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MONITORING COMPLIANCE – Investigations

Purpose

The purpose of this Guidance Note is to promote awareness among Market Participants of the practices and procedures followed by ASX Investigations and ASX Enforcement when conducting an investigation under the ASX Market Rules (“Rules”) concerning a Regulated Person.

This Guidance Note does not address ASX’s practices and procedures in relation to disciplinary proceedings, which may be commenced by ASX following an ASX investigation. That topic is addressed in a separate Guidance Note titled ‘ASX Disciplinary Proceedings’.

Background

Investigatory Obligations and Powers

ASX considers that one of its core functions is to promote and maintain a high level of market integrity in the interests of market participants and the broader economic community.

ASX is also obliged by Section 792A of the Corporations Act to, among other things to the extent it is reasonably practicable to do so, do all things necessary to ensure that its market is a fair, orderly and transparent market and have adequate arrangements for monitoring and enforcing compliance with its market operating rules.

The Rules provide ASX with broad powers to monitor, investigate and obtain information from Regulated Persons in the course of complying with its Corporations Act obligations and for the purpose of promoting and maintaining market integrity.

Pursuant to Rules 28.1.1 and 28.1.2, ASX may require Regulated Persons to provide any information known to the Regulated Person and provide or permit inspection at the offices of the Regulated Person or any other place notified by ASX of any records which may relate to a matter which is the subject of an ASX investigation.

Cross Reference

1. ASX Market Rule Guidance Note No. 02 – Record of Action & Announcement – Management Letters Publication
2. ASX Market Rule Guidance Note No. 10 – Disciplinary Proceedings

Guidance Note History

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01 November 2006

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ASX GN 2/01

Other provisions in the Rules enable ASX to require Regulated Persons to produce particular documents, for example, Rule 13.1.10 (identification of order source).

Pursuant to Rule 28.1.3, during an investigation ASX may also require a Regulated Person to cause one or more of its Employees to appear before ASX or a Tribunal for interview in connection with matters relating to the business of the Market Participant.

Who conducts ASX investigations?

ASX investigations are carried out by ASX Investigations, which forms part of ASX Market Supervision. ASX Investigations frequently conducts formal interviews and calls for the production of documents during the course of its investigations.

Who refers matters to ASX Investigations?

ASX's Surveillance unit, which also forms part of ASX Market Supervision, calls for information and the production of documents in carrying out its role of monitoring trading on ASX markets. Surveillance refers matters of possible regulatory concern regarding Regulated Persons to ASX Investigations, which, after an initial assessment, may commence an investigation. Other ASX units which request Regulated Persons to provide ASX with information, as part of satisfying ASX's obligation to monitor compliance with its Rules, include Compliance Services and Risk Management. These units may also refer matters of possible regulatory concern to ASX Investigations for assessment and possible investigation.

Investigatory Powers

ASX's investigatory powers under the Rules, in particular its powers to require Regulated Persons to produce documents and to cause its Employees to appear for interview, may be enforced under sections 793C and 1101B of the Corporations Act. If a Regulated Person fails to comply with a direction from ASX to produce documents or appear for interview, ASX may apply to a court under those provisions for orders that it does so.¹ As the Rules have contractual force (see section 793C of the Corporations Act), ASX may also treat a failure to comply with such a direction as a breach of contract and seek redress from a court for such breach.



A failure by a Regulated Person to comply with a direction from ASX in the course of an investigation, may also constitute a breach of the Rules. ASX may elect to bring disciplinary proceedings in respect of any such failure.

Procedures During Investigations

Where a matter is referred to ASX Investigations for investigation, ASX Investigations makes an initial assessment as to the seriousness of the allegations and whether the matter warrants an investigation.

ASX Investigations considers the available information and may approach the Regulated Person concerned for further documents and information, with a view to preparing an 'Inspection/Investigation Report'.

Notification of and Scope of Investigations

The Rules do not oblige ASX to notify a Regulated Person that its conduct is being investigated. However, ASX's practice is to notify a Regulated Person at an appropriate time that its conduct in relation to a particular matter is being investigated.

When ASX advises a Regulated Person that an investigation is under way, it will inform the Regulated Person as to the general subject matter of the investigation and, if known, the date range within which the circumstances being investigated are believed to have occurred. ASX Investigations' primary task is to ascertain the relevant facts concerning the circumstances which are being investigated. Having regard to ASX's general obligation to monitor compliance with the Rules, ASX Investigations will not necessarily limit its inquiries to the information referred to it for investigation. Nor is it ASX Investigations' role to limit its inquiries to only those facts which might support a preconceived view as to whether a particular breach of the Rules has occurred.

ASX Investigations will not be in a position to express an opinion as to whether a breach of the Rules or the Corporations Act has occurred until at or near the conclusion of an investigation. Accordingly, and having regard to ASX's general monitoring obligation, ASX Investigations' practice is to refrain from expressing a view on whether ASX Investigations considers any particular breaches may have occurred when commencing an investigation. This practice may differ from that of ASIC in the course of its investigations, having regard to sections 13 and 19(3) of the ASIC Act, in relation to identifying which contraventions of the law it suspects may have occurred.

Access to Documents

At the commencement of and during an investigation, ASX Investigations may write to the Regulated Person requesting copies of particular documents or documents within a particular class, which may be relevant to the matters under investigation.

Alternatively, ASX Investigations may elect to visit the Regulated Person's offices and request that its original documents be produced for inspection. In limited and



appropriate circumstances, ASX Investigations may make such a visit with little or no notice, depending on the urgency of the matter and any other relevant circumstances.

In some instances, a matter concerning a Regulated Person which is being investigated by ASX, may also be the subject of an investigation by ASIC. If relevant documents have already been provided by the Regulated Person to ASIC, ASX Investigations may seek to minimise inconvenience to the Regulated Person by obtaining access to those documents by arrangement with ASIC. In those instances, ASX Investigations will consult with the Regulated Person as necessary with a view to inspecting or obtaining copies of the documents in ASIC's possession.

ASX Interviews

Obligation to Appear

In the course of an investigation, ASX Investigations may conduct interviews of Employees of the Regulated Person pursuant to Rule 28.1.3. That Rule requires a Regulated Person to cause its Employees to appear before ASX and to give such information as may be required by ASX relating to the business of the Regulated Person. A refusal by an Employee to comply with a reasonable direction from a Regulated Person to appear before ASX for interview may constitute a breach of the Employee's contract of employment, as well as being a breach of the Rules by the Regulated Person.

Conduct of Interview

Rule 28.1.3 interviews are conducted by ASX Investigations. The time and venue for an interview will be determined by ASX Investigations, usually after consultation with the Regulated Person.

Subject Matter of Interview

Prior to a Rule 28.1.3 interview, ASX will notify the relevant Regulated Person of the general subject matter of the investigation. The Regulated Person should communicate this information to the interviewee before the interview takes place. In conducting an interview, ASX Investigations will be seeking the assistance of the interviewee in establishing the relevant facts concerning the matter under investigation. The information generally sought from an interviewee will relate primarily to his or her personal knowledge of the circumstances which are under investigation.

Obligation to Tell the Truth

The Rules do not require the interviewee to take an oath or make an affirmation. However, ASX expects that the interviewee, to the best of their recollection, will answer truthfully all questions put by ASX Investigations in the interviewee's own words, consistent with a Regulated Person's obligation under the Rules to provide information to ASX relating to its business.²



Qualified Privilege

ASX considers that statements made by interviewees in the course of Rule 28.1.3 interviews are protected in actions for defamation by a defence of qualified privilege, both at common law and by section 1100C of the Corporations Act.

Presence of Representatives of the Regulated Person

Rule 28.1.4 allows representatives of the Regulated Person (other than the person being interviewed) to be present at an interview of another person at the discretion of ASX Investigations. In permitting such attendance, ASX Investigations may do so subject to conditions, for example, that the person so attending first undertakes to keep the contents of the interview confidential until the conclusion of all interviews to be conducted during the investigation. It may be necessary, in some circumstances, for ASX Investigations to decline to permit a particular representative to be present, for example, where that representative is to be interviewed at a later stage of the investigation.

Presence of Legal Advisers

The practice of ASX Investigations is to permit, at its discretion, an interviewee's legal adviser and/or the Regulated Person's legal adviser, to be present during the interview, again possibly subject to conditions such as the prior provision of an undertaking as to confidentiality. ASX Investigations will afford such legal advisers an opportunity to address ASX Investigations on any relevant issue and, before the conclusion of the interview, to clarify any outstanding matters by asking the interviewee further questions regarding any of the matters on which he or she has been interviewed. ASX Investigations reserves the right to exclude from the interview any legal adviser who disrupts or obstructs the interview.

Recording of Interviews and Transcripts

ASX's practice is to record Rule 28.1.3 interviews. A transcript of the recording may be prepared in cases where ASX Investigations forms a view that a transcript is necessary. Upon request, a copy of the transcript (or a copy of the recording if a transcript has not been prepared) will be provided to the Regulated Person, but usually not before the conclusion of all interviews conducted in the course of the investigation.

A copy of the transcript (or the recording) may be provided to a Regulated Person at an earlier time upon request, subject to conditions such as an appropriate confidentiality undertaking.

When the transcript is provided to a Regulated Person, the interviewee and the Regulated Person will each be afforded an opportunity to correct any errors it contains.

ASX does not require an examinee to sign his or her transcript of interview.



The contents of the interview may be relied on by ASX Investigations in preparing an Inspection/Investigation Report and, if so, a copy of the recording and/or transcript will be attached to a draft Inspection/Investigation Report provided to the Regulated Person for its comment at the conclusion of the investigation. The contents of the interview may also be relied on by ASX at any disciplinary hearing which may subsequently take place before the Disciplinary Tribunal and Appeal Tribunal in relation to matters which were the subject of investigation.

Confidentiality

ASX treats information which it receives from Regulated Persons pursuant to its investigatory powers as being confidential and seeks to maintain the confidentiality of that information in accordance with its obligations under the Rules. ASX considers that the obligation to maintain the confidentiality of confidential information which becomes known in the course of an ASX investigation also applies to Regulated Person. Thus ASX considers that its reports and records of interviews should not be disclosed to persons other than officers, employees or agents of a Regulated Person without ASX's written consent.

Rule 1.7.2 obliges ASX to take all reasonable measures to protect from unauthorised use or disclosure information provided to ASX in confidence by or on behalf of a Market Participant pursuant to the Rules. Accordingly, ASX seeks to ensure that all confidential information provided to it by Market Participants in the course of an investigation remains confidential in ASX's hands, except for such limited disclosure permitted by the Rules as may be appropriate.

In particular, Rule 1.7.1 and 1.7.2 permit ASX to disclose confidential information, which it obtains from Market Participants, to regulatory authorities (eg ASIC and the Reserve Bank of Australia) in relation to dealings in securities, pursuant to reciprocal arrangements with those regulatory authorities. Limited disclosure outside ASX, to persons such as expert witnesses and legal representatives, is also permitted when it is made for the purpose of monitoring compliance with or enforcing the Rules (eg when required for a disciplinary hearing before ASX's Disciplinary Tribunal).

Disclosure to persons outside ASX is also permitted under Rule 1.7.1 and 1.7.2, where ASX is required to produce confidential documents for inspection pursuant to a court order.

However, where ASX considers that it would not be in the public interest for particular confidential information to be made public (eg where the disclosure could compromise an ASX investigation or surveillance methodologies), ASX may seek to oppose such production, relying on the doctrine of public interest immunity. ASX's standing to decline to disclose such documents and information in appropriate cases on public interest immunity grounds has been recognised by the courts.³

ASX may seek to place conditions on the persons to whom a permitted disclosure is to be made by, for example, restricting the number of individuals who may have access to the information and regarding what use may be made of the information.



Public Disclosure

ASX's practice during an ongoing investigation is to refrain from commenting publicly on the substantive issues which are being examined by ASX Investigations in the course of the relevant investigation. However ASX may, in appropriate cases, confirm publicly that a matter is the subject of an ASX investigation, in particular where there is a substantial public interest.

Legal Professional Privilege

In conducting an investigation under the Rules, pursuant to its obligations under the Corporations Act referred to above, ASX seeks to ascertain all of the relevant facts and circumstances relating to the matter being investigated, with a view to promoting and preserving the integrity of its market.

Accordingly, and having regard to the difficulties often involved in ascertaining all of the relevant facts and circumstances, ASX's powers under Rules 28.1.1 and 28.1.2 to require production of documents and disclosure of information from Regulated Persons are broad.

Where a Regulated Person is compelled, as part of an investigation under the Rules, to produce documents and disclose information to ASX which they consider may be protected from production or disclosure by legal professional privilege, the Regulated Person should seek independent legal advice as to whether the privilege attaches to the documents and/or information in question.

Where a Regulated Person claims they are exempt from producing some of the documents or disclosing some of the information that ASX has requested on the basis that the documents or information are subject to a claim for legal professional privilege, they must inform ASX of the nature of the documents or information and the basis upon which the claim for legal professional privilege is made.

Privilege Against Self-Incrimination

No exemption from disclosure is made in the Rules for relevant documents and information which a Regulated Person might seek to withhold from disclosure on the basis of a common law claim of privilege against self-incrimination.

Documents and information which a Regulated Person might otherwise claim to be protected from disclosure on the grounds of a claim of privilege against self-incrimination must be disclosed to ASX in the same way as any other relevant documents and information which are required for the purposes of an investigation. ASX notes that, quite apart from the position under the Rules, the common law does not in any event recognise an entitlement by corporations (as opposed to individuals) to rely on the privilege. Thus, for Regulated Persons which are corporations, such a claim could not be maintained even if the availability of the privilege was not curtailed by the Rules.



Inspection/Investigation Reports

Is a Report Necessary?

After ASX Investigations has considered all relevant information which becomes available during an investigation, a view is formed as to whether any regulatory issues which arose during the investigation regarding the Regulated Person's business or conduct are of sufficient concern to warrant the preparation of a formal "Inspection/Investigation Report". As part of that process, ASX Investigations may consult with the Regulated Person regarding his or her understanding of the relevant factual circumstances. In some instances ASX Investigations may prepare a written statement of facts and seek confirmation from the Regulated Person as to whether it agrees that the facts stated are correct.

Draft Report

If a view is formed that any regulatory issues arising are of sufficient concern, ASX Investigations prepares an Inspection/Investigation Report in draft form, which sets out the relevant facts and issues. The Draft Report may include ASX Investigations' tentative view as to whether a breach of the Rules or the Corporations Act may have occurred. Documents relied on by ASX Investigations in preparing the Draft Report are attached to the Draft Report.

The Draft Report is provided to the Regulated Person to afford it an opportunity, if it chooses, to provide ASX Investigations with written comments on the Report's contents within a reasonable time. Any comments received are taken into account by ASX Investigations in forming a considered opinion of the matter and in finalising the Report. A full copy of the Regulated Person's comments are attached to the Final Report. ASX Investigations may also choose to respond specifically to some of the Regulated Person's comments, either in a separate attachment to the Final Report or in the body of the Final Report.

After ASX Investigations has taken into account any comments received, or if no comments are received within the time specified, ASX Investigations will finalise and sign the Report as a Final Report.

Final Report

A copy of the Final Report is provided to the Regulated Person and to relevant members of ASX's management. ASX may have regard to the contents of the Report in considering whether to issue a Contravention Notice against the Regulated Person pursuant to Rule 28.3.5 for hearing before the Disciplinary Tribunal. However, any opinion of ASX Investigations which may be expressed in the Report will not be the sole determinant of whether a Contravention Notice is issued or of the ambit of that Notice. Those are matters which are wholly within the discretion of ASX, having regard to its regulatory obligations and all other relevant circumstances. For less serious matters, the Report may be considered by the Disciplinary Tribunal as ASX's delegate under Rule 28.3.2 without a formal



Contravention Notice being prepared and without the Regulated Person and ASX Enforcement being present (known as an expedited disciplinary proceeding).

A Regulated Person may choose to, but is not obliged to, provide ASX with any comments it may wish to make regarding the contents of the Final Report at any time, whether before or after a Contravention Notice (if any) is issued or a matter is assigned to an expedited disciplinary proceeding.

Effect and Status of Final Report

It is important to note that ASX Investigations' opinion in a Final Report as to whether a breach of the Rules or the Corporations Act has occurred will not necessarily result in disciplinary action being commenced by ASX against the Regulated Person concerned. Nor does it follow if disciplinary action is commenced, that ASX's Disciplinary Tribunal will adopt or agree with the Final Report in the course of a disciplinary hearing. If the Final Report is taken into account in the course of a disciplinary hearing, it is entirely a matter for the Disciplinary Tribunal as to how much weight it will give to the Report and to any other evidence which is placed before it by ASX or by the Regulated Person. However, ASX's practice is to seek to rely on the facts and circumstances set out in a Final Report, including any attachments to the Report, at hearings before the Disciplinary Tribunal and during expedited disciplinary proceedings.

Procedural Fairness

ASX's practice when conducting an investigation regarding the conduct of a Regulated Person is to have regard to and comply with the requirements of procedural fairness to the full extent that those requirements apply to investigations by ASX⁴ (and bearing in mind that the requirements of procedural fairness in respect of investigations may differ from the requirements of procedural fairness in respect of disciplinary actions and hearings). The requirements of procedural fairness will also vary according to the circumstances of each matter.

In conducting its investigations, ASX is conscious that a balance needs to be achieved between the legitimate interests and expectations of a Regulated Person and ASX's obligation to preserve the integrity of its investigations in the public interest and to maintain the integrity of its market on behalf of all Market Participants.



Qualification

ASX has published this note to promote commercial certainty, and assist Market Participants. Nothing in this note necessarily binds ASX in the application of the Rules in a particular case. In issuing this note, ASX is not providing legal advice and Market Participants should obtain their own advice from a qualified professional person in respect of their obligations. ASX may replace this Guidance Note at any time. Readers should contact ASX to ensure they have the latest version.

¹ *Australian Stock Exchange Ltd v Hudson Securities Pty Ltd* (2000) 35 ACSR 55

² Note that section 1309(1) of the Corporations Act provides that an officer of a corporation (this would include an officer of an incorporated Market Participant) who furnishes or permits the furnishing of information to a securities exchange (this would include ASX) relating to the affairs of the Market Participant, which to the knowledge of the officer is materially false or misleading, is guilty of an offence. By section 1309(2), if the officer of the Market Participant does not know that the information so furnished is materially false or misleading, but has not taken reasonable steps to ensure that the information is not false or misleading, then he or she is also guilty of an offence.

³ *CTC Resources NL and Ors v Australian Stock Exchange Ltd and Anor* (1998) WASC 22. See also *Law Institute of Victoria v Irving* [1990] VR 429, *Finch v Grieve* (1991) 22 NSWLR 578 and *Goldberg v Ng* (1994) 33 NSWLR 639

⁴ *McLachlan v Australian Stock Exchange Ltd and Anor* (1998) 30 ACSR 26 at 36; *Shaw Stockbroking Ltd v Australian Stock Exchange Ltd* (1998) 26 ACSR 702 at 718-9.