



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations and Credit (Amendment) Instrument 2023/589

This is the Explanatory Statement for *ASIC Corporations and Credit (Amendment) Instrument 2023/589 (Amendment Instrument)*.

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

Summary

1. Australian financial services licensees, their representatives and Australian credit licensees (**licensees**) must lodge reports with ASIC in relation to ‘reportable situations’ under Subdivision B of Division 3 of Part 7.6 of the *Corporations Act 2001 (Corporations Act)*.
2. This responsibility includes an obligation to report any breach of the prohibitions on misleading and deceptive conduct or false and misleading representations in subsection 1041H(1) of the *Corporations Act* and subsections 12DA(1) and 12DB(1) of the *Australian Securities and Investment Commissions Act 2001 (ASIC Act) (MDC provisions)*.
3. Licensees must lodge their reports within 30 days after the licensee first knows that, or is reckless with respect to whether, there are reasonable grounds to believe that a reportable situation has arisen under subsection 912DAA(3) of the *Corporations Act* or subsection 50B(4) of the *National Consumer Credit Protection Act 2009 (Credit Act) (timeframe obligations)*.
4. The Amendment Instrument amends *ASIC Corporations and Credit (Breach Reporting-Reportable Situations) Instrument 2021/716 (Principal Instrument)* to insert items that modify the obligations for licensees to report certain reportable situations. This follows concerns about the costs of reporting some reportable situations that have limited regulatory benefit.
5. The Amendment Instrument also amends subsection 912D(3) of the *Corporations Act* to make consequential amendments that were missed when Schedule 2 of the *Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023 (Improvement Package Act)* was made.

Purposes of the instrument

First purpose

6. The first purpose of the Amendment Instrument is to reduce the regulatory burden for licensees arising from reportable situation reports that offer limited or no regulatory intelligence value for ASIC and meet certain criteria. This is achieved by modifying reportable situations deemed ‘significant’ breaches under paragraphs 912D(4)(b) and 912D(4)(c) of the Corporations Act and paragraph 50A(4)(d) of the Credit Act (**significance thresholds**).
7. The operation of section 912D of the Corporations Act and section 50A of the Credit Act mean that any breach of the MDC provisions are a ‘significant’ breach of a ‘core obligation’. This fact means that there is automatically a reportable situation under paragraph 912D(1)(a) of the Corporations Act and paragraph 50A(1)(a) of the Credit Act.
8. This presence of an automatic reportable situation has led to a large volume of MDC provisions breaches being reported to ASIC that have little or no intelligence value. This reporting involves a cost for licensees with little regulatory benefit.
9. The Amendment Instrument means that licensees are exempt from reporting breaches of the MDC provisions that are one reportable situation, impact one consumer or involve a relevant product that is jointly held and impacts the holders of that product, cause no financial loss or damage, or likely financial loss or damage, and are not otherwise a reportable situation.

Second purpose

10. The second purpose of the Amendment Instrument is to further reduce the regulatory burden for licensees arising from reportable situation reports by permitting licensees up to 90 days to report a reportable situation (a **related reportable situation**) that has underlying circumstances that are the same as, or substantially similar to, underlying circumstances of an earlier reportable situation that the licensee has reported to ASIC.
11. ASIC acknowledges there is burden associated with such reports for licensees who may be investigating a breach and identifying further reportable situations, and is mindful of its obligations under section 1 of the ASIC Act. These include an obligation to strive to ‘maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy.’
12. ASIC expects that the additional time should contribute to better reporting by licensees and enable licensees to address and rectify breaches more quickly. ASIC also reminds licensees that they are expected to undertake regular reviews or audits of the number of breaches reported and identify any trends in reports, as outlined in Regulatory Guide 78 *Breach reporting by AFS licenses and credit licensees* ([RG 78](#)). These reviews or audits are another mechanism to mitigate

the burden of reportable situations reports and ASIC expectations in this regard are not affected by the Amendment Instrument.

Third purpose

13. The third purpose of the Amendment Instrument is to modify subsection 912D(3) of the Corporations Act to correct a missed consequential amendment of that subsection that the Improvement Package Act should have made.
14. If subsection 912D(3) is not modified then some legal requirements that are core obligations of licensees for the purposes of the reportable situation regime, such as the requirements in Division 2 of Part 2 of the ASIC Act, would cease to be core obligations. This is because subsection 912D(3) was not amended in response to the revised ‘financial services law’ definition paragraph lettering in new section 761A of the Corporations Act that item 289 of the Improvement Package Act inserted.
15. ASIC makes the modifications to s912D(3) as an interim measure as Parliament may implement legislation making the consequential amendments of that subsection.

Consultation

16. ASIC undertook targeted consultation with a wide range of stakeholders including industry, consumer representative bodies and the Treasury before making the Amendment Instrument. No stakeholder opposed the making of the Amendment Instrument.
17. ASIC foreshadowed this consultation in a 27 April 2023 Media Release ([23-106MR](#)) that released an updated RG 78.
18. The updates to RG 78 followed targeted consultation on proposed changes in late 2022. The updates clarified aspects of the guidance in RG 78 and provided new guidance in response to operational issues that had arisen since the reportable situations regime commenced on 1 October 2021. When releasing the updated RG 78, ASIC stated that ‘[t]hrough our engagement with industry, we are aware of other issues raised regarding the operation of the reportable situations regime. ASIC’s work on these other matters is ongoing, and we expect to undertake further consultation with a range of stakeholders.’

Operation of the instrument

19. Section 2 of the Amendment Instrument provides that it commences on the later of the day after the Amendment Instrument is registered on the Federal Register of Legislation and the commencement of Schedule 2 of the Improvement Package Act.
20. Section 3 of the Amendment Instrument provides that the instrument is made under subsection 926A(2) of the Corporations Act and subsection 109(3) of the Credit Act. Section 4 has the effect that the Principal Instrument is amended as

set out in Schedule 1 of the Amendment Instrument and any other item in Schedule 1 has effect according to its terms.

New significance thresholds

21. Schedule 1 of the Amendment Instrument amends the Principal Instrument to insert section 7 that makes minor amendments of section 912D of the Corporations Act and section 50A of the Credit Act. Section 7 also inserts new subsections 912D(4A) and 912D(4B) of the Corporations Act and subsections 50A(4A) and 50A(4B) of the Credit Act (the **new significance thresholds**).
22. The new significance thresholds exempt a breach constituted by a contravention of the MBC provisions from being deemed ‘significant’ and therefore reportable if certain conditions are met.
23. The first condition is that the underlying circumstances in relation to the breach must have only given rise, and only be likely to give rise, to a single reportable situation under paragraph 912D(1)(a) of the Corporations Act and paragraph 50A(1)(a) of the Credit Act: see new subsection 912D(4A)(a) of the Corporations Act and new subsection 50A(4A)(a) of the Credit Act. A single reportable situation exists even if conduct has given rise to a single contravention of multiple MDC provisions: see new paragraph 912D(4B)(a) of the Corporations Act and new paragraph 50A(4B)(a) of the Credit Act. This is because the same conduct may contravene different MDC provisions.
24. The condition that there be only a single reportable situation means that the underlying circumstances must not give rise, and be unlikely to give rise, to another reportable situation pursuant to subsection 912D(4) of the Corporations Act or subsection 50A(4) of the Credit Act. For example, a licensee cannot fail to report a contravention of the MDC provisions that results from a circumstance, such as an erroneous call centre script or organisational publication, which has resulted, or is likely to result, in a further contravention or contraventions of the MDC provisions.
25. Likewise, a licensee cannot fail to report a contravention that has given rise, or would be likely to give rise, to a reportable situation pursuant to subsection 912D(5) of the Corporations Act or subsection 50A(5) of the Credit Act. Examples are a contravention that is one of a series of breaches of the MDC provisions, a contravention that has an impact on the licensee’s ability to provide the financial services covered by their Australian financial services licence or credit licence, or a contravention that indicates the licensee’s arrangements to ensure compliance with the MDC provisions are inadequate.
26. If, after identifying an initial contravention of the MDC provisions, there is a subsequent contravention of those provisions resulting from the same underlying circumstances, the relief in new subsection 912D(4A) of the Corporations Act and new subsection 50A(4A) of the Credit Act ceases to apply. Accordingly, both the initial contravention and the subsequent contravention will give rise to a reportable situation at the time of the subsequent contravention. Licensees must lodge a report with ASIC about the contraventions within the timeframes in subsection 912DAA(3) of the

Corporations Act and subsection 50B(4) of the Credit Act (as amended by the Amendment Instrument).

27. Underlying circumstances are the factual circumstances of the relevant conduct that led to the reportable situation and its underlying cause(s) or 'root cause(s)' - see further the prescribed form available from the ASIC Regulatory Portal ([Portal](#)) and RG 78 Table 11. Examples are the failure to apply an aspect of product application requirements due to staff negligence, staff misunderstanding of the terms and conditions for a product that has meant a consumer is given incorrect advice, a systems deficiency that has resulted in a particular error and a process defect causing a misrepresentation due to inadequate management controls when designing the process.
28. The second condition under the Amendment Instrument is that only one consumer must typically be, or be likely to be, impacted by the breach: see new paragraph 912D(4A)(b) of the Corporations Act and new paragraph 50A(4A)(b) of the Credit Act. The exception is where the contravention of the MDC provisions relates to a product that is, or that is proposed to be, held by more than one person jointly: see subparagraph 912D(4A)(b)(ii) and subparagraph 50A(4A)(b)(ii). Products for this purpose are a financial product (within the meaning of section 9 of the Corporations Act) or a credit contract, consumer lease, mortgage or guarantee (within the meaning of section 5 of the Credit Act).
29. If a product is to be jointly held, the persons that are, or will be, the persons that hold the product must be the only persons who are, or are likely to be, impacted by the MDC provisions contravention. Impact for the purposes of the new paragraph 912D(4A)(b) and new paragraph 50A(4A)(b) is whether the consumer was misled or deceived as a result of the breach or the recipient of a false or misleading representation to which the breach relates: see new paragraph 912D(4B)(b) of the Corporations Act and paragraph 50A(4B)(b) of the Credit Act.
30. The number of consumers is not one where the misleading and deceptive conduct or false or misleading representation is made as part of a wider public communication such as advertising, website or product or market disclosure. There is also not only one consumer if the number of consumers that are, or likely to be, impacted by the contravention of the MDC provisions is not discernible. Licensees must still report any contraventions of the MDC provisions that occur in these circumstances.
31. The third condition is that the breach must not have resulted in, and be unlikely to result in, financial loss or damage to any person. This includes immediate or future financial loss or damage and extends to loss or damage to a person other than the relevant consumer that has been misled or deceived, or been the recipient of the false or misleading representation. Financial loss or damage exists irrespective of whether the loss or damage has been, will, or may be, remediated: see new paragraph 912D(4A)(c) of the Corporations Act and paragraph 50A(4A)(c) of the Credit Act.

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32. Provided they meet the condition to be a single reportable condition, some examples of reportable situations that would no longer automatically be deemed significant, and therefore reportable, under the new significance thresholds are:
- (a) a customer service agent states that car hire is available ‘for 14 days’ rather than ‘up to 14 days’ when the consumer seeks to hire the car for 14 days;
 - (b) a sales agent quotes a lower savings rate on a savings account at account opening than its actual rate, and the institution promptly advises the consumer of the actual rate and pays that higher rate in circumstances where, given the speed of identifying and paying the higher rate, the account holder has suffered no financial loss or damage;
 - (c) a staff member mistakenly advises a consumer that a payment will be processed on the following day but that day is a public holiday so the payment will not be processed until a day later in circumstances where there is no financial loss incurred by the consumer as a result of the payment being processed a day later;
 - (d) a Statement of Advice given to a client contains an error that the adviser rectifies with the client promptly and involves no actual or expected financial loss to the client i.e. is not an error that, if the correct information was provided, could have influenced the client’s decision;
 - (e) an approval letter issued to a superannuation fund member confirming their account balance fails to include a total and permanent disablement benefit amount that has been approved, but the payment made to the member includes this amount, and the omission was not made in circumstances where another omission has arisen, or is likely to arise (e.g. because the root cause of the omission is a defective letter template or systems error);
 - (f) a 100 basis point discount, which was outlined in a letter of offer accompanying a new home loan, is not applied when the linked transaction account is set up, but the mistake is identified before the first monthly repayment and rectified so that it applies to that repayment and later repayments, and further reportable situations because of the non-application have not arisen and are not likely to arise as the error was a one off and not due to a systemic fault such as a defective template;
 - (g) a staff member incorrectly advises a customer about the amount of daily external transfer they are permitted to make during a phone call and corrects the error on the same call in circumstances where there is no actual or anticipated financial loss to the consumer; and
 - (h) in a sales call regarding a credit card, a staff member mistakenly advises that the interest rate will be 17% per annum when it is actually 15% per annum but the customer proceeds with acquisition of the card based on a 17% per annum rate, the bank promptly advises the customer of the lower rate and charges the lower rate.

New timeframes

33. Schedule 1 of the Amendment Instrument amends the Principal Instrument to insert section 8 that substitutes subsection 912DAA(3) of the Corporations Act and subsection 50B(4) of the Credit Act with new subsections (the **new timeframes**).
34. The new timeframes provide that licensees have up to 90 days from when they first know that, or are reckless with respect to whether, there are reasonable grounds to believe that a reportable situation has arisen to lodge a report with ASIC if the situation is a related reportable situation. All other reportable situations must be reported within 30 days.
35. A related reportable situation exists if a situation has underlying circumstances that are the same as, or substantially similar to, underlying circumstances relating to a previous reportable situation reported to ASIC. As noted in paragraph 27, underlying circumstances are the factual circumstances of the relevant conduct and its ‘root cause(s)’ within the meaning of the prescribed form available from the Portal and further guidance is in RG 78 Table 11.
36. As RG 78 explains, licensees may group different reportable situations in a single report to ASIC if there is similar, related or identical conduct and the conduct has the same root cause: see RG 78.112–118 and Table 9. The Amendment Instrument means that licensees also have up to 90 days to report a reportable situation from when they first know that, or are reckless with respect to whether, there are reasonable grounds to believe that the situation has arisen if the situation could have been grouped with an earlier reported reportable situation in a single report.
37. Notwithstanding the new timeframes, ASIC retains a right to direct the reporting of related reportable situations within a shorter period than 90 days. For example, ASIC may take this approach where the related reportable situations are relevant to an active investigation.

Core obligations modification

38. Schedule 1 of the Amendment Instrument amends the Principal Instrument to insert section 9 that modifies paragraphs of subsection 912D(3) of the Corporations Act so that the following continue to be core obligations for the purposes of that subsection:
 - (a) the unconscionable conduct and consumer protection provisions (Division 2 of Part 2) of the ASIC Act;
 - (b) in relation to financial services (other than traditional trustee company services provided by a licensed trustee company), Commonwealth, State of Territory legislation that is specified in sub-regulation 7.6.02A(1) of the *Corporations Regulations 2001* as far as that legislation covers conduct relating to the provision of financial services; and

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- (c) in relation to traditional trustee company services provided by licensed trustee companies, any rule of common law or equity that covers conduct relating to the provision of traditional trustee company services but only as far as the rule covers conduct relating to the provision of those services.

Legislative instrument and primary legislation

39. The subject matter and policy implemented by the Amendment Instrument are more appropriate for a legislative instrument rather than primary legislation because the instrument provides administrative relief in circumstances where strict compliance with the primary legislation produces anomalous outcomes that are inconsistent with the intent of the primary law.
40. As paragraph 11.29 of the explanatory memorandum for the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* illustrates, there was an intent that delegated legislation should be utilised to relieve ASIC of receiving a large number of reports about minor, technical or inadvertent breaches where those breaches are not otherwise significant.
41. It will be a matter for the Government and for Parliament as to whether the Corporations Act and/or associated regulations may be amended in future to include the relief in the Amendment Instrument. The Principal Instrument, which the Amendment Instrument amends, is to be repealed on 5 October 2024.

Legislative authority

42. The Amendment Instrument is made under subsection 926A(2) of the Corporations Act and subsection 109(3) of the Credit Act.
43. The Amendment Instrument is a disallowable legislative instrument.
44. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Statement of Compatibility with Human Rights

45. 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 (Amendment) Instrument 2023/589

Overview

1. This instrument amends *ASIC Corporations and Credit (Breach Reporting– Reportable Situations) Instrument 2021/716 (Principal Instrument)* to insert sections 7–9.
2. Section 7 modifies section 912D of the *Corporations Act 2001 (Corporations Act)* and section 50A of the *National Consumer Credit Protection Act 2009 (Credit Act)* to exclude contraventions of subsections 12DA(1) or 12DB(1) of the *Australian Securities and Investments Commission Act 2001* and subsection 1041H(1) of the *Corporations Act* (collectively **MDC provisions**) from being deemed a ‘significant’ breach of a core obligation and therefore a reportable situation if certain conditions are met.
3. Section 8 substitutes subsection 912DAA(3) of the *Corporations Act* and subsection 50B(4) of the *Credit Act* with new subsections that permit up to 90 days from the day the relevant licensee first knows that, or is reckless with respect to whether, there are reasonable grounds to believe that a reportable situation has arisen if that reportable situation is related to an earlier reported reportable situation.
4. Section 9 modifies subsection 912D(3) to make consequential amendments that were missed when Schedule 2 of the *Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023* was made.

Assessment of human rights implications

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

Conclusion

6. 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*.