



NZX Regulation Decision

Class Waiver from Independent Director Requirements—
NZX Main Board Listing Rules 3.3.1(c), 3.3.2, 3.3.3, 3.3.5,
3.6.2(c), 9.2.4(a), 9.2.4(d), 10.4.5(l) and paragraph 3.11 of
Appendix 16

6 March 2014



Explanatory Note

The effect of this waiver is that a Director of an Issuer, who is not an executive officer and who has an ACC Disqualifying Relationship (as that term is defined in paragraph 1 of the decision) may be considered to be an Independent Director of that Issuer for the purposes of the Rules. The waiver will not apply if the relevant Director has a Disqualifying Relationship other than an ACC Disqualifying Relationship.

Decision

1. For the purposes of this decision, an “**ACC Disqualifying Relationship**” is a Disqualifying Relationship (as that term is defined in the NZX Main Board Listing Rules) that arises solely because a Director of an Issuer is a Board Member of Accident Compensation Corporation (“**ACC**”) and ACC is a Substantial Security Holder of that Issuer.
2. On the conditions set out in paragraph 3 below, NZXR waives the application of NZX Main Board Listing Rules 3.3.1(c), 3.3.2, 3.3.3, 3.3.5, 3.6.2(c), 9.2.4(a), 9.2.4(d), 10.4.5(l) and paragraph 3.11 of Appendix 16 (“**Rules**”), to the extent that those Rules prohibit a Director of an Issuer, who is not an executive officer, and who has an ACC Disqualifying Relationship from being considered to be an Independent Director of that Issuer.
3. The waiver in paragraph 2 above is provided on the conditions that:
 - a. ACC holds a Relevant Interest in no more than 15% of the Issuer’s Voting Securities;
 - b. the Issuer makes due and reasonable inquiry of the relevant Director(s) as to whether ACC is in compliance with its internal policies and processes relating to the governance and management of the Issuer as an Investee as described in Appendix One, and having done so, the Issuer reasonably believes that ACC is in compliance with those policies and procedures to the extent that they relate to that Issuer as an Investee;
 - c. at the time that the Issuer releases the announcement required by Rule 3.3.3 in respect of the relevant Director, the Issuer must also release an announcement including a statement to the effect that the Director has an ACC Disqualifying Relationship and that the Board has determined that the Director is an Independent Director in reliance on this waiver; and
 - d. the Issuer clearly and prominently discloses in its half-year and annual reports that the Issuer has relied on the waiver during the reporting period.
4. The information on which this decision is based is set out in Appendix One to this decision. This waiver will not apply if that information is not or ceases to be full and accurate in all material respects.
5. The Rules to which this decision relates are set out in Appendix Two to this decision.

Reasons

6. In coming to the decision to provide the waiver set out in paragraph 2 above, NZXR has considered that:
- (a) The Rules preclude Directors with a Disqualifying Relationship from being considered to be “Independent Directors” to ensure that Directors who have a relationship that could, or could be perceived to influence the exercise of their judgement in an independent manner are not considered “Independent Directors” for the purposes of the Rules. ACC has demonstrated that it does not seek to influence any ACC board member who is also a Director of an Issuer of which ACC is a Substantial Security Holder to act in the interests of ACC while acting in their capacity as a Director of that Issuer, and has demonstrated that it has robust procedures and arrangements in this regard. The Rules should not prevent a Director (who is not an executive officer of the Issuer) and who has an ACC Disqualifying Relationship from being considered to be an “Independent Director”, in these circumstances.
 - (b) ACC is a Crown Entity and its investment activities are designed to ensure the financial stability of the accident compensation scheme for future generations. ACC has a broad portfolio of investments and invests in accordance with weight limits to ensure that its portfolio is appropriately diversified. ACC currently invests in approximately 30 Issuers.
 - (c) The waiver only applies where ACC holds a Relevant Interest in no more than 15% of the Voting Securities of an Issuer which is appropriate to avoid the perception of a relationship that could influence the exercise of a Director’s judgement in an independent manner and is consistent with this approach.
 - (d) There is a public benefit in ACC having a diverse Board comprising individuals with a wide range of experience, including experience as Director of an Issuer.
 - (e) The application of the Rules to preclude a Director from being considered an Independent Director in circumstances where there is no indication of influence is unnecessary and may be a disincentive to ACC board members serving as Directors of Issuers.

Appendix One

1. ACC is a Crown Entity and its investment activities are designed to ensure the financial stability of the accident compensation scheme for future generations. ACC has a broad portfolio of investments and invests in accordance with weight limits to ensure that its portfolio is appropriately diversified. ACC currently invests in approximately 30 Issuers.
2. ACC has internal policies relating to its governance and management of Issuers in which it invests (“**Investees**”) that do not allow ACC to seek to exert influence over Board Members (“**Members**”) who are Directors of an Investee.
3. In particular, ACC’s “Philosophy in Relation to the Management of Investee Companies” provides that:

“From time to time, a director of an investee company may also have a professional relationship with ACC in another capacity (for example, as a Board or Investment Committee Member).

In these circumstances, to avoid any suggestion that ACC is inappropriately taking advantage of its relationship with that director, ACC will not attempt to influence the director’s decisions in relation to the investee company. Rather, any shareholder advocacy on ACC’s part will target the company generally, or alternatively other board members.”
4. ACC has internal processes to ensure that ACC does not provide any information generated by ACC about an Investee to Members who are Directors of the Investee. Any ACC Board papers relating to an Investee will not be provided to such Members.
5. A Member who is a Director of an Investee will also not participate in ACC Board discussions or vote at ACC Board meetings in relation to matters concerning the Investee.
6. ACC operates two interest registers to ensure that it can identify ACC Board Members who are Directors of Investees and therefore ensure that the policies and processes described in paragraphs 4 and 5 above, are appropriately applied.
7. ACC Board Members are not legally required to take account of ACC’s interests when acting in another capacity, such as acting as a Director of an Investee.

Appendix Two

“Disqualifying Relationship”

means any direct or indirect interest or relationship that could reasonably influence, in a material way, the Director’s decisions in relation to the Issuer.

Without limiting the definition, a Director shall be deemed to have a Disqualifying Relationship in the following circumstances:

- (a) the Director is a Substantial Security Holder of the Issuer or an Associated Person of the Substantial Security Holder (other than solely as a consequence of being a Director of the Issuer); or...

“Substantial Security Holder”

has the meaning given in section 2 of the Securities Markets Act 1988.

“Independent Director”

means a Director who is not an executive officer of the Issuer and who has no Disqualifying Relationship.

“Associated Person”

1.8.1 In the Rules, a person is an Associated Person of another person if the first person is associated with the other in terms of Rules 1.8.2 to 1.8.6

1.8.2 A person (the "first person") is associated with another person (the "second person") if, in making a decision or exercising a power affecting an Issuer, the first person could be influenced as a consequence of an Arrangement or relationship existing between, or involving, the first person and the second person.

1.8.3 Without limiting Rule 1.8.2, the first person is associated with the second person if:

- (a) the first person is a company, and the second person is:
 - (i) Director of that company; or.....

Rule 3.3 Appointment and Rotation of Directors

3.3.1 The composition of the Board shall include the following:...

- (c) the minimum number of Independent Directors shall be two or, if there are eight or more Directors, three or one-third (rounded down to the nearest whole number of Directors) of the total number of Directors, whichever is the greater.

An example under Rule 3.3.1(c) is if an Issuer has ten Directors, three of them must be Independent Directors.

3.3.2 The Board must identify which Directors it has determined, in its view, to be Independent Directors.

3.3.3 The Board must make a determination under Rule 3.3.2:

- (a) no later than 10 Business Days following an appointment of a Director by Security holders. Immediately after making such a determination the Issuer shall release to the market whether the Board has determined that the Director is an Independent Director unless a determination by the Board in relation to that Director was disclosed under Rule 10.4.5 in the most recently published annual report; and
- (b) no later than 10 Business Days following appointment by the Board in respect of any Director appointed by the Board and immediately after making such determination, the Issuer shall release to the market whether the Board has determined that such Director is an Independent Director; and
- (c) prior to publication of its annual report to enable it to comply with Rule 10.4.5(l).

...

3.3.5 No person (other than a Director retiring at the meeting) shall be elected as a Director at an annual meeting of Security holders of an Issuer unless that person has been nominated by a Security holder entitled to attend and vote at the meeting. There shall be no restriction on the persons who may be nominated as Directors (other than the holding of qualification shares, if the Constitution so requires) nor shall there be any precondition to the nomination of a Director other than compliance with time limits in accordance with this Rule 3.3.5. The closing date for nominations shall not be more than two months before the date of the annual meeting at which the election is to take place. An Issuer shall make an announcement to the market of the closing date for Director nominations. Notice of every nomination received by the Issuer before the closing date for nominations shall be given by the Issuer to all persons entitled to attend the meeting together with, or as part of, the notice of the meeting and the Issuer shall specify in such notice the Board's view on whether or not the nominee would qualify as an Independent Director.

Rule 3.6 Audit Committee

3.6.2 The Audit Committee shall:...

- (c) have a majority of members that are Independent Directors...

Rule 9.2 Transactions with Related Parties

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9.2.4 Rule 9.2.1 shall not apply to:

- (a) any transaction entered into by an Issuer with a Bank which is a Related Party of that Issuer as principal, on arm's length terms and in the normal course of banking business.....

1. Where the Independent Directors of an Issuer are satisfied that the criteria in Rule 9.2.4(a) are satisfied no application need be made by that Issuer to NZX for approval of that transaction and no shareholder ratification of that transaction is required. The Rule stipulates that in the transaction in question the Bank must be acting as principal. The intention of this is to exclude a transaction such as one in which a Bank acts as agent of a third party.

...

- (d) an employment contract or contract for personal services with an Issuer which is a Material Transaction under Rule 9.2.2.(e) where:
 - (i) the terms of the contract are set on an arm's length and commercial basis and have been approved by the Independent Directors of the Issuer; and
 - (ii) the Independent Directors approving the contract sign and deliver to NZX a certificate stating Rule 9.2.4(d)(i) has been complied with; and....

Rule 10.4.5

10.4.5 The annual report of an Issuer shall contain:

...

- (l) a statement as to which of its Directors are Independent Directors and which of its Directors are not Independent Directors, as at the balance date of the Issuer.

Appendix 16

3.11 An Issuer should establish a nomination committee (which may be comprised of members of the Issuer's remuneration committee) to recommend Director appointments to the Board. At least a majority of the nomination committee should be Independent Directors. Issuers should identify in their annual report the member or the nomination committee.