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Reportable Situations Review Team
Australian Securities &
Investments Commission

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Discussion Paper: Reportable Situations Industry Engagement

The Australian Financial Markets Association (AFMA) is providing comment on the *Discussion Paper: Reportable Situations Industry Engagement*. AFMA welcomes ASIC's effort to program seeks to address challenges experienced with the reportable situations regime implementation and aim to better achieve the regime's objectives.

1. Circumstances in which related reportable situations should be grouped into a single report

We propose issuing supplementary guidance advising that ASIC's preference is that reportable situations are grouped together in a single report where:

- *there is similar or related conduct – this means conduct involving the same or very similar factual circumstances (e.g., similar representations made in relation to the same type of product/service);*
- *that conduct involves a breach of the same legislative provision(s); and*
- *the conduct has the same root cause.*

F1A.1 Would this proposal enhance clarity about expectations for when licensees can and should group multiple reportable situations into a single report?

F1A.2 Is this proposal likely to lead to any change in regulatory burden for your organisation? Please provide details.

F1A.3 Is further guidance needed on what is meant by 'root cause'?

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In our view, guidance will be helpful, but grouping should not be a requirement.

We do not consider additional guidance is the issue we are concerned with in regard to the meaning of 'root cause'. There may not always be alignment in timing between the undertaking of root cause analysis on an event and the need to report a reportable situation to ASIC. ASIC's proposed definition of "Investigation Complete" in Issue 10 suggests that ASIC acknowledges this. ASIC should consider permitting the initial grouping of reportable situations that reasonably appear to be as a result of human error on the proviso that if after undertaking root cause analysis, different root cause(s) are detected — then that is clarified in the report (and if necessary additional grouping/reporting is undertaken that reflects those different root causes).

Furthermore, the proposal opens up the question about how timing triggers work when you still have to report each individual instance even though the issues are grouped together? In this regard, a 30-day rule is suggested which would start running from one date rather than multiple dates for each reportable situation that has been grouped together. To this end, an example to illustrate what the boundaries are would be useful.

We consider that the proposal will lead to additional regulatory burden. In large organisations, there are a large number of minor incidents where a staff member makes a manual error (e.g. fat finger keying mistakes or not reading a script in full/accurately). We consider that specifying why we are satisfied there is no other root cause in each of these instances would be repetitive, burdensome and have limited regulatory value.

Some worked examples that might be useful (given the proposed guidance) could include the following:

- two discrete events occurred in a space of two weeks which relate to the same legislative provision but with different factual circumstances; alternatively
- two similar fact situations relating to the same legislative provision but arising from different root causes.

As a general comment, guidance on answering questions in the Regulatory Portal should be embedded within the form (e.g. as information bubbles), in addition to a stand-alone FAQ document to obviate the need to check an external source when in the Regulatory Portal. Ease of access will make the guidance more effective at improving consistency in the way licensees answer questions.

The character limits and/or pre-defined answer options can limit a fulsome explanation of a reportable situation and remedial action taken. It is understood that ASIC wishes to see the Regulatory Portal report as the sole source for the reports without reference to additional explanatory attachments, so there is a need for a report to contain more fulsome explanations.

We propose issuing supplementary guidance to provide clarity on the circumstances in which a licensee may group reportable situations falling within the category of root cause of 'staff negligence/error'. This will include guidance that this is appropriate, provided that:

- *the criteria for grouping more generally set out above in Issue 1A are satisfied;*
- *no other root cause is identified (for example, a policy/process error); and*

- *the licensee provides an explanation in the breach description field of ASIC's Form of how they are satisfied that there is no other root cause for those breaches.*

F1B.1 Would this proposal enhance clarity about expectations for when it is appropriate for the root cause category of staff negligence/ error to be the basis of grouping multiple reportable situations in a single report?

F1B.2 Do you have any views about the proposal that licensees provide details about why they are satisfied that there is no other root cause for the breaches?

F1B.3 Is this proposal likely to lead to any change in regulatory burden for your organisation? Please provide details.

AFMA does not support this proposal. There is no need for an additional step of recording why there is no other root cause. This will merely increase the regulatory burden through an additional, procedural stage, that may create operational inefficiencies with little or no regulatory benefit.

2. Calculation of the number of reportable situations

We are currently considering two alternative options:

- 1) Providing additional guidance to clarify how this question should be answered (e.g., as the total number of regulatory breaches). To address inconsistencies arising from different legal interpretations, we would need to provide practical guidance on how to approach a number of common scenarios.*
- 2) Deleting the question "How many reportable situations relate to the breach/likely breach" from ASIC's Form and relying on other existing fields to inform ASIC about the magnitude of the breach.*

F2.1 Do you consider option 1 is likely to provide sufficient clarity about how to respond to the question?

F2.2 If option 1 is adopted, what types of factual scenarios do you think ASIC would need to provide practical guidance about to ensure consistency in reporting?

No comment.

F2.3 We would like to understand any views that you have about the difference in regulatory burden that would be associated with these two options.

In our view, Issue 1 does not provide sufficient clarity. Answering the question involves an assessment of a range of factors, including complex legal principles.

There is support for Issue 2 (deleting the question) as the details are already covered by other existing fields in the form. This additionally avoids confusion and inconsistent interpretation.

3. Calculation of the number of instances

We propose to provide supplementary guidance about common factual scenarios – within the form and as FAQs on the ASIC website – to support licensees in calculating and reporting the number of instances of the event that relate to the reportable situation.

F3.1 Do you agree with ASIC’s proposed approach to provide more detailed guidance? Please provide details.

F3.2 Will supplementary guidance in the manner proposed adequately clarify how to respond to this question? Do you see the potential for inconsistency even with this guidance?

F3.3 What factual scenarios do you consider any supplementary guidance will need to cover?

There is support for additional guidance that is specific and practical. Our view is that other interpretations as to what constitutes an “instance” are open and may be dependent on the interpretation of the specific legislation breached. An “instance” may not necessarily equate to an impact on a customer. For example, in the case of an error being built into a loan serviceability calculator, it may be said that one instance of this issue occurred but that it impacted x numbers of customers.

Remediation activities are typically not concerned with identifying the number of times a client suffers an impact (for example the charging of a fee to which the bank is not entitled). The remediation is concerned with identifying the total amount of that overcharging. We would suggest that to require licensees to count and report on each impact on each customer, imposes a significant regulatory burden without a clear countervailing regulatory benefit.

Where a licensee is unable to determine the number of instances an error has occurred some suggested factual scenarios that may be used in the supplementary guidance would be of use. For example:

- Where there may have been incorrect information provided to clients via our website and we are unable to determine how many clients were potentially misled by the information and no client complaints have been received.
- Unit pricing errors – ASIC could provide a detailed example of how they expect unit pricing errors to be reported.
- In the case of Derivative Transaction Reporting breaches, it should be clarified whether the number of instances equates to the number of transactions or the number of positions or reports that failed to meet the reporting requirements?

4. Expectations for frequency of lodging updates

We propose to provide supplementary guidance further clarifying when licensees should provide an update to ASIC.

This will include more specific guidance that licensees should update ASIC in the event of material changes (for example, material changes in the number of clients impacted or remediation activities, the quantum of financial loss, changes in root cause etc). It

may also include guidance that in any event licensees should update ASIC on an incomplete investigation at least every 6 months.

The supplementary guidance will clarify that where further reportable situations are discovered, licensees will continue to need to meet their obligation to lodge those reports within 30 days, and can continue to use the update functionality on the Regulatory Portal to do so.

F4.1 Do you see any issues in implementing this approach within your organisation?

F4.2 Is this proposal likely to lead to any change in regulatory burden for your organisation? Please provide details.

F4.3 If this proposed guidance is not helpful (for example, it is not specific enough) what guidance do you think would be helpful in light of ASIC's regulatory interest in timely updates as noted above?

F4.4 As part of this guidance, ASIC is considering whether to include a minimum expectation that licensees provide an update to ASIC on the status of any incomplete report at least once every 6 months. Do you see any issues in implementing this approach within your organisation?

As ASIC knows, the question around what constitutes a “material change” has long been a point of doubt for the industry. ASIC has indicated from time to time that its view on this question can be different to a reporting entity’s view, with a consequent detrimental impact on the reporting entity. Accordingly, there is value in looking at how to make the judgment. Examples and % change thresholds could be helpful. However, AFMA would not like to see this become an exercise fostering granular dictates which would impose a significant regulatory burden. The approach of dialogue with ASIC to improve clarity as to when ASIC requires a new report and when the licensee can use the update functionality, as paragraph 42 is not sufficiently clear — is one way to take this forward.

We note that if a number of ‘material changes’ occur in a short period of time; ASIC would receive multiple updates in that period.

We consider guidance about completion of an investigation is appropriate where the ‘investigation’ in question is an investigation into root cause and customer impact etc. If, however, this reference is to ‘investigation’ as used in the breach reporting provisions (e.g. to determine whether a significant breach has occurred) and the reportable situation is that the investigation is continuing — there is presently no facility within the portal to make updates.

Guidance could also be given on what is an update versus new reportable situation. E.g., the original breach report was 10,000 customers, but is actually 20,000, as not being a new reportable situation.

5. Quality of breach descriptions

We propose to provide supplementary guidance setting out ASIC's expectations regarding the information that should be provided as part of the breach description.

This would include examples of 'minimum requirements' and/or 'better practice' examples and articulate the nature and extent of breaches where greater detail should be provided.

F5.1 Is there specific information that you think should be included in this field – either as 'minimum requirements' or 'best practice'?

F5.2 Are there specific breaches where this additional information is more relevant/appropriate than others (e.g., where context is required or where there is greater customer harm)?

F5.3 Is this proposal likely to lead to any change in regulatory burden for your organisation? Please provide details.

We do not support the setting of minimum requirements. Licensees must discharge the legislative obligation to report reportable situations even if the description of the situation does not meet ASIC's expectations.

Good practice guidance could be helpful. 'Good practice' guidance should make clear that the level of detail required is dependent on the materiality of the reportable situation breaches and should not duplicate what is in other fields. AFS licensees should be able to adopt a scalable approach, depending on the complexity and/or magnitude of the breach.

AFMA would be concerned with requirements that would require staff drafting reports of reportable situations to explain how the reportable situation is a breach of a licensee's obligations, serious fraud, or gross negligence. These staff are typically not legally trained and, given the number of events being considered and the timeframes within which that consideration must be given, legal advice is sought for only a relatively small proportion of events.

As noted in response to Question 1, the word or formatting limitations of current text fields limits the ability to provide fulsome explanations, which is necessary from time to time if attachments are not permitted.

6. Date the licensee first identified there may be a breach

We propose to reword the question "when did you first become aware that a breach, serious fraud or gross negligence had occurred – or that you were no longer able to comply with a core obligation" to a question asking licensees to "specify the date when it was first identified or discovered that there may be a breach/serious fraud/gross negligence".

We will also provide supplementary or in-form guidance to ensure licensees are clear about how to answer this question.

F6.1 Is this proposal likely to lead to any change in regulatory burden for your organisation? Please provide details.

The simple objective appears to be obscured by the language used in this proposal. The apparent objective is to know when a reporting entity first identified the issue that has subsequently been determined to be a reportable situation, so examples are likely to assist. Examples could include consideration of:

- whether a certain person or team e.g., a risk management professional versus an operational staff member, is aware;
- what constitutes awareness e.g., what level of detail is sufficient to have identified there may be a breach;
- rationale for the proposed change to the earliest point in time e.g., the date at which anyone in the organisation identifies an 'issue' (at which point it may not be an 'incident').

The proposal to provide both (i) discovery date i.e. when a licensee first identifies that there may be a breach or likely breach that is significant/serious fraud/negligence; and (ii) date on which they determine a reportable situation has arisen must be clarified carefully.

It must be borne in mind that staff tasked with initial identification of an incident in large organisations do not have (and should not have) expertise to assess if there is a likely regulatory breach in the first instance. Internally, in banks, this could be termed the date an incident is first identified. But for these reason stated here, it may be impractical to expect this date to equal the date on which the licensee first identifies there may be or is likely to be a breach that is significant / serious fraud/negligence.

Incidents, once identified and confirmed as such, are subsequently triaged by control functions and it is at this point where the appropriate compliance SMEs are brought in to determine if there could be potential regulatory breaches.

7. Naming of employees and representatives

We propose to provide supplementary guidance stating that details of employees only need to be provided where that employee is:

- *authorised by the licensee to provide a financial or credit service;*
- *a director of the licensee or a related body corporate;*
- *a responsible manager or key person named in the licence condition; or*
- *otherwise a member of senior management of the licensee or a related body corporate.*

F7.1 Is this proposal likely to lead to any change in regulatory burden for your organisation?

Individuals that are dealt with under other laws and regulations should be out of scope for this proposal to reduce regulatory burden (e.g. Directors have duties covered in the Corporations Act, Senior Managements is covered under FAR). We also submit that Authorised Representatives and Responsible Managers should be excluded.

We agree that this proposal should apply to the key person who was involved in any actual misconduct activity identified, but it should be noted that it is often not sufficiently clear which individual's actions are the subject of the reportable situation, or there may be a

number or individuals; especially where an investigation is not complete. We would therefore suggest that this is an optional requirement.

ASIC should be clear on what the intention is behind requesting this information. It should also clearly define terms used (e.g. does “authorised” only refer to formal ‘authorised representatives’ appointed under a licence? What constitutes “a member of senior management”?) These fields should also be editable (if not already) when making an update to a previously submitted report in case new information about individuals’ involvement comes to light.

For details of employees to be provided, we think that the reportable situation must first relate to an actual breach committed by an individual as opposed to the AFS licensee. We would suggest the reference to ‘financial planners’ or ‘representatives providing financial advice in relation to tier 1 financial products’.

The breadth of obligations which require reporting as Representative Conduct may also require the reporting of breaches by individual employees (including junior staff) in relatively minor circumstances.

In such circumstances, the ASIC portal requires naming the Representative, which could have serious ramifications for the employee.

In any event we seek clarification from ASIC that licensees do not need to name the person who is the subject of a reportable situation that is an investigation.

By way of example of the complexity which arises across various legislative provisions:

When section 961B (provider must act in the best interests of the client) and/or s961G (resulting advice must be appropriate to the client) is breached by an employee representative, the breach will only be significant and reportable as a representative breach if it meets the material loss and damage significance criteria. However, any breach by an employee representative, whether significant or not, will always be a deemed reportable breach by the Licensee. Accordingly, these obligations may be reported as a breach by the Representative and the Licensee, or the Licensee— only depending on the circumstances.

By way of example of obligations, the breach of which could require reporting as by a Representative including provision of the employee’s name:

Banker completes a Statement of Advice and due to a system error, information about the customer’s current insurance coverage is not visible to the banker. Customer is inadvertently sold a duplicate policy. The event would be a reportable situation as conduct by the Licensee, however, in these circumstances, should the employee representative also be reported and named?

By way of example of a situation in which an employee’s name would be required to be provided to ASIC at the investigation stage:

The date noted in a Home Loan Protection checklist for provision of a Product Disclosure Statement was after the date of the relevant sale. The AFS licensee’s investigation into whether this constitutes a reportable situation continues for more than 30 days, following which it is found that the date noted in the checklist was a typo, and the customer had in fact received all documentation, as required.

8. Threshold for reporting of misleading and deceptive conduct

The reportable situations legislation deems as significant misleading and deceptive conduct arising from breaches of s1041H(1) of the Corporations Act or s12DA(1) of the Australian Securities and Investments Commission Act 2001 (ASIC Act).

F8.1 What impact would the proposal in Issue 1 regarding grouping of reports have on the regulatory burden involved in reporting misleading and deceptive conduct?

F8.2 Is there any guidance that ASIC could provide that would address the regulatory burden involved with reporting breaches where there is little or no customer loss or impact on market integrity that does not amount to introducing a new threshold for reporting these breaches?

Breaches of misleading and deceptive conduct provisions of the *Corporations Act 2001* and *Australian Securities Investments Commission Act 2001* are deemed significant and do not have a materiality threshold which means that minor conduct must be reported; even if there is only a single customer involved and there is no financial loss.

We support ASIC giving guidance about what they consider is not misleading or deceptive conduct. Examples could include “over compliance” and examples of the types of misleading or deceptive conduct ASIC considers of reporting value.

Addressing long term problem with Reportable Situations arising from inadvertent wash trades.

In addition to addressing S1041H, we are also taking this opportunity to provide feedback about S1041B, given that it likewise relates to false and misleading conduct provisions.

AFMA has long advocated that ASIC should also provide further guidance on the reporting of breaches of S1041B (e.g. expectations for reporting inadvertent wash trades with no market impact); as there are inconsistencies between participants’ interpretation of the reportability of minor wash trades. This is particularly the case for futures washes due to the reporting exceptions in the Futures MIRs. Participants need greater clarity on how the ‘reportable situations’ and Futures MIRs interact with one another in this regard.

The ASX Market Integrity Rules (Futures Market) 2017 (the MIRs) recognise that there are circumstances where cross trades will not compromise the market integrity [Rule 3.1.12(2)]. Unfortunately, the Act does not make this distinction, meaning each time this happens (all other things being equal) there is a need to:

- 1) capture the event in GRACE; and
- 2) report the matter to ASIC.

There is a long history of criticism of S1041B as drafted, notably by the now ASIC Chair, Joe Longo; who in 2001 presented a paper that included an analysis of the defects in 1041B at the *Centre for Corporate Law and Securities Regulation* seminar on Market Misconduct and the Financial Services Reform Bill.

In 2009, the provision remained untouched when the Corporations and Markets Advisory Committee (CAMAC) considered misconduct provisions and, separately, a number of academic papers on the topic specifically called for ‘urgent reform’ of the section. AFMA’s

submission to CAMAC's review specifically pointed out that the drafting meant a defendant could incur civil or criminal liability for transactions that were entered into for legitimate purposes and which did not create a false or misleading appearance. Despite all this, no changes have been made to the provision other than to increase the penalties that apply for contravention.

At minimum the reportable situations reporting regime can address the superfluous reporting burden imposed by this legislative problem.

3.1.12 – ASIC Market Integrity Rules (Futures)

ASIC Market Integrity Rule (Futures) 3.1.12 sets out ASIC rules in relation to inadvertent wash trades and creates obligations for material transactions to be reported to ASIC and for non-material transactions to be recorded in the Participant Wash Trade register. This rule has been in operation for many years, works well and is regulatory efficient.

Section 1041B - Corporations Act (Cth)

The ASIC Market Integrity Rule has operated alongside S1041B of the Corporations Act 2001, which deals with transactions that involve no change in beneficial ownership, as well as other trading that could be false and misleading. Transactions in scope for 3.1.12 also would appear to represent a breach of S1041B, due to the technical application of the deeming provision in S1041B(2)(a) and the deemed significance test used for Reportable Situations.

ASX24 Participants have primarily applied the MIRs to inadvertent wash trades but since the introduction of the Reportable Situation regime in October 2021, technical breaches of S1041B also trigger a notification to ASIC. The application of the Reportable Situation to inadvertent wash trades duplicates the existing MIR regime and is therefore inefficient for ASIC and ASX24 Participants.

ASIC Relief

As explained in RG 51, ASIC have discretion with respect to the enforcement decisions in relation to the Corporations Act 2001. The ASIC MIR (Futures) represent current ASIC policy in relation to inadvertent wash trades by ASX24 Market Participants. For these reasons we believe ASIC should exercise its discretion to provide AFS licensees relief from enforcement with respect to S912D, limited to ASX24 "inadvertent wash trades" resulting in breaches of S1041B (via the deeming provision in S1041B(2)(a)).

It is also noted that in the case where the Unintentional Crossing Prevention triggers a "BP" tagging; guidance is sought from ASIC as to its expectations of licensee assessment and reporting of events that appear to be a technical breach of 1041B given no change of beneficial owner.

Policy grounds

There is no harm or loss to the public from this approach as it would result in the same situation that ASX24 Participants are already required to meet under the Market Integrity Rule 3.1.12. This regime already requires that material breaches are reported to ASIC via the ASIC Regulatory Portal.

The benefit to providing this relief is that it would alleviate the administrative burden carried by AFS licensees who have to report Reportable Situations as well as maintaining a Wash trade register and making a separate report to ASIC under the MIR. This would ensure that all Market Participants take the same approach with respect to this behaviour. We also believe that providing this relief would be consistent with ASIC's desire to reduce "red-tape" and in our view would be worthwhile, remove duplication, and enhance regulatory efficiency.

9. Reporting on previous similar breaches

We propose to provide supplementary guidance – likely as FAQs on the ASIC website – to provide further context as to what is intended to be captured by this question (including by specifying that licensees are expected to look back for a period of six years prior to the date of the reportable situation).

As part of this change, we will also consider clarifying the terminology in the question so that it refers to a breach/likely breach/gross negligence/serious fraud rather than to a reportable situation.

F9.1 Is this proposal likely to lead to any change in regulatory burden for your organisation? Please provide details.

F9.2 Do you have any views on how far back a licensee should be required to look back (and specifically, our proposal that this be a six-year period from the date of the reportable situation)?

We are supportive of the proposal to provide supplementary guidance on what is intended to be captured by this question.

The Regulatory Portal is and will increasingly provide ASIC with a more valuable original source on data about reportable situations than can be gained reporting about similar breaches. In the context of ASIC building this historical database, the call for an operationally burdensome 6 year look back for similar reportable situations will be redundant when information lodged since the start of the new regime is available to ASIC.

The requirement would be operationally burdensome because when there are system changes or enhancements, searching becomes complex and time consuming.

We also consider extra guidance about what is similar is needed to eliminate ambiguity i.e. to what degree of similarity should situations be to warrant inclusion in answering this question. As an example (such as Issue 1), if there are two late substantial disclosure filings in breach of S671B but in both cases, the facts (and parties) were different, one was due to a late filing while the other required an alteration as there were errors in the information provided— would these have a sufficient nexus to be considered 'similar'?

10. Definition of 'investigation complete'

We propose to embed explanatory text into ASIC's Form alongside this question which will state that an investigation is complete only after determining the root cause(s) and

that the licensee has identified all affected clients and all instances of the reportable situation.

We will provide an FAQ to clarify the distinction between the terminology 'investigation', as it used in ASIC's Form, and that in the legislation and the RG ('reportable investigation').

Where the investigation completion date is used in future public reporting, ASIC will make clear that the investigation timeframes include the time for a licensee to determine the root causes and identify all affected clients and all instances of the reportable situation.

F10.1 Does ASIC's proposed approach provide sufficient clarity as to when an investigation 'completes'?

There is general support for the proposed approach, provided it does not extend to remediation. Given the need for ASIC to clarify the distinction between "investigation", as it used in ASIC's Form, and that in the legislation and the RG ("reportable investigation"), it would be helpful if ASIC also clarified its expectation in relation to responding to the question of when an "investigation starts". Is this when a "reportable investigation" commences, or when an investigation commences into the 'incident' (to establish facts relating to who, what, when, where, why, how etc.)?

It should also be made clear by ASIC that further identification of impacted clients does not trigger a reopening of the investigation.

11. Interpretation of drop-down options

We propose to provide supplementary guidance (likely as an FAQ, but potentially as embedded guidance on ASIC's Form) in relation to the intended meaning of drop-down menu options for categories of root cause and investigation trigger.

We will also consider streamlining answer options as an alternate approach to extensive drop-down options.

F11.1 Do you see that there would be challenges in operationalising any guidance within your organisation? How can ASIC implement this guidance in a way that is most likely to achieve greater consistency in responses?

F11.2 Are there any specific investigation trigger options or categories of root cause options that would benefit from further definition?

F11.3 Are there any other questions with drop-down options where you consider that there would be value in providing further definitions or guidance about the intended meaning and operation of those options?

F11.4 Do you have any views about how ASIC might – as an alternative or in addition to guidance – consolidate or change the drop-down options to improve clarity?

F11.5 Is this proposal likely to lead to any change in regulatory burden for your organisation? Please provide details.

We welcome supplementary guidance on the matter and would also appreciate a downloadable template for a breach report. We additionally have the following feedback on drop down menu options:

- When responding to a prompt to list the “nature of the reportable situation” you are given limited options in the drop-down menu. If a “General obligation” is selected (e.g. obligation to maintain competence, sufficient financial resources or professional indemnity insurance; or obligation to comply with licence conditions) the listed “sections of the Act” are limited and the obligation may relate to a different section not found in the drop-down menu.
- When making an investigation submission relating to managed investment schemes, the names of the schemes impacted are mandatory before progressing through the form once you confirm there has been impact. The schemes impacted may not be fully known before submission of an investigation.

12. Use of placeholder values for client financial loss / clients affected

We propose to include supplementary guidance and/or embedded text setting out ASIC’s expectations that the use of placeholder values is not acceptable, and that ASIC expects licensees to make a reasonable attempt to estimate the number of clients affected and client financial loss.

F12.1 Are there any challenges associated with providing an estimate of client financial loss or the number of clients affected that ASIC should consider? Please provide specific details, and examples where appropriate.

F12.2 Is this proposal likely to lead to any change in regulatory burden for your organisation? Please provide details.

Estimates, particularly at the early stages of the investigation of a reportable situation are extremely rough and unreliable. There is often significant variance between an early estimate that the final impacts are known. We query whether early estimates would provide any real regulatory value to ASIC.

It can also be a complex exercise to obtain data to ascertain customer numbers of loss, this will take time (generally well more than 30 days). In some cases, a degree of manual interrogation or cleaning of data may be needed for accuracy.

We suggest that providing estimates should not be a general obligation, with the ability to have a text box to explain the reason.

13. Calculating the number of clients affected

We propose to provide supplementary guidance on the definition of ‘number of clients impacted’.

This guidance would provide ASIC's preferred position in relation to the issues outlined above, and other areas of ambiguity raised by industry.

In relation to the issues outlined above, this guidance is likely to indicate that licensees should:

- *treat each account holder of a joint account as a separate client; and*
- *interpret 'affected' as including any customers who were or are likely to have been impacted, whether financially or non-financially (e.g., inconvenience, distress or by way of impact to their ability to make an informed decision about a matter).*

F13.1 Do you agree with ASIC's proposed approach to provide more detailed guidance? Please provide details.

F13.2 Are there any areas of ambiguity associated with this question (and identifying the total number of clients) that you consider would benefit from further guidance from ASIC? Please provide detailed examples.

The proposal to treat each account holder of a joint account as a separate client could be technically difficult and burdensome. For example, remediation and bank systems are currently set up to treat a joint account as the one customer and so an extra layer of work will be required to split to this level.

The proposed interpretation of 'affected' would not be feasible in some circumstances, as firms may not be able to identify the number of clients impacted. e.g., Third party brokerage issue or PDS related issues (people who have received and read the document). The number of clients affected should also be defined differently in different circumstances. ASIC should give more clarity about how "likely to have been impacted" should be interpreted. For example, should this be interpreted as customers likely to have been impacted if the breach were to occur (tied to likely breach/no longer able to comply), rather than an estimate of customers who were likely to have been impacted. For example, by misleading information on a website/advertising collateral where it is not known how many customers accessed/read or relied on it.

14. Recording of "other circumstances specified in the Regulations" as a reason for significance

We propose to remove the answer option "Other circumstances specified by the Regulations" until such time that further circumstances are prescribed in the Regulations.

This will improve data quality by reducing the ability for licensees to provide invalid responses.

F14.1 Do you see any challenges with implementing this change? If yes, please provide details.

This proposal is supported.

15. Approach to withdrawing or amending a submitted report

We propose to provide guidance in an FAQ that clarifies ASIC's proposed process for licensees to request changes to or withdrawal of a lodged report, and the circumstances in which ASIC will process these requests.

F15.1 Are there any challenges associated with this approach?

The Regulatory Portal should allow withdrawal functionality without a separate request being made to ASIC. This would reduce the burden for both ASIC (to review each request on a case-by-case basis) and licensees (to have to contact ASIC separately via email). Guidance on what type of things require a report to be amended or withdrawn is also supported. For example, human errors in information submitted (incorrect date selected, forgetting to include a legislative provision but the description is clear as to the breach) – would ASIC expect a report to be formally amended? Further, if an AFS Licensee is already in direct engagement with ASIC on a lodged report, would ASIC expect that any updates/new information be made in the Regulatory Portal also? 12 (financial loss estimates) and, 13 (number of impacted clients). To help with the audit trail, this functionality should include a requirement to provide a reason for the withdrawal and/or any changes needed (e.g. where fields are locked and cannot be updated on the previously submitted report). ASIC could still seek further information if there is a withdrawal it wishes to discuss it with a Licensee.

If ASIC goes ahead with its proposal to publish further guidance, AFMA requests more details be provided in relation to the guidance prior to publishing, especially with relation to amending details mentioned in Issues 1 (grouping of similar breaches into same report), a practical mechanism to 'reopen' a transaction that has been marked as closed. For example, the ability to submit messages to ASIC on submitted reports via the Regulatory Portal.

Please contact David Love either on 02 9776 7995 or by email at dlove@afma.com.au in regard to this letter.

Yours sincerely



David Love
General Counsel & International Adviser