



## Understanding JSE Investigations and Imposition of Censures

JSE

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ISSUER REGULATION

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Johannesburg  
Stock Exchange



# 1. INTRODUCTION

The investigative arm of the JSE has adopted an overall approach of 'credible deterrence' which includes a commitment to identify and investigate potential breaches of the JSE Listings Requirements ("Listings Requirements") at an early stage. The principal purpose of imposing a censure or penalty is to promote a high standard of regulatory conduct by deterring regulated parties who have committed breaches, from committing further breaches and thereby helping to deter other parties from committing similar breaches, and demonstrating generally the benefits of compliant behaviour. Censures and penalties are therefore the tools which we may employ to achieve our regulatory objectives.

Through this document we aim to promote awareness of the JSE's regulatory and enforcement powers including its investigative process and to highlight the manner in which the JSE intends to adopt the principles of the International Organisation of Securities Commissions ("IOSCO") in its report titled "Credible Deterrence in the Enforcement of Securities Regulation" which identifies key factors aimed at deterring misconduct in the market.

## 2. CREDIBLE DETERRENCE IN THE ENFORCEMENT OF SECURITIES REGULATION

The IOSCO report identifies key elements in the prevention of misconduct and financial crime from a range of international regulatory authorities and encourages regulators operating in both emerging and developed markets to consider how they might integrate credible deterrence into new or existing enforcement strategies. The report identifies seven key elements for credible deterrence:

1. Legal certainty – consequences for misconduct must be certain and predictable
2. Detecting misconduct – regulators must be well connected and obtain the right information
3. Co-operation and collaboration – safe havens must be eliminated by working together
4. Investigation and prosecution of misconduct – enforcement must be bold and resolute
5. Sanctions – strong punishments must be given to wrongdoers so as to stop them profiting from misconduct
6. Public messaging – public understanding, transparency and caution must be promoted
7. Regulatory governance – good governance is necessary to deliver better enforcement

Strong and effective regulation that holds individuals and issuers accountable for their actions, consequently deterring misconduct, promotes public confidence in the issuer and in the market as a whole and is a key factor in the development of efficient markets, financial services and economies.

The report is based on inter-alia the premise that deterrence is credible when would-be offenders perceive that the risks of engaging in misconduct outweigh the rewards and when non-compliant attitudes and behaviours are discouraged. Deterrence occurs when persons who are contemplating engaging in misconduct are dissuaded from doing so because they have an expectation of detection and that detection will be rigorously investigated, vigorously punished with robust and proportionate sanctions.

The report cautions that credible deterrence cannot be one size fits all and regulators must decide what it means for them in the context of their strategic objectives, powers and responsibilities.

### 3. REGULATORY POWERS OF THE JSE

A regulatory framework with a robust enforcement programme is diminished if industry participants are unaware of it, its processes or the consequences of non-compliance with its Listings Requirements.

The JSE operates as a self-regulatory organisation (“SRO”) and its powers are derived from the Financial Markets Act, 19 of 2012 (“FMA”). These powers are limited to matters that are dealt with in the Listings Requirements and when provisions of the Listings Requirements are contravened, it has the power to take appropriate action. The JSE has regulatory authority over the following regulated parties:

- Issuers of securities listed on the JSE (including new applicants for listing)
- Directors
- Company secretaries
- Sponsors
- Designated Advisers
- Depositories

In respect of the regulated parties below, the JSE may only terminate the accreditation of these entities and remove these parties from the JSE List of Auditors and their advisers:

- Auditor
- IFRS Adviser
- Reporting Accountant and Reporting Accountant Specialist

The SRO Oversight Committee (a formal sub-committee of the JSE Board of Directors tasked with the regulatory oversight of the JSE) is mandated to review the enforcement and disciplinary action undertaken by the JSE and report to the JSE Board on whether the JSE has applied its regulation fairly and consistently to its authorised users and issuers and have imposed appropriate sanctions for non-compliance.



## 4. PROCEDURE FOR INVESTIGATIONS

The investigations unit of the JSE, whose task it is to investigate potential breaches of the Listings Requirements, is notified of a potential breach either by an external complainant or internally through the Corporate Finance, Continuing Obligations or Market Regulation divisions of the JSE. The process adhered to by the investigations unit during each investigation is set out hereunder:



### STEP 1: Initial Information Gathering

- (i) A letter is issued to the regulated party for the purpose of gathering information regarding the background to the event(s) that may have led to a possible breach of the Listings Requirements.
- (ii) In the event of an uncomplicated or straightforward complaint such as the late publication of a director's dealing, the JSE may already be in the possession of all the relevant information and it may not be necessary to request further information.
- (iii) The regulated party will usually have seven business days in which to respond in writing and is specifically requested to provide the JSE with all the facts and information that may be of importance to the investigation in order for the JSE to properly assess whether there has been a breach of the Listings Requirements.
- (iv) Please note that the response time in (iii) above may vary depending on the complexity of the investigation.



### STEP 2: Identification of Potential Breaches of the Listings Requirements

- (i) The response in step 1 is assessed to ascertain if further questions need to be asked and to determine if one or more specific Listings Requirements may have been breached.
- (ii) A further letter is issued to the regulated party in which the particular paragraph(s) of the Listings Requirements are stipulated which the investigations unit believes may have been breached based on the information provided to it.
- (iii) It is important to note that receiving such a letter does not imply that the JSE has found any party guilty of breaching any of the Listings Requirements.
- (iv) The regulated party will usually have seven business days (which may be varied) in which to respond in writing. In the response, the regulated party may provide further information over and above any information already presented in any preceding letters, or, alternatively, provide a negative statement. The information provided should be relevant to the JSE's decision in determining whether or not there has been a breach of the Listings Requirements.

## 4. PROCEDURE FOR INVESTIGATIONS *(continued)*



### STEP 3: Confirmation of Breach of the Listings Requirements

- (i) Once the response to the above letter has been evaluated, the JSE will decide whether or not to confirm any of the identified breaches of the Listings Requirements.
- (ii) If no breach has been identified or there is no reason to proceed with the investigation, the investigations unit will confirm this to the recipient.
- (iii) If one or more breaches have been identified, the investigations unit will issue the regulated party with a letter confirming the breaches and confirming the finding of guilt on the part of the regulated party in respect of those breaches of the Listings Requirements.



### STEP 4: Right of Objection to the Finding of Guilt

- (i) The JSE has an internal appeal process that affords the right to a regulated party to lodge an objection against the JSE's decision, as provided for in paragraph 1.4 of the Listings Requirements. Such objection must be in writing and presented to the investigations unit within 48 hours, measured over business days, giving reasons for such objection. The JSE may however, depending on the facts and circumstances of each matter, extend the period with which an affected party may lodge an objection.
- (ii) If the regulated party does not wish to object to the JSE's finding that it has breached the Listings Requirements, the JSE's decision is final. The regulated party will then be afforded an opportunity to provide the JSE with all the relevant facts and information that may influence the JSE's decision in respect of the imposition of an appropriate sanction.
- (iii) If the regulated party elects to object to the JSE's decision, the JSE will consider the objection, all the facts and information at its disposal and will reconsider its decision *de novo*. The JSE's decision (to uphold or dismiss the objection) will be conveyed to the regulated party in writing.
- (iv) If the objection is upheld, the investigations unit will issue the regulated party with a letter confirming this, and the investigation will be closed.
- (v) If the objection is dismissed by the JSE, the JSE's decision is a final decision as provided for in the Listings Requirements.

## 4. PROCEDURE FOR INVESTIGATIONS *(continued)*



### STEP 5: Censure and penalties

If the response to the above letter under step 3 is not an objection to the finding of guilt or if the JSE has dismissed an objection to the finding of guilt, the JSE will assess all the facts and information at its disposal before deciding upon an appropriate censure. Once a decision regarding an appropriate censure is reached, the investigations unit will issue the regulated party with a letter advising the regulated party of the intended censure.



### STEP 6: Right of Objection to Censure or penalty

(i) Again, the regulated party has a right to lodge an objection against the JSE's decision in relation to the proposed censure against the regulated party, as provided for in paragraph 1.4 of the Listings Requirements.

(ii) The JSE will afford the regulated party an opportunity to lodge an objection against the censure, as detailed in step 4 above.

- (iii) It is important to note that at this stage, as the regulated party has elected not to object to the JSE's decision on the merits, that such decision is a final decision and that the regulated party can only object to the sanction imposed as a result of this decision.
- (iv) If the regulated party does not object to the censure, the JSE's decision will be final and the censure will be issued thereby concluding the investigation and a record will be kept of the action taken against the regulated party.
- (vi) If the regulated party objects to the censure, the JSE will assess all the facts and information at its disposal, reconsider its decision in imposing a censure, evaluate the merits of the objection and will decide whether to uphold or dismiss the objection.
- (v) If the objection is dismissed, the JSE's decision will be final and the censure will be issued thereby concluding the investigation and a record will be kept of the action taken against the regulated party.
- (vi) If the objection is upheld by the JSE, the censure will either be waived in its entirety or altered/lessened.
- (vii) The regulated party will be notified of the JSE's final decision.

## 5. CENSURES AND PENALTIES

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Where a regulated party has contravened or failed to adhere to the provisions of the Listings Requirements, in accordance with the provisions of the FMA and subject to the number and nature of the breaches, the JSE may impose any of the following against a regulated party, per breach identified:

- Private censure
- Public censure
- A fine not exceeding R7.5 million per transgression (this is the limit imposed in terms of the FMA) or in the case of sponsors and designated advisers, a fine not exceeding R1 million
- Disqualify an issuer's director(s) from holding the office of a director of a listed company for any period of time
- Terminate the accreditation of and remove an auditor, IFRS adviser, reporting accountant or reporting accountant specialist from the JSE List of Auditors and their advisers
- Remove the sponsor or designated adviser from the Register of Sponsors maintained by the JSE
- Suspend an issuer's securities
- Terminate an issuer's listing
- Issue any other penalty that is appropriate in the circumstances



## 6. FACTORS TO TAKE INTO ACCOUNT WHEN A CENSURE OR PENALTY IS ISSUED

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Each case is assessed and decided on its merits however there are certain general guidelines and factors that the JSE may consider in conjunction with the factors mentioned in point 7 below, when reaching a decision in respect of a censure, namely: (this list is not exhaustive)

1. First time offenders
2. General compliance history of the offender
3. Offenders that have previously received a censure for a separate investigation
4. If the act/omission by the offender was intentional or negligent/reckless
5. Evidence of material harm or prejudice
6. Profit made or loss avoided
7. The nature, duration and severity of the act/omission
8. The lapse of time between the act/omission and the notification, disclosure or correction thereof
9. The breach being a direct result of an action or omission by the regulated party
10. If it involves a fundamental breach of the Listings Requirements
11. Shareholder dilution
12. Share price reaction
13. Whether the breach may have impacted a stakeholder's economic decision or decision to trade in the issuer's securities
14. The length of time that a specific Listing Requirement has been enforceable and in place
15. What the most effective deterrent for the particular breach would be
16. If the offender has shown remorse, co-operated with the JSE and has put procedures in place to avoid a repeat of the transgression
17. Whether the JSE's objectives to provide JSE users with an orderly market place for trading in securities, to regulate the market accordingly and to ensure that the business of the JSE is carried on with due regard to the public interest has been impeded or compromised by the act/omission
18. The interests of the investing public and the objects of the FMA

## 7. FACTORS TO TAKE INTO ACCOUNT WHEN QUANTUM OF A FINE IS CONSIDERED

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In addition to the factors mentioned in point 6 above, the JSE may also use the following general guidelines when determining the quantum of a fine depending on the seriousness of the transgression (this list is not exhaustive):

1. The severity of the breach of the Listings Requirements
2. The deterrent value of a financial penalty imposed as a result of breaches of the Listings Requirements
3. Mitigating factors may result in a lesser fine being issued
4. Consideration as to whether innocent shareholders may inadvertently be punished or suffer a loss as a result of a fine being imposed on the issuer
5. The financial position of the issuer could result in the fine being suspended for a specified period
6. Assessment of any benefit gained or loss avoided
7. The interests of the investing public and the objects of the FMA
8. A percentage of the market capitalisation of an issuer may be used to calculate a penalty
9. Fines may be suspended for between 12 to 24 months depending on the nature of the breach and the likelihood of a repeat offence by the regulated party



## 8. PUBLIC CENSURE

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In furtherance of our objective to credibly deter wrongdoers from engaging in misconduct, we believe that this will be met by the consistent imposition of rigorous penalties of a public nature for serious breaches of the Listings Requirements. Again, each case will be assessed and decided on its merits taking into account inter-alia the factors mentioned in points 6 and 7 above.

## 9. RIGHT OF APPEAL

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Subject to the provisions of the FMA, if the JSE decides, at its instance, to remove a listing and the issuer concerned objects to its decision, then the issuer may appeal to the Issuer Regulation Appeal Committee in writing, within 48 hours of the decision, giving reasons for such objection. In such event, the JSE will constitute the Issuer Regulation Appeal Committee in accordance with the mandate issued by the JSE Board for this purpose.

In all other respects, a person aggrieved by a decision of the JSE, after exhausting all steps above, may appeal to the appeal board of the Financial Services Board on the conditions determined by or under section 26 of the Financial Services Board Act, 97 of 1990.

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## 10. CONCLUSION

In support of the JSE's commitment to communicate and promote public understanding and transparency of its objectives, procedures and outcomes and to encourage credible deterrence of misconduct, all censures and penalties imposed by the investigations unit will be published on the JSE's website during the first quarter of each year on a no-name basis.



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