



# Listing Rule Amendments – Company Policies on Trading ‘Windows’ and ‘Blackout Periods’

ASX Public Consultation

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## WHAT THIS PAPER IS ABOUT

This paper sets out amendments which ASX proposes to make to its Listing Rules to require listed entities to:

- adopt, and disclose, a company trading policy concerning trading in company securities by key management personnel (including directors);
- include restrictions in the policy as to when key management personnel can trade the entity's securities (and associated clearance procedures); and
- publicly disclose whether any trading by directors occurred during an otherwise restricted period.

This combination of requirements is designed to incentivise the adoption of robust trading policies in the minority of listed entities that do not already have them. The boards of most listed companies and trusts already recognise that leaders of the entity have to accept greater restrictions than other shareholders and unit holders on when they can buy and sell securities in the entities that they lead if other shareholders and unit holders are to be confident that insider trading is not tolerated.

ASX requests comments on the proposed draft amendments to the Listing Rules and the issues for which it would be appropriate to include in a Guidance Note on trading policies under the Listing Rules.

Comments received as a result of this consultation will be considered in the finalisation of the proposed amendments to the Listing Rules, which will be provided to the Australian Securities and Investments Commission (ASIC) for comment, prior to being formally lodged with the Minister for Financial Services, Superannuation and Corporate Law.

It is envisaged that the amendments to the Listing Rules, if not disallowed by the Minister, would come into operation in late 2010 or early 2011. It is intended that listed entities would be provided with approximately six months notice before the commencement of the new Listing Rules.

### INVITATION TO COMMENT

ASX is seeking comments on the proposed amendments to the Listing Rules put forward in this paper by close of business Friday, **26 February 2010**. Submissions can be forwarded to:

[regulatorypolicy@asx.com.au](mailto:regulatorypolicy@asx.com.au)

or

ASX Regulatory & Public Policy Unit  
Level 7, 20 Bridge Street  
Sydney NSW 2000

ASX prefers to receive comments in electronic form.

For enquiries, please call Diane Lewis on +61 2 9227 0154

#### *Confidentiality*

It will be assumed that submissions are not confidential and may be made publicly available. If you would like your submission, or any part of it, to be treated as 'confidential' please indicate this clearly.

## Overview

1. Creating confidence that a market is free from insider trading takes more than appropriate laws and vigorous enforcement. It also involves restricting the freedom of company leaders to engage in activities which, though not involving insider trading, may create a suspicion of insider trading.
2. It is on this basis that ASX is proposing the introduction of listing rules that establish minimum requirements for the adoption, content and disclosure of trading policies and impose disclosure obligations on listed entities in relation to waivers granted to key management personnel by other key management personnel.
3. The primary objective of the proposed listing rule requirements is to complement the existing regulatory arrangements to help minimise the potential for insider trading and, at the same time, address the perception risk of insider trading, thereby promoting investor confidence in the governance arrangements of listed entities.
4. ASX considers that a disclosure-based approach, together with the proposal to introduce principles-based Listing Rules that require listed entities to determine when to restrict their leaders from trading in the entity's securities, provides a proportionate and balanced approach to the market integrity issues associated with 'blackout' trading identified by CAMAC in its June 2009 report 'Aspects of Market Integrity'.
5. ASX considers that the increased transparency promoted by the additional mandatory disclosure obligations will create the right incentives for listed entities to adopt a robust approach to implementing appropriate trading restrictions. At the same time, it should provide a disincentive to boards taking lightly the granting of waivers to allow directors and other key management personnel to trade during periods prohibited under their trading policies.

## Background

### Recent developments

6. On 30 July 2009, CAMAC publicly released a report to Government, 'Aspects of Market Integrity', in which it concluded that:
  - directors and executive officers should be prohibited by their respective companies from actively trading in the securities of their company, except in exceptional circumstances, in the period between the close of books and the release of half-year or full-year financial results and at any other times, at the initiative of the company, when it is aware of, or has under consideration, a market-sensitive matter;
  - directors or executive officers should only be permitted by their respective companies to dispose of securities during this prescribed period where that person is not aware of inside information and is in severe financial difficulty or there are other exceptional circumstances; and
  - listed companies should keep a record of any waivers granted.
7. CAMAC's view – that these steps should be undertaken by a company in the company's interest – was supplemented by a call for ASX to consider whether leaving such practices to emerge via adoption of the ASX Corporate Governance Council's "if not, why not" approach would be sufficient. CAMAC said:

"The ASX could consider whether this best practice approach to blackout trading is sufficiently central to corporate governance and market integrity to be adopted in

its Listing Rules ..... In the absence of effective implementation in a governance context, a legislative approach could be considered.”

8. The insider trading law and CAMAC’s recommendations are consistent with directors not necessarily being in possession of price-sensitive information merely because they have access to non-public information subsequent to books close about what the company’s financial statements will eventually reveal to a wider audience.
9. Conversely, adoption of blackout periods which are at least as extensive as the period between books close and release of the relevant financial statements is widely seen as a prudent way of dealing with any uncertainty as to how the market is likely to react to publication of financial statements. The ASX Corporate Governance Council’s Principles and Guidelines currently provide a flexible framework which leaves considerable scope for listed entities to decide the duration of:
  - (a) the periods when clearance to trade would usually be denied (‘blackout periods’); and consequently
  - (b) the remainder of the year when clearance to trade would usually be given (‘window periods’).
10. Recommendation 3.2 of the ASX Corporate Governance Council’s Principles and Recommendations states that: companies should establish a policy concerning trading in company securities by directors, senior executives and employees, and disclose the policy or a summary of that policy.
11. The commentary on Recommendation 3.2 states that where companies establish a trading policy, they should also introduce appropriate compliance standards and procedures to ensure that the policy is properly implemented. The commentary also provides suggestions for the content of a trading policy as follows:
  - Clearly identify the directors, officers, employees or group of employees who are restricted from trading (“designated officers”).
  - Identify and raise awareness about the prohibitions under the law and the requirements of the policy. This should include an awareness that it is inappropriate for the designated officer to procure others to trade when the designated officer is precluded from trading, and an awareness of the need to enforce confidentiality against external advisers.
  - Require designated officers to provide notification to an appropriate senior member of the company, for example, in the case of directors, to the chair, of intended trading, including entering into transactions or arrangements which operate to limit the economic risk of their security holdings in the company. No prior notification is needed for participation in dividend reinvestment plans and other corporate actions open to all shareholders.
  - Require subsequent confirmation of the trading that has occurred.
  - Identify whether trading windows or black-outs are used and if so, details of their application.
  - Specify whether there is any discretion to permit trading by designated officers in specific circumstances, for example, financial hardship, details of such circumstances, and the basis upon which discretion is applied.

- Specify whether the company prohibits designated officers from trading in financial products issued or created over the company's securities by third parties, or trading in associated products.
- Specify that the company prohibits designated officers from entering into transactions in associated products which operate to limit the economic risk of security holdings in the company over unvested entitlements.
- Specify whether the policy applies to the securities of other companies of which the designated officer has inside knowledge because of their position in the company.

## ASX proposal

### Problem to be addressed

12. There may be legitimate reasons why a company director may need to trade even when there is a significant gap between the amount of information known to directors and the lesser amount of information known to other shareholders. But there are no explicit legislative prohibitions against trading by directors purely on this basis. Nevertheless, trading during some periods when the information gap might be thought to be largest – e.g. after books close and before results announcements – can give rise to suspicion that directors will trade on the basis of inside information (irrespective of whether the results involve any change from market expectations). Regardless of whether there is substance to such suspicions that breaches of the law are occurring, it is this perception that directors may be engaging in insider trading that negatively impacts the reputation of the listed entities and has the potential to undermine the integrity of the market. Furthermore, the difficulties in detecting insider trading also contribute to the perception risk of insider trading.
13. While ASX considers that the insider trading and other market misconduct provisions under the *Corporations Act 2001* are largely adequate to deal with any underlying impropriety with respect to trading by a company director, ASX also considers that the introduction of a set of minimum requirements around the adoption, content and disclosure of a company trading policy under the Listing Rules would complement the existing regulatory arrangements.
14. The Q1 2009 review by ASX Market Supervision of trading by directors during the 'blackout' period revealed that only a small proportion of director trades conducted during the 'blackout' period contravened the trading policies of the entities concerned (and that these tended to involve the smaller listed entities). But the finding that 33 per cent of all active trades by directors during Q1 2009 occurred during the period between books close and release of financials raised concerns in the media and investor community more generally. In particular, it raised questions about the robustness of company trading policies, the scope for the provision of waivers to allow directors to trade during the 'blackout' period and the extent of insider trading.
15. The potentially more disturbing statistics, in ASX's view, were that 2.3 per cent of the trades contravened the trading policies of the entities concerned and that 7.8 per cent of the trades conducted when the company had imposed a "prima facie" restriction, resulted in a director obtaining clearance from a fellow director (typically the Chairman). Whilst this does not imply trading while in possession of price-sensitive information, it does potentially imply a level of willingness to disregard reputation risks.

## Objectives & benefits

16. In designing the proposed listing rule requirements, ASX is seeking to achieve an outcome that would not only promote market integrity, but would also be of net benefit to individual listed entities. ASX considers that a disclosure and principles-based approach to trading policy requirements achieves this balance by creating the right incentives for listed entities to adopt and implement robust trading policies that are appropriate for their particular circumstances. The proposed listing rule requirements are expected to deliver the following benefits:
- focus boards and directors on insider trading issues;
  - substantively improve the corporate governance arrangements of listed entities lagging in this area;
  - signal that listed entities take the threat of insider trading seriously and address the perception risk of insider trading;
  - help prevent insider trading; and
  - promote investor confidence in corporate governance arrangements of the listed sector and promote market integrity.
17. Many boards have found, when making the difficult judgments as to whether their company's reputation is at risk from transparency around dealings by directors, that merely precluding their directors from dealing in the period after books close and before release of financial results does not sufficiently ameliorate the reputation risks. Accordingly, they effectively adopt much more extensive prohibited periods that stretch back well before books close until a few weeks after the last results announcement.
18. The proposed rules are compatible with these "windows" - based approaches to management of reputation risk and risk of insider trading. Indeed, ASX's decision not to settle for a rule which implicitly sanctioned the creation of blackout periods confined to the period between books close and release of financial results as invariably being sufficient, is motivated by a desire to focus the attention of boards on the fact that leading companies do not regard such measures as an adequate risk management approach.
19. Furthermore, boards that have not yet faced the discipline of having a light shone on the extent to which they provide waivers to enable trading during otherwise restricted periods will need to consider the disadvantages that accrue from adopting very short restricted periods. This will include consideration of how to deal with situations where potentially price-sensitive negotiations are not yet completed and not yet known by all leaders of the company. The risks of premature signalling of the existence of prudently imposed event-driven restrictions on dealings being in place may lead companies to conclude that this signalling risk is best addressed by having lengthy blackout periods when trading clearance would invariably not be granted, leaving only narrow windows after release of financial results and annual general meetings when clearance to trade would readily be granted.

## Proposed requirements

### *Requirement for a trading policy with trading restrictions*

20. The proposed new listing rule introduces a requirement that listed entities adopt, and disclose, a trading policy that identifies the periods of the year where trading in its securities by key management personnel will be prohibited.

21. The proposed listing rule provides listed entities with the flexibility to formulate trading prohibitions that are appropriate for the circumstances of the entity.
22. The proposed listing rule provides listed entities with the ability to put procedures in place that provide a mechanism for key management personnel to obtain prior written clearance to trade in the entities' securities in exceptional circumstances during a period where trading is otherwise prohibited under the trading policy.
23. The proposed listing rule includes a requirement that, where an entity provides a mechanism for key management personnel to obtain prior written clearance to trade in exceptional circumstances, the entity's trading policy must include details of the procedures put in place for obtaining prior clearance and also outline the exceptional circumstances under which a clearance to trade during a prohibited period will be considered.
24. The exceptional circumstances under which the person(s) specified in the trading policy may grant prior clearance for key management personnel to trade during a prohibited period under the entities' trading policy shall be determined by the company. However, it is expected that the exceptional circumstances would be limited to various passive trades and severe financial hardship. Interpretation could be provided on this in a Guidance Note in the Listing Rules.
25. The proposed listing rule includes a requirement that listed entities give their trading policy, and any subsequent amendments to their trading policy, to ASX for release to the market via the Company Announcements Platform.

*Additional disclosure requirement in relation to director trading*

26. It is proposed that the Listing Rules be amended to introduce a requirement that all listed entities disclose to the market when prior written clearance has been granted for a director to trade during a period where trading is otherwise prohibited under the entities' trading policy.
27. It is proposed that this requirement be introduced through amendments to Listing Rule 3.19A.2 and Appendix 3Y for a *Change of Director's Interest Notice*.
28. The amendments require that each time the entity tells ASX of any change in a director's notifiable interest, it must indicate whether the change of interest occurred during a period where trading would not normally be permitted under the entity's trading policy and, if so, whether prior written clearance was provided to allow the trade to proceed. It also requires that the entity disclose the date that the clearance was provided
29. The scope of coverage of the additional disclosure requirements under the proposed amendments to Listing Rule 3.19A.2 and Appendix 3Y is confined to directors and does not extend to other key management personnel. This is primarily because s205G of the *Corporations Act 2001* currently only imposes the obligation to disclose notifiable interests to the ASX on directors.
30. ASX would be supportive of s.205G being amended to catch up with the more timely disclosures required of directors under the current Listing Rules. That would be an appropriate time for legislative consideration of a similar "catch-up" by extending any disclosure obligations from "directors" to "key management personnel".

*Scope of application of the proposed amendments*

31. The proposed new requirements will not apply to entities that are ASX Foreign Exempt Listings and ASX Debt Listings.

32. Nothing in the proposed amendments to the Listing Rules or listed entities' compliance with the requirements contained in the proposed Listing Rules is intended to create any inconsistencies with the existing legislative provisions with respect to insider trading and market misconduct.

# Draft Listing Rule Amendments

## *Definitions*

19.12 The following expressions have the meanings set out below.

Introduced 1/7/96. Origin: Definitions.

<b>Expressions</b>	<b>meanings</b>
key management personnel	the meaning in Accounting Standard AASB 124 Related Party Disclosure.
prohibited period	a period of time when an entity's +key management personnel are prohibited from trading in accordance with the entity's +trading policy.
trading policy	an entity's policy relating to trading in the entities' securities by the entity's +key management personnel during +prohibited periods.

## *Trading Policy*

- X.1 An entity must have a +trading policy that complies with the requirements of rule X.4 and must give its +trading policy to the +company announcements office for release to the market.
- X.2 An entity must give any amended +trading policy to the +company announcements office for release to the market within 5 +business days of the amendments taking effect.
- X.3 An entity must give its +trading policy to ASX immediately on request by ASX.

## **Content of Trading Policy**

- X.4 At a minimum, an entity's +trading policy must include the following information:
  - X.4.1 The entity's +prohibited periods.
  - X.4.2 The restrictions on trading that apply to the entity's +key management personnel.
  - X.4.3 Any exceptional circumstances in which the entity's +key management personnel may be permitted to trade during a +prohibited period with prior written clearance.
  - X.4.4 The procedures for obtaining prior written clearance for trading under rule X.4.3.

## Disclosure of directors' interests

### 3.19A An entity must tell ASX the following.

3.19A.1 The +notifiable interests of a director of the entity (or in the case of a trust, a director of the responsible entity of the trust) at the following times.

- On the date that the entity is admitted to the +official list.
- On the date that a director is appointed.

The entity must complete Appendix 3X and give it to ASX no more than 5 business days after the entity's admission or a director's appointment.

Introduced 30/9/2001. Amended 24/10/2005.

Note: An entity is not required to give information to ASX under this rule that, notwithstanding that it has complied with listing rule 3.19B, it does not have.

If a director has no interests at the time when the entity is required to complete an Appendix 3X, the entity must lodge an Appendix 3X that discloses that the director has no interests.

Cross reference: Guidance Note 22 - Disclosure of Directors' Interests.

3.19A.2 A change to a +notifiable interest of a director of the entity (or in the case of a trust, a director of the responsible entity of the trust) including whether the change occurred during a +prohibited period and, if so, whether prior written clearance was provided. The entity must complete Appendix 3Y and give it to ASX no more than 5 business days after the change occurs.

Introduced 30/9/2001.

Note: An entity is not required to give information to ASX under this rule that, notwithstanding that it has complied with listing rule 3.19B, it does not have.

Cross reference: Guidance Note 22 - Disclosure of Directors' Interests.

If a director has no interests at the time when the entity is required to complete an Appendix 3X under Listing rule 3.19A.1, the entity must lodge an Appendix 3Y when the director first acquires an interest.

Example: The events giving rise to the requirement to give ASX an Appendix 3Y in relation to an on market purchase or sale of shares are the trades being effected on ASX's trading platform. The entity has five business days after the date the trades were effected to give ASX the appendix.

The events giving rise to the requirement to give ASX an Appendix 3Y in relation to an exercise of options are the exercise of the options. The entity has five business days after the date the options were exercised to give ASX the Appendix.

3.19A.3 The +notifiable interests of a director of the entity (or in the case of a trust, a director of the responsible entity of the trust) at the date that the director ceases to be a director. The entity must complete Appendix 3Z and give it to ASX no more than 5 business days after the director ceases to be a director.

Introduced 30/9/2001. Amended 11/3/2002.

Note: An entity is not required to give information to ASX under this rule that, notwithstanding that it has complied with listing rule 3.19B, it does not have.

Cross reference: Guidance Note 22 - Disclosure of Directors' Interests.

3.19B An entity must make such arrangements as are necessary with a director of the entity (or in the case of a trust, a director of the responsible entity of the trust) to ensure that the director discloses to the entity all the information required by the entity to give ASX completed Appendices 3X, 3Y and 3Z within the time period allowed by listing rule 3.19.A. The entity must enforce the arrangements with the director.

Introduced 30/9/2001.

Cross reference: Guidance Note 22 - Disclosure of Directors' Interests.

## Appendix 3Y

### *Change of Director's Interest Notice*

Information or documents not available now must be given to ASX as soon as available.  
Information and documents given to ASX become ASX's property and may be made public.

Introduced 30/9/2001.

Name of entity
ABN

We (the entity) give ASX the following information under listing rule 3.19A.2 and as agent for the director for the purposes of section 205G of the Corporations Act.

Name of Director	
Date of last notice	

#### Part 1 - Change of director's relevant interests in securities

*In the case of a trust, this includes interests in the trust made available by the responsible entity of the trust*

Note: In the case of a company, interests which come within paragraph (i) of the definition of "notifiable interest of a director" should be disclosed in this part.

Direct or indirect interest	
Nature of indirect interest (including registered holder) Note: Provide details of the circumstances giving rise to the relevant interest.	
Date of change	
No. of securities held prior to change	
Class	
Number acquired	
Number disposed	
Value/Consideration Note: If consideration is non-cash, provide details and estimated valuation	
No. of securities held after change	
Nature of change Example: on-market trade, off-market trade, exercise of options, issue of securities under dividend reinvestment plan, participation in buy-back	

## Part 2 – Change of director’s interests in contracts

Note: In the case of a company, interests which come within paragraph (ii) of the definition of “notifiable interest of a director” should be disclosed in this part.

<b>Detail of contract</b>	
<b>Nature of interest</b>	
<b>Name of registered holder (if issued securities)</b>	
<b>Date of change</b>	
<b>No. and class of securities to which interest related prior to change</b> <small>Note: Details are only required for a contract in relation to which the interest has changed</small>	
<b>Interest acquired</b>	
<b>Interest disposed</b>	
<b>Value/Consideration</b> <small>Note: If consideration is non-cash, provide details and an estimated valuation</small>	
<b>Interest after change</b>	

## Part 3 – +Prohibited period

<b>Were the interests in the securities or contracts detailed above traded during a +prohibited period?</b>	
<b>If so, was prior written clearance provided to allow the trade to proceed during the +prohibited period?</b>	
<b>If prior written clearance was provided, on what date was this provided?</b>	