

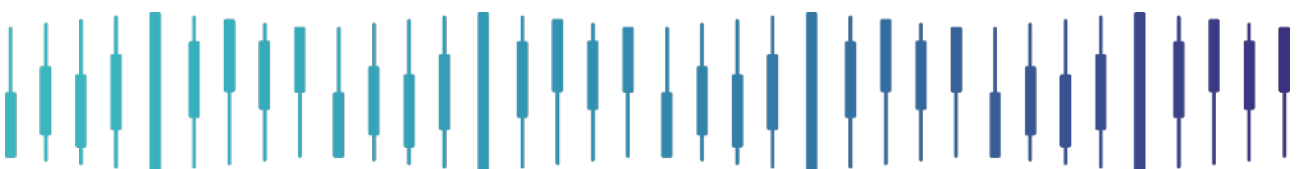
**NZ RegCo**

NZ'S LISTED  
MARKET REGULATOR

21.09.2021

# NZ RegCo Decision

Class Rulings and Waivers for Bank PPSs



## Background

1. These rulings and waivers apply to the NZX Listing Rules (the **Rules**) and to:
  - a. perpetual preference shares issued by a Registered Bank that qualify as "Additional Tier 1 capital" (**AT1 capital instruments**) for the purposes of Reserve Bank of New Zealand document BPR110 (**BPR110**); and
  - b. perpetual preference shares issued by a SPV (as defined in **BPR110**), the proceeds of which are to be used by the SPV to fund the purchase of perpetual preference shares issued by a Registered Bank that qualify as AT1 capital instruments for the purposes of BPR110,together, **Bank PPSs**.
2. The Rules to which these decisions relate are set out in Appendix One.
3. Capitalised terms that are not defined in these decisions have the meanings given to them in the Rules.

## Ruling on definition of Debt Security

### Decision

4. NZX Regulation Limited (NZ RegCo) declares a Bank PPS to be a Debt Security for the purposes of the Rules.

### Reasons

5. In coming to the decision to grant the ruling set out in paragraph 4 above, NZ RegCo has considered that:
  - a. Although BPR110 requires a Bank PPS to be a perpetual preference share, BPR110 also requires the terms of a Bank PPS to include a number of features that make a Bank PPS more like a subordinated debt instrument than an equity instrument;
  - b. For example:
    - i. BPR110 provides that the terms of a Bank PPS must not confer any right on a holder to subscribe for new securities of the Issuer, or to otherwise participate in the profits or property of the Issuer, except by receiving payments as set out in the terms of the instrument, which means that a Bank PPS will not carry any equity upside;
    - ii. BPR110 provides that the terms of a Bank PPS must provide for the dividend rate to be fixed for the entire term of the instrument and must not provide for that rate to be altered or reviewed, except where the dividend is cancelled or where there is a variable rate and the formula for setting the rate is fixed for the term of the instrument at the outset, which means that a Bank PPS will pay distributions on a fixed or floating basis on regular scheduled payment dates; and
    - iii. BPR110 provides that a Bank PPS must represent the most subordinated claim in the liquidation of the Issuer after "Common Equity Tier 1 capital", which means that a Bank PPS will not represent the most subordinated claim in the liquidation of the Issuer; and
  - c. It is therefore more appropriate to define a Bank PPS as a Debt Security than an Equity Security.

## Ruling on definition of Governing Document

### Decision

6. NZ RegCo rules that Governing Document means, in the case of an Issuer of Bank PPSs:
- a. its constitution, articles of association or other constituent documents; and
  - b. if not included in its constitution, articles or association or other constituent documents, the terms of issue of those Bank PPSs,
- and including (in each case) any amendments to a document referred to in paragraph (a) to (b).

### Reasons

7. In coming to the decision to grant the ruling set out in paragraph 6 above, NZ RegCo has considered that:
- a. the definition of Governing Document, as it applies to an Issuer of Debt Securities, means "a trust deed or the one or more deeds, agreements or instruments that constitute those Debt Securities";
  - b. BPR110 requires a Bank PPS to be a perpetual preference share, which means that:
    - i. a Bank PPS will be issued in accordance with:
      - aa) the Companies Act 1993 (Companies Act) or the Building Societies Act 1965 (Building Societies Act); and
      - bb) the Issuer's constitution, articles of association or other constituent documents;
    - ii. the terms of a Bank PPS will typically be recorded in a resolution of the Board; and
    - iii. a Bank PPS will not be constituted under a trust deed or other deed, agreement, or instrument; and
  - c. therefore:
    - i. the definition of Governing Document, as it applies to an Issuer of Debt Securities, should not apply to an Issuer of Bank PPSs; and
    - ii. in the case of an Issuer of Bank PPSs, Governing Document should instead mean the Issuer's constitution, articles of association or other constituent documents and, if not included in its constitution, articles or association or other constituent documents, the terms of issue of those Bank PPSs.

## Waivers from Rules 2.19 and 2.21.1(a) and (b)

### Decision

8. With respect to Bank PPSs issued by an Issuer that is a company incorporated under the Companies Act, NZ RegCo grants waivers from:
- a. Paragraphs (a) and (b) of Rule 2.21.1; and
  - b. Rule 2.19, provided that NZX does not require the Governing Document in the particular case to contain any other provisions under paragraph (c) of Rule 2.21.1.

## Reasons

9. In coming to the decision to grant the waivers set out in paragraph 8 above, NZ RegCo has considered that:
- a. Paragraphs (a) and (b) of Rule 2.21.1 require every Governing Document governing Quoted Debt Securities to include certain provisions relating to the convening of a meeting of holders of Debt Securities and the necessary majority for passing an extraordinary resolution of holders of Debt Securities;
  - b. Paragraph (c) of Rule 2.21.1 requires every Governing Document governing Quoted Debt Securities to contain such other provisions as NZX may require in any particular case for the protection of holders of the Debt Securities in question;
  - c. Rule 2.19 requires an Issuer to provide a solicitor's opinion to NZX that states whether, in the opinion of the solicitor, the Issuer's Governing Document complies with the Rules;
  - d. BPR110 requires a Bank PPS to be a perpetual preference share and the Governing Document governing Bank PPSs will be the Issuer's constitution, articles of association or other constituent documents and, if not included in the Issuer's constitution, articles or association or other constituent documents, the terms of issue of those Bank PPSs, which means that these provisions will be governed by the Companies Act or the Building Societies Act and the Issuer's constitution, articles of association or other constituent documents and, if not included in the Issuer's constitution, articles or association or other constituent documents, the terms of issue of those Bank PPSs;
  - e. The Companies Act includes provisions that are equivalent to paragraphs (a) and (b) of Rule 2.21.1:
    - i. Under section 121(b) of the Companies Act, a special meeting of shareholders entitled to vote on an issue must be called by the Board on the written request of shareholders holding shares carrying together not less than 5% of the voting rights entitled to be exercised on the issue; and
    - ii. Under section 2 of the Companies Act, a special resolution means a resolution approved by a majority of 75% or, if a higher majority is required by the constitution, that higher majority, of the votes of those shareholders entitled to vote and voting on the question;
  - f. The Building Societies Act does not include provisions that are equivalent to paragraphs (a) and (b) of Rule 2.21.1;
  - g. Paragraphs (a) and (b) Rule 2.21.1 should therefore not apply with respect to Bank PPSs issued by an Issuer that is a company incorporated under the Companies Act;
  - h. Rule 2.21 is the only Rule that requires the Governing Document governing Quoted Debt Securities to include certain provisions, which means that if:
    - i. paragraphs (a) and (b) of Rule 2.21.1 do not apply with respect to Bank PPSs issued by an Issuer that is a company incorporated under the Companies Act; and
    - ii. NZX does not require the Governing Document in the particular case to contain any other provisions under paragraph (c) of Rule 2.21.1,then there are no provisions of the Rules for the solicitor's opinion required under Rule 2.19 to state compliance with; and

- i. Rule 2.19 should therefore not apply with respect to Bank PPSs issued by an Issuer that is a company incorporated under the Companies Act, provided that NZX does not require the Governing Document in the particular case to contain any other provisions under paragraph (c) of Rule 2.21.1.
10. For the avoidance of doubt, Rule 2.20 will not apply with respect to Bank PPSs.

## Ruling on Rule 3.14.3(a)

### Decision

11. NZ RegCo rules that, with respect to Bank PPSs, paragraph (a) of Rule 3.14.3 is varied to also apply to routine dividend payments, to the effect that it reads "*routine interest payments or routine dividend payments on Debt Securities*".

### Reasons

12. In coming to the decision to grant the ruling set out in paragraph 11 above, NZ RegCo has considered that:
  - a. Paragraph (a) of Rule 3.14.3 provides that routine interest payments on Debt Securities are not required to be notified under Rule 3.14.1;
  - b. Distributions on Bank PPSs will take the form of dividend payments, not interest payments;
  - c. The dividend payments on Bank PPSs will be routine because:
    - i. BPR110 requires that either the dividend rate must be fixed for the entire term of the Bank PPS or, if the dividend rate is a variable rate, the formula for setting the rate must be fixed for the term of the Bank PPS at the outset; and
    - ii. given this, a Bank PPS will have regular scheduled payment dates; and
  - d. Routine dividend payments should not be required to be notified under Rule 3.14.1.

## Ruling on Rule 3.14.5

### Decision

13. NZ RegCo rules that, with respect to Bank PPSs, Rule 3.14.5 is varied to also apply where an Issuer decides that it will not, or determines that, under the terms of the Bank PPSs, it may not, pay all or part of the dividend on the due date for that dividend, to the effect that it reads "*Where an Issuer decides that it will not, or determines that, under the terms of issue of the Quoted Debt Securities, it may not, pay all or part of the interest or dividend on any Quoted Debt Securities on the due date for that interest payment or dividend payment, the Issuer must release that decision or determination through MAP promptly and without delay*".

### Reasons

14. In coming to the decision to grant the ruling set out in paragraph 13 above, NZ RegCo has considered that:
  - a. Rule 3.14.5 provides that, where an Issuer decides that it will not pay the interest on any Quoted Debt Securities on the due date for that interest payment, the Issuer must release that decision through MAP promptly and without delay;
  - b. Distributions on Bank PPSs will take the form of dividend payments, not interest payments;

- c. While the dividend payments on Bank PPSs will be routine, BPR110 provides that distributions on the Bank PPSs must be able to be cancelled and must not be paid in certain circumstances, which means that the terms of issue of the Bank PPSs will provide for routine dividend payments to be cancelled or varied in certain circumstances; and
- d. Any cancellations or variations of routine dividend payments should be required to be notified under Rule 3.14.5.

## Ruling on Rule 7.6

### Decision

15. NZ RegCo rules that, with respect to Bank PPSs, Rule 7.6 is varied to also apply to any repayment and to dividends, to the effect that it reads:

**"7.6 Additional Requirements for Debt Securities**

7.6.1 *Where an issue provides for ~~early~~ repayment of Debt Securities, the Offer Document or Profile must state the basis on which interest or dividends will be calculated until the date of ~~early~~ repayment or refer to the relevant provisions of the Governing Document.*

7.6.2 *Where a Debt Securities issue provides for repayment or conversion ~~before maturity~~ on a date to be fixed at the discretion of the Issuer, the Offer Document or Profile must state those terms."*

### Reasons

16. In coming to the decision to grant the ruling set out in paragraph 15 above, NZ RegCo has considered that:
- a. Rule 7.6 requires the Offer Document or Profile for an issue of Debt Securities that provides for early repayment to include certain provisions relating to the basis on which interest will be calculated until the date of early repayment and, if the early repayment date is to be fixed at the discretion of the Issuer, those terms;
  - b. BPR110 requires a Bank PPS to be a perpetual preference share, which means that a Bank PPS will not have a scheduled maturity date;
  - c. BPR110 provides that a Bank PPS may be callable or redeemable in certain circumstances and subject to certain conditions, which means that a Bank PPS may be repaid;
  - d. Distributions on Bank PPSs will take the form of dividend payments, not interest payments; and
  - e. If an issue of Bank PPSs provides for repayment, the basis on which dividends will be calculated until the date of repayment and the terms of any repayment date to be fixed at the discretion of the Issuer should be required to be included in the Offer Document or Profile for the issue of Bank PPSs under Rule 7.6.

# APPENDIX ONE

## NZX Listing Rules – 10 December 2020

### Glossary

Debt Security	has the meaning given in sections 8(1) and 8(5) of the FMC Act, subject to NZX's sole discretion to declare, by way of a Ruling, a Financial Product to be, or not to be, a Debt Security.
Governing Document	means: <ul style="list-style-type: none"><li>a. in the case of an Issuer of Equity Securities, its constitution, articles of association or other constituent documents,</li><li>b. in the case of an Issuer of Debt Securities, a trust deed or the one or more deeds, agreements, or instruments that constitute those Debt Securities,</li><li>c. in the case of a Managed Investment Scheme constituted as a trust, the one or more trust deeds that constitutes the scheme, or</li><li>d. in the case of any other Managed Investment Scheme where (c) does not apply, the one or more deeds, agreements, or instruments that constitute or govern the scheme,</li></ul> and including (in each case) any amendments to a document referred to in paragraph (a) to (d).

### Section 2

#### Governance Requirements

##### Governing Document requirements for all Issuers

###### 2.19 Solicitor's opinion regarding Governing Document

- 2.19.1 An Issuer or applicant for Listing providing a Governing Document to NZX, or prior to changing its Governing Document, must provide a solicitor's opinion. That opinion must:
- a. be provided by a solicitor or firm of solicitors approved by NZX,
  - b. be addressed to NZX and acknowledge that the solicitor or firm of solicitors accepts responsibility to NZX in respect of the opinion,
  - c. disclose any conflicting duties or interests the solicitor or firm of solicitors has and confirm that this disclosure is complete in all respects, and
  - d. state whether, in the opinion of that solicitor, the document in question complies with the Rules.

##### Governing Document requirements for Issuers of Debt Securities

###### 2.21 Content of Governing Document for Issuers of Debt Securities

- 2.21.1 Every Governing Document governing Quoted Debt Securities must provide that:
- a. a meeting of Debt Security holders must be convened by the Issuer on the written request of holders of Debt Securities that have a combined nominal value of 5% or more of the nominal value of the Debt Securities on issue in that Class, or such other number of holders as required by section 120(1)(b) of the FMC Act (if applicable),

- b. the necessary majority for passing an extraordinary resolution is approval of holders holding at least 75% of the nominal value of those Debt Securities held by persons entitled to vote and voting, and
- c. must contain such other provisions as NZX may require in any particular case for the protection of holders of the Debt Securities in question.

## Section 3

### Disclosure

#### Announcements of capital changes and distributions

##### 3.14 Distributions, conversion and calls

- 3.14.1 An Issuer must release through MAP, at least 5 Business Days before the Record Date, the details of a proposal to:
- a. pay or distribute a benefit on Quoted Financial Products,
  - b. proceed with a Conversion of Quoted Financial Products, or a Conversion of any Financial Products into Quoted Financial Products, or
  - c. make a call on a Quoted Financial Product,
- in the form prescribed by NZX from time to time.
- 3.14.2 Where the timing of a call on Quoted Financial Products is not stated in the Offer Document or Profile, the Issuer must promptly and without delay notify NZX through MAP after determining that date.
- 3.14.3 No notification is required under Rule 3.14.1 of:
- a. routine interest payments on Debt Securities, or
  - b. the redemption of Debt Securities on the scheduled maturity date.
- 3.14.4 If the Directors recommend or pay dividends other than in accordance with the Issuer's most recently published dividend policy, they must fully explain the reasons for the divergence by releasing that information through MAP in, or at the same time as, the notice given under Rule 3.14.1.
- 3.14.5 Where an Issuer decides that it will not pay the interest on any Quoted Debt Securities on the due date for that interest payment, the Issuer must release that decision through MAP promptly and without delay.
- 3.14.6 A supplementary dividend paid in terms of the Income Tax Act 2007 is not treated as a dividend for the purposes of Rule 3.14.1. An Issuer paying a supplementary dividend in respect of Quoted Financial Products must release through MAP, not less than 5 Business Days before the payment of the supplementary dividend, details of:
- a. the amount (in cents) of the proposed supplementary dividend per Quoted Equity Security, and
  - b. the date upon which it will be paid, in the form prescribed by NZX from time to time.



## Section 7

### Requirements for Documents

#### Content of documents

#### **7.6 Additional Requirements for Debt Securities**

- 7.6.1 Where an issue provides for early repayment of Debt Securities, the Offer Document or Profile must state the basis on which interest will be calculated until the date of early repayment or refer to the relevant provisions of the Governing Document.
- 7.6.2 Where a Debt Securities issue provides for repayment or conversion before maturity on a date to be fixed at the discretion of the Issuer, the Offer Document or Profile must state those terms.