



RS and IDR Data Publication Project Team
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001
data.publication@asic.gov.au

14 May 2025
By Email

Dear Project Team

Submission – CP 383: Reportable situations and internal dispute resolution data publication

1 Introduction

This submission is made by Herbert Smith Freehills (**HSF**) in response to the proposed changes outlined in ASIC Consultation Paper 383: Reportable situations and internal dispute resolution data publication (**CP 383**).

HSF is an international law firm with 24 offices located around the globe and which specialises in, amongst other things, financial services and financial services regulation.

In CP 383, ASIC proposes to publish interactive dashboards containing firm-level data about reportable situations (**RS**) and internal dispute resolution (**IDR**) reported to ASIC.

Of the specific proposals contained within CP 383, we wish to respond to:

- B1: ASIC's proposal to publish data in an interactive dashboard that enables users to search and filter the data to obtain insights; and
- B2: ASIC's proposal to provide explanatory information to help users understand and interpret the data elements.

In our submission, there is a tangible risk that publication of firm-level data would be inconsistent with certain objectives of the RS and IDR regimes, including the objectives of enhancing transparency, encouraging breach reporting, and maintaining (and improving) trust and confidence in the financial system. From this perspective, the regulatory cost associated with the proposed changes in sections B1 and B2 of CP 383 are likely to outweigh any potential regulatory benefit.

In our submission, ASIC has a discretion to decide whether it will publish identifying information about licensees and what data elements it will publish. We submit that ASIC's current approach to publishing information should be retained. That is, publishing an annual report summarising aggregated data regarding reported breaches and internal complaints correctly and appropriately balances transparency in relation to breach reporting and compliance by providing consumers with contextual information and trends, while still upholding trust and confidence in the financial system. We submit that information should not be published at a firm-level, nor should the underlying data, without context, be accessible to the public.

If, despite our submission, ASIC does begin publishing firm-level RS and IDR data as outlined in CP 383, its plan to include contextual statements will be an imperative element to increase consumer understanding of the reports.



2 **B1: ASIC's proposal to publish data in an interactive dashboard the enables users to search and filter the data to obtain insights**

2.1 **ASIC's proposal**

ASIC has sought comments regarding the proposed format of the data publication by way of interactive dashboards. We wish to make submissions on two factors:

- (1) the publication of firm-level data; and
- (2) the level of detail that is to be included in the data elements.

2.2 **Firm-level data**

ASIC is proposing to publish identifiable information about licensees, including name, AFSL number, ACN and ABN, in connection with both the RS and IDR data.

(a) **Discretionary power**

If there is any doubt as to whether the power under which ASIC proposes to publish identifiable data is discretionary, we submit that it is discretionary for the following reasons.

In relation to IDR data, section 243 of the *Australian Securities and Investments Commission Act 2001* (Cth) stipulates that ASIC *may* publish IDR data which *may* "relate to a particular entity".

In relation to RS reports, ASIC is required under section 912DAD(1)(c) of the *Corporations Act 2001* (Cth) (**Corporations Act**) to publish information about "the entities in relation to which [RS reports] are lodged with ASIC or APRA". In our view, this does not require names or identifying information to be published. This is reinforced by the relevant Explanatory Memorandum,¹ which noted at [11.121] that "ASIC may include...the name of the licensee" (emphasis added).

Notably, ASIC proposes not to exercise its discretion under this section in at least one regard, as the dashboard will not include information about licensees who are individuals (something they are able to do under section 912DAD of the Corporations Act).

Further, there is precedent for not publishing details about licensees – specifically, ASIC has chosen not to publish details (such as names of licensees etc) over the past 3 years. The first two of ASIC's published RS reports noted that "inconsistencies in reporting practices" meant that comparisons between licensees by way of firm-level data was "unlikely to provide meaningful insights".² Neither CP 383, nor the latest report (*Report 800: Insights from the reportable situations regime July 2023 to June 2024 (Report 800)*) discussed these inconsistencies, nor explained if they have been addressed in current reporting practices.

ASIC is not obligated to publish either RS or IDR at a firm-level and, for the reasons discussed below, we submit that ASIC should continue its current practice of not publishing firm-level data.

(b) **ASIC's key objectives**

The publication of firm-level RS and IDR data is intended to support the key objectives of the RS and IDR regimes, including to enhance accountability and transparency, provide an incentive for improved behaviour by firms and improve trust and confidence in the financial system: see CP 383 at [3].

¹ Explanatory Memorandum, Corporations (Fees) Amendment (Hayne Royal Commission Response) Bill 2020 (Cth).

² See *ASIC Report 740: Insights from the reportable situations regime October 2021 to June 2022* and *ASIC Report 775: Insights from the reportable situations regime: July 2022 to June 2023*.

However, we consider that there is a risk that publication of firm-level information could disincentivise reporting accurate RS and IDR data to ASIC. For example, knowing that such a report will be made public:

- if there is any ambiguity as to whether an incident is an RS or IDR, firms may err on the side of not reporting the incident or delaying reporting;
- if there is any ambiguity on the particulars of an RS (e.g. the number of affected customers, the total financial loss suffered by customers or the contraventions that have occurred), firms may err on the side of reporting particulars that suggest the RS is less significant or material; and
- may cause conflicts between a firm's reporting obligations and their obligation to take reasonable steps to prevent matters arising that would adversely affect the firm's prudential standing or prudential reputation.³

This could adversely impact another of ASIC's key objectives: to provide an incentive for improved behaviour of firms and to enhance transparency.

There is also a risk that the publication of firm-level information could increase the time taken to finalise an RS investigation or breach report. A key objective of the RS regime, which was introduced in 2021 in its current enhanced form, was to reduce timeframes for reporting by licensees, to ensure that ASIC is obtaining reportable breach information in a timely manner. If RS data will be made publicly available, the data may become subject to additional levels of licensee review and approval, particularly for example where the licensee is part of a publicly listed group. This may (as alluded to above) result in delayed reporting, lengthening the timeframe in which licensees report potential breaches to ASIC.

The publication of firm-level RS and IDR data is similarly at risk of eroding trust and confidence in the financial system. In its current form, the de-identified summary ASIC publishes contextualises and explains RS and IDR data in a way that is accessible for consumers to understand and allows firms to learn from (and improve their compliance based on) other firm's RS and IDR experience and reports. In contrast, when encountering the proposed dashboard, consumers who are unfamiliar with the breach reporting regime may not understand the data that is published and may take an incorrect understanding from it.

Further, as ASIC points out in Report 800, there was significant variation between the reporting of licensees depending on their size. For example, between July 2023 – June 2024, 81% of licensees with \$1,000 million or more in revenue lodged reports compared to just 10% of licensees with \$50 million or less in revenue. The higher prevalence in reports amongst larger entities could have an adverse impact on confidence in the system, with consumers assuming that these firms have poor systems and higher rates of non-compliance (as opposed to assuming that they have stronger compliance systems that identify and remedy breaches in a timely manner).

While ASIC does propose to publish explanatory information to provide contextual statements about why firms may have large amounts of reports (discussed in more detail in section 3 below), some consumers may not see or read these statements (i.e., if the statistics are published as a headline to a news article or if the explanatory material is voluminous).

As such, it is our submission that the proposal to publish RS and IDR data at a firm-level will come at a tangible regulatory cost and risks not meeting the desired objective of CP 383.

³ See section 20(c) of the *Financial Accountability Regime Act 2023* (Cth).



2.3 Level of detail in data elements

In addition to the concerns in relation to the RS and IDR data being published at a firm-level, we submit there are similar concerns with the level of detail ASIC is proposing to publish. In our submission, the data elements that ASIC proposes to publish are too granular, and may not assist to inform the public (or other licensees seeking to improve their compliance systems based on the experience of other firms' RS and IDR reports).

Many of the proposed fields would be derived straight from the prescribed form through which firms submit RS and IDR reports and may not, without additional context, provide consumers with useful information.

The publication of such data may lead to other unintended consequences, such as fomenting potential class actions.

Some key examples of data proposed under CP 383 to be published that, in our submission, will be unlikely to assist the public, include:

- (a) **Time taken to identify breaches:** While information about the time taken to identify and investigate breaches is important information for ASIC to have so it can fulfill its supervisory role, its utility to the public is less clear. There are many factors which impact investigation time which the public may not appreciate or be aware, such as complexity of the issue or suspected breach, or availability of accurate data. In these circumstances, consumers may assume there is an inherent issue if a breach takes a longer period of time to be investigated, but this time may be reasonable when considered in context.
- (b) **Reportable situations versus number of instances:** Due to the technical nature of the RS regime, many consumers may not understand what a reportable situation is.

For example, consumers may not appreciate that a report of a breach does not imply or amount to an admission of a legal contravention,⁴ or how a "number of reportable situations" is comparable to "number of instances".

Further, one error may cause a very high number of "instances" to occur. When viewed in isolation, this may appear as though the firm has numerous, chronic issues that are challenging to address, when in reality, it may be one issue, caused by a single error that was rectified quickly after identification.

In addition, larger licensees will inevitably have a higher number of "instances" which can paint a skewed picture of compliance.
- (c) **Lack of context:** One field that is not proposed to be included is the free-text box that is completed when making a breach report that asks the licensee to "Describe the reportable situation". While we do not submit that this text field should be included in the dashboards, a prominent statement should be included explaining that certain information provided by the reporting entity that may provide additional context to the RS or IDR has been omitted.
- (d) **Act or Rule breached:** ASIC is proposing to publish a breakdown of some or all data elements by act or rule breached. Licensees are required to report to ASIC when they have reasonable grounds to believe a reportable situation, including a significant breach of a core obligation, has arisen. However, this does not amount to a finding by a court that the obligation has in fact been breached. In our view, disclosing the particular provisions that licensees consider they have breached is unlikely to be useful information for the public and may disincentivise transparent reporting by licensees, given the potential risks of third party litigation, such as class action litigation, or in the case of

⁴ *Australian Prudential Regulation Authority v Kelaheer* [2019] FCA 1521



publicly listed entities, potential adverse impact on their share price/market value.

2.4 HSF's recommendation

In our submission, ASIC's current approach of publishing an annual report summarising aggregated breaches and internal complaints, correctly balances transparency in relation to breach reporting and compliance by providing consumers with contextual information on key categories and trends, while still upholding trust and confidence in the financial system. In our view, this is the correct regulatory cost/benefit balance given that it incentivises timely and accurate reporting from licensees. As such, we suggest this approach should be retained. We submit that information should not be published at a firm-level, nor should the raw data, without context, be accessible to the public given its propensity to be confusing or skew public understanding of compliance conduct.

3 B2: ASIC's proposal to provide explanatory information to help users understand and interpret the data elements

3.1 ASIC's proposal

ASIC has proposed to provide, alongside the firm-level data, certain contextual statements to help explain the reports. For example, a statement could be included explaining that a large number of reports "does not necessarily suggest a higher incidence of non-compliance or consumer dissatisfaction, but may in fact reflect stronger compliance systems that can effectively identify and record non-compliance or consumer dissatisfaction".

It is our submission that while it is imperative that such contextual information accompany any publication of firm-level data, it is unlikely to effectively qualify or temper the impact of the publication of raw quantitative data – which will typically be read or picked up (for example, by mass media, social media or a consumer) in isolation. Accordingly, our primary submission remains that firm-level data should **not** be published.

Notwithstanding the above, if ASIC does begin publishing firm-level RS and IDR data as outlined CP 383, we submit that its plan to include contextual statements will be a vital step to increase consumer understanding of the reports.

3.2 HSF's recommendation

If firm-level data is to be published, we recommend that ASIC ensure that statements, such as those outlined in CP 383 are included in a clear and accessible manner to aid the public's contextual understanding of the reports. In addition to the statements outlined at B3(b) of CP 383, we suggest including statements to the following effect:

- **Time taken to identify breaches:** Consider including wording that addresses the average time it takes to identify breaches, as well as an explanation of why some breaches take longer to identify than others (i.e. complex or historical issues may take longer to identify).
- **Clarifying information:** ASIC's summary reports currently include clarifying information that seeks to provide context to the data. For example, Report 800 at page 17 noted that the time taken to identify breaches increased compared to previous reporting periods, but that this increase was likely due to the change of composition in breaches reported to ASIC as a result of changes to requirements. This clarifying information should not be lost in the proposed dashboards.
- **Number of instances:** Consider including an explanation of how the "number of instances" are calculated and that a number of instances may arise from a single incident or cause.



- **Act or Rule breached:** We recommend wording be included to explain that licensees are required to report to ASIC when they have reasonable grounds to believe that a reportable situation has arisen, but that this does not amount to a finding that the relevant obligation has, in fact, been breached.

The above are only a select few examples of explanatory statements we submit will be necessary to accurately and accessibly explain the data contained in the proposed dashboards to consumers. Other important factors will not be either known or entirely capable of explanation at the time of reporting, such as:

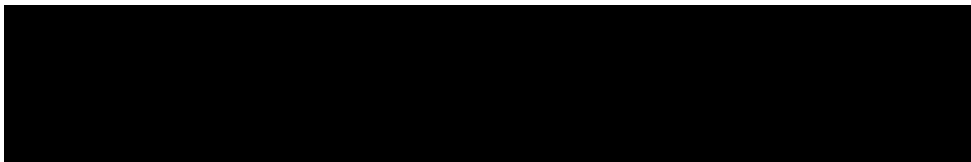
- efficiency and effectiveness of remediation;
- the genesis of the incident; or
- mitigatory or exculpatory factors such as third-party involvement or system errors.

The need for such numerous and detailed explanatory statements does suggest that publicising firm-level data in the proposed dashboards is not the most suitable method for ensuring the public are accurately and contextually informed about RS and IDR. As discussed above, it is our submission that retaining ASIC's current summary level reports is the preferred approach to promote transparency and compliance, while still upholding trust and confidence in the financial system.

4 Conclusion

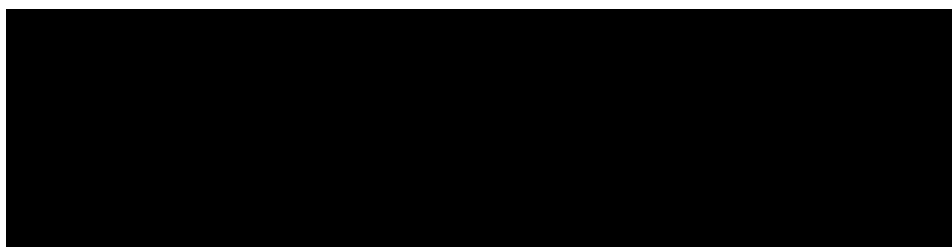
Thank you for providing us the opportunity to comment on the proposals outlined in CP 383. If you would like to discuss the matters raised in this submission, please contact any of us at the details below.

Yours sincerely



Partner
Herbert Smith Freehills

Partner
Herbert Smith Freehills



Partner
Herbert Smith Freehills

Partner
Herbert Smith Freehills

