



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

Ms Niki De Mel
Strategic Policy Adviser
Strategy Group

Email: BR.submissions@asic.gov.au

2 June 2021

Dear Ms De Mel

Response to CP 340 Breach Reporting and related obligations

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide feedback to ASIC on its proposed guidance to Australian financial services (AFS) licensees and Australian credit licensees (credit licensees) on the breach reporting obligations that apply from 1 October 2021.

The FPA would welcome the opportunity to discuss with ASIC the issues raised in our submission.

Please contact me on [REDACTED] if you have any questions.

Yours sincerely

[REDACTED]

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Head of Policy, Strategy and Innovation
Financial Planning Association of Australia¹

¹ The Financial Planning Association (FPA) has more than 14,000 members and affiliates of whom 11,000 are practising financial planners and 5,720 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 26 member countries and the more than 175,570 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 18 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally.
- We are recognised as a professional body by the Tax Practitioners Board.



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ASIC CONSULTATION PAPER340: BREACH REPORTING AND RELATED OBLIGATIONS

Prepared for the Australian Securities and Investments Commission

2 June 2021

Consistency

The FPA supports measures to enhance consumer protections by improving the identification, investigation and reporting of breaches of the Corporations Act. The Regulator plays a fundamental role in ensuring the confidence and protection of consumers, which is paramount to the effective and sustainable operation of Australia's financial service sector.

The FPA welcomes the development of an updated Regulatory Guide (Updated RG78) that aims to provide clarity and assistance to licensees in understanding when and how to report a breach as well as an information sheet on the new obligation to notify, investigate and remediate clients and consumers in certain circumstances.

Interaction with other requirements

In the FPA's submission on 26 March 2021 into Treasury's review of AFCA, we highlighted that the compensation framework for financial advice now includes four similar elements presenting a high risk of duplication and confusion:

1. Licensee investigation and compensation obligations in the Corporations Act
2. ASIC RG256: Consumer remediation
3. ASIC's Financial Services and Credit Panel (FSCP) who will have oversight of individual financial planners' adherence to the legislated FASEA Code of Ethics, and
4. IDR/EDR system

Each of these four elements comes with a set of timeframes and definitions. The FPA suggests care is needed to ensure there is not a disconnect between the requirements in the law for a specific subsector, the obligations ASIC includes in the updated RG256 and RG78, the requirements in the IDR/EDR framework, and the pending structure for oversight of planners' obligations under the Code. Consumers and businesses need consistency and certainty on the rules that apply in each situation.

The FSRC 2020 Act, proposals to update RG256, the IDR/EDR obligations and the pending proposed model for the new FSCP single disciplinary body, mandate licensees to undertake the same type of action, which is to investigate, report and compensate. However, the specific requirements on how licensees should undertake such action differs slightly. This creates the potential for expensive duplication and oversight, and confusion for consumers and industry.

The FPA suggests Treasury, ASIC and AFCA consider how these sets of requirements can be rationalised to ensure the intent of all these measures is achieved in a manner that improves consumer outcomes through cost effective and efficient regulation.

The FPA notes that it has been suggested that ASIC should provide a consolidated regulatory guidance on how the four consumer compensation elements interact into one process.

However, this may be an issue with the provisions in laws. There is a risk that provisions in the Corporations Act, AFCA Act and FSRC 2020 Act set different requirements and standards for the same consumer issue, requiring licensees to undertake different actions for the same matter, and setting duplicated requirements for AFCA and ASIC. This will confuse consumers and industry and risk some consumers and issues falling through the cracks or potentially being awarded double compensation.

Hence, this issue may not be adequately addressed through ASIC regulatory guidance and may warrant further investigation by Treasury in the first instance.

The FPA recommends Treasury, ASIC and AFCA consider, rationalise and provide details of the interaction of:

- the licensee remediation obligations in the FSRC Act 2020
- the enforcement of the FASEA Code by the FSCP
- the rights of the consumer to recover damages for a contravention of s921E under s1324 of the Corporations Act
- ASIC's updated RG256: Consumer remediation
- IDR and EDR

The FPA recommends the above information should also be included/clearly referenced in ASIC's RG78.

Furthermore, in the FPA's submission in responses to CP335: Consumer remediation, the FPA suggested care is needed to ensure there is not a disconnect between the requirements in the law for a specific subsector and the obligations ASIC includes in the updated RG256. The FPA is concerned that obligations in the current RG 256, the suggestions in CP335, and the proposed obligations in CP340 and draft RG78, may confuse licensees as, based on the wording used in these documents, they have the potential to be interpreted as redefining key definitions in the FSRC 2020 Act and creating two sets of requirements for the same steps in the remediation process. Businesses need consistency and certainty on the rules that apply.

The FPA understands ASIC's intention to extend the updated RG256 to all financial services and credit licensees, however the FSRC 2020 Act sets specific requirements for licensees providing personal financial advice to retail clients.

The FPA suggests consideration be given to exempting personal financial advice providers from the requirements of the updated RG256 given the primary legislation, underpinned by the proposed RG78, sets detailed and continuous investigation and compensation requirements for these licensees.

ASIC readiness

The new legislation introduces a significant increase in the mandated requirements in relation to breach reporting, and investigating and remediating misconduct. The FPA is concerned that with the rapid increase of breaches that will be reported, ASIC may not yet have the capability to respond to licensees, and filter through the breach reports efficiently and effectively to identify serious breaches and systemic issues for enforcement action in a timely manner. The expected rapid increase in breach reports will make it more difficult for the Regulator to undertake effective and timely enforcement action. This creates the potential for some breach reports to fall through the cracks. ASIC must ensure they have systems and sufficient resources in place to deal with the increase in reporting.

Whilst ASIC's prescribed form clearly identifies the information required to be reported, it must also be flexible to cater to different business models and different types of breaches. The FPA recommends that ASIC consider ways to automate the lodgement of breach reports through the creation of an open data format and APIs for lodgement. The Regulator would require appropriate data mining capability to efficiently analyse breach reports and identify the most serious breaches and systemic issues for enforcement action. This may require ASIC to improve the speed and reliability of its current licensee portal.

The FPA recommends that ASIC put in place an API gateway to allow Licensees to report directly into the ASIC portal via their own breach reporting software tool. This would ensure efficiency from the Licensees point of view as well as less room for error as the information will feed directly into ASIC's portal.

ASIC proposal B4

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).*

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

FPA response

Draft RG 78 gives some relevant and practical examples of “deemed significant breaches”, together with a detailed summary of the core obligations set out in s912D(3) of the Corporations Act. And whilst further guidance is provided regarding other breaches that are significant but do not fall within the category of deemed significant breaches, these will vary significantly across licensees.

Whilst table 3 provides some useful insights into the factors that may be applied to determine whether a breach is significant, the examples provided in tables 4 and 5 of breaches that may be considered significant could be expanded to include the types of issues that may occur on a day to day basis, (e.g. in the course of providing of personal advice) and consider if these types of occurrences would be a breach of a civil penalty, thus a “deemed significant breach” or other significant breach.

Further guidance is also suggested regarding what constitutes ‘material loss or damage’ to a client. Whilst example 2(a) in table 2 provides an example of material loss or damage to members of a superannuation fund, it would be useful to provide some examples of what constitutes loss or damage to a client who has received personal advice, particularly examples of non-financial loss or damage.

In the absence of further guidance, this may still be open to be interpreted by Licensees with varying degrees of interpretation. With the intent of the changes being to create a unified breach reporting regime, the more guidance on such issues, the less room for interpretation.

In relation to reportable situations about other licensees, RG 78.66 reiterates that failure to lodge a report with ASIC in the circumstances where you have reasonable grounds to believe that a reportable situation has arisen in relation to another individual who provides personal advice and provide a copy to the licensees can attract civil penalties. It goes on to state that if *there are reasonable grounds to believe that ASIC is aware of the reportable situation and all the information that is required in a report you do not need to lodge a report.*

The FPA recommends ASIC provide further what they would see as **reasonable grounds to believe that ASIC is aware of the reportable situation and all the information that is required in a report you do not need to lodge a report.** It is unlikely that one would be aware if another person/party has not only reported a breach to ASIC, but they have done so in the correct manner and with the required information.

Whilst table 7 provides examples of reportable situations about other licensees, a further example demonstrating an instance where there are reasonable grounds to believe that ASIC is aware of the reportable situation and there is no requirement to lodge a report would be useful.

ASIC proposal B5

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.C1Q1 Do you agree with this proposal? If not, why not?

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.

FPA response

The FPA has some concerns in relation to determining who within the licensee “first knows” whether there are reasonable grounds to believe a reportable situation has arisen and states the licensee must consider section 769B(3) of the Corporations Act.

Draft RG 78.77 states **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.**

This appears to expand, significantly, the number of employees within an organisation who may have reasonable grounds to believe a reportable situation has arisen in comparison to the current RG 78.28 which states: *The reporting period starts on the day you became aware of a breach (or likely breach) that you consider could be significant. We will administer this requirement as meaning that you become aware of a breach (or likely breach) when a person responsible for compliance becomes aware of the breach. We expect your internal systems to make sure that the relevant people are aware of breaches in a timely and efficient manner.*

This is consistent with case study 4 of draft RG78 which states: *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.*

As it is currently worded, draft RG78.77 is unclear whether the test of when the licensee “first knows” is at the point an employee/agent becomes aware of a breach or likely breach or from when the compliance area first knows.

It is important to acknowledge that within an organisation/Licensee there are many employees who are not authorised to lodge a report, nor work in a compliance role/function yet due to the nature of their role, they may in fact possess knowledge and have reasonable grounds to believe a reportable situation has occurred. RG78 should therefore make it clearer that Licensees would need to ensure these employees/agents, will need to be upskilled on the process they need to follow, in order to comply with the new regime.

The FPA recommends that these paragraphs (RG78.73–77) be re-drafted and simplified to explain in a clearer manner the expectation when an employee/agent who does not have actual authority within their employment by the licensee to make a decision to lodge a breach report becomes aware a reportable situation has arisen. In particular, whether the commencement of the 30 day reporting period commences at that point or from when the compliance area first knows.

The FPA recommends 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.

ASIC proposal D1

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.

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?

FPA response

We suggest the Information Sheet be retained as a separate document with a reference to it in both RG 78 and RG 256 directing Licenses to refer to the information sheet to assist them comply with their obligation to notify, investigate and remediate affected clients.

It would be useful to include an example of a situation where the obligation to notify, investigate and remediate is triggered. ASIC could create a new example/scenario, or use an example or case study presented in RG78 to demonstrate the trigger of the obligations. Example 5(b) presented in the draft RG78 may be a suitable and relevant example of a likely scenario a licensee may be faced with. ASIC can

expand example 5(b) into the info sheet as a way of demonstrating the trigger of the obligation and the steps the licensee would then need to follow to comply with the notify, investigate, remediate obligations.

ASIC proposal C2

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 D2Q1 Do you agree with our proposal that beneficial assumptions should be used to make up for absent records? If not, why not?

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?

FPA response

FPA agrees with the proposal to provide high level guidance about the types of information it considers should be included in the notices that must be provided to affected clients.

However the FPA does not believe that the form of the notices should be approved by ASIC. The info sheet currently has sufficient guidance on what must be included in the form to allow Licensees to create a notice that sets out all the required information. ASIC may wish to consider providing an example of what a notice may look like to provide further guidance and assurance to Licensees.