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Email: [BR.submissions@asic.gov.au](mailto:BR.submissions@asic.gov.au)

Niki De Mel  
Strategic Policy Adviser  
Strategy Group  
Australian Securities and Investments Commission

Dear Niki

## CONSULTATION PAPER 340: BREACH REPORTING AND RELATED OBLIGATIONS

The Stockbrokers and Financial Advisers Association (SAFAA) is the professional body for the stockbroking and investment advice industry. Our members are Market Participants and Advisory firms that provide securities and investment advice, execution services and equity capital-raising for Australian investors, both retail and wholesale, and for businesses. Practitioner Members are suitably qualified professionals who are employed in the securities and derivatives industry.

SAFAA welcomes the opportunity to provide feedback on ASIC Consultation paper 340: *breach reporting and related obligations*.

### Detailed comments

#### *Consistency with credit licensees*

***B1Q1 Do you agree with our proposed approach? If not, why not?***

***B1Q2 Are there differences in the structure or operation of credit licensees that require specific guidance on how the breach reporting obligation applies?***

SAFAA has no comment on any proposed guidance for credit licensees. SAFAA's comments will be limited to guidance proposed for AFSL holders.

#### *Specific examples*

***B2Q1 Are there any specific issues, incidents, challenges or areas of concern you think we should include as examples, case studies or scenarios? If so, please provide details and explain why they should be included.***

As a general comment SAFAA's view is that case studies and scenarios that supplement ASIC's general guidance and illustrate key principles as they may apply to different licensees are extremely helpful. We encourage ASIC to provide as many case studies and scenarios as possible in the Regulatory Guide. We point out that aspects of the breach reporting obligation are new and will be challenging for some licensees to implement. Some examples of issues where case studies and scenarios would be useful that have been identified by our members are:

- issues identified as part of 'business-as-usual' audits of client files for licensees who provide personal advice to clients
- the definition of affected clients in the context of further investigations
- the extent of the scope of the investigation of further clients where misconduct is detected.

We discuss these issues in greater detail throughout this submission.

### ***Existing obligations***

***B3Q1 Should we include further guidance to help AFS licencees understand how the existing breach reporting obligations under section 912D of the Corporations Act (as in force before 1 October 2021) applies? If so, please provide details.***

As our members are already complying with the existing breach reporting obligations, we consider that ASIC should focus on providing guidance to licensees on how they can comply with the new obligations.

### ***What must be reported to ASIC***

***B4Q1 Do you agree with our proposed approach? If not, why not?***

Considering that the reforms aim to 'provide greater certainty for industry participants' we consider that high-level guidance on its own will not necessarily be helpful in providing certainty. Some particularity will be needed to ensure consistency amongst licensees.

***B4Q2 Should we include further guidance on what constitutes a 'core obligation'? If so please provide details.***

We note that we are waiting for Treasury to release final changes to regulations that support the breach reporting rules. SAFAA provided a [submission](#) to Treasury in April 2021 supporting a carve-out to the 'deemed' breach reporting provisions as a sensible solution to the problem of minor matters triggering a reporting obligation. SAFAA considers that only more material matters should trigger a reporting requirement. We consider that it is difficult to provide feedback on this issue until the regulations have been finalised and it is clear what constitutes a breach of a 'core obligation'.

***B4Q3 Should we include further guidance on how to determine whether a breach or likely breach of a core obligation is 'significant'? If so, please provide details.***

We consider that the current guidance is appropriate.

***B4Q4 Should we include further guidance on reporting an 'investigation' to ASIC? If so, what should be clarified? Please provide examples of scenarios (where relevant)***

The requirement to report an investigation into whether a significant breach of a core obligations has occurred that continues for more than 30 days is a new obligation on licensees. We consider that additional scenarios and case studies would be valuable as this is an area where licensees will require guidance.

As discussed in our response to B2Q1 it will be helpful to have guidance around issues identified as part of 'business-as-usual' audits of client files for licensees who provide personal advice to clients. Where an audit ends and an investigation begins can be a grey area and cause uncertainty for licensees and their staff.

***B4Q5 Should we include further guidance on what constitutes ‘material loss or damage’? If so, what are the challenges licensees face in determining whether loss or damage is material? Please provide examples of how you consider questions of material loss or damage.***

As a breach that results in material loss or damage to clients is a deemed significant breach, examples of what would be considered to be material loss or damage to a client in an investment or stockbroking context would be helpful.

***B4 Q6 Should we include further guidance on reportable situations involving serious fraud or gross negligence? If so, what are the challenges licensees face in identifying when serious fraud or gross negligence has occurred.***

We have no comment on this question.

***B4Q7 Should we include further guidance on reportable situations about other licensees? If so, please provide details.***

The requirement to lodge a breach report in relation to a reportable situation about other licensee is a new obligation and our members are of the view that more guidance from ASIC is needed. We are concerned about how the ‘dob in’ provisions will work in practice. Our members advise that a breach report to ASIC typically involves a large amount of work. It is important that licensees understand the expectations that ASIC has about the degree of knowledge one licensee has about the operations of another. Additional guidance on the following questions would be helpful:

- What is the level of investigation a licensee will need to make to determine if another licensee has committed a reportable breach?
- Are licensees who report other licensees required to give the other licensee the same information they provide to ASIC?
- How will licensees actually provide that information to other licensees. Who will they contact and how?
- What happens to licensees who have been the subject of a report? Do they need to make their own breach report?
- Are licensees able to notify other licensees about their intentions to make a report or notify them after they have made a report?

### ***Knowledge of licensees***

***B5Q1 Should we include further guidance to help licensees understand when to report to ASIC? If so, please provide details, including what guidance would be helpful and why.***

We have no comment on this question.

***B5Q2 Should we include further guidance on what may amount to ‘knowledge’, ‘recklessness’ and ‘reasonable grounds’? If so, please explain what specific guidance would be helpful and why.***

SAFAA considers that further guidance is needed on what may amount to ‘knowledge’, ‘recklessness’ and ‘reasonable grounds’. A useful approach would be to provide examples of matters a licensee should have and should not have known. It will be particularly important for clear guidance on the differences between the obligations arising under the previous breach reporting provisions and the new ones.

***B5Q3 Should we include any additional or alternative guidance to help licensees provide reports to ASIC in a timely manner? If so, please give details.***

We have no comment on this question.

***Guidance on the prescribed form***

***B6 Q1 Do you have any feedback about the types of information we propose must be included in the prescribed form? If so, please provide details, and identify any issues.***

***B6Q2 Should we include any other information in the prescribed form? If so, please provide details.***

***B6Q3 Do you have any concerns about the types of information in the prescribed form and whether this information can be provided within the prescribed 30-day time period? If so, please provide details.***

An important issue raised by our members is the ability to lodge a report even if all fields are not completed to ensure that licensees are able to comply with reporting deadlines. For example, a licensee may not be aware for how long a breach has lasted. They must have the ability to lodge the report within the required timeframe with a 'not known' entry with the option to provide additional information once it is known.

Our members would like to understand if there will be technology support available to licensees in submitting online forms in the event they experience technological issues.

Our members also consider that guidance on how to report multiple breaches that are interlinked would be helpful.

***Guidance on notification, investigation and remediation of affected clients***

***C1 Q1 Do you agree with our proposed approach? If not, why not?***

***C1Q2 Should the guidance we provide on the new obligations be provided in the form of a separate information sheet, or be incorporated into RG 256? Please provide details.***

***C1Q3 Should we include further or more specific guidance on the circumstances in which licensees must:***

- ***Notify affected clients of a breach of the law***
- ***Investigate the full extent of that breach or***
- ***Remediate affected clients?***

***If so what other information would be helpful in determining how these obligations apply?***

SAFAA considers that it is important that guidance, to the extent possible, be kept in one place to assist licencees and their advisers. We refer to the recent ASIC consultation on affordable advice and the discussions on the importance of guidance on advice provisions being easily accessible. For this reason, SAFAA recommends that the guidance on the notification, investigation and remediation of affected clients be incorporated into RG 256: *Client review and remediation conducted by advice licensees*.

SAFAA recommends that further guidance be provided on how remediations can be operationalised and in particular, the following:

- how to define and identify an affected client
- how to comply with timelines around breach notifications, investigations and remediations
- how to scope the investigation
- how to identify the impact and calculate loss suffered by clients.

## Conclusion

If you require additional information or wish to discuss this submission in greater detail please do not hesitate to contact SAFAA's policy manager, Michelle Huckel, at [michelle.huckel@stockbrokers.org.au](mailto:michelle.huckel@stockbrokers.org.au).

Kind regards

A handwritten signature in black ink, appearing to read 'J Fox', with a stylized flourish above the 'x'.

Judith Fox  
Chief Executive Officer