



Infringement Notices

Guidelines on the use of Infringement Notices by the Australian Prudential Regulation Authority


1 July 2013

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Purpose of these guidelines

1.1 Purpose

These guidelines provide background information and general guidance on the Australian Prudential Regulation Authority (APRA)'s approach to issuing infringement notices under the *Superannuation Industry (Supervision) Act 1993 (SIS Act)* and the *Financial Sector (Collection of Data) Act 2001 (FSCOD Act)*.

Infringement Notices may be issued for a breach of certain provisions of the SIS Act and the FSCOD Act.

1.2 The Australian Prudential Regulation Authority and its supervisory approach

APRA is the prudential regulator of the Australian financial services industry. It oversees banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies, and superannuation entities. APRA's supervisory approach is forward-looking, primarily risk-based, consultative, consistent and in line with international best practice. This approach also recognises that management and boards of supervised institutions are primarily responsible for financial soundness.

1.3 The aim of the infringement notice regime

1.3.1 SIS Act

APRA is the Australian government prudential regulator in relation to superannuation funds (other than self-managed superannuation funds), approved deposit funds (ADFs) and pooled superannuation trusts (PSTs). Under the SIS Act, APRA is given certain powers to assist with its prudential regulation of the superannuation industry. Included in those powers is the ability to issue infringement notices under the infringement notice schemes outlined in Part 3B and Part 22 of the SIS Act.

1.3.2 FSCOD Act

The FSCOD Act enables APRA to collect information to assist it in the prudential regulation of bodies in the financial sector. This information may also be considered by other financial sector agencies, such as the Reserve Bank when formulating monetary policy.

The FSCOD Act includes an infringement notice scheme which APRA may use when information is not provided in a timely and complete way. A contravention of sub-sections 9(1), (2) or (6), 13(9), 14(3) or 17(8) of the FSCOD Act may give APRA grounds to serve an infringement notice.

1.4 Key Terms

In these guidelines:

- **Acts** means both of the *Superannuation Industry (Supervision) Act 1993* and the *Financial Sector (Collection of Data) Act 2001*.
- **APRA** means the Australian Prudential Regulation Authority established by section 7 of the *Australian Prudential Regulation Authority Act 1998*.
- **APRA Act** means the *Australian Prudential Regulation Authority Act 1998*.
- **decision maker** means the person to whom APRA has granted authority to exercise the powers and functions of APRA under the particular provision of the Acts.
- **entity** means the potential recipient of the infringement notice and may include a natural person.
- **FSCOD Act** means the *Financial Sector (Collection of Data) Act 2001*.
- **SIS Act** means the *Superannuation Industry (Supervision) Act 1993*.

Status of the guidelines

These guidelines are operative and current as at 1 July 2013.

A decision maker is not bound to exercise his or her discretion to issue a notice only in accordance with these guidelines. Each case will be considered by the decision maker on its particular facts.

The most recent version of these guidelines is available at www.apra.gov.au.

Prerequisites for issue of infringement notices

3.1 Reasonable grounds

APRA must have reasonable grounds to believe that an entity has committed an offence or offences when issuing an infringement notice under sub-section 34R(1) or 224(1) of the SIS Act or sub-section 19(1) of the FSCOD Act.

If APRA believes there are reasonable grounds for the issue of a notice, APRA may then enter into correspondence with the entity requesting that the entity explain why further action should not be taken in relation to an alleged breach. The entity might make submissions to APRA.

3.2 Guide for decision maker

The decision maker must consider the elements of each alleged offence to decide if grounds exist to issue an infringement notice.

Once the decision maker establishes that there are reasonable grounds, he or she must exercise a discretion whether it is appropriate in all of the circumstances for an infringement notice to be served. See part 4 below for guidelines on the exercise of this discretion.

3.3 Time to issue an infringement notice

An infringement notice must be given within 12 months after the day on which the contravention is alleged to have taken place.

Where APRA becomes aware of a contravention more than 12 months after the day on which the contravention is alleged to have taken place, APRA may take an alternative form of action, such as referring a matter for prosecution.

Exercise of discretion to issue an infringement notice

4.1 Factors which may be considered

Once a decision maker has reasonable grounds to believe that one or more of the contraventions in question has been committed, then the decision maker would ordinarily exercise a discretion whether or not to issue an infringement notice.

The following is not an exhaustive list of factors to be considered and not every factor listed here will always be relevant:

- 4.1.1 The significance of the contravention, including: the seriousness of the consequences flowing from a contravention; the length of time that has passed from the date of a contravention; and the response or lack of response by the entity to any reminders or warnings issued by APRA about the alleged contravention;
- 4.1.2 The entity's efforts/attempts to comply with any requests made by APRA in relation to the contravention, including whether APRA has previously reminded the entity to comply or warned the entity that further contraventions of the type in question could be dealt with in future through the infringement notice process and/or the compliance history of the entity;
- 4.1.3 A potential defence to the contravention. The decision maker may consider whether a defence is likely to be available to the proposed recipient of an infringement notice. If so, the decision maker may need to make further enquiries with the entity or obtain further legal advice before determining whether to issue an infringement notice;

4.1.4 Any reasons beyond the entity's control that have led to a contravention of the provision including: how the actions of any other person contributed to the entity committing an offence and the relationship between that person and the entity; and/or whether the entity relied upon information provided by an unrelated party and whether it was reasonable to do so;

4.1.5 Current legal or review proceedings. Where APRA is a party to legal or review proceedings, APRA will usually not serve an infringement notice relevant to the subject matter of the proceedings. The issues will be left for determination in the legal or review proceedings; and/or

4.1.6 Other factors that may be considered in exercising the discretion to issue an infringement notice. For example, whether issuing an infringement notice will improve the compliance of the entity (or related entities) on whom it is issued and/or that of other industry participants.

4.2 Multiple contraventions in one infringement notice

An infringement notice may relate to more than one contravention. An infringement notice may relate to multiple contraventions of one offence or it may relate to single contraventions of multiple offences. A continued failure to comply can constitute further offences. In some cases an offence occurs each day of non-compliance.

When a decision-maker is deciding whether or not to issue a single infringement notice for multiple contraventions, the factors in Part 4.1 above may be relevant. Other factors may also be relevant, such as if APRA has warned the entity that daily offences will be committed if non-compliance continues and non-compliance has continued or did continue for a time after the receipt of this warning.

Penalties

5.1 SIS Act

The penalty that will be specified in an infringement notice will, in the case of a strict liability offence, be equal to one-fifth of the maximum penalty that a Court could impose on the entity for that contravention.¹

5.2 FSCOD Act

The penalty that will be specified in an infringement notice will be whichever is the lesser of one-fifth of the maximum penalty that a Court could impose for the offence or offences or 50 penalty units.

Options for entity receiving notice

6.1 Payment of penalty

The first option available to an entity is to pay the penalty specified in an infringement notice by the due date. Any liability of the entity for the offence or offences specified in the notice and for any other offence or offences constituted by the same omission is taken to be discharged.

On receipt of payment, APRA will not take further proceedings in respect of such an offence or offences and the entity has no conviction recorded against it. The payment of the penalty is also not taken as an admission by the entity of guilt or liability for the alleged contravention. APRA will keep a record of infringement notice history as specified in Part 7 of these guidelines.

6.2 Application for extension of time to pay penalty

The entity may request that APRA extend the time for payment of the penalty specified in the infringement notice.

Under the SIS Act, such an application must be made before the end of the period to be extended. Under the FSCOD Act, APRA can grant an extension even if the period for payment of the penalty has expired.

¹ If a civil penalty provision is listed as subject to the infringement notice regime contained in Part 22 of the SIS Act, the relevant penalty would be one-fortieth of the maximum penalty that a Court could impose.

APRA may consider a number of factors in deciding to extend time for payment of the penalty specified in the infringement notice. For example, if APRA has issued infringement notices previously in respect of other contraventions, did the recipient request an extension of time for payment and, if so, what were the reasons given?

6.3 Elect to leave matter for APRA to prosecute or take other action

If the entity elects not to pay the penalty, or informs APRA that it would prefer to defend itself in Court, APRA may exercise its discretion to refer the matter for prosecution.

6.4 Application for withdrawal

The entity may make written representations to APRA seeking withdrawal of an infringement notice.

APRA may also withdraw an infringement notice on its own initiative.

6.4.1 SIS Act

For infringement notices issued pursuant to subsection 34R(1) of the SIS Act, a person to whom an infringement notice has been given must make any written representations within 21 days after the notice is given. For all other infringement notices issued under the SIS Act, APRA recommends that written representations are made prior to the date specified for payment of the penalty.

When deciding whether or not to withdraw an infringement notice under the SIS Act, the decision maker must take into account any written representations seeking the withdrawal that were given by the entity and may take into account any other matter that the decision-maker considers relevant.

If a decision is made to withdraw the notice, APRA will give a notice of withdrawal to the entity.

6.4.2 FSCOD Act

The FSCOD Act specifies that a notice can only be withdrawn within the period specified for payment of the penalty.

The FSCOD Act specifies some of the factors to which APRA may have regard in deciding whether or not to withdraw an infringement notice, including any written representations made by the entity and whether the entity has previously been convicted of an offence for a contravention of the FSCOD Act.

If a decision is made to withdraw the notice, APRA will serve written notice of the withdrawal on the entity.

6.4.3 Consequences of withdrawal

If the penalty has already been paid within the timeframe required and the notice is subsequently withdrawn, APRA must refund the amount paid.

Keeping and use of infringement notice history by APRA

7.1 Record kept

APRA will keep a record of the issue of an infringement notice and the payment or non-payment of the amount specified in the notice. APRA will keep a record of the issue of an infringement notice for the same period of time as it retains returns to APRA (7 years).

7.2 Reporting

APRA's record of an entity's infringement notice history will be used for the purpose of recording, monitoring and reporting on enforcement activities undertaken by APRA in compliance with any relevant Commonwealth policies or procedures, such as the *Archives Act 1983*.

Access to Information and Publication of Information

8.1 Freedom of Information Act

A record of the issue of an infringement notice or payment or non-payment of the amount specified in an infringement notice is subject to the *Freedom of Information Act 1982* (the FOI Act). Each request under the FOI Act will be considered on a case by case basis. APRA may refuse to release information that falls within an exemption under the FOI Act.

8.2 Register of Infringement Notices

APRA will maintain a register of infringement notices on its external website www.apra.gov.au.

8.3 Information sharing with other regulators

APRA may provide information about infringement notices issued by APRA to other regulators, such as ASIC, for the purposes of assisting those regulators in carrying out their responsibilities.

8.4 Publication

Having regard to the deterrent effect of publicity, APRA reserves the right to issue a press release in relation to the payment of a penalty imposed in an infringement notice or on commencement of prosecution.



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