



ASIC
Australian Securities &
Investments Commission

CONSULTATION PAPER 340

Breach reporting and related obligations

April 2021

About this paper

This consultation paper sets out our proposals for providing guidance to Australian financial services (AFS) licensees and Australian credit licensees (credit licensees) on the breach reporting obligation that applies from 1 October 2021.

It also sets out our proposals for guidance on the new obligations for AFS licensees who are financial advisers and credit licensees who are mortgage brokers. The obligations require these licensees to notify, investigate and remediate breaches of the law in certain circumstances.

Note: For the draft regulatory guide and draft information sheet that set out our proposed guidance, see the attachments to this consultation paper. These attachments are available on our website at www.asic.gov.au/cp under CP 340.

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 paper was issued on 22 April 2021 and is based on the legislation as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on the new breach reporting regime and the new notify, investigate and remediate obligations. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section D 'Regulatory and financial impact'.

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information on how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 3 June 2021 to:

Niki De Mel, Strategic Policy Adviser, Strategy Group
email: BR.submissions@asic.gov.au

What will happen next?

Stage 1	22 April 2021	ASIC consultation paper released
Stage 2	3 June 2021	Comments due on the consultation paper
Stage 3	Quarter 3 2021	Updated regulatory guide and information sheet released

A Background to our proposals

Key points

Currently, the existing breach reporting obligation, as set out in s912D of the *Corporations Act 2001* (Corporations Act), applies to Australian financial services (AFS) licensees. The *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Financial Sector Reform Act) clarifies the breach reporting obligation that applies to AFS licensees, and extends its application to Australian credit licensees (credit licensees).

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

New obligations also apply to AFS licensees who are financial advisers and credit licensees who are mortgage brokers. The obligations require these licensees to notify, investigate and remediate breaches of the law in certain circumstances. These obligations give effect to Recommendations 1.6 and 2.9 of the Financial Services Royal Commission.

This consultation paper sets out our proposals for guidance on the breach reporting obligation and the new notify, investigate and remediate obligations.

A draft regulatory guide and a draft information sheet with our proposed guidance are included as attachments to this paper.

Note: For the draft regulatory guide and draft information sheet, see the attachments to this consultation paper. These attachments are available on our website at www.asic.gov.au/cp under CP 340.

Breach reporting by AFS licensees and credit licensees

- 1 Breach reporting is a core component of Australia's financial services and credit regulatory framework, where AFS licensees and credit licensees act as the 'first line' of compliance.

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

- 2 In April 2018, the Australian Government released the report of the ASIC Enforcement Review Taskforce. As well as recommending the existing breach reporting obligation be extended to credit licensees, the taskforce made several recommendations for strengthening and clarifying the existing breach reporting requirements in the Corporations Act.
- 3 The ASIC Enforcement Review Taskforce's recommendations aimed to:
 - (a) reduce uncertainty about when a breach or likely breach is significant and reportable;
 - (b) reduce timeframes for reporting breaches to ASIC; and

- (c) improve the consistency of information provided by licensees in their breach reports.

Note: See Treasury, [ASIC enforcement review: Taskforce report](#), December 2017 (ASIC Enforcement Review Taskforce report).

- 4 The ASIC Enforcement Review Taskforce’s recommendation that the existing breach reporting be extended to credit licensees was outlined as follows:

... the Compliance Certificate regime is no substitute for the self-reporting obligation that AFS licensees are subject to because:

- The information in the certificate is high level, generalised information;
- ASIC is not able to ascertain the veracity of credit licensee responses in certificates without undertaking surveillance or issuing notices to obtain additional information; and
- There is no obligation to provide ASIC with information about breaches in a timely way, as certificates are only required annually.

Note: See Treasury, [ASIC enforcement review: Taskforce report](#), December 2017, p. 7.

- 5 In September 2018, ASIC released [Report 594 Review of selected financial services groups’ compliance with the breach reporting obligation](#) (REP 594). The report sets out the findings of our review of AFS licensees’ compliance with the existing breach reporting obligation under s912D of the Corporations Act.

- 6 This included findings on whether AFS licensees:

- (a) conduct adequate and effective breach reporting;
- (b) comply with the existing breach reporting obligation; and
- (c) demonstrate elements of a sound breach reporting culture.

- 7 In its final report, the Financial Services Royal Commission recommended that:

- (a) the recommendations of the ASIC Enforcement Review Taskforce that relate to AFS licensees’ and credit licensees’ self-reporting of contraventions should be carried into effect (Recommendation 7.2);
- (b) AFS licensees should be required, as a condition of their licence, to report ‘serious compliance concerns’ about individual financial advisers to ASIC on a quarterly basis (Recommendation 2.8); and
- (c) credit licensees should be bound by reporting obligations in relation to mortgage brokers similar to those referred to in Recommendation 2.8 (Recommendation 1.6).

Note: See Financial Services Royal Commission, [Final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry](#) (Final report), February 2019.

The breach reporting obligation under the reforms

8 The Financial Sector Reform Act was passed in response to the Financial Services Royal Commission recommendations. The Act revises the breach reporting obligation, including extending the obligation to credit licensees (breach reporting obligation).

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

9 The breach reporting obligation commences on 1 October 2021.

10 The concerns underlying the existing breach reporting obligation are expressed in the [Explanatory Memorandum to the Financial Sector Reform \(Hayne Royal Commission Response\) Bill 2020](#) (Explanatory Memorandum):

ASIC and industry participants have raised concerns about the existing breach reporting regime in the Corporations Act. The concerns mainly relate to the test for whether a breach or likely breach is significant and therefore reportable, as this requires a financial services licensee to make a judgement based on a broad range of matters. As a result, breach reporting is largely inconsistent amongst licensees in terms of the matters reported and the timeliness of reports.

Note: See Explanatory Memorandum, paragraph 11.5.

11 The reforms are designed to strengthen and clarify the existing breach reporting obligation to help:

- (a) provide greater certainty for industry participants; and
- (b) ensure that ASIC receives reports in a timely and consistent manner.

12 The information provided about breaches in reports to ASIC is critical. It allows us to detect significant non-compliance early and take action where appropriate, as well as identifying and addressing emerging trends of non-compliance in the industry.

Note: See [Explanatory Memorandum](#), paragraph 11.3.

13 Key features of the breach reporting reforms include:

- (a) expanding and clarifying the types of situation that must be reported to ASIC, including when determining whether a breach or likely breach is significant;
- (b) requiring licensees to lodge breach reports with ASIC in a prescribed form within 30 calendar days after the licensee first knows that, or is reckless with respect to whether, there are reasonable grounds to believe a reportable situation has arisen;
- (c) creating an obligation to report an investigation into whether there is a reportable situation if that investigation continues for more than 30 days;

- (d) requiring ASIC to publish data about breach reports annually on our website; and
- (e) amending the National Credit Act to introduce a comparable breach reporting regime for credit licensees.

Note: See ‘Comparison of key features of new law and current law’, [Explanatory Memorandum](#), pp. 220–221.

- 14 The Australian Government has released exposure draft regulations specifying the civil penalty provisions excluded from ‘deemed significance’ under s912D(4)(b) of the Corporations and s50A(4)(b) of the National Credit Act. This is the subject of a [separate consultation by Treasury](#), which closed on 9 April 2021.

Notifying, investigating and remediating breaches of the law

- 15 In its final report, the Financial Services Royal Commission also recommended that:
- (a) AFS licensees should be required to take steps where they identify a breach of the law by a financial adviser to make inquiries to determine the nature and full extent of the breach, and where there is sufficient information to suggest the adviser has engaged in a breach of the law, to notify and remediate affected customers (Recommendation 2.9); and
 - (b) credit licensees should be subject to the same obligations in relation to mortgage brokers as those applying to AFS licensees in relation to financial advisers (Recommendation 1.6).

Note: See Financial Services Royal Commission, [Final report](#), February 2019.

The new obligations to notify, investigate and remediate breaches of the law

- 16 In conjunction with the reforms to breach reporting, the Financial Sector Reform Act introduces new obligations for AFS licensees who are financial advisers and credit licensees who are mortgage brokers. The obligations require these licensees to notify, investigate and remediate a breach of the law in certain circumstances.

Note: The Financial Sector Reform Act inserted obligations into Pt 7.6, Div 3, Subdiv C of the Corporations Act and Pt 2-2, Div 5, Subdiv C of the National Credit Act. See ‘Comparison of key features of new law and current law’, [Explanatory Memorandum](#), pp. 266–267.

- 17 The obligations respond to the findings of the Financial Services Royal Commission:
- The purpose of recommendations 1.6 and 2.9 is to address a particular subset of licensees (those that provide personal advice and credit assistance)

and high-risk conduct that has historically remained undetected for undue periods.

Note: See [Explanatory Memorandum](#), paragraph 12.12.

- 18 The obligations must be considered in the context of [Regulatory Guide 256](#) *Client review and remediation conducted by advice licensees* (RG 256), which provides guidance on the broader remediation framework to ensure consumers are remediated in a fair, honest and efficient manner and put back in the position they would have been in had the breach not occurred. RG 256 is currently under review: see [Consultation Paper 335](#) *Consumer remediation: Update to RG 256* (CP 335), which was open for consultation until 26 February 2021.
- 19 The new obligations also commence on 1 October 2021.

Our approach to providing guidance

- 20 In response to the reforms, we have prepared the following draft guidance:
- (a) *A draft updated regulatory guide*—We are proposing to update our guidance on breach reporting to help licensees comply with the breach reporting obligation: see draft Regulatory Guide 78 *Breach reporting by AFS licensees and credit licensees* (draft RG 78) in Attachment 1 to this paper.
 - (b) *A draft information sheet*—We are proposing to provide a concise overview of the new obligations to notify, investigate and remediate certain breaches of the law: see draft Information Sheet 000 *Complying with the notify, investigate and remediate obligations* (draft INFO 000) in Attachment 2 to this paper.
- 21 The draft regulatory guide explains:
- (a) how we interpret key concepts of the breach reporting obligation;
 - (b) our general approach to administering the obligation; and
 - (c) how licensees can demonstrate compliance with the obligation.

Note: The final updated regulatory guide will replace our guidance in the current version of [Regulatory Guide 78](#) *Breach reporting by AFS licensees* (current RG 78). During the transitional period, that version of RG 78 will continue to be available on our website.

- 22 Our draft guidance is intended to help industry make changes and improve practices before the reforms commence.
- 23 We are seeking your feedback on both the draft regulatory guide and draft information sheet in this consultation paper. We welcome any feedback you may have on our proposals. We will take your comments into account when finalising the regulatory guide and information sheet. We intend to release our final guidance before the reforms commence on 1 October 2021.

B Breach reporting by AFS licensees and credit licensees

Key points

We are proposing to provide guidance for AFS licensees and credit licensees on how they can comply with the breach reporting obligation: see draft RG 78 in Attachment 1 to this paper.

The draft guidance explains how we interpret key concepts of the breach reporting obligation, our general approach to administering the obligation, and how licensees can demonstrate compliance with this obligation.

Our proposed approach to guidance

Proposal

- B1** We propose to give consistent guidance for AFS licensees and credit licensees on how they can comply with the breach reporting obligation, with examples of how the obligation applies in particular situations.

Your feedback

- B1Q1 Do you agree with our proposed approach? If not, why not?
- B1Q2 Are there differences in the structure or operation of credit licensees that require specific guidance on how the breach reporting obligation applies?

- B2** We propose to include case studies and scenarios to supplement our general guidance and help illustrate key principles as they might apply to different licensees, industries and business models.

Your feedback

- B2Q1 Are there any specific issues, incidents, challenges or areas of concern you think we should include as examples, case studies or scenarios? If so, please provide details and explain why they should be included.

Rationale

24

In draft RG 78, we have provided:

- (a) broad, consistent, principles-based guidance for a range of licensees, across a number of industries and business models; and
- (b) examples of how these principles will apply in practical circumstances.

- 25 This is an approach to guidance similar to our approach in [current RG 78](#). Importantly, the examples are intended for illustration only. We expect, in all cases, that licensees will consider their specific circumstances when considering their legal obligation to report to ASIC.

How our guidance applies

Proposal

- B3** Draft RG 78 identifies where the existing breach reporting obligation (as in force immediately before 1 October 2021) continues to apply to AFS licensees: see draft RG 78.14–RG 78.18.

Your feedback

- B3Q1** Should we include further guidance to help AFS licensees understand how the existing breach reporting obligation under s912D of the Corporations Act (as in force before 1 October 2021) applies? If so, please provide details.

Rationale

- 26 Our guidance is intended to clarify the circumstances in which AFS licensees must comply with the breach reporting obligation as in force before 1 October 2021. In these circumstances, AFS licensees should follow our previous guidance on breach reporting by AFS licensees in current RG 78.

What must be reported to ASIC

Proposal

- B4** We propose to provide high-level guidance to help AFS licensees and credit licensees identify what they must report to ASIC, including guidance on:
- (a) what is a 'reportable situation' (see draft RG 78.19–RG 78.25);
 - (b) whether a breach or likely breach of a core obligation is significant (see draft RG 78.26–RG78.45);
 - (c) when an investigation is a reportable situation (see draft RG 78.46–RG 78.57);
 - (d) what are 'additional reportable situations' (see draft RG 78.58–RG 78.60); and
 - (e) what are reportable situations about other licensees (see draft RG 78.61–RG 78.67).

Your feedback

- B4Q1 Do you agree with our proposed approach? If not, why not?
- B4Q2 Should we include further guidance on what constitutes a 'core obligation'? If so, please provide details.
- B4Q3 Should we include further guidance on how to determine whether a breach or likely breach of a core obligation is 'significant'? If so, please provide details.
- B4Q4 Should we include further guidance on reporting an 'investigation' to ASIC? If so, what should be clarified? Please provide examples of scenarios (where relevant).
- B4Q5 Should we include further guidance on what constitutes 'material loss or damage'? If so, what are the challenges licensees face in determining whether loss or damage is material? Please provide examples of how you consider questions of material loss or damage.
- B4Q6 Should we include further guidance on reportable situations involving serious fraud or gross negligence? If so, what are the challenges licensees face in identifying when serious fraud or gross negligence has occurred?
- B4Q7 Should we include further guidance on reportable situations about other licensees? If so, please provide details.

Rationale

- 27 The existing breach reporting obligation in force before 1 October 2021 for AFS licensees focused on reporting 'significant breaches' of certain obligations. Under the revised breach reporting obligation, AFS licensees and credit licensees must report to ASIC different types of 'reportable situation'.

Note: A 'reportable situation' has the meaning given by s912D of the Corporations Act for AFS licensees or s50A of the National Credit Act for credit licensees.

- 28 We are proposing to provide guidance on the range of reportable situations that licensees must consider when assessing what must be reported to ASIC.
- 29 The breach reporting obligation requires licensees to objectively determine whether there are reasonable grounds to believe a reportable situation has arisen. Our proposed guidance, including the examples, is intended to illustrate the types of situation that licensees must report to ASIC.
- 30 The reforms to the existing breach reporting obligation are intended to provide greater consistency and certainty for licensees when determining whether a breach is required to be reported to us. For example, this includes defining circumstances in which a breach will automatically be taken to be significant.

- 31 Additionally, licensees must report to ASIC when they conduct an investigation that continues for more than 30 days into whether there is a significant breach of a core obligation.
- 32 We expect licensees to have sufficient arrangements in place to identify breaches of their obligations and determine objectively whether those breaches are significant.
- 33 We are not seeking feedback on the civil penalty provisions to be specified in the regulations for exclusion from deemed significance: s912D(4)(b) of the Corporations Act, s50A(4)(b) of the National Credit Act.

How to report to ASIC

When to report a reportable situation

Proposal

- B5** We propose to include guidance in draft RG 78 about the obligation for licensees to report to ASIC within 30 days after they first know that, or are reckless with respect to whether, there are reasonable grounds to believe a reportable situation has arisen: see draft RG 78.68–RG 78.81.

Your feedback

- B5Q1 Should we include further guidance to help licensees understand when to report to ASIC? If so, please provide details, including what guidance would be helpful and why.
- B5Q2 Should we include further guidance on what may amount to 'knowledge', 'recklessness' and 'reasonable grounds'? If so, please explain what specific guidance would be helpful and why.
- B5Q3 Should we include any additional or alternative guidance to help licensees provide reports to ASIC in a timely manner? If so, please give details.

Rationale

- 34 The guidance in draft RG 78 on the timeframes to report a reportable situation mirrors the provisions in the Financial Sector Reform Act: see s912DAA(3) of the Corporations Act, s50C(3) of the National Credit Act. It is not prescriptive or industry specific.
- 35 The issue arises as to:
- (a) when the licensee first knows or is reckless as to whether there are reasonable grounds to believe a reportable situation has arisen; and
 - (b) 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.

- 36 If a licensee delegates the decision to lodge a breach report to a particular person or committee, when determining who within the licensee ‘first knows’ 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.
- 37 In providing up to 30 calendar days to report after the licensee first knows of, or is reckless about whether, there are reasonable grounds to believe a reportable situation has arisen, the law allows the licensee more time to complete their internal governance processes and lodge the breach report.

How to report a reportable situation

Proposal

- B6** We propose to provide general guidance on the types of information we will include in the prescribed form that licensees must use to provide reports to ASIC: see Table 8 in draft RG 78

Your feedback

- B6Q1 Do you have any feedback about the types of information we propose must be included in the prescribed form? If so, please provide details, and identify any issues.
- B6Q2 Should we include any other information in the prescribed form? If so, please provide details.
- B6Q3 Do you have any concerns about the types of information in the prescribed form and whether this information can be provided within the prescribed 30-day time period? If so, please provide details.

Rationale

- 38 Licensees must report to ASIC in writing, using the prescribed form: see s912DAB(2) of the Corporations Act and s50B(3) of the National Credit Act.

Note: The prescribed form gives effect to Recommendation 5 of the [Taskforce report](#), ‘The required content of breach reports should be prescribed by ASIC and be lodged electronically.’

- 39 The purpose of a prescribed form for licensees is stated in the Explanatory Memorandum:

The use of a prescribed form aims to enhance the effectiveness of the breach reporting regime, as the reports will need to include all the information and supporting documents required by ASIC to assess the reportable situation and determine whether further action should be taken.

Note: See [Explanatory Memorandum](#), paragraph 11.66.

- 40 The types of information we have included reflect our experience with the breach reporting obligation, including reviewing and assessing misconduct. We consider that this information is necessary to receiving high-quality reports that we can act on appropriately and efficiently. It will also help reduce the regulatory burden for licensees by lessening the need for ASIC to request further and clarifying information.
- 41 The types of information included in our guidance have been collected by ASIC from AFS licensees since March 2020 using the [ASIC Regulatory Portal](#), and a standard form was available for use by AFS licensees before then.

How licensees can demonstrate compliance

Proposal

- B7 We propose to provide high-level guidance on compliance systems for breach reporting to help licensees comply with the breach reporting obligation: see Section D of draft RG 78.

Your feedback

- B7Q1 Do you agree with our proposed approach? If not, why not?
- B7Q2 Are there any other specific areas that we should consider including in our guidance? If so, please provide details.
- B7Q3 Are there any challenges that you would face in applying our guidance to your specific circumstances (i.e. the nature, scale or type of your business)? If so, please provide details.

Rationale

- 42 We consider that having robust breach reporting systems, processes and procedures in place is a key component of a licensee's compliance and risk management framework.
- 43 Our guidance in draft RG 78 includes high-level expectations and other helpful practices, drawing on our findings in [REP 594](#). This report reviewed selected AFS licensees' compliance with the breach reporting obligation. We consider that these practical insights will help licensees as they develop or improve their approach to complying with the breach reporting obligation.

C Notifying, investigating and remediating breaches of the law

Key points

We are proposing to provide guidance on the new obligations that apply to AFS licensees who are financial advisers and credit licensees who are mortgage brokers. The obligations require these licensees to notify, investigate and remediate a breach of the law in certain circumstances: see draft INFO 000 in Attachment 2 to this paper.

Draft INFO 000 explains the new obligations and should be considered in the broader context of our guidance on remediation in [RG 256](#).

Our proposed approach to guidance

Proposal

- c1 We propose to provide guidance for AFS licensees who are financial advisers and credit licensees who are mortgage brokers. The new obligations require these licensees to notify, investigate and remediate affected clients in certain circumstances. We have set out our proposed guidance in an information sheet: see draft INFO 000 in Attachment 2 to this paper.

Your feedback

- C1Q1 Do you agree with our proposed approach? If not, why not?
- C1Q2 Should the guidance we provide on the new obligations be provided in the form of a separate information sheet, or be incorporated into [RG 256](#)? Please provide details.
- C1Q3 Should we include further or more specific guidance on the circumstances in which licensees must:
- (a) notify affected clients of a breach of the law;
 - (b) investigate the full extent of that breach; or
 - (c) remediate affected clients?
- If so, what other information would be helpful in determining how these obligations apply?

Rationale

- 44 The proposed guidance in the draft information sheet is intended to provide an overview of the obligations for AFS licensees and credit licensees to notify clients affected by certain breaches of the law, investigate the nature

and extent of those breaches and remediate affected clients within certain timeframes.

- 45 It should be viewed alongside the framework set out in [RG 256](#) (currently under review). This includes, for example, considering whether it is efficient, honest and fair to remediate in circumstances where the notify, investigate and remediate obligations do not apply or have ceased applying.

What should be included in notices to affected clients

Proposal

- c2 We propose to give high-level guidance to AFS licensees and credit licensees about the types of information we consider should be included in the notices that must be given to affected clients: see in Actions 1 and 3 of draft INFO 000 in Attachment 2 to this paper.

Your feedback

- c2Q1 Do you agree with our proposed approach? If not, why not?
- c2Q2 Should the form of the notices referred to in Actions 1 and 3 of the information sheet be approved by ASIC? If so, what information, or types of information, should be mandatory, and what should be left to the discretion of the licensee?

Rationale

- 46 We have provided high-level guidance about what to include in notices to affected clients in the draft information sheet, as well as in [RG 256](#).

Note: In draft INFO 000, 'affected clients' refers to both clients and consumers as these terms are defined in the Corporations Act and National Credit Act.

- 47 While we have not approved a form at this time, we may do so if we become aware of deficiencies in the approach taken by licensees in communicating with affected clients.

D Regulatory and financial impact

- 48 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact.
- 49 On the information currently available to us, we think the proposals will strike an appropriate balance between ensuring that:
- (a) AFS licensees and credit licensees comply with the breach reporting obligation and obligations to notify, investigate and remediate for breaches of the law; and
 - (b) they do not incur unreasonable costs in complying with these obligations.
- 50 ASIC did not prepare a separate Regulatory Impact Statement (RIS) for this guidance. The Australian Government has confirmed that a process and analysis equivalent to a RIS has been undertaken through the Financial Services Royal Commission.

Note: See Treasury, [Government response to the Financial Services Royal Commission](#), 26 September 2019.

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to give consistent guidance for AFS licensees and credit licensees on how they can comply with the breach reporting obligation, with examples of how the obligation applies in particular situations.</p>	<p>B1Q1 Do you agree with our proposed approach? If not, why not?</p> <p>B1Q2 Are there differences in the structure or operation of credit licensees that require specific guidance on how the breach reporting obligation applies?</p>
<p>B2 We propose to include case studies and scenarios to supplement our general guidance and help illustrate key principles as they might apply to different licensees, industries and business models.</p>	<p>B2Q1 Are there any specific issues, incidents, challenges or areas of concern you think we should include as examples, case studies or scenarios? If so, please provide details and explain why they should be included.</p>
<p>B3 Draft RG 78 identifies where the existing breach reporting obligation (as in force immediately before 1 October 2021) continues to apply to AFS licensees: see draft RG 78.14–RG 78.18.</p>	<p>B3Q1 Should we include further guidance to help AFS licensees understand how the existing breach reporting obligation under s912D of the Corporations Act (as in force before 1 October 2021) applies? If so, please provide details.</p>

Proposal	Your feedback
<p>B4 We propose to provide high-level guidance to help AFS licensees and credit licensees identify what they must report to ASIC, including guidance on:</p> <ul style="list-style-type: none"> (a) what is a 'reportable situation' (see draft RG 78.19–RG 78.25); (b) whether a breach or likely breach of a core obligation is significant (see draft RG 78.26–RG78.45); (c) when an investigation is a reportable situation (see draft RG 78.46–RG 78.57); (d) what are 'additional reportable situations' (see draft RG 78.58–RG 78.60); and (e) what are reportable situations about other licensees (see draft RG 78.61–RG 78.67). 	<p>B4Q1 Do you agree with our proposed approach? If not, why not?</p> <p>B4Q2 Should we include further guidance on what constitutes a 'core obligation'? If so, please provide details.</p> <p>B4Q3 Should we include further guidance on how to determine whether a breach or likely breach of a core obligation is 'significant'? If so, please provide details.</p> <p>B4Q4 Should we include further guidance on reporting an 'investigation' to ASIC? If so, what should be clarified? Please provide examples of scenarios (where relevant).</p> <p>B4Q5 Should we include further guidance on what constitutes 'material loss or damage'? If so, what are the challenges licensees face in determining whether loss or damage is material? Please provide examples of how you consider questions of material loss or damage.</p> <p>B4Q6 Should we include further guidance on reportable situations involving serious fraud or gross negligence? If so, what are the challenges licensees face in identifying when serious fraud or gross negligence has occurred?</p> <p>B4Q7 Should we include further guidance on reportable situations about other licensees? If so, please provide details.</p>
<p>B5 We propose to include guidance in draft RG 78 about the obligation for licensees to report to ASIC within 30 days after they first know that, or are reckless with respect to whether, there are reasonable grounds to believe a reportable situation has arisen: see draft RG 78.68–RG 78.81.</p>	<p>B5Q1 Should we include further guidance to help licensees understand when to report to ASIC? If so, please provide details, including what guidance would be helpful and why.</p> <p>B5Q2 Should we include further guidance on what may amount to 'knowledge', 'recklessness' and 'reasonable grounds'? If so, please explain what specific guidance would be helpful and why.</p> <p>B5Q3 Should we include any additional or alternative guidance to help licensees provide reports to ASIC in a timely manner? If so, please give details.</p>

Proposal	Your feedback
<p>B6 We propose to provide general guidance on the types of information we will include in the prescribed form that licensees must use to provide reports to ASIC: see Table 8 in draft RG 78</p>	<p>B6Q1 Do you have any feedback about the types of information we propose must be included in the prescribed form? If so, please provide details, and identify any issues.</p> <p>B6Q2 Should we include any other information in the prescribed form? If so, please provide details.</p> <p>B6Q3 Do you have any concerns about the types of information in the prescribed form and whether this information can be provided within the prescribed 30-day time period? If so, please provide details.</p>
<p>B7 We propose to provide high-level guidance on compliance systems for breach reporting to help licensees comply with the breach reporting obligation: see Section D of draft RG 78.</p>	<p>B7Q1 Do you agree with our proposed approach? If not, why not?</p> <p>B7Q2 Are there any other specific areas that we should consider including in our guidance? If so, please provide details.</p> <p>B7Q3 Are there any challenges that you would face in applying our guidance to your specific circumstances (i.e. the nature, scale or type of your business)? If so, please provide details.</p>
<p>C1 We propose to provide guidance for AFS licensees who are financial advisers and credit licensees who are mortgage brokers. The new obligations require these licensees to notify, investigate and remediate affected clients in certain circumstances. We have set out our proposed guidance in an information sheet: see draft INFO 000 in Attachment 2 to this paper.</p>	<p>C1Q1 Do you agree with our proposed approach? If not, why not?</p> <p>C1Q2 Should the guidance we provide on the new obligations be provided in the form of a separate information sheet, or be incorporated into RG 256? Please provide details.</p> <p>C1Q3 Should we include further or more specific guidance on the circumstances in which licensees must:</p> <ul style="list-style-type: none"> (a) notify affected clients of a breach of the law; (b) investigate the full extent of that breach; or (c) remediate affected clients? <p>If so, what other information would be helpful in determining how these obligations apply?</p>
<p>C2 We propose to give high-level guidance to AFS licensees and credit licensees about the types of information we consider should be included in the notices that must be given to affected clients: see in Actions 1 and 3 of draft INFO 000 in Attachment 2 to this paper.</p>	<p>C2Q1 Do you agree with our proposed approach? If not, why not?</p> <p>C2Q2 Should the form of the notices referred to in Actions 1 and 3 of the information sheet be approved by ASIC? If so, what information, or types of information, should be mandatory, and what should be left to the discretion of the licensee?</p>