



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 193

Notification of directors' interests in securities—listed companies

June 2008

About this guide

This guide provides information for directors of Australian listed public companies about their obligations under s205G of the *Corporations Act 2001* (Cth) (Corporations Act).

It explains when they must notify the market operator about their interests in securities and how ASIC approaches breaches of these requirements.

About ASIC regulatory documents

In administering legislation, ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This version was issued on 27 June 2008 and is based on legislation and regulations as at 27 June 2008.

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Section 205G obligation

- RG 193.1 Under s205G(1) of the Corporations Act, every director of an Australian listed public company must notify the relevant market operator (i.e. the operator of the market on which the company is listed) of:
- (a) the director's relevant interests in securities of the company or a related body corporate; and
 - (b) contracts:
 - (i) to which the director is a party or under which the director is entitled to a benefit; and
 - (ii) that confer a right to call for or deliver shares in, debentures of, or interests in a managed investment scheme made available by, the company or a related body corporate.
- RG 193.2 ASIC regards s205G as an important part of the regulatory regime, which, together with the prohibitions on insider trading and market manipulation, helps to maintain an informed and orderly market. All market participants, shareholders and other investors are entitled to know the shareholdings, and changes to those shareholdings, of directors and their associates.
- RG 193.3 Directors of companies have access to significantly more detailed information about companies than shareholders do. Accordingly, shareholders are influenced by the actions taken by directors in relation to the acquisition or disposal of shares by them. Shareholders are entitled to know, in a timely manner, whether directors are buying or selling shares in the company. Similarly, shareholders are entitled to be informed of, and companies are obliged by law to disclose, information that may impact on the share price.
- RG 193.4 Particularly at times of share price volatility, price-sensitive announcements or takeover activity, the requirement for directors to lodge notices of changes in shareholdings in a timely way is an important measure to ensure the market remains properly informed.

Note: Treasury has indicated that the Government is considering implementing changes to s205G: see *Insider Trading—Position and Consultation Paper* (March 2007) at www.treasury.gov.au. Potential changes include reducing the notification requirement from 14 days to 2 days; extending the obligation to all listed entities, not just listed public companies; extending the obligation to senior executives as well as directors; extending the obligation to cover a one-month period after the resignation of a director. At the release date of this document, the timing for implementation of these proposed changes was not known.

Enforcement action against s205G breaches

- RG 193.5 A breach of s205G is a strict liability criminal offence. Where a breach occurs, ASIC may take criminal action against the director. Cases would proceed in the summary jurisdiction of the state's local or magistrates courts, as applicable.
- RG 193.6 If we are considering taking criminal action, we will first give the director an opportunity to explain the circumstances of the breach.

Relationship with ASX Listing Rule 3.19A

- RG 193.7 ASX Listing Rule 3.19A is a separate but complementary requirement to s205G. The listing rule requires disclosure by the company of certain interests in securities held by directors, together with some additional information, within 5 business days of the relevant change occurring (see RG 193.17).
- RG 193.8 If the listed company has provided the relevant information to the ASX under LR 3.19A, notice need not be given by the director under s205G. ASIC Class Order CO 01/1519 sets out the conditions that must be met if this exception is to apply (see RG 193.20–RG 193.21).

B Section 205G obligation

Key points

Section 205G requires every director of an Australian listed public company to notify the relevant market operator of certain interests.

The following section gives guidance about:

- who is responsible for complying with s205G (see RG 193.9);
- what interests need notification (see RG 193.10–RG 193.15);
- when the director needs to notify (see RG 193.16–RG 193.17);
- what information should be in the notice (see RG 193.18–RG 193.19); and
- when a notice is not required (see RG 193.22).

Who is responsible for complying with s205G?

- RG 193.9 Every director of an Australian listed public company is personally responsible for complying with s205G. This is the case even if the company secretary is the person given the task of organising and preparing the lodgment of the forms by the company.

What interests need notification?

- RG 193.10 Under s205G(1) of the Corporations Act, every director of an Australian listed public company must notify the relevant market operator of:
- (a) the director's relevant interests in securities of the company or a related body corporate; and
 - (b) contracts:
 - (i) to which the director is a party or under which the director is entitled to a benefit; and
 - (ii) that confer a right to call for or deliver shares in, debentures of, or interests in a managed investment scheme made available by, the company or a related body corporate.

Note: The relevant market operator is the operator of the market on which the company is listed (e.g. if the company is listed on ASX, the notification should be given to ASX).

Relevant interests

- RG 193.11 A director has a relevant interest in a security if they are the holder of the security or have the power to control the voting or the disposal of the

security. This means that a director may have a relevant interest in securities that the director does not own (e.g. if the securities are owned by a family trust or a spouse or child and the director can determine how the securities are to be voted or when they are to be sold).

- RG 193.12 The definition of 'security' includes the director's interests in shares or debentures in the company or a related body corporate or interests in managed investment schemes made available by the company or a related body corporate.
- RG 193.13 The issue of options by a listed company needs to be disclosed under the ASX Listing Rules. The rules require the company to notify ASX when any securities are issued (currently, under Appendix 3B of the ASX Listing Rules), together with specific disclosure obligations in the annual financial report. When any option is exercised, a director would be required to give a notice under s205G(4) for the security into which the option had been exercised.
- RG 193.14 A contract does not need to be in writing to fall within s205G(1)(b). An option may be a contract under which a director has the right to call for shares under s205G(1)(b).
- RG 193.15 Section 205G(1)(b) extends to contracts where the director is not the actual acquirer or disposer of shares. For example, it includes the situation when a director is entitled to be paid a commission when another person subscribes for shares in the company.

When does the director need to notify?

- RG 193.16 Under s205G, the notification must be made within 14 days of:
- (a) the company listing;
 - (b) the person becoming a director; and
 - (c) any change to the director's interests.
- RG 193.17 Generally the change to a director's relevant interest occurs at the time they:
- (a) enter into an agreement to purchase the securities (i.e. in the case of a trade on market, the day of the trade) and also when they
 - (b) dispose of securities, that is when they cease to hold the securities (settlement of a market trade).

What information should be in the notice?

- RG 193.18 Section 205G(2) specifies that a notice of relevant interests under s205G(1)(a) must set out the number of securities and the circumstances giving rise to the relevant interest. A notice of a contractual right under s205G(1)(b) requires more description.
- RG 193.19 Although there is no prescribed format under the Corporations Act, the ASX has produced the following forms:
- (a) 'Initial Director's Interest Notice' (see Appendix 3X of the ASX Listing Rules); and
 - (b) 'Change of Director's Interest Notice' (see Appendix 3Y of the ASX Listing Rules).

Relationship with ASX Listing Rule 3.19A

- RG 193.20 ASX Listing Rule 3.19A imposes a complementary obligation on a listed entity to notify ASX of a director's interests within 5 business days of:
- (a) an entity's listing;
 - (b) the appointment of the director; and
 - (c) any change to the director's interests.
- RG 193.21 Relief from the requirement for a director to provide information under s205G is available under CO 01/1519 *Disclosure of directors' interests* if the relevant ASX forms are correctly completed and the following conditions are met:
- (a) a hard copy of the form is retained by the company or director for a period of not less than 7 years from the date it is given to the ASX; and
 - (b) electronically lodged forms are provided through the ASX's electronic lodgment facility in compliance with its technical and security features as set out in ASX Guidance Note 20 – 'ASX Online' issued on 5 May 2008.

When is a notice not required?

- RG 193.22 Table 1 sets out the situations where a director does not have to give a notice under s205G.

Table 1: When a notice need not be given under s205G

| | |
|--|--|
| Information has already been provided by the company | If the listed company has provided the information to the ASX (e.g. see RG 193.20–RG 193.21 for filings under LR 3.19A). |
| Information has already been provided by the director | If the director has already provided the relevant information to the market operator (see s205G(5)). An example is a substantial holding notice. |
| Listed entity is not a public company or is a foreign company | Notice is not required under s205G when the listed entity is not a listed public company (although the listing rules will continue to apply to the listed entity), or it is a foreign company. |
| ASIC makes an order relieving director of obligation | <p>Other than granting the class order referred to above, ASIC has rarely made these orders. ASIC will make these orders if the disclosure would not assist in achieving the objectives of increasing transparency of directors' transactions or providing an indication of the director's confidence in the company. An example is the disclosure of transactions in a cash management trust (used like a daily bank account), operated by a related body corporate of the company.</p> <p>ASIC will not grant these orders on the basis that the director only has an interest in a small parcel of securities. Unlike the substantial holding requirement, directors must notify the market operator about any of their holdings and any changes to those holdings whatever their size.</p> |

C Enforcement action against s205G breaches

Key points

The following section details the penalties for breaching s205G and action ASIC may take following a breach.

What is the penalty for a breach of s205G?

- RG 193.23 A breach of s205G is a strict liability criminal offence. The maximum penalty is:
- a fine of 10 penalty units (at the date of publication of this guide, \$1,100);
 - 3 months imprisonment; or
 - both.

Note: See s1311 and Schedule 3 of the Corporations Act and s4AA of the *Crimes Act 1914* (Cth).

How are breaches identified?

- RG 193.24 Breaches of s205G are sometimes identified after a relevant notice is lodged with ASX (e.g. the 'Change of Director's Interests Notice' that records the late lodgment, see RG 193.19). This notice identifies the date of the disposal or acquisition of securities. If the notice is lodged later than 14 days after the date of disposal or acquisition of the securities, and disclosure of the change has not been made to ASX in other documentation, then a breach of s205G has occurred.
- RG 193.25 Similarly, a breach may be identified where a company has recently listed, or a new director has been appointed, but an 'Initial Director's Interest Notice' (see RG 193.19) has not been lodged within 14 days of the relevant event. If disclosure has not been made to the ASX in other documentation, then a breach of s205G has occurred.
- RG 193.26 Breaches may also be brought to ASIC's attention by complaints from members of the public.

What action may ASIC take?

- RG 193.27 Whenever there is a breach of s205G, ASIC may take criminal action against the director.

Request for explanation

- RG 193.28 When ASIC has identified a breach of s205G and is considering prosecution, the director is generally sent a letter asking for reasons for the breach. This gives the director an opportunity to explain the circumstances.
- RG 193.29 This explanation will not necessarily avoid prosecution action being taken. However, the information provided will be taken into account when we are deciding whether to prosecute.

What are the relevant factors in ASIC's decision?

- RG 193.30 ASIC will consider the following factors in assessing whether or not it is in the public interest to take criminal action against a director:
- (a) the amount, if any, of trading in the company's shares while the notice was, or has remained, outstanding and the price at which shares were traded;
 - (b) whether at or shortly after the time that the notice should have been lodged, there was a market announcement that did or was likely to, affect the price of the company's securities;
 - (c) the length of delay in lodging the notice;
 - (d) whether there have been any other instances of late lodgment of a notice by the director and whether a warning letter has previously been issued to the director for a breach of s205G;
 - (e) reasons that have been provided for failing to lodge the notice at the requisite time; and
 - (f) whether the change in a directors' interest arose from a rights offer or other issue that was available to all shareholders in that capacity.

How will ASIC publicise criminal action?

- RG 193.31 Where ASIC does take criminal action, our policy on media announcements will apply: see Regulatory Guide 47 *Public comment* (RG 47). We will generally issue a media release when charges have been laid and following the outcome of the prosecution (i.e. on a conviction or acquittal).

Key terms

| Term | Meaning in this document |
|--------------------------|--|
| ASX | Australian Securities Exchange |
| CO 01/1519 (for example) | An ASIC class order (in this example numbered 01/1519) |
| Corporations Act | The <i>Corporations Act 2001</i> (Cth) including regulations made for the purposes of the Act |
| interests | <p>May be:</p> <ul style="list-style-type: none"> • relevant interests in securities of the company or a related body corporate; or • contracts: <ul style="list-style-type: none"> – to which the director is a party or under which the director is entitled to a benefit; and – that confer a right to call for or deliver shares in, debentures of, or interests in a managed investment scheme made available by, the company or a related body corporate. |
| LR 3.19A (for example) | An ASX listing rule (in this example numbered 3.19A) |
| strict liability | There are no fault elements for any of the physical elements of the offence |
| s205G (for example) | A section of the Corporations Act (in this example numbered 205G) |

Related information

Headnotes

Relevant interests, directors, listed companies, securities, disclosure, enforcement, breach, s205G

Class orders and pro formas

Class Order CO 01/1519 *Disclosure of directors' interests*

Regulatory guides

Regulatory Guide 47 *Public comment* (RG 47)

Legislation

Corporations Act 2001 (Cth) s205G