



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations and Credit (Breach Reporting – Reportable Situations) Instrument 2021/716

This is the Explanatory Statement for *ASIC Corporations and Credit (Breach Reporting – Reportable Situations) Instrument 2021/716* (the *Reportable Situations instrument*).

The Explanatory Statement is approved by the Australian Securities and Investments Commission (*ASIC*).

Glossary

The following definitions of primary and delegated legislation are used:

ASIC Act means the *Australian Securities and Investments Commission Act 2001*.

Corporations Act means the *Corporations Act 2001*.

Credit Act means the *National Consumer Credit Protection Act 2009*.

IDR Standards Instrument means the *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98*

Legislation Act means the *Legislation Act 2003*.

Reportable Situations Instrument means the *ASIC Corporations and Credit (Breach Reporting – Reportable Situations) Instrument 2021/716*

Background

1. On 30 July 2020, ASIC made *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98 (IDR Standards Instrument)*, which, *inter alia*, specifies and approves standards for the purposes of subparagraph 912A(2)(a)(i) of the *Corporations Act 2001 (Corporations Act)* and paragraph 47(1)(h) of the *National Consumer Credit Protection Act 2009 (Credit Act)*. It does so by reference to enumerated paragraphs in ASIC Regulatory Guide RG 271 *Internal dispute resolution (RG 271)*.
2. Compliance with any such specified or approved standards is an obligation under subparagraph 912A(1)(g)(ia) of the *Corporations Act*, and under subparagraph 47(1)(h)(ii) of the *Credit Act* (both as notionally inserted by

clause 7 of the *IDR Standards Instrument*). Subsections 912A(5A) of the Corporations Act and 47(4) of the Credit Act makes non-compliance with these general obligations a civil penalty provision for the purposes of their respective legislative regimes.

3. On 10 December 2020, the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (the *FSRC Reform Act*) was passed, which amended the breach reporting obligations set out in section 912D of the Corporations Act and inserted parallel obligations into the Credit Act, in particular relating to reporting requirements for contraventions of civil penalty provisions, including those contained in subsection 912A(5A) of the Corporations Act and subsection 47(4) of the Credit Act.
4. As a result of the *FSRC Reform Act*, a contravention of subsection 912A(5A) of the Corporations Act and subsection 47(4) of the Credit Act, arising from a failure by a licensee to comply with notional subparagraphs 912A(1)(g)(ia) of the Corporations Act or 47(1)(h)(ii) of the Credit Act is deemed to be a 'reportable situation' (by paragraph 912D(4)(b) of the Corporations Act, and paragraph 40A(4)(b) of the Credit Act). Licensees are required to report such 'reportable situations' under section 912DAA of the Corporations Act or section 50B of the Credit Act.

Purpose of the instrument

5. The Reportable Situations Instrument is intended to notionally modify the law to exclude non-compliance with standards set out in the *IDR Standards Instruments* from the categories of situations deemed to be 'significant' breaches of core obligations about which licensees are to be required to lodge breach reports.
6. The IDR Instrument was made with the intention of attaching pecuniary penalties to non-compliance with ASIC's prescribed standards. It was not anticipated that attaching a pecuniary penalty in this manner would automatically result in the breach being deemed 'significant' and therefore reportable.
7. The Reportable Situations Instrument therefore provides administrative relief in circumstances where strict compliance with the legal obligations imposed by primary legislation (as notionally modified by the *IDR Standards Instrument*) results in every failure to comply with any of the enumerated paragraphs in RG271 being automatically considered 'significant', and therefore a 'reportable situation'. On this basis, it is appropriate for ASIC to provide relief through its exemption and modification powers, as the matters contained in the Reportable Situations Instrument relate to modifications made by another ASIC legislative instrument and, as a result, are of a highly specific nature more appropriate for legislative instrument rather than primary legislation.
8. The making of this exclusion is consistent with the rationale Government applied in excluding certain other civil penalty provisions from being deemed 'significant' breaches under section 912D of the Corporations Act (or section

50A of the Credit Act). This rationale is expressed at page 6 of the explanatory statement for the *Financial Sector Reform (Hayne Royal Commission Response—Breach Reporting and Remediation) Regulations 2021*.

9. Relevantly, contraventions of the type identified in the Reportable Situations Instrument fit into the category of being largely minor, technical, or inadvertent in nature. Given that, and the frequency with which breach reports would need to be lodged (and relevant documents supplied) in relation to such breaches, there would be a large regulatory burden imposed if the breaches were considered automatically significant.
10. Furthermore, where more material breaches of these provisions occur, these breaches may be otherwise reportable under the test in subsection 912D(5) or the other limbs of the deemed significance test in subsection 912D(4) of the Corporations Act (or subsection 50A(5) or the other limbs in subsection 50A(4) of the Credit Act).
11. ASIC makes the Reportable Situations Instrument for a period of 3 years, as an interim measure. This period will provide Parliament with the necessary time to consider legislative amendments to the relevant regulation power in paragraph 912D(4)(b) of the Corporations Act and paragraph 50A(4)(b) of the Credit Act, and for Government to make appropriate regulations.

Consultation

12. ASIC engaged in limited targeted consultation before making the Reportable Situations Instrument. The vast majority of respondents to the consultation did not oppose the creation of the Reportable Situations Instruments.
13. ASIC had previously also conducted a:
 - a. 3-month public consultation about the proposed new internal dispute resolution standards and requirements between May and August 2019 with the release of Consultation Paper 311 *Internal dispute resolution: Update to RG 165*; and
 - b. 6-week public consultation about its proposed new breach reporting guidance between April and June 2021, with release of Consultation Paper 340 *Breach reporting and related obligations*.

Operation of the instrument

14. The amending instrument omits and varies provisions of the Corporations Act and Credit Act inserted by FSRC Reform Act.

Corporations Act

15. The Reportable Situations instrument varies the situations in which a contravention will be automatically considered ‘significant’ (as set out in subsection 912D(4) Corporations Act), such that it specifically excludes a

contravention of subsection 912A(5A) which arises from a failure to comply with subparagraph 912A(1)(g)(ia) (as notionally inserted by Part 2 of the IDR Standards Instrument). This has the effect that such contraventions will no longer automatically meet the definition of a ‘reportable situation’ under subsection 912D(1) and therefore will not necessarily attract an obligation to lodge a report in accordance with sections 912DAA and 912DAB (notwithstanding the operation of subsection 912D(5)).

Credit Act

16. The Reportable Situations instrument varies the situations in which a contravention will be automatically considered ‘significant’ (as set out in subsection 50A(4) of the Credit Act), such that it specifically excludes a contravention of subsection 47(4) which arises from a failure to comply with subparagraph 47(1)(h)(ii) (as notionally varied by Part 2 of the IDR Standards Instrument). This has the effect that such contraventions will no longer automatically meet the definition of a ‘reportable situation’ under subsection 50A(1) and therefore will not necessarily attract an obligation to lodge a report in accordance with sections 50B and 50C (notwithstanding the operation of subsection 50A(5)).

Legislative authority

17. The source of the power to make the Reportable Situations Instrument is subsection 926A(2)(c) of the Corporations Act and subsection 109(3) of the Credit Act.
18. The amending instrument is a disallowable legislative instrument.

Statement of Compatibility with Human Rights

19. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Corporations and Credit (Breach Reporting – Reportable Situations) Instrument 2021/716

Overview

1. This instrument amends the operation of sections 912D of the Corporations Act and section 50A of the Credit Act to clarify those situations in which licensees are required to lodge breach reports.

Assessment of human rights implications

3. This instrument does not engage any of the applicable rights or freedoms.

Conclusion

4. This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.