

Friday 12 May 2017

ASIC Enforcement Review
Financial System Division
The Treasury
By email: ASICenforcementreview@treasury.gov.au

To the ASIC Enforcement Review Taskforce,

Re: Self reporting of contraventions by financial services and credit licensees

CHOICE welcomes the opportunity to comment on the self reporting arrangements for ASIC regulated entities.

Having businesses like financial advice providers, major banks and payday lenders self report when they fail to meet their obligations to their customers and the broader community is an essential protection in the financial system. It's vital that self reporting of breaches captures as much as possible to provide genuinely useful data about problems in financial markets.

CHOICE largely supports the proposals put forward in the consultation paper. In particular, we strongly support the introduction of an infringement notice regime for failure to report breaches as the current option available to ASIC, criminal action, does not allow swift or proportionate enforcement. We also strongly support extending the regime to credit licensees.

Our comments focus on areas where we believe the regime needs to be strengthened even further to protect consumers.

The significance test should be removed and all breaches reported

We agree with the consultation paper that the current significance test for breach reporting is too subjective. The greatest failure of the current system is that it allows large businesses to not report breaches that may be significant to consumers but are relatively minor when looking at the overall size of the business. In short, it allows commercial scale to hide consumer harm.

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Businesses that have done the wrong thing should not be allowed to judge whether their actions should be reported to the regulator. Businesses that have breached laws or regulations have strong incentives to hide that behaviour, especially when fines or infringement notices are likely.

The consultation paper recommends that the businesses still only report on significant breaches but that a new objective standard is introduced to help businesses determine what breaches are significant. Our concern is that this proposal still requires the business that has breached laws or regulations to assess whether the breach should be reported. Only a system that requires reporting of all breaches removes the risk that businesses who have breached the law will self classify breaches as insignificant.

For consumers and consumer groups, it is important that all breaches are reported. Reports of 'minor' breaches of the law, when aggregated, can point to systemic issues that need to be addressed.

We recognise that the pre-2003 arrangement, where all breaches were reported, was eliminated because of a perceived administrative burden. Any burden, for businesses and ASIC, can be overcome through digital solutions such as simple online reporting tools that link to an ASIC database which could automatically classify reports.

Reporting of all breaches could lead to multiple different outcomes, such as an assessment of the effectiveness of current disclosure mechanisms for consumers or ASIC guidance targeted to a specific industry.

Another alternative for dealing with a greater volume of reports is to have a two-tier reporting system: a simple online reporting option for minor breaches (that ASIC can review and ask for more detail if necessary) and a more comprehensive reporting option for significant breaches.

Reports should be made within three working days, not ten

The consultation paper proposes that licensees are given ten working days to report a breach. It is unclear why such a generous period is required. An overly generous timeframe introduces unnecessary risk to the reporting system as it gives businesses time to destroy evidence or otherwise hide further misconduct.

With online reporting options, it is reasonable to expect that a breach can be reported within hours of its occurrence. Prior to 2003, licensees had three days to report all breaches. We believe this is a fair timeline that should be reinstated. It aligns with similar requirements on businesses to report harm to consumers. For example, under the Australian Consumer Law any supplier that becomes aware of an incident where a person has suffered death or serious injury or illness that was caused by, or may have been caused by, a consumer good must make a report to the ACCC within two days. Reports are made through an online form, reducing administration for the ACCC and businesses.

Content of breach reports must be consistent to allow comparisons and data aggregation

Breach reports should be standardised to allow data on breaches to be aggregated and compared. This is likely best achieved through an online form for reports combined with guidance from ASIC.

CHOICE does not expect that a breach report should include information about steps taken to rectify the problem or staff discipline matters in the first instance. Initially, it is important for ASIC to know that a breach has occurred or is likely to occur. Detail about resolutions and preventative action can come at a later date.

Enhanced transparency is required to restore consumer trust in banks and banking regulation

It is essential that ASIC release data on breach reports to restore consumer trust in the financial system and regulators.

Ideally, ASIC should release all reports. We recognise that early release of data could have a negative impact on ongoing ASIC investigations. This is a case to establish processes to delay the release of reports based on ASIC's discretion, rather than to not release all reports.

However, if individual reports aren't released, the Taskforce should require the release of aggregate data including number of breaches by institution and a breakdown of the types of breaches by category. This would add greater accountability to the banking system. It would also provide valuable data to public policy makers and consumer groups about non-compliance trends that will allow better targeted proposals for reform.

We encourage the Taskforce to require regular release of data. CHOICE's preference is that data is released each month or, if this isn't possible, quarterly rather than annually. More regular reporting of breach data will allow for earlier public identification of breach trends.

If you have any questions about this submission please contact CHOICE on eturner@choice.com.au

Kind regards,

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