

ASIC Enforcement Review
Financial System Division
The Treasury
Langton Crescent
Parkes ACT 2600

Email: ASICenforcementreview@treasury.gov.au

Attention: Mr Jerome Davidson

12 May 2017

Dear Mr Davidson

**The Australian CFD & FX Forum (“CFD & FX Forum”) response to the ASIC Enforcement Review –
Position and Consultation Paper 1
Self-reporting of contraventions by financial services and credit licensees**

1. Preamble

The CFD & FX Forum is grateful for the opportunity to respond to the questions and provide comments on the proposals in the Position and Consultation Paper.

Representing over 60% of Australian CFD & FX providers by market share, the CFD & FX Forum has established Best Practice Standards for the purpose of continuously improving existing CFD and FX industry standards and addressing specific CFD and FX industry issues and investor concerns, building upon existing legislation to deliver additional benefits to investors and elevating investor perception and understanding in dealing in CFD and FX products.

2. Executive Summary

The CFD & FX Forum supports the Taskforce’s objective of developing a set of reforms aimed at enhancing the current breach reporting regime and making it more effective. The FX and CFD Forum largely supports the proposals set out in the Position and Consultation Paper, and we provide the following comments and feedback in response to the questions posed, which we hope the Taskforce will consider.

3. Questions and the CFD & FX Forum’s comments

Position 1: The ‘significance test’ in section 912D of the Corporations Act should be retained but clarified to ensure that the significance of breaches is determined objectively

1.1 Would a requirement to report breaches that a reasonable person would regard as significant be an appropriate trigger for the breach reporting obligation?

The CFD & FX Forum agrees that the 'significance test' should be retained, however we do not consider a 'reasonable person' test would necessarily materially alter how Australian Financial Service Licensees ("licensees") assess the significance of a breach, given that there is an inherent subjectivity in assessing what a 'reasonable person would regard as significant', and therefore it is unclear how such a test would assist achieving the aims set out in the Position and Consultation Paper. If the 'reasonable person' test is adopted, further clarity is needed regarding what a 'reasonable person' means, and how a reasonable person would assess the significance of the breach, to remove – to the extent possible – the subjective element and guesswork required by licensees in assessing the significance of a breach.

1.2 Would such a test reduce ambiguity around the triggering of the obligation to report?

For the reasons set out above, we do not consider that such a test would reduce the ambiguity around the triggering of the obligation to report. Should this test be adopted, licensees would require further regulatory guidance clarifying the 'reasonable person' test, along with examples to illustrate the reporting threshold.

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

2.1 What would be the implications of this extension of the obligation of licensee's to report?

We prima facie support this position, subject to licensees having sufficient time to complete a thorough and robust investigation of a suspected significant breach or other significant misconduct by an employee, before the reporting obligation is triggered. Further, any extension of the obligation should be supplemented by regulatory guidance demonstrating the types of misconduct that ASIC would expect to be reported.

We note the proposal to report employees who are suspected of not being of good fame and character is a highly subjective one, and places the licensee at risk of legal proceedings brought by the employee. It is therefore our view that the threshold to report should be significantly higher than a mere suspicion that an employee is not of good fame and character, and any such obligation should be supplemented by clear regulatory guidance clarifying exactly what is meant by 'not being of good fame and character' and at what point the reporting obligation is triggered, along with examples.

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

3.1 Would the threshold for the obligation to report [outlined above] be appropriate?

We do not agree that the threshold for the obligation to report is appropriate, as such an obligation would result in licensees having to lodge significant breach reports before the licensee has had a reasonable opportunity to assess the breach. When a possible breach is identified, often only limited information pertaining to the possible breach is available, and with such limited information the possible breach may initially appear to be a significant, and therefore reportable. However, with reasonable time to investigate the circumstances of the breach, it may become clear that the breach is not significant, and therefore not reportable. Given the varied complexities of many licensees,

detailed investigations of possible breaches generally involve input and assistance from multiple departments and stakeholders, and it is this type of thorough investigation that will generate an accurate assessment of the breach and, for reportable breaches, enable licensees to provide ASIC with quality data and information pertaining to the breach. It is our view that the approach proposed by the Taskforce would inevitably result in unnecessary reporting of non-significant breaches, and breach reports containing inadequate information that is lacking in detail, rendering some breach reports meaningless, thereby effecting the efficiency of the regulatory breach reporting framework.

We agree with the 10 day reporting timeline, however this should commence from the time the licensee determines that the relevant breach has occurred and is significant.

Notwithstanding this, we don't agree that licensees should be able to take advantage of the reporting trigger by way of dragging out investigations to delay reporting significant breaches. Breach investigations should be a priority for licensees and must be completed at the earliest opportunity. ASIC should have regard to the length of time a licensee's breach investigation takes, and whether or not this is reasonable having regard to the circumstances and complexity of the breach, throughout any enforcement proceedings.

3.2 Should the threshold extend to broader circumstances such as where a licensee "has information that reasonably suggests" a breach has or may have occurred, as in the United Kingdom?

No. It is our view that the reporting threshold should only be triggered for identified breaches.

3.3 Is 10 business days from the time the obligation to report arises an appropriate limit? Or should the period be shorter or longer than 10 days?

We consider 10 business days from the time the obligation to report arises an appropriate limit.

3.4 Would the adoption of such a regime have a cost impact, either positive or negative, for business?

We do not consider that the adoption of the regime would have a significant cost impact for business.

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

4.1 What is the appropriate consequence for a failure to report breaches to ASIC?

It is imperative that any consequences of failing to report breaches to ASIC have regard to the severity of the breach, whether or not the failure to report the breach was intentional, the duration of the internal investigation and whether or not it was reasonable, and any other relevant mitigating factors. Further, we seek clarity on the proposed penalties that may apply, and in what circumstances. ASIC should clearly outline the factors to be taken into consideration when determining the appropriate enforcement action, i.e. a full rationale for the decision needs to be provided.

4.2 Should a failure to report be a criminal offence? Are the current maximum prison term and monetary penalty sufficient deterrents?

It is our view that an unintended consequence of introducing a criminal offence for failure to report is that licensees may be too fearful of not reporting, and may therefore over-report by way of submitting unnecessary breach reports for non-significant breaches because of the risk of committing a criminal offence if they fail to do so. Such an outcome does not align with the aim of the Position and Consultation Paper of improving efficiency of the breach reporting regime.

It is our view that failing to report a significant breach should only be a criminal offence in the most serious of cases. As set out above, ASIC should issue guidance clarifying the factors to be taken into consideration when determining the appropriate enforcement action.

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

4.3 Should a civil penalty regime be introduced?

We consider it is imperative that any enforcement action taken by ASIC has regard to the severity of the breach, whether or not failure to report was intentional and any relevant mitigating factors.

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

4.4 Should an infringement notice regime be introduced?

We consider an infringement notice regime may be appropriate for the least serious offences.

Position 7: Encourage a co-operative approach where licensees report breaches, suspected or potential breaches or employee or representative misconduct at the earliest opportunity

4.5 Should the self-reporting regime include incentives such as that outlined above? What will be effective to achieve this? What will be the practical implications for ASIC and licensees?

We are thoroughly supportive of a co-operative approach where licensees report breaches, suspected or potential breaches of employee or representative misconduct at the earliest opportunity. It is our view that ASIC should have regard to self-reporting and a licensee's co-operation throughout enforcement proceedings. Such an approach would have the added benefit of incentivising licensees to report breaches at the earliest opportunity.

Position 8: Prescribe the required content of reports under section 912D and require them to be delivered electronically

5.1 Is there a need to prescribe the form in which AFS licensees report breaches to ASIC?

Yes. The prescribed form should also include notes on the type and level of detail to provide.

5.2 What impact would this have on AFS licensees?

Prescribed forms ensure consistency, and that licensees have considered every aspect of the breach and provided all the relevant information pertaining to the breach as expected by ASIC.

Position 9: Introduce a self-reporting regime for credit licensees equivalent to the regime for AFS licensees under section 912D of the Corporations Act

6.1 Should the self-reporting regime for credit licensees and AFS licensees be aligned?

Yes, a self-reporting regime for credit licensees should be introduced and aligned with the licensee regime under section 219D of the Corporations Act.

Position 10: Ensure qualified privilege continues to apply to licensees reporting under section 912D

We consider it essential that qualified privilege continues to apply to licensees reporting under section 912D.

Position 11: Remove the additional reporting requirement for responsible entities

7.1 Should the self-reporting regime for responsible entities be streamlined?

Yes, the additional reporting requirement for responsible entities should be removed, and the regime streamlined.

7.2 Is it appropriate to remove the separate self-reporting obligation in section 601FC? If so, should the threshold for reporting be incorporated in the factors for assessing significance in section 912D?

Yes.

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

8.1 What would be the implications for licensees of a requirement for ASIC to report breach data at the licensee level?

For the following reasons, the CFD & FX Forum does not support the proposal requiring ASIC to report breach data at the licensee level:

- It is our view that such an approach effectively penalises those licensees that have effective and robust compliance frameworks in place. It is the licensees with such frameworks in place that are more likely to identify compliance breaches and report to ASIC accordingly. Inevitably, it will be the licensees that have the most effective compliance frameworks that are over-represented in any published breach data, and, conversely, those licensees with inadequate compliance frameworks in place will be disproportionately under-represented;

- Requiring annual publication of breach report data at a licensee level will likely operate as a disincentive for licensees to report, and, in our submission, is inconsistent with the aim of the proposals set out in the Position and Consultation Paper;
- We question how the mere number of breach reports submitted by a licensee can be meaningful to any reader without the full context and details of the breach, and a thorough understanding of the breach reporting regime;
- The size, nature, delivery channels and complexity of a licensee impacts the number of breach reports lodged each year, yet this will not be evident from the published breach report data;
- Publishing such data may have unintended consequences for licensees as it may be used for a competitive or reputational advantage, shining a licensee who reports breaches in a poor light, whereas competitors with less reported breaches, perhaps due to less robust compliance frameworks will appear to an uninformed reader as more 'compliant'; and
- While the Taskforce notes that some jurisdictions have regimes for public reporting of complaints data, e.g. the UK and US, complaints data is not comparable to breaches as complaints result from a consumer's dissatisfaction with the firm's product or service, not the firm's internal compliance arrangements; an entirely different process. We therefore don't think these comparisons are relevant to the breach reporting regime in Australia.

8.2 Should ASIC reporting on breaches at a licensee level be subject to a threshold? If so, what should that threshold be?

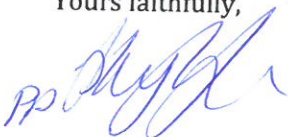
For the reasons set out above, ASIC should not report on breaches at a licensee level.

8.3 Should annual reports by ASIC on breaches include, in addition to the name of the licensee, the name of the relevant operational unit within the licensee's organisation? Or any other information?

No. The purpose of publishing such information is unclear and may act as a disincentive for licensees to report.

Please contact me should you wish to discuss the CFD & FX Forum's response.

Yours faithfully,



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