



# Guidance Note

## Major and Related Party Transactions

6 November

Mark-up of proposed changes against current Guidance Note  
Exposure Draft Consultation Response

This guidance is published to help Issuers to understand whether Rule 5.1 or 5.2 applies to a transaction that they propose to enter into. It has been prepared to provide guidance to ~~issuers~~Issuers as to their obligations relating to major transaction and related party transactions under the NZX Listing Rules ~~that take effect from 10 December 2020~~ (**Rules**).

Under Rule 9.15.1, NZX Limited (**NZX**) may act by and through NZX Regulation Limited (**NZ RegCo**) in performing any function or discharging any power set out in the Rules. References in this ~~Guidance Note~~guidance note to NZX therefore also include NZ RegCo in relation to any regulatory activity or discretion.

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**Important Information:** This guidance note applies to the major transaction and related party transaction obligations contained in the NZX Listing Rules. Issuers should note that this guidance note is not intended to be a definitive statement of the application of the Rules in every situation, and is only a guide to NZX’s policy and practice. This guidance note does not limit NZX’s discretion under the ~~rules.~~[Rules \(including NZ RegCo’s discretion in respect of granting rulings or waivers in respect of, or enforcing, the Rules\)](#). [Issuers should seek their own legal advice in respect of the application of their Rules to them and their particular circumstances.](#) This guidance note reflects the Rules and law as ~~a 10 December 2020~~[November 2023](#) -~~DATE~~ which is subject to change. NZX takes no responsibility for any error contained in this guidance note. NZX may replace guidance notes at any time and Issuers should ensure that they have the most recent version of this guidance note by checking NZX’s website at [www.nzx.com](http://www.nzx.com).

# 1. Introduction

Under the ~~NZX Listing Rules (the Rules)~~,<sup>1</sup> major transactions and ~~material transactions~~Material Transactions with a ~~related party~~Related Party must be approved by shareholders before they are entered into, or must be conditional upon such approval.

This guidance is published to help Issuers to understand whether Rule 5.1 or 5.2 applies to a transaction that they propose to enter into. This guidance is subject to the matters set out under Important Information on the first page of this guidance note.

Unless otherwise defined, capitalised terms in this guidance note have the same meaning as given in the Rules.

## 3.2. Major Transactions

### 3.12.1 What is a major transaction?

~~Pursuant to Rule 5.1.1, The Rules do not define the term “major transaction”. In this guidance note, that term is used to describe a transaction, or series of related transactions, may be considered that are subject to Rule 5.1.1. The Rule applies to a major transaction, or series of related transactions, to acquire or dispose of assets if it:~~

- significantly changes, either directly or indirectly, the nature of the Issuer’s business; and/or
- involves a Gross Value above 50% of the AMC Average Market Capitalisation of the Issuer.

An Issuer may not enter into a major transaction unless the transaction is first approved by the Issuer’s shareholders by ordinary resolution, ~~(or if section 129 of the Companies Act 1993 (the Companies Act) applies, a special resolution)~~, or is made conditional upon such approval.

The policy behind Rule 5.1.1 is to regulate transactions that are ~~deemed to be~~ so significant to the ~~company~~ Issuer, and therefore so likely to impact shareholders’ interests, that shareholders should have an opportunity to consider and vote on the transaction ~~and exercise their right to vote~~ before the transaction can take effect. Major transactions significantly change the nature of an Issuer’s business or represent a majority of the equity that investors hold in the Issuer, and are therefore significant.

In this guidance note, unless otherwise specified, a reference to the major transaction rule is a reference to Rule 5.1.1, rather than section 129 of the Companies Act. See paragraph 2.1.2 for further discussion of the relationship between Rule 5.1.1 and section 129.

#### 2.1.1 Transactions by subsidiaries

The definition of “~~issuer~~ Issuer” set out in the Glossary to the Rules extends to certain other members of a group of companies in which the ~~issuer~~ Issuer is the holding company or has a controlling interest, to the extent that this is necessary to prevent the object of the Rules being frustrated or avoided by the use of a separate legal personality. This means that Rule 5.1.1 applies to transactions entered into by one or more subsidiaries of an Issuer, ~~(other than a Listed subsidiary)~~. If an Issuer’s subsidiary enters into a transaction or related series of transactions that ~~either significantly changes the nature of the business is a major transaction for, or of,~~ the Issuer ~~or exceeds 50% of the AMC of the Issuer, the,~~ Rule 5.1.1 will apply.

#### 2.1.2 Relationship with “major transactions” under the Companies Act 1993

Issuers governed by the Companies Act ~~1993 (the Act)~~ should be aware of the requirement for shareholder approval, by special resolution, for “major transactions” as defined in that section. Transactions that trigger the major transaction test in Rule 5.1.1 may also trigger the section 129 test, and vice versa. ~~This means that an Issuer may need to meet both requirements for the same transaction or related series of transactions.~~

Where Rule 5.1.1 applies, but section 129 of the Companies Act does not, then only an ordinary resolution is required to approve the transaction (a simple majority of the votes of those

shareholders entitled to vote and voting). Otherwise, if both Rule 5.1.1 and section 129 of the Companies Act apply, then a special resolution is needed (a 75% majority ~~of 75%~~ of the votes of those shareholders entitled to vote and voting).

### **2.1.3 Relationship with the Backdoor or Reverse Listing Rule**

A ~~backdoor~~Backdoor or ~~reverse listing~~Reverse Listing is defined as a transaction, or series of related transactions, entered into by an Issuer which would result in a significant change:

- (a) in the ownership of a majority of the Equity Securities carrying Votes, and
- (b) either directly or indirectly, in the nature or scale of its activities, including through the acquisition of a new business.

This type of transaction will, in addition to being a Backdoor and Reverse Listing, almost always be a major transaction under Rule 5.1.1. For further guidance on backdoor and reverse listing, please refer to Rule 1.11.1 and NZX's Guidance Note [Backdoor and Reverse Listing Transactions Listings](#).

### **2.1.4 Renewals**

The renewal of a transaction will only require approval under Rule 5.1.1 if the renewal itself is a major transaction. In addition, even 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 (including, for example, the existence and nature of the right, the circumstances in which the Issuer could exercise the right, and the financial and other material implications of exercising the right) and the approval resolution specifically empowers the renewal.

In the event an issuer wishes to effect an administrative amendment or variation in the context of a renewal, shareholder approval under Rule 5.1.1 will not be required to the extent the amendment or variation is minor or administrative in nature.

### **2.1.5 Amendments and variations**

Amendments or variations of a transaction which has previously been approved by shareholders under Rule 5.1.1 will not require further shareholder approval if they relate to minor or administrative changes. Other amendments or variations to a major transaction will require shareholder approval under Rule 5.1.1. This is because the amendment or variation changes the major transaction itself, and therefore while the amendment or variation may be of a size or nature that does not trigger the application of Rule 5.1.1, it is the full major transaction that should be considered, which means shareholder approval is required for the variation or amendment.

If Issuers are unclear about how Rule 5.1.1 applies to renewal, amendments, or variations, they can contact NZX to discuss further.

### **3.22.2** Is the Issuer, acquiring, selling, leasing, ~~exchange~~exchanging or disposing of an asset?

Rule 5.1.1 ~~is concerned with~~applies to transactions to acquire, sell, lease, ~~(as lessor or lessee),~~ exchange or otherwise dispose of assets. ~~(except by way of charge).~~

“Assets” is not a defined term in the Rules. However, NZX considers that it has a wide meaning and includes tangible or intangible property of any kind. ~~For the avoidance of doubt, the issue of financial products for cash and payment of a dividend are transactions involving the acquisition or disposal of assets.~~

NZX notes that any purchase of an asset also generally involves the disposal of cash which is an asset. This may be relevant if the Issuer is paying cash to build an asset, and the market value of the asset is difficult to determine, ~~or where a contract for services involves the~~ payment of cash. However, Rule 5.1.2(c) provides that Rule 5.1.1 does not apply to the issue of Financial Products for cash which does not significantly change the nature of the Issuer’s business.

NZX considers that the payment of a cash dividend or other cash distribution by an Issuer is the disposal of an asset (i.e., cash) for the purposes of Rule 5.1.1(b).

#### **2.2.1 Charges excluded**

Rule 5.1.1 specifically excludes charges (such as general security agreements, specific security agreements or other fixed or floating charges) themselves from the major transaction test ~~(floating charges or otherwise).~~ NZX considers that this includes both the granting of the charge and any exercise of the charge by the charge-holder (or relevant nominee, such as a receiver or security agent). However, ~~the underlying~~ a charge may arise in the context of a commitment or obligation which may itself ~~may constitute~~ qualify as a major transaction ~~if the Issuer.~~ For instance, an indemnity or guarantee that was secured by a charge could nonetheless create a contingent liability that is incurring rights under another contract (for example, a loan document)-an agreement to dispose of assets (i.e., cash) in an amount equal to that liability.

### **2.3** What is a ~~Related Series~~related series of transactions?

#### **3.3** Transactions?

~~Transactions cannot~~ should not be considered in isolation when applying Rule 5.1.1 ~~or Rule 5.2.1.~~ If two or more transactions form part of a “related series of transactions”, those transactions must be considered together. This is to prevent a situation where Issuers could avoid the protections provided to shareholders by artificially structuring a large transaction into several smaller transactions.

#### **Example:**

An Issuer wishes to buy a single residential subdivision. It purchases a number of separate lots under individual sale and purchase agreements ~~at the same time, with the intention of~~ broadening its property portfolio. While none of the purchases alone are big enough to



constitute a major transaction, taken together those purchases could result in a major transaction.

A major transaction can be comprised in more than one document. Individual transactions do not necessarily need to be cross-conditional to form part of a related series of transactions.

Factors that may suggest that two or more transactions form part of a related series include (but are not limited to):

- the transactions are inter-dependent or cross-conditional,
- the transactions are with the same counterparty, or related counterparties,
- the transactions ~~form part of a common commercial strategy underpinning the transactions~~ are entered into contemporaneously,
- each transaction was contemplated prior to the entry into the first transaction,
- there is a specific common purpose for entering into the transactions,
- the Issuer would not have reasonably pursued each transaction individually if the other transaction did not, or may not, occur, ~~and~~
- the transactions occur together within a short period of time.

NZX notes that entry into and completion of one transaction can subsequently lead to further transactions that are seemingly related but were not previously contemplated. In this situation, NZX considers that the transactions are not a series of related transactions.

**Example:**

An Issuer buys shares in a company to expand its business into a new region. Following the purchase, it must incur additional capital expenditure to satisfy demand in that region. The additional capital expenditures have not previously been foreseen or forecast by the issuer.

**Outcome:**

While the acquisition and capital expenditure are connected in the sense that they relate to expansion of the Issuer's business in the new region, NZX would consider that the unforeseen capital expenditure should **not** be included.

The lack of premeditation of the second transaction when entering into the first transaction makes it artificial to consider them as a related series.

### **2.3.1 Underwriting Transactions**

~~For the purposes of Rule 5.1.1 and 5.2.1, NZX considers that underwriting and sub-underwriting arrangements are related to the issue of securities to which the underwriting relates. Any underwriting arrangements will be related to the offer (including a contractual commitment by a party to take up its full entitlement under that offer).~~

#### **Example:**

~~An Issuer proposes to undertake a rights issue which would result in the issue of equity securities having a market value of approximately 45% of that Issuer's AMC. That rights issue would not, of itself, be a major transaction. However, the issuer also proposes to enter into an underwriting agreement in relation to the offer. The aggregate gross value of the rights issue and the underwriting arrangement exceeds 50% of the issuer's AMC. Accordingly, shareholder approval will be required for the series of transactions that are represented by the rights issue and the underwriting arrangements.~~

~~If a Related Party to the Issuer was to sub-underwrite the rights offer, that would be a related party transaction for the purposes of Rule 5.2.1, unless an exception in the Rules applied. This is discussed in further detail in this guidance note.~~

Issuers who have questions as to whether two or more proposed transactions constitute a series of related transactions are encouraged to discuss those proposed transactions with NZX.

### **3.42.4 Rule 5.1.1(a) - What is a significant change to the nature of the Issuer's business?**

The major transaction rule requires an Issuer to consider whether the proposed transaction, or series of related transactions, would significantly change, directly or indirectly, the nature of the Issuer's business. NZX considers this to mean a major change in the character of the Issuer's business activities.

If an Issuer has a clearly identifiable main activity, this requires there to be a significant change in the character of its main undertaking. However, if a conglomerate entity conducts a number of different businesses ewith different characterscharacteristics, no one of which is separately identifiable as its main undertaking, this requires there to be a significant change to the conglomerate character of the Issuer's business activities.

If an issuer is unsure whether its proposed transaction will result in a significant change to the nature of its business, it should engage with NZX in the first instance. NZX is likely to regard the following examples of an Issuer deciding to switch its main business activity as a significant change in the nature of the Issuer's business (or vice versa). It is always best to engage with NZX when you are unclear or uncertain about activity:

In either case, relevant factors include the nature and scope of the Issuer's existing activities and strategy, the nature and scope of the business to be acquired, earnings contribution of the business to be acquired/sold, and whether there has been a significant change to the driver for returns.

An asset acquisition or disposal, including in respect of a businesses that is vertically integrated or aligned to the Issuer's industry sector, may give rise to a significant change in the Issuer's business under Rule 5.1.1(a), as demonstrated in the following examples::

Original main business activity	New main business activity
Long-haul freighting	Manufacturing consumer goods
Exploration for gold	Exploration for offshore oil and gas
Trading <del>financial products</del> <u>Financial Products</u>	Commercial property investment
Conglomerate that conducts a number of different businesses	Disposal of all existing businesses and purchase of a new business

Conversely, NZX would not regard the following examples as a significant change in the nature of the Issuer's business:

Original main business activity	New main business activity	Comment
Mining exploration entity for one type of mineral	Mining exploration entity deciding to explore for different type of mineral on same tenements	The Issuer's main undertaking remains exploring for minerals on the same tenements
Mining exploration	Mining producing entity following successful exploration <u>Electricity generation and retail</u>	This is a natural extension <u>Electricity generation (i.e. after sale of, rather than a major change to, the nature of the Issuer's <u>electricity retail</u> business)</u>
Financial product trading entity	Entity reweights its holdings to predominantly fixed interest investments and cash	Its main undertaking remains trading in financial products

<del>Conglomerate that conducts a number of different businesses</del>	<del>Conglomerate sells some businesses and purchase some additional businesses</del>	<del>Its main undertaking is and remains conducting conglomerate businesses</del>
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If an Issuer is unsure whether a proposed transaction will be viewed as resulting in a significant change to the nature of its business, it should engage with NZX in the first instance. It is always best to engage with NZX when you are unclear or uncertain about the change in activity.

### **3.52.5 Rule 5.1.1(b) - Calculating Gross Value of the Transaction and AMCAverage Market Capitalisation of the Issuer**

~~The major transaction rule also~~ Rule 5.1.1(b) requires an Issuer to assess whether the ~~gross value~~ Gross Value of the transaction, or series of related transactions, exceeds 50% of its ~~AMCAverage Market Capitalisation.~~

This requires the calculation of both the ~~value~~ Gross Value of ~~the~~ transaction, or series of related transactions, and the Issuer's ~~AMCAverage Market Capitalisation.~~ Each of these calculations is discussed below.

#### **2.5.1 Calculating the value of the transaction**

The "Gross Value" of the assets to be acquired or disposed of by way of a transaction, or series of related transactions, is calculated as the greater of:

- the gross asset value (or, for leased assets, the value of the right of use) from the most recently published financial statements of the relevant Issuer (if applicable);~~);~~ or
- the ~~gross~~ market value.

~~In both cases, this is calculated irrespective of any liabilities attributable to the assets or any subsidiaries (or other entities through which the assets are held).~~

~~If the transaction involves the leasing of an asset, the value is to be calculated as the value of the right to use that asset rather than the value of the asset itself.~~

Assets which are not valued in the relevant Issuer's most recent financial statements

Where the gross asset value (or, for leased assets, the value of the right of use) is not set out in an Issuer's most recently published financial statements, this must be based on the market value and the Issuer must have a reasonable basis for the assessment of the gross value of the relevant assets. An Issuer conducting a disposal should refer to the gross asset value in its own financial statements. An Issuer acquiring an asset should refer to the counterparty's financial statements if the counterparty is also an Issuer, otherwise the Issuer should assess the market value of the assets.

Market value

NZX considers that, in general, the market value of the asset to be acquired or disposed of will be the price agreed between the Issuer and the counterparty. If the asset being acquired or disposed of is the shares in an entity which itself owns assets and owes debt obligations, then NZX considers that the Gross Value should be the market value of that entity. If an Issuer is unsure as to how to calculate Gross Value in these circumstances, it should engage with NZX in the first instance.

#### Exclusions from Gross Value

The Gross Value of relevant assets should be calculated without double-counting and without adding external transaction costs to the asset value. For example, the calculation of Gross Value should exclude:

- any debt or equity funding raised or used to finance an acquisition,
- debt funding repaid from the proceeds of a disposal,
- bona fide third party costs associated with obtaining or repaying equity or debt funding (such as lead management fees, underwriting fees, arranger fees and repayment break fees), and
- bona fide third party costs associated with the acquisition or disposal (including professional adviser costs, such as the costs of investment bankers, lawyers, accountants.

#### Example transactions applying the Rules

##### **Example 1:**

An Issuer which operates a software-as-a-service business acquires a similar business to expand its market share for \$100 million (being, for the purposes of this example, the market value of the asset). Associated transaction costs are \$1.5 million, including a success fee payable to the Issuer's financial adviser and fees payable to the Issuer's other professional advisers.

##### **Application:**

The transaction to be assessed under Rule 5.1.1(b) is the acquisition of the business for \$100 million. Transaction costs are not 'added' to the market value of the business for the purposes of that Rule.

##### **Example 2:**

An Issuer which operates a commercial real estate investment business agrees to acquire a shopping mall for \$50 million (being, for the purposes of this example, the market value of the asset).

To fund the acquisition, the Issuer raises \$25 million of new equity by way of the cash issue of Financial Products and draws down \$25 million under an existing \$100 million facility.

**Application:**

The transaction to be assessed under Rule 5.1.1(b) is the acquisition of the shopping mall for \$50 million. The 'acquisition' of cash by way of equity or debt funding to finance the acquisition, and associated fund raising fees, is not 'added' to the market value of the shopping mall for the purposes of that Rule.

Further, the equity capital raising would also be excluded under Rule 5.1.2(c).

**Example 3:**

As above, an Issuer which operates a commercial real estate investment business agrees to acquire a shopping mall for \$50 million (being, for the purposes of this example, the market value of the asset). The Issuer raises \$100 million of equity by way of the cash issue of new Financial Products. The new equity will be used to fund the acquisition of the shopping mall, and the balance will provide a 'war chest' for future (not yet identified) commercial real estate acquisition opportunities.

**Application:**

Under Rule 5.1.2(c), the major transaction rule does not apply to the 'acquisition' of cash by way of the \$100 million equity capital raising because (in this example) it will not significantly change the nature of the Issuer's business. Accordingly, only the \$50 million acquisition price for the shopping mall is taken into account under Rule 5.1.1(b).

**Example 4:**

An Issuer which operates a hospitality business agrees to sell a restaurant for \$5 million in cash (being, for the purposes of this example, the market value of the asset) and to use the proceeds to repay \$4.95 million of debt and pay \$50,000 of break fees for early repayment.

**Application:**

The transaction to be assessed under Rule 5.1.1(b) is the disposal of the restaurant for \$5 million. The 'disposal' of the cash proceeds of sale to repay debt and pay associated break fees is not 'added' to the market value of the restaurant for the purposes of that Rule.

**Example 5:**

An Issuer acquires the ownership of a private software as a service business through the acquisition of 100% of the shares in the business for an acquisition price of \$14 million. The statement of financial position of the acquired entity shows assets of \$15 million, equity of \$10 million and liabilities of \$5 million.

**Application:**

The Issuer must assess the market value of the shares that it has acquired under limb (b) of the definition (as although the SaaS business has financial statements it is not an Issuer). The market value of the shares acquired by the Issuer is the \$14 million consideration paid by the Issuer as this is the best reflection of the value of the asset (i.e. shares) being acquired, and there is no gross asset value for the shares contained in an Issuer's financial statements.

**Example 6a:**

An Issuer acquires software development assets, and trademark and patents relating to those assets, of a private software as a service business at a price of \$8 million. The statement of financial position of the private software business shows the value of the acquired assets to be \$9 million, total assets to be \$15 million, equity of \$10 million and liabilities of \$5 million.

**Application:**

The Issuer must assess the market value of the assets that it has acquired under limb (b) of the definition (as although the SaaS business has financial statements it is not an Issuer). The market value of the assets acquired by the Issuer is the \$8 million consideration paid by the Issuer as this is the best reflection of the value of the software development assets, trademarks and patents being acquired, and the gross asset value of the assets is not contained in an Issuer's financial statements.

**Example 6b:**

The same facts apply as in example 6a, however the Issuer also undertakes to make a settlement payment to a third party of \$1 million in relation to alleged contractual breaches that relate to the performance of the software development assets being acquired.

**Application:**

The value of the software assets acquired remains \$8 million. The Issuer should not deduct the \$1 million from the value of the software development assets for the purposes of assessing the value of those assets under Rule 5.1.1(b).

## 2.5.2 Calculating the Issuer's **AMC** Average Market Capitalisation

An Issuer's **AMC** "Average Market Capitalisation" is linked to the trading price of that Issuer's quoted Equity Securities, which can vary day-to-day.

The calculation under Rule 5.1.1**(b)** is to be determined as at "Day A", which will be the earlier of:

- the ~~business~~-day before the transaction ~~is~~in question is announced to market, or
- the ~~business~~ day before the transaction is entered into.

Once Day A is identified, the following formula ~~can~~must be applied:

$$\text{AMC} \underline{\text{Average Market Capitalisation}} = A * B$$

Where:

A = the Average Market Price of the Issuer's ~~shares~~Quoted Equity Securities, being the lesser of the volume weighted average price of ~~an Issuer's quoted equity securities~~those Quoted Equity Securities calculated from trading through the ~~main board~~Main Board over the following two periods:

- 20 Business Days before Day A, or
- 5 Business Days before Day A.

B = the number of Quoted Equity Securities carrying Votes on Day A.

### **3.62.6 Exceptions**

Rule 5.1.2 exempts the following transactions from the major transaction rule:

- ~~a takeover offer (or scheme of arrangement) made by an Issuer (if one of the three limbs in Rule 5.1.2(a) applies), or~~
- a takeover offer made by the Issuer (a) under the Takeovers Act 1993 or by a scheme of arrangement under the Companies Act; (b) to another Issuer whether the transaction is covered by Appendix 3 to the Rules; or (c) in accordance with foreign takeover law which provides similar protection to the Takeovers Code or Appendix 3 to the Rules, or
- any transaction entered into by the Issuer with a Bank as principal, on arm's length terms and in the ordinary course of the Bank's banking business.

Further, as noted above, an issue of Financial Products for cash is exempt from the major transaction rule unless the issue would significantly change the nature of the Issuer's business.

### **3.72.7 Continuous Disclosure**

An Issuer's decision to enter into a major transaction will ~~almost certainly~~ require disclosure in accordance with the Issuer's continuous disclosure obligations in Rule 3.1.1. In addition, the acquisition or disposal of assets from or to a Related Party may require disclosure under Rule 3.4.1. For further guidance on continuous disclosure, please refer to NZX's Guidance Note [Continuous Disclosure](#).

### **3.82.8 Shareholder approval**

~~The~~Approval thresholds

Unless section 129 of the Companies Act applies, the resolution required to approve a major transaction for the purposes of Rule 5.1.1 ~~or Rule 5.2.1~~ is an ordinary resolution. This is a



resolution passed by a simple majority of the votes of the ~~holders of financial products~~shareholders who are entitled to vote ~~and are voting~~.

If section 129 of the Companies Act applies, a special resolution of ~~financial products who are entitled to vote~~shareholders is required (see paragraph 2.1.2 above for further guidance on section 129 of the ~~Act~~Companies Act). This is a resolution passed by a 75% majority of the votes of shareholders who are entitled to vote and voting.

#### NZX review and non-objection

The notice of meeting, explanatory notes, proxy form and any other documents to be sent to shareholders with the notice of meeting (such as any Appraisal Report) for the meeting where ~~these resolutions~~the resolution to approve a major transaction will be considered and voted on cannot be circulated to shareholders until NZX provides written confirmation that it does not object to the notice of meeting under Rule 7.1.1.

The notice of meeting, explanatory notes, proxy form and any other documents to be sent to shareholders with the notice of meeting (such as any Appraisal Report) must be provided to NZX in draft for review at least 10 Business Days (or such other time as NZX may prescribe or advise from time to time) before the notice of meeting and accompanying documents are proposed to be printed or sent to shareholders. NZX reserves the right to extend the 10 Business Day review period if significant changes are made to the documents from the versions first provided to NZX (other than in response to comments from NZX).

#### Approval resolution(s)

The Rules do not specify the terms of the resolution required under Rule 5.1.1 ~~or Rule 5.2.1~~. NZX considers that a resolution to the following effect will suffice:

*“That the [description of transaction / transaction described in the explanatory notes] is approved under and for the purposes of NZX Listing Rule [5.1.1 ~~/5.2.1~~](a)/(b)] [and section 129 of the Companies Act 1993].”*

Where multiple approvals are required under the Rules ~~and/or~~ the Companies Act and/or the Takeovers Code, NZX has no objection to the approvals being combined into the one resolution (or separate but cross-conditional resolutions) provided:

- the notice of meeting makes it clear which Rules, or sections of the Companies Act, or provisions of the Takeovers Code, approval is being sought under, and
- the voting restrictions for such Rules, ~~or~~ sections of the Companies Act, or rules of the Takeovers Code, align. ~~The voting restrictions under the Rules are set out in Rule 6.3.~~

#### Information to be contained in or included with the notice of meeting

Rule 7.8.2 requires each notice of meeting to contain or be accompanied by sufficient explanation, reports, valuations, and other information, as to enable a reasonable person entitled to Vote to understand the effect of the resolution proposed, including:

- the consequences if the resolution in questions is not passed, and
- a statement outlining who is subject to voting restrictions in relation to such resolution (if applicable).

To comply with Rule 7.8.2 when seeking shareholder approval to a major transaction, NZX will expect the notice of meeting to include a reasonable level of detail about the transaction. This may include (as applicable):

- an assessment of the financial effect of the transaction on the Issuer and on the interests of financial product holders in the entity shareholders, including information about the likely effect of the transaction on the Issuer's total assets, total equity interests, annual revenues, annual expenditure and annual profit before tax. It will be helpful to shareholders if this information is presented in pro-forma format. If the Issuer is acquiring a business NZX expects that summary financial statements are provided (or full financial statements, if available). The notice should clarify whether information is presented under standards other than NZ GAAP.
- if a third party report was prepared to support the evaluation of the value of the transaction (for example third party share valuations, or property valuations) which is being relied upon by the Issuer in its assessment of the transaction, NZX expects that either (a) the report or a summary of the report be made public for shareholders or (b) if the report is not to be made public, the Issuer should include sufficient explanation in the notice what third party report has been obtained and why the report or a summary has not been provided. A summary of a report under (a) should include sufficient information to explain the third party report. This may include an outline of the valuation range for the subject of the transaction, together with the key assumptions and risks underpinning the valuation. This guidance relates to a situation where an Issuer has obtained such a third-party report and is seeking to rely on that report for the purpose of recommending the transaction to shareholders for approval. There is no requirement for a third-party report evaluation of the value of a transaction to be obtained.
- how the Issuer will fund the transaction, including if the Issuer plans to raise equity the details of that equity raising, and/or if the Issuer plans to take on new debt, information relating to that borrowing and the total borrowing of the Issuer,
- details of any changes the Issuer will be making to its business model in light of the transaction,
- ~~in the case of an acquisition, details of how the Issuer intends to pay for the acquisition,~~
- in the case of a disposal, details of what the Issuer intends to do with the proceeds of the disposal,
- any changes proposed to the Issuer's board or senior management in connection with, or as a consequence of, the transaction,
- whether there are any, and a description of, break fees that apply,

- the timetable for implementing the transaction,
- a prominent statement that the transaction requires ~~financial product holder~~ shareholder approval under the Rules (or the Companies Act if applicable) and therefore ~~may not~~ cannot proceed if that approval is not forthcoming, and
- a statement that NZX takes no responsibility for the contents of the notice, in the form required by NZX.
- If section 129 of the Companies Act applies to the major transaction, the notice of meeting must comply with clause 2(2)(c) of Schedule 1 to the Companies Act and explain shareholders' minority buyout rights (see also Rule 7.8.7).

Issuers should also refer to NZX's Practice Note ~~Notice of Meeting~~ Notice of Meeting which includes checklists of information NZX expects to be included in a notice of meeting.

If an Issuer seeks shareholder approval in advance of entering into a major transaction (~~for example, an Issuer intends to dispose of its main business and pursue business in i.e., before signing a different sector~~ transaction agreement), NZX will require the approval sought to sufficiently define the scope of the major transaction ~~being approved in advance.~~ An Issuer cannot obtain general shareholder approval to enter into a major transaction, without providing sufficiently specific details regarding the nature of the transaction to be pursued.

#### Other requirements

The notice of meeting should comply with the other provisions of Rule 7.8, to the extent applicable. In addition, if the Issuer is required to obtain an Appraisal Report (see Rules 1.19.3, 7.8.5 and if applicable 7.8.8 (where the Major Transaction is also a Material Transaction with a Related Party)). The Appraisal Report must comply with Rule 7.10 and must be provided to NZX for review with the notice of meeting.

In addition, the notice of meeting should be accompanied by a Profile in accordance with Rule 7.3.1(b)(iii).

#### Proxy forms

NZX expects Issuers to provide the proxy form to NZX for review with the notice of meeting. The proxy form must comply with Rule 7.9.

### **3.92.9 Waiver of Rule 5.1.1**

The policy behind Rule 5.1.1 is ~~to ensure that shareholders have an opportunity to consider and vote on transactions that will significantly change the nature of an Issuer's business or which have a value that represents a majority of the equity that investors hold set out in that company paragraph 2.1.~~ NZX may grant a waiver from Rule 5.1.1 in circumstances which do not offend that policy.

~~For example, a variation of and if an agreement Issuer can establish and certify that was itself at the major transaction is also a major transaction under the Rules. NZX may waive the application of Rule 5.1.1 to a variation to a material agreement where shareholder approval was originally given in respect of the agreement, and if the variation:~~

- ~~• is entirely within the ordinary course of the Issuer's business,~~
- ~~• confirms itself, and expands the current commercial relationship between the contractual parties rather than being an immediate expenditure of shareholder funds,~~
- ~~• is the granting of a waiver would be in the best interests of the company and shareholders; and as a whole.~~
- ~~• has been negotiated on an arm's length basis.~~

~~Low This is considered to be a difficult test and NZX expects that waivers from Rule 5.1.1 will be very rare due to the importance of shareholders considering and voting on major transactions.~~

~~In particular, waivers from Rule 5.1.1(a) are extremely unlikely and any waiver request from Rule 5.1.1(b) is likely to be granted only in very limited circumstances.~~

~~Examples of situations in which NZX may grant waivers are set out below.~~

#### ~~Long-term contracts for cash payments~~

~~NZX may consider waiving the application of Rule 5.1.1 if an Issuer is entering into a multi-year arrangement where it is receiving cash under a contract in excess of 50% of the Issuer's Average Market Capitalisation where the Issuer is undertaking business as usual activities, such as an IT service contract where the issuer is receiving cash for the services it provides.~~

#### ~~Significant decline in market capitalisation~~

~~NZX may waive application of Rule 5.1.1 where, due to a significant recent deterioration in the financial position of the Issuer, the AMC Average Market Capitalisation of the Issuer has reduced to such an extent that the Rules impose an unreasonable restriction on the ability of the Issuer to realise assets or operate in the ordinary course of business (as occurred for some Issuers during the Covid-19 period and global financial crisis).~~

#### ~~Information to support for a waiver application~~

~~As noted above, establishing that the major transaction and waiver are in the best interests of the company and shareholders as a whole is a difficult test.~~

~~When applying for a waiver, along with explaining why the transaction does not offend the policy of Rule 5.1.1, the Issuer must explain the background reasoning about why the waiver relief, and the transaction, is in the best interests of the Issuer, and the Issuer's shareholders as a whole. A summary of the non-interested directors' grounds for this view must be included in the certifications that will be required as a standard condition of any waiver relief (described further below), which NZ RegCo will release to the market with the waiver decision.~~

If applying for a waiver, NZX requires detailed information and will likely ask for further information through the waiver consideration process. NZX relies on the veracity of submissions from issuers but may also ask for further supporting information.

All waiver decisions summarise the key information submitted by the Issuer. Any waiver decisions are based on the facts as presented to NZX, including the certificates that are provided in support of the application, and will no longer apply if the information is not, or ceases to be, full and accurate in all material respects.

#### Standard conditions for Rule 5.1.1(b) waivers

NZX requires that the non-interested directors (where interested has the meaning contained in section 139 of the Companies Act 1993) provide certain certifications to support any waiver, including to provide transparency to shareholders as to why the Board considers the waiver relief to be appropriate. This certification will form one of the key grounds on which any waiver is granted.

While all waiver decisions are based on the specific circumstances, conditions that NZX is likely to apply when granting Rule 5.1.1(b) waivers are that:

- (a) the non-interested directors of the issuer certify to NZX that the granting of the waiver is in the best interest of each of:
  - i. the Issuer, and
  - ii. the Issuer's shareholders as a whole, and
- (b) the non-interested directors of the issuer certify to NZX that the transaction:
  - i. does not significantly change the nature of the Issuer's business,
  - ii. is in the ordinary course of the Issuer's business,
- (c) the non-interested directors of the issuer certify to NZX that the transaction is in the best interest of each of:
  - a. the Issuer,
  - b. the Issuer's shareholders as a whole,
- (d) the non-interested directors include in the certificate a summary of the core grounds for the certifications given under each limb of conditions (a), (b), and (c), described above,
- (e) the non-interested directors of the issuer certify to NZX that the transaction is not a major transaction requiring shareholder approval of the Issuer's shareholders for the purposes of the Companies Act 1993, and
- (f) the waiver, its conditions and implications being disclosed in the Issuer's next annual report.

Issuers should submit draft certification to NZX when applying for a waiver. While NZ RegCo does not approve the certificate, it forms an important part of the factual matrix on which NZ RegCo bases its decision as to whether to grant waiver relief. A waiver will be inapplicable if the information it is based upon is not, or ceases to be, full and accurate in all material respects.

The requirement for the certification to include a summary of the core grounds on which the certificate is given (including why the non-interested directors have determined that the transaction, and granting of the waiver, are in the best interests of the issuer and its shareholders), is an important shareholder protection. This summary must address the core grounds applicable to each limb of the certification.

NZ RegCo will publish the certification to market at the time NZ RegCo releases its waiver decision, reflecting the importance of shareholders being provided with transparency of the reasons for certain Board decisions.

Shareholder support, competitive processes and prejudice to negotiations

There are a small number of historical waivers from shareholder approval requirements under previous versions of the Rules, where the reasons for the granting of the waiver included one or more of the following:

- written confirmation of majority shareholder support for the transaction,
- the requirement to seek shareholder approval would prejudice the Issuer's ability to participate in a competitive process to acquire an asset,
- the requirement to seek shareholder approval would prejudice the Issuer's negotiation position in a bi-lateral negotiation.

NZX has progressed its policy position on these matters and the historical waivers do not have precedent value. For clarity, NZX considers that the major transaction rules represent a fundamental governance protection for shareholders. Accordingly, NZX is very unlikely to grant a waiver from Rule 5.1.1 where the sole or predominant basis for the waiver application is one of the above reasons.

## **2.10 Disclosure of waiver decisions**

As contemplated by Rules 9.7.2 and 9.7.4, NZX will usually publish waiver decisions through the Market Announcement Platform over the Issuer's ticker and the NZ RegCo ticker. Ordinarily, this will occur on announcement of the relevant transaction. The waiver decision will set out facts of the application and grounds for the decision unless the affected Issuer establishes satisfactory grounds for maintaining confidentiality, or NZX elects at its sole discretion not to publish the decision.

As discussed above, NZ RegCo will normally release the certifications to the market at the time the waiver decision is released by NZ RegCo.

Issuers should be mindful that when disclosing all Material Information on the major transaction, that if grounds for a waiver are made out, shareholders will not receive a notice of meeting. With no notice of meeting, it is likely that shareholders will have less information available and therefore will be less able to assess the impact of the major transaction on the Issuer.



## 3. Related Party transactions

### 3. Material Transactions

#### 3.113.1 The with Related Party Transaction test Parties

Rule 5.2.1 prohibits an Issuer from entering into a Material Transaction with a Related Party unless the transaction is first approved by the Issuer's shareholders by ordinary resolution, or is conditional upon such approval. The purpose of ~~the rule~~that Rule is to ensure that shareholders have an opportunity to consider, and vote on, such transactions where there is, or may be a perception of, the potential for undue influence by a Related Party on an Issuer's decision to enter into a transaction or agree to its terms.

Not all transactions with Related Parties are captured by Rule 5.2.1. For Rule 5.2.1 to apply:

- the transaction must be a Material Transaction, (that is, above certain materiality thresholds specified in the Rules), and
- a Related Party must be either a direct party to the Material Transaction, or a beneficiary of a guarantee or other transaction that is a Material Transaction.

~~The Rule also~~5.2.2 sets out certain specific exceptions from Rule 5.2.1, which are discussed ~~further~~ below.

#### 3.123.2 What is a Material Transaction?

##### Definition

Material Transaction is defined within the Glossary of the Rules, and includes situations where an Issuer:

- a) buys, acquires, gains, leases, sells or disposes of assets that have Aggregate Net Value of more than 10% of that Issuer's AMC; Average Market Capitalisation,
- b) issues Financial Products, or acquires its own Equity Securities that have a market value above 10% of that Issuer's AMC (subject to some exceptions); Average Market Capitalisation (except where Rule 4.5 applies or in the case of an issue of Debt Securities, in which case only the market value of Financial Products being issued to any Related Party (individually, or in aggregate with all Related Party involvement) or to any Employees of the Issuer are to be taken into account),
- c) borrows, lends, pays or receives money, or incurs an obligation of more than 10% of that Issuer's AMC; Average Market Capitalisation (except in the case of an issue of Debt Securities, in which case only the nominal amount of the Debt Securities being issued to any Related Party or to any Employees of the Issuer are to be taken into account).



- d) \_\_\_\_\_ enters into a guarantee, indemnity, underwriting, or similar obligation, or gives any security, which could expose the Issuer to a liability above 10% of its AMC;Average Market Capitalisation.
- e) \_\_\_\_\_ provides or obtains any services (including the underwriting of Financial Products or services as an Employee) where the gross cost to the Issuer in any financial year is likely to exceed 1% of its AMC;Average Market Capitalisation, or
- f) \_\_\_\_\_ undertakes an amalgamation, except for amalgamations of a wholly owned subsidiary of the Issuer.

It is noted that for the purposes of limb (d) of the definition that the reference to a 'similar obligation' does not include warranties (for example: under a subscription agreement, or a sale and purchase agreement).

The diagram set out in Appendix 2 has been prepared to assist Issuers navigate the Material Transaction definition, and the corresponding exceptions to this Rule.

#### Relationship between the separate limbs of the definition of Material Transaction

Some transactions involve various aspects which fall under different paragraphs of the definition of Material Transaction. In such circumstances different paragraphs should **not** be aggregated together when considering whether a transaction is a Material Transaction.

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.

#### **Example:**

An Issuer wishes to acquire assets from a Related Party. The Issuer will satisfy the \$20 million purchase price by paying \$10 million in cash and issuing \$10 million of new shares, \$2 million of which are issued to the Related Party. The Issuer has an Average Market Capitalisation of \$250 million.

#### **Application:**

As the \$20 million purchase price for the assets is less than 10% of the Issuer's Average Market Capitalisation, the transaction is not a Material Transaction for the purposes of Rule 5.2.1.

The issue of new shares must also be considered under paragraph (b) of the definition of Material Transaction. Only the \$2 million worth of shares that are issued directly to the Related Party must be considered, as paragraph (b) of the Material Transaction definition requires consideration to be given only to the shares issued to the Related Party where the issuance is through a placement conducted under Rule 4.5. The issue of the shares to the

Related Party should not be aggregated together with the asset price that is assessed under paragraph (a) of the Material Transaction definition.

**Example:**

An Issuer decides to purchase a building from a Related Party. The Issuer will satisfy the \$16 million purchase price payment to be made to the Related Party, by paying \$6 million in cash and borrowing \$10 million from a private unrelated third-party. The Issuer has an Average Market Capitalisation of \$90 million.

**Application:**

The payment of the purchase price of \$16 million to the Related Party should be assessed against limb (a) of the definition of Material Transaction. As the Aggregate Net Value of the building (based on its market value represented by the consideration payment) exceeds 10% of the Issuer's Average Market Capitalisation the transaction is a Material Transaction with a Related Party.

Even though the loan of \$10 million exceeds 10% of the Issuer's Average Market Capitalisation for the purposes of limb (c) of the definition of Material Transaction, the Related Party is not a direct party to the loan and so the loan is not a Material Transaction with a Related Party for the purposes of Rule 5.2.

**Example:**

An Issuer agrees to lease a commercial aircraft for one year for \$20 million. The aircraft is owned by three parties, Owner A (as to 20%), Owner B (as to 50%) and Owner C (as to 30%). Owners A, B and C, as owners of the aircraft, are direct parties to the lease agreement with the Issuer. Owner A is a Related Party of the Issuer. The Issuer has an Average Market Capitalisation of \$75 million.

**Application:**

This consideration payable under the lease agreement (\$20 million) exceeds 10% of the Issuer's Average Market Capitalisation and, therefore, is a Material Transaction under paragraph (c) of the definition of Material Transaction. As Owner A is a direct party to the lease agreement, the transaction is a Material Transaction with a Related Party and shareholder approval is required under Rule 5.2.1.

### **3.2.1 Related series of transactions**

Two or more transactions, which form part of a related series of transactions, and fall within the same limb of the Material Transaction definition must be considered in aggregate when determining whether one of the Material Transaction thresholds has been triggered.

For further guidance on what is a "related series of transactions", refer to section 2.3 of this guidance note.

**Example:**

An Issuer owns a parcel of land which it intends to subdivide into five sections and build a high-end house on each section. The Issuer enters into five building agreements with Builder at the same time. Under each agreement, Builder agrees to build a house on one of the sections for per-house build price of \$3 million.

The Issuer has an Average Market Capitalisation of \$50 million. Builder is a Related Party of the Issuer.

**Application:**

The five building agreements are a related series of transactions and must be aggregated together. Together, the build cost for the five houses under the five agreements is \$15 million. This aggregate cost exceeds 10% of the Issuer's Average Market Capitalisation and, therefore, is a Material Transaction under paragraph (c) of the definition of Material Transaction. As Builder is a Related Party of the Issuer, shareholder approval is required under Rule 5.2.1.

**Example:**

An Issuer wishes to buy two adjoining parcels of land to undertake a residential housing development. One parcel is owned by a Seller A and one parcel is owned by Seller B. The Issuer will only buy Seller A's land if it can buy Seller B's land at the same time (and vice versa). Accordingly, the transaction agreements are cross-conditional.

The Aggregate Net Value of the land to be acquired from Seller A is 7% of the Issuer's Average Market Capitalisation. The Aggregate Net Value of the land to be acquired from Seller B is 5% of the Issuer's Average Market Capitalisation.

Seller B is a Related Party of the Issuer.

**Application:**

The transaction with the Related Party, being the acquisition of land from Seller B, is taken into account under Rule 5.2.1. In addition because the transactions are entered into for a common specific purpose and are cross-conditional, the acquisition of land from Seller A is part of a related series of transactions.

Therefore the acquisition of land from Seller B and Seller A needs to be assessed against limb (a) of the definition of Material Transaction. The Aggregate Net Value of that land being acquired under the transactions with Seller A and Seller B together exceeds 10% of the Issuer's Average Market Capitalisation and, therefore, the acquisition is a Material Transaction with a Related Party.

Individual transactions do not necessarily need to be cross-conditional to form part of a related

series of transactions. Factors that may suggest that two or more transactions form part of a related series include (but are not limited to):

- the transactions are inter-dependent or cross-conditional,
- the transactions are with the same counterparty, or related counterparties,
- there is a specific common purpose for entering into the transactions,
- the Issuer would not have reasonably pursued each transaction individually if the other transaction did not, or may not, occur.
- the transactions are entered into contemporaneously,
- each transaction was contemplated prior to the entry into the first transaction, or
- the transactions occur together within a short period of time.

NZX notes that entry into and completion of one transaction can subsequently lead to further transactions that are seemingly related but were not previously contemplated. In this situation, NZX considers that the transactions are not a series of related transactions.

Issuers who have questions as to whether transactions constitute a series of related transactions are encouraged to discuss those proposed transactions with NZX.

### **3.2.2 Calculating AMC Average Market Capitalisation**

Often Except in the case of amalgamations, for an Issuer- to determine whether a transaction, or related series of transactions, is a Material Transaction, it must determine its AMC. Information on how to calculate AMC is provided at section 2.5 of this guidance note. Average Market Capitalisation.

An Issuer's "Average Market Capitalisation" is linked to the trading price of that Issuer's quoted Equity Securities, which can vary day-to-day.

The calculation to determine whether a transaction, or a series or related transactions, is a Material Transaction is to be determined as at "Day A", which will be the earlier of:

- the day before the transaction in question is announced to market, or
- the day before the transaction is entered into.

Once Day A is identified, the following formula must be applied:

Average Market Capitalisation = A \* B

Where:

A = the Average Market Price of the Issuer's Quoted Equity Securities, being the lesser of the volume weighted average price of those Quoted Equity Securities calculated from trading through the Main Board over the following two periods:

- 20 Business Days before Day A, or
- 5 Business Days before Day A.

B = the number of Quoted Equity Securities carrying Votes on Day A.

### **3.2.3 Revolving Value metrics**

The different limbs of the definition of Material Transaction use different value metrics when calculating whether a transaction or series of related transactions is a Material Transaction, including Aggregate Net Value, market value and gross cost.

#### Aggregate Net Value

Paragraph (a) of the definition of Material Transaction provides that a Material Transaction includes the acquisition or disposal of assets having an Aggregate Net Value above 10% of the Issuer's Average Market Capitalisation.

Aggregate Net Value means the net value of the assets to be acquired or disposed of, calculated as the greater of:

- the net tangible asset value or, for leased assets, the value of the right of use, in each case from the most recently published financial statements of the relevant Issuer, if applicable; or
- market value.

#### Net tangible asset value

This limb of the definition will usually apply where an Issuer is disposing of an asset to a Related Party. Where the asset is a fixed asset its net tangible asset value will usually be its book value, less any accumulated depreciation and impairments.

#### Market value

Paragraph (b) of the definition of Material Transaction provides that a Material Transaction includes the issue by an Issuer of Financial Products or acquisition by an Issuer of its own Equity Securities having a market value above 10% of the Issuer's Average Market Capitalisation.

In general, NZX considers that the market value (whether paid in full or in instalments):

- of Financial Products to be issued by the Issuer for cash, is the aggregate subscription price; and

- of Financial Products to be issued by the Issuer for non-cash consideration, is the aggregate reasonable present cash value of the Financial Product as certified by the Board in accordance with the Companies Act (to the extent that the Companies Act applies).

In addition, the term ‘market value’ is used as one of the limbs by which to assess Aggregate Net Value for the purposes of limb (a) of the Material Transaction definition. Where the assets to which the transaction relate are shares, in most circumstances the market value of the shares will be reflected in the consideration that is payable for them under the transaction. The greater of the market value or the net tangible asset value (if relevant) should then be used to assess the Aggregate Net Value of the shares.

#### Gross cost

Paragraph (e) of the definition of Material Transaction provides that a Material Transaction includes providing or obtaining services where the gross cost to the Issuer in any financial year is likely to exceed 1% of the Issuer’s Average Market Capitalisation. NZX considers that, for this purpose, gross cost means the aggregate gross cost incurred by the Issuer and its subsidiaries in providing or obtaining the services.

### **3.2.4 Related Party credit facilities**

Prior shareholder approval is required if an Issuer wishes to borrow an amount above 10% of the AMCAverage Market Capitalisation of the Issuer from a Related Party. For example, an Issuer with an AMCAverage Market Capitalisation of \$25m25 million must obtain shareholder approval if the Issuer was to borrow more than \$2.5m5 million from a Related Party.

If an Issuer has a ~~revolving~~ credit facility with a Related Party which allows the Issuer to drawdown an aggregate amount in excess of 10% of the Issuer’s ~~AMC~~, NZX would expectAverage Market Capitalisation, the Issuer ~~should~~ obtain shareholder approval prior to entering into the facility (rather than the point in time when the Issuer seeks to make a drawdown on that facility which would result in the aggregate loan balance exceeding 10% of the Issuer’s AMCAverage Market Capitalisation).

Further, if an Issuer does not obtain prior shareholder approval before entering into the ~~revolving~~ credit facility, NZX considers that each drawdown from the facility forms part of a related series of transaction. As such, the 10% AMCAverage Market Capitalisation threshold test requires recalculation for each subsequent drawdown. For example, using the figures in the table below and assuming no principal repayments are made between drawdowns, the Issuer would require shareholder approval for drawdown 3 as, at the relevant time that drawdown is made, the total drawn down amount would exceed 10% of the Issuer’s AMCAverage Market Capitalisation at the time of third drawdown.

	Drawdown 1 (year 1)	Drawdown 2 (year 2)	Drawdown 3 (year 3)
<u>AMCAverage Market Capitalisation</u>	15m	16m	11m

Drawdown	500k	300k	500k
Total drawdown	500k (being 3.33% of AMCAverage Market Capitalisation at the time of drawdown 1)	800k (being 5% of AMCAverage Market Capitalisation at the time of drawdown 2)	1.3m (being 11.8% of AMCAverage Market Capitalisation at the time of drawdown 3)

### Renewing, varying or renegotiating a Material Transaction

Rule 5.2.1 applies to any subsequent renewal, material variation or renegotiation of a Material Transaction. Section 3.6 of this guidance note discusses NZX waivers from the obligation to seek shareholder approval in that scenario.

### 3.2.4

### 3.2.5 Underwriting and sub-underwriting transactions

It is common for Issuers to obtain underwriting for the issue of Financial Products by entering into underwriting arrangements with one or more professional underwriters. In some cases, the underwriter may seek sub-underwriters to mitigate its risk.

NZX considers that, in general, a sub-underwriting arrangement between the underwriter, and a Related Party of the Issuer acting as sub-underwriter, will not in and of itself make the Related Party a direct party to a Material Transaction (assuming the issue of Financial Products is a Material Transaction).

There may however be circumstances in which the contractual nexus between the sub-underwriter (who is a Related Party) and the Issuer is not determinative of whether the sub-underwriter is a direct party to the transaction, refer to section 3.2.6, below. This includes where the sub-underwriter has had some other direct involvement in the capital raising (other than an involvement that is subject to an applicable exception, as addressed in paragraph 3.2.9).

It is noted for completeness that Rule 5.2.2(b) does not permit a Related Party to act as a direct underwriter of a pro rata capital raising because the underwriter is receiving a benefit that is not available to other shareholders, being the ability to take up the shortfall.

#### Example:

An Issuer, which has an Average Market Capitalisation of \$300 million, wishes to undertake a \$50 million capital raising by way of the issue of new Financial Products by way of a renounceable rights issue.

#### Situation One:

The Issuer engages a professional underwriter to underwrite the capital raising. The underwriter, in turn, enters into a sub-underwriting arrangement with a person, Shareholder

A, who holds 15% of the Issuer's shares. Shareholder A has no other involvement in the Material Transaction, except to take up its pro rata share of the renounceable rights issue.

**Application:**

The capital raising is a Material Transaction as the market value of the Financial Products to be issued exceeds 10% of the Issuer's Average Market Capitalisation.

Shareholder A is a Related Party as it has a Relevant Interest in more than 10% of the Issuer's shares (being Equity Securities carrying Votes).

Rule 5.2.1 does not apply to Shareholder A's direct participation in the capital raising (i.e. by way of Shareholder A taking up its pro rata share of the rights issue), because Rule 5.2.2(b) provides that Rule 5.2.1 does not apply to the issue of Financial Products where the Issuer gives each holder of Financial Products the opportunity to receive the same benefit (e.g. a renounceable rights issue).

Shareholder A's sub-underwriting arrangements do not make Shareholder A (who is a Related Party of the Issuer) a direct party to the Material Transaction (the capital raising), because the sub-underwriting arrangement is between the underwriter and Shareholder A. That is, there is no contractual nexus between the Issuer and Shareholder A, or any direct influence by Shareholder A over the transaction as sub-underwriter. Accordingly, Shareholder A's sub-underwriting of the capital raising does not engage Rule 5.2.1, and would not be considered part of a related series of transactions for the capital raising

**Situation Two:**

The Issuer engages Shareholder B, who holds 15% of the Issuer's shares, to underwrite the capital raising. The Issuer will pay Shareholder B an underwriting fee of \$3.5 million and the Issuer agrees to indemnify Shareholder B for liabilities in connection with the capital raising, capped at \$50 million.

**Application:**

The capital raising is a Material Transaction as the market value of the Financial Products to be issued exceeds 10% of the Issuer's Average Market Capitalisation.

Shareholder B is a Related Party as it has a Relevant Interest in more than 10% of the Issuer's shares (being Equity Securities carrying Votes).

Shareholder B is a direct party to the transaction as the underwriter. The potential issue of \$50 million of new shares to the underwriter exceeds 10% of the Issuer's Average Market Capitalisation, the underwriting fee payable by the Issuer to Shareholder B exceeds 1% of the Issuer's Average Market Capitalisation and the indemnity provided by the Issuer to Shareholder B could expose the Issuer to liability above 10% of the Issuer's Average Market Capitalisation. Accordingly, the underwriting is a Material Transaction under each



of limbs (b), (d) and (e) of the definition. As Shareholder B is a Related Party, prior shareholder approval to the underwriting is required under Rule 5.2.1.

### **3.2.6 Is the Related Party a direct party to the transaction?**

The examples in paragraphs 3.2.1 and 3.2.5 illustrate how Rule 5.2.1 will apply where a Related Party is a direct party to a series of related transactions that is a Material Transaction, but will not apply where a Related Party is an indirect party.

The key (but not necessarily the only) factor that will be taken into account by NZX is whether there is a direct contractual nexus between the Issuer and a Related Party (or some other direct benefit conferred on a Related Party by the Issuer), other relevant factors will be whether the Related Party has had a significant level of involvement in the design or negotiation of the transaction, and whether the Related Party is receiving payments or benefits directly from the Issuer as a result of the transaction. This distinction reflects the policy of Rule 5.2.1, as set out in paragraph 3.1.

Issuers who have questions as to whether a Related Party is a direct or indirect party to a Material Transaction are encouraged to discuss the proposed transaction with NZX.

### **3.2.7 Renewals,**

The renewal of a Material Transaction with a Related Party will only require approval under Rule 5.2.1 if the renewal itself is a Material Transaction with a Related Party. In addition, even if a renewal itself is a Material Transaction with a Related Party, the renewal will not require approval under Rule 5.2.1 if the notice of meeting for the original transaction provided an appropriate level of disclosure regarding the renewal (including, for example, the existence and nature of the right, the circumstances in which the Issuer could exercise the right, and the financial and other material implications of exercising the right) and the approval resolution specifically empowers the renewal.

In the event an Issuer wishes to effect an administrative amendment or variation in the context of a renewal, shareholder approval under Rule 5.2.1 will not be required to the extent the amendment or variation is minor or administrative in nature.

### **3.2.8 Amendments and variations**

Amendments or variations of a transaction which has previously been approved by shareholders under Rule 5.2.1 will not require further shareholder approval if they relate to minor or administrative changes which do not change the fundamental or essential terms of the deal previously approved by the Issuer's shareholders. Other amendments or variations may require shareholder approval. This is because the amendment or variation changes the Material Transaction itself, and therefore while the amendment or variation may be of a size or nature

that does not trigger the application of Rule 5.2.1, it is the full Material Transaction that should be considered, which means shareholder approval is required.

If Issuers are unclear about how Rule 5.2.1 applies to renewal, amendments, or variations, they can contact NZX to discuss further.

### **3.2.9 Exceptions**

There are certain exceptions to ~~the Material Transaction~~ Rule 5.2.1. These ~~include:are~~ addressed below.

~~for Issuers~~ Bank transactions

Rule 5.2.1 does not apply to any transaction entered into by an Issuer with a Bank as principal, on arm's length terms and in the normal course of the Bank's banking business (see Rule 5.2.2(a)).

Issues of Financial Products and acquisitions of Equity Securities

• For an Issuer issuing Financial Products, or acquiring its Equity Securities, with a market value above 10% ~~AMC:Average Market Capitalisation~~, Rule 5.2.1 does not apply to the following transactions:

- any placement of ~~equity securities~~Equity Securities (Rule 4.5) or issue of ~~debt securities~~Debt Securities where the market value of the Financial Product being issued to any Related Party (individually or in aggregate) or Employee does not exceed 10% ~~AMC is excluded;~~of the Issuer's Average Market Capitalisation (see paragraph (b) of the definition of Material Transaction),
- any issue or acquisition of Financial Products (or the provision of financial assistance in connection with the purchase of Financial Products) where the Issuer gives each holder of the Financial Products of the Class in question the opportunity to receive the same benefit in respect of each Financial Product held (see Rule 5.2.2(b)),
- any issue of Equity Securities under a Share Purchase Plan ~~or Dividend Reinvestment Scheme is excluded;~~under Rule 4.3.1(c) or a dividend reinvestment plan (under Rule 4.8) (see Rule 5.2.2(c)), or
- the issue of Equity Securities under an Accelerated Offer if the certification in Rule 5.2.2(d)(i) is provided ~~is excluded.~~(see Rule 5.2.2(d)).

• anyRule 5.2.1 does not apply to the issue of Debt Securities where the nominal amount of Debt Securities being issued to any Related Party or Employees does not exceed 10% of ~~AMC is excluded;~~the Issuer's Average Market Capitalisation (see paragraph (c) of the definition of Material Transaction).

AnyRelationship between Rule 4.5 and paragraph (b) of the definition of Material Transaction

When calculating whether a placement under Rule 4.5 is a Material Transaction, Related Party involvement is considered on an aggregate basis for all Related Parties that are participating. A placement will be a Material Transaction if aggregate Related Party involvement exceeds 10% of the Issuer's Average Market Capitalisation.

**Example:**

An Issuer wishes to place \$15 million of new Financial Products under, and in compliance with, Rule 4.5. The Issuer has an Average Market Capitalisation of \$100 million.

*Situation One:*

One Related Party, Person A, proposes to participate in the placement. The Issuer proposes to allocate, in compliance with Rule 4.5, \$4 million of Financial Products to Person A.

*Situation Two:*

Three Related Parties, Person A, Person B and Person C, propose to participate in the placement. The Issuer proposes to allocate, in compliance with Rule 4.5, \$4 million of Financial Products to Person A, \$6 million of Financial Products to Person B and \$5 million of Financial Products to Person C.

**Application:**

*Situation One:*

The aggregate Related Party participation in the placement is \$4 million. This is less than 10% of the Issuer's Average Market Capitalisation and, accordingly, the placement is not a Material Transaction for the purposes of Rule 5.2.1.

*Situation Two*

The aggregate Related Party participation in the placement is \$15 million. This is more than 10% of the Issuer's Average Market Capitalisation and, accordingly, the placement is a Material Transaction for the purposes of Rule 5.2.1 and shareholder approval is required.

Distributions

Rule 5.2.1 does not apply to the payment of a distribution by an Issuer where the Issuer gives each holder of Financial Products of the Class in question the opportunity to receive the same benefit in respect of each Financial Product held (see Rule 5.2.2(b)).

### Indemnification of Directors or Employees

- Rule 5.2.1 does not apply to any indemnification of a Director or Employee of the Issuer (or a Related Body Corporate) where at the time the indemnity is to be granted the relevant Director or Employee has not been involved in circumstances in any capacity which are likely to result in a claim under the indemnity ~~is excluded;~~(see Rule 5.2.2(f)).
- ~~for providing or obtaining any services (including the underwriting of Financial Products or services as an Employee) where the gross costs to the Issuer in any financial year is likely to exceed an amount equal to 1% of AMC:~~
  - ~~a contract where the gross cost to the Issuer in any financial year is \$250,000 or less is excluded;~~

### Employment agreements

- Rule 5.2.1 does not apply to an employment agreement with a natural person who is not a Director of the Issuer ~~is excluded;~~ or (see Rule 5.2.2(h)).
- In addition, Rule 5.2.1 does not apply to an employment ~~contract~~agreement or contract for personal services where the ~~condition~~terms of the contract are set on arm's length commercial terms approved by the Issuer's Independent Directors, the certification and disclosure requirements in Rule 5.2.2(e) are satisfied ~~is excluded,~~ and material particulars of the contract (including the Issuer's use of this exception) are disclosed in the next annual report of the Issuer.
- ~~amalgamations of a wholly owned Subsidiary with another wholly owned Subsidiary with the Issuer is excluded;~~ or

### Low value transactions

Rule 5.2.1 does not apply to a transaction with a total value (or, where paragraph (e) of the definition of Material Transaction applies, gross cost to the Issuer in any financial year) of \$250,000 or less (see Rule 5.2.2(i)).

### Amalgamations, arrangements and compromises

- Rule 5.2.1 does not apply to arrangements, amalgamations or compromises under Parts 13 or 15 of the Companies Act ~~is excluded;~~ (see Rule 5.2.2(g)).

### **3.433.3 Who is a "Related Party"?**

The definition of Related Party is ~~purposely~~intentionally broad. It includes:

- the Issuer's ~~directors~~Directors and Senior Managers,
- ~~these persons~~ with a Relevant Interest in 10% or more of a ~~class~~Class of the Issuer's ~~voting securities,~~Equity Securities carrying Votes,

- Associated Persons of either the Issuer or those persons referred to above, ~~and~~
- a person in respect of whom there are current arrangements intended to result in that person becoming a Related Party of the Issuer at any time in the future. (other than as a consequence of the Material Transaction).

The diagram set out in Appendix 3 has been prepared to assist Issuers to identify their Related Parties.

The definition of Related Party includes a person who has been a Related Party at any time within the ~~6~~six months before the relevant Material Transaction, even if that person has ceased to be a Related Party at the time of the Material Transaction.

### 3.3.1 Timing

Issuers should determine whether or not a Related Party is a direct party or beneficiary of a guarantee or other transaction that is a Material Transaction before entering into that transaction. Issuers should allow sufficient time to make this determination to allow for any further administrative steps, including, where appropriate, holding a meeting of shareholders to ~~approve~~obtain prior approval to the transaction or negotiating the terms of the transaction so that it is conditional on shareholder approval.

Issuers should also continue to monitor any share price or foreign exchange movements when finalising a transaction, as the exact application of the Rules will not be determined until announcement (see paragraph 3.2.2 above in relation to Day A).

### 3.3.2 Treatment of Subsidiaries and Joint Ventures

Subsidiaries and incorporated and unincorporated joint ventures (**JVs**) will ~~generally be captured by Related Parties of the Associated Person-Issuer unless both A and B in the table below apply to the subsidiary or JV (see paragraph (f) of the definition, which means that Material Transactions between an Issuer and of Related Party).~~ If a subsidiary or JV would likely be captured by Rule 5.2.1. However, in many cases the other parties with interests in the subsidiary or the JV are bona fide arm's length commercial parties and not otherwise related to the ~~does not satisfy A and B then any Material Transaction between the subsidiary or JV, and the Issuer. Given the existence of additional parties the potential for undue influence from a related party is mitigated and the cost of requiring, requires~~ shareholder approval of these transactions is unlikely to be justified. under Rule 5.2.1, unless an exception applies.

~~In recognition of this, subsidiaries and JVs have been carved out of the Related Party definition in certain circumstances. A Subsidiary or JV will not be a Related Party of the Issuer if both A and B in the table below apply:~~

Entity	Issuer's interest ("A")	No other Related Party ("B")
--------	-------------------------	------------------------------

<b>Subsidiary</b>	The Issuer:	No other Related Party of the Issuer has or intends to obtain a material direct or indirect economic interest in the <del>entity</del> subsidiary/JV, other than: through the Issuer itself, or receiving reasonable director's fees or executive remuneration.
<b>Incorporated JV</b>	has at least 50% of the votes, or is entitled to at least 50% of the dividends, of the entity.	
<b>Unincorporated JV</b>	The Issuer is entitled to at least 50% of the income or profits, and the assets, of the JV.	

### **3.4 Disclosure of transactions with Related Parties**

#### **3.14 Continuous Disclosure – Rule 3.1**

An Issuer's decision to enter into a ~~related party transaction~~Material Transaction with a Related Party under Rule 5.2.1 will ~~almost certainly~~ require disclosure in accordance with the Issuer's continuous disclosure obligations under Rule 3.1. For further guidance on continuous disclosure, please refer to NZX's Guidance Note ~~Continuous Disclosure~~Continuous Disclosure.

#### **Rule 3.4 – Disclosure of Related Party Transactions - Rule 3.4**

Rule 3.4.1 requires Issuers to release details through MAP upon entering into certain transactions with Related Parties. This includes transactions which involve more than 5% of the Issuer's ~~AMC~~Average Market Capitalisation. However, if Rule 5.2.1 applies to the transaction, Rule 3.4.1 does not apply as Material Transactions with Related Parties must be disclosed under Rule 3.1.

#### **3.15.5 Shareholder approval**

##### Approval threshold

The resolution required to approve a ~~transaction~~Material Transaction with a Related Party for the purposes of Rule 5.2.1 is an ordinary resolution. This is a resolution passed at by a general meeting simple majority of the holders votes of financial products the shareholders who are entitled to vote and voting.

##### Voting restrictions

Voting restrictions are set out at Rule 6.3. For further guidance on what should be included in the notice of meeting, please refer to section 2.8 of this guidance note (which applies equally to Rule 5.2.1).

##### Additional information

~~In addition to the information set out in section 2.8 of this guidance note, the notice of meeting~~

In particular, the Related Party who is a party or beneficiary of the Material Transaction that is to be approved under Rule 5.2.1 is not entitled to vote on the approval resolution, nor is any

Associated Person of that Related Party (unless such Related Party or Associated Person is voting as a proxy for a person entitled to vote and under that person's express voting instructions).

#### NZX review and approval

The notice of meeting for the meeting where the resolution to approve a Material Transaction with a Related Party will be considered and voted on cannot be circulated to shareholders until NZX provides written confirmation that it does not object to the notice of meeting under Rule 7.1.1.

The notice of meeting, explanatory notes, Appraisal Report (discussed further below), proxy form and any other documents to be sent to shareholders with the notice of meeting must be provided to NZX in draft for review at least 10 Business Days (or such other time as NZX may prescribe or advice from time to time) before the notice of meeting and accompanying documents are proposed to be printed or sent to shareholders. The 10 Business Day review period will not start until NZX has received all documents in their proposed final form.

#### Approval resolution(s)

The Rules do not specify the terms of the resolution required under Rule 5.2.1. NZX considers that a resolution to the following effect will suffice:

*"That the [description of transaction / transaction described in the explanatory notes] is approved under and for the purposes of NZX Listing Rule [5.2.1]"*

Where multiple approvals are required under the Rules, the Companies Act and/or the Takeovers Code, NZX has no objection to the approvals being combined into the one resolution (or separate but cross-conditional resolutions) provided:

- the notice of meeting makes it clear which Rules, or sections of the Companies Act, or provisions of the Takeovers Code, approval is being sought under; and
- the voting restrictions for such Rules, sections of the Companies Act, or rules of the Takeovers Code, align.

#### Information to be contained in or included with the notice of meeting

Rule 7.8.2 requires each notice of meeting to contain or be accompanied by sufficient explanation, reports, valuations, and other information, as to enable a reasonable person entitled to Vote to understand the effect of the resolution proposed, including:

- the consequences if the resolution in questions is not passed, and
- a statement outlining who is subject to voting restrictions in relation to such resolution (if applicable).

To comply with Rule 7.8.2 when seeking shareholder approval to a Material Transaction with a Related Party, NZX will expect the notice of meeting to include a reasonable level of detail about the transaction. This may include (as applicable):

- identification of the Related Parties who are parties to the Material Transaction and why the Issuer considers that a Material Transaction with those Related Parties is appropriate,
- an explanation as to why an Appraisal Report was required and, if appropriate, a summary of the report's conclusions,
- an assessment of the financial effect of the transaction on the Issuer and on the interests of Financial Product holders,
- in the case of an acquisition, details of how the Issuer intends to pay for the acquisition,
- in the case of a disposal, details of what the Issuer intends to do with the proceeds of the disposal,
- the timetable for implementing the transaction,
- a prominent statement that the transaction requires shareholder approval under the Rules (or the Companies Act or Takeovers Code if applicable) and therefore may not proceed if that approval is not forthcoming, and
- a statement that NZX takes no responsibility for the contents of the notice, in the form required by NZX.

Issuers should also refer to NZX's Practice Note *Notice of Meeting*, which includes checklists of information NZX expects to be included in a notice of meeting.

If an Issuer seeks shareholder approval in advance of entering into a Material Transaction with a Related Party, NZX will require the approval to sufficiently define the scope of the transaction being approved in advance. An Issuer cannot obtain general shareholder approval to enter into a Material Transaction with a Related Party, without providing sufficiently specific details regarding the nature of the transaction to be pursued.

### Appraisal Report

The notice of meeting for the purposes of Rule 5.2.1 must be accompanied by an Appraisal Report. An Appraisal Report must be made by an independent appropriately qualified person previously approved by NZX (for more information about NZX's approval of appraisers, see NZX's Guidance Note *Approval of Appraisers*).

The Appraisal Report must comply with the requirements set out in Rule 7.10.2.



### Voting Restrictions

~~When voting on a resolution to approval a Related Party transaction under Rule 5.2.1, the Related Party who is a party or beneficiary of the transaction in question cannot vote, nor can any Associated Person of that Related Party (unless such Related Party or Associated Person is voting as a proxy for a person qualified to vote and under that person's express voting instructions). Other requirements~~

~~To the extent applicable, the notice of meeting should comply with the other provisions of Rule 7.8.~~

### Proxy forms

~~NZX expects Issuers to provide the proxy form to NZX for review with the notice of meeting. The proxy form must comply with Rule 7.9.~~

~~Voting restrictions are set out at Rule 6.3.~~

### **3.173.6 Waiver of Rule 5.2.1**

~~The purpose of the requirement to obtain shareholder approval of a Material Transaction with a Related Party is to ensure that shareholders have an opportunity to consider, and vote on, such transactions where there is, or may be a perception of, the potential for undue influence by a Related Party on an Issuer's decision to enter into a transaction or agree to its terms. NZX considers this to be a fundamental shareholder protection. NZX is therefore very unlikely to grant waivers from this requirement and considers that the threshold for the granting of a waiver is very high.~~

~~NZX may waive the requirement to obtain shareholder approval of a Material Transaction with a Related Party if it is satisfied that the personal connections with, or involvement or personal interest of, any Related Party are immaterial or ~~plainly unlikely to have~~ not influenced the promotion of, or the decision to enter into, the transaction or its terms and conditions. NZX will also require an Issuer to establish that the granting of the waiver is in the best interests of the Issuer, and the shareholders who are not precluded from voting under Rule 6.3 (being the Related Party and its Associated Persons). However, even where these factors are made out NZX retains the right to decline a waiver application.~~

### Requirements when applying for a waiver

~~When making an application for a waiver from Rule 5.2.1 ~~on~~, Issuers should consider the policy of Rule 5.2.1 (as set out in paragraph 3.1) and explain both why any waiver does not offend the policy, and why the granting of a waiver is in the best interests of the Issuer, and those grounds, ~~shareholders who are not precluded from voting under Rule 6.3. Along with consideration of the policy (which includes shareholder protection),~~ NZX will expect to receive submissions establishing (as applicable):~~

- that entry into, and the terms of, the Material Transaction were negotiated on an arm's length basis,

- the basis on which the agreed consideration for the transaction has been determined to support the view taken by the non-interested Directors, including where applicable whether third-party validation of the proposed consideration has been obtained,
- that the Related Party has not and will not be in a position to exercise undue influence over the Issuer's decision to enter into the transaction,
- ~~entry into the transaction is in the best interests of the Issuer and its non-related shareholders, and~~
- explanation of why the granting of the waiver is in the best interests of (i) the Issuer and (ii) the shareholders who are not prevented from voting under Rule 6.3. A summary of the grounds for this view will be required to be included in the certificate supporting the waiver and released to the market (which is discussed in the section below describing the likely conditions for a waiver),
- entry into the transaction is in the best interests of (i) the Issuer (ii) its shareholders as a whole, and (iii) the shareholders who are not prevented from voting under Rule 6.3. A summary of the grounds for this view will be required to be included in the certificate supporting the waiver and released to the market (which is discussed in the section below describing the likely conditions for a waiver), and
- if applicable, that the terms of the transaction are not materially different to similar transactions entered into with non-related parties.

The Issuer should also clearly explain what information will be released to market about the Material Transaction. An applicant can also usefully provide a draft announcement for background information.

If applying for a waiver, NZX requires detailed information and will likely ask for further information through the waiver consideration process. NZX relies on the veracity of submissions from Issuers but may also ask for further supporting information.

All waiver decisions summarise the key information submitted by the Issuer. Any waiver decisions are based on the facts as presented to NZX, and will no longer apply if the information is not, or ceases to be, full and accurate in all material respects.

#### Likely conditions to any waiver

When granting a waiver from Rule 5.2.1, NZX will likely make it conditional upon certain matters. These conditions reflect the fact that shareholders will not have the ability to vote on the Material Transaction, and also that an Appraisal Report will not be published with a notice of meeting, where a waiver is granted. The likely conditions are as follows:

- ~~the non-interested directors of the Issuer certifying that (as appropriate):~~
  - (a) \_\_\_\_\_ the terms of the Material Transaction have been entered into, and negotiated, on an arm's length commercial basis,

~~⊖(b) the non-interested directors of the Issuer certifying that the Issuer was not influenced to enter into the Material Transaction by the Related Party, ~~and~~~~

~~(c) the non-interested directors of the Issuer certifying that the granting of the waiver is in the best interests of:~~

~~i. the Issuer, and~~

~~ii. the Issuer's shareholders who are not precluded from voting under Rule 6.3,~~

~~(d) the non-interested directors of the Issuer certifying that the entry into the Material Transaction is in the best interests of:~~

~~i. the Issuer,~~

~~⊖ii. all of the Issuer's shareholders, and~~

~~(a) the waiver, its conditions and implications being disclosed in the Issuer's next annual report.~~

~~A variation or a renewal of a related party transaction is itself a related party transaction for which a waiver would be available.~~

- iii. the Issuer's shareholders who are not precluded from voting under Rule 6.3,
- (e) the non-interested directors include in the certificate a summary of the core grounds for the certifications given under each limb of conditions (a), (b), (c), and (d), described above, and
- (f) the waiver, its conditions and implications being disclosed in the Issuer's next annual report.

Issuers should submit draft certification to NZX when applying for a waiver. While NZ RegCo does not approve the certificate, it forms an important part of the factual matrix on which NZ RegCo bases its decision as to whether to grant waiver relief. A waiver will be inapplicable if the information it is based upon is not, or ceases to be, full and accurate in all material respects.

The requirement for the certification to include a summary of the core grounds on which the certificate is given (including why the non-interested directors have determined that the transaction, and granting of the waiver, are in the best interests of the issuer and its shareholders), is an important shareholder protection. This summary must address the core grounds applicable to each limb of the certification.

NZ RegCo will publish the certification to market at the time NZ RegCo releases its waiver decision, reflecting the importance of shareholders being provided with transparency as to why certain Board decisions have been made.

#### Disclosure of waiver decisions

As contemplated by Rules 9.7.2 and 9.7.4, NZX will usually publish waiver decisions through the Market Announcement Platform over the Issuer's ticker and the NZ RegCo ticker. Ordinarily, this will occur on announcement of the relevant transaction. The waiver decision will set out facts of the application and grounds for the decision unless the affected Issuer establishes satisfactory grounds for maintaining confidentiality, or NZX elects at its sole discretion not to publish the decision.

As noted in section 3.6, NZ RegCo will usually release the certifications that are to be provided to support the waiver application to the market at the time NZ RegCo releases its waiver decision.

Issuers should be mindful that when disclosing all Material Information relating to the transaction, that if grounds for a waiver are made out, shareholders will not receive a notice of meeting or appraisal report. With no notice of meeting, it is likely that shareholders will have less information available and therefore will be less able to assess the impact of the transaction on the Issuer.

## 4. Contact us

If you have any questions on the matters in this guidance note, please contact NZ RegCo at [issuer@nzregco.com](mailto:issuer@nzregco.com) or (04) 495 2825. However, it is the issuer's obligation to comply with the ~~continuous disclosure rules~~ Rules and any assistance from NZ RegCo should not be taken to constitute legal advice on the ~~issuer's~~ Issuer's obligations.



## Appendix 1: Relevant Listing Rules

### Glossary

#### Aggregate Net Value

means the net value of the relevant assets calculated as the greater of:

- (a) the net tangible asset value or, for leased assets, the value of the right of use (in each case, from the most recently published financial statements of the relevant Issuer, if applicable), or
- (b) market value.

#### Associated Person

a person (**A**) is associated with, or an **Associated Person** of, another person (**B**) if:

- (a) A is able, directly or indirectly, to exert a substantial degree of influence over the activities of B (or vice versa),
- (b) B is a body corporate and A has the power, directly or indirectly, to exercise, or control the exercise of, more than 50% of the Votes attaching to the Financial Products of B (or vice versa),
- (c) A and B are Relatives or Related Bodies Corporate,
- (d) A and B are partners to whom the Partnership ~~Act 1908~~ Law Act 2019 applies,
- (e) A is a director or Senior Manager of B (or vice versa), or
- (f) A and B are acting jointly or in concert,

except that:

- (g) A is not an Associated Person of B merely because:
  - i. A acts as a professional or business adviser to B, without a personal financial ~~interest~~ interest in the outcome of that advice,
  - ii. A's ordinary business includes dealing in Financial Products on behalf of others and A is acting in accordance with the specific instructions of B,
  - iii. A acts as a proxy or representative of B for the purposes of a meeting of holders of

- iv. there is another person with which A and B are both associated,
- (h) persons will not be Associated Persons if NZX makes a Ruling that they are not Associated Persons.

**Average Market Capitalisation**

means, in relation to an Issuer, the Average Market Price multiplied by the number of Quoted Equity Securities carrying Votes on Day A.

**Average Market Price**

means, on Day A, the lesser of the volume weighted average price of an Issuer's Quoted Equity Securities (or, when calculating a Minimum Holding, the relevant Financial Product) calculated from trades through the Main Board over the following two periods:

- (a) 20 Business Days before Day A, or
- (b) 5 Business Days before Day A.

If there are no trades in either period, the last traded price.

**Gross Value**

means the gross value of the relevant assets calculated as the greater of:

(a) the gross asset value (or, for leased assets, the value of the right of use) from the most recently published financial statements of the relevant Issuer, if applicable, or

(b) market value.

**Material Transaction**

means a transaction, or a related series of transactions, whereby an Issuer:

- (a) buys, acquires, gains, leases (as lessor or lessee), sells or otherwise disposes of, assets having an Aggregate Net Value above 10% of the Issuer's Average Market Capitalisation,
- (b) issues its own Financial Products, or acquires its own Equity Securities, having a market value above 10% of the Issuer's Average Market Capitalisation (except where Rule 4.5 applies or in the case of an issue of Debt Securities, in which case only the market value of Financial Products being issued to any Related Party or to any Employees of the Issuer are to be taken into account),
- (c) borrows, lends, pays or receives money, or incurs an obligation of an amount above 10% of the Average

Market Capitalisation of the Issuer (except in the case of the issue of Debt Securities, in which case only the nominal amount of Debt Securities being issued to any Related Party or to any Employees of the Issuer are to be taken into account)).

- (d) enters into any guarantee, indemnity, underwriting, or similar obligation, or gives any security, which could expose the Issuer to liability above 10% of the Average Market Capitalisation of the Issuer,
- (e) provides or obtains any services (including the underwriting of Financial Products or services as an Employee) where the gross cost to the Issuer in any financial year is likely to exceed an amount equal to 1% of the Average Market Capitalisation of the Issuer, or
- (f) undertakes an amalgamation, except for amalgamations of a wholly owned Subsidiary with another wholly owned Subsidiary or with the Issuer.

### **Related Party**

means a person who, at the time of a Material Transaction, or at any time within the previous six months, was:

- (a) a Director or Senior Manager of the Issuer or any of its Subsidiaries,
- (b) the holder of a Relevant Interest in 10% or more of a Class of Equity Securities of the Issuer carrying Votes,
- (c) an Associated Person of the Issuer or any of the persons referred to in (a) or (b), except where the person becomes an Associated Person as a consequence of the Material Transaction, or
- (d) a person in respect of whom there are arrangements which are intended to result in that person becoming, or expected to become, a person described in (a), (b), or (c) other than as a consequence of the Material Transaction,

but a person is not a Related Party of an Issuer if:

- (e) the only reason why that person would otherwise be a Related Party of the Issuer is that a Director or Senior Manager of the Issuer is also a Director of that person, so long as:



- (i)- the proportion of Directors of the Issuer who are also Directors of that person is one third or less, and
  - (ii)- no Director or Senior Manager of the Issuer has a material direct or indirect economic interest in that person, other than receiving reasonable Director's fees or executive remuneration, or
- (f) that person is a Subsidiary or incorporated joint venture of, or unincorporated joint venture participant with, the Issuer and:
- (i)- no Related Party of the Issuer has or intends to obtain, other than through the Issuer itself, a material direct or indirect economic interest in that Subsidiary or joint venture other than receiving reasonable Director's fees or executive remuneration, and
  - (ii)- the Issuer has at least 50% of the Votes in or is entitled to at least 50% of the dividends declared or paid by the Subsidiary or incorporated joint venture or is entitled to at least one half of the income or profits, and the assets, of the unincorporated joint venture (if and when distributed).

## 5.1 Disposal or Acquisition of Assets

5.1.1 An Issuer must not enter into any transaction, or a related series of transactions, to acquire, sell, lease (whether as lessor or lessee), exchange, or otherwise (except by way of charge) dispose of assets where the transaction or related series of transactions:

- (a) would significantly change, either directly or indirectly, the nature of the Issuer's business, or
- (b) involves a Gross Value above 50% of the Average Market Capitalisation of the Issuer,

unless the transaction, or related series of transactions, is:

- (c) approved by an Ordinary Resolution, or a special resolution if approval by way of special resolution is required under section 129 of the Companies Act 1993, or
- (d) conditional upon such approval required by paragraph (c) above.

5.1.2 Rule 5.1.1 does not apply to:

- (a) a takeover offer made by an Issuer:
  - (i) to a Code Company in accordance with the Takeovers Act 1993 or by a scheme of arrangement under Part 15 of the Companies Act 1993,
  - (ii) to an Issuer which is covered by Appendix 3 of these Rules, in accordance with the relevant provisions in the Governing Document of that other Issuer which complies with Appendix 3, or
  - (iii) to any person, in accordance with the takeover law of a jurisdiction other than New Zealand applicable to that person where this provides, in the opinion of NZX, a similar or greater level of protection to the recipients of the offer as the Takeovers Code or Appendix 3,
- (b) any transaction entered into by the Issuer with a Bank as principal, on arm's length terms and in the ordinary course of the Bank's banking business, or
- (c) an issue of Financial Products for cash which does not significantly change the nature of the Issuer's business.

## 5.2 Transactions with Related Parties

5.2.1 An Issuer must not enter into a Material Transaction if a Related Party is, or is likely to become:

- (a) a direct party to the Material Transaction, or
- (b) a beneficiary of a guarantee or other transaction which is a Material Transaction, unless that Material Transaction is approved by an Ordinary Resolution (such resolution being subject to the voting restrictions in Rule 6.3) or conditional on such approval.

5.2.2 Rule 5.2.1 does not apply to:

- (a) any transaction entered into by an Issuer with a Bank as principal, on arm's length terms and in the normal course of the Bank's banking business,
- (b) the issue, acquisition or redemption of Financial Products, or the provision of financial assistance in connection with the purchase of Financial Products, or the payment of a distribution, where the Issuer gives each holder of Financial Products of the Class in question the opportunity to receive the same benefit in respect of

each Financial Product held (except to the extent that an issue excludes holders outside New Zealand in accordance with Rule 4.4.1(e)),

- (c) the issue of Equity Securities by an Issuer under Rule 4.3.1(c) or Rule 4.8,
- (d) the issue of Equity Securities by an Issuer by way of an Accelerated Offer under Rule 4.3.1(a), provided that:
  - (i) Directors of the Issuer, excluding any Director that is an Associated Person of the Related Party, certify, in a form acceptable to NZX, that:
    - (A) the terms of the Accelerated Offer are fair, reasonable and in the best interests of the Issuer's Equity Security holders, other than the Related Party,
    - (B) the Issuer will pay and receive fair value under the Accelerated Offer,
    - (C) the Issuer was not unduly influenced in its decision to enter into the Accelerated Offer by the Related Party,
    - (D) the Related Party will ~~be~~ not be involved in, or influence, any allocation decision in relation to any bookbuild(s) undertaken in connection with the Accelerated Offer, and
    - (E) the Related Party will derive no benefit as a result of the Related Party relationship, other than solely through participation in the Accelerated Offer on the same terms and conditions as other Equity Security holders or as an underwriter or sub underwriter on commercial terms.
- (e) an employment contract or contract for personal services which is a Material Transaction, where:
  - (i) the terms of the contract are set on an arm's length, commercial basis and have been approved by the Independent Directors of the Issuer,
  - (ii) the Independent Directors approving the contract sign and provide to NZX (not for market release) a certificate stating Rule 5.2.2(e)(i) has been complied with, and
  - (iii) material particulars of the contract (including the Issuer's use of this exception) are disclosed in the next annual report of the Issuer,
- (f) indemnification of a Director or Employee of the Issuer, or a Director or Employee of a Related Body Corporate of the Issuer, which would be a Material Transaction, where, at the time the indemnity is to be granted, the relevant Director or Employee has not been involved in proceedings, threatened proceedings or

circumstances in any capacity which are likely to result in a claim by them under the indemnity,

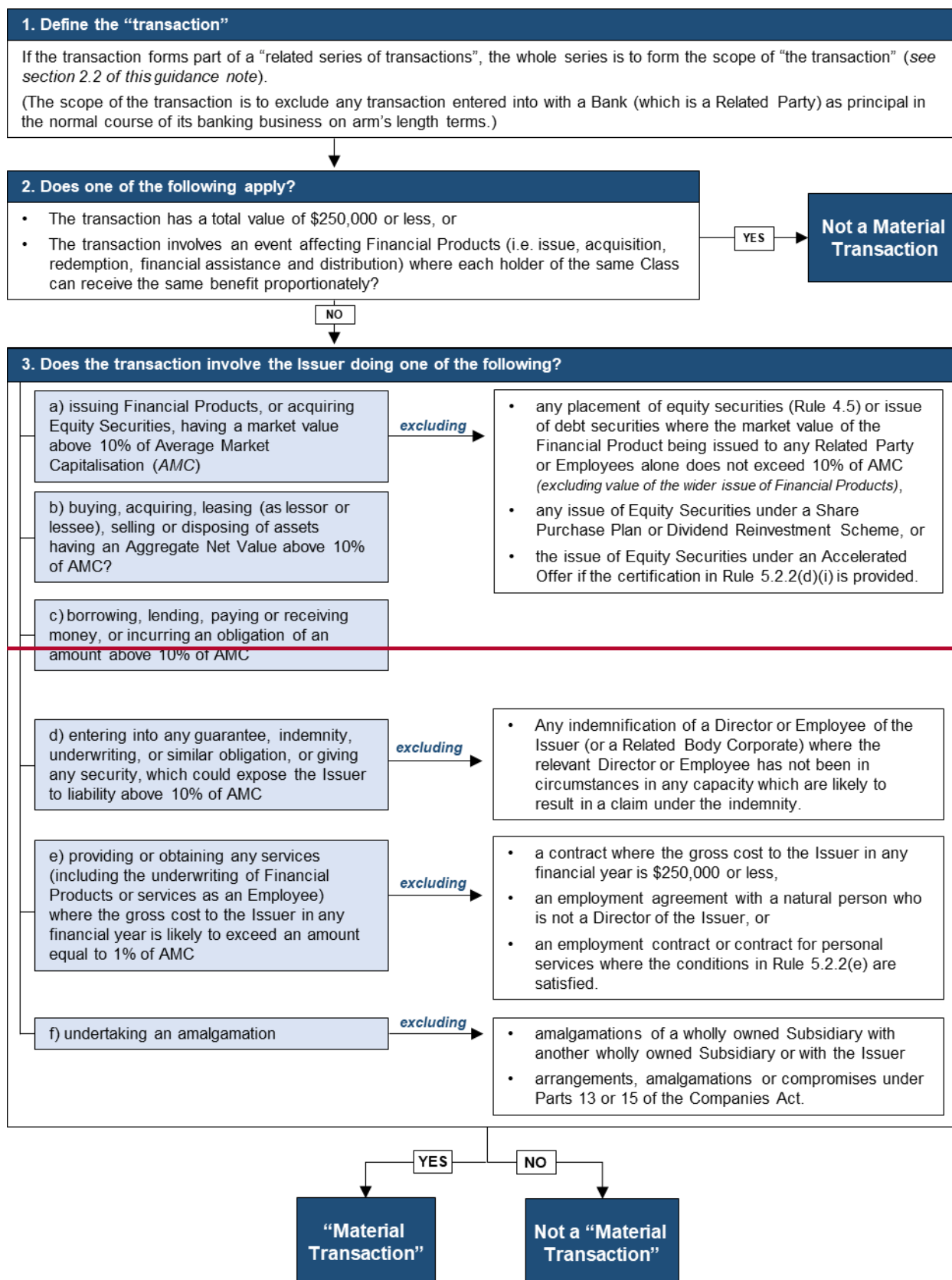
- (g) arrangements, amalgamations or compromises under Parts 13 or 15 of the Companies Act 1993,
- (h) a Material Transaction that is an employment agreement with a natural person who is not a Director of the Issuer, or
- (i) a Material Transaction with:

~~(i)~~ (i) a total value of, or

~~(ii)~~ (ii) in the case of paragraph (e) of the definition of Material Transaction, a gross cost to the Issuer in any financial year of, ~~\$250,000 or less.~~

\$250,000 or less.

## Appendix 2: Material Transaction Flow Chart



### 1. Define the "transaction"

If the transaction forms part of a "related series of transactions", the whole series is to form the scope of "the transaction" (see section 2.3 of this guidance note).

(The scope of the transaction is to exclude any transaction entered into with a Bank (which is a Related Party) as principal in the normal course of its banking business on arm's length terms.)

### 2. Does one of the following apply?

- The transaction has a total value of \$250,000 or less, or
- The transaction involves an event affecting Financial Products (i.e. issue, acquisition, redemption, financial assistance and distribution) where each holder of the same Class can receive the same benefit proportionately?

YES

**Not a Material Transaction**

NO

### 3. Does the transaction involve the Issuer doing one of the following?

a) issuing Financial Products, or acquiring Equity Securities, having a market value above 10% of Average Market Capitalisation (AMC)

excluding

- any placement of equity securities (Rule 4.5) or issue of debt securities where the market value of the Financial Product being issued to any Related Party or Employees alone does not exceed 10% of AMC (excluding value of the wider issue of Financial Products);
- any issue of Equity Securities under a Share Purchase Plan or Dividend Reinvestment Scheme, or
- the issue of Equity Securities under an Accelerated Offer if the certification in Rule 5.2.2(d)(i) is provided.

b) buying, acquiring, leasing (as lessor or lessee), selling or disposing of assets having an Aggregate Net Value above 10% of AMC?

c) borrowing, lending, paying or receiving money, or incurring an obligation of an amount above 10% of AMC

d) entering into any guarantee, indemnity, underwriting, or similar obligation, or giving any security, which could expose the Issuer to liability above 10% of AMC

excluding

- Any indemnification of a Director or Employee of the Issuer (or a Related Body Corporate) where the relevant Director or Employee has not been in circumstances in any capacity which are likely to result in a claim under the indemnity.

e) providing or obtaining any services (including the underwriting of Financial Products or services as an Employee) where the gross cost to the Issuer in any financial year is likely to exceed an amount equal to 1% of AMC

excluding

- a contract where the gross cost to the Issuer in any financial year is \$250,000 or less,
- an employment agreement with a natural person who is not a Director of the Issuer, or
- an employment contract or contract for personal services where the conditions in Rule 5.2.2(e) are satisfied.

f) undertaking an amalgamation

excluding

- amalgamations of a wholly owned Subsidiary with another wholly owned Subsidiary or with the Issuer
- arrangements, amalgamations or compromises under Parts 13 or 15 of the Companies Act.

YES

**"Material Transaction"**

NO

**Not a "Material Transaction"**

## Appendix 3: Related Party Flow Chart

