

6 October 2014

NZX Limited
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Wellington
By email: consultation@nzx.com

Attention: Megan Mcluskie

NZX draft *Guidance Note - Continuous Disclosure* (August 2014)

Thank you for the opportunity to provide comment on the draft *Guidance Note - Continuous Disclosure*. By way of general comment, the IoD considers the draft guidance is clear, well written and codifies a number of the current operational practices of the NZX as we understand them. The draft Guidance Note appears to have been written with the intention to provide clarity for end users such as directors.

There are a number of matters we provide specific comments on in our submission and welcome the opportunity to discuss these with you.

About the Institute of Directors

The Institute of Directors in New Zealand (IoD) is a non-partisan voluntary membership organisation committed to raising governance standards in New Zealand. We aim to help businesses understand governance and concurrently assist skilled and experienced directors with vision and independence of thought to work with management to achieve better business performance.

We represent a diverse membership of over 6,600 members drawn from NZX-listed corporations, unlisted companies, private, closely held companies, small to medium enterprises, public sector organisations, not-for-profits and charities. In preparing this submission the IoD has consulted its Forum for Governance Excellence group of senior directors.

Commentary on the draft guidance

We have a number of specific comments on the draft guidance.

Definition of 'immediately'

The NZX proposes that immediately means 'promptly and without delay' or 'as soon as practicable.' We prefer the interpretation of 'as soon as practicable' but note that the two terms are, in fact, quite different interpretations of 'immediately.'

We consider this term could still be improved for end users. Regardless of the nature of the information, company directors require adequate time to ascertain whether the information before them is price

sensitive and requires disclosure. We recommend that NZX should keep the use and interpretation of the 'immediately' definition under review as it is applied.

Material information

Clarifying the meaning of conservative approach (3.1)

In the definition of material information the NZX states that it encourages issuers to *'take a conservative approach when determining whether information is 'material information''*.

The notion of a 'conservative approach' is difficult to interpret and requires clarification.

Reasonable person and definition of intrinsic value (3.1)

In the definition of a *'reasonable person'* the NZX states that this is *'...a person who commonly invests in securities based on a view of the intrinsic value of a security.'*

It is difficult to determine the category of investors who 'commonly invest in securities' which (for example) may be retail investors, hedge funds or institutional investors. We think NZX may want to offer clearer guidance by referencing the intrinsic value of a security but it is impractical for directors to use when applying the standard.

Regardless, the intrinsic value definition differs from the standard in the Rule itself, is difficult to interpret and requires clarification.

Determining material effect (3.1)

The guidance states that NZX will generally treat price movements of 10% or more being evidence of a material effect. IoD considers this should be reworded to reflect that the guide is for directors to apply when considering what is material.

We suggest that as this is a guidance note directors could be recommended to usefully keep in mind that *'a share price movement of more than 10% is highly likely to be material'* (or similar). Currently, the guidance could be read to be a requirement or rule which the courts might also apply.

It is unclear what this proposed guidance is based on and it would be helpful to provide some further quantitative guidelines as to how materiality is to be determined and possibly align the guidance with accounting standards.

Expanding general guidance in clause 3.3

With respect to proposed clause 3.3 it would be helpful for the NZX to advise that *"In general we expect the market to not regard as material, the mere prospect that an event may occur. Information about a prospective event is only material if there is a legitimate likelihood of its occurrence."*

Every company is subject to contingencies that are unrealistic or unlikely to occur and there would not be an expectation they would announce them. The market and issuers should be expected by NZX to weigh up the probabilities and use business judgment notwithstanding imperfect information.

Disclosure and materiality (3.3)

Sometimes the act of disclosure in the particular circumstances determines the market relevance of the information or the matter. If information is disclosed, but the issuer is unsure of the information's materiality, a disclaimer can be included within the body of the disclosure to that end.

It would be helpful for NZX to be explicit about the **circumstances** in which particular information is material – giving a real flavour for the reality of the disclosures and impacts.

Keeping the market informed (3.4)

We note that in proposed clause 3.4 NZX states it is important that issuers '*...keep the market fully informed of any matters that **may be** material to their progress in achieving them.*' This is not the test required by the Rule.

Formal sign off of reports (3.4)

Proposed clause 3.4 also states NZX expects that announcements will be released "*...to the market on the scheduled reporting date (regardless of when the board may have formally signed off such reports).*"

We consider there may be some drafting changes needed here to clarify meaning as it is difficult to interpret.

Clause 4: Becoming aware of information

Particular information: Use of 'usually not'

Proposed clause 4 states that information will "*...**usually not** be material if it only relates to securities or issuers generally.*"

We consider there may be some drafting clarification needed here.

Clause 6: Compliance procedures and clarifying 'ensuring...'

With respect to draft clause 6 we have a view that some drafting clarification may be required as the guidance to 'ensure' certain things under the Rule reads in a directive way which reads as though an issuer might be expected to guarantee the information.

The guidance itself is helpful, but may need to be re-cast in a less directive way e.g. 'designed to ensure.'

Clause 7: Disclosure

We consider it may be useful to include aspects of the ASX guidance on analyst briefings with reference to proposed clause 7 and disclosure.

Trading halts

The IoD notes that the nature of the proposed guidance appears to encourage the use of trading halts as a mechanism by which an entity can manage its continuous disclosure obligations. In our view a trading halt can be a useful measure for companies, particularly in circumstances where information is assessed and not well understood and an announcement is being prepared or when disclosure itself is imminent.

We have three specific comments on the trading halts guidance.

1. Risk of hindsight bias a concern

The test for continuous disclosure compliance is whether information is “material”, and is therefore required to be disclosed immediately. What is “material information” is governed by a reasonable person test. The reasonable person test is a useful guide but IoD is concerned that there is a risk NZX will put itself in the position of a listed entity at the time when deciding whether a company acted immediately and a regulator could fall prey to hindsight bias. We strongly encourage the regulator to be vigilant about hindsight bias.

2. Market perception of negativity

In summary, we accept that the trading halt mechanism may be more widely used but there is a market perception, including media, that trading halts are a negative and companies prefer not to use them unless absolutely necessary. There may be an argument that the gravity of a trading halt should be retained for this reason.

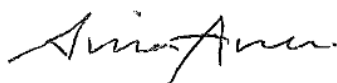
We suggest the NZX might make specific commentary that a trading halt should not be viewed negatively.

3. Announcements for dual listed entities

We note that dual listed entities face a challenge, particularly when dealing with the NZX and ASX. Whether the market is open and trading is also a relevant consideration in determining how promptly information has to be released. In addition, the decision to make an announcement means going through the process in both exchanges. The IoD encourages the NZX to work towards streamlining this procedure and to work closely with ASX to reduce complexity for dual listed entities when making announcements.

The IoD thanks the NZX for the opportunity to make a submission on behalf of its members.

Yours sincerely



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