



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 238

Suspicious activity reporting

August 2013

About this guide

This guide is for market participants of the ASX market (operated by ASX Limited), the Chi-X market (operated by Chi-X Australia Pty Limited) and the APX market (operated by Asia Pacific Exchange Limited).

It gives guidance on how market participants can comply with the ASIC market integrity rules relating to suspicious activity reporting.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This guide was issued in August 2013 and is based on legislation and regulations as at the date of issue.

Previous version:

- Superseded Regulatory Guide 238, issued July 2012

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

ASIC is responsible for supervising Australian domestic licensed financial markets.

As part of our supervisory responsibilities, ASIC makes market integrity rules and monitors compliance by market participants with those rules.

This document gives guidance on the obligations for market participants of the ASX market (operated by ASX Limited), the Chi-X market (operated by Chi-X Australia Pty Limited) and the APX market (operated by Asia Pacific Exchange Limited) to notify ASIC of suspicious trading activity.

RG 238.1 ASIC is responsible for supervising compliance by market participants, market operators and other relevant entities with all market integrity rules. This is in addition to our role of supervising compliance by market participants and market operators with other provisions of the *Corporations Act 2001* (Corporations Act), including the Australian financial services (AFS) licensing provisions.

RG 238.2 This document gives general guidance on a market participant's obligations under Part 5.11 of the ASIC Market Integrity Rules (ASX Market) 2010, Part 5.11 of the ASIC Market Integrity Rules (Chi-X Australia Market) 2011 and Part 5.11 of the ASIC Market Integrity Rules (APX Market) 2013 to notify ASIC of certain suspicious trading activity. A copy of Part 5.11, which is identical for the ASX, Chi-X and APX markets, is reproduced in the appendix.

Note 1: See also ASIC Market Integrity Rules (ASX Market) Amendment 2012 (No. 1), ASIC Market Integrity Rules (Chi-X Australia Market) Amendment 2012 (No. 1) and ASIC Market Integrity Rules (APX Market) 2013 at www.asic.gov.au/markets.

Note 2: In this guide 'ASIC Market Integrity Rules (ASX)' refers to the ASIC Market Integrity Rules (ASX Market) 2010; 'ASIC Market Integrity Rules (Chi-X)' refers to the ASIC Market Integrity Rules (Chi-X Australia Market) 2011; and 'ASIC Market Integrity Rules (APX)' refers to the ASIC Market Integrity Rules (APX Market) 2013.

Note 3: In this guide 'Part 5.11' or 'Rule 5.11.1' (for example) refers to a particular part or rule of the ASIC Market Integrity Rules (ASX), ASIC Market Integrity Rules (Chi-X) and ASIC Market Integrity Rules (APX).

RG 238.3 This guide should be read in conjunction with other regulatory guides on market integrity rules and other obligations for market participants. Table 1 identifies other regulatory guides that may be relevant.

Table 1: Related guidance

Topic	ASIC regulatory guide
The disciplinary process for breaches of all ASIC market integrity rules (including market integrity rules for competition in exchange markets)	Regulatory Guide 216 <i>Markets Disciplinary Panel</i> (RG 216)
The operational framework for the Markets Disciplinary Panel when considering alleged breaches of ASIC market integrity rules	Regulatory Guide 225 <i>Markets Disciplinary Panel practices and procedures</i> (RG 225)
Notifying ASIC of significant breaches (or likely breaches) by AFS licensees under s912D	Regulatory Guide 78 <i>Breach reporting by AFS licensees</i> (RG 78)
Our approach to supervising compliance with ASIC market integrity rules for competition in exchange markets	Regulatory Guide 223 <i>Guidance on ASIC market integrity rules for competition in exchange markets</i> (RG 223)
Our rule-making regime and approach to supervising compliance with ASIC market integrity rules for ASX and ASX 24 (including our approach to waivers)	Regulatory Guide 214 <i>Guidance on ASIC market integrity rules for ASX and ASX 24 markets</i> (RG 214)
Our approach to supervising compliance with AFS licensing obligations	Regulatory Guide 104 <i>Licensing: Meeting the general obligations</i> (RG 104) and Regulatory Guide 105 <i>Licensing: Organisational competence</i> (RG 105)
Guidance on ASIC Market Integrity Rules (ASX)	RG 214
Guidance on ASIC Market Integrity Rules (Chi-X) and (APX)	Regulatory Guide 224 <i>Guidance on ASIC market integrity rules for the Chi-X and APX markets</i> (RG 224)

Ongoing review and further consultation

- RG 238.4 We intend to keep the market integrity rules for suspicious activity reporting and related guidance under review. We will consult with industry before making any amendments to these rules (e.g. to widen the application of the rules to other markets such as ASX 24) or related guidance.
- RG 238.5 For the two years from the date these market integrity rules come into effect, we intend to provide guidance and feedback to market participants on the reporting received and the reporting we expect. We expect to be able to review and add to guidance on these rules with the benefit of experience.

B What suspicious activity must be reported?

Key points

Under Rule 5.11.1, a market participant must notify ASIC if it has reasonable grounds to suspect that a person has placed an order or entered into a transaction while in possession of inside information, or which has the effect of creating or maintaining an artificial price or a false or misleading appearance in the market or price for trading in financial products.

For the purposes of Rule 5.11.1, we do not expect a market participant to actively seek to detect reportable matters, or to undertake detailed legal analysis about whether a reportable matter constitutes a contravention of the law or market integrity rules. If a market participant becomes aware of information, in the course of its business activities and in the course of complying with its existing obligations, which may raise a warning signal of market misconduct, the market participant must notify ASIC.

'Reasonable grounds to suspect' requires both a suspicion and a just cause for that suspicion. The test is satisfied by circumstances that would create an actual apprehension or fear that a reportable matter exists.

RG 238.6 Under Rule 5.11.1, a market participant must notify ASIC in writing, as soon as practicable, if it has reasonable grounds to suspect that:

- (a) a person has placed an order or entered into a transaction while in possession of inside information; or
- (b) a transaction, or an order transmitted to the ASX, Chi-X or APX trading platform, has or is likely to have the effect of:
 - (i) creating an artificial price for trading in financial products on the market;
 - (ii) maintaining at a level that is artificial (whether or not it was previously artificial) a price for trading in financial products on the market;
 - (iii) creating or causing the creation of a false or misleading appearance of active trading in financial products on the market; or
 - (iv) creating or causing the creation of a false or misleading appearance with respect to the market, or price, for trading in financial products on the market.

These are collectively referred to as 'reportable matters' in this guide.

RG 238.7 Based on regulatory experience overseas—in major jurisdictions such as the United Kingdom and Germany—we anticipate that over time market participant notifications under Rule 5.11.1 will provide ASIC with a valuable supplementary source of market intelligence, which, when

combined with other information available to ASIC, will be useful in assisting us to focus our investigations and resources.

- RG 238.8 Rule 5.11.1 requires a market participant to notify ASIC in writing of the details of the relevant transaction or order, and the reasonable grounds it has to suspect that there is a reportable matter: see RG 238.26 for guidance on the meaning of ‘reasonable grounds to suspect’ and RG 238.58–RG 238.60 for guidance on the content of notifications under Rule 5.11.1.
- RG 238.9 The obligation to notify ASIC in writing under Rule 5.11.1 arises whether or not a market participant has knowledge of all the details surrounding the transaction or order, the identity of any insider (if the reportable matter relates to a person trading with inside information) or the intention of any party to a transaction or order (if the reportable matter relates to the effect on the market).
- RG 238.10 Market participants also have an obligation to submit suspicious matter reports (SMRs) to the Australian Transaction Reports and Analysis Centre (AUSTRAC) under s41 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) and s16 of the *Financial Transaction Reports Act 1988* (FTR Act) (collectively referred to in this guide as ‘AML reporting legislation’). To avoid double-reporting, Rule 5.11.1(2) provides that, where a market participant has reported information to AUSTRAC under AML reporting legislation, it is not required to notify ASIC of the same information under Rule 5.11.1(1): see RG 238.50–RG 238.54 for further information about the interaction between Rule 5.11.1 and the AML reporting legislation.
- RG 238.11 Under Rule 5.11.2, a market participant must not disclose to any person that it has notified ASIC of a reportable matter, nor disclose the information contained in the notification: see RG 238.61 for further information about Rule 5.11.2, including exceptions to the rule.
- RG 238.12 Under Rule 5.11.1, a market participant is not required to form a view about whether a person has, or would have, a defence available if prosecuted for a contravention of any provision of the Corporations Act or any market integrity rule, or about whether all the elements of insider trading or market manipulation exist.
- RG 238.13 A market participant will need to decide on a case-by-case basis whether there are reasonable grounds to suspect that there is a reportable matter. Table 2 and Table 3 provide guidance on when we would generally expect a market participant to consider notifying ASIC under Rule 5.11.1. These examples are not intended to provide an exhaustive list. There will be situations that do not fall squarely within any of the examples included in this guide where there would be reasonable grounds to suspect that a reportable matter has occurred.

Obligation to report, not actively investigate

- RG 238.14 We do not expect a market participant to actively seek to detect reportable matters for the purposes of Rule 5.11.1. Rather, the rule requires market participants to report activity they become aware of in the ordinary course of their client and proprietary trading activities.
- RG 238.15 The obligation under Rule 5.11.1 is to report information that is known. The obligation under Rule 5.11.1 does not require a market participant to put in place new surveillance arrangements to detect circumstances that may trigger a reporting obligation.
- RG 238.16 As part of its arrangements to comply with its current obligations under the law, a market participant will have in place existing trading safeguards and monitoring mechanisms. These may include system alerts, and procedures and processes, which, at a minimum:
- (a) ensure that it does not do anything which results in a market for a financial product not being both fair and orderly (Rule 5.9.1);
 - (b) enable it to consider the circumstances of an order set out in Rule 5.7.2 to prevent the submission of orders that have the effect of, or are likely to have the effect of, creating a false or misleading appearance of active trading in a financial product or with respect to the market for, or the price of, a financial product (Rule 5.7.1);
 - (c) ensure that its system for automated order processing does not interfere with the efficiency and integrity of the market or the proper functioning of a trading platform (Rule 5.6.1);
 - (d) for AFS licensees, ensure that it complies with the financial services laws (s912A(1)(c) of the Corporations Act); and
 - (e) for AFS licensees, ensure that it takes reasonable steps to ensure that its representatives comply with the financial services laws (s912A(1)(ca) of the Corporations Act).
- RG 238.17 Some market participants may also be subject to obligations under the AML/CTF Act to collect ‘know your customer’ information and conduct ‘ongoing customer due diligence’. We expect that these existing processes will, in some circumstances, be a source of information that a market participant should take into account in determining whether a reportable matter exists (e.g. details of a client’s investment profile or a client’s financial means—see Table 2 and Table 3).
- RG 238.18 If a market participant becomes aware of information, in the course of its business activities and in the course of complying with its existing obligations, that gives rise to reasonable grounds to suspect that there is a reportable matter, the market participant must notify ASIC. Not all knowledge, by itself, gives rise to a reportable matter. Table 2 and Table 3

give some examples of information that, by itself, or in combination with certain other information, may give rise to a reportable matter. We do not expect market participants to make specific external inquiries to gather information for the purposes of Rule 5.11.1.

Information in different parts of the organisation

- RG 238.19 Where information in different parts of a market participant's business would collectively give rise to a reportable matter, we will take into account whether:
- (a) the information has in fact come together; and
 - (b) it is reasonable to expect the information to have come together (e.g. in the compliance function of the market participant's business).
- RG 238.20 Once information has come together, we would expect a market participant to notify ASIC in accordance with Rule 5.11.1. Market participants will need to consider which parts of the organisation are required to escalate potentially reportable matters to those responsible for compliance. At a minimum, we expect the trading function of the market participant to escalate potential reportable matters to those responsible for compliance with Rule 5.11.1: see RG 238.38.

Retrospective review

- RG 238.21 We expect a market participant to notify ASIC of orders or transactions that meet the Rule 5.11.1 criteria at the time they occur. We also expect that the Rule 5.11.1 criteria may be met as a result of information that the market participant becomes aware of after an order has been placed or a transaction entered into (e.g. price-sensitive announcements).
- RG 238.22 Where a market participant conducts retrospective spot checks in the ordinary course of ensuring compliance with its obligations, and discovers information that may give rise to reasonable grounds to suspect that there is a reportable matter (e.g. Client A's trading is inconsistent with its investment history and investment or risk profile, and Client A has made a large profit), we expect the market participant, at a minimum, to identify this matter for internal escalation and active determination about whether to notify ASIC.
- RG 238.23 Where a market participant has received a notice to produce books or information to ASIC and, in the ordinary course of gathering information to comply with the notice, becomes aware of information about particular orders or transactions that may give rise to reasonable grounds to suspect there is a reportable matter, we expect the market participant, at a minimum, to identify this matter for internal escalation and active determination about whether to notify ASIC.

- RG 238.24 We do not expect a market participant to retrospectively review all orders or transactions in light of subsequent events, or information that it later becomes aware of, to detect potentially reportable matters under Rule 5.11.1.
- RG 238.25 The operation of Rule 5.11.1 is not intended to affect current processes that may be conducted by a market participant for other reasons (e.g. post-trade analysis). However, if post-trade analysis reveals any indicators of a reportable matter (see Table 2 and Table 3), we would expect a market participant to ensure that the indicators are considered further to determine whether the matter should be notified to ASIC under Rule 5.11.1.

What does ‘reasonable grounds to suspect’ mean?

- RG 238.26 A market participant must notify ASIC if it has reasonable grounds to suspect that there is a reportable matter. Establishing ‘reasonable grounds to suspect’ requires both a suspicion and a just cause for that suspicion.
- RG 238.27 The test is satisfied by circumstances that would create an actual apprehension or fear that a reportable matter exists. The suspicion has to be honest and reasonable, and must be based on facts that would create suspicion.
- RG 238.28 In *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, Kitto J described (at 303) a suspicion of something as being:
 ...more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust amounting to a slight opinion, but without sufficient evidence.
- This case was applied by the High Court in *George v Rockett* (1990) 170 CLR 104 at 106.
- RG 238.29 A reasonable suspicion can exist without the market participant conducting exhaustive and conclusive investigations into the matter and, as stated above, we do not expect a market participant to conduct external inquiries for this purpose: see RG 238.18. Nor do we expect a market participant to undertake extensive legal analysis to determine whether a contravention of the Corporations Act or market integrity rules has occurred: see RG 238.31.
- RG 238.30 In some instances, there may be legitimate reasons or trading strategies behind conduct that, based on a system alert, suggests that a reportable matter exists. For example, clients may legitimately request the deletion of their orders if they believe the market is falling. However, this may be a less plausible explanation if orders are repeatedly entered into the market and deleted. A market participant will need to exercise judgement in determining whether it should notify ASIC.

How much analysis is required?

- RG 238.31 A market participant is not required to form any view on whether a breach of the Corporations Act or market integrity rules has occurred. We do not expect a market participant to engage in detailed legal analysis to determine whether a particular law applies to the facts, whether an exception may apply in the circumstances, or whether it is aware of the knowledge or intention of the relevant person.
- RG 238.32 We expect all employees of a market participant to have some level of familiarity with, and knowledge of, the laws prohibiting insider trading and market manipulation, corresponding to the nature of their role in the organisation. We would expect that certain indicators of a reportable matter are referred to a compliance officer to ascertain whether a reporting obligation exists under Rule 5.11.1.
- RG 238.33 As a general rule, a market participant should exercise common sense and judgement when deciding whether to notify ASIC. We would not expect a market participant to notify ASIC every time a system alert is generated.

Some indicators of reportable matters

- RG 238.34 In RG 238.35, we provide some indicators that may give rise to a reportable matter. In most cases, one indicator alone will not give rise to reasonable grounds to suspect that a reportable matter has occurred. In most instances, a combination of two or more indicators may lead the market participant to decide there are reasonable grounds to suspect a reportable matter. Table 2 and Table 3 set out our guidance on combinations of indicators that may give rise to reasonable grounds to suspect a reportable matter. A market participant will need to decide, in the context of complying with its other obligations (see RG 238.18), whether further review is necessary after observing one or more indicators. Clear policies and procedures detailing when further review should be conducted will assist market participants to comply with Rule 5.11.1.
- RG 238.35 Examples of indicators that a market participant may wish to take into account when considering whether a reportable matter exists include (but are not limited to):
- (a) unusual or unexpected activity—for example:
 - (i) transactions that do not appear to make economic sense;
 - (ii) large volumes of orders or trades;
 - (iii) orders inconsistent with previous investment behaviour or investment profiles;
 - (iv) unusually high profits within a short time period; and

- (v) financial commitments entered into by a client that appear beyond the client's means;
- (b) unusual concentration of trading or repetition of trading;
- (c) knowledge of client relationships (e.g. that a client is related to a director of the company that releases a price-sensitive announcement);
- (d) use of multiple accounts for no apparent reason, or accounts in the names of family members or corporate entities with no apparent business purpose or other purpose;
- (e) rapid purchase and sale of shares;
- (f) buying and selling shares with no discernible purpose;
- (g) sell-down of stock to purchase particular securities, which are then sold shortly after;
- (h) instructions to place an order immediately or urgently;
- (i) trades modifying the valuation of a position without affecting the size of the position;
- (j) trades modifying the valuation of an underlying financial instrument to create an impact on a related derivative;
- (k) orders or trades made outside of volume limits, bid-offer spread parameters or any other applicable trading parameters; and
- (l) trading that takes place before the release of a price-sensitive announcement or research report, or ahead of a large house or client order ('front running').

RG 238.36 Table 2 and Table 3 provide detailed examples of how a review of some indicators may lead to reasonable grounds to suspect that there is a reportable matter. These examples are not intended to be an exhaustive list of circumstances in which a reportable matter may arise. While Table 2 and Table 3 refer to trading in shares, the indicators are equally relevant for trading in all financial products.

RG 238.37 The presence of one or more of the indicators described in Table 2 and Table 3 is not necessarily conclusive. Conversely, the absence of any of the indicators does not indicate that a reportable matter does not exist. A market participant needs to exercise its own judgement in evaluating whether the presence of certain facts gives rise to reasonable grounds to suspect that there is a reportable matter.

RG 238.38 At an individual trader level in a market participant's business, it may be that only one or two of these indicators are visible to the trader. This may, for example, result from the internal separation of a market participant's business as part of its compliance program. We would expect that, in these instances, where the trader has reason to question whether a reportable matter exists, the trader should escalate their observations to the person

responsible for compliance. In the normal course of carrying out their responsibilities, the relevant compliance officer would:

- (a) assess these observations in light of all the information they possess; and
- (b) determine, in accordance with the market participant's policies and procedures, whether there are reasonable grounds to suspect that there is a reportable matter.

RG 238.39 Once a notification is made, we will consider the information provided and may make further inquiries where appropriate. If a market participant notifies us of a reportable matter, it must not disclose to others that it has done so, except in limited circumstances: see RG 238.61.

Table 2: Indicators that may combine to give rise to reasonable grounds to suspect that a person is trading while in possession of inside information—Rule 5.11.1(1)(a)

Primary indicator	Other indicators
<p>Orders or transactions are inconsistent with a client's or trader's recent prior trading history or risk profile.</p>	<p>On its own, trading that is inconsistent with a client's or trader's prior trading history or risk profile may not give rise to a reportable matter.</p> <p>However, if there are other indicators present, this may give rise to reasonable grounds to suspect that a person is trading while in possession of inside information.</p> <p>Other indicators may include:</p> <ul style="list-style-type: none"> • the type of financial product that is the subject of the order or transaction; • the profile of the company invested in; • the amount invested (including whether this is out of proportion with the client's monetary means or earning capacity); • the risk profile of the client; • the size of the order; • the length of time the security is held; • a significant increase in profit in the client's or trader's account; and • a significant increase in the particular adviser's commission. <p>For example, an order or transaction may give rise to reasonable grounds to suspect a reportable matter if a client buys shares in a speculative company and the market participant knows from its relationship and dealings with the client that the client has a conservative risk profile and typically only invests in blue chip stocks.</p> <p>We consider recent trading history to be the three-month period before the order or transaction occurs.</p>
<p>An order or transaction occurs immediately before a price-sensitive announcement.</p>	<p>Without further knowledge or information, the order or transaction may not give rise to reasonable grounds to suspect that a person is trading while in possession of inside information.</p> <p>However, if there are other indicators present, this may give rise to reasonable grounds to suspect that a person is trading while in possession of inside information.</p> <p>Other indicators may include the knowledge that the client is connected to (or the compliance officer is aware that the trader is connected to) the company or the subject matter of the announcement (front running).</p> <p>For example, the client may be an officer or employee of the company, or the trader may have been involved in providing professional advice to the company.</p>

<p>An order is placed or a transaction entered into immediately after a client opens a new account.</p>	<p>Without further knowledge or information, the order or transaction may not give rise to reasonable grounds to suspect that a person is trading while in possession of inside information.</p> <p>However, if there are other indicators present, this may give rise to reasonable grounds to suspect that a person is trading while in possession of inside information.</p> <p>Other indicators may include instructions for the order to be carried out urgently, without reference to the price at which the order is to be executed.</p>
<p>A client or trader opens simultaneous positions in related derivatives (e.g. contracts for difference (CFDs), options or warrants).</p>	<p>Without further knowledge or information, the orders or transactions may not give rise to reasonable grounds to suspect that a person is trading while in possession of inside information.</p> <p>However, if there are other indicators present, this may give rise to reasonable grounds to suspect that a person is trading while in possession of inside information.</p> <p>Other indicators may include:</p> <ul style="list-style-type: none"> • the trading in the derivatives is inconsistent with the client's or trader's prior trading history or risk profile; and • the trading takes place just before a price-sensitive announcement.
<p>A trading account receives a large transfer of money before an order is placed or a transaction entered into.</p>	<p>Without further knowledge or information, the orders or transactions may not give rise to reasonable grounds to suspect that a person is trading while in possession of inside information.</p> <p>However, if there are other indicators present, this may give rise to reasonable grounds to suspect that a third party is trading while in possession of inside information and attempting to disguise their own trading by trading through another account or person.</p> <p>Other indicators may include:</p> <ul style="list-style-type: none"> • the authorisation on the account has recently changed; • the authorised person or account holder applies for the transfer of shares (or money) to a third party; and • the authorised person or account holder applies for the transfer of shares (or money) to the recently authorised person's own account after the trade is executed.
<p>A trader is an employee of the market participant and an order is placed, or transaction entered into, ahead of house or client orders in the same security.</p>	<p>Without further knowledge or information, the orders or transactions may not give rise to reasonable grounds to suspect that a trader may be profiting from the effect of the house or client orders on the price of the security (front running).</p> <p>However, if there are other indicators present, this may give rise to reasonable grounds to suspect that a person is trading while in possession of inside information.</p> <p>Other indicators may include:</p> <ul style="list-style-type: none"> • the employee has not received internal consent for the trade; • the security and size of the order are inconsistent with the employee's prior trading history (as far as the market participant is aware); and • the trading is accompanied by the trader taking simultaneous positions in related derivatives.

Trading takes place prior to the release of a research report that has been prepared by the market participant.

Without further knowledge or information, the orders or transactions may not give rise to reasonable grounds to suspect that a trader may be profiting from the effect of the house or client orders on the price of the security (front running).

However, if there are other indicators present, this may give rise to reasonable grounds to suspect that a person is trading while in possession of inside information.

Other indicators may include:

- the employee has not received internal consent for the trade; and
- no effective information barriers are in place between the market participant's business units.

A market participant may have a sell-side division that prepares research reports that will be released to the public. A trader may intend to profit from the effect that the release of the report will have on the price of the securities that are discussed in the research report (front running).

Note: If the market participant is an AFS licensee, it may also be required to make an assessment about whether a significant breach report is to be made to ASIC under s912D of the Corporations Act.

Table 3: Indicators that may combine to give rise to reasonable grounds to suspect an order or transaction may affect market integrity—Rule 5.11.1(1)(b)

Primary indicator	Other indicators
<p>An order is placed:</p> <ul style="list-style-type: none"> • near the close of the trading day; or • on the last day of the month, quarter, half year or financial year. 	<p>The order forms part of a trading pattern where the client or trader regularly chooses to buy high or sell low at the close. This may be a reportable matter where the order would, if executed, represent a significant increase or decrease from the previous trade price ('price support', 'marking the close' or 'window dressing').</p> <p>Other indicators include:</p> <ul style="list-style-type: none"> • the client or trader chooses not to buy or sell at other times of the trading day when better prices are available; • the client or trader is a substantial shareholder of the company invested in (Company A) or a related entity; • Company A is the bidder or target in a takeover; or • Company A is conducting a placement. <p>In addition, the client or trader may already hold existing positions in Company A (e.g. as a fund manager), and:</p> <ul style="list-style-type: none"> • have an interest in maintaining the price of the shares at a certain level; or • the order would have the effect of modifying the valuation of their position without materially affecting the size of the position.
<p>An order is placed near the expiry date of related derivatives (e.g. options).</p>	<p>As a general rule, the market participant is not expected to investigate whether a client holds positions in related derivatives. A trader executing a client's order may not be able to 'see' if a client holds, or has opened, positions in related derivatives because of the way in which the market participant's business is structured.</p> <p>However, if the client has entered into those derivative positions with the market participant, this may become apparent to the relevant compliance officer in the course of conducting retrospective spot checks.</p> <p>This may raise an early warning signal if the market participant is aware that the client holds positions in derivatives over Company A, such as an option that is close to expiry. The order would, if executed, represent a significant increase or decrease from the previous trade price of the underlying security, and thereby increase or decrease the value of the related derivatives. As a result, the client or trader makes a profit or avoids a loss.</p>

<p>A client or trader places matched orders—prearranged trades.</p>	<p>The order is for a large volume of Company A shares, which are illiquid. Immediately after the client's order is placed, an order for a similar volume at the same price is placed on the opposite side of the market. The effect is that the order is executed unusually quickly, given the size of the order and the limited liquidity in the stock. This may indicate that the trade is a 'wash trade'.</p> <p>We note that this may not always be indicative of suspicious conduct, as legitimate prearrangement of trades is often conducted for large volumes of illiquid stock.</p>
<p>A client or trader places multiple orders on the same side of the market at different price levels, which are just behind the best bid or ask.</p>	<p>These orders may be intended to create a false or misleading appearance of buying or selling demand ('layering the order book').</p> <p>This may be more suspicious if the client or trader subsequently submits an order on the other side of the market. Once this latter order is executed, the client or trader rapidly removes the initial multiple orders.</p> <p>The market participant may be aware that the client or trader is a substantial shareholder of Company A, or may otherwise have an interest in supporting the share price of Company A.</p> <p>The pre-auction period is a time to be particularly vigilant of this conduct.</p>
<p>An order is for a significant volume (possibly close to priority) and is then cancelled shortly after.</p>	<p>The order may have been intended to draw speculators to follow the order into the market, thereby precipitating a small run in the price of Company A's shares.</p> <p>On its own, this factor may be insufficient grounds to establish market manipulation. However, it may raise a warning signal if the market participant is not aware of any plausible explanation for the client cancelling their order. It may also be particularly concerning if the client or trader appears to be repeatedly cancelling their orders.</p>
<p>An order is for a significant volume close to priority. This is followed by the execution of an order on the opposite side of the market. The initial order is then deleted.</p>	<p>The order may have been intended to attract interest or liquidity on one side of the market. This may lead to a small run in the price of Company A's shares. It may also assist the client or trader to discover the depth of the market, with the aim of executing the order on the opposite side of the market at a better price and with less impact on the market.</p>

Note: Rule 5.11.1 does not require the market participant to be aware of the intention of any party to the transaction or order before it notifies ASIC.

C Compliance with Part 5.11

Key points

A market participant should have a clear, well-understood and documented process for complying with its obligations under Rule 5.11.1, including:

- identifying potentially reportable matters;
- escalating matters to appropriate compliance staff;
- determining whether there is in fact a reportable matter; and
- notifying ASIC in writing.

Notifying ASIC of a reportable matter under Rule 5.11.1 does not relieve market participants from compliance with other obligations, including significant breach reporting to ASIC under s912D of the Corporations Act and other reporting requirements to AUSTRAC.

To avoid double-reporting, where a market participant has reported information to AUSTRAC under AML reporting legislation, it is not required to notify ASIC of the same information under Rule 5.11.1.

Under Rule 5.11.2, a market participant must not disclose to others that it has notified ASIC of a reportable matter, nor disclose the information contained in the notification, subject to exceptions for disclosure to legal advisers and disclosure required by law.

Clear policies and procedures detailing when staff should conduct further inquiries will assist market participants to comply with Rule 5.11.1.

RG 238.40 To assist a market participant to ensure compliance with the obligation to notify ASIC of reportable matters, a market participant should have a clear, well-understood and documented process for:

- (a) identifying indicators of reportable matters;
- (b) ensuring that employees escalate potentially reportable matters to compliance staff, who are made aware of the indicators identified;
- (c) determining whether indicators of reportable matters give rise to an obligation to report; and
- (d) notifying ASIC in writing of reportable matters.

RG 238.41 A market participant will need to consider how best to keep these documents or records (e.g. they may be kept electronically). Keeping documents and records (particularly of the determinations made in RG 238.40(c)) will help market participants to demonstrate to ASIC compliance with the obligation under Rule 5.11.1.

RG 238.42 These records may be kept in a similar manner to a breach register for significant breach reporting purposes (see RG 78.20–RG 78.22), although

this is not the only method that market participants can use to demonstrate compliance.

- RG 238.43 In enforcing Rule 5.11.1, we intend to focus on instances where market participants are obliged to notify us, but wilfully or recklessly disregard this obligation.
- RG 238.44 We will consider whether a market participant's policies and procedures have been followed, as well as whether the policies are adequate, when deciding whether a market participant has failed to report a reportable matter. Where internal policies and procedures are followed strictly but the market participant is not adequately reporting reportable matters to ASIC, the market participant may need to review its policies and procedures to ensure they are effective.

How does this relate to other breach reporting obligations?

- RG 238.45 Section 912D requires AFS licensees to report to ASIC certain breaches (or likely breaches) of obligations imposed by the Corporations Act, where the breach (or likely breach) is significant: see RG 78 for more detail.
- RG 238.46 The obligation to report suspicious conduct under Rule 5.11.1 is in addition to the breach reporting obligations imposed on AFS licensees under s912D.
- RG 238.47 In contrast to the s912D obligation, Rule 5.11.1 requires notification to ASIC of information relating to the trading activities of clients, other market participants or any other person.
- RG 238.48 In addition, the obligation under Rule 5.11.1 applies to all market participants of ASX, Chi-X and APX, not all of whom are AFS licensees (e.g. some foreign market participants are exempt from holding an AFS licence).
- RG 238.49 The reporting obligations in s912D and Rule 5.11.1 are distinct. A notification under Rule 5.11.1 does not relieve a market participant that is an AFS licensee from its obligation to report under s912D. There may be instances where a reportable matter is notified to ASIC in the first instance, and then, after further inquiry to determine whether it is also a significant breach by the AFS licensee under s912D, a subsequent significant breach report is made to ASIC. In these instances, when making the significant breach report, it will assist ASIC if market participants advise, in their s912D report, that a suspicious activity report has been made to ASIC and state the date of the suspicious activity report.

How does this relate to reporting obligations to AUSTRAC?

- RG 238.50 A market participant may have an obligation under AML reporting legislation to submit a suspicious matter report (SMR) to AUSTRAC if it forms a suspicion on reasonable grounds relating to insider trading or market manipulation. Many of these cases may also give rise to reasonable grounds to suspect that there is a reportable matter that must be reported to ASIC under Rule 5.11.1(1).
- RG 238.51 To avoid double-reporting, Rule 5.11.1(2) provides that, where a market participant has reported information to AUSTRAC under AML reporting legislation, it is not required to notify ASIC of the same information under Rule 5.11.1(1). ASIC already has access to SMRs lodged with AUSTRAC.
- RG 238.52 It is important to note that market participants cannot discharge their obligation to report under AML reporting legislation by reporting to ASIC.
- RG 238.53 Market participants should refer to the AUSTRAC Regulatory Guide—in particular, ‘Chapter 9: Reporting obligations’ and ‘Chapter 11: Designated services’—for more information about their obligations under AML reporting legislation.
- RG 238.54 We expect that the processes and procedures that a market participant has in place to comply with Rule 5.11.1 may not be the same as those it has in place to comply with the AML reporting legislation.

When must market participants notify ASIC?

- RG 238.55 A market participant must give ASIC the written notification required under Rule 5.11.1 as soon as practicable. We would expect that this is within three business days of determining that there is a reportable matter.
- RG 238.56 We expect a market participant’s internal systems to ensure that the relevant staff are aware of potentially suspicious activity in a timely and efficient manner.

How can market participants notify ASIC?

- RG 238.57 Notification to ASIC under Rule 5.11.1 may be sent by email to markets@asic.gov.au.

What should the notification contain?

- RG 238.58 Notification to ASIC under Rule 5.11.1 is required to contain details of the transaction or order (to the extent known to the market participant) and the reasons the market participant suspects that there is a reportable matter.
- RG 238.59 As a general guide, we would expect a notification to contain:
- (a) the name and contact details of the person suspected of trading while in possession of inside information, or who placed the order or entered into the transaction that has, or is likely to have, one of the effects set out in Rule 5.11.1(b);
 - (b) the details of the order or transaction that is the subject of the notification, including the security, time of placement, price and volume;
 - (c) the recent trading history of the client if the reportable matter arises partly because a market participant considers an order or transaction is inconsistent with a client's recent trading history (i.e. for the previous three months); and
 - (d) the client's investment profile and risk profile if the reportable matter arises partly because a market participant considers an order or transaction is inconsistent with a client's investment or risk profile; and
 - (e) a snapshot of specific trading or order book activity that illustrates the context of the order or transaction that is the subject of the notification.
- RG 238.60 As stated in RG 238.51, where information that would otherwise be required to be contained in the notification to ASIC under Rule 5.11.1 has already been reported to AUSTRAC under the AML reporting legislation, a market participant does not need to notify ASIC of the same information: see Rule 5.11.1(2).

Confidentiality

- RG 238.61 Under Rule 5.11.2, a market participant must not disclose that it has notified ASIC of a reportable matter under Rule 5.11.1, nor disclose the information contained in the notification. This rule does not preclude a market participant from communicating that it has obligations under Rule 5.11.1, generally, or from communicating to a client or trader that it has concerns about the conduct of that person, which may constitute an offence under the law or which may expose the market participant to risk.

Qualified privilege

RG 238.62 A market participant notifying ASIC under Rule 5.11.1 has qualified privilege under s1100A for the notification. Section 89 states that, where a person has qualified privilege, that person is not, in the absence of malice, liable to an action for defamation. Qualified privilege under the Corporations Act does not affect any right, privilege or immunity that a person may otherwise have: see s89(3).

Note: Section 1100A(1)(a) refers to information that a person is required to give under Ch 7 of the Corporations Act. Section 761H provides that, in Ch 7, a reference to a provision of Ch 7 includes (unless a contrary intention appears) a reference to other instruments made for the purposes of Ch 7.

RG 238.63 A market participant that has qualified privilege under s1100A for the notification is also not liable for any action based on breach of confidence in relation to the notification: see s1100A(3).

RG 238.64 This protection extends to the officers, employees and representatives of a market participant: see s1100D.

Appendix: Part 5.11—Suspicious activity reporting

5.11.1 Notification requirement

(1) Subject to subrules (2) and (3), if a Market Participant has reasonable grounds to suspect that:

- (a) a person ('the Insider') has placed an order into or entered into a transaction on the Market in relation to a financial product while in possession of inside information (within the meaning of section 1042A of the Corporations Act), whether or not the Market Participant is aware of:
 - (i) the identity of the Insider; or
 - (ii) all of the details of the order or transaction; or
- (b) a transaction or an order transmitted to a Trading Platform has or is likely to have the effect of:
 - (i) creating an artificial price for trading in financial products on the Market;
 - (ii) maintaining at a level that is artificial (whether or not it was previously artificial) a price for trading in financial products on the Market;
 - (iii) creating, or causing the creation of, a false or misleading appearance of active trading in financial products on the Market; or
 - (iv) creating, or causing the creation of, a false or misleading appearance with respect to the market for, or the price for trading in, financial products on the Market, whether or not the Market Participant is aware of:
 - (v) the intention of any party to the transaction or order; or
 - (vi) all of the details of the transaction or order,

the Market Participant must, as soon as practicable, notify ASIC in writing of the details of the transaction or order (to the extent known to the Market Participant) and the reasons it suspects the matter set out in paragraphs (a) and/or (b).

(2) A Market Participant is not required to notify ASIC under subrule (1) if the Market Participant has reported the information that would otherwise be required to be contained in the notification to ASIC under subrule (1) to the Australian Transaction Reports and Analysis Centre under section 41 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* or under section 16 of the *Financial Transaction Reports Act 1988*.

(3) A Market Participant is not required to comply with subrule (1) until 1 November 2012.

Maximum penalty: \$20,000

5.11.2 Confidentiality

A Market Participant that notifies ASIC under subrule 5.11.1(1) must not disclose that the notification was made, or the information contained in the notification, to any person other than:

- (a) for the purposes of seeking legal advice; or
- (b) as required by law.

Maximum penalty: \$20,000

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
AML/CTF Act	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>
AML reporting legislation	Section 41 of the AML/CTF Act and s16 of the FTR Act
APX	Asia Pacific Exchange Limited or the exchange market operated by APX
ASIC	Australian Securities and Investments Commission
ASIC Market Integrity Rules (APX)	ASIC Market Integrity Rules (APX Market) 2013—rules made by ASIC under s798G of the Corporations Act for trading on APX
ASIC Market Integrity Rules (ASX)	ASIC Market Integrity Rules (ASX Market) 2010—rules made by ASIC under s798G of the Corporations Act for trading on ASX
ASIC Market Integrity Rules (Chi-X)	ASIC Market Integrity Rules (Chi-X Australia Market) 2011—rules made by ASIC under s798G of the Corporations Act for trading on Chi-X
ASX	ASX Limited or the exchange market operated by ASX Limited
AUSTRAC	Australian Transaction Reports and Analysis Centre—Australia's anti-money laundering and counter-terrorism financing regulator and specialist financial intelligence unit
Australian domestic licensed financial market	A financial market licensed under s795B(1) of the Corporations Act
Chi-X	Chi-X Australia Pty Limited or the exchange market operated by Chi-X
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
financial market	As defined in s767A of the Corporations Act, a facility through which offers to acquire or dispose of financial products are regularly made or accepted

Term	Meaning in this document
financial product	<p>A facility through which, or through the acquisition of which, a person does one or more of the following:</p> <ul style="list-style-type: none"> • makes a financial investment (see s763B); • manages financial risk (see s763C); • makes non-cash payments (see s763D) <p>Note: This is a definition contained in s763A of the Corporations Act: see also s763B–765A.</p>
FTR Act	<i>Financial Transaction Reports Act 1988</i>
market participant	An entity that is a participant of a financial market on which financial products are traded
Part 5.11 (for example)	A part of the ASIC Market Integrity Rules (ASX), ASIC Market Integrity Rules (Chi-X) and ASIC Market Integrity Rules (APX) (in this example numbered 5.11)
reportable matter	<p>Where a market participant has reasonable grounds to suspect that:</p> <ul style="list-style-type: none"> • a person has placed an order or entered into a transaction while in possession of inside information; or • a transaction, or an order transmitted to the ASX, Chi-X or APX trading platform, has or is likely to have the effect of: <ul style="list-style-type: none"> – creating an artificial price for trading in financial products on the market; – maintaining at a level that is artificial (whether or not it was previously artificial) a price for trading in financial products on the market; – creating or causing the creation of a false or misleading appearance of active trading in financial products on the market; or – creating or causing the creation of a false or misleading appearance with respect to the market, or price, for trading in financial products on the market.
RG 214 (for example)	An ASIC regulatory guide (in this example numbered 214)
Rule 5.11.1 (for example)	A rule of the ASIC Market Integrity Rules (ASX), ASIC Market Integrity Rules (Chi-X) and ASIC Market Integrity Rules (APX) (in this example numbered 5.11.1)
s912A (for example)	A section of the Corporations Act (in this example numbered 912A), unless otherwise specified

Related information

Headnotes

front running, insider trading, market integrity rules, market manipulation, market participants, qualified privilege, reportable matters, significant breach reporting, suspicious activity

Regulatory guides

RG 78 *Breach reporting by AFS licensees*

RG 104 *Licensing: Meeting the general obligations*

RG 105 *Licensing: Organisational competence*

RG 214 *Guidance on ASIC market integrity rules for ASX and ASX 24 markets*

RG 216 *Markets Disciplinary Panel*

RG 223 *Guidance on ASIC market integrity rules for competition in exchange markets*

RG 224 *Guidance on ASIC market integrity rules for the Chi-X and APX markets*

RG 225 *Markets Disciplinary Panel practices and procedures*

AUSTRAC Regulatory Guide, Chapter 9 and Chapter 11

Legislation

AML/CTF Act, s41

Corporations Act, s89, 912A, 912D, 110A and 1100D

FTR Act, s16

Market integrity rules

ASIC Market Integrity Rules (APX), Part 5.11

ASIC Market Integrity Rules (ASX), Part 5.11

ASIC Market Integrity Rules (Chi-X), Part 5.11

Cases

George v Rockett (1990) 170 CLR 104; *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266