with your obligation to identify and report all reportable situations, including your obligation under s912D(5)(a) of the Corporations Act or s50A(5)(a) of National Credit Act to have regard to the number or frequency of similar breaches when determining whether a breach (or likely) breach of a core obligation is significant: see RG 78.34–RG 78.45.

RG 78.117 To ensure that you can satisfy yourself and ASIC that you have done all things necessary to properly identify, record and report to ASIC reportable situations, including systemic breaches, we consider that your breach register should contain the information in the prescribed reportable situation form (as summarised in Table 8).

Note: For a discussion of breach registers, including the types of information they might include and good compliance practices for breach registers, see [REP 594](#).

RG 78.118 You will need to consider how best to keep these documents or records. Keeping documents and records helps you to demonstrate to ASIC and to yourself that you know whether or not you are complying with your obligations as a licensee, including the obligation to report all reportable situations to ASIC.

Note: For more information, see [RG 104](#) and [RG 105](#) for AFS licensees and [RG 205](#) for credit licensees.

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## Appendix: Summary of core obligations for licensees

RG 78.119 Under s912D(3) of the Corporations Act (for AFS licensees) or s50A(3) of the National Credit Act (for credit licensees), you must report to ASIC any significant breach (or likely significant breach) of your ‘core obligations’.

### What are the core obligations for AFS licensees?

RG 78.120 If you are an AFS licensee, the following are core obligations under s912D(3):

- (a) your general obligations under s912A or s912B other than the obligation under s912A(1)(c) of the Corporations Act, which are your obligations to:
  - (i) do all things necessary to ensure that the financial services covered by your licence are provided efficiently, honestly and fairly;
  - (ii) have in place adequate arrangements for the management of conflicts of interest;
  - (iii) comply with the conditions of your licence;
  - (iv) take reasonable steps to ensure that your representatives comply with the financial services laws;
  - (v) if you are the operator of an Australian passport fund, or a person with responsibilities in relation to an Australian passport fund, comply with the law of each host economy for the fund;
  - (vi) comply with the ASIC reference checking and information sharing protocol;
 

Note: As at the date of the release of this draft guidance, ASIC has consulted on a draft of the protocol and plans to release the final protocol in June 2021.
  - (vii) have adequate resources to provide the financial services covered by your licence and to carry out supervisory arrangements (unless you are a body regulated by APRA—see RG 78.30–RG 78.31);
  - (viii) be competent to provide the financial services;
  - (ix) have trained and competent representatives;
  - (x) have a dispute resolution system for retail clients;
  - (xi) have adequate risk management systems (unless you are a body regulated by APRA—see RG 78.30–RG 78.31);
  - (xii) have compensation arrangements in accordance with s912B; and

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- (xiii) comply with any other obligations prescribed by Corporations Regulations, including the requirement to cooperate with AFCA.
- (b) the obligation under s912A(1)(c) of the Corporations Act to comply with the ‘financial services laws’ as defined in s761A, but only those parts which are set out in s912D(3)(b), which are as follows:
  - (i) Ch 5C of the Corporations Act (managed investment schemes);
  - (ii) Ch 5D of the Corporations Act (licensed trustee companies);
  - (iii) Ch 6 of the Corporations Act (takeovers);
  - (iv) Ch 6A of the Corporations Act (compulsory acquisitions and buy-outs);
  - (v) Ch 6B of the Corporations Act (rights and liabilities about Ch 6 and 6A matters);
  - (vi) Ch 6C of the Corporations Act (information about ownership of listed companies and managed investment schemes);
  - (vii) Ch 6D of the Corporations Act (fundraising);
  - (viii) Ch 7 of the Corporations Act (financial services and markets);
  - (ix) Ch 8A of the Corporations Act (Asia Region Funds Passport);
  - (x) Ch 9 of the Corporations Act (miscellaneous), but only as it applies to the chapters of the Corporations Act listed above;
  - (xi) a provision of the Passport Rules for this jurisdiction; and
  - (xii) Div 2 of Pt 2 of the ASIC Act (unconscionable conduct and consumer protections for financial services) and related regulations under the Australian Securities and Investments Regulations 2001 (ASIC Regulations);
- (c) in relation to financial services, other than traditional trustee company services provided by a licensed trustee company, the obligations under the Commonwealth legislation administered by APRA and specified in reg 7.6.02A of the Corporations Regulations, which are as follows:
  - (i) *Australian National Registry of Emissions Units Act 2011*;
  - (ii) *Banking Act 1959*;
  - (iii) *Carbon Credits (Carbon Farming Initiative Act) 2011*;
  - (iv) *Clean Energy Act 2011* (no longer in force);
  - (v) *Financial Sector (Collection of Data) Act 2001*;
  - (vi) *Financial Sector (Shareholdings) Act 1998*;
  - (vii) *Financial Sector (Transfer of Business) Act 1999*;
  - (viii) *Insurance Acquisitions and Takeovers Act 1991*;
  - (ix) *Insurance Act 1973*;

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- (x) *Insurance Contracts Act 1984*;
- (xi) *Life Insurance Act 1995*;
- (xii) *Retirement Savings Accounts Act 1997*;
- (xiii) *Superannuation Industry (Supervision) Act 1993*;
- (xiv) *Superannuation (Resolution of Complaints) Act 1993*; and

Note: Regulation 7.6.02A of the Corporations Regulations will be amended by the [Financial Sector Reform \(Hayne Royal Commission Response—Protecting Consumers \(2020 Measures\)\) Regulations 2021 \(exposure draft\)](#)

- (d) in relation to traditional trustee company services provided by a licensed trustee company, the obligation under s912A(1)(c) of the Corporations Act to comply with financial services laws so far as they are Commonwealth, state or territory legislation or the common law or equity that relate to provision of financial services and traditional trustee company services (see paragraphs (d) and (e) of the definition of ‘financial services law’ in s761A).

## What are the core obligations for credit licensees?

RG 78.121 If you are a credit licensee, the following are core obligations under s50A(3) of the National Credit Act:

- (d) your general obligations under s47 of the National Credit Act other than the obligation under s47(1)(d), which are your obligations to:
  - (i) do all things necessary to ensure that the credit activities covered by your licence are provided efficiently, honestly and fairly;
  - (i) have in place adequate arrangements for the management of conflicts of interest;
  - (ii) comply with the conditions of your licence;
  - (iii) take reasonable steps to ensure that your representatives comply with the credit legislation;
  - (iv) comply with the ASIC reference checking and information sharing protocol;

Note: As at the date of the release of this draft guidance, ASIC has consulted on a draft of the protocol and plans to release the final protocol in June 2021.

- (v) be competent to engage in the credit activities covered by your licence;
- (vi) have trained and competent representatives;
- (vii) have a dispute resolution system for retail clients;
- (viii) be a member of the AFCA scheme;
- (ix) have compensation arrangements in accordance with s48; and

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- (x) have adequate arrangements to ensure compliance with your obligations under this section;
  - (xi) have adequate resources available to engage in the credit activities covered by your licence and carry out supervisory arrangements (unless you are a body regulated by APRA);
  - (xii) have adequate risk management systems (unless you are a body regulated by APRA); and
  - (xiii) comply with any other obligations prescribed by the National Credit Regulations.
- (b) your obligation under s47(1)(d) of the National Credit Act to comply with the ‘credit legislation’ as defined in s5 so far as it relates to all provisions of the National Credit Act (including the National Credit Code), *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*, and Div 2 of Pt 2 of the ASIC Act (unconscionable conduct and consumer protections for financial services) and related regulations under the ASIC Regulations; and
- (c) your obligation under s47(1)(d) of the National Credit Act to comply with Commonwealth legislation that covers conduct relating to credit activities, but only in so far as it relates to such conduct.

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## Key terms

Term	Meaning in this document
additional reportable situations	<p>A reportable situation as set out in s912D(2) of the Corporations Act or s 50A(2) of the National Credit Act, including where the licensee or its representative:</p> <ul style="list-style-type: none"> <li>engages in conduct constituting gross negligence in the course of providing a financial service or engaging in a credit activity; or</li> <li>commits serious fraud</li> </ul>
AFS licence	<p>An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services</p> <p>Note: This is a definition contained in s761A.</p>
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASIC Regulations	Australian Securities and Investments Commission Regulations 2001
authorised representative	<p>A person authorised by an AFS licensee, in accordance with s916A or 916B of the Corporations Act, to provide a financial service or services on behalf of the licensee.</p> <p>Note: This is a definition contained in s761A.</p>
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7)
client	May refer to a retail client of financial services, a consumer of credit products or a member of a superannuation fund
consumer	Includes an existing, potential or prospective client
core obligations	A core obligation has the meaning given to it by s912D(3) of the Corporations Act or s50A(3) of the National Credit Act. For a summary of the core obligations for AFS licensees and credit licensees, see the appendix to this guide
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001

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Term	Meaning in this document
Credit Guide	A document that must be provided to a consumer by a credit provider, credit service provider, credit representative or debt collector under the National Credit Act
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
Criminal Code	Schedule to the <i>Criminal Code Act 1995</i>
deemed significant breach	A breach or likely breach of a core obligation that is taken to be significant under s912D(4) of the Corporations Act or s50A(4) of the National Credit Act
Explanatory Memorandum	Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020
Financial Sector Reform Act	<i>Financial Sector Reform (Hayne Royal Commission Response) Act 2020</i>
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
FSG	A Financial Services Guide—a document required by s941A or 941B to be given in accordance with Div 2 of Pt 7.7 of the Corporations Act  Note: This is a definition contained in s761A.
INFO 151	An ASIC information sheet (in this example numbered 151)
licensee	An AFS licensee or credit licensee
likely breach	The situation where a licensee or a representative of the licensee is no longer able to comply with a core obligation and the breach, if it occurs, will be significant  Note: See s912D(1)(b) of the Corporations Act and s50A(1)(b) of the National Credit Act.
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
National Credit Code	National Credit Code at Sch 1 to the National Credit Act
National Credit Regulations	National Consumer Credit Protection Regulations 2010
PI insurance	Professional indemnity insurance
reg 7.6.04(1)(i) (for example)	A regulation of the Corporations Regulations or National Credit Regulations (or other regulations) as specified (in this example numbered 7.6.04(1)(i))
registered scheme	A managed investment scheme that is registered under s601EB of the Corporations Act

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Term	Meaning in this document
regulations	Corporations Regulations and National Credit Regulations
REP 594 (for example)	An ASIC report (in this example numbered 594)
reportable situation	Has the meaning given by s912D of the Corporations Act or s50A of the National Credit Act
representative (of an AFS licensee)	Means: <ul style="list-style-type: none"> <li>• an authorised representative of the licensee;</li> <li>• an employee or director of the licensee;</li> <li>• an employee or director of a related body corporate of the licensee; or</li> <li>• any other person acting on behalf of the licensee</li> </ul> <p>Note: This is a definition in s910A of the Corporations Act.</p>
representative (of any other person)	Means: <ul style="list-style-type: none"> <li>• an employee or director of the person;</li> <li>• an employee or director of a related body corporate of the person; or</li> <li>• any other person acting on behalf of the first person</li> </ul> <p>Note: This is a definition in s910A of the Corporations Act.</p>
responsible entity	A responsible entity of a registered scheme as defined in s9 of the Corporations Act
RG 104 (for example)	An ASIC regulatory guide (in this example numbered 104)
s912A (for example)	A section of the Corporations Act, unless otherwise specified (in this example numbered 912A)
significant breach	Means: <ul style="list-style-type: none"> <li>• a deemed significant breach; or</li> <li>• a breach or likely breach of a core obligation that is significant having regard to the factors in s912D(5) of the Corporations Act or s50A(5) of the National Credit Act</li> </ul>

## Related information

### Headnotes

AFS licensee, breach, breach reporting, compensation, credit licensee, deemed significant breach, financial services, licensee obligations, likely breach, reportable situation, self reporting, significant breach

### Regulatory guides

[RG 7](#) *Calculating time periods*

[RG 34](#) *Auditor's obligations: Reporting to ASIC*

[RG 36](#) *Licensing: Financial product advice and dealing*

[RG 40](#) *Good transaction fee disclosure for bank, building society and credit union deposit and payments products (transaction accounts)*

[RG 98](#) *ASIC's powers to suspend, cancel and vary AFS licences and make banning orders*

[RG 104](#) *AFS licensing: Meeting the general obligations*

[RG 105](#) *AFS licensing: Organisational competence*

[RG 132](#) *Funds management: Compliance and oversight*

[RG 146](#) *Licensing: Training of financial products advisers*

[RG 165](#) *Licensing: Internal and external dispute resolution*

Note: RG 165 applies to complaints received by financial firms before 5 October 2021, when RG 271 comes into effect. We will withdraw RG 165 on 5 October 2022.

[RG 166](#) *Licensing: Financial requirements*

[RG 175](#) *Licensing: Financial product advisers—Conduct and disclosure*

[RG 181](#) *Managing conflicts of interest*

[RG 182](#) *Dollar disclosure*

[RG 205](#) *Credit licensing: General conduct obligations*

[RG 206](#) *Credit licensing: Competence and training*

[RG 207](#) *Credit licensing: Financial requirements*

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[RG 218](#) *Licensing: Administrative action against persons engaging in credit activities*

[RG 256](#) *Client review and remediation conducted by advice licensees*

[RG 265](#) *Guidance on ASIC market integrity rules for participants of securities markets*

## Information sheets

[INFO 104](#) *Complying with your credit obligations*

[INFO 134](#) *Complying with your obligations if both credit licensee and AFS licensee*

[INFO 135](#) *Annual compliance certificates for credit licensees*

[INFO 151](#) *ASIC's approach to enforcement*

INFO 000 *Complying with the notify, investigate and remediate obligations*  
(see Attachment 2 to CP 340)

## Reports

[REP 515](#) *Financial advice: Review of how large institutions oversee their advisers*

[REP 594](#) *Review of selected financial services groups' compliance with the breach reporting obligation*

## Pro formas

[PF 209](#) *Australian financial services licence conditions*

## Legislative instruments

[\[CO 14/923\]](#) *Record-keeping obligations for Australian financial services licensees when giving personal advice*

## Legislation

ASIC Act, Pt 2, Div 2; s12CA, 12CB, 12DA, 12DB, 12DF, 12DI

Corporations Act, Ch 5C, 5D, 6, 6A, 6B, 6C, 6D, 7, 8A, 9; Pt 7.6, Div 3; s311, 601HG, 601FC, 761A, 769B, 910A, 912(1)(h), 912A, 912B, 912D, 912DAA, 912DAB, 912DAD, 912EB, 941B, 961B, 961G, 990K, 1017D, 1041H, 1100A, 1317E, 1671A

Corporations (Passport) Rules 2018, s12

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Corporations Regulations, reg 7.6.02A, 7.6.04(1)(i)

*Criminal Code Act 1995*, Criminal Code, s5.3, 5.4

Financial Sector Reform Act

Financial Sector Reform (Hayne Royal Commission Response) Bill 2020

[Financial Sector Reform \(Hayne Royal Commission Response—Protecting Consumers \(2020 Measures\)\) Regulations 2021 \(exposure draft\)](#)

*National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*

National Credit Act, Ch 2; Pt 2-2, Div 5; s5, 47, 48, 50(4)(c), 50A, 50B, 50C, 50D, 51B, 53, 113(1), 324

National Credit Code, s85, 111

National Credit Regulations, reg 9(10), 12(3), 12A

Note: See also the legislation listed in RG 78.120(c).

### **Other references**

Financial Services Royal Commission, [Final report](#), 4 February 2019

Treasury, [ASIC enforcement review: Taskforce report](#), December 2017

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