

Appendix A

Formal Response to Comments Received on Strawdog Draft

For efficiency, the responses seek to address comment areas/topics and are generally not referenced by commentator. The changes arising from the comments are underlined in the relevant response(s).

Lack of detail regarding internal MSA processes and records

The MSA acknowledges that the revised Investigation Procedures focus on external processes which will entail interaction with market participants and other parties regarding investigations. This is consistent with the direction given in s. 7 of the *Market Surveillance Regulation*. The internal deliberations of the MSA are not made subject to the revised Investigation Procedures.

Increased Use of MSA Guidelines

The concept of increased use of guidelines is a worthwhile discussion, but (as noted) is not directly relevant to the Investigation Procedures. The MSA agrees that guidelines are a useful tool in helping stakeholders to understand how the MSA views a given issue, and will be considered by the MSA wherever appropriate.

The application of discretion or forbearance by the MSA is significantly determined by facts relating the specific matter being considered, and thus the MSA holds the view that it would not be useful to attempt to set out guidance regarding those matters.

Objectives - Issue Resolution

Various objectives of the MSA are cited in the existing Investigation Procedures. Although such objectives are not considered relevant to external processes/interactions re: investigations (and were therefore not included in the Strawdog draft), the MSA remains committed to them. The objectives are published on its website under *About the MSA*, partly excerpted below.

Activities

- ***Investigator:*** *responding to matters brought to the attention of the MSA through complaint or referral, and resolving issues before they become complaints. Examining the conduct of market participants to ensure compliance with legislation, regulations and rules; making sure sufficient remedies exist to avoid untoward market behaviour or activity.*

Assessment Procedures

The revised Investigation Procedures include the concept of 'Issue Assessment' prior to the decision to commence an investigation. There are external processes/interactions described, as applicable. The MSA agrees that it is appropriate to communicate clearly regarding the relevant phase of the process when requesting information for the purposes

of the Issue Assessment. Such communication is part of the interaction contemplated at section 3.3 of the Draft Investigation Procedures.

Timeline and Changes

The MSA does try to move investigations along efficiently. However, experience has shown that investigations are not readily susceptible to target end dates. Each investigation has unique circumstances and complexities affecting how long the investigation will take.

Timelines are not entirely within the control of the MSA. For example, delays can arise where the MSA is trying to accommodate the scheduling preferences of the parties regarding information requests or interviews, or where there is a need to engage the court process.

In furtherance of efforts to move a particular investigation along efficiently, and where circumstances warrant, the MSA may find it useful to amend the Investigation Procedures. In such a case the MSA would discuss the procedural change(s) with the party under investigation beforehand, in an effort to provide a clear understanding of the rationale for and implications of the change(s). This would be investigation specific and would not constitute a generalized or material departure from the published Investigation Procedures.

Investigation Considerations

As set out above, the contemplated Investigation Procedures focus on external processes which will entail interaction with market participants and other parties regarding investigations. This is consistent with the direction given in s. 7 of the *Market Surveillance Regulation*.

Apart from those external processes, the MSA will (as before) continue to assess and consider factors relevant to the matters at issue, including aspects such as intent, materiality, repeatability and sustainability. Its views on such matters have been, and will continue to be, expressed through published reporting, through guidelines, and through private interactions with market participants – all of which will help to provide clarity to market participants.

Confidentiality

The *Market Surveillance Regulation* addresses, in detail, the process and the considerations to be undertaken by the MSA before publishing any record which will name a market participant or address investigation related matters. In the view of the MSA, there is therefore no need for a guideline in this area.

Clearly the MSA must act in accordance with the regulation and with other applicable enactments. Provided that it does so, the MSA is granted certain discretion regarding whether it will publish and regarding the subject matter and content.

Information Requests

In the view of the MSA, sections 4.8 and 4.9 of the contemplated MSA Investigation Procedures sufficiently address the normal practices of the MSA re: information requests, including the possibility of extension to timelines. Given that information requests are investigation and circumstance specific, and not formulaic, the MSA does not pre-determine standard timelines for responses. For example, if very little information is sought then a shorter response time would be more reasonable than where a greater volume of information is sought.

Interviews

The MSA agrees that the interview transcript should be made available to the party under investigation, and to the individual witness, if requested. Generally this transcript will be available quickly. However, in circumstances where the MSA is interviewing more than one person from a market participant organization the MSA may not make the transcripts available until after all of those interviews occur. The MSA will substitute the word “will” for the words “may by agreement” in section 4.10 of the Draft Investigation Procedures.

Discontinuance of Investigation

The Investigation Procedures contemplate that the MSA will not necessarily provide specific investigation findings where it decides to close a file without taking enforcement action against the market participant. From a process perspective, the right to know the case against them no longer arises for the market participant (there is no hearing or enforcement proceeding occurring).

Such flexibility is also reasonable given that an investigation can be discontinued at many points during the investigation process, including at early stages where there may be no material findings *per se*, and for a variety of reasons (not all of which will directly relate to the market participant who was under investigation). For example, the MSA may form the view that the matter is better addressed via guideline making than through a prosecution.

The MSA would also note that the Investigation Procedures do not preclude the possibility of discussions with a market at any time, and indeed this can occur, where the participant seeks feedback from the MSA on specific matters.

Referral of matters to another body

The MSA will not generally inform a market participant when information (records) pertaining to that market participant have been provided to another body such as the AUC or the Competition Bureau. This is the case whether or not the MSA has commenced an investigation.

Such confidentiality (as between the MSA and the other body having jurisdiction) is consistent with the relevant enactments, including the *Alberta Utilities Commission Act*. Further, the loss of confidentiality might interfere with the process used by that other body insofar as its mandate.

Specified Penalties

Subject to certain changes or clarifications set out in other responses, the MSA believes that the application of the contemplated Investigation Procedures to ISO rules compliance and enforcement is adequately set out in Appendix A, and in other materials published on the MSA and AESO websites. The MSA also notes the work being done by the AUC regarding Rule 019.

Self-reporting

Until further notice, self-reporting by market participants in relation to contraventions of the ISO rules should continue to be directed to the AESO at first instance. The MSA and the AESO are in communication regarding rule compliance and enforcement, so the MSA will become aware of the matter in due course. The MSA will further clarify this in section 2.3 and in Appendix A to the MSA Investigation Procedures.

Publishing Notice of Specified Penalty

The *Market Surveillance Regulation* is relevant and places certain obligations on the MSA when considering whether to publish a record. The regulation contemplates that the rules of the Alberta Utilities Commission might impact the publishing decision, and the current AUC Rule 019 in fact requires the MSA to make public any notice of specified penalty issued under s. 52 of the *Alberta Utilities Commission Act*. However, Rule 019 is under review, particularly regarding the associated Penalty Table. This lends some uncertainty to the publishing issue; particularly insofar as whether a ‘warning letter’ or ‘non-compliance letter’ should be made public - such letters are contemplated in the current Penalty Table which was adopted, at least temporarily, from ISO rule 12.

The MSA understands that the approach taken by the AESO has been to not make such letters public, although they may be summarized in reporting without naming the market participant(s) involved. In contrast, financial penalties are made public.

The MSA will take this same approach while the existing AUC Rule 019 is under review. Insofar as the Draft MSA Investigation Procedures, the MSA will adopt the suggestion to change the wording from “will” to “may” in Appendix A, Notice of Specified Penalty made public.

As to any opportunity to reserve ultimate comment on the revised Investigation Procedures until after the AUC has finalized Rule 019, the MSA does not plan to change the Project Schedule for that reason. To the extent that a revised Rule 019 sets out a requirement for the MSA to publish a notice of specified penalty, the MSA will act accordingly (consistent with the *Market Surveillance Regulation*). If a revised Rule 019 does not require publishing of such notices, the MSA will apply its discretion in accordance with the regulation.