

# Issuer Training Module – Continuous Disclosure

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Welcome to the NZ RegCo NZX Listing Rules Issuer Training Modules. This module covers matters relating to continuous disclosure for NZX issuers and provides an overview of the NZX Listing Rule requirements that apply. It is likely to take you 50 minutes to complete this module.

The key learning outcome for this module is to understand an issuer's continuous disclosure obligations under the NZX Listing Rules, and how to discharge them.

Issuers can direct any questions about this module to NZ RegCo Issuer Regulation – [issuer@nzregco.com](mailto:issuer@nzregco.com)


**Let's get started!**


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 NZX Issuer Training Modules – Continuous Disclosure

*Lesson 1 of 14*

# **Introduction**

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# Welcome to the Continuous Disclosure Module

The continuous disclosure rules explained in this module are short, but their impact is significant.

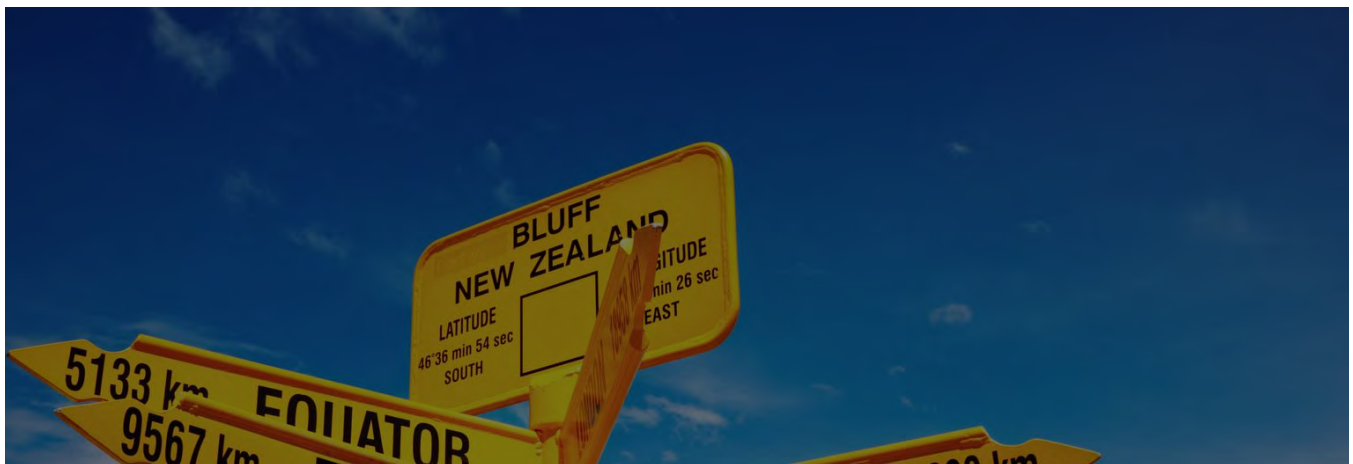
The core purpose of these rules is to ensure that there is an informed market for an issuer's financial products (e.g. shares or bonds). In this way, a fair, orderly and transparent market can operate as all market participants, not just insiders, have access to information material to pricing a

financial product by disclosure through the NZX Market Announcement Platform (MAP).

While there are safe harbours to disclosure, which we will also cover, this core purpose should be kept in mind when you are making disclosure decisions.

**i** In this module a question you'll frequently ask yourself *would this information impact my decision to buy or sell these financial products at the current price?*

CONTINUE





In this module, we cover:

- the core obligation to disclose material information promptly and without delay;
- the safe harbours to the disclosure rule;
- the obligation to prevent a false market;
- continuous disclosure compliance systems;
- NZ RegCo enquiries and enforcement.

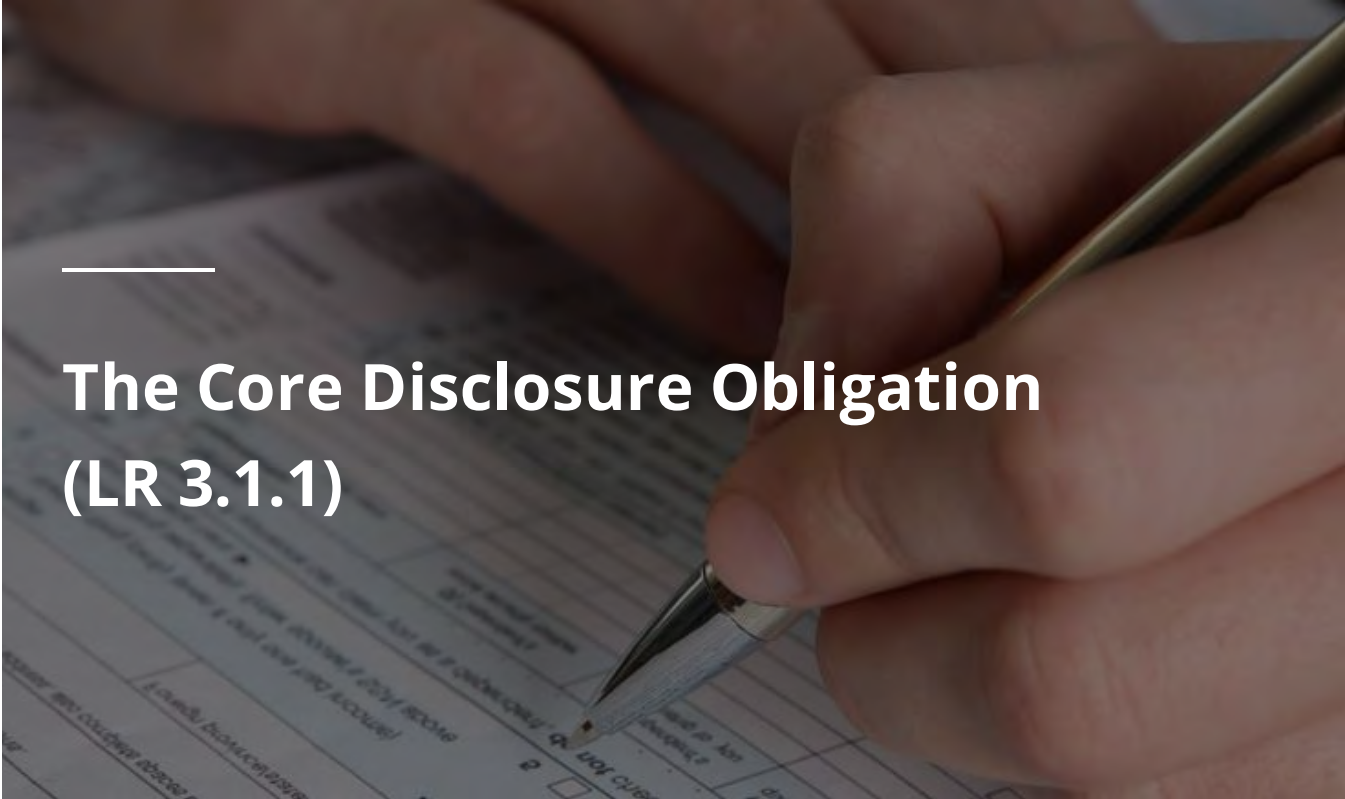


**For further information on continuous disclosure obligations, please refer to**

**the NZX Continuous Disclosure Guidance  
Note (CDG) –**

**<https://www.nzx.com/regulation/nzx-rules-guidance/nzx-mo-announcements/guidance-notes>**

**CONTINUE**



## **The Core Disclosure Obligation (LR 3.1.1)**

*Click on each arrow to view more.*

The core obligation in LR 3.1.1 is short and we've bolded the key components:





Once an Issuer becomes **Aware** of any **Material Information** relating to it, the Issuer must **promptly and without delay** release that **Material Information** through MAP, and not disclose any **Material Information** to the public, any other stock exchange ... or any other party without **first releasing that Material Information through MAP.**



This rule is subject to certain **safe harbours** to disclosure.

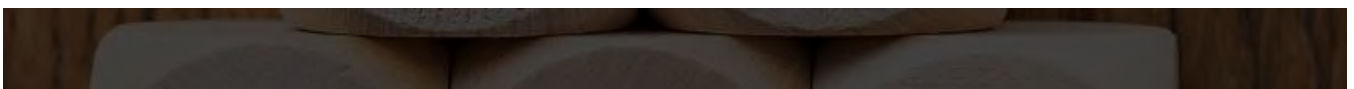


In the coming sections of this module, we will cover the high-level thinking process to use in working your way through these core concepts.



We will also include examples showing how the concepts work in practice. If you need to remind yourself of key concepts you can always come back to this section.

CONTINUE





## The Components of the Core Obligation

Below is the general thinking process for each NZX issuer on continuous disclosure in relation to give piece of information:

- 1 Do we have **Material Information**?
  - 2 Does **a safe harbour** to disclosure apply?
  - 3 If not, how quickly do I have to disclose (how soon is **promptly and without delay** and how does **awareness** impact this)?
-

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Are there any restrictions on how we disclose  
**(disclose through MAP first)?**

CONTINUE

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## Quick Check

Click and drag to complete the sentence:



Once an Issuer becomes  of any  relating to it,  
the Issuer must  release  
that  through MAP, and not disclose any   
to the public, any other stock exchange ... or any other party without first  
releasing that  through .

Material Information

Aware

promptly and without delay

MAP



Complete the content above before moving on.

# Material Information

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Material Information has a statutory definition from the Financial Markets Conduct Act 2013, which requires judgement on the part of management and directors. It is information that:



- a **reasonable person** would expect, if it were **generally available** to the market, to have a **material effect** on the price of the issuer's quoted financial products; and
- relates to particular issuers and financial products, rather than financial products or listed issuers generally.

Sometimes the matter will be obvious e.g. receipt of a takeover offer, but at other times judgement will be needed e.g. when material deviations to published earnings guidance would arise.





Issuers should be guided by the principle that if in doubt, disclose the information. NZX encourages issuers to take a cautious approach because this is a fundamental obligation that is monitored closely, and enforcement action can be taken.

**(i)** **As noted above, a good question to ask yourself is: *would this information impact my decision to buy or sell these financial products at the current price?***

CONTINUE

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## Material Information



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## Reasonable Person

The assessment of materiality is 'objective'. This means that it is to be judged from the perspective of an independent fair-

minded bystander (being the “**reasonable person**”). Not from the perspective of someone whose interests are aligned with the issuer or with the investment community.

NZX views a “reasonable person” to be a person who commonly invests in securities, and holds such securities for a period of time, based on their view of the inherent value of the securities.

Despite the focus being on inherent value, a “reasonable person” will still consider material, albeit temporary, effects on price.



**For example:**

An issuer has a factory that is damaged due to a severe weather event and will be at reduced capacity. Remediation will be covered by insurance and the issuer expects the factory to be at full capacity within 6 months. Revenue will be down 20% for the year with dividends reduced, but the issuer expects next year to be back to normal.

Even though, in the long run, the value of the business would recover, in the meantime there will be an objective material effect on price.

CONTINUE

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**Generally Available**

Information is generally available to the market (i.e. public)  
if:

- 1 it is information that has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in relevant securities, and since it was made known, a reasonable period for it to be disseminated among those persons has expired; or
- 2 it is likely that persons who commonly invest in relevant securities can readily obtain the information (whether by observation, use of expertise, purchase from other persons, or any other means); or
- 3 it is information that consists of deductions, conclusions, or inferences made or drawn from either or both of the kinds of information referred to in paragraphs (1) and (2).

*Click on each arrow to view more.*





A person who “commonly invests in securities” is considered to be a person who commonly buys and holds securities for a period of time. They have a level of sophistication that permits them to form a view of the inherent value of the securities, and make investment decisions on the basis of that view. They are not expected to be professional investors, or to derive the majority of their income from investing activity.



Despite the breadth of the above definition, it only goes so far, when thinking about information released other than through MAP, and even then, there are limitations.



Issuers should be mindful of 'general' vs 'specific' events. As noted above to be material information, information must relate to a particular issuer / financial products. But general information can produce specific effects.



**For example:**

A severe weather event may be widely

reported. But the specific impact on the issuer of that event is unlikely to be. An issuer will need to consider whether those specific effects require disclosure.

As an example, NZ RegCo has engaged with issuers in sectors such as horticulture and viticulture following severe weather events. While the severe weather event was a matter of common knowledge, individual issuers updated the market when they assessed the particular effects for them.

Although the full extent of the specific impact was unlikely to be known after these initial assessments, where it was sufficiently certain that there was a material effect, disclosure was made.

Note that follow up announcements would be needed as further specific material information arises on the impacts. We also cover further below, the obligation to release information promptly and without delay.

## CONTINUE

Information only available to a certain group of investors (for example, behind a paywall on a website), or which requires substantial collation or research, is not considered generally available. Therefore, you need to be comfortable that there is a clear and direct link between a material inference and the source public information for it to be generally available.



NZX cautions issuers in taking a view that the market will have correctly and fully deduced, concluded or inferred the impact of certain external events on the issuer without the issuer having provided disclosure of those impacts to the market such that its expectations are properly informed by them.



The general availability of information about a known external event, will not discharge an issuer's obligation to disclose the

effect of that event on an issuer where that effect is material information.



CONTINUE

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**Material Effect**

Determining a material effect on price requires judgement in marginal cases. It is not a hindsight test based on the degree of price movement occurring upon release of information, because issuers must make an assessment in real time as to whether they are required to disclose information. It is about what a reasonable person would expect in advance.

**NZX generally views evidence of a material effect to be:**

*Click on the flip cards to reveal.*



Price movement of  $> 10\%$   
= evidence of material  
effect.





Price movement of  $< 5\%$  = evidence of no material effect.



Price movement of  $5\% - 9.9\%$  = more likely than not to be evidence of material effect. Specific facts will determine if there is a material effect.

NZX considers this only as evidence and not determinative of whether something is material information as circumstances of issuers vary. A price change of  $5\%$  may

not be a “material effect” for an illiquid security, but for issuers with large market capitalisations and highly liquid securities, such price changes may be a “material effect”.

These guidelines don’t change the law – it is not a hindsight test. Issuers will need to familiarise themselves with the trading in the market for their securities and what is material to their business. Only with this understanding can a judgement be made on materiality.

**i** **If in doubt, take a cautious approach on this determination. See the CDG for further information on materiality in section 3.1.**

CONTINUE

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## Development Over Time

*Click on each plus icon to view more.*





In some situations, an issuer may receive information about an event over time. The issuer may not be able to make a determination regarding the materiality of the information based on the initial or piecemeal information alone. In such cases, no disclosure obligation will be triggered.



However, if an issuer requires further information in order to determine whether or not initial information is material information, the issuer must take reasonable steps to seek the additional information as soon as possible.



An issuer will have a disclosure obligation upon further information being received by the issuer allowing a determination that the information is material to be made. This need not be a perfect set of complete information, once there is sufficient reliable information to make a determination of materiality that is enough. See the example below on a cyber security incident.



There may also be situations where an issuer becomes aware that a material event is going to occur but the event has not yet actually occurred. An issuer will be required to disclose the event promptly and without delay upon becoming aware that the event will occur instead of waiting until the event has occurred.

For example, if an issuer becomes aware that it will breach a financial covenant, and the fact of such prospective breach is information that a reasonable person would expect to have a material effect on the price of that issuer's quoted financial products (i.e. the fact of the prospective breach is material information) the issuer must disclose

this information promptly and without delay, regardless of the fact that the breach has not actually yet occurred. The types of factors that issuers may need to consider in determining whether a particular breach or pending breach is material include:

- 1 the nature of the covenant;
- 2 the particular loan or facility involve;
- 3 the impact of the breach or pending breach;
- 4 discussions with the lender;
- 5 the issuer's current financial position.



**See section 3.3. of the CDG for further information.**

CONTINUE



## Examples of Material Information

Here are some examples of what will generally be considered to be material information:

- a change in the Issuer's financial forecast or expectation;
- a transaction for which the consideration payable or receivable is a significant proportion of the published value of the issuer's consolidated assets. Normally, an amount of 5% or more would be significant, but a smaller amount may be significant in a particular case;
- a recommendation or declaration of a dividend or distribution, or that a dividend or distribution will not be declared;
- giving or receiving a notice of intention to make a takeover.



As noted earlier, materiality can also vary depending on the market for the security. For example, material information for a debt security is likely to relate to the ability to pay interest and principal, but not a significant increase in sales where repayment ability is not in doubt.



**The CDG contains detailed guidance in this respect – see section 3.2.**

CONTINUE



## Recap of Material Information

We have now considered what is 'Material Information' and its components:

- a **reasonable person** would expect, if it were **generally available** to the market, to have a **material effect** on the price of the issuer's quoted financial products; and

- relates to particular issuers and financial products, rather than financial products or listed issuers generally.

Remember that the test is objective and is assessed from the point of view of a person who commonly invests in securities, and holds them for a period of time, based on their view of the securities' inherent value.

The exclusion for generally available (i.e. public information) is limited. If a general event has a specific material impact on the issuer, there can be non-public material information. Further, if relying on inferences from public information, be sure that there is a clear and direct link.

While 5% or more price movements are a rule of thumb, material effects vary depending on the issuer and the market for its securities. If in doubt, take a cautious approach.

CONTINUE



## Disclosure Example - Cyber Security

If a cyber security incident occurs, the impact can be difficult to assess and will likely develop over time as the extent of the breach becomes known. The CDG currently provides guidance on incomplete and developing events (at section 3.3 of the CDG) – a key principle for issuers to remember is that a developing situation is still capable of being material information.





That said, the same test and approach applies, including the safe harbours to disclosures (e.g. matters that are insufficiently definite as well as that the release of information may be a breach of law, such as where the breach concerns particularly sensitive information, an issuer may be under a statutory non-disclosure order).

An issuer should be monitoring the incident at each stage of its development for materiality, including cumulatively to

determine whether disclosure is required. Key stages include:

- when detected, what amount of information and what type of information has been compromised e.g. is it anodyne or is it sensitive personal information. In this respect, the nature of the issuer's business and the information it has will be relevant;
- as and when the malicious actor makes demands or acts, and there is a material disruption to operations; and
- when a serious harm notification must be made to the Privacy Commissioner and affected individuals. Of course, once this occurs confidentiality will be lost.

If the incident is initially known to be significant such that disclosure is required but the details for an announcement are not readily clear, engage with NZX for a trading halt. This should only be to gather key details, not obtain perfect information.



Care still has to be taken to announce information which does not transpire to be false or misleading as the incident develops.

**CONTINUE**

## Safe Harbours to Disclosure

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When an issuer has determined that it is aware of material information, it will need to assess whether a safe harbour exists which would prevent the need for disclosure through MAP.

Under LR 3.1.2 a three-part test applies, and all three limbs of the test must be satisfied for disclosure not to be required.

When any one of these three limbs ceases to apply disclosure must be made promptly and without delay (see next section for how this works in practice).

*Click on each arrow to view more.*

The three limbs of the safe harbour test are:

**One or more of the following applies:**

- release of the information would be a breach of law;
- the information concerns an incomplete proposal or negotiation;
- the information contains matters of supposition or is insufficiently definite to warrant disclosure;
- the information is generated for internal management purposes; or
- the information is a trade secret.

**The information is confidential, and its confidentiality is maintained.**



**A reasonable person would not expect the information to be disclosed.**



CONTINUE





## Safe Harbours

*Click the headings to view more.*

### **Breach of Law** —

The first limb has a number of components, and only one of them must apply:

**Breach of law:** this is a high threshold and would require breach of specific statute, regulation, rule, administrative order or court order binding on the issuer.

Breach of contractual obligation, such as a confidentiality provision, does not suffice. Therefore, use of this category is likely to be limited.



## **Incomplete Proposal** —

The first limb of the safe harbour test, continued:

**Incomplete proposal or negotiation:** this is one of the most commonly used categories and can cover significant mergers and acquisitions, major supply contracts, capital raisings etc.

Generally, the proposal or negotiation is complete when both parties sign an agreement to implement or give effect to the transaction (whether conditional or not). Further, where the proposal is unilateral, it is complete where the issuer adopts the proposal and commits to executing it.

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## **Insufficiently Definite** —

The first limb of the safe harbour test, continued:

**Matters of supposition or is insufficiently definite:** great care should be taken with this category as it usually goes hand in hand with information not being material in the first place.

If information is a supposition (i.e. a belief without proof of knowledge), or is indefinite (i.e. vague, unverifiable, highly uncertain etc), then there is a serious question as to whether it is actually material information.

Therefore, if this category is proposed to be relied upon it should be thoroughly tested, and also closely monitored in case proof arises and/or certainty increases.

### **Internal Management Information** —

The first limb of the safe harbour test, continued:

**Information for internal management purposes:** this is another frequently used category. This covers a great deal of information that an issuer routinely prepares or receives, such as management accounts, budgets, business plans, projections, meeting minutes, advice and so on.

But care is required here as a reasonable person may expect disclosure in some cases. *The classic example is when management accounts and projections show with reasonable certainty that published results guidance will be materially exceeded or missed (note – we discuss deviations from market expectations in more detail below).*

Senior management should always be asking itself, have we created material non-public information and does it require disclosure.

Again, ask yourself, would this information impact my decision to buy or sell these financial products at the current price?

*To continue with the projection example, where you know that projections will be materially exceeded or missed that will have an*

*impact on this decision.*

### **Trade Secrets** —

The first limb of the safe harbour test, continued:

**The information is a trade secret:** this category is designed to protect proprietary information which has economic value because it is kept secret. This is because release of such information would cause prejudice e.g. disclosure of inventions yet to be patented would prejudice that process.

This type of information should be readily identifiable (e.g. formulas, device blueprints, recipes etc).

### **Second Limb - Confidentiality** —

The Material Information must be subject to confidentiality obligations and must actually be kept confidential. In this context “confidential” has the sense “secret”.

Therefore, issuers should be comfortable that binding confidentiality obligations exist. But remember that issuers **cannot** contract out of their continuous disclosure obligations. Therefore, issuers should always ensure that their confidentiality obligations have carve outs for where disclosure is required by the Listing Rules. For example, where an issuer has an operating

subsidiary negotiating a material contract, there should be a carve out allowing its listed parent to make disclosure when required by the Listing Rules.

If information is 'leaked' disclosure will be required to NZX. This means that the information is received by any person who is not bound by any corresponding obligation of confidentiality with which that person is likely to comply.

Media speculation about a matter does not necessarily mean that information has not been kept in confidence. An assessment of whether information has been kept in confidence needs to be made on the particular facts of each situation.

It is nonetheless good practice, if negotiating a material transaction, to monitor the news, market price movements and inbound media / analyst queries for leaks.

Issuers should also have 'leak' announcements prepared for common leak scenarios e.g. one version if the existence of the transaction is leaked, one version if the price is leaked as well etc.

More detail on confidentiality is available in section 5.1 of the CDG.

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### **Third Limb - Reasonable Person** —

The third limb is that a reasonable person must not expect disclosure. NZX's view is that a "**reasonable person**" would not

expect the information to be disclosed if the release of the information would:

- unreasonably prejudice the issuer; or
- provide no benefit to a person who commonly invests in financial products.

NZX considers this limb has a narrow application in practice because, generally, information which falls in the specified categories under the first limb and is confidential will also satisfy the reasonable person requirement.


However, as noted above, this will not always be the case. *A good example is where management have reasonable certainty that published earnings guidance will be materially missed. While this may have been prepared for internal management purposes and be confidential, the reasonable person will expect disclosure.*

Remember also that in objectively considering 'unreasonable prejudice', issuers cannot cherry pick information and simply choose to withhold unfavourable news from the market. It is the investors' investment, and they should know if it is going badly.

CONTINUE

# Releasing Information Promptly and Without Delay

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Promptly and Without Delay

*Click on each plus icon to view more.*





Once an issuer is aware of material information that it cannot withhold under the safe harbours, it must release that information promptly and without delay.





What promptly and without delay means, will depend on the nature and complexity of the matter, where the information originated from, whether the information needs to be checked or verified, and the time to prepare an announcement so it is complete, accurate and not misleading.



Issuers will need to have systems in place which enable them to comply with their disclosure obligations, such as having people available to sign off on announcements, ensuring potentially material information is escalated to senior personnel in a timely manner who can then decide if disclosure or a trading halt is required. Inefficient systems that cause delays are not acceptable. See the section Continuous Disclosure Compliance Systems for details.



Where material events are predictable, NZX will expect near immediate disclosure e.g. getting close to agreeing/signing a material contract. Therefore, announcements should be prepared in anticipation of signing. Similarly, for internal matters such as scheduling Board meetings to approve an announcement, issuers should prepare draft announcements in advance.

**i For unexpected events or third party disclosures that may become material, NZX expects issuers to consider the use of trading halts to manage their obligations.**

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## Trading Halts

Examples of situations where trading halts may be appropriate while the facts are being gathered, are where a natural disaster occurs, where a material write down is more likely than not, or where unexpected information comes from a third party or event (e.g. cyber security incident).

Trading halts usually last for a maximum of 2 business days, so in rare circumstances a trading suspension may also be considered for severe incidents that require more time for the issuer to assess.

BUT continuous disclosure obligations continue to apply during a trading halt or suspension. Halts and suspensions

are simply a tool to stop trading in situations where there is asymmetric information.



**See section 6.1 of the CGN and also NZX's guidance note on Trading Halts and Suspensions for further details.**

**CONTINUE**

# Awareness

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## Becoming Aware of Information

A component of assessing whether material information is released promptly and without delay, is determining when an issuer became "Aware" of that material information.



For NZX Listing Rules purposes, an Issuer is **Aware** of information if and as soon as a Director or a Senior Manager of the Issuer has, **or ought reasonably to have**, come into possession of the information in the course of the performance of his or her duties.



This is a “constructive knowledge test” as it covers information actually known and information attributed to an issuer. This is a mixed subjective and objective test, in that it takes into account both the information actually known by the directors and senior managers of an issuer, **and** the information which they reasonably should have known.





You may ask, how can a disclosure obligation apply if directors and senior managers of the issuer do not actually know the relevant material information. The reason that the obligation works this way, is to ensure that issuers have appropriate systems and controls in place so that material information is brought to the attention of senior management efficiently. This is why in the previous section we said that inefficient systems that cause delays are not acceptable.



Therefore, if directors or senior managers of an issuer with appropriate systems would have known the information, then your directors and senior managers will be deemed to know the information, notwithstanding that they actually did not. See the section on Continuous Disclosure Compliance Systems for more information.

This is a factor that NZ RegCo will take into account in determining whether an issuer's obligations have been discharged or not. As such issuers need to be mindful of this and ensure that their systems function properly, remain fit for purpose for your organisation and are aligned with best practice. As noted above, the section on Continuous Disclosure Compliance Systems has information on the types of matters your systems should achieve.

"Senior Manager" – means a person who is not a director but occupies a position that allows that person to exercise significant influence over the management or administration of the issuer (for example, a CEO or a CFO).

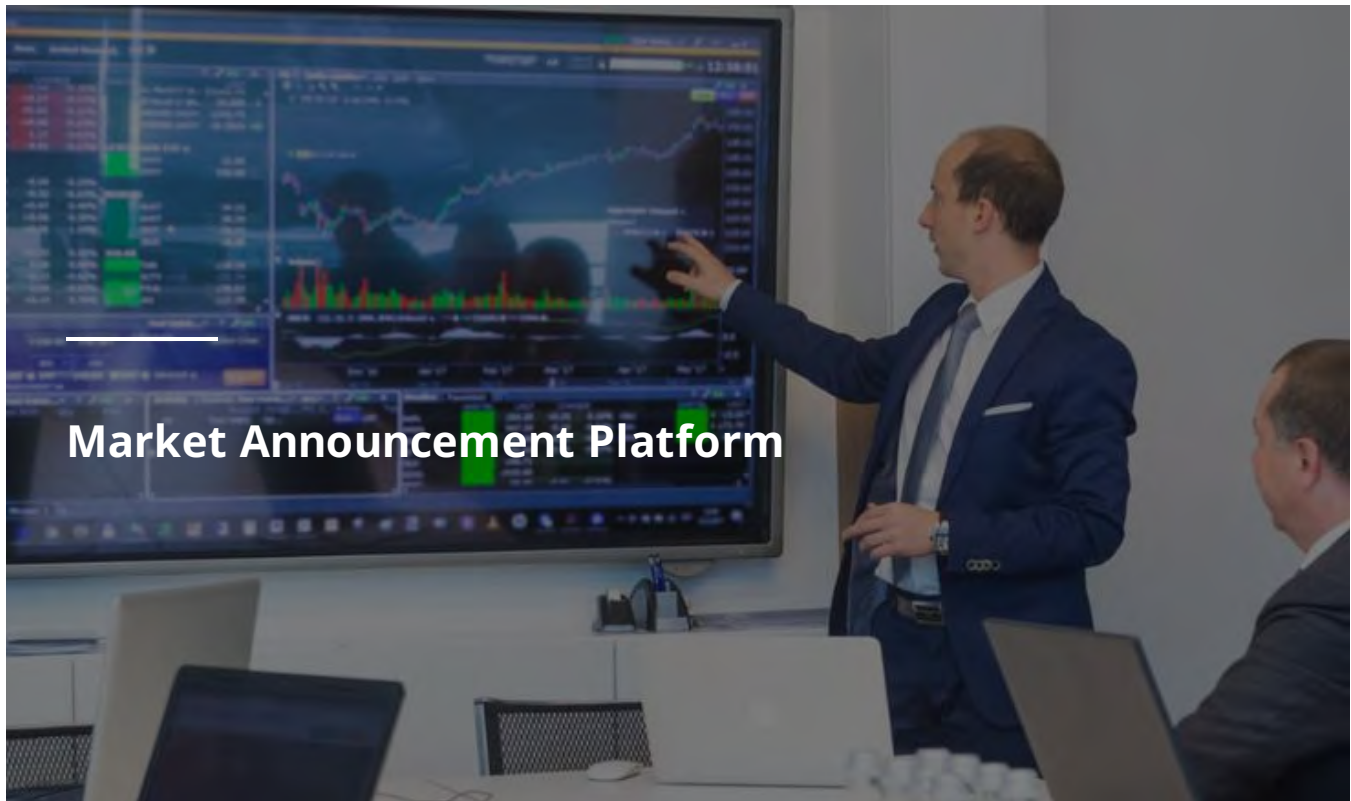


It is likely the Senior Manager(s) will be the same persons as the issuer has determined are required to file D&O share trading notices.

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## Release to NZX First

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Any Material Information must be released through MAP first before being released elsewhere.

Therefore, issuers need to be particularly careful in media statements, analyst / investor briefing, shareholder strategy days etc. It is good practice to release over MAP the packs

for those events before they begin to mitigate the risk and stay to a script.

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**For example, a common scenario is where issuers engage with their shareholders by email on a regular basis to keep them informed about the business outside of the formal AGM. While this is a good way to keep shareholders informed about their investment, it is important that such communications are also reviewed to check whether they have any non-public material information. This review should occur in accordance with an issuer's continuous disclosure policy. If the review reveals that the communication has non-public material information, it must be released through MAP first before going to shareholders.**

NZ RegCo does monitor such communications and will take action where there is a breach of this requirement.

Where an announcement is submitted to MAP after 5.30pm, even though it will not be released until 8.30 am the next trading day due to the timing of when

announcements are released over MAP, the issuer may engage with third parties using that information and publish the information in other locations. This is because trading cannot occur and the issuer has discharged its obligation to submit the information to MAP.

CONTINUE

## **Releasing Through MAP – Foreign Exempt Issuers**





An exception applies for issuers with a foreign exempt listing on NZX from the requirement to release through MAP first. These issuers should comply with their home exchange disclosure requirements if NZX is out of trading hours, and release through MAP promptly and without delay after release to its home exchange.

Issuers with a foreign exempt listing on ASX must immediately provide to ASX any information disclosed via MAP (ASX LR 1.15.2). They must also apply for a trading halt / suspension on ASX if

applied for  
on NZX.

CONTINUE

# False Markets

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An issuer must promptly and without delay release material information through MAP to the extent necessary to prevent the development or subsistence of a market for

its quoted financial products which is materially influenced by false or misleading information emanating from:


- the Issuer or any Associated Person of the Issuer; or
- other persons in circumstances in each case which would give such information substantial credibility;
- and which is of a reasonably specific nature.



This obligation exists to prevent quoted financial products from being mispriced by the market on the basis of false or misleading information. This effect must be material, so monitoring price movements and volumes is necessary.

A common situation where a false market can develop is where an issuer has elected to provide earnings guidance. If it becomes reasonably clear that guidance will be materially exceeded or missed, then the issuer must release updated guidance to prevent a false market trading on the old guidance.

CONTINUE



**Preventing False Markets**



*Click on each arrow to view more.*



The rule is limited so that third parties cannot force information out of the issuer simply by generating a false rumour. It is intended to be limited to reasonably specific information from a source which lends substantial credibility to them. Mere speculation, disseminated by the media, without being backed by a credible source would not have the requisite degree of substantial credibility.



If an issuer does not have material information with which to respond to the rumour, then it can simply confirm that it is in compliance with its continuous disclosure obligations.





If further clarification is needed the issuer should approach NZX with additional information for NZX to review. Alternatively, it can simply release information to address the false market.



Remember that if the rumours are true, an issuer will need to consider whether disclosure of material information is required due to the loss of confidentiality.



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# Earnings Guidance

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## Overview of Providing Earnings Guidance

*Click on the flip cards to reveal.*

In a number of places in the module so far, we have referred

to continuous disclosure  
consequences of providing

It is important to note that there is **no obligation** to provide earnings guidance to the market. It is optional, but where an issuer does so it creates a benchmark of market expectation of performance against which an issuer needs to monitor its actual performance in

1 of 4

In a number of places in the module so far, we have referred to continuous disclosure

It is important to note that there is **no obligation** to provide earnings guidance to the market. It is optional, but where an issuer does so it creates a benchmark of market expectation of performance against which an issuer needs to monitor its actual performance in managing disclosure obligations. This can also occur if an issuer affirms analyst guidance.

2 of 4

If no guidance is given, market expectations may still form based on the earnings forecasts of credible analysts that cover the issuer and the issuer's earnings results for the prior comparable period, in the context of any outlook statements or other disclosures made by the

If no guidance is given, market expectations may still form based on the earnings forecasts of credible analysts that cover the issuer and the issuer's earnings results for the prior comparable period, in the context of any outlook statements or other disclosures made by the issuer in the relevant reporting period.

3 of 4

The basic principle is that if a

reasonable person would expect a deviation in its actual or projected earnings from market expectations to have a material effect on the price of its quoted financial products, and that deviation is sufficiently certain, the deviation should be

4 of 4

The basic principle is that if a reasonable person would expect a deviation in its actual or projected earnings from market expectations to have a material effect on the price of its quoted financial products, and that deviation is sufficiently certain, the deviation should be disclosed.

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## Providing Updates to Earnings Guidance

This principle means that all issuers must regularly assess their financial performance against market expectations.

Whether deviations to market expectations would have a material effect on price is a factual analysis, but non-

exhaustive factors issuers should consider include:

- whether near term earnings are a material driver of the price of the issuer's quoted financial products;
- whether the deviation affects cash flows (rather than being a result of a non-cash item such as a change in accounting treatment or an impairment charge);
- whether the deviation will affect the outlook for the issuer in the future reporting period, (rather than being due to a revenue recognition timing difference, or corrected by a countervailing item (such as a tax credit)); and
- whether the issuer's performance is usually stable, rather than volatile.

Beyond these non-exhaustive factors, the broader nature and effects of the deviation must be assessed in considering the need to disclose, as well as extent and certainty. The absence of




materiality against one of the above factors, is not sufficient to determine that the deviation does not need to be disclosed.



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**For example, merely because a deviation is contributed to by a change in accounting treatment or an impairment charge, is not determinative that the deviation is not material information. The wider context of the treatment or impairment must be considered.**

CONTINUE



## Deviations from Earnings Guidance

As noted above, the extent of deviations to market expectations has a role to play in whether disclosure is required.

Guidance from an issuer is more authoritative and reliable than market expectations informed from other sources

(including analyst coverage and prior comparable period performance), and so deviations from it are more likely to be material information and therefore usually would require disclosure. By contrast, deviations from expectations from other sources will usually need to be more significant in order to be considered material information and require disclosure.



**See section 3.5.3 of the CDG for further discussion of the waterfall of considerations in this respect.**

NZX considers that deviations from an issuer's own guidance:

- of 10% or more will usually be material;
- of between 5% and 10% may be material;  
and
- below 5% will not usually be material.

*Click on the flip cards to reveal.*



This is a rule of thumb, issuers will need to consider their own wider circumstances when assessing deviations within 5%-10%. Where a guidance range is involved, the floor is the base amount in respect of



NZX does not provide guidance on assessing deviations to market expectations from analyst information and other sources as they are likely to generate a less certain and broader view of market expectations, and

CONTINUE



## Analyst Coverage of Earnings Guidance

With respect to analyst coverage, ongoing internal monitoring of performance means that issuers will be aware of how their actual or projected earnings are tracking against third party forecasts or estimates, on an ongoing basis.

However, NZX does not consider that issuers have a general obligation under the NZX Listing Rules to:

- correct analyst earnings forecasts or consensus estimates which do not align with an issuer's internal earnings projections; or
- publish their internal earnings projections solely because they do not align with analyst earnings forecasts or consensus estimates.



Nonetheless, in the absence of issuer guidance, market expectations can form around analyst coverage and past issuer results announcements.

Therefore, where analyst earnings forecasts significantly differ from an issuer's actual or projected earnings, issuers should carefully consider whether disclosure is required on the principles discussed in this section.


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**For example, engagement with analysts may indicate to an issuer that the market does not have all of the information it needs to inform its expectations of an issuer's performance, or that the market has not properly understood the importance of information previously released to the market. In those circumstances, issuers should consider whether there is any information they are able to release to better inform market expectations.**

An issuer should also consider the matter from the point of view of preventing a false market from arising.

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**For example, if multiple credible analysts present expectations that deviate materially and consistently from the issuer's own internal information, the issuer should consider if a false market may develop on that information.**

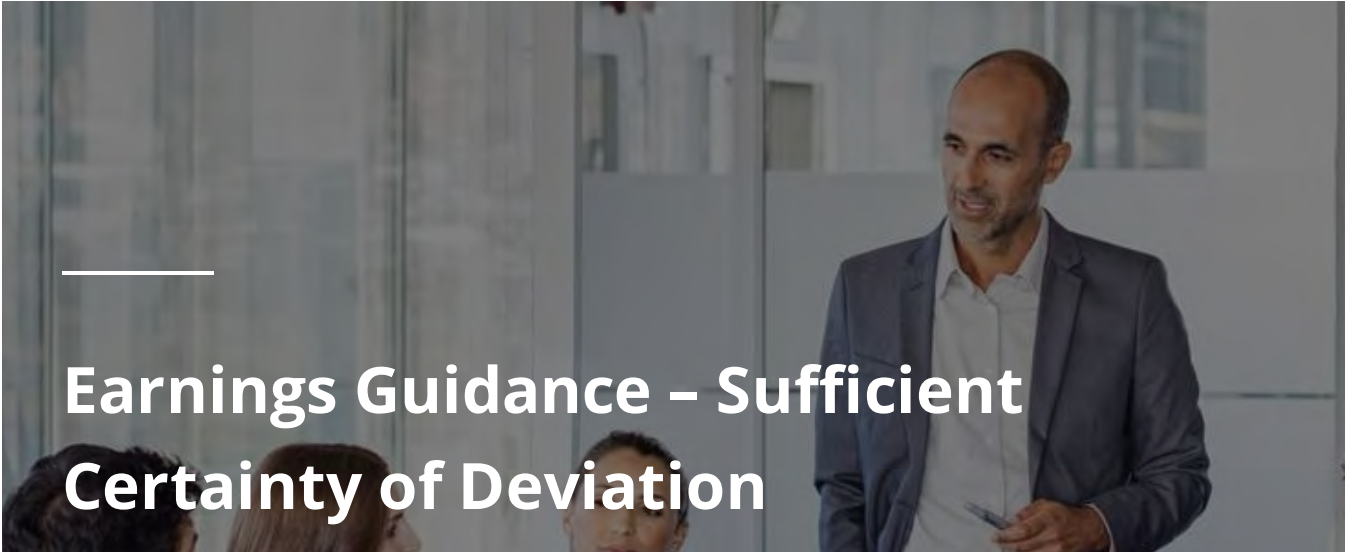
** See also section 3.5.6 of the CDG in relation to engaging with analysts. If issuers do engage with analysts, remember to assess whether any non-public material information is proposed to be disclosed, if so it must either not be released to the analysts or it must be released through MAP before that engagement.**

Finally, issuers should carefully consider their disclosure obligations before approving or supporting forecasts or estimates provided by third parties, including analysts. NZX considers that statements by issuers that could be construed as supporting third party estimates or forecasts are likely to be treated as de facto guidance by the issuer.





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Finally, for a disclosure obligation to arise, there needs to be sufficient certainty that a material deviation will occur.

2

Naturally, the closer in time to the end of the guidance period (whether full or half year), the greater the certainty of a deviation.

3

Sometimes, an issuer's actual or expected earnings can change gradually due to a number of events that, viewed individually, may not require disclosure.

4

However, if the combined effect of all of the events reveals a pattern or trend that a reasonable person would expect to have a material effect on the price of the quoted financial products of the issuer, disclosure will be required.

This is why NZX encourages all issuers to monitor their monthly management accounts against market performance expectations.

Once there is sufficient certainty of material deviation and that is material information, disclosure is needed. That disclosure must set out corrected guidance (which may be

a description of the extent of the deviation, if the issuer is unable to numerically assess its magnitude).



**For further information see section 3.5 of the CDG.**

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## Earnings Guidance Examples

A photograph of a business meeting. Several people are seated around a table, looking at various documents and charts. One person is holding a blue folder, another is holding a pen over a document. The documents feature bar charts and data tables. The scene is dimly lit, focusing on the work materials.

Here is an example of non-compliance in the context of earnings guidance. The key points coming out of this case are:

- 1 disclose when there is a material risk (i.e. reasonable certainty) that results will materially deviate from an announced projection or expectation, don't delay until there is absolute certainty;
- 2 price movements following the release of information are not the primary basis for determining whether information is material information – it is a cross check only.

*Click on each plus icon to view more.*





An issuer published full year forecasts on a number of financial metrics, including EBITDA and revenue. It later affirmed those forecasts. The latest confirmation of the forecasts occurred early in the second half of the financial year.



The issuer tracked its financial performance at a management and Board level, including its performance against its EBITDA and revenue forecasts.



The issuer's performance in the first half of its financial year was largely in line with expectations. Due to events beyond the issuer's control, financial performance at the beginning of the second half of its financial year was significantly below expectations. However, the issuer had an expectation, based on historical performance, until late in the financial year that it would be able to meet, or not materially deviate from, its forecasts.





A market update was published after financial year end. That update stated that EBITDA for the year would be lower than previously indicated, but did not provide figures or an indication of the possible materiality of the deviation from forecast.

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## Subsequent Release of Financial Information

The issuer subsequently released its preliminary results announcement and annual report, which disclosed a material deviation between the issuer's results against forecast EBITDA and revenue.

A price movement of between 5% and 10% was observed together with the volume of shares traded on the relevant dates being approximately four to six times higher than the average volume per day over the previous twelve months.

NZ RegCo was concerned that the issuer had not disclosed the risk of a material deviation from forecasts in a timely manner, and engaged with the issuer to understand the circumstances. NZ RegCo requested material from the issuer (including board reports and minutes) as part of its investigation.

[CONTINUE](#)

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# **NZ RegCo's Review, and the NZ Markets Disciplinary Tribunal**

*Click on each arrow to view more.*



Based on the information provided, NZ RegCo considered that the issuer was aware of the material risk of a material deviation from its forecasts before the announcements it ultimately made. The fact of the material risk of the material deviation was not within the exceptions to disclosure in Listing Rule 3.1.2, and should have therefore been disclosed earlier than it was.



Accordingly, NZ RegCo considered that the issuer had failed to comply with its continuous disclosure obligations, and referred this conduct to the NZ Markets Disciplinary Tribunal. Ultimately, the parties submitted a settlement agreement to the Tribunal which provided for a financial penalty and costs. This settlement agreement was approved by the Tribunal.



One of the key issues that arose in the course of NZ RegCo's investigation and the proceedings was that the issuer's share price moved less than 10% following the relevant announcements.



The NZX Listing Rules state that material information is “information that a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of Quoted Financial Products of an issuer”. This is not a hindsight test, and the absence of a material price movement will not preclude NZ RegCo investigating and, if considered appropriate, taking enforcement action.

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# Continuous Disclosure Compliance Systems

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**i** **Recommendation 4.1 of the NZX Corporate Governance Code states that an issuer's board should have a written continuous disclosure policy. This may be part of a more general market announcements policy.**

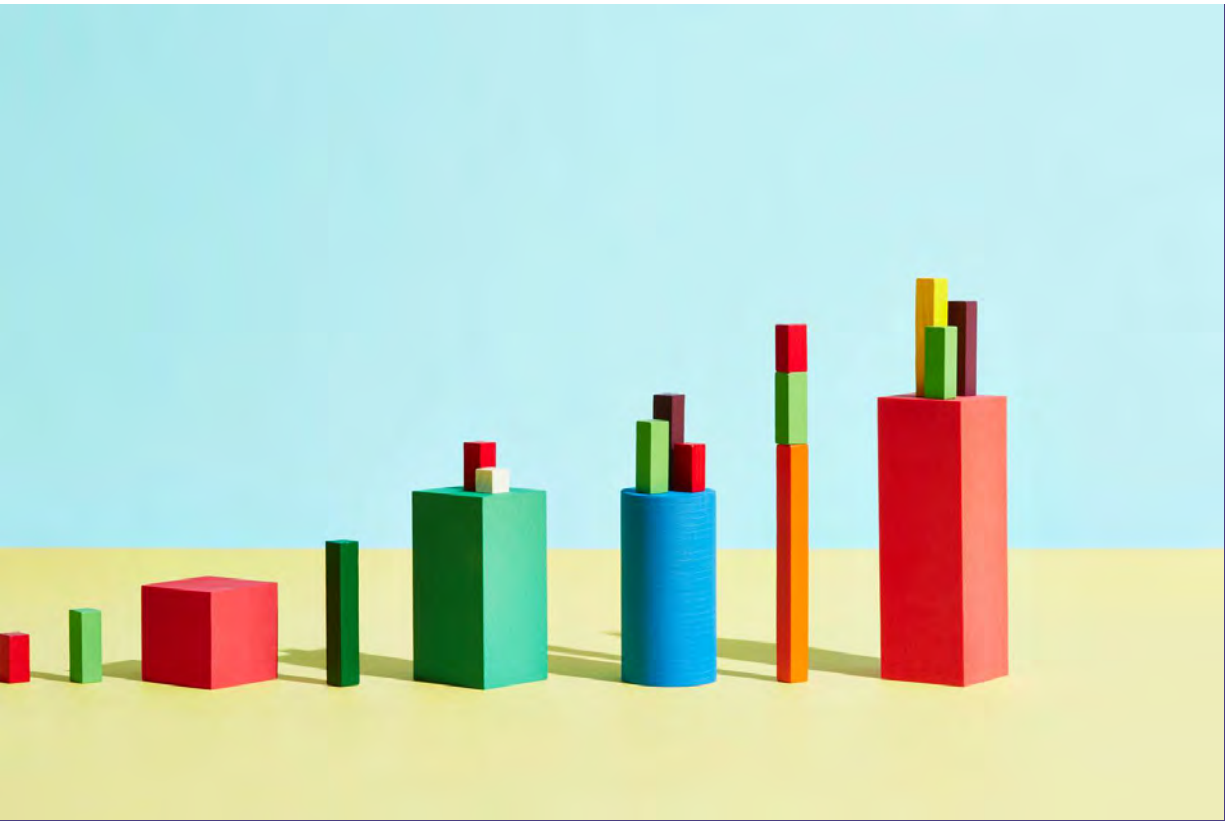
The policy should aim to ensure that for a continuous disclosure event the issuer has a clear process to follow, ensuring a smoother response in a time-critical scenario. There is no prescribed content, but it should be designed so that:

- there is ongoing monitoring of potential material information events;

- material information is brought to the attention of the issuer's directors and senior managers promptly and without delay (or a disclosure committee thereof); and
- it is assessed to determine whether it requires disclosure under LR 3.1, and if yes, it is promptly released through MAP with the appropriate flag.

NZX encourages all directors and senior managers to actively engage in training on continuous disclosure, including refresher training where there are new developments.

Appropriate processes, training and policies will be a mitigating factor in any enforcement action and a potential defence to an FMA action.



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*Click on each arrow to view more.*

Other general points to note are set out below, but see also appendix 4 of the CDG:



Issuers should have clearly defined reporting lines for communicating information that may be material and issuers should regularly consider whether appropriate measures are in place to encourage proper disclosure of information within an issuer.



Have a point person for disclosure and a disclosure committee, and make sure staff know who this person is. Outside of designated individuals, staff should not be authorised to speak on behalf of the issuer.



Be mindful of your disclosure habits – if you create expectations of market updates on given topics (e.g. deciding to give earnings guidance), failing to do so may create a false market.



Staff should send recommendations to directors with board papers as to what should be disclosed under the Listing Rules. There should also be a fixed board agenda item to consider whether any matters should be disclosed.





Ensure appropriate confidentiality agreements are in place where the issuer enters into material negotiations with carve outs that permit compliance with disclosure obligations. Relevant personnel should be mindful, however, that issuers cannot contract out of their continuous disclosure obligations, and may need to make this clear when dealing with third parties, including the extent of required disclosure so that there is no delay when it comes time to make an announcement.



For expected disclosures (e.g. signing a significant contract) have an announcement prepared in advance so that disclosure can be made once agreement is reached (normally when the contract is signed). This includes agreeing the form of the announcement with the counterparty in advance so that there is no delay.

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# Content of Announcements

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There is no prescriptive list of announcement content, but it must contain sufficient information for investors to understand and assess the implications of the announcement and the potential impact on price.



This means that issuers need to carefully consider their announcements to ensure that they are complete and accurate, and more generally not misleading (including by omission). Once a disclosure obligation crystallises, an announcement must disclose all relevant material information (whether good or bad). This does not mean that an issuer cannot state its view on a given topic or its assessment of the matter, but it must accurately reflect the material facts and not leave out bad news or be otherwise misleading.



Where an issuer is making an announcement that discloses details of an issuer's engagement with a third party (for example, a contractual counterparty or regulator), or the prospects of success of a process with them (e.g. litigation) it will need to be especially mindful of the above matters. Remember, an issuer's role is first to present the material information in its entirety and impartially, so that investors understand what is happening. It can then state its view and how it is going to deal with a given matter, so long as it is presented in an accurate and balanced manner.



Failure to provide complete, accurate and balanced disclosure can result in a failure to comply with not only the obligation to disclose relevant material information, but also to prevent a false market (which can occur where the market is materially influenced by false or misleading information from the issuer).

Beyond the above, key items must be emphasised and not buried in the details. Long and complex announcements must have a summary of key points. If a transaction is disclosed as material information, all material details must be disclosed, which may include:



- a description of the assets or financial products acquired or disposed of;
- the amount, composition, and method of payment of the consideration;
- where financial products are acquired or disposed of, the percentage of the total issued financial products of each class represented and the percentage of each class of security held following the acquisition or disposition; and
- the nature of any material conditions which may result in the transaction not proceeding and the dates on which the transaction is to become unconditional along with the settlement date.



**If the announcement contains material information, use the “P” flag on MAP. Note that this results in an automatic 15 minute trading halt to allow time for investors to consider the information.**

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# Penalties and Enforcement

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The requirement under LR 3.1.1 to immediately disclose material information to the market is a fundamental obligation and is treated very seriously.

The continuous disclosure rules are given statutory force by sections 270-272 of the Financial Markets Conduct Act 2013.

Therefore, while NZX cannot impose a fine on a director, the FMA can impose civil penalties for involvement in a contravention. NZ RegCo and the FMA are co-regulators in respect of the continuous disclosure provisions of the Rules, and in some instances the FMA may take over an investigation to bring an action under the FMC Act.

The NZ Markets Disciplinary Tribunal (NZMDT) rules contain three different penalty bands, with the highest potential penalty for issuers of \$500,000.

NZMDT can consider mitigating and aggravating factors, such as inadvertence, degree of market impact, repeated offending, procedures in place relating to continuous disclosure, third party actions / cause of disclosure event, etc.

Therefore, the degree of penalty varies, but aggravating scenarios will likely have a significant financial penalty imposed.

Public censure will very likely occur in all cases.

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# Market Oversight by NZ RegCo

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NZ RegCo Surveillance actively monitors anomalous trading and activity, which may include analysis of activity by security, by participant or by client. NZ RegCo will take into account changes in price and volume, given liquidity of the security.

Where this is found, NZ RegCo will consider the matter and may issue a price enquiry, if it considers appropriate in the circumstances. This is typically where there is a material and persistent change to an issuer's market price, and this cannot reasonably be explained by information generally available to the market.




Where NZ RegCo does make a price enquiry, this will be released to the market together with the issuer's response to the price enquiry in relation to share price or trading volumes.

Similarly, NZ RegCo may also question an issuer where an announcement contains material information as to when that information arose. For example, where material price movements occur after periodic results releases (e.g. full year), as that may indicate that the issuer's performance was not in-line with market expectations.

NZ RegCo may also proactively engage with issuers where media commentary suggests that a disclosure obligation may have arisen. Issuers must expect that they may be contacted at short notice and need to ensure that they have suitable processes in place for urgent decision making.

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Where non-compliance is found serious matters will be referred to NZMDT or the FMA, with potential consequences as noted above.

 Complete the content above before moving on.

# Guidance and Examples

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NZX has issued guidance in the CDG on the continuous disclosure obligation and recommends that relevant issuer personnel familiarise themselves with it. NZX can assist by answering queries on the CDG and providing general guidance. However, compliance with continuous disclosure

obligations is a fundamental obligation and is the issuer's responsibility.

NZ RegCo does not grant Listing Rule waivers from continuous disclosure requirements.



**For continuous disclosure examples, NZ RegCo strongly recommends that relevant issuer personnel review the continuous disclosure examples in Appendix 3 of the CDG.**

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## Conclusion

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Well done! You have completed  
the NZX Issuer Training Modules –  
Continuous Disclosure

**Let's start the test.**

[GO TO TEST](#)