



NZ RegCo

NZ'S LISTED
MARKET REGULATOR

NZ Automotive Investments Limited Investigation Report



Introduction

NZ Automotive Investments Limited (**NZA**) is a New Zealand incorporated company with its ordinary shares quoted on the NZX Main Board. NZA is subject to the NZX Listing Rules (**Rules**).

In July and August 2022, there were a number of changes to the composition of NZA's board. NZ RegCo has concluded that NZA breached Rule 2.7.1 in relation to the re-appointment of one of the directors appointed at that time. Rule 2.7.1 imposes obligations for the rotation of directors, subject to election by an issuer's shareholders. That Rule also applies to board-appointed directors.

NZ RegCo has determined to pursue an educative outcome through publication of this report to clarify the correct application of Rule 2.7.1, rather than an enforcement outcome against NZA.

Background

On 19 July 2022, NZA announced that all of NZA's then directors other than executive director Mr Yusuke (David) Sena had resigned. That announcement stated that those resignations would become effective upon the earlier of the appointment of sufficient new independent directors to meet the requirements of the Rules and 20 August 2022. The announcement also identified three director candidates that had been nominated by Mr Sena, whose appointment would be voted on by shareholders at the scheduled NZA annual shareholder meeting (ASM) on 25 August 2022.

Two of the nominated director candidates subsequently withdrew their consent for nomination.

On 10 August 2022, NZA announced that the ASM would be held on 2 September 2022.

On 12 August 2022, NZA published its notice of meeting. That notice outlined that Mr Sena had undertaken to the then current NZA board members that, immediately upon their resignations becoming effective on 20 August 2022, Mr Sena would appoint Michael Stiasny and Gordon Shaw as NZA directors pursuant to NZA's constitution, in order to ensure that NZA met the board composition requirements under Rule 2.1. Those appointments were temporary, with Messrs. Stiasny and Shaw to retire and both offer themselves for re-election at the ASM.

At this time, NZA's Chief Executive Officer was David Page. Mr Page had resigned on 1 July 2022, and NZA had advised the market that he would work out his notice until 30 September 2022. Over the weekend of 20 / 21 August 2022, Mr Page decided to go on gardening leave for the remainder of his notice period.

On 22 August 2022, NZA announced that it had appointed Mr Shaw as interim CEO, pending the appointment of a new CEO. That appointment meant Mr Shaw no longer qualified as an independent director of NZA. NZA also announced that it had appointed Ms Samantha Sharif as an independent director on an interim basis, pending the end of Mr Shaw's term as interim CEO at which time he would revert to the status of an Independent Director. That announcement advised that Ms Sharif would seek approval of her appointment from shareholders at the ASM on 2 September 2022.

At the ASM, Messrs. Stiasny and Shaw were re-elected. Ms Sharif was not put forward for re-election. Mr Shaw stated, in his presentation to the meeting, that “[a]s Samantha is a co-opted director, she does not stand for election”. NZA stated in an announcement on 2 September 2022 that the NZA board had reappointed Ms Sharif as an independent director, effective immediately following the conclusion of the ASM and on the same terms as she was originally appointed.

Listing Rules

Rule 2.2.1(a) permits the board of an issuer to appoint directors, if the issuer’s constitution (or other governing document) provides for such appointments. NZA’s constitution gives its board this power.

Rule 2.7.1 limits this power, by requiring board elected directors to seek re-election. Rule 2.7.1 states:

A Director of an Issuer must not hold office (without re-election) past the third annual meeting following the Director’s appointment or 3 years, whichever is longer. However, a Director appointed by the Board must not hold office (without re-election) past the next annual meeting following the Director’s appointment.

Rule 2.7.1 reflects an underlying policy that the appointment of directors is a matter fundamentally reserved to shareholders. Although the Rules contemplate that an issuer’s constitution may enable the appointment of directors by the board, that appointment is temporary. It is subject to a requirement that such board-appointed directors not hold office past the issuer’s next annual meeting following appointment. NZX has communicated this interpretation of Rule 2.7.1 to the market in its Guidance Note on Governance, at page 7. Board-appointed directors are eligible for re-election. The requirements of Rule 2.7.1 are long-standing requirements, and also applied under the then NZX Main Board Listing Rule 3.3.6 prior to the holistic rules review undertaken by NZX in 2018.

Issuers must comply with the Rules as interpreted:

- (a) in accordance with their spirit, intention and purpose,
- (b) by looking beyond form to substance; and
- (c) in a way that best promotes the principles on which the Rules are based

NZ RegCo’s investigation

NZ RegCo has investigated the approach taken by NZA for the reappointment of Ms Sharif on 2 September 2022, given the requirements of Rule 2.7.1.

NZA made the following submissions to NZ RegCo:

- Ms Sharif retired as a director with effect from the conclusion of the ASM. Accordingly, her position as a director of NZA came to an end immediately following the ASM, consistent with Rule 2.7.1.
- The purpose of Rule 2.7.1, in NZA's view, is to ensure that a company's board does not become entrenched. Ms Sharif's appointment to NZA's board was a temporary appointment only (limited to a period of six months from the time of her appointment or until a new CEO is appointed). Given that her appointment was only temporary, there was no risk that the action NZA's board took would result in Ms Sharif's position as a director becoming entrenched. Accordingly, NZA's view was that Ms Sharif's re-appointment by the board was within the purpose of Rule 2.7.1.
- The Rules do not expressly prohibit the board from renewing a director's temporary appointment for the balance of its term.

NZ RegCo interprets the requirements of Rule 2.7.1 in light of the long-standing policy underpinning that Rule. While Rule 2.7.1 could be interpreted in the manner put forward by NZA, NZ RegCo considers that would be inconsistent with that policy. That approach could potentially enable a board to avoid shareholder approval of a director indefinitely, i.e. if board-appointed directors were to technically retire at an ASM to then be immediately reappointed by the board following the meeting.

NZ RegCo notes that Rule 2.7.1 does not distinguish between directors that have been board-appointed to hold office for a limited time, and directors that are board-appointed without such limitation. Although an issuer's board may intend to appoint a director to only serve for a specific period of time, this does not affect the application of Rule 2.7.1.

NZ RegCo has concluded that NZA breached Rule 2.7.1 by not putting forward Ms Sharif for election at the ASM.

NZ RegCo acknowledges that NZA relied on legal advice in taking the view that Ms Sharif was not required to seek re-election at the ASM. NZ RegCo notes that NZA fully cooperated with NZ RegCo's investigation, and there is no evidence that NZA sought to intentionally circumvent the requirements of Rule 2.7.1.

Lessons for issuers

Issuers and their advisers must bear Rule 2.7.1 in mind when considering governance and succession issues.

If permitted by an issuer's governing document, the ability for a board to appoint directors can be an effective way to add valuable skills and also manage compliance with the board composition requirements under the Rules. However, all board-appointed directors are subject to Rule 2.7.1, requiring that they retire at the issuer's next annual meeting following their appointment. They are eligible to seek reappointment at that time.

Issuers should avoid appointing new board-appointed directors after they have released their notice of meeting for an upcoming ASM, if it is intended those directors will continue to serve on the board after the ASM. This is because the notice of meeting for that ASM will need to include the appropriate resolution to enable the re-election of that director, together with suitable information for shareholders. Where this is unavoidable, issuers may wish to defer a scheduled meeting to allow the preparation of an amended notice of meeting.