



Listing Rule Amendments – New Requirements for a Remuneration Committee and a Company Trading Policy

ASX Exposure Draft

22 April 2010

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WHAT THIS PAPER IS ABOUT

This paper sets out amendments ASX proposes to make to its Listing Rules to require the top 300 ASX listed entities to have a remuneration committee that is comprised solely of non-executive directors. It also reports on the outcomes of public consultation undertaken on the proposed amendments to the Listing Rules introducing requirements for the adoption, content and disclosure of company trading policies. The proposed amendments to the Listing Rules setting out the requirements for a company trading policy have been revised to take account of the key issues raised in submissions responding to ASX's Consultation Paper "Listing Rule Amendments – Company Policies on Trading 'Windows' and 'Blackout' Periods", dated 4 December 2009.

The revised proposed listing rule requirements for company trading policies, which are included in this paper, have been informally lodged with the Australian Securities and Investments Commission (ASIC). Informal lodgement is the first step in the regulatory approval process whereby, after considering advice from ASIC, the Minister for Financial Services, Superannuation and Corporate Law has the opportunity to disallow any rule change made by ASX.

The proposed listing rule changes to require the top 300 ASX listed entities to have a remuneration committee that is comprised solely of non-executive directors have not yet been informally lodged with ASIC and there is an opportunity for comment on these proposed amendments. In particular, ASX seeks comments on whether the requirement to have a remuneration committee, but not the requirement that it be comprised solely of non-executive directors, should be extended to the top 500 ASX listed entities.

Comments received as a result of this consultation will be considered in finalising the amendments to the Listing Rules that are submitted for regulatory approval.

If the regulatory approval processes are completed by mid-year (with details of the final form being publicly released at that time) any listed entities that are not already in compliance with the proposed changes will have until 1 January 2011 to implement the requirements for a remuneration committee and a company trading policy.

INVITATION TO COMMENT

ASX is seeking comments on the proposed amendments to the Listing Rules in relation to the remuneration committee requirements by Monday, **31 May 2010**. Submissions can be forwarded to:

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.

Remuneration Committees

ASX Proposal

1. ASX proposes to amend the Listing Rules to introduce a requirement that entities included in the S & P / ASX 300 Index at the beginning of their financial year have a remuneration committee that is comprised solely of non-executive directors.

Problem to be addressed

2. While there is a legitimate role for executive directors (in particular, the CEO and MD) to participate in remuneration committee deliberations with respect to a number of the responsibilities of the remuneration committee, such as the development and implementation of organisational remuneration policy, succession planning for the senior levels of management and the remuneration arrangements for the executive team, executive director membership of remuneration committees creates the perception that remuneration committees are conflicted in advising the board on the remuneration arrangements for executive directors. This perception that remuneration committees are not adequately independent from executive directors in providing recommendations to the board on their remuneration arrangements has the potential to negatively impact on investors' and the community's confidence in the corporate governance arrangements of listed entities in this area. By drawing a clear distinction between membership of, and attendance at, meetings of a remuneration committee by executive directors, the proposed change is designed to reinforce the importance of remuneration committee members bringing independent judgment to bear on their advice to the whole board.

Objectives and benefits

3. The main objectives of the proposed amendments are to help reduce the potential for, and perceptions of, conflicts of interest associated with the operation of remuneration committees in providing advice to the board on the remuneration arrangements of executive directors. The proposed listing rule requirements seek to both promote investor confidence in the corporate governance arrangements of listed companies and, at the same time, deliver a net benefit to the individual listed entities subject to the requirements.
4. The proposed listing rule requirements are expected to deliver the following benefits:
 - 4.1 facilitate improvements in remuneration processes and outcomes of the larger listed entities for which the benefits would be expected to outweigh the costs of requiring a separate remuneration committee comprised of non-executive directors; and
 - 4.2 reduce the potential for, and perceptions of, conflicts of interests in relation to executive directors being able to influence the remuneration committee's advice to the board on their own remuneration arrangements.
5. The proposed listing rule requirements for the top 300 ASX listed entities, which represent approximately 90% by market capitalisation and 15% by number of ASX listed entities, is considered to provide a proportionate and balanced response to the issues identified in the 2009 Productivity Commission Inquiry into Executive Remuneration with respect to remuneration committees. This is primarily because it targets the listed entities that are both best able to meet the compliance costs and obtain efficiency benefits from a remuneration committee and those where community perceptions of conflicts of interest in executive remuneration setting are most prevalent.

6. ASX considers that the proposed threshold for the top 300 ASX listed entities to have a remuneration committee that is comprised solely of non-executive directors is appropriate because these entities have the resources and a sufficient number of non-executive directors on their boards to serve on a remuneration committee to ensure that the relative compliance costs are proportionate to the risks being addressed.
7. ASX does not consider it appropriate to extend the requirement for a remuneration committee that is comprised solely of non-executive directors beyond the top 300 ASX listed entities because of the significant number of companies above the top 300 that would not have enough non-executive directors on their boards to serve on a remuneration committee. In these circumstances, such a listing rule requirement would operate to impose a de facto requirement with respect to the composition of boards of smaller companies, which would represent a significant and disproportionate compliance cost for these entities.
8. The ASX Corporate Governance Council has invited ASX to take the opportunity to consult on whether it should be mandatory under the ASX Listing Rules for the top 500 ASX listed companies to have a remuneration committee as a step in the development of corporate governance practices appropriate to the stage of growth and development of those companies and their place in the capital market.
9. ASX is considering the merit of extending the proposed requirement under the Listing Rules for companies in the S & P / ASX 300 Index to have a remuneration committee to companies in the S & P All Ordinaries Index (top 500 ASX listed entities) in recognition of the important role that remuneration committees can play in more effectively dealing with complex and specialised remuneration issues and in focusing the board on appropriate remuneration policies. However, ASX is not proposing to extend the requirement that remuneration committees must be comprised solely of non-executive directors to companies beyond the top 300 ASX listed companies on the basis of the issues discussed above in paragraphs 6 and 7. A similar approach has been adopted with respect to the audit committee requirements under the Listing Rules, whereby the requirement to have an audit committee applies to the top 500 ASX entities and the compositional requirements for the committee apply to the top 300 ASX listed entities.

Background

10. On 19 March 2009, the then Assistant Treasurer (and current Minister for Financial Services, Superannuation and Corporate Law), the Hon Chris Bowen MP, requested that the Productivity Commission undertake an inquiry into the trends and existing regulatory framework around director and executive remuneration in Australia.
11. On 4 January 2010, the Productivity Commission released its Inquiry Report on Executive Remuneration in Australia, which included seventeen recommendations for regulatory and corporate governance reforms. Recommendation 3 of the Inquiry Report indicated that a new ASX listing rule should specify that all ASX300 companies should have a remuneration committee that is comprised solely of non-executive directors.
12. On 16 April 2010, the Government publicly released its response to the Productivity Commission's Inquiry Report Recommendations. In its response, the Government provided in-principle support for Recommendation 3 and ASX introducing a new listing rule requirement for ASX300 companies to have a remuneration committee, which is comprised of non-executive directors.

Company Trading Policies

ASX proposal

13. ASX proposes to amend the Listing Rules to introduce minimum requirements for the adoption, content and disclosure of company trading policies. The proposed amendments also impose additional disclosure obligations on listed entities in relation to any waivers granted to allow a director to trade during a prohibited period specified under the entity's trading policy.
14. The proposed new listing rules require listed entities to:
 - 14.1 adopt and disclose a trading policy that specifies periods of the year where trading in its securities by key management personnel will be prohibited;
 - 14.2 include in that trading policy, details of the procedures for obtaining prior written clearance to trade during these prohibited periods;
 - 14.3 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;
 - 14.4 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, which are not entered into or subsequently amended during a prohibited period; and a margin call;
 - 14.5 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 the Company Announcements Platform; and
 - 14.6 notify the market through an Appendix 3Y Change of Directors Interest Notice: whether the trading occurred during a closed period (a period specified in the trading policy where trading is prohibited) where prior written 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.

Consultation process & outcomes

15. ASX undertook public consultation on the proposal to introduce new listing rule requirements for the adoption, content and disclosure of company trading policies as set out in "Listing Rule Amendments – Company Policies on Trading 'Windows' and 'Blackout' Periods", dated 4 December 2009¹. A twelve week consultation period was provided for comment.

¹http://www.asx.com.au/about/pdf/20091203_asx_consultation_paper_listing_rule_amendments.pdf

16. ASX received seven submissions in response to the consultation paper. Almost all of the submissions were supportive of the principles and disclosure-based approach to the proposed new listing rules. However, the submissions identified three key areas of concern to be addressed in revised drafting so as to avoid potential unintended consequences. The key issues raised in the submissions for ASX to consider in finalising the proposed amendments are:
- 16.1 the definition of 'prohibited period' and the draft listing rules did not distinguish between the trading prohibitions associated with scheduled announcements, which can be specified up front, and those implemented by the company on an ad hoc basis prior to an unscheduled material announcement when the company is considering a confidential, but incomplete price sensitive matter or transaction. Capturing trading prohibitions put in place when a company is considering a confidential, but incomplete price sensitive matter in X.4 and in the proposed amendments to 3.19A.2 would have created the following difficulties:
 - 16.1.1 X.4 as drafted would have required companies to include information on its 'prohibited periods' in the trading policy. It would be difficult to include information on prohibited periods imposed in relation to unscheduled announcements other than to indicate that the company has arrangements in place to implement discretionary trading prohibitions from time to time when it is considering a confidential, but incomplete price sensitive matter which is subject to Listing Rule 3.1A, and
 - 16.1.2 the proposed amendments to Listing Rule 3.19A.2, which would have required a company to disclose whether a change to a notifiable interest of a director had occurred during a prohibited period would capture these ad hoc trading prohibitions implemented in conjunction with unscheduled events and, as a result, would have tipped off the market that the company was considering an incomplete material matter or transaction;
 - 16.2 the listing rule should provide flexibility for company trading policies to permit certain passive trades and trades resulting from pre-approved non-discretionary trading plans without requiring prior written clearance in periods where trading is otherwise prohibited by the company (i.e. the listing rule should allow company trading policies to carve-out certain trades from the operation of the trading policy); and
 - 16.3 the proposed requirement that any amended company trading policy be provided to the ASX company announcements office within 5 business days of the amendments taking effect would have an onerous compliance burden on companies without commensurate benefits and could have the unintended consequence of discouraging ongoing review and improvements being made to company trading policies.
17. A number of submissions also indicated that a Guidance Note would be a useful addition to the proposed listing rule. Some of the submissions indicated that a Guidance Note could most usefully provide clarity on:
- 17.1 the circumstances in which a company trading policy may allow for trading during a prohibited period with prior written clearance. In relation to this issue, there were diverging views on the general approach that should be taken and the scope of circumstances for which clearance should be provided;
 - 17.2 the types of trades a company may determine to be outside the scope of the trading policy and, as such, not require prior written clearance for trading during prohibited periods; and
 - 17.3 the appropriate procedures for obtaining prior written clearance to trade during and otherwise prohibited period.

18. Following the consultation, ASX has revised its proposed amendments to the Listing Rules to address the three key issues raised:
 - 18.1 to provide companies the ability to carve-out certain trades from the operation of their trading policy so that these trades can take place during a prohibited period without requiring prior written clearance.
 - 18.2 the additional Appendix 3Y Change in Directors Interest Notice requirements in relation to whether clearance to trade was provided now only relates to trading prohibitions implemented in the lead up to scheduled announcements that are specified in the company trading policy (closed periods); and
 - 18.3 only changes that have been made to the 'closed periods' specified in the policy will trigger the requirement for companies to their amended trading policy to ASX for release to the Market.

Consequential amendments to the Corporate Governance Council Principles and Recommendations

19. The proposed listing rules duplicate most of the content of Recommendation 3.2 and associated commentary of the ASX Corporate Governance Council (CGC) Principles and Recommendations. In order to avoid creating overlapping requirements for listed entities, the CGC has decided to delete Recommendation 3.2 and the associated commentary from the Principles and Recommendations. On this basis, ASX has decided to deal with the main outstanding issue covered in Box 3.2 'Suggestions for the content of a trading policy' in the CGC Principles and Recommendations with respect to companies specifying whether they prohibit trading in derivatives in a Guidance Note associated with the proposed listing rules.
20. On 16 April 2010, the Government announced that it would address the other main outstanding issue covered in Box 3.2 'Suggestions for the content of a trading policy' in the CGC Principles and Recommendations - hedging over unvested entitlements – in the *Corporations Act 2001*.

Draft Listing Rule Amendments

Remuneration Committee Requirements

Chapter 1 - Admission

ASX Listing

Requirements for ASX Listing

- 1.1 For an entity (except an entity admitted as an ASX Foreign Exempt Listing or an ASX Debt Listing) to be admitted to the +official list, the following conditions must be met to ASX's satisfaction.

Introduced 1/7/96. Amended 30/9/2001.

...

Condition 16 An +entity which will be included in the +S & P / ASX 300 Index on admission to the +official list must have a +remuneration committee.

Chapter 12 - On-going requirements

Remuneration Committee

- 12.8 An +entity which was included in the +S & P / ASX 300 Index at the beginning of its financial year must have a +remuneration committee for the entire duration of that financial year.

Note: The +S & P / ASX 300 Index is reviewed quarterly. If an +entity was included in the Index on the first day of its financial year, but is subsequently not included in the Index following a quarterly review, it must comply with this rule for the whole of the financial year. If an +entity was not included in the Index on the first day of its financial year, but is subsequently included in the Index following a quarterly review, it need not comply with this rule for that financial year.

- 12.8.1 An +entity which is subject to listing rule 12.8 must have a +remuneration committee comprised solely of non-executive directors.

Chapter 19 - Interpretation and definitions

Definitions

- 19.12 The following expressions have the meanings set out below.

Introduced 1/7/96. Origin: Definitions.

Expressions	meanings
remuneration committee	is a committee formulated by an +entity to advise that +entity on matters pertaining to the remuneration of its +key management personnel.

Company Trading Policy Requirements

Chapter 1 - Admission

ASX Listing

Requirements for ASX Listing

- 1.1 For an entity (except an entity admitted as an ASX Foreign Exempt Listing or an ASX Debt Listing) to be admitted to the +official list, the following conditions must be met to ASX’s satisfaction.

Introduced 1/7/96. Amended 30/9/2001.

Condition 1 The entity’s structure and operations must be appropriate for a listed entity.

Introduced 1/7/96.

Example: When deciding if an entity’s structure and operations are appropriate for that entity to be listed, ASX may have regard to whether the principles on which the listing rules are based have been and will be complied with. See the Introduction.

...

Condition 15 The entity must have a +trading policy that complies with ASX listing rule 12.9.

Introduced X/X/XX.

Chapter 19 - Interpretation and definitions

Definitions

- 19.12 The following expressions have the meanings set out below.

Introduced 1/7/96. Origin: Definitions.

Expressions	meanings
key management personnel	the meaning in Accounting Standard AASB 124 Related Party Disclosure.

Expressions	meanings
prohibited period	means: <ol style="list-style-type: none"> i. any +closed period; or ii. additional periods when an entity's +key management personnel are prohibited from trading, which are imposed by the entity from time to time when the company is considering matters which are subject to Listing Rule 3.1A.
closed period	fixed periods specified in the +trading policy when an entity's +key management personnel are prohibited from trading in the entity's securities.
trading policy	an entity's policy relating to trading in the entities' securities by the entity's +key management personnel during +prohibited periods.

Chapter 3 – Continuous disclosure

Disclosure of directors' interests

3.19A An entity must tell ASX the following.

...

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 +closed period where prior written clearance was required 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 SEATS. The entity has five business days after the date the SEATS 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.

Chapter 12 - On-going requirements

Trading Policy

12.9 An entity must have a +trading policy that complies with the requirements of ASX listing rule 12.12. An entity must give its +trading policy to the +company announcements office for release to the market.

- 12.10 An entity must give any amended +trading policy, where the amendments change the closed periods specified in the policy, to the +company announcements office for release to the market within 5 +business days of the amendments taking effect.
- 12.11 An entity must give its +trading policy to ASX immediately on request by ASX.

Content of Trading Policy

- 12.12 At a minimum, an entity’s +trading policy must include the following information:
 - 12.12.1 The entity’s +closed periods.
 - 12.12.2 The restrictions on trading that apply to the entity’s +key management personnel.
 - 12.12.3 Any trading which is not subject to the entity’s +trading policy.
 - 12.12.4 Any exceptional circumstances in which the entity’s +key management personnel may be permitted to trade during a +prohibited period with prior written clearance.
 - 12.12.5 The procedures for obtaining prior written clearance for trading under rule 12.12.4.

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	
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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.

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

Part 3 – Prohibited period

Were the interests in the securities or contracts detailed above traded during a closed period where prior written clearance was required?	
If so, was prior written clearance provided to allow the trade to proceed during this period?	
If prior written clearance was provided, on what date was this provided?	