



# Review of Directors' Trading during the 'Blackout' Period – Q1 2010

1 June 2010

## WHAT THIS REPORT IS ABOUT

The rule framework created by ASX listing rules 3.19A and 3.19B requires listed entities to disclose directors' interests in securities and transactions in securities. This framework complements the director notification requirements of Section 205G of the Corporations Act. The listing rules and Section 205G, together with the prohibitions on insider trading and market manipulation, help to maintain an informed and orderly market.<sup>1</sup>

Directors' Interest Notices are reported to ASX through the lodgement of Appendices 3X, 3Y and 3Z under listing rule 3.19A via the Company Announcements Platform (CAP). They are monitored by ASX Markets Supervision Pty Limited (ASXMS) as a matter of course. ASXMS also undertakes periodic reviews of entities' compliance with the requirements of this listing rule.<sup>2</sup>

Using the data from the reviews of directors' trading, ASXMS also conducts reviews of trading by directors during the so-called 'blackout period' - that is, the period between the close of an entity's financial period and the release of its half-year or full-year results.

## KEY RESULTS OF THE REVIEW FOR Q1 2010

ASXMS conducted its fifth review of all Directors' Interest Notices for Notices lodged between 1 January 2010 and 31 March 2010 (Q1 2010). The results of the Q1 2010 review were released on 20 May 2010. Using the data from the Q1 2010 review, ASXMS also identified instances where directors engaged in active (ie on-market) trading in securities during the blackout period.

- There were 1,987 Appendices 3Y (Change of Director's Interest Notice) lodged during Q1 2010 compared to 2,365 in Q3 2009 and 2,596 in Q1 2009.
- Of the Appendices 3Y lodged during Q1 2010, 766 involved active (ie on-market) trades compared to 713 in Q3 2009 and 1,047 in Q1 2009. Of the active trades, 315 trades (41.1%) occurred during the blackout period (but not necessarily in contravention of the relevant entity's trading policy).
- **Three of the 766 total active trades (0.4%) by directors in Q1 2010 were *confirmed* as contraventions of the trading policy of the entity concerned where permission from the relevant chairman of the board had not been granted for the trading.**
- The confirmed contraventions involved three individual directors in the securities of three different entities.
- This compares to five confirmed contraventions (0.7%) by four directors in the securities of four entities in Q3 2009, and eight confirmed contraventions (0.8%) by six directors in the securities of six entities in Q1 2009.
- All three confirmed contraventions of trading policies in Q1 2010 related to entities outside the All Ordinaries Index (AOI). This compares to zero trades related to an entity in both the S&P/ASX 200 Index and the AOI in Q3 2009, and three trades related to a single entity in both the S&P/ASX 200 Index and the AOI in Q1 2009.

### Further results for Q1 2010

- Of the 766 active trades (involving 370 entities) conducted during Q1 2010, 315 trades (41.1%) occurred during the blackout period (but not necessarily in contravention of the relevant entity's trading policy). These 315 trades were conducted by 209 individual directors in the securities of 174 different entities. This compares to 224 trades (31%) by 151 individual directors in the securities of 129 different entities during the blackout period in Q3 2009, and 346 trades (33%) by 219 individual directors in the securities of 189 different entities during the blackout period in Q1 2009.

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<sup>1</sup> ASX released a Companies Update in October 2005 reminding entities of their obligations under listing rules 3.19A and 3.19B and outlining possible ASX action where entities do not comply with the Listing Rules. ASX also wrote to each entity to advise of the ASX enforcement program. ASX released a further Companies Update in June 2008 advising of ASX action in cases of non-compliance with the Listing Rules.

<sup>2</sup> ASXMS carried out a review of all Directors' Interest Notices lodged between 1 January 2008 and 31 March 2008 (Q1 2008), between 1 July 2008 and 30 September 2008 (Q3 2008), between 1 January 2009 and 31 March 2009 (Q1 2009), between 1 July 2009 and 30 September 2009 (Q3 2009), and between 1 January 2010 and 31 March 2010 (Q1 2010). The results of these reviews are available at [www.asx.com.au](http://www.asx.com.au).

- Of the 315 active trades during the blackout period in Q1 2010, 39 trades (12.4%) (involving 27 listed entities) *potentially* contravened the trading policies of the entities concerned, compared to 29 potential contraventions (12.9%) in Q3 2009 and 35 potential contraventions (10.1%) in Q1 2009.
- Of the *potential* contraventions, ASXMS contacted the 27 listed entities to ascertain whether a contravention of the trading policy may have occurred. The majority of responses indicated that the transactions *did not* breach the relevant trading policy because the chairman of the board had given the appropriate approval for the trade. The principal reason for the chairman's approval was that the chairman was of the opinion that the director was not in possession of material information that had not been released to the market at the time of the trade.
- Of the 39 *potential* contraventions of the trading policies of the 27 entities concerned, there were three *confirmed* contraventions in Q1 2010, involving three entities, compared to five confirmed contraventions in Q3 2009 and eight in Q1 2009.

ASXMS will examine the data from the review, in conjunction with its usual examination of all trading data, to determine if there are possible instances of insider trading by directors and/or breaches of continuous disclosure obligations by listed entities. If ASXMS forms the view that there may be a breach then ASXMS will refer the matter/s to Australian Securities and Investments Commission (ASIC) for further investigation.

## PROPOSED ASX LISTING RULES

On 22 April 2010, ASX released an exposure draft<sup>3</sup> of the proposed new listing rule requirements for company trading policies and Appendix 3Y Change of Director's Interest Notices. The exposure draft also reports on the outcome of public consultation undertaken on the proposed amendments set out in ASX's consultation paper *Listing Rule Amendments – Company Policies on Trading 'Windows' and 'Blackout' Periods*, dated 4 December 2009.

The proposed listing rule requirements included in the April exposure draft have been informally lodged with ASIC. The proposed implementation date for the new rules is 1 January 2011.

The new listing rules will require listed entities to:

- Adopt and disclose a trading policy that specifies periods of the year where trading in its securities by key management personnel will be prohibited;
- Include in that trading policy details of the procedures for obtaining prior written clearance to trade during these prohibited periods;
- Disclose in the trading policy the exceptional circumstances under which key management personnel may be granted prior written clearance to trade during periods where trading is otherwise prohibited under that policy. ASX envisages providing guidance in a Guidance Note that 'exceptional circumstances' is expected to be confined to circumstances, such as, severe financial hardship and where there are court orders requiring the sale of the securities;
- Disclose in the trading policy any types of trades that are excluded from the operation of the trading policy. ASX envisages providing guidance in the Guidance Note that such trades are expected to be limited to: certain passive trades, such as dividend reinvestment plans, share purchase plans, rights issues and accepting takeover offers (these are trades where the plan that determines the timing and nature of trading has been approved by the board); pre-approved non-discretionary trading plans that are not entered into or subsequently amended during a prohibited period; and a margin call;
- Give their trading policy, and any subsequent amendments to the specified periods where trading is prohibited (closed periods) therein, to ASX for release to the market through CAP; and
- Notify the market through an Appendix 3Y Change of Director's Interest Notice: whether the trading occurred during a closed period (a period specified in the trading policy where trading is prohibited) where prior written

<sup>3</sup> *Listing Rule Amendment – New Requirements for a Remuneration Committee and a Company Trading Policy* can be found at [http://www.asx.com.au/about/whats\\_new.htm#listingrules](http://www.asx.com.au/about/whats_new.htm#listingrules)

clearance was required; if prior written clearance was required, whether that clearance was provided to allow the trade to proceed; and if clearance was provided, on what date was it provided.

## SUMMARY OF RESULTS OF Q1 2010, Q3 2009 AND Q1 2009 REVIEWS OF BLACKOUT TRADING

Blackout trading			
Quarter	Q1 2009	Q3 2009	Q1 2010
Number of Appendix 3Y forms lodged	2,596	2,365	1,987
Total number of active trades	1,047	713	766
Total number of active trades during blackout period & as % of active trades	346 (33%)	224 (31.4%)	315 (41.1%)
Number of potential contraventions of trading policy & as % of active trades during blackout period	35 (10.1%)	29 (12.9%)	39 (12.4%)
Confirmed contraventions of trading policy & as % of active trades during blackout period	8 (2.3%)	5 (2.2%)	3 (1%)
<i>Confirmed contraventions of trading policy as % of total active trades</i>	<i>0.8%</i>	<i>0.7%</i>	<i>0.4%</i>

## BACKGROUND

The framework created by listing rules 3.19A and 3.19B was introduced by ASX in 2001 and requires listed entities to disclose directors' interests in securities and transactions in securities. This framework complements the director notification requirements of Section 205G of the Corporations Act.

ASXMS conducts ongoing analysis of compliance to help identify strategies to improve compliance. This includes **education initiatives** through:

- Companies Updates;
- Guidance Notes; and
- ASXMS Education and Research Program seminars.

In 2002 ASX released Guidance Note 22 that provides information to assist listed entities in complying with their obligations under listing rules 3.19A and 3.19B. It also provides an overview of ASX policy on disclosure of directors' interests and transactions in securities.

The Listing Rules and Section 205G, together with the prohibitions on insider trading and market manipulation, help to maintain an informed and orderly market. ASX considers that investors in a listed entity and the market in general, have a legitimate interest in trading by directors. To be useful, this information about holdings must be up-to-date and, where changes have occurred, must enable investors to understand the nature of the changes. ASX recognises that a director may choose to trade an entity's securities for a broad range of reasons and that trading by directors is not necessarily an indicator of an entity's prospects.

## Blackout trading

Public confidence in an entity can be eroded if there is insufficient understanding about the entity's policy on trading by potential insiders, such as directors, officers and employees. Investor confidence in directors and the market can be undermined when there is trading in blackout periods in contravention of an entity's own trading policy.

A trading policy which includes a provision for a blackout on trading by directors and others in the period between the close of books and the announcement of full or half-year results acts as a mechanism for minimising the potential for any perception that directors or others are dealing in an entity's securities while in possession of inside information. Trading policies frequently permit trading in 'windows' following the full and half-year results announcements.

Blackout trading does not breach the Corporations Act or current ASX rules. However, directors and others who trade with information that is not generally available are subject to the insider trading provisions of the Corporations Act and directors are subject to the notification provisions of listing rule 3.19A and Section 295G of the Corporations Act.

## ASX CORPORATE GOVERNANCE COUNCIL'S RECOMMENDATIONS

The ASX Corporate Governance Council's (Council) 2007 *Corporate Governance Principles and Recommendations* (Revised Recommendations) recommend that entities establish a trading policy concerning trading in the entity's securities.<sup>4</sup> The Revised Recommendations suggest that a trading policy identify whether trading windows or blackouts are used and, if so, provide details of how they apply.<sup>5</sup> It is also recommended that entities disclose their trading policies or summaries of those policies. The Revised Recommendations outline that public confidence in a company can be eroded if there is insufficient understanding about the company's policies governing trading by potential insiders.

While listed entities are not required to follow the Council's Recommendations, they are required under listing rule 4.10.3 to disclose the extent to which they have followed the Council's Recommendations in the corporate governance statement in their annual report. Where entities have not followed the Recommendations they must identify the Recommendations they have not followed and give reasons for not following them - the 'if not, why not' approach. Central to the 'if not, why not' approach is the need for an entity to explain how its practices accord with the spirit of the relevant Principle.<sup>6</sup>

ASXMS's review of annual reports has shown improvement in the number of entities establishing a trading policy, with over 91% of entities having disclosed in annual reports for the period ended 30 June 2009 that they have trading policies, compared to 86% in annual reports for the period ended 30 June 2008. ASXMS is currently reviewing annual reports for the period ended 31 December 2009 for compliance with listing rule 4.10.3. The results of this review are expected to be released in July 2010.

On 22 April 2010, the Council released for public comment proposed changes to the Revised Recommendations<sup>7</sup> in relation to trading policies, amongst other things. Council has proposed that the recommendations and associated commentary concerning company trading policies be removed from the Revised Recommendations to avoid any overlap or duplication with the proposed listing rule requirements for the adoption and disclosure of a company trading policy.

## ASXMS RESPONSE TO CONTRAVENTIONS

A review of the publicly available information on share trading policies showed that prima facie 39 of the active trades (involving the securities of 27 entities) conducted during the blackout period in Q1 2010 may have contravened the entities' own trading policies (the potential contraventions).

ASXMS wrote to all 27 entities where prima facie (or potentially) it appeared that an active trade during the blackout period may have contravened the entity's own trading policy. In these letters, ASXMS asked entities:

- Whether the trades occurred outside a designated trading window?
- If the trades occurred outside a designated trading window, the reason for the departure from the entity's trading policy?
- In the event that the trades deviated from the usual trading window specified in the entity's trading policy with the approval of the managing director or chairman, when the approval was obtained and why it was granted?
- What arrangements the entity has in place with its directors to ensure compliance with the trading policy?

<sup>4</sup> See the 2003 *Principles* Recommendation 3.2 at page 26 and the *Revised Recommendations* Recommendation 3.2 at page 23.

<sup>5</sup> See the 2003 *Principles* Box 3.2 at page 27 and the *Revised Recommendations* at page 23.

<sup>6</sup> See the *Revised Recommendations* at page 6.

<sup>7</sup> The Exposure Draft of proposed changes can be found here: [http://www.asx.com.au/about/whats\\_new.htm#principles](http://www.asx.com.au/about/whats_new.htm#principles)

- If the current arrangements are inadequate or are not being enforced, what additional steps the entity intends to take to ensure compliance with its trading policy?

The majority of responses to these letters indicated that the transactions did not contravene the relevant trading policy because the chairman of the board had given the appropriate approval for the trade. The principal reason for the chairman's approval was that the chairman was of the opinion that the director was not in possession of material information that had not been released to the market at the time of the trade.

ASXMS considers that where trading occurs outside the usual trading windows specified in an entity's trading policy, the entity should provide additional explanation in relation to the trade. If the departure from the usual trading window has been approved by the board, this, together with the reasons for the departure, should be communicated to the market along with any other relevant information. This additional explanation could be provided either in the Appendix 3Y form or at the time the Appendix 3Y is lodged. However, currently it is for boards and shareholders to address these issues.

The data from the Q1 2010 blackout trading review will be further analysed to determine whether there are possible instances of insider trading by directors and/or breaches of the continuous disclosure requirements by listed entities, in which case, they will be referred to ASIC for further investigation.

## **METHODOLOGY**

ASXMS analysed all 1,987 Appendix 3Y Change of Director's Interest Notices lodged from 1 January 2010 to 31 March 2010 inclusive. The changes of relevant interest were initially classified as 'active' or 'passive'. Changes of relevant interest were deemed to be passive if they involved the acquisition of securities through an employee incentive scheme, if the issue had been approved by security holders or otherwise presented no market concerns; for example, issues under dividend reinvestment plans, share purchase plans and rights issues – in each case directors participate on identical terms to all other security holders.

The active changes of relevant interest were then assessed to determine whether the trade occurred during the blackout period; that is, the period between the close of the financial period and the release of half-year or full-year results. The publicly available information on share trading policies was reviewed to determine whether or not any of the active trades conducted during the blackout period had also contravened an entity's own trading policy.