

**In this edition we review the ASX's updated Guidance Note 27 on Trading Policies (and the scandal that precipitated it).**

## ASX'S NEW GUIDANCE NOTE ON TRADING POLICIES – WHAT IT MEANS FOR YOU

In the last week of January (Friday 30 January to be precise) ASX released an overhauled Guidance Note 27 on Trading Policies. According to ASX's media release, the updated guidance "*incorporates learnings from market developments since the last update in January 2012*".

For those who were overseas or otherwise engaged in November 2013, perhaps missing the trading scandal that erupted at that time, we elaborate later in this alert just what those "*market developments*" were... (partly because they make for good reading, but mostly because they are integral to understanding ASX's reasons for updating its Trading Policy Guidance Note).

For time-poor readers, here are our key take-away points.

### Key take-away points:

- (a) Significant changes have been made to ASX GN 27 and your Trading Policy will need to be updated to at least comply with the minimum requirements of the updated Guidance Note, if not substantially overhauled to meet best corporate governance practice.
- (b) Identifying the specific changes required to your Trading Policy is not necessarily an easy task, as substantive changes have been incorporated into re-ordered paragraphs, making them hard to identify. Our alert gives you an idea of the types of changes made and what they relate to.
- (c) If you do not update your policy, we consider ASX may start using its power under Listing Rule 12.11 to require you to provide a copy of your Trading Policy to ASX upon request. If ASX has concerns that the version of your Trading Policy is materially out of date, it will call on this power to require disclosure. With such significant changes having been made to GN 27, it seems likely that ASX will call on this power if your Trading Policy is not updated promptly to address the changes.

### ASX Guidance Note 27 – what you need to know

First, the minimum content requirements for a Trading Policy (specified in the Listing Rules<sup>1</sup>) are the same. What's changed is ASX's guidance on how to comply with the minimum content requirements for a trading policy, and the "other issues" ASX would *like* you to include, over and above those minimum requirements. In amongst this, ASX has introduced further explanatory commentary on various matters, which may help you in refining your current Trading Policy.

The layout has also changed, causing some commentary to simply have moved place and be differently worded, as opposed to substantively changed (although sometimes it is difficult to tell whether ASX has simply changed its language to make things clearer, or has changed its language to convey a subtly different emphasis or requirement).

All of this, whilst resulting in a user-friendly end-product, makes identifying necessary or desirable changes to an existing trading policy a somewhat time-consuming exercise.

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<sup>1</sup> Listing Rules 12.9 and 12.12

## What do you need to do?

If your Trading Policy was designed to:

- (a) reflect ASX's original policy; and / or
- (b) meet best corporate governance practice,

and you want to maintain that position, then you will need to overhaul your current policy to reflect the new Guidance Note.

If your sights are set a little lower, and you are aiming for minimum compliance only, you will still need to make some changes to your policy, but perhaps not as many. However, identifying which ones to make is not necessarily a straight forward task, and by the time you have poured through the guidance note deciding which ones to adopt and which to politely ignore, you might as well have adopted the changes holus-bolus.

You may also want to amend your employment contracts if they don't already contain the matters now recommended by ASX in their Guidance Note<sup>2</sup>.

## What are the changes to the Guidance Note?

There are too many changes to outline in this alert. However, here are a few examples to give a flavour of what to expect.

- (a) **Purpose** – if your Trading Policy provides a background to, or purpose for, the policy, then (to use one of ASX's favourite phrases in the policy) 'you may wish to' update it to reflect ASX's greater emphasis on perception, as well as actual prevention, of insider trading. In ASX's words "*The purpose of such a policy is not only to minimise the risk of insider trading but also to avoid the appearance of insider trading and the significant reputational damage that may cause.*"
- (b) **Who should be restricted from trading?** If your policy extends to employees beyond KMPs, there is now more guidance on how to determine which employees your policy should cover and in what circumstances (and gentle encouragement to extend your policy to cover such employees if the Trading Policy doesn't currently do so).
- (c) **Fixed closed periods** - There is greater encouragement to extend closed periods beyond just the release of full and half year results, to other periodically released financial information (which would have captured, for example, David Jones' quarterly sales results). Whereas the previous Guidance Note gently encouraged the issuers of quarterly reports and cash-flow statements to extend their closed periods to include these reports, the new Guidance Note has a longer list of periodic financial information that should trigger a closed period, and effectively states that those other periodic statements should trigger closed periods.
- (d) **Warnings** –The ASX recommends that you include a warning that a person who possesses inside information about your securities is generally prohibited from trading in those securities under insider trading laws, and that this applies even where: (a) the trade occurs within a permitted trading window, or outside a black-out period; (b) the trade falls within an exclusion specified in the policy; or (c) where the person has been given clearance under the policy. (If you read our David Jones trading scandal summary below, some of these circumstances may sound familiar...)

There are also significant changes to:

- the types of trading that should be restricted (there is now significant discussion of and guidance for derivatives, short-term trading, short-selling, hedging transactions, margin lending and trading in other entities' securities);
- procedures to clear trading in exceptional circumstances (including why you need them, who should give it (which, interestingly, no longer includes the Board), what factors to take into account, how long it should last and other matters to include);
- other matters that could be addressed in a Trading Policy (whilst not everything is new, some matters are); and
- compliance matters (including greater guidance on how to increase awareness and undertake training, how to monitor compliance and how to enforce compliance).

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<sup>2</sup> GN 27 instructs you on how to require compliance with your policy from your KMPs and their "closely connected persons and entities"<sup>2</sup> (if your policy extends to these persons), by (for example) having appropriate clauses in your employment contracts.

## The trading scandal - David Jones

On 29 October 2013, David Jones directors Leigh Clapham and Steve Vamos bought shares in David Jones. This was one day after Myer had approached the David Jones board with a merger of equals takeover offer that had not been disclosed to the ASX, and three days before David Jones released positive quarterly sales results. Following the release of those sales results, David Jones' share price surged 7%.

The trades occurred during David Jones' "window period" under its trading policy, and (in accordance with that policy) the directors advised the then Chairman, Peter Mason, of their proposed share purchases. In other words, the trades were conducted in accordance with David Jones' then trading policy.

Despite this, when news broke of the trades, there was an overwhelming perception of impropriety on the part of the 'insiders', triggering an ASIC investigation and ultimately the resignation of Clapham, Vamos and Mason.

One would imagine that, somewhat nervously, ASIC announced a few months later (in February 2014) its decision not to prosecute Clapham and Vamos for insider trading. Media, government and market participants could not understand just how trades that appeared to them to be 'insider trading' were allowed to go unreprimed. ASIC explained it could not establish that Clapham and Vamos "*knew or ought to have known the information was material and not publicly available.*" Further, (based on independent and in-house market experts) it had insufficient evidence to establish that the information was 'material'. (As additional background, it appears the intentions of Clapham and Vamos were honourable – to be seen by shareholders to be supporting the company during difficult times.)

Such was the media attention and public furore over the trades that ASIC took the unusual step of conveying its decision via YouTube. The video delivery was not enough to dilute the shock and outrage over ASIC's decision not to prosecute. This sparked a request to ASIC by then Assistant Treasurer to hold, and report<sup>3</sup> on the outcome of, a 'roundtable' to consider, amongst other things, current market practice regarding director share trading in Australia and related aspects of market integrity. ASX was part of that roundtable discussion.

Whilst not amounting to insider trading, the David Jones trades had considerable impact on the integrity of the market generally. This left the regulators with a difficult quandary – how to maintain the high standards and integrity of Australia's financial markets against conduct which is not, technically, in breach of the law.

It is in this context that ASX has updated its Trading Policy Guidance Note, seeking to use this avenue to discourage conduct that creates a *perception* of impropriety (with its consequential impact on market integrity) as well as actual wrongdoing. Understanding the David Jones scandal and the subsequent regulatory fall-out gives context and an appreciation of many of the changes to GN 27.

### Contact



Lisa Merryweather  
Principal  
Corporate  
+61 2 8075 1706  
[lmerryweather@allionlegal.com](mailto:lmerryweather@allionlegal.com)



Philip Lucas  
Principal  
Corporate  
+61 8 9216 7171  
[plucas@allionlegal.com](mailto:plucas@allionlegal.com)



Jon Cane  
Principal  
Corporate  
+61 2 8075 1720  
[jcane@allionlegal.com](mailto:jcane@allionlegal.com)



Hayley Lawrence  
Special Counsel  
Resources  
+61 8 9216 7128  
[hlawrence@allionlegal.com](mailto:hlawrence@allionlegal.com)

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<sup>3</sup> The report was forwarded to then Assistant Treasurer in May 2014 and, at present, the contents of the report are not public  
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