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Disclaimer

This Guidance Note has been issued to promote commercial certainty and assist market participants. The Guidance Note sets out NZX's general approach to the subject, but is not to be regarded as a definitive statement of the application of the Rules in every situation. Guidance Notes do not constitute legal advice and are only a guide to NZX's policy and practice. NZX recommends that Issuers take advice from qualified professionals.

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GUIDANCE NOTE – DEBT SECURITY ISSUES

Introduction

One of the functions NZX Regulation ("NZXR") undertakes in its role as regulator of the markets that NZX operates is to review Offering Documents and advertisements submitted by issuer's who seek to be listed on those markets.

NZXR's authority to review and approve Offer Documents can be found in NZDX Listing Rule ("Rule") 6.1.1. In exercising its discretion to approve Offer Documents an issuer must satisfy NZXR that those Offer Documents comply with both the Listing Rules and applicable Securities legislation and that the disclosure contained in those documents is otherwise adequate.

In a number of recent offers of debt securities NZXR has been concerned at the quality of disclosure contained in the initial draft of Offer Documents submitted to NZXR for its review. In particular NZXR is concerned that debt issuer's are not making clear and prominent disclosure of the key terms (and risks) of the offer.

The purpose of this Guidance Note is to set out NZXR's expectations as to the quality, prominence and placement of these key terms in Offer Documents for debt issues submitted for NZXR review under Rule 6.1.1.

The Review Process

When NZXR reviews Offer Documents it consults members of the NZX Listing Sub-committee ("LSC"), which is currently a four member panel of individuals with long and valuable experience in the securities markets, finance, accounting and investment banking fields. Usually two members of the LSC review an Offer Document.

An NZXR solicitor also reviews the Offer Document providing additional input in relation to any waivers of the Listing Rules applicable to the offer and also for Securities Act and other securities laws compliance.

Once an initial review is complete, the NZXR solicitor will advise the Issuer (usually via the solicitors for the Issuer) of required amendments before NZXR approval of the document will be provided. NZXR may also provide suggestions for improvement of the Offer Documents. Issuers should allow sufficient time in their timetables for this review and feedback to be conducted.

Rules and Other Legal Authority

NZX Regulation administers the Listing of a new Issuer under the following Rules:

Rule 5.1 – Listing: This Rule sets out who may apply for Listing and the information required by NZX.

Rule 5.2 – Quotation of Securities: This Rule sets out the process for application for Listing (via a Market Participant) and the content of the application including the draft Offer Document with the timetable required by Rule 7.1.5(b).

Rule 6.1 – Approval of Documents: This Rule gives NZX authority to review and approve any Offer Document and Rules 6.1.4 and 6.1.5 set out the timing (10 Business Days) and procedure for the review by NZX Regulation.

Rule 7.1 – Offering Documents and Advertisements: This Rule addresses the requirements of Offer Documents and advertisements and the requirement for NZX approval. Rule 7.1.6 refers specifically to Rule 6.1 and gives NZX the authority to make it a condition of its approval that the document: “contain such information, in addition to the information referred to in the Rule, as NZX in its **discretion** considers appropriate.”

Rules 7.1.7 to 7.1.17 set out specific requirements that each Offer Document shall contain and these rules reflect securities law to a large degree including the requirement for Offer Documents to contain a statement required by Regulation 23 of the Securities Regulations.

Generally the NZX Regulation solicitor will consider the document’s compliance with the requirements of the Rules and the requirements of the Securities Act 1978, Securities Regulations 1983, Companies Act 1993 and other relevant legislation. However ultimate responsibility for compliance with securities law and all other laws rests with the Issuer itself. Furthermore the Companies Office also reviews any registered prospectus (Offering Document).

NZXR’s General Requirements

In addition to ensuring that all of the requirements of the Rules are addressed in an Offering Document NZXR will generally also require disclosure of the following matters:

- Waivers or rulings issued by NZXR that are applicable to the offer of securities should be clearly outlined along with an explanation of how those waivers affect the rights of subscribers.
- All references to NZX or markets operated by NZX (NZSX, NZDX and NZAX) should be set out as follows:
 - o NZX should be defined as New Zealand Exchange Limited and accordingly referred to in the Offering Document as a proper noun (ie: “NZX”, not “the NZX”)
 - o Markets should be defined as per the following example: “NZDX means the market for debt securities operated by NZX” and may be referred to as a common noun.

NZXR’s Requirements for Prominent and Clear Disclosure

NZXR often encounters the same issues in its review of Offer Documents with respect to the disclosure of **key elements** of debt security offers. As noted above NZXR seeks to uphold the integrity of its markets by ensuring a high standard of disclosure in an Offering Document of the fundamental elements of a security. Whilst NZXR does not ‘merit check’ Issuers in its review of Offering Documents (consistent with the policy in the Foreword to the Rules), NZXR does seek to ensure that investors have clear, unambiguous disclosure to enable them to make an unfettered assessment of both the **risks** and **return** of an investment.

Accordingly whilst Issuers are required to comply with securities legislation in the preparation of the offer documents, this compliance may be achieved without the clear, unambiguous and prominent disclosure of the material terms that NZXR will require prior to its approval of the Offer Document.

The Offering Document must contain clear, unambiguous and prominent disclosure of the material terms of the offer to enable investors to make an informed decision based on clear and concise disclosure.

Usually this will require the disclosure within the first 5 pages of the Offer Document. The nature of the disclosure required will vary depending on the terms of the offer. Set out below are some examples of the disclosure NZXR has required.

Examples of Disclosure NZXR has Required

Special Purpose Vehicle ("SPV") debt issuers:

- Required that debt issuing subsidiary company SPVs to outline clearly for the benefit of investors how the SPV fits into the parent's group of companies.
- Required that SPVs, when relying on the strength of the balance sheet of the parent to clearly set out how the liabilities of the SPV to its investors relate to the parent.
- Any other reliance on features of the parent company (e.g. credit rating or market reputation) must be explained in the full context of the relationship between the parent and the SPV.
- Any guarantee or security offered by the parent in favour of investors in the SPV must be clearly explained and prominently disclosed. In particular any subordination of guarantee obligations must be clearly and prominently disclosed.

Preference Share issues with debt characteristics:

- The priority of payment of dividends on preference shares must be set out prominently and clearly.

Governance of the Issuer:

- If a trustee is appointed by the Issuer, in addition to the Securities Act and Securities Regulations requirements, a clear statement of the trustee's role in supervising the Issuer is required.
- In the case of preference share issues, the constitutional arrangements relating to the security of the investment and payment of the return should be disclosed prominently. NZX will generally rule that Rule 3.2 will apply to the Constitution relating to a preference share issue with debt characteristics.

Prevalent Disclosure Issues:

- Often the details of key elements of a security (e.g. the information normally contained in a term sheet for the security) will be buried deep in the document. NZXR usually requires that key elements are set out within the first 5 pages of the document. In some cases it will be appropriate to include a summary of the key elements and cross reference to the expanded explanation.
- Any loans or other liabilities or obligations (or the ability to create such obligations) of the Issuer that rank ahead of the securities being offered need to be clearly and prominently disclosed. This is particularly the case where securities are referred to as being "First Ranking".
- The priority of payment of returns to investors must be clearly outlined. Any prior ranking obligations (and the ability to create prior ranking obligations in the future) of the Issuer or parent must be set out up front
- If an Issuer intends conducting a 'book build' process to set the rate of return for the debt security, the method and timetable relating to the book build process must be clearly set out up front.

- The timing and method of the initial payment of interest (or other return) must be disclosed and explained. If the initial interest payment will be paid to the original subscriber (“ITOS”) it should be clearly disclosed.
- Any underwriting agreements and arrangements need to be disclosed to NZX, however, the underwriting arrangements need not always be disclosed in the offer document (unless required by the Securities Act and Regulations).
- An Issuer wishing to rely on a credit rating must clearly set out the current rating, the date the rating was given, the name of the rating agency providing the rating, the rating scale of which the Issuer’s rating forms part, and, if applicable any credit watch warning relating to the Issuer’s rating, the date on which it was given and the reasons for it.