



5 October 2014

NZX
NZX Centre
Cable Street
Wellington

Submission on proposed changes to NZX guidance notes

Introduction

Thank you for the opportunity to submit on NZX's review of its current guidance notes. Z is committed to best practice market and investor communications and we welcome the opportunity to assist with the development of the NZX's guidance on key components of the Listing Rules.

Z has had listed debt on the NZX Debt Market since September 2010 and our shares have been quoted on both the NZX Main Board and ASX since August 2013. Z is included in the NZX20 index.

Being straight up and sharing everything are two of Z's organisational values that underpin what we do and how we go about it. We want to communicate with our shareholders and the market in a manner that is clear, transparent, consistent and recognises our accountability to our owners.

We also believe that collaboration and strong lines of communication between capital market participants is important to ensuring that markets remain efficient and flexible. We believe that investors, issuers, advisers, regulators and other stakeholders all have a role in this review.

Please do not hesitate to get in touch with us if you would like to discuss anything in this submission or otherwise. We look forward to seeing the results of this review.

Jonathan Hill
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Z Energy Limited

General comments on the consultation materials

Overview

We think the revised guidance is a positive evolution in the existing NZX guidance. Invariably such a consultation will traverse complex issues and we think there is opportunity for certain aspects of the proposals to be considered further and possibly refined. In the table below, we address the following issues at a high level:

Part I - Continuous Disclosure Guidance Note

1. Encouraging issuers to take a conservative approach to what constitutes "material information" and a "material effect".
2. NZX's view of the reasonable person for the purposes of the material information test.
3. NZX's view of what constitutes a material effect on the price of securities.
4. Materiality thresholds for equity and debt securities.
5. NZX's general guidance on material information.
6. Examples of material information.
7. Changes in an issuer's financial projections, forecasts or expectations.
8. Release of periodic financial reports on scheduled reporting dates.
9. Executive officers of an issuer.
10. Meaning of "immediately".
11. Release of information outside of NZX hours.
12. Particular information.
13. Compliance procedures – systems and processes.
14. Managing disclosure obligations via scheduling of board meetings / the execution of legal agreements.
15. Managing disclosure obligations by obtaining embargoed copies of information.
16. Where a reasonable person would expect information to be disclosed.
17. Incomplete negotiations and the public censure of Rakon Limited.
18. Disclosure to NZX first.
19. Correction of false or misleading announcements.
20. Price enquiries.

Part II - Trading Halts and Suspensions Guidance Note

21. Issuer views on price sensitivity.
22. Release of reasons for trading halt requests.
23. Alignment of trading halts for dual listed companies.

General comments

We also make the following general comments:

FMA engagement

- Given the FMA's role in overseeing market infrastructure and securities markets activity, it would be helpful to understand what input FMA has had to date on these consultation materials and any future engagement NZX intends to have with FMA in this area.
- We note that this has been an area of recent focus for the FMA:
 - in its 2013 and 2014 General Obligations Reviews of the NZX, the FMA encouraged the NZX to complete a review of guidance notes; and
 - in its 2014 General Obligations Review, the FMA noted that the NZX had consulted with the FMA on the review of its continuous disclosure and trading halts guidance notes, and welcomed the opportunity to comment.

ASX guidance notes

- The FMA also notes in its 2014 General Obligations Review of the NZX that the NZX took into account recently updated guidance from ASX and consulted dual-listed issuers when reviewing its continuous disclosure guidance note.
- We would like it if, where possible, the NZX will seek to avoid inconsistency with the ASX's listing rules and guidance (and vice versa). However, we acknowledge that there will always be interpretation difficulties where two different sets of rules and accompanying guidance are operating side-by-side. To minimise such difficulties, we think it could be helpful for the NZX to be clear where it perceives that there are areas of similarity or divergence between ASX's rules and guidance and its own.

NZX's specific questions

We have addressed the NZX's specific questions in the following schedule.

Discussion

	ISSUE	DETAIL	Z COMMENT
A	PART I - CONTINUOUS DISCLOSURE GUIDANCE NOTE – CONSULTATION DRAFT		
1.	Encouraging issuers to take a conservative approach to what constitutes "material information" and a "material effect"	NZXR encourages issuers to take a conservative approach when determining whether information is "material information" and whether information will have a "material effect".	<p>We believe the guidance set out in the rest of the consultation draft, where properly followed, will cause issuers to adopt sufficiently conservative practices without the need for an overarching culture of conservatism.</p> <p>We are concerned that this addition to the "material information" and "material effect" tests could lead to unintended consequences, such as over-disclosure by issuers. NZX notes (at section 6.1 of the consultation draft) that it is important that the key items of announcements are given the proper emphasis and not buried in the details. This principle also applies more generally i.e. that issuers should avoid over disclosing because there is a risk that this will have the effect of burying the key announcements.</p> <p>We do agree, however, that, in practice, issuers with good continuous disclosure records tend to take a conservative approach to these questions. So we suggest a rephrasing this guidance along the following lines: "NZXR notes that, in practice, issuers with good continuous disclosure records tend to take a conservative approach to determining whether information is 'material information'".</p>
2.	NZX's view of the reasonable person for the purposes of the material information test	In NZXR's view, a "reasonable person" is a person who commonly invests in securities based on a view of the intrinsic value of a security.	<p>We don't believe it is useful to introduce a new characterisation of the "reasonable person" in the investment context on top of those that already exist (for example, the "prudent but non-expert investor" in the Securities Act context).</p> <p>We make the same comment about the "intrinsic value" component of this guidance. The ASX rules refer to "inherent value" and provide guidance on what this means. We suggest the ASX approach is adopted here.</p>
3.	NZX's view of what constitutes a material effect on the price of securities	NZXR will generally treat a price movement of 10% or more as evidence that information has had a material effect and a price movement of 5% as evidence that information has not had a material effect on price.	<p>We think this guidance is helpful.</p> <p>We agree it is important that issuers clearly understand that these thresholds do not alter or replace the definition of "material information" contained in the rules or its application to any particular set of facts.</p> <p>We feel that there is further scope to clarify that these thresholds are "rules of thumb" only. We suggest that some further examples of where the thresholds might not be useful evidence may help to achieve this. For example, we think it would be useful for NZX to note that movements</p>

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			<p>above or below the thresholds may reflect movements in the market generally, within particular indices or general movements within a particular sector, such as energy, for example.</p> <p>We also suggest that the NZX provides some “rules of thumb” on the time periods over which the price movements may evidence materiality. As we allude to above, companies may see a 5% – 10% movement over the course of a week which is a result of other factors in the market generally. We would normally expect that the price movement as a result of material information would be immediate.</p>
4.	Materiality thresholds for equity and debt securities	Information that is considered material in relation to equity securities may not always be considered material in relation to debt securities, and vice versa.	We agree that, in theory, there may be circumstances where there is information that is material in relation to an issuer’s debt securities but not in relation to its equity securities. However, it may be helpful to clarify that, generally, this will not be the case.
5.	NZX’s general guidance on material information	NZX provides guidance on continuous disclosure where information emerges gradually, is incomplete or anticipated.	<p>We suggest that the heading for section 3.3 should be tailored to the subject matter, for example “<i>Guidance on imperfect information and uncertain events</i>”.</p> <p>In relation to the third paragraph of this section, we think it would be useful for NZX to:</p> <ul style="list-style-type: none"> • modify the third paragraph as follows: “<i>There may also be situations where an issuer becomes aware that an a material event is going to occur but the event has not yet actually occurred. An issuer will be required to immediately disclose the event upon becoming aware that the event will occur instead of waiting until the event has occurred.</i>” • clarify that, where an issuer becomes aware that an event may be going to occur (but hasn’t yet), the principal question will always be whether a “reasonable person” would expect disclosure at that point, having regard to the nature of the event and the likelihood of the event occurring. <p>We also think that a cross reference to NZX’s discussion on trading halts would be useful in this section.</p>
6.	Examples of material information	NZX sets out some examples of the type of information that is likely to	We suggest cross referring to the detailed list of examples in Appendix 1 rather than including some, but not all, of the examples in the body of the guidance note. We believe

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		<p>be material information, and cross refers to a more detailed list of examples in Appendix 1.</p>	<p>this would be the clearest method of presenting these examples, and will prevent undue emphasis being given to the examples that are included up front.</p>
7.	<p>Changes in an issuer's financial projections, forecasts or expectations</p>	<p>It is important that all issuers regularly assess their financial performance against any announced financial projections, forecasts or expectations and keep the market fully informed of any matters that may be material to their progress in achieving them.</p>	<p>We think that the quotation from the <i>Energy Mad</i> decision is not helpful because it suggests that issuers must:</p> <ul style="list-style-type: none"> • assess their financial performance against any announced projections, forecasts or expectations "constantly" as opposed to "regularly" (which is the term used in the body of the guidance note); • disclose matters which may be (and accordingly, may not be) material. This seems to introduce a lower threshold for disclosure than suggested elsewhere in the guidance note. <p>We think that there is scope for NZX to clarify that:</p> <ul style="list-style-type: none"> • issuers are expected to disclose where the issuer believes that, based on one or more of its regular assessments, there is a material risk that the actual results of the issuer will material differ from an announced projection, forecast or expectation; and • keeping the market "fully informed" does not require an issuer to disclose events or results where it has no reason to believe that there is a material risk that the issuer will not meet that announced projection, forecast or expectation. <p>We also think it would be useful for NZX to consider giving guidance on how issuers might approach ups and downs in financial results where good grounds exist for the issuer to conclude that results will still ultimately be in line with guidance for the reporting period (for example, due to seasonal variations in sales).</p>
8.	<p>Release of periodic financial reports on scheduled reporting dates</p>	<p>NZXR would expect announcements of periodic financial reports to be released to the market on the scheduled reporting date (regardless of when the board may have formally signed off such reports) unless the report in question contains material information which must</p>	<p>Our understanding of NZX's guidance is that, unless a periodic financial report contains material information that must be immediately disclosed, announcements of periodic financial reports can be released in line with a scheduled reporting date that is, for example, the morning after an issuer's board approves a periodic financial report for release.</p> <p>If our understanding is correct, we suggest that, for the avoidance of doubt, NZX clarifies that it is not saying "if you have a scheduled reporting date, you must release on this date and may not, for example, reschedule the reporting date for a day later due to an unexpected logistical issue.</p>

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		be immediately disclosed.	<p>In our view ASX's guidance on this point (at 4.10 of its Guidance Note 8) is useful.</p> <p>Further, we suggest that the proviso to the expectation that announcement can be released on the scheduled reporting date should clarify that the NZXR would not expect financial results to be disclosed prior to the scheduled reporting date (due to materiality) if those results fall within previous guidance.</p>
9.	Executive officers of an issuer	A director or executive officer of an issuer who becomes aware of information, must consider, immediately, whether that information is "material information"	We note that NZX has removed its previous guidance that an issuer may wish to use, as a rule of thumb, the concept of officers contained in the Securities Market (Disclosure of Relevant Interests by Directors and Officers) Regulations 2003. We assume that this is because of the Financial Markets Conduct Act (FMCA) reforms and that NZX intends to amend the Listing Rules to move to the FMCA concept of "senior managers". If this is the case, interim guidance on this point would be helpful.
10.	Meaning of "immediately"	In NZXR's view, "immediately" means "promptly and without delay" or "as soon as practicable".	<p>In our view, and on a plain and ordinary interpretation, "promptly and without delay" and "as soon as practicable" are not really equivalent concepts to each other. We would like it if NZX would clarify that "immediately" means "as soon as practicable in the particular circumstances". Further, we think there is scope for clarification that "as soon as practicable" means neither "when the issuer manages to get around to it" nor "literally upon receipt of the information" but "without any more delay than an issuer which has implemented, and has correctly followed, appropriate compliance procedures."</p> <p>This concept should also be applied consistently throughout the guidance note (by using "immediately" rather than other terms to describe NZX's interpretation of "immediately"). For example, in the following: "<i>Where a decision or recommendation is incomplete until it is signed off or approved by an issuer's board, the issuer should prepare an announcement in advance, so that it can be released as soon as practicable <u>immediately</u> after board sign-off</i>".</p>
11.	Release of information outside of NZX hours	The fact that a public announcement is made outside of NZX's operating hours in these circumstances would not be a concern to NZXR provided that the announcement is	<p>We think it is still unclear whether NZX requires out of hours announcements to be provided to NZX:</p> <ul style="list-style-type: none"> • prior to the next market open (i.e. not necessarily at the same time as when it is released publicly, or as reasonably practicable after this time); or • at the same time as it is released publicly, or as soon as reasonably practicable after this time.

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		<p>provided to NZX prior to the next market open.</p>	<p>We assume that NZX position is the latter option, which accords with that of ASX.</p> <p>We also think it would be useful for NZX to clearly state that, where an issuer releases an announcement after hours, the issuer will not receive an acknowledgement from NZX until the market next opens but that this does not preclude an issuer from releasing publicly.</p>
12.	Particular information	<p>Information will usually not be material if it only relates to securities or issuers generally.</p>	<p>We think that the “usually not” addition to this guidance and the removal of the previous example “<i>an agricultural company should not be required to announce general changes in the price of wheat</i>” should be further explained as these amendments conflict with the clear wording of the definition of Material Information in the Listing Rules:</p> <p>“<i>Material Information, in relation to an issuer, is information that ... relates to particular securities, or particular issuers, rather than to securities generally...</i>”. The amendments also conflict with similar wording in section 59 of the FMCA.</p> <p>We note ASX’s example of a gold producer and the price of gold at 4.1 of its Guidance Note 8, and wonder whether this is the type of situation NZX is providing for here.</p>
13.	Compliance procedures – systems and processes	<p>List of systems and processes NZX suggests issuers have in place to ensure they can release material information as soon as they become aware of it.</p>	<p>We think this list will be helpful for issuers, particularly newly-listed and small issuers.</p> <p>We suggest that the word “<i>ensuring</i>”, which is used on several occasions, be substituted for a less absolute formulation, such as “<i>putting processes in place to enable</i>”.</p>
14.	Managing disclosure obligations via scheduling of board meetings / the execution of legal agreements	<p>Issuers can also take other steps to manage continuous disclosure obligations by scheduling of board meetings or the execution of legal agreements.</p>	<p>It would be useful for NZX to provide guidance on whether it considers it appropriate for issuers to time the signing of legal agreements solely to manage continuous disclosure timing. We refer NZX to ASX’s unequivocal guidance on this point at 5.4 of its Guidance Note 8.</p> <p>We also suggest that NZX includes a cross reference here to its discussion of the <i>Rakon</i> decision (i.e. information may need to be disclosed before an agreement is signed). We understand the <i>Rakon</i> decision to be stating that issuers should disclose the entry into legal agreements once they are substantively agreed, rather than waiting for formal execution.</p>
15.	Managing disclosure obligations by obtaining embargoed copies of information	<p>If an issuer needs to respond to information to be released by a third party, it may be possible to obtain an embargoed</p>	<p>We think it would be helpful for NZX to make it clear that simply labelling information as “embargoed” does not relieve an issuer of the obligation to consider whether it falls within a continuous disclosure safe harbour – perhaps by reference to NZX’s discussion of the safe harbours.</p>

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		<p>copy of the information in advance of release so that the issuer has an opportunity to consider and prepare a response for immediate release</p>	
16.	<p>Where a reasonable person would expect information to be disclosed</p>	<p>NZXR considers that this sub clause of the "safe harbour" provision has a narrow application in practice. It is likely that the question of whether a reasonable person would not require disclosure would follow the determination of whether the other sub clauses apply (ie whether the information remains confidential and falls within one of the specific exemptions outlined in sub-paragraph 10.1.1(a)(iii) of the rules).</p>	<p>We agree with this interpretation.</p> <p>We note that the ASX discussion on this point in its Guidance Note 8 is more comprehensive on this topic. We assume that NZX does not disagree with this discussion.</p>
17.	<p>Incomplete negotiations and the public censure of Rakon Limited</p>	<p>NZX notes that the NZ Markets Disciplinary Tribunal determined that "a proposal or negotiation can be complete for the purposes of Rule 10.1.1(a)(iii)(B) before it becomes legally binding" and that, generally, the appropriate point at which a proposal ceases to be an incomplete proposal or negotiation is "when both parties sign an agreement".</p>	<p>We suggest the this phrasing be modified as follows to illustrate that the first statement is non-typical: "<i>a proposal or negotiation can be complete for the purposes of Rule 10.1.1(a)(iii)(B) before it becomes legally binding</i>" and but <i>that, generally, the appropriate point at which a proposal ceases to be an incomplete proposal or negotiation is "when both parties sign an agreement"</i>.</p> <p>We also think it would be useful to include a bit more detail on the key point here: that a proposed agreement is incomplete until the parties have adopted it and will proceed – so timing of signing normally will be this point (because typically parties will be anxious to ensure they are not bound to an agreement before they sign it), but this is not necessarily the case.</p>
18.	<p>Disclosure to NZX first</p>	<p>Directors and officers of the issuer should only talk about information that has already been disclosed, or information that is not material.</p>	<p>We note Rob Everett's recent statements on this topic, in particular in respect of analyst briefings (see below). We query whether NZX wishes to provide further guidance on analyst briefings in light of these comments.</p> <p><i>"As a statement of principle, everyone needs to apply laser-like focus to the fact that disclosure to the market is critical to shareholders, and that it is also intended to</i></p>

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			<p><i>produce an informed and confident market.</i></p> <p><i>No prisoners can be taken in the drive to get standards as high as possible in this space.</i></p> <p><i>I'd like to acknowledge the willingness of NZX to tackle this subject head-on, knowing that it will be debated among directors, company management, and counsel.</i></p> <p><i>In particular, we do and will look at what is said to or given to analysts that is not made publicly available."</i></p> <p>– Rob Everett, CEO of FMA, 6 Sept 2014</p>
19.	Correction of false or misleading announcements	Rule 10.2.5 enables NZXR, in discussion with the issuer, to require that additional information be disclosed to the market to correct an announcement that may be false or misleading.	<p>We suggest clarification on whether NZX will only exercise its discretion under this rule where it considers an announcement may be false or misleading.</p> <p>Further, we suggest clarity around the statement that if a company does not have any material information then it can announce that it is in compliance with its continuous disclosure obligations. Rule 10.1.1(C) only requires material information to be disclosed to correct a false market. On that basis, this statement could suggest that a company has an obligation to say something every time a rumor persists in the market irrespective of whether the company is in possession of material information. In some cases we have concerns that by making an announcement of this nature where a company holds no material information, it will lend weight to the rumor. This could occur as the market may view the statement an acknowledgement that something may be happening which could be subject to confidentiality.</p>
20.	Price enquiries	Where NZX does make a price enquiry, this will be released to the market.	We suggest further guidance would be useful to indicate whether NZX will give an issuer advanced notice of a price enquiry release, and allow issuer input into the content of such releases.
B PART II - TRADING HALTS AND SUSPENSIONS GUIDANCE NOTE – CONSULTATION DRAFT			
21.	Issuer views on price sensitivity	NZX suggests that issuers may wish to express a view on the price sensitivity of any announcements it uploads.	<p>NZX notes that issuers may wish to include a note outlining their view on whether a particular announcement is price sensitive within the comments section of the Market Announcement Platform ("MAP") when uploading the relevant announcement.</p> <p>We agree that it is in the interests of all for genuinely price sensitive announcements to be consistently marked with a 'P'. However, we are concerned that a practice may develop whereby issuers will be expected to take the lead on such analysis and/or that more announcements will be</p>

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			<p>marked with a 'P' as a result of issuer conservatism.</p> <p>We suggest that an alternative approach would be to encourage issuers to ensure that all announcements contain a clear explanation of all relevant information, which will assist CMS in its analysis.</p>
22.	Release of reasons for trading halt requests	There appears to be a difference in the amount of information NZX typically releases compared to ASX's practice	<p>NZX notes that if the reasons for a trading halt request are confidential or commercially sensitive and should not be released to the market, this should be noted in the issuer's request to NZX and that, generally, it will not release specific details in relation to the reasons for a trading halt.</p> <p>We understand that ASX's standard practice is to attach an issuer's application for trading halt (including reasons) to its own market release announcing a trading halt.</p> <p>We think it would be helpful for there to be consistency between the practices of NZX and ASX in this area.</p>
23.	Alignment of trading halts for dual listed companies	There is presently no guidance on NZX's approach to trading halts for issuers which are dual listed.	<p>We think it would be useful for NZX to provide guidance on the topic of trading halts/suspensions for issuers with a dual listing. For example, we would expect that if NZX agrees to, or imposes, a trading halt on an issuer listed on ASX, ASX would follow suit (and vice versa) unless there was a good reason that this should not be the case.</p> <p>It would also be useful to know the processes NZX has in place for communicating with other exchanges in situations like this.</p>

Schedule: NZX's specific questions

Part I - Continuous Disclosure Guidance Note		
1.	NZX seeks comment on the proposed amendments to the continuous disclosure guidance note	Please refer to the table above.
2.	NZX seeks comment on whether there are any areas where additional guidance on continuous disclosure would be useful	Please refer to the table above.
3.	NZX invites comment on whether market participants are of the view that the requirement to disclose material information "immediately" is appropriate to ensure the timely provision of information to investors, or whether a review of the continuous disclosure rules is required	<p>We are aware of market commentary that the rules should be amended to permit (in appropriate circumstances) an issuer to call a board meeting to enable the issuer to make properly-considered decisions on materiality.</p> <p>While we accept that timely disclosure of material information should be obligatory, we submit that, regardless of an issuer's compliance procedures are, there must always be a class of disclosure decisions which require prior board consideration. We submit that this means that in certain cases it is proper that a timely board meeting be held before timely disclosure can be made (or not made, as the case may be). Arguably, the rules already cater for this as it is unlikely that some information can be "material information" unless and until the board has formed a view on it.</p> <p>Even so, we believe there is merit to the suggestion that NZX amends rule 10.1.1 to provide that, where an issuer reasonably believes that:</p> <ul style="list-style-type: none"> (a) a disclosure issue requires board consideration; and (b) a board meeting can be convened within (for example) 48 hours of the issuer becoming aware of the relevant information, <p>the issuer may hold a board meeting within that time period before making a final decision on disclosure.</p>
Part II - Trading Halts and Suspensions Guidance Note		
4.	NZX invites comment on the proposed amendments to the trading halts and suspensions guidance note	Please refer to the table above.
5.	NZX invites comment on the proposed amendments to the trading halts and suspensions guidance note and whether there are any areas where additional guidance would be useful	Please refer to the table above.
6.	In addition, NZX invites comment on whether the administrative trading halts applied upon release of	Z has no direct experience in this space and cannot comment.

<p>price sensitive information are useful or whether NZX should review this practice</p>	
<p>Part III - NZX's guidance notes</p>	
<p>7. NZX invites comment on its proposal to update or withdraw the guidance notes as set out in the consultation materials</p>	<p>Although we have not conducted a detailed analysis of each guidance note, NZX's proposals make sense to us at a high level.</p>
<p>8. In relation to the guidance notes that NZX intends to update, are there any particular areas where additional guidance would be useful?</p>	<p>We assume that NZX will release consultation drafts of the guidance notes it proposes to update in due course. We would welcome the opportunity to submit on these when available.</p>
<p>9. NZX also invites comment on whether the guidance notes that it intends to withdraw are still used or relied on</p>	<p>NZX notes that the guidance notes it proposes to withdraw are ones which no longer reflect current market practice or are no longer required.</p> <p>We agree that NZX should withdraw any guidance notes which are no longer required.</p> <p>For completeness, we assume that NZX is not withdrawing any guidance notes simply because they do not reflect current market practice, but rather, NZX is withdrawing some guidance notes because the market now has a clear understanding of the particular issue.</p>