

## Introduction

As Australia's financial system adjusts to the coronavirus disease 2019 (COVID-19) pandemic and as difficult as the operating environment currently is, the direction from ASIC is that Australian financial service (AFS) licensees must remain focused on meeting their general obligations (including those under their AFS Licence and the Corporations Act 2001 (Cth) (Corporations Act)).

ASIC has not granted relief for AFS licensees from their obligation to comply with licensing and conduct obligations under Australian financial services laws. As such, AFS licensees should proactively assess the impacts of COVID-19 on its ability to meet its obligations and their existing compliance measures, with a view to approaching ASIC early to seek exemptions or modifications to their obligations if any non-compliance is expected.

Below is a high-level summary of some of the immediate issues for AFS licensees, particularly in the funds management industry in Australia.

## ASIC's Reminder to AFS Licensees

While ASIC is mindful of the difficulties faced by AFS licensees with respect to regulatory compliance in the current crisis, ASIC has confirmed that AFS licensees still need to comply with their obligations, including those discussed below in particular.

Responsible entities should notify ASIC if any registered scheme becomes non-liquid or if redemptions are suspended. Affected responsible entities should email [investment.managers@asic.gov.au](mailto:investment.managers@asic.gov.au).

Until at least 30 September 2020, ASIC will give priority to matters where there is a "risk of significant consumer harm, serious breaches of the law, risks to market integrity and time-critical matters".

- **Business continuity** – AFS licensees are expected to have business continuity plans (BCPs) in place to deal with major events and to maintain robust monitoring and supervision controls to ensure they provide financial services efficiently, honestly and fairly. COVID-19 will test BCPs and risk management procedures of AFS licensees, potentially revealing issues that need to be addressed (e.g. compliance procedures may prove inadequate and may need to be reviewed and updated).
- **Financial requirements and liquidity** – COVID-19-driven pressures on liquidity may affect AFS licensees (in particular, responsible entities of a scheme) ability to satisfy the financial requirements under their AFS Licences.

Licensees should actively review their ongoing compliance in light of their own liquidity and the value of the assets that underpin the compliance with their Net Tangible Assets requirements. Licensees should update their cash flow requirements to reflect revised projections of inflows and outflows, factoring in any disruptions.

- **Adequate resources** – The requirement to maintain adequate human and information technology resources may also be tested as a result of COVID-19. Licensees need to assess whether resources remain available and adequate to continue providing financial services covered by their AFS Licence and supervisory arrangements.
- **Risks and financial exposure** – With the increased level of market volatility, AFS licensees are also reminded to ensure they are appropriately monitoring risks and financial exposure. This includes, for example, the following:
  - Being well prepared for margin calls
  - Closely monitoring client positions
  - Protecting client money
  - Considering system capacity issues
  - Closely monitoring the use of trading algorithms to avoid aberrant trading, the contribution to, or perpetuation of, market movements
  - Closely monitoring arrangements to ensure that any short positions are covered
- **Disclosure** – AFS licensees should consider including a generic COVID-19 risk statement in their product offer documents (which may acknowledge that the situation is uncertain and rapidly evolving), with more bespoke disclosure for funds whose investment strategy exposes them to specific risks (for example, real estate funds).

## External Services Providers

AFS licensees remain liable for the actions of service providers, representatives under their AFS Licence, or other persons they have engaged to do anything in connection with the business/scheme.

As such, AFS licensees need to ensure they have adequate processes and procedures in place so that representatives are adequately supervised and monitored for compliance with the financial services laws.

## Breach Reporting Obligations

There are no changes to the ongoing breach reporting obligations for AFS licensees. If you have breached, or are likely to breach, one of your AFS Licence obligations (such as those discussed above), then you need to assess and rectify the breach in accordance with your compliance procedures, bearing in mind the following:

- **ASIC notification** – AFS licensees must notify ASIC in writing of any “significant” breach (or likely breach) of their obligations, as soon as possible, and in any event within 10 business days of becoming aware of the breach or likely breach. If you do not inform ASIC of a significant breach (or likely breach), then ASIC could consider the omission itself is a significant breach. AFS licensees should have a clear, well-understood and documented process for identifying and reporting such a breach.
- **New ASIC requirements** – Effective 30 March 2020, AFS licensees are now required to submit breach reports to ASIC via the ASIC Regulatory Portal.

## Should You Apply to ASIC for Relief?

If you think you would be unable to comply with an obligation due to the COVID-19 crisis, you should consider applying to ASIC for relief.

In the current crisis, ASIC has stated that relief or waivers from regulatory requirements will be provided where warranted. For example, ASIC may make available relief to allow the responsible entity of a scheme to return some capital to certain members in exceptional circumstances of hardship if the scheme becomes non-liquid.

If you are experiencing cash flow issues, which may prevent you from meeting obligations to pay regulatory fees (including any late fees), then you may apply to ASIC for a payment plan or fee waiver.

## How Can We Help?

It is important that you assess the COVID-19 impact on your ability to comply with the licensing obligations. If you have any questions or need assistance, please call or email one of the key contacts listed in this article.

We would also be pleased to assist you in complying with the breach reporting obligations (including undertaking an assessment of your internal procedures) and making relief or waiver applications to ASIC.

We are continually monitoring the legal, regulatory and commercial implications for the financial services industry.

## Contacts



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