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NZX Listing Rules: Bell Gully's comments on the latest proposed changes

Review nears completion

NZX's 2005 review of its Listing Rules is in its final stages – and changes could be made as early as April 2006.

In this update, we outline briefly the key proposed changes. If you would like a fuller analysis of the changes, Bell Gully has prepared a guide on the more substantive rule changes raised in the consultation process and the exposure draft.

This guide is available online at http://www.bellgully.com/resources/pdfs/NZX_Listing_Rules_March_2006.pdf or you can contact us for a printed version. This guide will be updated when the final rule changes have been announced.

Background

On 11 January 2006, NZX issued an Initial Exposure Draft (dated 30 December 2005) of NZSX/NZDX Listing Rule changes as a result of its September 2005 consultation process.

Submissions on this exposure draft closed on 14 February, and further changes are possible based on comments received from market participants and stakeholders

It is expected that NZX will submit the final rule changes to the Minister of Commerce

this month (March) with the new rules coming into effect 40 working days after they have been submitted.

This could mean implementation of the new rules as early as April 2006.

Scope of changes

In their current form, the rule changes largely reflect clarifications of the existing Listing Rules and do not place additional obligations on listed issuers.

The more significant amendments relate to the rules governing related party transactions and to the disclosure and information rules.

NZX has said that these rule changes should see a reduction in waiver applications to NZX, as well as a reduction in the overall compliance costs of disclosing material information.

For further information on the exposure draft and NZX's summary of the exposure draft, please visit www.nzx.com/regulation.

Changes to related party provisions

The related party and material transaction provisions in Section 9 of the Listing Rules have undergone a number of changes to

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further clarify the scope of the provisions and reduce the types of transactions falling under the regime.

The more significant proposed changes are outlined below.

The de minimus exception

The confusion surrounding the application of the NZ\$250,000 de minimus exception in the related party transaction rules for long-term service contracts has been clarified. Under the proposed changes, the rules now make it clear that even if a service contract is classified as a material transaction because its overall value exceeds a specified percentage of the issuer’s market capitalisation, it will not fall under the related party approval requirement if its value in each financial year of the contract is less than NZ\$250,000.

Executive employment contracts

Employment contracts between an issuer and a related party entered into on an arm’s length, commercial basis and approved by independent directors will no longer be considered a related party transaction so long as the appropriate disclosure is made. The extent of public disclosure which will be required is still being debated by NZX.

New threshold for substantial security holders

A person will no longer be deemed to be a related party solely because that person holds 5% of the voting securities in the issuer. In recognition that a 5% holding is unlikely to influence an issuer, the threshold has been increased to 10%.

Exceptions extended

The need to apply for waivers from the application of the related party rules should be reduced by the addition of the following new exceptions:

- an extension of the general bank

exception to cover loan transactions;

- a common director exception to avoid the situation where the rule only applies because a director of the issuer is also a director of the other party in the transaction; and
- a subsidiary (and joint venture) exception in recognition that there is usually no incentive for an issuer to enter into such transactions other than on commercial terms,

(although both of these latter exceptions are subject to strict criteria).

Guidance on meaning of “officers”

NZX has replaced references to “officer” with the term “executive officer” in the related party rules. The change is in response to a request to focus the related party rule on persons that are likely to exercise influence over an issuer such as the chief executive officer or the chief financial officer. This will also avoid any comparison with the term “officer” as defined in the Securities Market Act 1988. However to retain flexibility, no definition of “executive officer” has been given. Instead NZX intends to issue a Guidance Note on this issue.

Disclosure and information rules

The other main area affected by the rule changes is the provisions governing the timely disclosure of information, the content requirements of such disclosures and the form of disclosure.

The main changes are:

Amalgamation of continuous disclosure obligations and announcements of material changes

Since the implementation of the continuous disclosure obligations at the end of 2002, there have been a number of minor changes to clarify the original provisions. However, despite these changes, there are still some inconsistencies between the continuous disclosure rules and the separate



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announcement requirements for material changes. These differences have arisen mainly because there is a large overlap between both sets of reporting requirements. This has been addressed by removing the requirement for separate announcements of material changes and the rules now rely only on the continuous disclosure obligations to ensure disclosure of all material information to the market. The footnotes to the continuous disclosure rules have been redrafted to retain the benchmarks which triggered notification under the previous material changes regime and also list the content requirements for such notices. Consequently, there should be no changes to announcements of material changes in practice.

Sharing of financial information

A concern arising from the introduction of the continuous disclosure obligations was the lack of clarity over the right of a subsidiary to share financial information with its parent without triggering the disclosure rules. This has been addressed through a new footnote in the continuous disclosure obligations affirming the right to share such information provided the information is given for the parent to comply with its financial reporting requirements and subject to the appropriate confidentiality being maintained. However the footnote is not in substitution of the main provisions in Rule 10.1 and accordingly is still subject to the other criteria set out in the rule.

Offering document required for major change of control or direction

Instead of an information memorandum, NZX (at its discretion) may now require an issuer to prepare a profile for major changes involving the controlling interest in an issuer; sale or purchase of a major part of an issuer's assets; or a change in direction of the business or activities of the issuer.

Notification requirements for director nominations

The notification requirements for director nominations have been linked to the "closing date" only to overcome some of the problems issuers faced in setting the date of their annual meetings when notification of directors nominations were included in the release of the preliminary full-year announcement. However, NZX's current proposal to adopt a "35 Business Day" notification period from the meeting date (from the previous two-month requirement) may still cause difficulties in practice.

Preliminary announcements, half-yearly reports and annual reports

NZX has removed specific content details from the rules for preliminary announcements and half-yearly reports to allow NZX to take a more flexible approach. We presume that a Guidance Note will be released in due course setting out NZX's new requirements. For annual reports, issuers now have the option to disclose details of waivers granted by providing a reference to the issuer's website.

Other notable changes

The exposure draft includes a number of other changes arising from the 2005 review. The more important of these are noted below:

Employee equity issues

The overall 7% cap for employee equity issues over a five-year period has been removed. NZX is now satisfied with the 3% threshold per year for control over employee share schemes.

Pricing of equity securities

The rules governing the issue price limits for equity securities has been extended to cover the exercise prices of securities (such as options) that convert into voting securities.

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Pro rata and NZ\$5,000 offers of equity securities

A number of minor changes have been made to the rules governing the issue of pro rata offers of equity securities not exceeding NZ\$5,000 for each existing security holder.

In particular:

- the rules have been extended to apply to beneficial owners of securities in line with the Securities Act (NZX – Share and Unit Purchase Plans) Exemption Notice 2005;
- a new time limit of three months has been included for the placement of unsubscribed securities after the close of the original offer; and
- it is now up to the issuer (and not NZX under the previous waiver regime) to decide whether to extend the offer to existing overseas security holders.

Requirements for issuers' constitutions

NZX has reduced significantly the number of rules which must be incorporated or replicated in an issuer's constitution. Those that remain reflect the constitutional requirements provided by the Companies Act.

Common shareholder numbers

An issuer will be required to record a common shareholder number (CSN) on allotment for each person issued securities.

Proposals not adopted by NZX

There were also a number of issues raised in NZX's September 2005 consultation paper which have not been adopted as part of the latest round of Listing Rule changes.

Of particular note are:

- debt only issuers will not be required to have a New Zealand resident director;
- a special resolution of shareholders will not be required for the approval of major transactions unless specified by the Companies Act;
- executive directors (appointed by directors) will still need to have their appointment confirmed at the next shareholders' annual meeting; and
- there will be a separate consultation process for addressing the standard format for disclosure of an issuer's preliminary half-year and full-year announcements.

Further information and advice

For further information or advice on the proposed Listing Rule changes, please contact your usual Bell Gully advisor or one of the partners listed on this page.

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