



NEW ZEALAND'S EXCHANGE
TE PAEHOKO O AOTEAROA

Major and Related Party Transactions Guidance Note

Consultation Response Paper

November 2023

CONTENTS

Introduction.....	3
Background.....	3
What are the next steps for the review?	3
Questions.....	3
Executive Summary	4
Summary of the submission feedback.....	4
International trends and future developments.....	4
Part A: Major Transactions	5
A1. Renewals, Variations and Amendments	5
A2. Charges and cash	6
A3. Related series of transactions	6
A4. Significant changes to an Issuer’s business.....	6
A5. Calculating the Gross Value of a transaction	7
A6. Shareholder approval	7
A7. Waivers from Rule 5.1.1	8
A8. Minor amendments.....	10
Part B: Material Transactions with a Related Party.....	11
B1. Related series of transactions	11
B2. Definition of Material Transaction	12
B3. Value metrics.....	13
B4. Underwriting and sub-underwriting transactions.....	13
B5. Renewals, variations and amendments	14
B6. Waivers from Rule 5.2.1	14

This consultation response paper has been prepared by NZX to provide transparency to the market of NZX’s consideration of the submission feedback that NZX received through the consultation relating to the review of the Major and Related Party Transactions Guidance Note that was undertaken in February 2023. Capitalised terms which are not defined in this paper have the same meanings given to them in the NZX Listing Rules.

Introduction

Background

The Major and Related Party Transactions Guidance Note (**Guidance Note**) is intended to inform the manner in which NZX Listing Rules (**Rules**) 5.1 and 5.2 are interpreted, and assist Issuers who are considering whether to seek a waiver from the Rules. It sets out the purpose of those Rules, and provides guidance as to the matters NZ RegCo considers when determining waiver applications.

The last substantial update to the Guidance Note was in 2018, when NZX updated its market structure and undertook a holistic review of the Rules. As some time has passed since that review, in February 2023 NZX consulted on proposed changes to the Guidance Note to ensure that it reflects current market practice, and to better align the guidance with the changes that were made to the Rules as part of the 2018 Rule review.

NZX received nine high-quality detailed submissions in response to the consultation on the proposed amendments, with submitters comprising major law firms, the New Zealand Corporate Governance Forum (**NZCGF**), and Accident Compensation Corporation (**ACC**).

NZX has now considered that submission feedback, which has included engagement with NZ RegCo, in accordance with our standard arrangements for the consideration of regulatory policy changes. This consultation paper is designed to provide transparency to the market of NZX's consideration of the submission feedback received.

What are the next steps for the review?

The proposed amendments to the Guidance Note are set out in the Exposure Drafts that accompany this consultation response paper, and which are available [here](#):

- Guidance Note Exposure Draft (comparative mark-up against Consultation Version).
- Guidance Note Exposure Draft (cumulative mark-up against current Guidance).

We intend the amended Guidance Note to become effective on 18 December. This will allow time for us to address any further feedback we receive in relation to the outcomes of the review, that are set out in this consultation response paper.

Questions

If you have any queries in relation to the review, please email policy@nzx.com or contact:

Kristin Brandon
Head of Policy and Regulatory Affairs
Email: kristin.brandon@nzx.com
DDI: +64 4 495 5054

Executive Summary

Summary of the submission feedback

Submitters supported the purpose of the review, which was to provide further clarity around the application of Rule 5.1 and Rule 5.2, and guidance in relation to the circumstances in which NZ RegCo would grant waivers from those requirements.

Submitters generally supported the proposed guidance relating to the disclosure of third-party valuation reports, which were generally regarded as containing useful information for shareholders and other stakeholders. In addition, the proposed standard conditions for waivers were generally supported, with some submitters suggesting that Issuers should provide greater clarity as to the reasons that waiver relief was required.

Submitters challenged the proposed guidance relating to the application of Rule 5.2 (to only consider the aspect of a transaction to which the Related Party is a direct party) and the proposed application of Rule 5.1 and 5.2 to variations and amendments of transactions. In response to this feedback, we have made changes to our approach in these areas.

Material changes to the consultation proposals

In recognition of submission feedback (which is set out in more detail in this consultation response paper), we have made some changes to the proposals on which we consulted. As a result:

- variations and amendments to major and related party transactions will require approval under Rules 5.1 and 5.2 respectively (unless the variation or amendment is minor or administrative in nature, or NZ RegCo agrees to grant a waiver),
- additional standard waiver conditions will require the non-interested directors of an Issuer to certify why waiver relief is in the best interests of the Issuer and certain groups of shareholders, along with providing a summary of the grounds for that opinion. NZ RegCo will release this certification to the market contemporaneously with the waiver decision,
- we have clarified the factors that would indicate that two or more transactions form part of a related series, and
- we have also provided further guidance on how a series of transactions should be considered when a Related Party is a direct party to one aspect of the transaction, when assessing whether the series of transactions is a Material Transaction under Rule 5.2.

International trends and future developments

NZX may consider whether a further 'grass root' review of Rule 5.2 is appropriate in the future. Whether such a review is necessary will depend on whether NZX becomes aware of conduct or other matters that would suggest that it would be appropriate to review these settings.

In this regard we note the recent consultation¹ being undertaken by the UK Financial Conduct Authority, that proposes the removal of compulsory shareholder votes and shareholder circulars for related party transactions, and the different approach that ASX takes in relation to these requirements.

¹ UK FCA Consultation Paper [CP 23/10 Primary Markets Effectiveness Review](#), May 2023.

Any future review would be prioritized in accordance with 'NZX's Approach to Policy' which sets out the arrangements for NZX's development of its policy work programme.

Part A: Major Transactions

Section 2 of the Exposure Draft provides guidance as to the interpretation of Rule 5.1 which imposes obligations in relation to transactions (or a series of related transactions) which:

- significantly change, either directly or indirectly, the nature of an Issuer's business, and/or
- involve a Gross Value above 50% of the Average Market Capitalisation of an Issuer.

In this consultation response paper, these types of transactions are referred to as 'major transactions' for ease of reference.

A summary of submitters' views of the consultation proposals relating to major transactions and the outcomes of the consultation that are reflected in the Exposure Draft are set out below. The summary is set out in the sequential order of the sections of the Exposure Draft.

A1. Renewals, Variations and Amendments

The guidance relating to the manner in which renewals of a major transaction is treated is set out in section 2.1.4 of the Exposure Draft. The treatment of amendments and variations is set out in section 2.1.5 of the Exposure Draft.

As part of the consultation proposals, NZX had proposed amendments to the Guidance Note to clarify that the renewal, amendment or variation of a transaction would only require approval under Rule 5.1 if the renewal, amendment or variation was itself a major transaction. We noted that it would be important that the notice of meeting relating to the transaction included an appropriate level of detail in relation to the transaction that was approved.

ACC, NZCGF and one major law firm provided very strong opposition to the proposed updated guidance in this area, as these changes were considered by these submitters to undermine existing shareholder rights. These submitters considered that even a comparatively small change to the originally proposed transaction (especially in respect of price) could have a significant effect on the shareholders' decision as to whether to support a transaction.

As a result of this feedback, we are no longer proposing to move forward with the proposal relating to variations and amendments. As a result, variations or amendments of major or related party transactions will require shareholder approval unless the variation or amendment was approved at the time of the original transaction, or is of a minor or administrative nature.

We are proposing to proceed with the proposed approach that the renewal of a transaction will only require approval if the renewal itself is a major transaction. We consider renewals can be differentiated from variations and amendments, as they can be entered into on the same terms as those already approved by shareholders. If a renewal itself is a major transaction, the renewal will not require approval under Rule 5.1.1 if the notice of meeting for the original major

transaction provided an appropriate level of disclosure regarding the renewal.

A2. Charges and cash

Section 2.2 of the Exposure Draft provides guidance as to the manner in which charges and cash transactions are treated for the purposes of Rule 5.1.1.

Cash

One submitter queried why NZX has deleted the reference to ‘the issue of financial products for cash, and payment of dividends’ as being transactions involved in the acquisition or disposal of assets to which Rule 5.1.1 applies. NZX confirms that it has not changed its position in relation to cash transactions. We have made drafting changes to more accurately reflect the application of Rule 5.1.2(c), which provides that Rule 5.1.1 does not apply to an issue of Financial Products for cash which does not significantly change the nature of the Issuer’s business.

Charges

NZX consulted on changes to clarify that both the entry into a charge, and the exercise of a charge by a charge-holder that allows the charge-holder to realise a security interest, are excluded from the operation of the Rule.

Submitters generally supported these changes, although one submitter opposed the changes on the basis that the Rule should apply to the entry into charges and should be linked to the obligation it secures, rather than the assets to which it applies. NZX does not consider that the entry into a charge will in and of itself result in the disposition of an asset, and in any event at the time of entry into a charge the obligation that it secures will already exist.

The Exposure Draft now clarifies that where a charge arises in the context of an obligation (such as a guarantee or indemnity) consideration should be given as to whether the underlying obligation may qualify as a disposition of an asset (i.e. cash) that is a major transaction for the purposes of the Rules.

A3. Related series of transactions

Section 2.3 of the Exposure Draft provides guidance as to when two or more transactions should be regarded as constituting a ‘related series of transactions’.

In response to submission feedback, we have removed the factor that referred to transactions forming part of a common commercial strategy, and replaced it with a narrower factor being whether there is a specific common purpose for entry into the transactions.

It is important to note that the factors set out in the Exposure Draft are not prescriptive or determinative in nature, and are intended as a guide for Issuers when considering how the Rules apply to two or more transactions.

A4. Significant changes to an Issuer’s business

Section 2.4 of the Exposure Draft provides guidance as to types of situations that may result in a significant change in an Issuer’s business for the purposes of Rule 5.1.1(a).

NZX remains of the view that the sale of one business unit within a vertically integrated business can cause there to be a significant change in the nature of an Issuer’s business

(despite the Issuer retaining a business unit within the same sector). Issuers should consider the factors outlined in the guidance when they are acquiring or disposing of a business unit within a vertically integrated business to assess whether the transaction would cause a significant change in the nature of the Issuer's business. We have, however removed the example included in the consultation materials relating to the divestment of vertically integrated businesses in response to submission feedback that this example could be confusing for Issuers who pursue disposals and expansions in the ordinary course of business, and remain in the same line of business. We have also softened the language above the table of examples to clarify that these are illustrative only.

We have also removed the commentary that was included in the consultation materials relating to the consideration as to whether a transaction would significantly change an Issuer's risk profile, in response to concerns from submitters that this may cause Issuers to consider that they need to undertake a risk factor analysis for small or immaterial transactions.

We have included a factor relating to whether there has been a significant change to the driver of returns that has led to an acquisition or disposition, as being relevant to the assessment as to whether there has been a significant change in an Issuer's business. This change is in response to submission feedback, that this factor would ensure the focus of the assessment relates to changes in the character and nature of an Issuer's activities, rather than scale.

A5. Calculating the Gross Value of a transaction

Section 2.5 of the Exposure Draft provides guidance as to how the gross value of a transaction should be calculated for the purposes of Rule 5.1.1(b).

In response to submission feedback, we have deleted the reference contained in the consultation materials that an Issuer may wish to seek an independent assessment from an external professional adviser when calculating gross asset value, as we agree with the views of submitters that this is only relevant where an Issuer is calculating the market value of a transaction under limb (b) of the definition.

We have retained the examples that demonstrate how transaction costs and funding should be excluded from the calculation of the market value.

In response to submission feedback, we have also included an example of how market value should be calculated in the situation where an Issuer acquires the shares in an entity which itself owns assets, and where the assets of a private business are acquired. These examples are intended to clarify the interpretation of Rule 5.1.1(b) in different scenarios. We note that these types of transactions are unique, and that Issuers should engage with NZ RegCo if they are unsure of how the definition of Gross Value should be applied to a particular transaction.

A6. Shareholder approval

Section 2.8 of the Exposure Draft sets out the information that should be included in a notice of meeting that contains a resolution that is seeking approval for a major transaction under Rule 5.1.

A6.1 Pro-forma financial statements

While submitters noted the compliance burden associated with providing pro-forma financial information with a notice of meeting seeking the approval of a major transaction, we have

retained the comment in the Exposure Draft that this information will be helpful for shareholders. This reflects that NZ RegCo may request that Issuers provide this information when reviewing notices of meeting, as this information is considered useful for shareholders in assessing the merits of the transaction.

A6.2 Third party reports

We have clarified that the guidance around the disclosure of a third party report, does not require such a report to be obtained. Rather, this disclosure is recommended in the situation where an Issuer has voluntarily obtained a third-party valuation report and is seeking to rely on that report to recommend a transaction to shareholders.

Submitters generally considered that this information had utility for shareholders, although some suggested that technical or specialised reports may not provide meaningful information. Most submitters considered it would be possible for these types of disclosures to be made, particularly on a non-reliance basis, although some noted that the terms of engagement may prevent this type of disclosure, in certain circumstances. We intend to move forward with this proposal as we consider that summary valuation reports provide useful information to enable shareholders to meaningfully evaluate the transaction.

We have adopted submitters' suggestions to clarify that this proposal relates to third party valuation reports, rather than all independent advice (such as tax or legal advice in relation to the transaction) that an Issuer may have obtained in relation to a transaction. We agree with the view of submitters that the board of an Issuer should retain the discretion as to whether to provide this type of disclosure and that the guidance does not create requirements in this area.

A6.3 Negotiation of the transaction and sunk costs

We have removed the guidance that the notice of meeting provide detail as to how the purchase price was negotiated, and details of the interest rates and covenants relating to the debt funding for a transaction in response to submission feedback that this will typically be commercially sensitive information. We have also removed the guidance that suggested the disclosure of sunk costs in response to submitter feedback that while this information may be relevant from a governance perspective (and will be disclosed in the Issuer's financial statements) this disclosure may create the wrong incentives for shareholders in determining whether to approve the transaction.

A7. Waivers from Rule 5.1.1

Section 2.9 of the Exposure Draft provides guidance as to the situations in which NZX (through NZ RegCo) may grant a waiver for Rule 5.1.1.

Submitters generally supported the proposed clarifications in this part of the guidance, with one submitter suggesting the extent of the guidance in this area was unnecessary, and given the rarity of such waivers being granted might create a false expectation that NZX would grant a waiver in certain circumstances.

A7.1 Circumstances in which waivers may be granted

We have updated the guidance to clarify that waivers from Rule 5.1.1 will be extremely (rather than very) unlikely. We have also clarified the circumstances in which waivers may be granted

for long-term cash contracts, by providing an example of a situation where this may be appropriate, and provided more colour around the circumstances in which a reduction in market capitalisation would be grounds to give rise to waiver relief.

The majority of law firms considered that it would be appropriate for the earlier precedent to stand relating to waivers that have been granted where majority shareholder support would enable a major transaction resolution to be approved. NZX considers it appropriate to proceed with the proposal to remove the precedent effect of these decisions through guidance, noting that the tabling of a resolution has broader effects than allowing an Issuer to obtain approval for a transaction, as it allows minority shareholders greater visibility over a major transaction and provides a fundamental governance protection for shareholders. The majority of the precedent waivers were granted during the Covid period, or the Global Financial Crisis, which further reduces their precedent value.

We also note the additional proposed changes to the standard waiver conditions that are described below, which are designed to ensure (amongst other things) that minority shareholders have greater visibility as to the reasons why an Issuer considers that waiver relief is necessary.

[A7.2 Information to support a waiver application](#)

Investor groups, through the course of the earlier consultation relating to the Guidance Note, the 2022 Code review, and the current director independence review, have suggested that Issuers need to provide greater transparency of the reasons why a waiver from the Rules is required (as opposed to the transaction's alignment with the policy of the Rules).

NZX agrees that this is an important element that should be satisfied before a waiver is granted, and reflects the guidance contained in section 7 of the Issuer Engagement Guidance Note. NZX expects an Issuer to explain why waiver relief is necessary and appropriate, and the grounds on which the Issuer has concluded that a waiver is in the best interests of the Issuer and shareholders. NZX will also wish to understand why the transaction is in the best interests of the Issuer, and the grounds for that view. As noted below, a standard condition of waivers granted from Rule 5.1.1 will be that these explanations will be required to be included in a certificate which will be released to the market, at the time NZ RegCo releases its waiver decision.

[A7.3 Standard conditions for waivers](#)

As noted above, NZX has received significant feedback relating to the need for Issuers to provide greater transparency to shareholders as to why waiver relief is necessary. NZX and NZ RegCo consider it appropriate to impose additional standard conditions to waivers from Rule 5.1.1, to address these concerns.

These conditions will include that the non-interested directors (adopting the interpretation of 'interested' included in section 139 of the Companies Act 1993) provide a number of certifications including that the transaction does not significantly change the nature of the Issuer's business and is in the ordinary course of business.

In addition, the non-interested directors will be required to certify that:

- the waiver relief being sought, is in the best interest of each of:

- the Issuer, and
- the Issuer's shareholders as a whole; and
- the transaction is in the best interest of each of:
 - the Issuer, and
 - the Issuer's shareholders as a whole.

The directors providing the certificate will be required to include a summary of the grounds on which each limb of the certifications are made, and NZ RegCo will release the certificate at the time the waiver decision is announced to the market.

Ordinary course of business

In the consultation NZX also proposed that a standard condition of a waiver from Rule 5.1.1 that the non-interested directors certify that the transaction for which a waiver has been sought is in the ordinary course of the Issuer's business. The majority of submitters queried the proposed standard condition, that the certificate includes confirmation that the transaction is in the ordinary course of business, noting that major transactions are likely to be extraordinary events. NZX and NZ RegCo consider it appropriate to retain this confirmation as part of the standard certifications, as the rationale for granting a waiver (to align with the policy of Rule 5.1.1) is that the macro-environment has changed in a manner that artificially captures a transaction as a major transaction. As noted above, the certificate will also need to include a summary of the grounds for the non-interested directors' view as to why the transaction is in the Issuer's ordinary course of business.

A8. Minor amendments

The exposure draft also contains a number of minor amendments that have been made for clarity and accuracy, these include amendments to clarify:

- **Section 2.1.2:** that Rule 5.1.1(c) disapplies Rule 5.1 to a transaction which has been approved under a resolution for the purposes of section 129 of the Companies Act 1993.
- **Section 2.8:** that the documents to be provided to NZ RegCo with a notice of meeting do not need to be executed.
- **Section 2.8:** that where a resolution relating to a major transaction is cross-conditional, or is being tabled to satisfy a number of different requirements (Rules, Companies Act and/or Takeover Code) that the voting restrictions must be aligned.
- **Section 2.8:** the manner in which the Appraisal Report requirements apply to a major transaction.

Part B: Material Transactions with a Related Party

Section 3 of the Exposure Draft provides guidance as to the interpretation of Rule 5.2 which imposes obligations on Issuers in respect of entry into a Material Transaction with a Related Party.

A summary of submitters' views of the consultation proposals and the outcomes of the consultation that are reflected in the Exposure Draft are set out below. The summary is set out in the sequential order of the sections of the Exposure Draft (other than section B1 which provides context for the matters contained in section B2).

B1. Related series of transactions

B1.1 Related Party involvement as a direct party on one of a related series of transactions

Section 3.2.1 of the Exposure Draft provides guidance as to how a 'related series of transactions' should be assessed against the Material Transaction definition.

In the consultation materials NZX proposed a change to its regulatory policy in this area, to narrow the application of the Rule to the aspect of a transaction to which the Related Party was a direct party, so that the Related Party's involvement did not taint a series of transactions. NZX considered that this approach was appropriate in light of the changes that were made in the 2018 Listing Rule review.

Prior to 2018, the Rule requirement for shareholder approval applied to an Issuer entering into a Material Transaction if the Related Party was, or was likely to become, a *direct or indirect party* to the Material Transaction, *or to at least one of a related series of transactions of which the Material Transaction forms part*. As part of the 2018 Rule amendments, NZX narrowed the Rule with the intention that it only applies to transactions to which the Related Party is actually a counterparty. Specifically, the 2018 amendments dis-applied the requirements to transactions where a Related Party was an *indirect party* to a Material Transaction. The changes also dis-applied the Rule requirements to Material Transactions that had a number of elements which were tainted by the involvement of a Related Party, by removing the reference in the Rule to '*at least one of a related series of transactions of which the Material Transaction forms part*'.

Most law firm submitters supported the proposed change in policy position. However, some law firm submitters queried whether the language of the Rules was sufficiently aligned with this change in policy (noting in particular that the definition of Material Transaction continues to refer to a related series of transactions, and the carve-out in limb (b) of the definition which creates an exclusion in an issuance situation so that only the issuance to the Related Party needs to be considered). These submitters suggested that a change on policy position would be better addressed through a Rule review.

In addition, investor groups noted that where a Related Party is only involved in a discrete element of a series of transactions, the component may still be material to the Related Party which could cause the Related Party to wish to exert undue influence over the Issuer. These submitters noted the importance of shareholder approval rights where the interests of Related Parties may be complicating the Issuer's focus on shareholder benefits, and considered that

ignoring the linked transactions to which the Related Party was not a direct party was too blunt to sufficiently protect shareholder interests.

While NZX considers that the policy intent behind the changes made to Rule 5.2.1 in 2018 was to narrow the operation of the Rule, we are sensitive to the submission feedback that this position may not be completely supported on the face of the Rules, and the concerns from investor groups. We therefore consider it appropriate to retain the policy position that applied prior to the 2018 Rule amendments, that will treat a series of transactions as a Material Transaction where a Related Party is a direct party to one transaction in the series. As noted below, each aspect of the transaction (including those to which the Related Party is not a direct party, but are part of the series within a limb of the definition of a Material Transaction will need to be assessed to determine whether Rule 5.2.1 applies.

Sometimes there may be a transaction with a number of components that fall within different limbs of the Material Transaction definition (e.g. acquisition and issuance). Where a Related Party is not a direct party to the transaction (or series of transactions) within one limb of the definition (e.g. it is not a party to the issuance), that component of the transaction (the issuance) will not be a Material Transaction with a Related Party for the purposes of Rule 5.2.

This will mean that the Rules that apply to Related Party transactions continue to be cast widely, as a Related Party will taint a series of transactions where it is a direct party to one transaction where there are other transactions in the series to which a limb of the Material Transaction definition applies. Issuers have the ability to seek a waiver from NZ RegCo in situations where it is appropriate to remove shareholders' approval rights (through waiver relief) and the transaction does not offend the policy of the Rule. The proposed approach to waiver relief is discussed in more detail in section B6, below.

NZX notes that the formulation of Rule 5.2.1 differs from the approach taken by ASX Listing Rule 10.1 which requires shareholder approval where an Issuer wishes to acquire a substantial asset from, or dispose of a substantial asset to, a Related Party. NZX also notes that the UK Financial Conduct Authority is currently consulting on the proposed introduction of a single listing category which includes changes to remove shareholder approval requirements for related party transactions.

NZX considers that it may be appropriate to conduct a full review of Rule 5.2.1 in the future. Any review would be prioritised against other initiatives in accordance with NZX's Approach to Policy.

B1.2 Factors indicating that individual transactions are a 'related series'

In response to submission feedback, we have refined the guidance as to when individual transactions form part of a related series. This is explained further in section A.3 of this paper (which relates to Major Transactions).

B2. Definition of Material Transaction

The opening portion of section 3.2 of the Exposure Draft provides guidance relating to the interpretation of a Material Transaction.

B2.1 Separate limbs of the transaction

NZX consulted on guidance to clarify that where transactions involve various aspects or components that fall under different paragraphs of the definition of Material Transaction, the different components should not be aggregated together when considering whether a transaction falls within the definition of a Material Transaction.

There was general support for this approach, and NZX intends to proceed with these amendments. In light of the change to the approach to a Related Party being involved in a related series of transaction (described in section B1, above), this will mean that where a Related Party is a direct party to one of a related series of transactions that fall within one limb of the Material Transaction definition, that the transactions in the series should be assessed in aggregate against the relevant limb of the Material Transaction definition (i.e. an acquisition comprised of multiple purchases will be assessed against limb (a), a loan with a number of components will be assessed against limb (c)), regardless of whether the Related Party is a direct party to every transaction in the series to which the limb of the definition applies.

B2.2 Aggregation of different Related Party participation

In the consultation materials, we proposed to include guidance as to how transactions to which multiple Related Parties were direct parties should be treated. We proposed that the aspects of the transaction to which the Related Parties were direct parties, should be aggregated together when assessing the limb of the transaction against the relevant limb of the definition.

As a result of the change in approach (described in section B1, above) this proposal to aggregate transactions with multiple Related Parties falls away.

B3. Value metrics

Section 3.2.3 of the Exposure Draft provides guidance as to the manner in which the different value metrics used in the definition of a Material Transaction should be assessed.

Submitters queried how the definition of 'net tangible asset value' should be applied and one submitter suggested that its application to the acquisition or disposition of shares should be clarified. We have therefore included more explanation in the Exposure Draft as to how this situation should be treated. We have noted that both the net tangible asset of the business whose shares are the subject of the transaction should be considered (i.e. the total assets less its total liabilities and intangible assets) along with the market value of the shares (which will normally be reflected by the consideration for the shares), and that the greater value should be used to determine the shares Aggregate Net Value.

B4. Underwriting and sub-underwriting transactions

Section 3.2.5 of the Exposure Draft contains guidance as to how underwriting and sub-underwriting transactions should be treated.

NZX consulted on changes to the Guidance Note in relation to underwriting and sub-underwriting arrangements, to reflect the changes made to Rule 5.2.1 in 2018, such that the Rules applies only where a Related Party is a direct party (rather than an indirect party) to a Material Transaction. We suggested that in general sub-underwriting arrangements will not be captured by the Rule given that there is typically no contractual nexus between the Related

Party and the Issuer. We noted in the consultation that there may be circumstances where despite the lack of a contractual relationship the direct involvement by the Related Party (as an underwriter or sub-underwriter) in the capital raise could nevertheless trigger the Rule.

Submitters generally supported this approach, with submitters representing investor groups suggesting that there may be circumstances where a sub-underwriter could have significant influence over the transaction, despite a lack of a contractual nexus with the Issuer. NZX agrees with these views (which are reflected in section 3.2.6 of the Exposure Draft) and we have clarified this section of the Exposure Draft in this regard.

B5. Renewals, variations and amendments

Section 3.2.7 and 3.2.8 of the Exposure Draft contains guidance as to how renewals, variations and amendments are to be treated for the purposes of Rule 5.2.1.

NZX consulted on proposed changes to the Guidance Note, such that renewals, variations or amendments should only be regarded as triggering the operation of the Rule, if the renewal, variation or amendment was itself a Material Transaction.

We have amended this proposal as a result of submission feedback, please refer to section A.1 of this paper which described the changes that have been made to the Exposure Draft.

B6. Waivers from Rule 5.2.1

Section 3.6 of the Exposure Draft provides guidance as to the circumstances when a waiver from Rule 5.2.1 may be granted, and explains the information Issuers should include in a waiver application, along with the standard conditions that NZ RegCo may apply when granting a waiver.

As a result of the submission feedback that we have received through the review of the Guidance Note, along with ongoing feedback we have received from investor groups regarding the importance of shareholders understanding why waiver relief that removes shareholders' right to approve a Material Transaction with a Related Party is necessary, we are proposing to bolster the standard conditions that will usually apply to waivers from Rule 5.2.1.

We are proposing that the non-interested directors (adopting the interpretation of 'interested' included in section 139 of the Companies Act 1993) provide a number of certifications including that the Material Transaction has been entered into, and negotiated on an arm's length commercial basis and that the Issuer was not influenced to enter into the Material Transaction by the Related Party.

In addition, the non-interested directors will be required to certify that:

- the waiver relief being sought is in the best interest of each of:
 - the Issuer, and
 - the Issuer's shareholders who are not precluded from voting under Rule 6.3 (being the Related Party and its Associated Persons)
- the transaction is in the best interest of each of:

- the Issuer, and
- the Issuer's shareholders as a whole, and
- the Issuer's shareholders who are not precluded from voting under Rule 6.3 (being the Related Party and its Associated Persons)

NZ RegCo will require the certificate to include a summary of the grounds on which each limb of the above certifications are based, and will publish the certificate to the market at the time NZ RegCo publishes its waiver decision.

NZX and NZ RegCo consider that these additional standard conditions will strike an appropriate balance by ensuring that there is sufficient visibility as to why an Issuer considers waiver relief to be necessary, given that a waiver removes shareholders' rights to consider and approve a Material Transaction with a Related Party.