NZX Capital Raising Settings

Consultation Response Paper

June 2023

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Introduction

Following a period of pre-engagement with market participants, NZX released a consultation paper dated 27 July 2022 seeking feedback on proposed amendments to the capital raising settings in the NZX Listing Rules (**Rules**). The background and objectives for the review are outlined in that paper together with an exposure draft of the proposed rule amendments.

As part of a holistic review of the Rules in 2018, the placement capacity was reduced from 20% to 15% to significantly improve shareholder protections for capital raising, and the current review is part of NZX's ongoing program to continuously review and improve its rule settings.

The consultation period closed on 16 September 2022. NZX received strong engagement with approximately twenty-one written submissions from a broad cross section of the market, including: investors, brokers and investment banks, law firms, industry bodies and individuals. This feedback was received in addition to extensive verbal feedback as part of preliminary discussions.

The feedback has been supportive of the review and its target areas. The submissions are very well considered and offer rich information, and in some cases data, to support the views expressed. Although there was opposition to some of the proposals, the balanced feedback has allowed NZX to finalise proposed outcomes on most of the issues with broad consensus.

A key decision of the review is whether to permit accelerated non-renounceable entitlement offers (**ANREOs**) as an accepted structure under the Rules and, if so, to determine the appropriate shareholder protections.

This paper summarises the feedback received and outlines the proposed outcomes of the consultation proposals.

What are the next steps for the review?

The views expressed in this paper will form the basis for an application to the FMA for formal approval of the amendments to the Rules, which is a requirement of the Financial Markets Conduct Act 2013.

Once the FMA has determined whether to approve the amendments to the Rules, the changes will be announced to the market. We will also publish guidance in relation to the new requirements prior to the updated Rules taking effect.

We will provide mark-up versions of the Rules and Corporate Action Notice (**Notice**) when we announce the changes.

We have provided an updated exposure draft of the proposed Rules and Notice alongside this paper (in both a cumulative mark-up format against existing requirements, and a mark-up against the consultation exposure drafts). The updated exposure drafts are available here.

When is it intended that the Rule amendments will become effective?

It is intended that the updates to the Rules that are approved by the FMA will take effect later this year. The exact timing will depend on the timing for the FMA's review and approval of the proposed updates. However, it is not expected to be prior to 1 October 2023 and NZX will provide at least one months' notice before any updated Rules and new guidance take effect.

Questions

If you have any queries in relation to the review, please email policy@nzx.com or contact:

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General feedback and NZX observations

Investors, notably the New Zealand Corporate Governance Forum (**NZCGF**), provided submissions responding both on the detail of the review and to outline their views on what they see as the key principles underpinning shareholder rights in relation to capital raising. The key principle of fairness which institutional investors say they would like reflected in the Rules is that shareholders are the owners of the issuer, and the rights to subscribe for new capital in a capital raising should belong to them, either to be exercised or sold.

Investors consider that placements and accelerated non-renounceable entitlement offers (**ANREOs**) do not reflect this key principle so they should receive a timely justification that their cost is compensated by the benefits to the issuer (effectively all shareholders) of such an offer structure.

Alternatively, sell side advisers (such as brokers and investment banks) and legal advisers expressed strong views in support of flexibility for boards to deliver outcomes in the best interests of the company. This includes strong support for allowing non-renounceable structures. These submitters noted the concern that some of the proposals may reduce flexibility and highlighted that NZX needs to maintain settings which align with ASX.

The views from investors are understandable, but the current rule settings, including the placement threshold of 15%, acknowledge that some flexibility is needed for boards to act in the best interests of a company. The placement capacity was reduced to 15% (from 20%) as part of the holistic review of NZX's market structure and Rule settings in 2017/2018. This amendment acknowledged the views of investors and significantly strengthened shareholder protections in this area.

There are some other areas where investors support the introduction of additional flexibility, such as:

- increasing share purchase plan (**SPP**) thresholds;
- allowing issuers to provide for downside price protection for retail investors under accelerated structures;
- allowing ratification of earlier SPPs; and
- reducing offer timetables for pro rata renounceable offers to make these forms of offers more attractive relative to non-pro rata structures.

There are also some areas where we can deliver additional shareholder protections and acknowledge the principle of fairness from investors noted above. A key area where this can occur is by enhancing existing disclosure requirements to provide greater transparency on board decision-making. Delivering improvements in this area has been a priority for the review and is considered a necessary corollary to allowing flexibility in relation to the use of capital raising structures. Alongside significantly strengthening disclosure requirements, we will also require disclosure at the time an offer is being made instead of requiring this disclosure within Annual Reports, which may be well after the event.

There are some other targeted measures which received broad support, and which will reinforce shareholder rights, such as requiring a liquidity event for a renounceable structure to ensure that both institutional and retail investors have an opportunity to access value in their rights as part of a renounceable structure. NZX is also considering options for delivering additional training and guidance for boards to increase capability in relation to capital raising.

Submitters did not support the proposed requirements in relation to shortfall allocation policies or in relation to disclosure of sub underwriting arrangements and we will not progress those proposals. The area which received the most feedback relates to accelerated non-renounceable entitlement offers, which is discussed below.

Copies of non-confidential submissions can be accessed here.

Feedback on specific proposals and proposed outcomes

This section sets out a summary of the feedback and proposed outcomes for each topic. We have split this into two parts: the first relates to the use of non-renounceable entitlement offers and the second part relates to the other aspects of the review.

Accelerated non-renounceable entitlement offers

In our initial consultation, we proposed to allow the use of accelerated non-renounceable entitlement offers (ANREOs) with a 1:1 offer limit to align with the ASX. As an additional protection to provide transparency on board decision making which went above and beyond the approach of ASX, we also proposed to require issuers to disclose within offer documentation:

1. the reasons why a non-renounceable structure had been selected;
2. why the non-renounceable structure is considered to be in the best interests of the company; and
3. the expected impact of the non-renounceable structure on non-participating shareholders.

The rationale for this approach was outlined in the consultation paper. The proposed disclosure obligations were identified as an important additional investor protection to ensure that issuers must be satisfied that a non-renounceable structure is in the best interests of the company. This measure went beyond the ASX approach and was considered an important limitation on the use of the structure. The proposal was consistent with preliminary feedback from investors that transparency on decision making was important. This point is discussed in further detail below as part of the post-consultation analysis.

As expected, submitters had different perspectives on this topic. Five submitters including the NZCGF, the New Zealand Shareholders Association (**NZSA**), Forsyth Barr and some individuals did not support the introduction of ANREOs as an offer structure permitted by default under the Rules. These submitters (with NZSA an exception) seemed to accept that an ANREO may be the best option in some circumstances but considered that a non-renounceable structure should not be an offer structure permitted by default under the Rules.

In particular, the institutional investors represented by the NZCGF considered that insufficient rationale had been provided for allowing ANREOs as an offer structure permitted by default under the Rules. They did not consider that alignment with ASX was sufficient rationale, although NZX notes that has never been the sole rationale. They noted that under an ANREO the discount to the theoretical ex-rights price (**TERP**) represents the value that can transfer from existing shareholders to other parties, so the structure is therefore viewed as inconsistent with the principle of fairness as noted in the general feedback section above. However, it is important to note that there were different views within the NZCGF group, as reflected in the submission, and some parties supported the use of ANREOs in some circumstances.

Forsyth Barr also opposed the use of ANREOs as an offer structure permitted by default under the Rules and said the structure should only be used rarely and infrequently due to the potential for this structure to dilute non-participating shareholders, even with a 1:1 offer limit, which they noted may be impractical for some offers anyway. Forsyth Barr suggested NZX should permit such structures only via waivers from NZ RegCo and that the Rules should outline the information which would be required for such waivers. NZ RegCo should then only grant a waiver if it is satisfied that sufficient grounds exist.

NZSA noted that it does not support ANREO offer structures in New Zealand or any other public market. NZSA noted the recent increase in the number of retail investors and stated that the Rules should protect those who lack the capability to protect themselves through active participation. NZSA noted this may result in a short-term imbalance with NZX competitors, but that it is in the long-term interests of New Zealand's investment market to protect and encourage new investors.

ACC supports allowing ANREOs but noted they should only be used in limited circumstances and that issuers should disclose the reasoning for why the structure has been used in the circumstances.

Some feedback has considered that the 1:1 offer limit is arbitrary and may not be practical in some circumstances if larger recapitalisation is needed. Some of the submissions (especially in opposition) seemed to suggest that these forms of offers are only suitable for distressed situations and recapitalisations.

Most sell side advisers and legal advisers supported the introduction of ANREOs as proposed. There were approximately 10 submissions in support of the proposed amendments.

Chapman Tripp, Jarden, the Australian Financial Markets Association (**AFMA**) and other submitters provided analysis on the rationale for when an ANREO structure may be the best option for an issuer. These submitters explained that this structure may be useful if there is a large shareholder who may or may not be participating and/or in the context of a distressed capital raising where other structures are unlikely to attract new investor support. These parties noted the structure may be useful if:

- some form of rights offer is required if the 15% placement capacity is insufficient from a capital raise sizing perspective.
- an accelerated timetable is needed due to the composition of the share register, funding certainty and/or market volatility.
- sub-underwriting interest is likely to be low and there is expected to be limited take up from existing shareholders.
- a major/large shareholder is not expected to participate.
- a large capital raise shortfall is expected meaning rights trading or a shortfall bookbuild would result in downward pressure on share price.
- the capital raising will be used to fund an acquisition, given the certainty of outcome and expected lower underwriting costs.

It was noted these factors may be particularly present in a recapitalisation where a failure to execute the equity raise may result in the breach of the issuer's banking covenants.

Submitters in support of the proposal noted that in certain circumstances ANREOs will be the best option and in the best interests of the company. These submitters noted that ANREOs generally find more underwriting and sub-underwriting support as sub-underwriters are almost certain to receive some shortfall shares, versus an accelerated renounceable entitlement offer (**AREO**) where sub-underwriters have an entitlement to shares only if the shortfall bookbuild does not clear, and otherwise to obtain shortfall shares need to bid again at the end of the retail offer (meaning the fee component of a sub-underwriting arrangement must be a more meaningful to make it worthwhile due to the length of time and uncertainty). By allowing ANREOs, some submitters said that the potential pool for underwriters and sub-underwriters expands which may result in tighter pricing. It is likely to enable issuers to more easily secure underwriting which some submitters stated is often a pre-requisite to launching a capital raise.

AFMA noted ANREOs are useful in volatile markets and if underwriting certainty is necessary. AFMA also stressed the importance of alignment between New Zealand and Australian markets.

In general, the sell side and legal advisers strongly support flexibility for boards and highlighted the importance of ensuring alignment with ASX, noting that the ability to undertake ANREOs may be seen as an incentive to select ASX over NZX for a primary listing. Some submitters who supported ANREOs did not agree with the proposed new requirement to disclose the reasons why a non-renounceable structure had been selected and why this was in the best interests of the company. These submitters stated it would create an impression that these structures are less favoured than others. This appears to highlight a lack of understanding of the investor perspective in relation to such structures and we respectfully disagree with this feedback.

One of the confidential submissions raised a potential alternative of only allowing ANREOs with increased dilution protection, noting that the Australian transaction data, which was summarised and analysed in the submission, has highlighted recent Australian offers typically have a lower offer limit of less than 1:3. This data is discussed further in a following section on the dilution limit.

The rationale from submitters, and suggested by the transaction data, for using a non-renounceable structure indicates that non-renounceable structures may be useful both in the context of growth (acquisition) opportunities and in recapitalisations.

Submitters appear to agree that non-renounceable structures are valid in some circumstances, even those submitters who opposed allowing them as a structure "as of right" (including the NZCGF and Forsyth Barr – NZSA was an exception to this).

Further analysis in relation to ANREOs and proposed outcome

Whether ANREOs should be permitted at all?

On balance, NZX considers that sufficient rationale has been provided within the submissions (and other inputs) to permit non-renounceable structures in some circumstances and that the structure should therefore be available to issuers provided there are sufficient investor protections.

This view is supported by the Australian transaction data noted above and discussed in more detail below. NZX also considers that a level of alignment with ASX, while not the sole determinative factor, is an important consideration given the ease with which companies may select their primary listing venue. We also note that most other recognised jurisdictions permit non-renounceable structures (often referred to as ‘open offers’) with varying degrees of shareholder protections. The current position under the Rules is an outlier in terms of international practice. This indicates that the proposed approach should not adversely impact the international perception of New Zealand’s capital markets. In fact, the opposite might be true and the perception of New Zealand’s market might be negatively impacted if these structures are not permitted given that most other international jurisdictions permit these structures in some form. NZX’s benchmarking analysis is discussed further below.

In addition, the current review by ASX of its rules in this area has not sought to amend the current fundamental policy settings for non-renounceable structures. This indicates that there are not significant concerns from stakeholders in the Australian market on the use of these structures. We reiterate the earlier point that, in order to acknowledge and respond to the views of investors, NZX’s proposals sought to introduce stronger shareholder protections than ASX in the form of disclosure requirements.

However, it was clear from some of the feedback that there should be limitations on the use of the structure due to the concern from investors that, despite being pro rata structures, non-renounceable structures may not fully recognise the property right of existing shareholders in situations where they choose not to or are unable to participate in a non-renounceable offer.

As discussed below, we consider that the appropriate way to address these concerns is to establish requirements that ensure the non-renounceable structure is only being used in circumstances where it is in the best interests of the company, and to provide settings that deliver sufficient investor protections in the form of disclosure requirements and a dilution limit. These measures seek to provide confidence that the availability of the non-renounceable structure will support overall market integrity.

Non-renounceable rights issues can be distinguished from placements because they are still pro rata offers, so existing shareholders are being given the same opportunity to participate. This is consistent with recommendation 8.4 within the NZX Corporate Governance Code, which is a recommendation that is strongly supported within the submission from the NZCGF. The potential for dilution occurs if shareholders choose not to participate or are unable to do so. We agree some constraints should be

put around the potential for dilution and that boards should be clear on the reasons why they have chosen a non-renounceable structure. This is discussed further below.

In addition, most views accept that a non-renounceable offer may be the best structure to use in some circumstances i.e. those who opposed enabling these structures via the Rules generally suggested a waiver pathway should be used instead. Therefore, the key question appears to be which mechanism is used to enable the use of non-renounceable pro rata structures in some circumstances and what protections should be put in place to respond to investor concerns.

As discussed further below, NZX considers that a waiver pathway is not consistent with a view that this is an acceptable structure in some circumstances. Any waiver consideration would also be difficult for NZ RegCo to apply in practice because it would need to make very difficult commercial judgments which would likely involve NZ RegCo making a merits assessment of the offer structure, which it is not placed to do solely through a waiver application process, and which should ultimately be a decision for an issuer's board.

We have therefore carefully considered the appropriate mechanism to enable (and limit) the use of non-renounceable pro rata structures in some circumstances and what protections should be put in place to respond to investor concerns.

NZX remains of the view that boards are best placed to make these assessments provided there are sufficient investor protections and issuers explain the basis for their decision making, noting also our recommendation that boards receive expert advice. Specific elements of the use of ANREOs are discussed below together with the outcome of the consultation process.

Rules vs waiver pathway

As noted above, a key initial question is whether non-renounceable offers should only be considered via waivers. This was suggested by some submitters. NZX is not aware of any other exchange taking this approach and has concerns with the principle that a form of capital raising structure is only permitted via waivers instead of the Rules. This will require very difficult merits-based assessments to be made by NZ RegCo which it is not in a position to do.

NZX also considers that a waiver pathway is not consistent with a view that this is an acceptable structure in some circumstances.

When NZ RegCo consider waivers, it is effectively determining that the policy intent behind a rule is not being adversely affected by the waiver. That is not possible in relation to capital raising thresholds. All things being equal, waivers by NZ RegCo of capital raising thresholds or which have the effect of enabling non pro rata capital raisings that are otherwise not permitted under the Rules, is contrary to the policy decision made by NZX on permitted dilution and investor protections.

Unlike other waivers, there is no clear basis to say such a waiver still meets the policy that underpins the Rule nor is it considered appropriate for NZ RegCo to make that decision based on its own view that that outcome is fair and reasonable to existing holders (even if the relevant issuer's board is prepared to certify to that effect).

If there was a market expectation that ANREOs are permissible via waiver by NZ RegCo, that effectively sees NZ RegCo making merits-based decisions which may see an outcome to dilute existing holders to the benefit of new holders, on limited information, often in very short timeframes. That is not considered an appropriate or viable outcome. It is noted that even with permitted issuance structures such as placements and SPPs, waivers are extremely rare and only in extreme situations (during the initial COVID-19 period being a prime example). Neither NZX nor NZ RegCo consider it appropriate for there to be market expectation that NZ RegCo will routinely facilitate capital raisings structures that are not permitted under the Rules by default.

In relation to timing, issuers seeking to undertake ANREOs often do so under urgency. Those

circumstances would invariably make NZ RegCo's consideration more complex and challenging, given the need to consider all facts and evaluate and assess the rationale for enabling a structure not otherwise permitted under the Rules. Further, the nature of NZ RegCo's involvement in the waiver process (i.e. as a third party, removed from the issuer) means it inevitably lacks the same context and information that a board possesses in relation to the proposed transaction and the company's overall financial position. In addition, while NZ RegCo has the ability to engage with an applicant and its legal advisers, practically it would not have the same ability to access information in thew same way the board who would be able to directly question management and external advisers.

Any waiver consideration would also be difficult for NZ RegCo to apply in practice because it would need to make very difficult commercial judgments about an issuer which would likely involve NZ RegCo making a merits assessment of the offer structure, which it is not placed to do solely through a waiver application process, and which should ultimately be a decision for an issuer's board. Ultimately, this becomes a question over who is best placed to determine whether a structure is in the best interests of the company based on a set of circumstances i.e. NZ RegCo or an issuer's board. We have discussed below some reasons why we consider that an issuer's board is better placed to make this assessment.

NZ RegCo does not support a proposal that ANREOs be permitted with waivers. This is consistent with NZ RegCo's approach generally to capital raising thresholds that apply under the Rules. The limited departure from this was in 2020, when NZ RegCo put in place class relief from the default restrictions under the Rules to permit the use of ANREO's based on comparable capacity under the ASX rules. That class approach was taken in recognition of the unprecedented impacts arising from COVID-19, and the challenges that were being experienced by Issuers that were imposing capacity constraints on Issuers' working capital positions.

We consider that similar issues and difficulties arise if NZX sought to limit the use of ANREOs for a particular use. There would be no grounds for NZ RegCo to grant a waiver if the structure was sought to be used for a different purpose to that proposed. The same practical difficulties would also arise.

NZX remains of the view that boards are best placed to make these assessments provided there are sufficient investor protections and issuers explain the basis for their decision making, noting also our recommendation that boards receive expert advice. Specific elements of the use of ANREOs are discussed below together with the outcome of the consultation process.

Australian transaction data and dilution limit

A summary of the recent Australian transaction data is as follows:

Australian transaction data highlights that there were 68 ANREOs in Australia between February 2021 and March 2022. Many of these raises were for smaller amounts - with 51% for less than $10m. The data highlights that offers were often completed at single digit discounts.

In regard to the proposed offer limit of 1:1, of the 68 Australian ANREOs:

- Only 3 (4%) were issued at 1:1
- Only 8 (11%) were issued at 1:2 or below
- 57 raises (85%) were issued at ratios less than 1:3

A discussion of New Zealand transaction data was included in the consultation paper dated 27 July 2022 (page 8). We analysed the above Australian data for a similar period to ensure comparability.

It could be argued that given the dilutionary effect that non-renounceable structures have on existing shareholders who do not or cannot take them up, the proposed ratio of 1:1 is unnecessarily generous when viewed against the actual offer ratios applied in Australia.

A 1:3 offer limit could achieve practical parity with ASX while ensuring there is still a limit on the

potential negative consequences for existing shareholders who choose not to (or cannot) participate, especially once coupled with the additional protections discussed further below.

We therefore propose to strengthen the proposed settings by reducing the offer dilution limit to 1:3.

Benchmarking research

NZX conducted benchmarking research against other exchanges to compare its current settings in relation to non-renounceable offer structures. These are often referred to as open offers in other jurisdictions.

Research considered the following exchanges:

- ASX
- HKeX
- SGX
- NYSE
- LSE

This research shows that these jurisdictions permit non-renounceable structures in some form via their rules. These exchanges all permitted these offers via the rules as opposed to a waiver pathway only. The typical shareholder protections used are either an offer limit or discount to restrict dilution.

Separately, we have also considered the approach of the London Stock Exchange in the United Kingdom. UK Listing Rules permit these forms of offers, referred to as open offers, subject to a 10% discount limit. Issuers may make open offers at greater discounts with shareholder approval. The UK Listing Rules are currently being reviewed as part of an extensive revamp of the UK listing regime designed to enhance the competitiveness of the UK listed market relative to international peers – see the most recent consultation paper here.

The UK review proposes to introduce dual class share structures and remove shareholder voting requirements in relation to approval of transactions (known as class one transactions) and some related party transactions. Major changes are not proposed in relation to capital raising requirements. The UK regime already acknowledges that open offers (i.e. non renounceable structures) are pre-emptive offers and are commonly used and accepted structures.

The most relevant exchange for NZX's purposes is ASX due to the connectivity between the New Zealand and Australian capital markets, as discussed under the background section of this paper. In the context of an Australian and New Zealand capital market, companies can choose where to list. Therefore, NZX making its settings materially different from ASX does not necessarily reduce the perceived risks to investors given the ease with which companies can elect to adopt a primary listing on ASX and be subject to its requirements.

NZX's starting point is to consider similar investor protections to those operating effectively in the Australian market. We consider that this supports a positive international perception of New Zealand's capital markets. Instead, non-renounceable structures appear to be an acceptable form in the Australian market. Our approach has therefore been to consider an offer limit, as opposed to a discount limit, to manage the risk of dilution.

In addition, NZX's Rules do not typically place restrictions on the price at which securities can be issued, which will be a commercial matter for boards. However, non-pro rata issues at a more than 15% discount require directors to certify the price is fair and reasonable to the relevant issuer and to those not participating in the offer. The regulatory lever of an offer limit is therefore more consistent with the approach NZX takes under its rule settings. Further discussion of offer and discount limits is included below.

Under the initial consultation proposals NZX had also proposed strong disclosure obligations in relation to the use of non-renounceable structures which will place a high burden on boards. These disclosure obligations go beyond the requirements of ASX and will require issuers to disclose the reasons why the structure is in the best interests of the company and to disclose those reasons.

Use of structure

The Australian transaction data indicates lower offer discounts than has been the case in New Zealand with discounts above 20% being quite infrequent (only 7% of offers). Many transactions appear to have been completed at single digit discounts (approximately 25% of offers) and the majority (approximately 55%) of non-renounceable offers in Australia are conducted at discounts of less than 20%. However, as noted in the initial consultation paper, this is likely to have been materially impacted by the fact the non-renounceable structures conducted in New Zealand occurred in response to Covid and attracted larger discounts due to the urgency at the time.

The average level of discounts alongside the size of the raisings for ASX issuers indicates that the ANREO structure is used for more than just recapitalisations, where you would expect significant discounts and significant capital raised (as was the case with some of the non-renounceable structures in New Zealand post-Covid). ASX does not seek to limit the purpose for which a non-renounceable structure may be used.

In addition, submissions support this view with numerous submitters highlighting that the rationale for conducting a non-renounceable structure may include to help fund an acquisition. Jarden, Chapman Tripp, the AFMA and other submitters specifically mentioned that non-renounceable structures may be suitable for acquisitions, for example where certainty of funding is needed and to reduce underwriting costs.

Therefore, the rationale from submitters, and supported by the Australian transaction data, indicates that non-renounceable structures may be appropriate both in the context of growth (acquisition) opportunities and recapitalisations.

In general, we do not think it is appropriate to seek to limit the purpose for which a non-renounceable structure may be used. Provided an issuer and its board can provide the proposed confirmations via disclosure, it will be up to the board of the issuer to determine that a non-renounceable structure is in the best interests of the company.

A lower dilution limit may reduce the utility of such structures across different purposes, especially for recapitalisations. However, issuers have other options for capital raising structures, including using ANREOs in combination with placement capacity or seeking shareholder approval for a larger placement or (perhaps less likely) a non-renounceable offer.

Investor protections

NZX has carefully considered the potential negative consequences on investors who choose not to participate in a non-renounceable offer. These concerns were articulated within the submissions from NZCGF, NZSA, Forsyth Barr, ACC and from a private submitter.

The key principle of fairness which institutional investors say they would like reflected in the Rules is that shareholders are the owners of the issuer and the rights to subscribe for new capital in a capital raising should belong to them, either to be exercised or sold. Their concern is that non-renounceable structures do not acknowledge this principle, even though the structure is still fundamentally a pro rata structure. In most cases the parties opposing the broad use of these structures would prefer to see them utilised only via waivers. NZX has discussed above its concerns in relation to that approach. We therefore consider that a Rules pathway is the only viable avenue if these structures are to be permitted.

A challenge with this process is that it is not possible to analyse the impact of a single factor (i.e. the use of a non-renounceable structure) on investors in relation to a capital raising process because there will always be a range of factors to consider as noted on pages 5 and 6 above. It is also impossible to determine the effect of a counterfactual offer structure in terms of the level of uptake under an alternative structure and the effect on an issuer's share price.

The effect of a single feature (i.e. use of a renounceable structure) as part of an offer can also not be analysed, given that the success of an offer will depend on all the elements of the offer (including the rest of the offer terms). Consideration of the impact of the offer on the after-market of an issuer's shares will also always be an important factor (so there are also differences depending on when the impact of an offer is assessed). It is therefore not correct to say that a non-renounceable structure is worse for investors in all cases and the limitations and shareholder protection we are proposing would ensure a high bar.

ANREO Disclosures and advice from external advisers

The disclosure obligations that were proposed in the initial consultation are a critical control in relation to the proposal to allow ANREOs as a permitted structure. This requires issuers to disclose within offer documentation (**ANREO Disclosures**):

- the reasons why a non-renounceable structure had been selected;
- why the non-renounceable structure is in the best interests of the company; and
- the expected impact of the non-renounceable structure on non-participating shareholders.

These ANREO Disclosures will be required to be made by issuers within offer documentation at the commencement of an offer. A board should have considered all the matters necessary in determining the appropriate structure (including receiving necessary third-party advice) and so should be able to make this disclosure at the time. It will also ensure that boards have turned their minds to the concerns of investors, including non-participating shareholders. The disclosure obligations will require shareholders to outline why the non-renounceable structure is in the best interests of the company, which will require an explanation of the financial or other benefits relative to other options. In addition, the disclosure obligations will require issuers to explain the expected impact of the non-renounceable structure on non-participating shareholders. This will require a discussion of the potential dilution impact with regard to the offer ratio and proposed discount level.

These disclosure obligations act as an important gating mechanism on the use of non-renounceable structures because a board must be satisfied that the structure is in the best interests of the company. This is a high standard because this confirmation must be disclosed and it must be supported by the reasoning.

In our view, any diligent board should have received independent external advice to support the disclosures which are required to be made above. NZX recommends that issuers obtain independent external advice in relation to capital raising decisions. We propose to reinforce this expectation within NZX guidance.

We will also outline within guidance an expectation that issuers disclose a summary of the independent external advice received, if appropriate, to support the ANREO Disclosures. This may form part of the explanation of the process followed to determine how the ANREO is in the best interests of the company – for example, this may relate to the level of discount, the overall cost to the issuer of underwriting or the availability of underwriting.

We have discussed the dilution limit above. Issuers will need to consider the potential dilution impact on non-participating shareholders as part of the third limb of the ANREO Disclosures. The level of discount will also be a significant factor and should be discussed as part of this disclosure. Some other jurisdictions have sought to place limits on the level of discount that can be offered under a non-renounceable structure – for example, a 10% discount limit. NZX considers that issuers should

carefully consider the level of discount and explain the reasons why the proposed discount has been offered as part of this limb of the disclosure. This will be especially important if the discount is significant.

We have carefully considered whether we should create a separate condition that an issuer must obtain independent external advice to support its ANREO Disclosures, and to provide a summary of the advice to shareholders. On balance, we consider this should not be a formal requirement and should instead be outlined as an expectation within guidance. This will balance the cost to issuers and avoid the need for NZ RegCo to merit assess advice received by issuers, or approve advisers as being suitable to provide the advice. However, we have updated the ANREO Disclosure requirements from those that were set out in the consultation proposals, so that issuers must outline whether they have received external investment banking or corporate finance advice on the merits of the ANREO and, if so, to name the party or parties.

Another reason for determining to expect but not require an issuer to obtain external advice is that this type of requirement is not a feature of any other market we reviewed so this would be a unique requirement and may be seen as creating too much complexity. The proposed approach is also consistent with the consultation feedback from the NZCGF which suggests expert advice should be obtained in relation to capital raising.

NZX will offer further guidance to issuers on these proposed updated disclosure requirements prior to updated rules taking effect.

NZ RegCo would monitor such disclosures as part of its standard issuer monitoring work. If it identified that an issuer had materially deviated from the expectations on disclosure, NZ RegCo has the ability under Rule 3.28.1 to require an amendment, addition or alteration to such an announcement, to ensure that the issuer met the requirements of the proposed Rule 4.4.2(c)(ii).

In addition to this real-time/triage response, NZ RegCo could take follow on action for breaches of the Rules. Any enforcement outcome would necessarily depend on the nature of the breach itself.

NZ RegCo would also seek to proactively engage with issuers proposing to undertake ANREOs, and the market generally, to reinforce the expectation on disclosure under the Rules and associated guidance.

Dilution limit

It could be argued that given the dilutionary effect that non-renounceable structures have on existing shareholders who do not or cannot take them up, the proposed ratio of 1:1 is too broad when viewed against the actual offer ratios applied in Australia.

A 1:3 offer limit could achieve practical parity with ASX while ensuring there is still a limit on the potential negative consequences for existing shareholders who choose not to (or cannot) participate, especially once coupled with the additional protections discussed further above (such as the ANREO Disclosures). As we are proposing a dilution limit that is lower than that imposed by ASX there are greater protections for non-participating shareholders from potential dilution than those that apply in Australia.

We have therefore proposed to strengthen the proposed settings by reducing the offer dilution limit to 1:3.

Discount limit

NZX has considered whether to impose a discount limit in relation to the use of ANREOs. This would have been the other measure to seek to introduce if it was determined that the proposals outlined below were insufficient. As noted in the benchmarking research, the London Stock Exchange and SGX have a 10% restriction on the discount which may be offered, but do not also apply a dilution

limit.

A difficulty with using a discount limit is that this is not the mechanism used in the most relevant comparable market, ASX, and it is not consistent with the approach taken to regulatory levers under NZX's rules currently. NZX considers it is appropriate to have more regard to its closest exchange given the connectivity between the two markets to enhance the effectiveness and perception of New Zealand's capital markets.

Finally, a discount limit was not proposed within any of the submissions NZX received during the review process and therefore we would be introducing a measure which has not been subject to feedback and which has not otherwise received support.

ANREO outcome

NZX has carefully considered the factors noted above in relation to the approach to non-renounceable structures. On balance, NZX considers that non-renounceable structures should be a permitted structure if issuers confirm via disclosure that the structure is in the best interests of the company and discloses the reasons why that is the case.

This will ensure that boards in New Zealand have the same range of capital raising structures which are available in other markets to discharge their obligations to act in the best interests of companies. NZX considers that permitting this option under the restrictions and protections proposed is consistent with promoting market integrity.

This outcome is reinforced by the fact that most submitters supported permitting non-renounceable structures.

Most of the submitters who did not support enabling non-renounceable structures via the Rules wanted to see the structure used only via waivers. This issue has been considered at length and discussed above. The analysis in the paper reflects extensive engagement and feedback from NZ RegCo as the front-line regulator. We acknowledge that the proposed outcome would not be supported by NZSA's stated policy position. However, we consider that the alternative of not permitting the structure will mean NZX is an outlier to other markets and that the approach of only permitting the structure via waivers would also be inconsistent with the approach of all other jurisdictions and is not supported by NZ RegCo. The proposed approach will also ensure regulatory certainty which would not be the case under a waiver approach.

NZX notes the concerns from investors and other stakeholders and has carefully considered the appropriate shareholder protections to respond to those concerns as follows:

- ensuring the threshold test is met that the offer structure is only used if it is in the company's best interests to do so;
- making the ANREO Disclosures – which reinforce the point above and will require disclosure of the objective reasoning of what a non-renounceable structure is in the best interests of the company and what the impact will be on non-participating shareholders;
- recommending boards received external advice and requiring disclosure of whether advice has been obtained; and
- introducing a dilution limit.

NZX recognises that training and guidance are an important factor. We have used the current process to seek to promote awareness of the relevant issues for boards to consider and to ensure that the investor perspective is understood. This will be reinforced in the proposed guidance. In addition, the recommendation that issuers obtain external advice is an important measure to encourage issuers to receive appropriate expert advice and this is supported by a mandatory disclosure obligation to identify whether advice has been obtained and to identify the adviser(s). NZ RegCo has a training module planned which will cover capital raising methods. NZX will also continue to engage with other relevant industry bodies on potential training for issuers and their boards.

NZX considers it is important for the international perception of New Zealand's capital markets that it has settings which are comparable to other markets. This is particularly the case for New Zealand given its connectivity with Australia where many of its issuers and participants operate in both jurisdictions.

As a result of the further considerations outlined above, the Rules will be amended to allow ANREOs on the following conditions:

- that the offer is subject to an offer limit of 1:3;
- that the issuer makes the ANREO Disclosures proposed in the initial consultation at the commencement of the offer, and, in addition to the ANREO Disclosure proposed in the initial consultation, issuers must disclose within offer documents whether they have received external investment banking or corporate finance advice on the merits of the non-renounceable structure and, if so, by whom.

We will provide guidance in relation to what is expected to satisfy the ANREO Disclosures (as updated). This guidance will be published prior to the updated Rules taking effect and will outline the level of information expected to satisfy the ANREO Disclosures. We will be expecting issuers to carefully consider their reasoning and to provide clear, concise, and effective disclosure on these matters.

This guidance will also outline an expectation that issuers have obtained independent external investment banking or corporate finance advice to support the ANREO disclosure obligations and disclose a summary of the advice received to support the ANREO Disclosures.

We do not propose that the Rules should only allow ANREOs for particular purposes (e.g. for recapitalisation or growth scenarios only), given the protections outlined above, and the regulatory uncertainty that this would create if waivers were to be used as a mechanism to permit ANREOs outside the scope of those purposes.

Other matters

Allowing downside price protection for retail investors in accelerated structures

Submitters supported the proposal to allow issuers to offer downside price protection for retail investors in accelerated offers, noting that this should be optional only, as per the exposure draft, and should not be a mandatory requirement for accelerated offers.

Submitters noted that this is market practice currently for placement and SPP structures and it will be useful to allow this for accelerated offers because it will help ensure that any shortfall is able to be placed in the back end bookbuild. This will help protect retail shareholders who have a longer risk exposure period and help issuers place shortfall shares notwithstanding a market downturn.

It was noted that this may allow tighter pricing for AREOs which currently require wide pricing to withstand market movements during offer periods. This change removes a key difference between placements/SPPs and accelerated offer structures (such as AREOs) and should therefore make them relatively more attractive. We will therefore proceed with this change as proposed.

Requiring a liquidity event for a renounceable structure

We proposed to require issuers to have a liquidity event in the form of rights trading and/or a shortfall bookbuild for renounceable offer structures to ensure fairness for both retail and institutional investors.

This proposal was generally strongly supported, subject to sell-side advisers supporting the proposal provided that ANREOs are enabled. There was a dissenting view from Jarden who noted that a liquidity event for certain offer structures can result in significant downward pressure on the share price to the offer price.

Jarden noted that the majority of equity raisings that have not had a “liquidity event” in the renounceable structure have been due to financial distress of the issuer and sub-underwriters have only participated in the equity raising on a financial risk basis as they are looking through to receiving shares at the end of the process and are potentially long term shareholders – i.e., they are not hedge funds that would have participated on the basis of a fee for the risk. Had there been a “liquidity event” in these distressed raisings, then the sub-underwriters would not have participated in that function and taken balance sheet risk through the offer period, but rather would have just sought to participate in a shortfall bookbuild at the end of the offer (a “free option”). Jarden submitted that this risk means that it would be very difficult to secure underwriting, which may affect the ability to launch equity raisings it was also submitted that there could also be other negative impacts on issuers in these scenarios, including that the issuer’s bank may not be supportive of providing necessary debt waiver packages without the certainty of the equity raising completing.

One submitter noted that NZX should consider the position of smaller issuers where the cost of imposing the liquidity event obligation may not be justified given expected low levels of liquidity.

Based on the majority views, we propose to progress this change given that we are also allowing ANREOs as a permitted structure in some circumstances.

5-day notice and acceptance periods for traditional rights

Submitters supported the proposal to remove the requirement to announce a rights issue 5 days prior to the record date, noting this would make pro rata renounceable structures more attractive relative to other options. We had sought feedback on whether retail investors may have concerns. However, NZSA has indicated its support on the expectation that we introduce the requirement for a liquidity event for all renounceable structures, which we propose to do.

The key constraint here relates to current system and operational constraints. NZX did not receive any submissions from external parties on this point, but this update would require a system change for NZX and we understand many external participants (often via third party vendors) and heightened operational risk due to the way NZX processes these corporate actions.

NZX understands that the current timeframe could be reduced by one day without any impacts on the systems of NZX or external participants. We therefore propose to progress that change immediately and we will conduct a broader process in relation to a longer-term change to reduce traditional rights issue timetables further.

Separately, some submitters also noted an additional area to condense retail offer timetables by reducing the minimum acceptance period from 7 to 5 working days for online acceptances only. It was noted this would further reduce the period issuers and underwriters are on risk and make offer processes more efficient. This does not require any NZX system changes and we understand it would not negatively impact market participants processes, so we propose to progress this change.

Prior to confirming this approach, we will ensure there are no other impacted external stakeholders as part of the final stages of the review process and the final position will be confirmed when the FMA approved changes are announced.

Shortfall allocation policies

We proposed to allow current shareholders the first opportunity to take up shares under a shortfall for a pro rata offer to align with a current proposal from ASX. This proposal received very little support. Submitters generally considered that a pro rata renounceable structure sufficiently recognises existing shareholder rights, and it was not necessary to offer this additional measure. Sell side advisers preferred not to have this constraint so that they can optimise outcomes for issuers in a shortfall allocation process.

We therefore do not intend to progress this proposal and it has been updated accordingly within the exposure draft of the amended Rules.

Share Purchase Plans

We proposed to increase the current monetary limits for SPPs from $15,000 to $50,000 per shareholder and the percentage of shares which may be issued in addition to placement capacity from 5% to 10%. Submitters generally supported these proposals, especially sell side advisers and retail investors who were strongly supportive.

Some institutional investors, led by the NZCGF, requested further data and analysis to support the proposal to increase the percentage that may be issued from 5% to 10%.

NZX has received further data from the share registries which highlights that a large proportion of share registers are owned by retail holders. The data obviously varies for different issuers, and it is difficult to compare across all issuers given that it is derived from different registries. However, many issuers have a majority (or a very significant proportion) of their registers held by retail investors. Given that SPPs are mostly used in conjunction with placements to ensure that retail investors can also participate in offers, NZX considers that it is appropriate in the context of this review to offer additional flexibility to support the delivery of pro rata outcomes for retail investors by increasing the issuance threshold permitted from 5% to 10%. This will ensure that those issuers who have a high proportion of retail holders can offer sufficient quantities of shares to retail holders via an SPP when conducting a placement to support the delivery of pro rata outcomes. The additional restrictions for SPP scaling policies and the associated disclosure requirements are an important protection for investors in this area.

NZCGF also suggested that NZX considers a dollar cap above which the allocation under the SPP will not exceed the investor's notional pro-rata entitlement. Within its submission, ACC has suggested that cap could be $20k. NZX considers that if this was intended as a hard cap on entitlements it might be too restrictive in situations where a company really needs the funds. Alternatively, in relation to scaling, we consider that the updated scaling requirement noted below is a more suitable measure at this stage. NZX will increase the monetary limit for SPPs to $50,000 per holder and the overall SPP issuance threshold to 10% as proposed.

The proposal to ensure that the price paid by retail investors cannot exceed the price paid by investors in a related placement was supported. Submitters do not want to see differential pricing as a mandatory requirement but support the change as included within the exposure draft and it will be progressed on that basis.

We proposed to restrict scaling only by reference to holdings at the record date as opposed to also allowing the option of doing so at the closing date of the offer. Three submitters (Bell Gully, Russell McVeagh and Jarden) preferred to retain the existing flexibility, otherwise this proposal received broad support. We propose to progress this change as it supports existing shareholder rights and would provide greater consistency across offer types. This also seeks to address the concern from institutional investors noted above that retail holders may have an unfair opportunity to receive allocations above their existing pro rata holdings at the expense of other investors.

Finally in relation to SPPs, we proposed to allow issuers to seek a ratification of issues made under an earlier SPP to replenish capacity. This proposal was generally supported and offers additional flexibility to issuers. We propose to make the change.

Disclosure requirements for underwriting arrangements

The proposed updated disclosure requirements for underwriting arrangements were generally supported except for disclosure of information in relation to sub underwriting arrangements. Most submitters opposed the disclosure of the identities of, and fees paid to, sub underwriters and

considered this an unnecessary level of detail. These submitters stated that the focus should be on the head underwriting arrangements. Submitters noted that sub underwriting arrangements are between the head underwriter and sub underwriters and there may be legal difficulties for an issuer in obtaining this information. We do not propose to progress that aspect of the proposals, but we will progress the other items.

Disclosure requirements in relation to offer decisions

Submitters generally supported the proposed enhanced disclosure requirements for board decisions in relation to offers, subject to some concerns that a specific disclosure requirement for an ANREO may be seen to suggest that these forms of offers are less acceptable, and to ensure that disclosure of shortfall allocation policies is general in nature and does not constrain an issuer.

As noted above, NZX considers that the ANREO Disclosures are a critical component of permitting ANREOs. Likewise, we plan to progress the disclosure requirements for placements to respond to investor feedback in this area.

Because we are not progressing the mandatory requirements for shortfall allocation policies, the accompanying disclosure obligations also fall away. However, we will retain the proposed obligation for issuers to disclose the proposed shortfall allocation policy within offer documentation.

We have considered the balance of disclosure between the corporate action notice and offer documentation for all the disclosure proposals, and we are comfortable with what is proposed. NZX will provide guidance on the application of these disclosure requirements prior to updated rules taking effect.

Ability for NZ RegCo to request an allocation schedule

We proposed to introduce an explicit permission for NZ RegCo to request an allocation schedule in relation to a capital raise. This proposal received mixed support. It seems this proposal may have been misunderstood as something NZ RegCo would seek to request routinely, which we are advised is not the intention. We will progress this change.

Guidance

We requested feedback on whether NZX should offer additional guidance to issuers and boards in relation to capital raising considerations and requirements under the Rules. This topic received mixed feedback.

There was some feedback that NZX needs to take care with general advice in this area. There was general support for providing guidance or commentary on specific NZX related matters such as disclosure requirements. This will be particularly important for ANREOs because the proposed additional disclosure obligations are an important investor protection. We consider that shareholders are entitled to transparency on board decision making and to understand why an ANREO is considered the best option in the circumstances.

NZX proposes to develop guidance to outline its expectations in relation to disclosure requirements and to identify the key matters that boards should be considering in relation to capital raising options. This is not intended to replace independent external advice which issuers are recommended to obtain. This will instead supplement the receipt of external advice as an additional resource for boards to consider, together with providing necessary guidance on the specific NZX disclosure requirements. This will cover the matters discussed under the ‘ANREO Disclosures and advice from external advisers’ section discussed above.

There was also a suggestion from some submitters that director groups should offer specific training in this area given the technical nature of the topic and the infrequent requirement to engage in the

area. NZX has provided this feedback to the Institute of Directors so it can consider the topic for future training and development programs. NZ RegCo has also advised that it intends to launch issuer training modules in the near term, which will include a module on capital raising. These matters could be covered in that module so that issuers have a better understanding of the trade-offs under each structure and the perspective of shareholders. Other parties may also wish to provide director training in this area.

Special Purpose Acquisition Companies and Dual class shares

There was minimal support for introducing frameworks for the listing of special purpose acquisition companies (**SPACs**) and dual class shares primarily due to a view there is low demand in the market. However, they were supported by some submitters such as the NZSA (who supported SPACs) and Russell McVeagh. Some investors had concerns that dual class share structures do not provide sufficient investor protections.

NZX will consider this feedback further in due course. Any process in relation to these workstreams would follow a more detailed consultation process in due course. In the meantime, such applications would be considered on a case-by-case basis.