

## TRADING POLICIES

### Table of Contents

Introduction.....	1
Categories of listed entity affected .....	2
Closed periods.....	2
Other prohibited periods .....	3
Application to key management personnel.....	3
Excluded trading.....	4
Exceptional circumstances .....	5
Procedures for clearance .....	6
Material changes to a trading policy .....	6
Appendix 3Y change of director's interest notice.....	6
Monitoring and enforcing compliance with a trading policy .....	7

### Introduction

This Guidance Note is published to assist listed entities to comply with their obligations under Listing Rules 12.9, 12.10 and 12.12 regarding trading policies.

Listing Rule 12.9 requires each listed entity to have a trading policy that restricts the entity's key management personnel (KMP) from trading in its securities during certain "prohibited periods". The trading policy must comply with the minimum content requirements set out in Listing Rule 12.12. There are five matters that must be covered in the policy:

- the entity's "closed periods";
- the restrictions on trading that apply to the entity's KMP;
- any trading that is excluded from the entity's trading policy;
- any exceptional circumstances in which the entity's KMP may be permitted to trade during a "prohibited period" with prior written clearance; and
- the procedures for obtaining such clearance.

Listed entities are free to adopt a trading policy that covers more than these minimum content requirements and that suits their individual circumstances, as long as it meets the minimum content requirements in Listing Rule 12.12. Some examples of how listed entities might choose to apply this freedom are given under the heading "Application to key management personnel" below.

Subject to the requirements of Listing Rule 12.12, it is for each entity to determine the details of its trading policy, having regard to its circumstances and to its obligation under Listing Rule 19.2 to honour the spirit, intention and purpose of the Listing Rules. The primary purpose of this Guidance Note is not to limit the matters to which a listed entity may have regard in determining its trading policy, but rather to give guidance on the minimum content requirements that the policy must address.

Some useful guidance on the issues a listed entity may wish to consider in determining its trading policy is provided by Chartered Secretaries Australia in *Good Governance Guide: No 3.2 – Issues to consider in developing or reviewing the policy on trading in company securities*.

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## Categories of listed entity affected

The obligation to have a trading policy that meets the requirements of Listing Rule 12.12 applies to all entities admitted to the Official List in the ASX Listing category. It does not apply to entities admitted to the Official List in the Debt Listing or Foreign Exempt Listing categories.<sup>1</sup>

## Closed periods

Listing Rule 12.12.1 requires a trading policy to include information on the entity's closed periods. A "closed period" is a fixed period specified in the trading policy when an entity's KMP are generally prohibited<sup>2</sup> from trading in the entity's securities.<sup>3</sup>

Hence, to comply with Listing Rule 12.12.1, an entity's trading policy must provide for at least one fixed period of time during which trading in securities by KMP is generally prohibited. A trading policy that does not specify any such fixed period, or that specifies that there is no such fixed period, does not comply with Listing Rule 12.12.1.

A trading policy may comply with the requirement to specify closed periods either by:

- generally prohibiting trading by KMP at all times, except during certain defined "trading windows" (in which case, the closed period is the whole of the year apart from the defined trading windows); or
- defining fixed periods, generally referred to as "black-out periods", throughout the year where trading by KMP is generally prohibited (in which case, the closed periods are the defined black-out periods).

Many consider trading windows to be preferable to blackout periods, because they are more effective and easier to administer due to the shorter periods during which KMP are permitted to trade, but either approach complies with the Listing Rules.

The Listing Rules do not prescribe what periods an entity must choose as its closed periods. It is the responsibility of each entity to specify in its trading policy closed periods that are appropriate to its circumstances. In doing so, however, the entity should be mindful of the perception that trading by its KMP during certain periods may create. One such example is if it takes place during a period where those personnel may have, or be perceived to have, access to information that has not yet been made available to the market (for instance, in the lead up to lodgement of periodic financial reports).

For this reason, entities which report on a semi-annual basis should consider whether it is appropriate to include within their closed periods the period from the close of books at half- and full-year end until the release of their financial results for the half- and full-year respectively. They can address this in their trading policy:

- if they prescribe trading windows, by confining their permitted trading windows to a short period (say, two to six weeks) commencing from the trading day after the release of their financial results for the half- and full-year;<sup>4</sup> or
- if they prescribe black-out periods, including within their nominated black-out periods the period from the close of books at half- and full-year end until the release of their financial results for the half- and full-year respectively.<sup>5</sup>

<sup>1</sup> ASX does have the discretion in respect of any particular ASX Debt Listing under Listing Rule 1.10.2, or any ASX Foreign Exempt Listing under Listing Rule 1.15.2, to specify additional Listing Rules with which the entity must comply.

<sup>2</sup> We say "generally prohibited" because, under Listing Rule 12.12.3, certain types of trading by KMP may be excluded from the operation of the trading policy. Also, under Listing Rule 12.12.4, prior written clearance may be given to KMP to trade during a closed period where there are exceptional circumstances.

<sup>3</sup> Listing Rule 19.12.

<sup>4</sup> Entities in this category may also wish to consider whether it is appropriate to allow a trading window for a short period commencing on the trading day after their annual general meeting and also during the currency of a long form prospectus or PDS offering securities that are to be quoted on ASX.

Some entities that report financial information on a quarterly basis (for example, mining exploration entities that are not yet producing revenue and that release quarterly cash flow reports under Listing Rule 4.7B) may decide that their quarterly reports are a more appropriate reference point for their closed periods than their half- and full-year financial results. Those entities should consider whether it is appropriate to include within their closed periods the periods from quarter-end until the release of their quarterly reports. Again, they can address this in their trading policy:

- if they prescribe trading windows, by confining their permitted trading windows to a short period (say, two to six weeks) commencing from the trading day after the release of their quarterly reports;<sup>6</sup> or
- if they prescribe black-out periods, including within their nominated black-out periods the period from the close of books at quarter-end until the release of their quarterly report.<sup>7</sup>

Listed investment companies or trusts that publish periodic net asset values (NAV) may wish to consider whether their closed periods should be linked to the publication dates of their NAV. This may be appropriate, for example, if they publish NAV on a monthly or quarterly basis. However, if they publish NAV on a daily basis, linking their closed periods to the publication of NAV is unlikely to be workable in practice and it may be easier for them to link their closed periods to their half- and full-year results.

## Other prohibited periods

The Listing Rules contemplate that a listed entity may wish to impose ad hoc restrictions on KMP from trading in its securities at times when it is considering matters which are subject to Listing Rule 3.1A, in addition to the restrictions that apply during the fixed closed periods required under Listing Rule 12.12.1.<sup>8</sup> It may wish to do so, for example, because information about those matters may amount to inside information under the Corporations Act, where insider trading laws could be breached, and the reputation of the entity could be significantly harmed, if its KMP were to trade in its securities at such times.

Although it is not a matter that is required to be included in a trading policy under Listing Rule 12.12, it would be prudent for a listed entity's trading policy to:

- explain the prohibition on insider trading under the Corporations Act; and
- note that, under insider trading laws, a person who possesses inside information may be prohibited from trading even where the trading occurs within a permitted trading window, or outside a black-out or other prohibited period, specified in the entity's trading policy.

## Application to key management personnel

Listing Rule 12.12.2 requires a listed entity's trading policy to include the restrictions on trading in its securities that apply to the entity's KMP. For these purposes, "key management personnel" has the same meaning as in

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<sup>5</sup> Entities in this category may also wish to consider whether it is appropriate for their black-out periods:

- to commence a few weeks before close of books to align with when key management personnel may receive unaudited information about the probable financial position at balance date; and
- to last at least until the beginning of the next trading day after the release of their results, to allow time for the market to absorb those results.

<sup>6</sup> Again, entities in this category may also wish to consider whether it is appropriate to allow a trading window for a short period commencing on the trading day after their annual general meeting and also during the currency of a long-form prospectus or PDS offering securities that are to be quoted on ASX.

<sup>7</sup> Again, entities in this category may also wish to consider whether it is appropriate for their black-out periods:

- to commence a few weeks before close of books to align with when key management personnel may receive unaudited information about the probable financial position at quarter end; and
- to last at least until the beginning of the next trading day after the release of their quarterly results, to allow time for the market to absorb those results.

<sup>8</sup> See the second limb of the definition of "prohibited period" in Listing Rule 19.12.

Accounting Standard AASB 124 *Related Party Disclosure*,<sup>9</sup> which requires subject entities to disclose the remuneration and shareholdings of, and various other transactions involving, KMP.

Even though the Listing Rules only require a trading policy to cover trading in its securities, a listed entity may choose to extend its trading policy to cover trading in financial products issued or created over or in respect of its securities (for example, exchange-traded options, contracts for differences and other derivatives). It may also choose to impose disclosure or approval requirements in relation to margin lending or other secured financing arrangements that KMP may enter into in respect of securities in the entity.

Similarly, even though the Listing Rules only require a trading policy to cover trading by its KMP, a listed entity may choose to extend its trading policy to cover trading by persons or entities closely related to KMP, such as spouses, minor children, family companies and family trusts, where the KMP may be, or be perceived to be, in a position to control or influence trading by those persons or entities. In some cases, it may also choose to extend its trading policy to cover trading by a wider group of executives or employees, in addition to its KMP.

For those entities that do extend their trading policy to a wider group of executives or employees, ASX will accept in satisfaction of the requirement to lodge a copy of the trading policy with ASX under the Listing Rules,<sup>10</sup> either a copy of the full trading policy or a verbatim extract of the relevant provisions in the trading policy that apply to KMP.

## Excluded trading

Listing Rule 12.12.3 contemplates that there may be trading that a listed entity appropriately excludes from the operation of its trading policy. Again, the Listing Rules do not prescribe what types of trading an entity may exclude from its trading policy. It is the responsibility of each entity to determine exclusions that are appropriate to its circumstances and to specify those in its trading policy.

Some examples of trading that are commonly excluded from the operation of a trading policy are:

- transfers of securities between a KMP and someone closely related to the KMP (such as a spouse, minor child, family company or family trust) or by a KMP to his or her superannuation fund, in respect of which prior written clearance has been provided in accordance with procedures set out in the trading policy;
- a disposal of securities arising from the acceptance of a takeover offer, scheme of arrangement or equal access buy-back;
- a disposal of securities that is the result of a secured lender or financier exercising its rights under a margin lending or other secured financing arrangement;<sup>11</sup>
- a disposal of rights acquired under a pro rata issue;
- an acquisition of securities under a pro rata issue;
- an acquisition of securities under a security purchase plan or a dividend or distribution reinvestment plan where:
  - the KMP did not enter into or amend the plan during a prohibited period; and
  - the entity's trading policy does not permit the KMP to withdraw from the plan during a prohibited period other than in exceptional circumstances;

<sup>9</sup> Listing Rule 19.12. AASB 124 defines KMP as: "those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity."

<sup>10</sup> Listing Rules 1.1 (condition 15), 12.9, 12.10 and 12.11.

<sup>11</sup> As mentioned previously, a listed entity may wish to consider including disclosure or approval requirements in its trading policy in relation to margin lending or other secured financing arrangements that KMP may enter into in respect of securities in the entity.

- an acquisition of securities under an employee incentive scheme;
- an acquisition or disposal of securities under a pre-determined investment or divestment plan for which prior written clearance has been provided in accordance with procedures set out in the trading policy and where:
  - the KMP did not enter into or amend the plan during a prohibited period;
  - the plan does not permit the KMP to exercise any discretion over how, when, or whether to acquire or dispose of securities; and
  - the entity's trading policy does not allow for the cancellation of the plan during a prohibited period other than in exceptional circumstances.
- where the listed entity has an employee incentive scheme with a KMP as a trustee of the scheme, trading by the KMP in his or her capacity as a trustee of the scheme; and
- indirect and incidental trading that occurs as a consequence of a KMP dealing in units or shares of a managed investment scheme, listed investment company, exchange-traded fund or similar investment vehicle that is managed by a third party and that happens to hold as part of its portfolio securities in the listed entity.

Again, although it is not a matter that is required to be included in a trading policy under Listing Rule 12.12, it would be prudent for a listed entity's trading policy to note that, under insider trading laws, a person who possesses inside information may be prohibited from trading even where the trading falls within an exception specified in the entity's trading policy.

## Exceptional circumstances

Listing Rule 12.12.4 requires a trading policy to specify any exceptional circumstances in which KMP may be permitted to trade during a prohibited period with prior written clearance. Again, the Listing Rules do not prescribe what types of exceptional circumstances an entity may specify in this regard. It is the responsibility of each entity to determine what circumstances are sufficiently exceptional in its case to warrant giving a KMP approval to trade during a prohibited period and to specify those circumstances in its trading policy.

One example of an exceptional circumstance that is commonly specified in this regard is where the KMP is facing severe financial hardship (for example, if he or she has a pressing financial commitment that cannot be satisfied otherwise than by selling his or her securities). It is for a listed entity that adopts this exception to define clearly what is "severe financial hardship" for the purposes of its trading policy and who makes the determination as to whether that exceptional circumstance applies.

Another example of an exceptional circumstance that is commonly specified is where the KMP is required by a court order or a court enforceable undertaking (for example, in a bona fide family settlement) or some other overriding legal or regulatory requirement to transfer, or accept a transfer of, securities.

In recognition that exceptional circumstances, by their nature, may not be able to be foreseen, ASX considers it acceptable for a trading policy to include a "catch-all" discretionary power for a senior officer of the company (for example, the chairperson or the chief executive officer) to determine that there are exceptional circumstances that warrant the granting of approval to a KMP to trade during a prohibited period. ASX would expect this power to be exercised sparingly and with caution.

Again, although it is not a matter that is required to be included in a trading policy under Listing Rule 12.12, it would be prudent for a listed entity's trading policy to note that, under insider trading laws, a person who possesses inside information may be prohibited from trading even where they have been given permission to trade under the trading policy because of exceptional circumstances.

## Procedures for clearance

Listing Rule 12.12.5 requires a trading policy to set out the procedures for a KMP to obtain prior written clearance under Listing Rule 12.12.4 to trade during a prohibited period. Again, the Listing Rules do not prescribe the procedures that need to be followed in this regard. It is the responsibility of each entity to determine appropriate procedures to ensure that the decision to grant approval to a KMP to trade during a prohibited period is made by someone sufficiently senior to make that judgment.

The trading policy should specify who is empowered to grant such a clearance in the case of particular KMP. Some entities may consider this decision is of such magnitude that it should be made by the board. Others may consider it appropriate for it to be made by the chairperson (in the case of non-executive directors and the chief executive officer) or the chief executive officer (in the case of other executives), recognising that timing constraints may require a decision outside of scheduled board meetings.<sup>12</sup> In the latter case, consideration will need to be given to who approves trading by the chairperson.

The trading policy should address the period for which any prior written clearance to trade is valid. Typically, such a clearance would be expressed to expire after a relatively short period (one week or less), reflecting the fact that it is being given to facilitate trading in exceptional circumstances when the KMP would otherwise be precluded from trading.

The trading policy should also specify the form of written clearance that is acceptable under the policy (for example, whether electronic clearance via email is acceptable) and who is responsible for keeping a record of the clearance.

## Material changes to a trading policy

Listing Rule 12.10 requires a listed entity which makes a material change to its trading policy to give a copy of the amended trading policy to ASX Market Announcements within five business days of the change taking effect.

For the purposes of Listing Rule 12.10, ASX would consider the following amendments to an entity's trading policy to constitute a material change:

- changes to the fixed periods specified in the trading policy when the entity's KMP are prohibited from trading in the entity's securities;
- changes with respect to the trading that is excluded from the operation of the entity's trading policy; and
- changes with respect to the exceptional circumstances in which the entity's KMP may be permitted to trade during a prohibited period.

## Appendix 3Y change of director's interest notice

The form of notification of a change in a director's interests that must be given to ASX under Listing Rule 3.19A.2 (Appendix 3Y) requires the following information to be included:

- whether the interests the subject of the notification were traded during a closed period where prior written clearance under the trading policy was required;
- if so, whether prior written clearance was obtained; and
- if prior written clearance was obtained, the date on which it was provided.

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<sup>12</sup> Entities which extend their trading policy to cover executives and employees as well as KMP may choose to delegate the decision to grant approval to executives and employees who are not KMP to trade during a prohibited period to another senior officer (such as the company secretary or the senior executive to whom the relevant executive or employee ultimately reports).

In light of this requirement, it is incumbent on listed entities to have appropriate record keeping procedures in place to capture details of written clearances given under Listing Rule 12.12.4 to KMP to trade during prohibited periods.

## Monitoring and enforcing compliance with a trading policy

ASX considers that it is inherent in the requirement in the Listing Rules for a listed entity to have a trading policy, that the entity should also have appropriate procedures in place to ensure that its KMP are aware of, and understand, their obligations under the trading policy and to monitor and enforce compliance with the trading policy. For it not to do so would be inconsistent with its obligation under Listing Rule 19.12 to honour the spirit, intention and purpose of the Listing Rules.

One measure a listed entity may wish to consider in this regard is having periodic (eg annual) sign-offs by KMP that they are aware of, and understand, the trading policy and are in compliance with it.

As a matter of good corporate governance, ASX would expect a listed entity to regard a breach of its trading policy by any of its KMP as a serious matter that warrants an investigation as to the circumstances of the breach and, depending on the circumstances, appropriate remedial or disciplinary action.<sup>13</sup>

Where a director of a listed entity breaches its trading policy by trading in securities during a closed period without prior written clearance, that breach will be a matter of public record because of the disclosures in the Appendix 3Y (Change of Director's Interest Notice) required to be lodged with ASX in relation to that trading (see above). In this situation, to meet the standards of good corporate governance expected by investors, ASX considers that an entity should make an announcement to the market at the earliest opportunity explaining the circumstances of the breach and what (if any) remedial or disciplinary action the entity has taken, or proposes to take, in relation to the breach.

If an Appendix 3Y is lodged with ASX that discloses a breach of its trading policy by a director of a listed entity and the listed entity has not made an announcement of the type referred to in the previous paragraph, ASX will give careful consideration to exercising its power under Listing Rule 18.7<sup>14</sup> to require the listed entity to explain the circumstances of the breach and what (if any) remedial or disciplinary action the entity has taken, or proposes to take, in relation to the breach and to publishing its correspondence with the listed entity to the market.

<sup>13</sup> One remedial measure that a listed entity may wish to consider in relation to a KMP who has acquired securities in breach of its trading policy, is to require the KMP to sell the securities at the earliest opportunity and to donate any profit derived from the sale to charity.

<sup>14</sup> Listing Rule 18.7 requires a listed entity to give ASX any information or explanation that ASX asks for to enable it to be satisfied that the entity is, and has been, complying with the Listing Rules. Under Listing Rule 18.7A, ASX may publish any correspondence between it and an entity if ASX has reserved the right to do so and considers that it is necessary for an informed market.