



ASIC

Australian Securities & Investments Commission

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Public comment on ASIC's regulatory activities

This information sheet (INFO 152) explains:

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In this information sheet:

- The term 'regulatory activities' includes investigations, regulatory actions and other activities we undertake within our functions and powers – for example, releasing reports and consultation papers, meeting statutory requirements, and providing regulatory guidance.
- The term 'investigation' is not limited to formal investigations conducted under section 13 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). It refers to the range of actions that ASIC takes to ensure compliance with the law and includes conducting surveillances and direct engagement with a member of our regulated population.
- The term 'regulatory action' includes enforcement actions, as well as actions taken by ASIC to achieve regulatory outcomes that do not involve criminal, civil or administrative proceedings. These outcomes may include ASIC accepting enforceable undertakings or negotiating agreements with a member of our regulated population to address past conduct.

When ASIC may comment publicly

ASIC is Australia's corporate, markets and financial services regulator. We strive to ensure that financial consumers and investors have trust and confidence and can participate in fair and efficient markets, while being supported by efficient and accessible registration.

We are accountable to Parliament and the public for our investigations, the regulatory actions arising from our investigations, and our general regulatory activities.

Informing the public of our regulatory activities is important because it promotes:

- public confidence in ASIC's administration of the law – that is, there is transparency around what we are doing about people who break the law

- compliance with the law by informing the public about the standards we expect and the consequences of failing to meet these standards.

Our general approach to public comment

ASIC has a strong policy of transparency and we are committed to communicating publicly about our regulatory activities.

We will usually put out a public statement, such as a media release or media advisory, on significant regulatory activities and outcomes, in order to:

- be transparent and accountable for what we do
- help inform our regulated population and the public of expected standards and of our priorities and areas of focus.

Limitations on informing the public of our regulatory activities

Despite the importance of informing the public of our regulatory activities, we may not release information to the public where, on balance, it may be against the public interest to do so – for example, to protect the legal rights of a person, to prevent a disorderly market, or where it may jeopardise a regulatory outcome.

Release of market sensitive information

We will generally consider if a proposed public release contains market sensitive information. Where it may contain market sensitive information and it is in the public interest to release the information, we will usually release the public statement after the relevant securities markets have closed.

Misreporting of information

In the event of a disorderly market as a result of misreporting following the release of an ASIC public statement, we will seek to issue a clarifying statement in a timely way.

When we may comment on investigations

We may make a statement about an investigation when it is in the public interest to do so.

If a matter is still in the investigation stage, it is generally accepted that a regulator such as ASIC must balance the public interest benefits of making a statement against the rights of the individual subject to the investigation.

For example, the International Organization of Securities Commissions (IOSCO) principles note that: 'Any publication of a report must be consistent with the rights of an individual to a fair hearing and the protection of personal data, factors that will often preclude publicity where a matter is still the subject of an investigation': see IOSCO, *Objectives and principles of securities regulation*, May 2003, page 11.

There are a range of factors that we take into account when considering if making a statement about an investigation is in the public interest.

Specific factors that limit our ability to comment about investigations include:

- legislative restrictions – for example, section 127 prevents disclosure of certain material, such as information provided to ASIC in confidence (this section requires ASIC to take all reasonable measures to protect information from unauthorised use or disclosure when it is given in confidence in connection to our powers and functions or in the exercise of our powers, or that is protected information, although certain exceptions apply)
- the need to safeguard confidential or sensitive information (such as confidential information that may affect the price or the market for that product)
- the potential to jeopardise investigations through the untimely release of information
- privacy legislation and guidelines
- ensuring a person's right to a fair trial is not prejudiced
- the risk of defamation or other legal proceedings against complainants, ASIC officers or other entities
- compliance with court orders not to disclose information in certain circumstances
- the need to use our resources efficiently – ASIC must allocate resources across a wide range of priorities and responsibilities.

Most importantly, we will consider whether making a statement would promote confidence in the integrity of the market, or facilitate the protection of consumers and investors in relation to the financial system. For example, there may be circumstances where making a statement could prevent widespread misconduct, or allay public concern about a matter having a significant negative impact on the operation of the market.

When considering whether to make a statement we will weigh up any potential public benefits of it against the potential prejudice that we believe may be caused to any individuals who are, or who are likely to be, a subject of the investigation. Where the risk of damage to an individual from the publicising of an investigation is high, that will often result in a decision not to confirm or deny that we are investigating a matter until further facts about the alleged misconduct can be gathered, analysed and tested.

Where it is appropriate to comment on an investigation, it should be remembered that the simple fact of an investigation does not mean that a person will necessarily be the subject of any legal or other proceedings. No adverse inference should be drawn from an investigation involving that person.

Where we do confirm the existence of an investigation, we will generally make no further comment until the investigation is concluded. We will only provide updates on the progress of the investigation if it is in the public interest to do so. In determining whether updates are in the public interest, we will have regard to the principles set out in this information sheet.

In some circumstances third parties may suggest that we are investigating a matter. We will only verify these comments if it is in the public interest to do so. In determining this we will have regard to the principles set out in this information sheet.

If we conclude an investigation without taking any regulatory action, we will tell that to people previously identified as persons of interest, if possible. This notification is not, however, a guarantee that we will not take action in the future. We will also generally advise any person who reported the alleged misconduct of this result.

When we may comment on matters with the CDPP

Generally, we will not comment on whether a matter is referred to the CDPP before a prosecution is commenced.

We may confirm that an investigation is concluded and the appropriate regulatory action (if any) is being considered where:

- we have previously confirmed the existence of an investigation
- the matter is with the CDPP for consideration
- there is a public interest in making such a statement.

When we may comment on regulatory actions

Normally, we will only make a public statement about regulatory actions:

- in criminal proceedings – no earlier than at the time of the first court appearance by the accused
- in civil proceedings – when the originating documents have been filed and served
- in administrative proceedings – when the decision has been made and any relevant requirement for the decision to be gazetted and/or to update a register has been met (see further below)
- when we refer a case to the Takeovers Panel, or
- when we secure a regulatory outcome.

We will generally not publicise matters that are the subject of private hearings, such as banning and licensing hearings before ASIC's Hearings Delegates and Companies Auditors and Liquidators Disciplinary Board (CALDB) references, when they commence.

Where we have publicised the laying of charges, we will generally publicise the outcome, including withdrawal of charges, acquittal or successful prosecution. If a matter is appealed, we will ordinarily publicise the outcome of the appeal. This may occur by an editorial note to the original media release.

In the same way, where we are a party to civil litigation, we will issue a media release or media advisory on the outcome of that litigation.

We will generally issue a media release or media advisory on the outcome of administrative proceedings, including merits reviews by the Administrative Appeals Tribunal. In these cases, the media release or media advisory will include the name of the person against whom the proceeding was taken and the outcome.

We will issue the media release or media advisory even where the person has a right to appeal against or otherwise seek review of the decision. This is because there is a significant public interest in ensuring that consumers are aware of and informed about action taken by us. A relevant court or tribunal will have jurisdiction to suppress a decision pending the outcome of an appeal or review. We will normally oppose applications for orders to this effect.

Note: The Full Court of the Federal Court has confirmed the importance of the public being informed about ASIC's banning decisions even when an application for review is pending: see *Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2009] FCFCA 185.

Media releases or media advisories following licensing and banning decisions will not be issued until we have gazetted the decision and/or updated the relevant register in accordance with the timeframes specified in Regulatory Guide 98 *Licensing: Administrative action against financial services providers* (RG 98) at RG 98.57–RG 98.59 and Regulatory Guide 218 *Licensing: Administrative action against persons engaging in credit activities* (RG 218) at RG 218.63–RG 218.65.

Given statutory restrictions, media releases or media advisories following the issue of an infringement notice by the Markets Disciplinary Panel will not be issued until at least 28 days after the notice is given: see regulation 7.2A.15(1) of the Corporations Regulations 2001 (Corporations Regulations).

We will also usually issue a media release or media advisory when ASIC secures a regulatory outcome that does not involve criminal, civil or administrative proceedings – for example, an enforceable undertaking or a negotiated agreement with a member of our regulated population to address past conduct.

We will always assert the right to make a regulatory outcome public, unless legal considerations require otherwise. We will not agree to keep regulatory outcomes secret. This is important for regulatory transparency and effective deterrence.

We may, at our discretion, give advance notice of a public statement about a regulatory outcome to an interested party. However, we will not provide any draft public statement before a regulatory outcome is reached (e.g. the terms of a settlement being agreed). We will usually provide advance notice to an affected party in a matter resolved by negotiated agreement (including an enforceable undertaking) and will:

- generally provide it 24 hours in advance of publication unless other reasonable circumstances apply
- only invite feedback on the factual accuracy of the draft public statement.

Who our authorised spokespersons are

Our authorised spokespersons for regulatory activities are listed below:

Circumstance	ASIC Spokesperson
All matters	Members of the Commission Senior Executive Leader, Corporate Affairs Senior Executive Specialist, Corporate Affairs ASIC Media Unit
Matters relevant to their responsibilities	Senior Executive Leaders
Matters relevant to their region	Regional Commissioners

Where can I get more information?

- Email media.unit@asic.gov.au.
- Contact ASIC on 1300 300 630.

Important notice

Please note that this information sheet is a summary giving you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional advice. Omission of any matter in this information sheet will not relieve a company or its officers from any penalty incurred by failing to comply with the statutory obligations of the Corporations Act. You should also note that because this information sheet avoids legal language wherever possible, it might include some generalisations about the application of the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases your particular circumstances must be taken into account when determining how the law applies to you.

This is **Information Sheet 152 (INFO 152)**, reissued in June 2015. Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.