



**ASIC**

Australian Securities & Investments Commission

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**Self-reporting of  
contraventions by financial  
services and credit licensees**

**Submission by the Australian  
Securities and Investments  
Commission**

May 2017

# Contents

<b>Overview</b> .....	<b>3</b>
ASIC Enforcement Review Taskforce’s position paper .....	3
ASIC’s responses to the Taskforce positions .....	5
Rationale for reforms .....	7
<b>A The subjectivity of the significance test</b> .....	<b>10</b>
Position 1: The ‘significance test’ in s912D should be retained but clarified to ensure that the significance of breaches is determined objectively .....	10
<b>B Obligation to report is set by reference to breaches by AFS licensees</b> .....	<b>13</b>
Position 2: The obligation for licensees to report should expressly include significant breaches or other significant misconduct by an employee or representative .....	13
<b>C Delay in reporting and ambiguity as to when the time allowed for reporting commences</b> .....	<b>15</b>
Position 3: Breach to be reported within 10 business days from the time the obligation to report arises .....	15
<b>D Sanctions for failure to report</b> .....	<b>19</b>
Position 4: Increase penalties for failure to report as and when required .....	19
Position 5: Introduce a civil penalty in addition to the criminal offence for failure to report as and when required.....	21
Position 6: Introduce an infringement notice regime for failure to report breaches as and when required .....	22
Position 7: Encourage a cooperative approach where licensees report breaches, suspected or potential breaches, or employee or representative misconduct at the earliest opportunity .....	22
<b>E Content of breach reports</b> .....	<b>26</b>
Position 8: Prescribe the required content of reports under s912D and require them to be delivered electronically .....	26
<b>F No equivalent regime for credit licensees</b> .....	<b>28</b>
Position 9: Introduce a self-reporting regime for credit licensees equivalent to the regime for AFS licensees under s912D .....	28
<b>G Additional issues</b> .....	<b>30</b>
Position 10: Ensure qualified privilege continues to apply to licensees reporting under s912D .....	30
Position 11: Remove the additional reporting requirements for responsible entities .....	30
Position 12: Require annual publication by ASIC of breach report data for licensees.....	32
<b>Key terms</b> .....	<b>36</b>

## Overview

- 1 We support the Government's commitment to ensuring that the Australian Securities and Investments Commission (ASIC) has the powers and regulatory tools we need to proactively address misconduct in the financial services sector.

Note: See The Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, Media Release No. 34, [ASIC enforcement review consults on breach reporting](#), 11 April 2017.

- 2 As Australia's corporate, markets, financial services and consumer credit regulator, we strive to ensure that Australia's financial markets are fair and transparent and supported by confident and informed investors and consumers.

- 3 We welcome the current ASIC Enforcement Review and will continue to provide advice and support to the Government and Treasury. In order to effectively carry out our role, we need a broad and effective enforcement toolkit.

Note: See The Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, Media Release No. 95, [ASIC Enforcement Review Taskforce](#), 19 October 2016.

## ASIC Enforcement Review Taskforce's position paper

- 4 We welcome the release of the ASIC Enforcement Review Taskforce's (the Taskforce) position paper, [Self-reporting of contraventions by financial services and credit licensees](#) (the position paper).

- 5 The position paper indicates that the timely detection of misconduct, breaches of regulatory requirements or other important matters that should be brought to our attention are important to ASIC's role as the regulator.

- 6 In this submission we provide observations from our regulatory experience to assist in the Government's consideration of the key implementation issues for the positions put forward in the paper. We support the Taskforce's goal of developing a set of reforms aimed at enhancing the current self-reporting regime and making it more effective.

- 7 From our regulatory experience, in many cases there are long gaps (sometimes of several years) between the occurrence of a breach and the reporting of the breach to ASIC. Some licensees appear to adopt complex reporting and assessment systems that delay the reporting of breaches.

- 8 One structural problem is where the person(s) who have been allocated responsibility for determining whether a breach is significant are not asked

to consider the matter until a long period of time has elapsed. Licensees are required to have adequate systems and processes in place to identify breaches and ensure that the relevant people become aware of breaches in a timely and efficient manner.

- 9 Breach reporting is a very useful mechanism for making ASIC aware of significant issues. Nevertheless, that does not mean we take action in response to all matters reported. We take a risk based approach, modulating our level of intervention based on a broad range of factors including the severity and scale of the breach, its impact on consumers and what it indicates about the licensee's compliance controls and systems. This means we take no formal regulatory action beyond engagement and monitoring in relation to the majority of the breach reports we receive (in the 2015–16 financial year we decided no action beyond monitoring was required for approximately 64% of the breach reports we received).
- 10 Timely and clear breach reports have ensured constructive responses from us. Some licensees also already inform us about suspected or potential breaches. Where licensees have reported breaches to us early, or have notified us of suspected breaches, this has worked well. We are able to engage with the licensee and take a cooperative approach to ensure proper rectification of the breach whilst still taking additional regulatory action as warranted. Early notification of breaches also allows us to work with licensees to improve their compliance procedures more broadly.
- 11 Our submission sets out observations and issues for consideration about the positions put forward in the paper: see Table 1 for a summary of our responses.

### **Terminology used in the position paper and this submission**

- 12 We note that we use 'breach reporting' and 'self-reporting' interchangeably in this submission. 'Self-reporting' accurately covers the proposed changes outlined in the position paper, including the requirement to report 'suspected' breaches.
- 13 We note the position paper uses the terms 'suspected', 'probable' and 'potential' intermittently. This submission will use the term 'suspected' to avoid confusion and to reflect our view that the relevant terms are distinguishable, with possible variable interpretations and consequences for their use. We also note that we understand the reference to 'suspected breaches' is intended to refer to suspected *significant* breaches.

## ASIC's responses to the Taskforce positions

14 Table 1 outlines our responses to each of the positions in the paper.

**Table 1: Summary of ASIC's responses to Taskforce positions**

Position number	Position description	ASIC's response	Further discussion
1	The 'significance test' in s912D of the <i>Corporations Act 2001</i> (Corporations Act) should be retained but clarified to ensure that the significance of breaches is determined objectively	We support this position.  In its current form, s912D does not facilitate and promote consistent reporting of breaches to ASIC. In addition, the ability to prescribe additional factors in regulations that determine whether a breach is significant would provide flexibility to address concerns that the types of reportable breaches may vary over time.	Section A
2	The obligation for licensees to report should expressly include significant breaches or other significant misconduct by an employee or representative	We support this position.  This is appropriate to ensure Australian financial services (AFS) licensees apply a more consistent approach when determining whether such breaches trigger the breach-reporting obligation. This will also ensure that we can investigate and take action to remove individuals from the industry to protect consumers. The change will allow for consistency with self-reporting regimes in international jurisdictions.	Section B
3	Breaches to be reported within 10 business days from the time the obligation to report arises	We support this position.  Lack of timeliness can affect the value of the breach report to ASIC and may also result in increased risk of consumer loss or detriment. We also consider it appropriate to identify instances where AFS licensees are deemed 'aware' of a significant breach or a suspected breach, and that there be a general principle to determine when 'awareness' would occur (e.g. where the licensee 'has information that reasonably suggests' a breach).	Section C
4	Increase penalties for failure to report as and when required	We support this position.  Contravention of the self-reporting obligation may have widespread ramifications and cause significant consumer detriment. Having a range of penalties allows us to calibrate our response, applying sanctions of greater or lesser severity commensurate with the misconduct.	Section D, paragraphs 65–79

Position number	Position description	ASIC's response	Further discussion
5	Introduce a civil penalty in addition to the criminal offence for failure to report as and when required	<p>We support this position.</p> <p>The lack of a civil penalty for a breach of the self-reporting obligation inhibits our ability to respond to wrongdoing flexibly and in a way that is effective and proportionate to the nature of the misconduct. The availability of a civil penalty would ensure more consistency of penalties within the Corporations Act.</p>	Section D, paragraphs 80–84
6	Introduce an infringement notice regime for failure to report breaches as and when required	<p>We support this position.</p> <p>Infringement notices provide a prompt and proportionate means of enforcing the law. There are significant variations in the seriousness of breach reporting failures. Infringement notices allow an efficient response to less serious breaches, permitting ASIC to focus more attention on the underlying substantive breach that has been reported.</p>	Section D, paragraphs 85–88
7	Encourage a cooperative approach where licensees report breaches, suspected or potential breaches, or employee or representative misconduct at the earliest opportunity	<p>We acknowledge the importance of a self-reporting system that encourages AFS licensees to notify ASIC early of issues and fosters a cooperative approach. The ability of ASIC to take no action is well established by both the law and practice.</p> <p>If a formal provision is to be inserted in the law, care needs to be taken to ensure that this does not prevent us from balancing the broader range of relevant factors in making a decision on what, if any, regulatory action to take, or accord disproportionate weight to one factor (i.e. that there was a report of the breach) in that balancing process.</p> <p>Further clarification and express mention in our regulatory guidance that we may decide not take action where a matter is reported early and/or the licensee takes a cooperative approach would be an effective way to address and set community expectations.</p>	Section D, paragraphs 89–100
8	Prescribe the required content of reports under s912D and require them to be delivered electronically	<p>We support this position.</p> <p>In our experience, breach reports often do not provide sufficient information to allow us to effectively assess the breach. If implemented, we should be able to prescribe the form and content of breach reports. This would also assist with any public reporting of data.</p>	Section E
9	Introduce a self-reporting regime for Australian credit licensees (credit licensees) equivalent to the regime for AFS licensees under s912D	<p>We support this position.</p> <p>While the requirement to self-report was not included when the credit regime was initiated, our expectations for the compliance of credit licensees are now higher.</p>	Section F



Position number	Position description	ASIC's response	Further discussion
10	Ensure qualified privilege continues to apply to licensees reporting under s912D	<p>We support this position.</p> <p>We note that equivalent changes would also need to be made to s243 of the <i>National Consumer Credit Protection Act 2009</i> (National Credit Act).</p>	Section G, paragraphs 119–120
11	Remove the additional reporting requirement for responsible entities	<p>The proposal to remove the additional reporting obligations for responsible entities would reduce their reporting obligations.</p> <p>We note the obligation under s601FC(1)(l) is more extensive than the s912D obligation in a number of respects.</p> <p>If this position is adopted, it would be appropriate to incorporate the existing threshold for reporting in s601FC(1)(l) into the factors for significance in s912D.</p>	Section G, paragraphs 121–124
12	Require annual publication by ASIC of breach report data for licensees	<p>We recognise the importance of transparency and executive accountability for misconduct in the financial services sector.</p> <p>Whilst the proposals put forward could assist with enhancing transparency and executive accountability for misconduct, the data involved would have significant limitations. To effectively supplement our current reporting, consideration could be given to the publishing of other forms of data—including internal dispute resolution (IDR) data, which will effectively achieve the intent of this position.</p>	Section G, paragraphs 125–152

## Rationale for reforms

- 15 ASIC's role includes promoting consumer trust in Australia's financial system and improving accountability for those providing financial products and services in our financial system.
- 16 We support the review of the breach reporting regime, and have publicly highlighted the importance of improvements to these provisions.

### Importance of breach reporting

- 17 Breach reporting is an important part of the regulatory framework. There is a clear expectation in the Australian financial services regime that financial services firms will play a role in identifying and reporting market problems. There is also a clear community expectation that firms need to take responsibility and play a role in lifting industry standards, and part of this comes from timely identification of problems within the industry.

- 18 Breach reporting by AFS licensees is one of our key information sources. We consider all breach reports that we receive. Effective breach reporting enables ASIC to:
- (a) identify misconduct and compliance issues within licensees;
  - (b) take steps to remedy the effects of misconduct and to protect investors from further misconduct;
  - (c) take regulatory and law enforcement action where warranted (disrupting harmful behaviour);
  - (d) understand emerging and changing trends and risks within the financial services industry; and
  - (e) respond to trends and risks by:
    - (i) educating investors; and
    - (ii) providing guidance to participants.
- 19 We understand that breaches will occur in businesses, and we have provided guidance to AFS licensees about how to comply with the breach reporting obligation in [Regulatory Guide 78](#) *Breach reporting by AFS licensees* (RG 78).
- 20 We have highlighted in [RG 78](#) that AFS licensees should not wait to report until:
- (a) the breach, or breach that is likely to occur (likely breach), has been considered by the licensee's board of directors or legal advisers;
  - (b) they have taken steps to rectify the breach; or
  - (c) in the case of a likely breach, the breach has in fact occurred.
- 21 Failure to or a delay in notifying ASIC of significant breaches, or suspected breaches, may impede our ability to take appropriate enforcement or other regulatory action. Importantly, it may also result in an increased risk of consumer loss or detriment.

### **ASIC's concerns**

- 22 For some time we have held concerns that AFS licensees are either not reporting significant breaches to ASIC at all, or not reporting in a timely and consistent manner. Delays in reporting are often caused by failures in compliance systems or subjective interpretations of the breach reporting obligation.
- 23 As mentioned at paragraph 8, it is problematic when the person(s) responsible for determining that a breach is significant are often not asked to consider the matter until a long period of time has elapsed.



- 24 In recent years we have renewed our focus on breach reporting and highlighted deficiencies in both large and small firms' approach to breach reports. For example, in [Report 515 \*Financial advice: Review of how large institutions oversee their advisers\*](#) (REP 515), we highlighted deficiencies in the approach to self-reporting by Australia's largest financial advice firms. The report identified that it was apparent that self-reporting practices varied. In fact, part of the problem was that in almost half of the cases, the institutions did not report serious compliance concerns to us until we gave them a direction to report.
- 25 As foreshadowed in [ASIC's Corporate Plan 2016–17 to 2019–20: Focus 2016–17](#), we have commenced a review of how AFS licensees discharge their breach reporting obligations. Given the importance of the breach reporting regime, we are seeking to better understand how AFS licensees—initially banking groups in particular—comply with their breach reporting obligations and address any associated cultural questions.
- 26 Therefore, it is opportune that the Government, as part of the ASIC Enforcement Review, has committed to improving transparency and accountability in the financial services industry by broadening and strengthening the obligations of licensees to make timely reports to ASIC.
- 27 We also observe that, in principle, it may be appropriate in the future to consider applying relevant reforms from the current review process to other breach reporting regimes, including that of market operators.

## A The subjectivity of the significance test

### Key points

We support the position that the 'significance test' in s912D should be clarified to ensure that the significance of breaches is determined objectively.

In its current form, s912D does not facilitate and promote consistent reporting of breaches to ASIC. In addition, the ability to prescribe additional factors in regulations that determine whether a breach is significant would provide flexibility to address concerns that the types of reportable breaches may vary over time.

### Position 1: The 'significance test' in s912D should be retained but clarified to ensure that the significance of breaches is determined objectively

- 28 The position paper proposes to amend s912D to provide that significance is to be determined by reference to an objective standard, rather than a subjective measure of significance for the particular AFS licensee. The Taskforce suggests that this could be achieved by providing that AFS licensees must notify ASIC of matters that a reasonable person would regard as significant, taking into account the existing factors set out in s912D(1)(b) and any additional factors prescribed by regulation.
- 29 We support this position. It will reduce subjectivity and uncertainty about when a matter is significant and reportable. Currently, the significance threshold requires AFS licensees to make a qualitative assessment of the significance of any breach or likely breach, taking into account the factors set out in s912D(1)(b).
- 30 In its current form, s912D does not facilitate and promote consistent reporting of breaches to ASIC. The subjective nature of the significance test has resulted in variations in interpretation and in reporting.
- 31 Although adopting the proposed more objective standard for determining significance will not remove the requirement for AFS licensees to make qualitative assessments of any breach, it will allow for a more consistent interpretation by industry of the requirement in the law.
- 32 As referred to in the position paper, the factors set out in s912D(1)(b) relate to the particular circumstances of the AFS licensee (i.e. impact of the breach on the licensee's ability to provide the financial services covered by its licence and the extent to which the breach indicates the licensee's arrangements are inadequate to ensure compliance). These factors would

continue to involve an element of subjectivity—for example, a reasonable person may form the view that a particular breach within a large AFS licensee would not have a significant impact on the licensee’s ability to provide financial services, but the same breach within a small licensee would have a significant impact on such ability.

- 33 Further, the size of consumer losses may suggest significance, whereas the lack of impact on the licensee’s ability to provide financial services may detract from the breach’s significance. This is despite our view, set out in [RG 78](#), that any breach of a licensee’s obligations that causes actual or potential financial loss to consumers is likely to be significant.
- 34 Importantly, and as acknowledged in the position paper, financial loss is not the only way a breach can involve detriment to consumers (e.g. failure to provide proper disclosure, which may not immediately result in financial loss). Non-financial loss can also equate to an opportunity cost for consumers, which can be significant. Even where losses may be minimal or non-existent, the breach may affect the licensee’s ability to provide financial services or indicate that the licensee’s compliance arrangements are inadequate.
- 35 Therefore, it is appropriate to supplement an objective reasonable person test by adding to the existing legislative list of relevant factors.
- 36 In addition, the ability to prescribe additional factors relevant to the determination of whether a breach is significant through regulations would make it clear that the test for significance is not confined to the listed factors, which may not adequately cater for assessing significance in all circumstances and may evolve over time. The ability to deem particular circumstances to be significant would also provide flexibility to address concerns that the types of reportable breaches may vary over time, in line with changes in industry practice, identified compliance patterns and areas of consumer vulnerability.
- 37 We consider that the proposed expansion of the trigger of the self-reporting obligation, to include suspected breaches, will lead to timelier reporting. This will allow ASIC to engage with the AFS licensee at an earlier stage and help ensure more effective rectification and remediation. Licensees will be able to report a suspected breach before the completion of an investigation, including where internal investigations may still have a substantial period of time to complete before determining the existence of a significant breach. Consistent with the practical reality of dealing with broader and systemic problems, engagement with ASIC and the design and implementation of any necessary fix and remediation can commence and continue during the ongoing investigation.

- 38 We note that if AFS licensees are required to report suspected breaches in addition to actual significant breaches, this will increase the number of reports made to ASIC and have practical implications for our resourcing for assessment and risk-based surveillance allocation.

## B Obligation to report is set by reference to breaches by AFS licensees

### Key points

We support the position that the self-reporting obligation should expressly include significant breaches or other significant misconduct by an employee or representative.

This is appropriate to ensure AFS licensees apply a more consistent approach when determining whether such breaches trigger the breach-reporting obligation. This will ensure that we can investigate and take action to remove individuals from the industry to protect consumers. This change will also ensure consistency with self-reporting regimes in international jurisdictions.

### Position 2: The obligation for licensees to report should expressly include significant breaches or other significant misconduct by an employee or representative

- 39 The position paper proposes to extend the AFS licensees' self-reporting obligation to matters relating to the conduct of employees and representatives.
- 40 It is indicated in the paper that, while such conduct may already be covered (as AFS licensees are responsible for conduct of their representatives, and therefore a breach by a representative involves a breach by the licensee), there are a number of obligations that apply directly to representatives, rather than to the licensee.
- 41 In Ch 7 of the Corporations Act, and in particular Pt 7.7A, important obligations are placed on a representative (or advice provider), rather than on an AFS licensee. Licensees must then monitor and enforce compliance by their representatives. To remove any doubt or confusion regarding breaches of Ch 7, the self-reporting obligation of an AFS licensee should explicitly extend to a breach by a representative of the licensee, as well as a breach by the licensee itself.
- 42 We support making this requirement clear in the legislation. We consider that this is appropriate to ensure AFS licensees apply a more consistent approach when determining whether such breaches trigger the self-reporting obligation. This will ensure that we can, where necessary, investigate and take action to remove individuals from the industry to protect consumers. As the position paper acknowledges, this change would also ensure consistency with the self-reporting regimes in international jurisdictions—for example,

the United Kingdom's Financial Conduct Authority (FCA) requires immediate notification of specified breaches of rules or regulations by the firm or its directors, officers, employees, approved persons or appointed representatives.

- 43 We note the position paper indicates that the decentralised nature of the authorised representative base in larger licensees may present difficulties in ensuring timely identification and reporting of breaches. The paper further states that, at present, licensees must have a system and policies to require representatives to report issues to them, to identify breaches and assess whether the licensees need to report them. However, the proposal to extend the self-reporting obligation does not place a reporting obligation on the representatives themselves—accordingly, it does not seem to address the identification difficulty for AFS licensees referred to in the paper. Under the current law we would expect that AFS licensees have systems that enable an adequate level of oversight of representatives' conduct, appropriate to the business structure and level of day-to-day contact with representatives.



## C Delay in reporting and ambiguity as to when the time allowed for reporting commences

### Key points

We support the continued requirement to report a breach within 10 business days from the time the self-reporting obligation is triggered.

Lack of timeliness can affect the value of the breach report to ASIC and may also result in increased risk of consumer loss or detriment. We also consider it appropriate to identify instances where AFS licensees are deemed 'aware' of a significant breach or a suspected breach, and that there be a general principle to determine when 'awareness' would occur (e.g. where the licensee 'has information that reasonably suggests' a breach).

### Position 3: Breach to be reported within 10 business days from the time the obligation to report arises

- 44 We support the continued requirement to report a breach within 10 business days from the time the self-reporting obligation is triggered.
- 45 As discussed in Section A, the assessment of 'significance' should be determined by reference to an objective standard. However, we consider that the adoption of this standard will have more influence on the consistency of the interpretation of significance than on the timing of the making of reports.
- 46 A difficulty with the current trigger of the self-reporting obligation is that the commencement of the time period for reporting is affected by when the AFS licensee becomes 'aware' of the significant breach, which is dependent on an individual licensee's internal processes and policies.
- 47 We expect that AFS licensees' internal systems should ensure that the relevant person(s) become aware of breaches in a timely and efficient manner. However, for some licensees the authority to determine the significance of a breach and whether it should be reported is invested in one staff member (or group) who, because of internal investigation and reporting processes, may not be asked to consider the matter until a long period of time has elapsed. On occasion, it appears that the delegated decision maker only becomes aware of the facts well after some others in the organisation. This situation is exacerbated in large organisations where there are multiple decision-making layers.
- 48 Recently, in [REP 515](#), we highlighted this problem, noting that there is a widespread view that the time period for breach reporting commences only

after the decision maker(s) delegated to decide whether a breach should be reported have become aware of the breach and determined that it is significant to the AFS licensee. This approach has led to considerable delays in reporting to ASIC.

- 49 We have received breach reports from AFS licensees that refer to conduct that occurred a number of years prior, where internal investigations have taken a substantial period of time to complete and there have been further delays in the ultimate decision-making process regarding whether the breach was significant and whether it was reportable.
- 50 Lack of timeliness can affect the value of the breach report to ASIC, hinder our ability to intervene in a meaningful way—including in rectification and remediation plans—and may also result in an increased risk of consumer loss or detriment.
- 51 Therefore, we consider it appropriate to identify instances where AFS licensees are to be deemed ‘aware’ of a significant breach or a suspected breach.
- 52 We also consider it appropriate to introduce a general principle to determine when ‘awareness’ would otherwise occur. This could potentially be consistent with the equivalent obligations in the United Kingdom, which specifies that a licensee is considered ‘aware’ when it has information that reasonably suggests that a breach has occurred or is likely to occur. This would support a consistent approach to awareness by AFS licensees.
- 53 A more objective standard for determining when a breach is significant and when an AFS licensee is ‘aware’, complemented with the ability to prescribe additional factors in legislation or in the regulations, will mitigate complex or artificial reporting structures that can delay a licensee becoming aware of a breach and considering whether it is significant (resulting in a delay in providing a report to ASIC).

### **‘Suspected’ breach reports**

- 54 Position 3 proposes to extend the reporting obligation to suspected significant breaches (suspected breaches)—that is, the self-reporting obligation is triggered when the AFS licensee becomes aware or has reason to suspect that a significant breach has occurred, may have occurred or may occur, instead of when the licensee determines the breach has occurred or is likely to occur.
- 55 We support the extension of the self-reporting obligation to suspected breaches. We consider that this change will ensure AFS licensees do not have to conduct lengthy investigations to determine whether they are required to report.

56 Suspicion may be considered a broader test than where an AFS licensee ‘has information that reasonably suggests’ a breach has or may have occurred, as per the FCA’s requirement. However, if ‘suspected breaches’ is not adopted as a trigger of the self-reporting obligation, we would also support the adoption of ‘has information that reasonably suggests’ as a trigger.

57 Alternatively, we would support the reporting of both suspected breaches and the trigger of ‘has information that reasonably suggests a breach has or may have occurred’. This combination could further assist with reducing any ambiguity.

### **Implications of changes**

58 The extension of this obligation to report may also address the reluctance of some AFS licensees to voluntarily advise ASIC of a potential issue, as voluntary reports do not have the benefit of the qualified privilege under s1100A of the Corporations Act.

59 It should be acknowledged that extending the self-reporting obligation to suspected breaches will change the nature of some of the breach reports we receive. Currently, all breach reports are received on the basis that the licensee has determined that a significant breach has occurred. Whereas a suspected breach may, on investigation, be determined to be a significant breach, a minor breach or in fact not a breach at all. However, we note that some licensees already advise us of suspected breaches (before they have completed their investigations) and this works effectively.

60 Further, the combination of an objective test to determine significance and extending the reporting obligation to suspected breaches will likely increase the number of reports we receive. As such (if these changes are adopted), there will be some effects on the processes and costs of both industry and ASIC.

61 However, the proposed change should not significantly affect the resources and systems required by AFS licensees to investigate suspected breaches, as these should already be in place.

### **ASIC oversight**

62 We take a risk-based approach to selecting the breaches we will monitor or investigate, as set out in [RG 78](#). Importantly, the extension of the self-reporting obligation to suspected breaches will provide ASIC with timely and additional intelligence that can be used when determining which matters to resource, and enhance the benefits of ‘effective breach reporting’: see paragraph 18.

63 To ensure we have appropriate oversight of all breach reports received, AFS licensees who lodge a suspected breach report should still be required to

formally advise ASIC if the suspected breach is confirmed as a significant breach.

- 64 We may be able to monitor suspected breaches more effectively if breach reports are required to be delivered in a prescribed electronic form. In any case, to ensure appropriate risk-based assessment of breach reports, in light of the expected increase of both suspected and significant breach reports, ASIC's resources will need to be considered.

## D Sanctions for failure to report

### Key points

We support:

- Position 4, which recommends that penalties for failure to report as and when required should be increased. Having a range of penalties allows us to calibrate our response, applying sanctions of greater or lesser severity commensurate with the misconduct;
- Position 5, which proposes to introduce a civil penalty in addition to the criminal offence for failure to report as and when required; and
- Position 6, which proposes an infringement notice regime for failure to report breaches as and when required. Infringement notices allow an efficient response to less serious breaches, so that ASIC can focus more attention on the underlying substantive breach that has been reported.

In response to Position 7, we acknowledge the importance of a self-reporting system that encourages AFS licensees to notify ASIC of issues earlier and fosters a cooperative approach. Our ability to take no action is well established by both the law and practice, and we currently consider a licensee's level of cooperation when deciding whether to take action.

Further clarification and express mention in our regulatory guidance that we may decide not take action where a matter is reported early and/or the licensee takes a cooperative approach may be an effective way to address and set community expectations.

### Position 4: Increase penalties for failure to report as and when required

#### Effective enforcement toolkit

- 65 The community expects ASIC to take strong action against corporate wrongdoers. Effective enforcement is therefore critical for ASIC in pursuing our strategic objectives of promoting investor and consumer trust and confidence and ensuring fair and efficient markets.
- 66 An overarching priority is to ensure that the enforcement regime provides adequate incentives for cooperation with ASIC, whether as a deterrent to misconduct or as an incentive for cooperation after misconduct has occurred (e.g. breach reporting and remediation).
- 67 It is important that we have a range of regulatory and enforcement sanctions and remedies available to us, including punitive, protective, preservative,

corrective or compensatory actions, or otherwise resolving matters through negotiation or issuing infringement notices: see [INFO 151](#).

68 An essential part of our enforcement toolkit is having access to a broad range of criminal, civil and administrative sanctions that adequately cover the typical range of corporate and financial misconduct, and a corresponding range of penalties that are set at an appropriate level, given the nature of the misconduct and the type of entity likely to be involved.

69 Gaps in this toolkit prevent ASIC from making an optimal enforcement response, because the appropriate maximum penalty or remedy is not available. This can risk undermining confidence in the financial regulatory system.

70 Central to effective enforcement are penalties set at an appropriate level, and having a range of penalties available for particular breaches of the law. Having a range of penalties allows us to calibrate our response, applying sanctions of greater or lesser severity commensurate with the misconduct. This aims to deter other contraventions, and promote greater compliance, resulting in a more resilient financial system.

71 A stronger penalty regime would allow us to deliver better market outcomes and improve the cost-effectiveness of our enforcement actions by maximising their impact and deterrent effect.

72 Penalties in the legislation we administer have been in place for extended periods, and either not reviewed at all since they were enacted, or reviewed only in a piecemeal way. Penalties available to ASIC are also out of step with those available to other international and domestic regulators. This has led to shortcomings in the consistency or size of penalties, which creates gaps between community expectations of the appropriate regulatory response to a particular instance of misconduct and what we can do in practice: see [REP 387](#).

73 We note that within the broader ASIC Enforcement Review, the current levels of maximum penalties available in ASIC-administered legislation are being considered. This follows the Government's response to the Financial System Inquiry (FSI). The FSI recommended that penalties available to ASIC should be substantially increased.

### **Criminal penalty for failure to report breaches**

74 We agree with the Taskforce's position that the monetary and custodial penalties for failure to report breaches in a timely fashion should be increased, to reflect the importance of the obligation and community expectations.

75 The position paper notes at paragraph XI that:



a criminal sanction is inappropriate for more minor or inadvertent infractions, and conversely, the modest nature of the fine is an insufficient deterrent to be effective in encouraging licensees to self-report offences at the more serious end of the spectrum.

- 76 Prosecution for a criminal offence is currently the only directly available remedy for contravention of s912D, with a maximum penalty of:
- (a) 50 penalty units (\$9,000) or imprisonment for one year, or both, in the case of an individual; and
  - (b) 250 penalty units (\$45,000) in the case of a body corporate.

Note: Each penalty unit is currently worth \$180.

- 77 This maximum penalty is not an adequate deterrent where an AFS licensee may be tempted to contravene s912D and not report breaches to ASIC. This is drawn from our experience as a regulator, including issues arising in particular cases and inquiries, and findings from [Report 387](#) *Penalties for corporate wrongdoing* (REP 387)

- 78 Contravention of the self-reporting obligation may have widespread ramifications and cause significant consumer detriment. Therefore, we consider that the provision should remain a criminal offence, punishable by a fine and/or imprisonment, for an AFS licensee who intentionally fails to report a breach of which it has actual knowledge. We also consider that the penalty should be increased, to be an effective deterrent.

- 79 Any penalties that are implemented would need to be considered for consistency within the broader ASIC Enforcement Review.

## **Position 5: Introduce a civil penalty in addition to the criminal offence for failure to report as and when required**

- 80 We support the introduction of a civil penalty, in addition to the existing criminal offence, for failure to report when required.
- 81 The lack of civil penalty for a breach of the self-reporting obligation inhibits our ability to respond to wrongdoing flexibly and in a way that is effective and proportionate to the nature of the misconduct. Introducing a civil penalty provision would facilitate regulatory responses appropriate to address and deter misconduct that may not be criminal.
- 82 In general, there is a gap in the penalties for breaching the financial services provisions of the Corporations Act where there are criminal offences, but no civil penalties sitting alongside the offence provisions, as there are for other offences in legislation we administer.

- 83 We note civil penalties were introduced for failure to comply with the best interest and related obligations in Pt 7.7A of the Corporations Act when those provisions were enacted as part of the Future of Financial Advice reforms. The availability of civil penalties for failure to comply with the breach reporting obligation would ensure more consistency within the Corporations Act.
- 84 The current ASIC Enforcement Review will also consider the broader civil penalty regime and process.

### **Position 6: Introduce an infringement notice regime for failure to report breaches as and when required**

- 85 We support the introduction of an infringement notice regime for failure to report breaches as and when required.
- 86 We require a broad, effective range of enforcement remedies to enable us to respond to the full range of types and severity of misconduct, from less grave to more serious breaches. There are significant variations in the seriousness of breach reporting failures. Infringement notices allow an efficient response to less serious breaches, permitting ASIC to focus more attention on the underlying substantive breach that has been reported.
- 87 For a contravention of the breach reporting obligation, not involving a deliberate failure to report, we should be able to issue an infringement notice or apply for a civil penalty, set at a level that adequately deters an AFS licensee from contravening the provision.
- 88 Infringement notices provide a prompt and proportionate means of enforcing the law. Such a remedy may be appropriate for less serious contraventions and where criminal and civil penalties would be disproportionate with the nature of the breach. This will allow ASIC to respond effectively and in a timely manner to less serious misconduct, where the absence of regulatory action could affect compliance more broadly.

### **Position 7: Encourage a cooperative approach where licensees report breaches, suspected or potential breaches, or employee or representative misconduct at the earliest opportunity**

- 89 ASIC's ability to take no action is well established by both the law and practice. We take into account the AFS licensee's level of cooperation and the actions they take to rectify the matter and/or remediate consumers when we decide whether to intervene or take any regulatory action. Further, as

indicated at paragraph 9, in the majority of cases we decide to not take any action beyond monitoring in response to the breach reports we receive.

- 90 If a formal provision is to be inserted in the law, care needs to be taken to ensure that this does not prevent us from balancing the broader range of relevant factors in making a decision on what, if any regulatory action to take, or accord disproportionate weight to one factor (i.e. that there was a report of the breach) in that balancing process.

### **Our current approach**

- 91 [Information Sheet 172](#) *Cooperating with ASIC* (INFO 172), in addition to other publicly available documents, clearly outlines that a cooperative approach to dealings with ASIC may benefit a person or entity in a number of ways. If a licensee cooperates with ASIC, we recognise this cooperation and can negotiate alternative resolutions to the matter. We may also provide a letter of comfort, which informs the licensee that they are not the subject of an investigation and/or that they will not be the subject of civil or administrative action as a result of a specific investigation.

- 92 We acknowledge the importance of a self-reporting regime that encourages AFS licensees to notify ASIC early of issues, and fosters a cooperative approach. As explained in [RG 78](#), our response to the breach will be influenced by whether we can be satisfied of the factors in RG 78.41; in some cases, we may decide to not take any further action. The factors in RG 78.41 include:

- (a) the licensee has made a genuine attempt to comply with the law and the breach reporting obligation;
- (b) the causes of the breach have been identified and, if readily rectified, addressed so that it is unlikely to recur;
- (c) in other cases, a plan for rectifying the compliance failure has been developed and submitted to ASIC;
- (d) the consequences (particularly to consumers) are able to be dealt with comprehensively (e.g. by compensation and communication);
- (e) there has been no undue delay in notifying ASIC; and
- (f) if the circumstances suggest that there are some more significant compliance issues within the licensee's business, they are identified.

- 93 If we cannot be satisfied of the factors in RG 78.41, then it may be necessary for us to require AFS licensees to take remedial action—such as changing procedures, strengthening existing compliance measures, systems and controls, or giving corrective disclosures or compensation (where appropriate) to consumers.

## Increasing awareness of our approach

- 94 If an express provision was made ‘allowing’ ASIC to decide to not take action in particular circumstances, it should not operate in a manner that would fetter our existing discretion about whether we take action, and what form this may take. Our ability to determine the appropriate regulatory response, taking all relevant factors into account, is central to our role and responsibilities as a regulator and to ensure that our financial system is fair and efficient. There may be circumstances where, despite cooperation and rectification by the licensee, it is still appropriate for us to take regulatory action in response to the breach(es). Our discretion regarding such instances should be preserved for this reason.
- 95 We consider that further clarification and express mention in our regulatory guidance that we may decide to not take action where a matter is reported early and/or the AFS licensee takes a cooperative approach (by, for example, implementing a program as set out in paragraph 68 of the position paper) may be an effective way to address and set community expectations.

## Our ability to make inquiries

- 96 We note the position paper states at paragraph 66 that ‘if a licensee is self-reporting suspected or potential breaches of obligations it should be given an opportunity to complete its investigations’. While we consider that it is essential that licensees complete their investigations and advise us of their conclusions, our ability to start our own concurrent inquiries should not be fettered. We should be able to make inquiries at any time where we consider this is necessary based on the seriousness of the suspected or potential breach(es) reported and other relevant factors.
- 97 If we were prevented from making inquiries while the licensee’s investigation continued, an incentive would be created to extend that investigation; this would increase the risk of evidence being compromised and of the effects on consumers remaining unaddressed and/or continuing.

## Cooperation in criminal and civil proceedings

- 98 The position paper also suggests an ‘uplift or discount’ in the penalty for a breach of the law, if the AFS licensee reports the breach within the statutory time limit, and for self-reporting to be identified as a circumstance to be taken into account when considering whether a licensee should be granted relief from liability in criminal or civil penalty proceedings.
- 99 We note that the court takes cooperation into account in both criminal and civil proceedings. Therefore, it is unclear whether this proposal would significantly add to the existing discretion of the court to take cooperation

into account in determining an appropriate penalty and circumstances in which relief from liability is appropriate.

100 However, we suggest that the court could be provided with some specific guidance on the amount of discount to be applied. It may also be useful to include a specific provision allowing a judge to draw a negative conclusion about an AFS licensee's degree of contrition where they fail to report a breach of which they are aware, which later leads to a penalty.

## E Content of breach reports

### Key points

We support the position that the content of breach reports should be prescribed, and that they must be delivered electronically.

In our experience, breach reports often do not provide sufficient information to allow us to effectively assess the breach. If implemented, we should be able to prescribe the form and content of breach reports. This would also assist with any public reporting of data.

### Position 8: Prescribe the required content of reports under s912D and require them to be delivered electronically

- 101 The position paper proposes electronic lodgement of breach reports in a prescribed form, which will allow some automated analysis and more readily enable ASIC to identify trends. While the form must include specified information, it should also have sufficient flexibility to allow AFS licensees to supplement the information provided.
- 102 We support this position and, if implemented, consider that we should be able to prescribe the form and content of breach reports.
- 103 It would improve the efficiency and usefulness of the breach reporting regime if a breach report had to:
- (a) be lodged with ASIC electronically to allow some automated analysis of breach reports;
  - (b) be lodged in a form prescribed and approved by ASIC;
  - (c) include the information required by the form; and
  - (d) be accompanied by any other material required by the form.
- 104 Currently, if the breach reporting obligation is triggered, s912D(1B) simply requires an AFS licensee to provide a ‘written report of the matter’, and there is no mechanism to prescribe the content of breach reports. Accordingly, the information contained in reports is determined by the AFS licensee. The varying quality and comprehensiveness of breach reports provided by AFS licensees is problematic as they do not always provide sufficient information to enable us to properly assess the breach. This necessitates further inquiries by ASIC, which in turn increases the length of time taken to consider and deal with the breach report.



105 We have suggested AFS licensees use [Form FS80 Notification by an AFS licensee of a significant breach of a licensee's obligations](#); however, it is not uniformly used and is not compulsory.

106 In a number of other reporting regimes under the Corporations Act, documents must be lodged with ASIC in a 'prescribed form'. This means that the lodged form must either be in the form prescribed in the regulations or be in the form approved by ASIC: see s350 of the Corporations Act.

107 Paragraph 73 of the position paper acknowledges that ASIC's information gathering powers can address some gaps in information initially provided by AFS licensees. However, at the preliminary assessment stage (when we first receive the breach report) having to pursue further information by notice would cause delays in assessing and, if required, escalating breaches. To address this issue, we suggest that s912D could be amended to include a requirement to give further relevant information and documents about the reported breach, if requested by ASIC.

108 In addition, it may also be useful to allow for a supplementary form to provide more detailed information in the prescribed format at a later stage in the licensee's investigation of the breach. A similar and effective provision for supplementary reporting is included in the statutory reporting obligations on external administrators under s422, 438D and 533 of the Corporations Act.

109 Prescribed and electronic reporting would also assist in the delivery (and integrity) of any public reporting contemplated under Position 12 of the proposals paper.

110 If the self-reporting obligation is extended to suspected breaches (see Position 3, paragraphs 54–64), different forms may need to be used—one to report a significant breach and one to report a suspected breach. This will take into consideration that limited information may be available when reporting a suspected breach.

111 Further, we consider that an electronic portal would make providing the breach report to ASIC a more efficient process for AFS licensees and has the potential to reduce the impact on our resources of expanding breach reporting to suspected breaches. Our ability to readily access such data would also benefit licensees and consumers—we envisage a portal that is also able to capture and identify trends in financial products and financial services.

Note: The Australian Prudential Regulation Authority (APRA) provides the [APRA Extranet](#) to licensees, an electronic portal through which they can submit breach reports.

112 We note that prescribed electronic reporting would also need to apply to self-reporting credit licensees (if implemented).

## F No equivalent regime for credit licensees

### Key points

We support the introduction of a self-reporting regime for credit licensees, equivalent to the regime for AFS licensees under s912D.

While the requirement to self-report was not included when the credit regime was initiated, our expectations for the compliance of credit licensees are now higher.

### Position 9: Introduce a self-reporting regime for credit licensees equivalent to the regime for AFS licensees under s912D

- 113 We support the introduction of equivalent self-reporting obligations on credit licensees. Self-reporting by credit licensees will serve the regulatory purposes of self-reporting more generally, as described in paragraph 18 of this submission.
- 114 We note the requirement to self-report was not included when the credit regime was initiated. The position paper indicates that the main reason the credit regime did not include self-reporting at its introduction was to reduce the range of new obligations placed on credit licensees. Therefore, the reason credit licensees do not having a self-reporting obligation would appear to be historical, rather than because of different characteristics of the credit industry.
- 115 Credit licensees have now had a number of years to adjust to the licensing regime and obligations, and put in place appropriate systems and processes to support compliance with their obligations (including the monitoring and supervision of representatives, and maintaining their own records of compliance breaches). Moreover, because the obligations have been in place for some time—and in light of the work we have done with the credit industry through our guidance, reviews and published reports—our expectations for compliance are now higher.
- 116 While the introduction of a breach reporting obligation would involve some additional costs for credit licensees, it should not be a matter of developing entirely new systems and processes. Credit licensees also have an obligation to have adequate systems in place for monitoring and compliance, which should be able to identify any breaches that occur.
- 117 There do not appear to be other reasons for treating credit licensee obligations differently from those of AFS licensees, as the risks posed by breaches of both types of licensee are aligned.

- 118 Credit licensees have an existing obligation to lodge an annual compliance certificate. We do not propose to remove that obligation, as the annual compliance certificate has the following other purposes:
- (a) updating details of the ‘fit and proper persons’ for the licensee;
  - (b) assessing the annual fee; and
  - (c) ensuring a focus at the licensee’s senior level on ensuring the adequacy of their processes and systems for complying with the law going forward.

## G Additional issues

### Key points

We support Position 10, which recommends that qualified privilege continue to be provided to AFS licensees reporting under s912D. We note that equivalent changes would also need to be made to s243 of the National Credit Act.

We consider that Position 11, which proposes to remove the additional reporting obligations under s601FC(1)(1) for responsible entities would reduce their reporting obligations. If this position is adopted, it would be appropriate to incorporate the existing threshold for reporting in s601FC(1)(l) into the factors for significance in s912D.

We consider the proposals put forward in Position 12 could assist with enhancing transparency and executive accountability for misconduct; however, the data involved would have significant limitations. To more effectively supplement our current reporting, consideration could be given to publishing other forms of data—including IDR data, which will effectively achieve the intent of this position.

### Position 10: Ensure qualified privilege continues to apply to licensees reporting under s912D

- 119 The position paper proposes that if any changes are made to self-reporting content and process requirements, s1100A of the Corporations Act may need to be reviewed to ensure qualified privilege continues to be provided to AFS licensees reporting to ASIC under s912D.
- 120 We support this position; however, we consider that if any changes are made to s1100A of the Corporations Act, equivalent changes would also need to be made to s243 of the National Credit Act.

### Position 11: Remove the additional reporting requirements for responsible entities

- 121 The position paper proposes that, to streamline the self-reporting regime for responsible entities, the self-reporting obligation under s601FC(1)(l) should be removed so that all breaches by responsible entities are self-reported under s912D.
- 122 This proposal would result in reduced reporting obligations for responsible entities. We note the obligation under s601FC(1)(l) is more extensive than the s912D obligation in a number of respects, as it extends to:

- (a) any breach of the Corporations Act the responsible entity becomes aware of—not only breaches of the financial services laws, as is the case with s912D. This covers obligations relating to registers of members (Ch 2C), meetings of members (Ch 2G), financial reporting and audit (Ch 2M), and the annual return (Ch 2N);
- (b) breaches that relate to the scheme, whether or not the responsible entity is in breach. This is important to cover breaches by:
  - (i) persons acting as a delegate or person engaged by the responsible entity. For example, it would include a case of misconduct by a custodian who fails to transfer securities on instructions and in breach of the custodian’s obligations under s912A(1)(a). The custodian themselves might not regard the breach as significant. In another example, misleading advertising for the scheme by an investment manager may not otherwise be reported by the responsible entity. Section 601FB(2) ensures that the acts or omissions of delegates engaged by the responsible entity are treated as acts or omissions of the responsible entity for certain purposes, but not for the purpose of breach reporting;
  - (ii) officers of the responsible entity under s601FD and employees under s601FE. While the responsible entity may report its breaches under s912D, it would not be required to report the breach by the officer or employee;
  - (iii) auditors—for example, in relation to their financial statement and compliance audits, meeting independence standards; or meeting their breach reporting obligations; and
  - (iv) former responsible entities of the scheme, after a change in responsible entity, for any previous conduct that meets the reporting test and for failing to cooperate with the transfer as required by s601FR;
- (c) a breach that has had, or is likely to have, a materially adverse effect on the interests of members. This may apply even when the significance tests in s912D are not satisfied.

123 The existing provision is consistent with other provisions in Ch 5C relating to compliance which refer to the Corporations Act—in particular, s601FD(1)(F)(i) and 601HA. It would be unusual for the Act to require compliance measures to address breaches of provisions such as Ch 2M, but not require reporting of breaches of the provision.

124 Therefore, we consider that, if this position is adopted, it would be appropriate to incorporate the existing threshold for reporting in s601FC(1)(I), applicable to responsible entities, into the factors for significance in s912D.

## Position 12: Require annual publication by ASIC of breach report data for licensees

- 125 We recognise the importance of transparency and executive accountability for misconduct in the financial services sector. Public reporting that provides regulatory transparency to the community promotes confident and informed investors and consumers in the financial system.
- 126 ASIC has a strong policy of transparency and we are committed to communicating publicly about our regulatory activities. We consider that enhanced transparency through effective data reporting can help ensure trust and confidence in the industry by holding licensees accountable.
- 127 Empowering consumers with useful and accurate information gives AFS licensees a strong incentive to comply with their obligations. Increasing consumers' access to useful data can also help them better assess and manage risks, and make better decisions.
- 128 At present, we publicly report on breach reports in aggregate in our annual report, enforcement reports, and our public reports and media releases that relate to individual breach reports. We name licensees where the breach reported is significant and it is in the public interest to do so. In addition, we also publish data on our enforcement outcomes, including criminal, civil and administrative actions in the financial services and credit industries.
- 129 We note the position paper proposes that our reporting could be supplemented by the publication of firm-level or licensee-level breach report data. The paper also suggests that the reporting could extend to identifying the operational area of the licensee's organisation in which the breach occurred.
- 130 We consider that these proposals could assist with enhancing transparency; however, the data involved would have some significant limitations. We consider that publication of other forms of data, particularly IDR data, would have more benefits and achieve the underlying intent of position 12.

### Limitations of breach report data

#### Volume of data

- 131 At 30 June 2016, there were 5,511 AFS licensees registered with ASIC. In 2016, only approximately 10% of those licensees lodged a breach report.
- 132 During 2015-16 approximately 1,172 breach reports were received under s912D and, on average, the number of breach reports per licensee was very low.

- 133 Of those licensees that had reported, most reported between one and five breaches. In 2015, 20 licensees reported more than five breaches and in 2016, only 17 licensees reported more than five breaches.
- 134 Even with some increase in reporting, if suspected breaches were to be reported, the large majority of licensees would likely make no reports and those that do would only make a small number. This lack of volume and granularity makes meaningful comparisons difficult.
- 135 This will also need to be taken into account when considering the need for a threshold for reporting and at what level the threshold should be set. We note that paragraph 107 of the position paper states that the proposed public reporting of AFS licensee data would be ‘most useful in respect of licensees reporting significant numbers of breaches, so could be subject to a threshold’.
- 136 The paper does not go into detail about the level of data that would be expected or used as a threshold for reporting—for example, the total number of breach reports per licensee and whether that data would be further broken down into categories (including how large licensee data would be broken down and how granular that would be).

#### **Variability in seriousness**

- 137 As the gravity of the underlying conduct and its impact on consumers varies significantly across breach reports, a focus purely on the number of reports may not be very informative. Some breach reports may result in significant regulatory action over an extended period requiring a complete review of the business involved. In contrast, in relation to other breach reports no regulatory action may be needed. As noted at paragraph 9 of this submission, in 2015-16 no action beyond monitoring was taken in relation to 64% of breaches reported.

#### **Comparability**

- 138 In order to be useful to consumers and others making judgements about licensees, the breach report data will need to be in a form that is comparable across licensees of different sizes.
- 139 In comparing entities, the information on the number of breach reports may be misleading if information about the size of the licensee's business is not provided.
- 140 We note, by way of example, that currently the Financial Ombudsman Service (FOS) publishes EDR data using comparative tables. The comparative tables present dispute statistics about financial service providers (FSP) that are members of FOS. One of the key indicators of FSP performance is the "Chance of a Dispute Coming to FOS" measure which

illustrates the number of disputes for each FSP in a product group relative to the size of the FSP's business in that product group. This measure ensures that meaningful comparisons can be made between FSPs of different sizes.

Note: See FOS [Annual Review](#) webpage, for more information.

### **Potential for misinterpretation**

141 Another issue to be considered is whether breach report data at the licensee level can be misinterpreted—for example, a higher level of breach reports may indicate that an AFS licensee is in fact properly identifying and reporting breaches to ASIC and may actually have a lower level of problems than other licensees who are less diligent in reporting.

142 Further, we consider that identifying the operational unit of the business may be of limited benefit in providing transparency to the community, as operational units of businesses do not have standard nomenclature, the standard unit title may have different meanings between licensees, and units are subject to restructure and renaming. Further, the breach may have occurred in more than one operational unit. Reporting by product sector may be more objective and informative although some breaches cross product sector lines.

### **Complaints data**

143 The position paper provides examples of jurisdictions that have regimes for public reporting of complaints data. It is important to make clear the distinction between publishing breach reporting data and complaints data. Both the FCA and the United States' Consumer Financial Protection Bureau (CFPB) publish complaints data.

Note: See the FCA's [Complaints data](#) webpage, and the CFPB's [Consumer Complaint Database](#) webpage.

144 We consider that publishing AFS licensees' IDR data in conjunction with existing EDR scheme data may be effective in achieving the intent of Position 12 in increasing transparency and accountability in the financial services industry.

### **Licensees' IDR data**

145 Compared to the number of breach reports ASIC receives annually, the annual volume of licensees' IDR data is notably higher.

146 For example, through their IDR processes in 2015–16, AFS licensees dealt with 1.2 million complaints about breaches of the Code of Banking Practice alone. We consider that the reporting of this data, using appropriate metrics (and level of granularity) to ensure effective comparability will be more useful in achieving the objectives of transparency and accountability.



Further, IDR data may have a higher level of objectivity and currency and can therefore effectively explain any trends.

147 We note the [Review of the financial system external dispute resolution and complaints framework: Final report](#) (EDR review report) described the benefits of increased transparency and accountability in IDR reporting and recommended that ASIC be empowered to collect data on licensees' IDR activity:

Recommendation 8: Transparency of internal dispute resolution

To improve the transparency of IDR, financial firms should be required to report to ASIC in a standardised form on their IDR activity, including the outcomes for consumers in relation to complaints raised at IDR.

ASIC should have the power to:

- (a) determine the content and format of IDR reporting (following consultation with industry and other stakeholders and having regard to the principles set out in this Chapter); and
- (b) publish data on IDR both at aggregate level and, at its discretion, at firm level.

148 In its response to the EDR review report, the Australian Government said it agreed with the recommendation and will provide ASIC with additional powers to allow us to set IDR standards and collect information on the IDR activities of financial firms.

## Other sources of data reporting

### Joint APRA and ASIC pilot of data collection on life insurance claims

149 On 8 May 2017, ASIC and APRA began the pilot phase of a project to improve public reporting of life insurance claims performance across the industry.

Note: See APRA, [Launch of pilot data collection for life insurance claims](#), media release, 8 May 2017.

150 This follows the finding of [Report 498](#) *Life insurance claims: An industry review* (REP 498), which found 'a clear need for better quality, more transparent and more consistent data about insurance claims' (paragraph 46), and announcements by ASIC and APRA in October 2016 that we would commence working together on a new data collection.

151 The initiative aims to collect and publish life insurance claims data on a per insurer basis, and include data on claims handling timeframes and dispute levels that will allow for meaningful comparisons of insurer performance and more effectively inform consumers.

152 We note that there may be scope for this type of approach to data reporting to be applied to other areas in the future.

## Key terms

Term	Meaning in this document
advice	Personal advice given to retail clients
AFS licence	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  Note: This is a definition contained in s761A
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act  Note: This is a definition contained in s761A
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
breach reporting obligation	An AFS licensee's obligation, set out in s912D of the Corporations Act, to report breaches or likely breaches of their obligations under the financial services laws
CFPB	Consumer Financial Protection Bureau (United States)
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7), unless otherwise specified
consumer	A natural person or strata corporation  Note: See s5 of the National Credit Act
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
credit	Credit to which the National Credit Code applies  Note: See s3 and 5–6 of the National Credit Code
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
EDR scheme (or scheme)	An external dispute resolution scheme approved by ASIC under the Corporations Act (see s912A(2)(b) and 1017G(2)(b)) and/or the National Credit Act (See s11(1)(a)) in accordance with our requirements in RG 139
FCA	Financial Conduct Authority (United Kingdom)
financial product	A facility through which, or through the acquisition of which, a person does one or more of the following: <ul style="list-style-type: none"> <li>• makes a financial investment (see s763B);</li> <li>• manages financial risk (See s763C); and</li> <li>• makes non-cash payments (see s763D)</li> </ul> Note: This is a definition contained in s763A of the Corporations Act. See also s763B–765A

Term	Meaning in this document
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
FSI	Financial System Inquiry
IDR	Internal dispute resolution
INFO 151 (for example)	An ASIC information sheet (in this example numbered 151)
investor	In relation to an AFS licensee, includes an existing, potential or prospective client
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
position paper	ASIC Enforcement Review Taskforce, <a href="#">Self-reporting of contraventions by financial services and credit licensees</a>
Pt 7.7A (for example)	As part of the Corporations Act (in this example numbered 7.7A), unless otherwise specified
REP 515 (for example)	An ASIC report (in this example numbered 515)
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 style="text-align: center;">Note: This is a definition contained in s910A of the Corporations Act</p>
retail client	A client as defined in s761G of the Corporations Act and associated Corporations Regulations
RG 78 (for example)	An ASIC regulatory guide (in this example numbered 148)
s912D (for example)	A section of the Corporations Act (in this example numbered s912D), unless otherwise specified
Taskforce	ASIC Enforcement Review Taskforce