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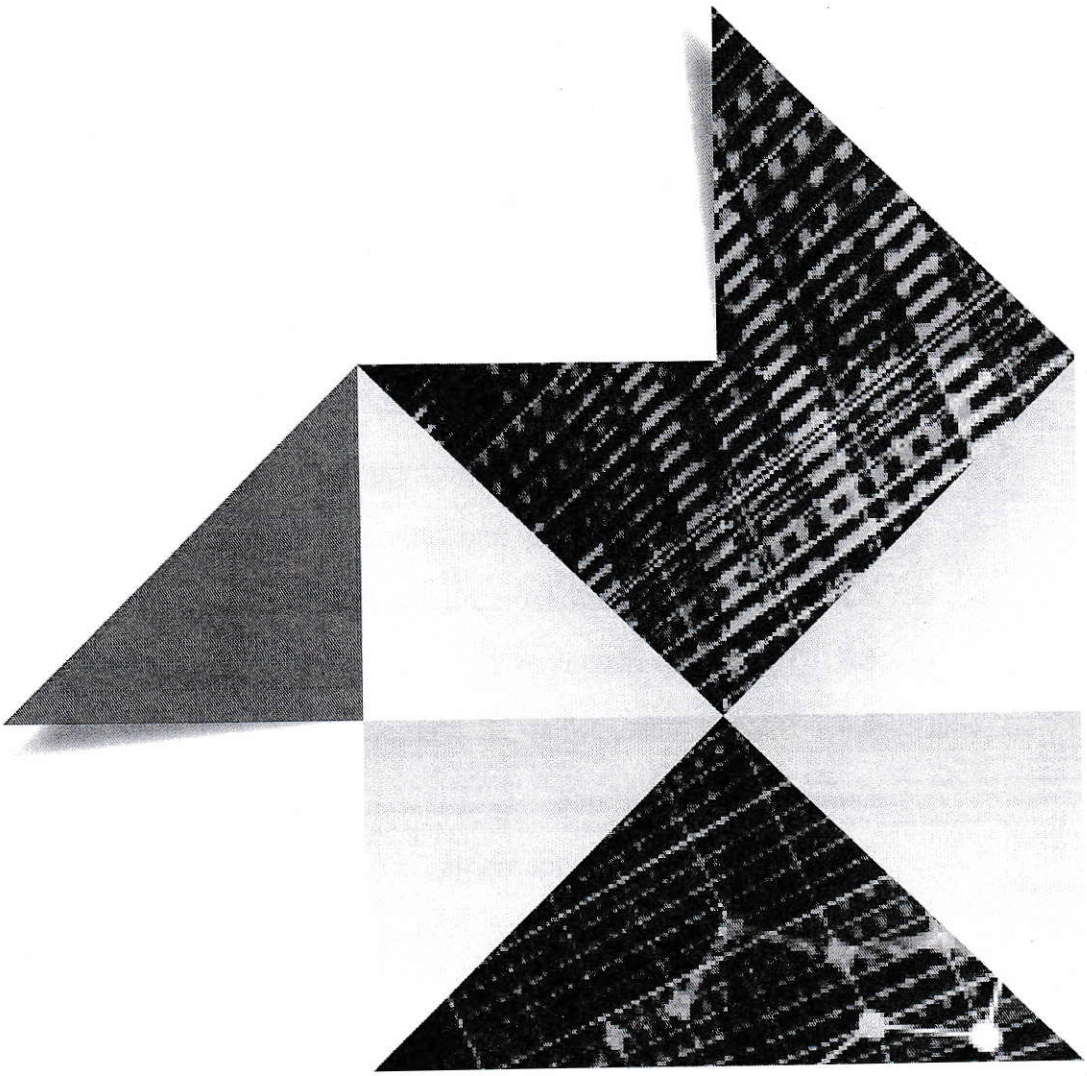
Guidance Note

Continuous Disclosure

1 January 2019



The purpose of this guidance note is to provide guidance to NZX Issuers which are subject to continuous disclosure obligations. This guidance note replaces the previous Continuous Disclosure guidance note issued in April 2017.

Contents

1. Introduction

Continuous disclosure is a disclosure framework which seeks to ensure the timely release of material information by issuers.

Timely disclosure of material information is essential to maintaining the integrity of the market and:

- ensures that the market is informed of relevant information in a timely manner;
- promotes equality of access to information so that investors can make informed investment decisions; and
- plays a critical role in promoting fair, orderly and transparent markets.

NZX's Main Board and Debt Market, and the Fonterra Shareholders' Market, operate within a continuous disclosure framework and the listing rules for each of these markets impose continuous disclosure obligations on the issuers listed on these markets. This guidance note provides guidance to issuers listed on the NZX Main Board and on the Debt Market, who are regulated under the NZX Listing Rules dated 1 January 2019 or later.

Further information relevant to continuous disclosure is set out in the appendices to this guidance note:

- Appendix 1 sets out the NZX Listing Rules (the "**rules**") relating to continuous disclosure;
- Appendix 2 sets out a flowchart for considering whether information is material and whether disclosure is required promptly and without delay.
- Appendix 3 provides some working examples to show the operation of the continuous disclosure rules in practice;
- Appendix 4 sets out a number of guidelines for disclosure of material information that issuers may use to assist them to comply with their continuous disclosure obligations.

2. The continuous disclosure rules

The continuous disclosure rules are set out in Section 3 of the rules (and Section 9.1 of the FSM Rules). All issuers must comply with the continuous disclosure rules, except for foreign exempt issuers (which must instead comply with the listing rules of their home exchange) and wholesale debt issuers. Issuers which only have debt securities quoted are exempt from rule 3.4 (which requires disclosure of specific arrangements involving related parties) but must otherwise comply with the continuous disclosure rules.

Issuers are required to comply with the continuous disclosure rules when entering into business with a company or other entity that is not subject to the rules. For example, if an issuer enters into an agreement containing confidentiality provisions with an entity that is not subject to the rules, the confidentiality provisions in that agreement will not override the issuer's continuous disclosure obligations contained in the listing rules.

The obligation to disclose material information promptly and without delay is a fundamental obligation placed on issuers under the rules. NZX Regulation ("**NZXR**") may refer breaches of the continuous disclosure rules to the NZ Markets Disciplinary Tribunal, which may impose penalties on issuers in respect of such breaches. In addition, the Financial Markets Authority ("**FMA**") has powers under financial product legislation to take action against issuers which breach the continuous disclosure rules.

This NZX guidance note addresses the key elements of the continuous disclosure obligation:

- An issuer must firstly assess whether information is information that a reasonable person would expect to have a material effect on the price of its financial product; that is, whether it is material information (see Section 3, below);
- The issuer must be "aware" of that material information in order to have a potential disclosure obligation (see Section 4, below);
- The issuer must then assess whether any of the exceptions from disclosure apply (refer to Section 5, below);
- If not, release that information via MAP promptly and without delay before it is released anywhere else (refer to Section 6, below); and
- Ensure that the appropriate flag is applied to the announcement in MAP.

3. What is material information?

3.1 The material information test

The most important consideration in relation to continuous disclosure compliance is whether information is "material", and is therefore required to be disclosed promptly and without delay.

"Material information" means information in relation to an issuer 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 Product; and
- relates to particular financial product, a particular issuer, or particular issuers, rather than to financial products generally, or issuers generally ("**particular information**").[1]

The meaning of material information, including the concepts of a "reasonable person", "material effect" and "particular information" are explained below. Issuers need to consider each of these concepts to determine whether information is "material".

When considering whether information is material, issuers should be guided by the principle that if in doubt, they should disclose the information. As noted above, the obligation to disclose material information promptly and without delay is a fundamental obligation and NZX may take disciplinary action against issuers for non-compliance. Therefore, NZXR encourages issuers to take a cautious approach when determining whether information is "material information".

While there can be no definitive list of the type of information that is material, as it will depend on the particular circumstances of the Issuer, the following information may be material information under the rules:

- a change in the Issuer's financial forecast or expectation.
- the appointment of a receiver, manager, liquidator in respect of any loan, trade credit, trade debt, borrowing or financial products held by the Issuer or any of its Subsidiaries.
- a transaction for which the consideration payable or receivable is a significant proportion of the written down value of the entity'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 change in the control of the manager of a managed investment scheme, or a change of trustee of a listed trust.
- a proposed change in the general character or nature of a listed trust.
- a recommendation or declaration of a dividend or distribution.
- a recommendation or decision that a dividend or distribution will not be declared.
- undersubscription or oversubscription to an issue.
- a copy of a document containing market sensitive information that the entity lodges with an overseas stock exchange or other regulator which is available to the public. The copy must be in English.giving or receiving a notice of intention to make a takeover.

[1] Section 231 of the Financial Markets Conduct Act 2013

- any proposed change in the general nature of the business of an Issuer or its group.
- a disposal or acquisition (including entering into any agreement or option to do so) of quoted securities of another Issuer carrying 5% or more of the votes attaching to any class of securities of that issuer.
- the acquisition or disposition of securities in the Issuer carrying 5% or more of the votes attaching to any class of securities of that issuer.
- acquisition or disposition, by whatever means of, assets of any nature (including entering into any agreement or option to do so) where the gross value of those assets, or the consideration paid or received by the issuer, represents more than 10% of the average market capitalisation of the issuer.

Section 3.2 of this guidance note sets out information about how the material information test differs for equity, debt and fund securities.

In deciding whether or not to release information, Issuers should have regard to:

- the definition of "issuer", the effect of which is to aggregate a group of entities for disclosure purposes;
- section 178 of the Companies Act 1993, dealing with the rights of shareholders to require the provision of information by a company;
- part 5, sub-part 2 of the FMC Act, dealing with insider conduct; and
- part 2 of the FMC Act, and in particular the sections dealing with the supply of information that is or is likely to be misleading or deceptive.

Reasonable person

The test of whether information is material information utilises a reasonable person test, which is an objective test that can be difficult to apply in practice because issuers need to assess whether, if a reasonable person was in possession of the relevant information, that person would consider the relevant information to have a material effect on the price of the issuer's quoted financial products.

"Reasonable person" is not defined in the rules, but in NZXR's view, a "reasonable person" is 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.

The reasonable person test is an objective one. It is to be judged from the perspective of an independent fair-minded bystander and not from the perspective of someone whose interests are aligned with the issuer or with the investment community.

Material effect

"Material effect" is not defined in the rules and whether or not a particular price movement constitutes a "material effect" will vary depending on the specific characteristics of the security and the issuer of the security. For example, whether or not a security is liquid or illiquid and the size of the issuer concerned.

The material information test is based on what a reasonable person would expect to happen upon the release of information. It is not a hindsight test based on the degree of price movement which actually occurs upon release of information. In any investigation, NZXR will consider all available evidence of the expected impact of information on traded price, including any information relating to investors'

expectations. NZXR encourages issuers to take a cautious approach when determining whether information will have a material effect on the price of its quoted securities.

The plain meaning of the definition of material information requires that this is a forward-looking inquiry rather than a backward-looking inquiry based on the information available before the release of the relevant information. NZX expects issuers to give thought to what they expect to happen to the price of their securities when material information is released, and it may assist to document this reasoning as part of the decision making process in the event this needs to be considered in future.

NZXR review procedures

Evidence of actual movements in the price of an issuer's securities following the release of the information may be relevant when NZXR is considering the assessment of materiality which had been made by the issuer, but only as a cross-check and not as the sole basis for the determination, given it is forward-looking at the time the information is released.

That means that issuers should be thinking carefully about what the market's response to the information will be and that actual price movements, observed after the release of information, may not be compelling evidence of whether or not information was material information. In fact, even where there is no actual price movement in the securities at the time the information becomes available to the market, at the time the information is being assessed by the issuer it may be material information that is required to be disclosed.

However, as a general rule, when NZX is monitoring the market response to issuers' disclosure and whether information has in fact had a material effect on the price of an issuer's quoted securities:

- A price movement of 10% or more in a quoted security will generally be treated by NZXR as evidence that information has had a material effect on the price of those quoted securities and the relevant disclosure and the decisions relating to its release would therefore be likely to be reviewed by NZXR.

- A price movement of between 5% and 10% in a quoted security is more likely than not to be treated by NZXR as evidence that information has had a material effect on the price of those quoted securities and would therefore be likely to be review by NZXR.

This test is necessarily general, because whether price movements between 5% and 10% are evidence of a material effect will depend on the specific facts and circumstances. A price movement of 5% may not be considered a "material effect" in respect of an illiquid security, but for issuers with large market capitalisations and highly liquid securities, price movements of this magnitude may be considered evidence of a "material effect". NZXR will consider all available evidence when analysing a particular price movement, including price movements in the market generally or within a particular index or sector and any other information relevant to an issuer that could have contributed to a price movement.

NZXR would generally expect any price movement attributable to the release of information to occur soon after the announcement (i.e. within one trading day) following the release of that information. NZXR will therefore also consider the time period between release of information and a price movement when analysing whether that information has had a material effect on the price of a security. NZXR will also consider whether any price movement occurred prior to the release of information (for example, due to information leak or rumour) and, if appropriate, take that price movement into account when considering whether the price movement is attributable to the release of the relevant information.

It is important to note that the guidance set out above does not alter or replace the definition of "material information" contained in the rules or its application to any particular set of facts. Therefore, the price movement guidance set out above is only a guide as to the level of price

movement that is likely to be considered by NZXR as evidence that information has had a material effect on the price of an issuer's quoted securities. It does not preclude NZXR (or any other regulatory body) from taking a different approach in a particular case. It should be noted that NZXR has referred matters to the Tribunal where there has been a negligible price movement.

Particular information

In order to be material information, information must be 'particular' in the sense that it must relate to a particular security or securities or to a particular issuer or issuers. Information will not be material if it only relates to securities or issuers generally. For example, an agricultural company should not be required to announce general changes in the price of wheat although there may be a requirement for an issuer to disclose the effect of such a change on that issuer if it is going to have a material effect on the price of that issuer's quoted securities.

Information does not necessarily have to originate from the issuer in order to be material and may instead originate from a third party (for example, a regulatory body such as the Commerce Commission or a rating agency).

If information is material to an issuer or to an issuer's quoted securities, the issuer has an obligation to disclose that information promptly and without delay upon becoming aware of it, regardless of where the information originated, if it is not already generally available to the public.

Where information has originated from a third party, it may be necessary for an issuer to apply for a trading halt, to allow the issuer time to formulate an announcement responding to the information. The use of trading halts in the context of continuous disclosure is discussed in more detail in section 6.4 below.

Generally available

Information is generally available to the market if:

a) 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

b) 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

c) 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 (a) and (b)[2].

Information only available to a certain group of investors, or which requires substantial collation or research, is not considered generally available.

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 will 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.

[2] Section 232 of the Financial Markets Conduct Act 2013.

3.2 Is the material information test the same for equity securities, debt securities and funds securities?

The material information test set out above applies in relation to all quoted securities - including equity, debt, and funds. However, information that is considered material in relation to equity securities may not always be considered material in relation to debt securities or funds securities, and vice versa. This is because equity, debt and funds securities have different characteristics and so information which may have a material effect on the price of a quoted debt security, such as a bond, is usually quite different from the type of information which may have a material effect on the price of an equity security, such as an ordinary share.

Fund Securities

In respect of managed investment products and other fund securities, an issuer of fund securities must disclose information that relates to the value of an underlying investment (or investments) when, taken in the context of the managed investment scheme as a whole, that information is information a reasonable person would expect, if it were generally available to the market to have a material effect on the price of the fund security. Information relating to the fund manager should also be considered when managing continuous disclosure obligations, not just information relating to the fund securities themselves.

Any information that is required to be made publicly available under the Financial Markets Conduct Act 2013 and Financial Markets Conduct Regulations 2014[3] should be released through MAP by funds issuers. In many cases this information is likely to be material information and in other cases this information must be released anyway under Rule 3.23.1(a)(ii).

Issuers of funds securities may choose to publish daily NAV figures.

Debt Securities

In respect of debt securities, any information that relates to the ability to pay interest on, and repay the principal on maturity of, a debt security is likely to be material information. Similarly, any change to, or review of, the credit rating of an issuer with debt securities quoted, or to the credit rating of quoted debt securities themselves is also likely to be material information (whether or not that credit rating has been solicited by the issuer).

Examples of the types of information that may be material in relation to debt securities include:

- Material changes in the overall level and nature (eg, ranking) of debt being serviced by an issuer of debt securities (e.g. interest rates on bonds).
- Material changes in sources of funding available to an issuer of debt securities.
- Material changes in the asset quality, including significant defaults and arrears and default concentrations of an issuer of debt securities.
- Breach of material banking covenants or credit rating changes.

In contrast to the above, an increase in sales by an issuer with only debt securities quoted is less likely to be material information because it may not have any effect on the ability of that issuer to pay interest on, or to repay the principal on maturity of, the debt security. However, it is important to note that the range of debt securities quoted on the NZX Debt Market has become increasingly complex with the introduction of securities that have both debt and equity characteristics (including "hybrid" securities).

[3] See regulation 55 of the Financial Markets Conduct Regulations 2014

The more closely a debt security resembles a traditional equity security, the more likely it is that a wider range of information may have a material effect on the price of that security, and therefore be material information. Note also that if debt securities start to trade at a distressed yield instead of at a normal yield, a wider range of information will potentially be material information.

If, after considering the material information test discussed above, information is determined to be "material", that information must be disclosed promptly and without delay - unless an exception applies. Exceptions to the obligation to disclose material information promptly and without delay are discussed below in section 5.

3.3 Dealing with incomplete information and upcoming events

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.

The issuer will only become aware of information that needs to be disclosed under Listing Rule 3.1 when a director or senior manager has, or ought reasonably to have, come into possession of sufficient information about the event or circumstance in order to be able to appreciate that it is material information. If an issuer determines (or is reasonably able to determine) that it holds material information based upon initial or incomplete information alone, that information must be disclosed promptly and without delay to the market, regardless of the fact that there may be additional information to follow. They cannot simply wait until they have received all information concerning a material event before a disclosure obligation will arise.

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 securities (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:

- The nature of the covenant;
- The particular loan or facility involved;
- The impact of the breach or pending breach;
- Discussions with the lender; and
- The issuer's current financial position.

Some information will only become material once it is signed off by the issuer's board. For example, if the chief financial officer of an issuer puts forward a proposal to write down the carrying value of an asset, that proposal may only be considered complete if and when it is approved by the issuer board. No disclosure obligation would arise until board sign-off has occurred.

The test for whether or not information is material information is an objective one and, if the issuer in

fact has information that is material information, the subjective opinion of its director or senior managers that it needs further information before it can assess materiality will not avoid a breach of Rule 3.1. If an issuer is on notice of information that potentially could be material information, it should make further enquiries or obtain any expert advice needed to confirm whether it is material information within a reasonable period.

3.4 Changes in an issuer's financial forecast or expectation

It is important for investors to understand an issuer's financial position.

An issuer's financial position can change gradually due to a number of events that, viewed individually, may not require disclosure. However, if the combined effect of all of the events reveals a pattern or trend that is material, disclosure will be required. For example, a review of an issuer's monthly management accounts over a six month period could reveal patterns, trends or changes, such as a gradual decrease in revenue or profitability. The impact of the decrease may not be material if it is only considered on a month-to-month basis, but may be material if the cumulative decrease over the six month period is considered.[4]

For this reason, it is expected that all issuers regularly assess their financial performance against any announced financial projections, forecasts or the market's expectations and keep the market fully informed of any matters that are material to their progress in achieving them. NZXR expects an issuer to disclose promptly and without delay where the issuer believes that, based on one or more of its regular assessments, there is a material risk that the actual results of the issuer will materially differ from an announced projection, forecast or the market's expectation.

In addition, if issuers provide financial information to the market on a regular and frequent basis, it is likely that the market will react less dramatically than it may if, for example, a loss is reported at the end of a long period. Some NZX listed issuers choose to release financial information, such as monthly metrics, on a regular basis to manage this. NZXR encourages issuers to consider whether this approach is appropriate.

3.5 Correcting information published by analysts

A number of issuers listed on NZX's markets are covered by analysts or other third parties, who publish earnings forecasts or estimates that may shape the market's expectations of the issuer's earnings or, conversely, may reflect the market's expectations. Issuers who are subject to this coverage, and who do not publish their own forecast earnings or estimates, should have reference to the following guidance.[5]

It is normal business practice to track financial performance on an ongoing basis throughout the year against a set of internal performance metrics. This information is likely to be confidential to the issuer and generated for internal management purposes. Accordingly, if the issuer continues to satisfy the other requirements of Rule 3.1, that information will be subject to a safe harbour and is not required to be published to the market.

Ongoing internal monitoring of financial performance means that issuers will be aware of how their

[4] In a public censure of Energy Mad by the NZ Markets Disciplinary Tribunal ("the tribunal") released on 14 October 2013, the tribunal found that Energy Mad did not release Material Information in relation to a change in its forecast EBITDA for the FY2012 promptly enough, as required by NZX Listing Rule3.1. The tribunal noted that "financial projects and forecasts can be inherently commercially difficult, particularly for new issuers. However, it is vitally important that all Issuers [regularly] assess their financial performance against any announced projections, forecasts or expectations and keep the market fully informed of any matters which [are] material to their progress in achieving them." See the full statement from the tribunal for further detail.

[5] Issuers that do publish their own earnings guidance should have reference to the guidance set out in section 3.4, above. All issuers, including those that do not publish their own forecasts, and are not subject to third party forecasts or estimates, should refer to section 3.6, below.

actual performance is tracking against third party forecasts or estimates, on an ongoing basis.

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

- correct analyst's 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 earnings forecasts or consensus estimates.

However, NZX considers that, if an issuer has not published its own forecasts, market expectations in respect of the issuer's performance will be influenced by public information, including forecasts published by analysts, and that the market will generally price in those performance expectations. Issuers should consider how the market may react if an issuer discloses actual performance that materially deviates from the market's expectations, and if an issuer has not published its own forecasts or guidance, this consideration will necessarily include the effect of forecasts and estimates published by third parties on market expectations, and the degree to which those forecasts and estimates reflect broader market expectations.

Issuers may experience a material effect on their share price where they release financial results that materially deviate from market expectations. In these circumstances, NZX considers that information relating to that expected deviation may itself be "material information" for the purposes of the Listing Rules, and trigger the obligation to disclose under Rule 3.1(a).

NZX considers that for a disclosure obligation to arise under Rule 3.1(a), the issuer will need to be sufficiently certain that the deviation will arise – that is, the issuer needs to be reasonably certain of its actual performance and that the deviation from market expectations will be material. A material deviation from expected results that an issuer anticipates has the potential to arise as a result of actual performance earlier in the reporting period is less likely to require disclosure, as there is still a significant opportunity for the deviation to reduce (either as actual results change, or expectations change). An obligation to disclose a material deviation is therefore most likely to arise near the end of the reporting period.

If, once it is sufficiently certain that its actual results will deviate from expectations informed by, or reflected in, a third party forecast or estimate, an issuer subsequently determines that the information regarding the deviation is material information (for the purposes of Rule 3.1):

- The issuer must promptly, and without delay, disclose that the issuer's performance for the reporting period is expected to materially deviate from market expectations, and give an indication of the order of magnitude of that deviation; and
- NZX expects that the issuer will consider why the deviation between forecasts and estimates and the actual performance of the issuer has arisen. NZX encourages issuers to monitor analyst coverage that relates to it and, if appropriate, clarify any issues with that analysis proactively.

There may be legitimate reasons why analyst coverage may not align with an issuer's own expectations, such as errors in the analysis or insufficient understanding of an issuer's strategies or business plans. In addition, the issuer may have factored in information, or made assumptions, that remain confidential to it and which are not subject to any disclosure obligation and therefore cannot have been considered by the analyst. That 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 which case issuers should consider what additional information they are able to release. If issuers are to release additional information, this must be released through NZX's market

announcements platform.

If issuers do engage with analysts, they are reminded to ensure they do not inadvertently breach their disclosure obligations under the Listing Rules by selectively disclosing material information to analysts which is not otherwise available to the market. In addition, issuers should carefully consider before approving or supporting forecasts or estimates provided by third parties. 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. This, in turn, increases the onus on issuers to address discrepancies that arise between that guidance and actual results.

3.6 Monitoring market expectations

Issuers should consider how to manage the market's expectations regarding their results on an ongoing basis during the year (including expectations that may arise as a result of performance in prior comparable periods), in order to avoid surprises when announcing their financial results. Issuers may choose to manage this by educating the market about, for example, the issuers' particular business models and how that may impact an issuer's financial performance, earnings and cashflow profile, as part of their usual stakeholder and investor relations efforts.

Issuers might also consider whether publishing forecasts of key performance metrics to the market would be beneficial. In NZX's opinion, this allows issuers to better manage market expectations, and may reduce the likelihood of earnings surprises. NZX acknowledges that this will not be a viable option for some issuers.

In addition, issuers may identify that additional information may need to be disclosed in order to provide further context in relation to the issuer's business or performance, or to support the market to understand previous announcements made by the issuer. Issuers could consider providing financial information to the market on a regular and frequent basis to avoid earnings surprises.

3.7 Intervention by NZX

As part of its monitoring and surveillance functions, NZX may identify situations where information in the market, which has not been released by an issuer, appears to be having a material effect on the price of the issuer's securities. In such circumstances, NZX will contact the issuer and seek its view on whether the market is fully informed.

In extreme cases, if it appears that a false market has arisen, NZX may exercise its powers to place an issuer's securities in a trading halt, while the issuer takes the necessary steps to release a market announcement.

In these circumstances, NZX will seek to understand:

- the degree of awareness the issuer has about information relating to it that is in the public arena;
- the degree of awareness the issuer has about the effect of that information on the price of its securities; and
- whether the issuer has considered its disclosure obligations under Rule 3.2.1.

3.8 Release of periodic financial reports and dividend information

In relation to release of periodic financial reports (such as results announcements and annual reports), NZXR would expect such announcements to be released to the market on or prior to the scheduled reporting date (regardless of when the board may have formally signed off such reports prior to this date). However, an issuer may need to release particular information contained within a proposed

report, or the report itself, earlier if that information is material information on a standalone basis and the issuer becomes aware of that information prior to the scheduled reporting date. For example, if an issuer becomes aware that it will not meet its full year earnings forecast by a material amount that information must be released promptly and without delay to the market regardless of the scheduled reporting date.

Information relating to payment of a dividend may also be released together with the periodic financial report, except if the dividend information is material information, in which case, it should be released promptly and without delay following board sign-off.

4. When does an issuer become aware of information?

4.1 When directors and Senior Managers become aware of information

An issuer is required to disclose information that it is "aware" of. The Rules state that an issuer becomes "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 their duties.

A senior manager is 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 chief executive or a chief financial officer).[6]

Actual awareness

A director or senior manager of an issuer who becomes aware of information, must consider, promptly and without delay, whether that information is "material information" and must therefore be disclosed. Issuers must implement appropriate systems and procedures to ensure that material information is promptly identified and decisions as to whether disclosure is required are made (refer to 'Compliance procedures' in section 7 below for further information).

Ought reasonably to be aware

The test of information that an issuer is aware of is extended to information its directors or senior managers "ought reasonably to have come into possession of" in the normal course of their duties. The practical effect of this is that issuers must have processes in place to ensure that information is appropriately escalated, because any information that is of such significance that a director or senior manager ought reasonably to have been made aware of it in the normal course of their duties as a director or senior manager will be information that an issuer is aware of. If that information is material information, the issuer will have a disclosure obligation under Rule 3.1. The issuer should have appropriate policies and procedures in place so that information is provided to a director or senior managers efficiently in order to meet these disclosure requirements.

This extension to information that a senior manager or director ought reasonably have come into possession of in the normal course of their duties is intended to ensure that issuers have appropriate systems and controls in place to that material information is brought to the attention of senior management efficiently.

[6] Section 6 of the Financial Markets Conduct Act 2013.

5. Exceptions to the Rules

There are a number of exceptions to the continuous disclosure rules, which are known as the "safe harbour" provisions. The "safe harbour" provisions permit material information to be withheld from disclosure under Rule 3.1.1 for as long as certain criteria are met. Rule 3.1.1 does not apply when:

(a) one or more of the following applies:

  (i) release of the information would be a breach of law,

  (ii) the information concerns an incomplete proposal or negotiation,

  (iii) the information contains matters of supposition or is insufficiently definite to warrant disclosure,

  (iv) the information is generated for internal management purposes, or

  (v) the information is a trade secret,

(b) the information is confidential and its confidentiality is maintained, and

(c) a reasonable person would not expect the information to be disclosed.

In order to rely on the exceptions, an issuer must be able to demonstrate that all three limbs apply. The information must be confidential *and* of a type that a reasonable person would not expect to be disclosed *and* one of the tests in (a) must also apply.

5.1 Requirements for exception

Rule 3.1.1 does not apply when companies withhold information where the **release of information would be a breach of law**. To satisfy this limb of the exemption, NZXR considers that it would require more than simply a breach of a contractual obligation, such as a confidentiality provision, otherwise a party could seek to contract out of its obligation to disclose material information promptly and without delay. It should also be noted that Rule 3.3.1 prohibits issuers from entering into any obligation which may prejudice their ability to comply freely with the provisions of Rule 3.1 or Rule 3.2, to the extent that is reasonably possible without causing a material adverse effect on the issuer's business.

Rule 3.1.2(ii) enables companies to withhold information about **incomplete proposals or negotiations**. In NZXR's view, a proposal or negotiation can generally be considered complete when both parties sign an agreement to implement or give effect to the transaction. This will also be the case in relation to signed conditional agreements, which are unlikely to be "incomplete proposals" for the purpose of the exceptions within the rules.[7] Issuers should also note that a proposal or negotiation can be complete for the purposes of this section before it becomes legally binding and even if it is conditional.[8]

[7] An agreement entered into f or the purpose of facilitating the negotiation of a transaction would generally not be expected to be disclosed (unless the existence of that option or arrangement was Material Information in its own right) and can be distinguished from an agreement which gives effect to a transaction.

[8] In a public censure of Rakon Limited by the NZ Markets Disciplinary Tribunal ("tribunal") released on 5 March 2014, the tribunal determined that "a proposal or negotiation can be complete f or the purposes of Rule 3.1(a)(iii)(B) before it becomes legally binding" and that, generally the appropriate point at which a proposal ceases to be an incomplete proposal or negotiation is "when both parties sign an agreement" See the full statement from the tribunal for further detail.

NZXR also notes rule 3.1.2 (iii) which enables companies to withhold **matters of supposition or matters insufficiently definite to warrant disclosure**, and sub clauses (iv) and (v) which provide exceptions from disclosure where information is generated for **the internal management purposes** of the issuer **or is a trade secret**. However, issuers should consider whether the information generated for internal management purposes has become of such significance that a reasonable person would no longer expect it to be withheld. This will particularly be the case in respect of financial information that indicates a material risk of a material deviation from the market's expectations. For example, a listed issuer that is a subsidiary may involve its parent in its business planning processes and be required to provide financial information on a regular basis to its parent for this purpose. These processes are for the issuer's internal business planning and management purposes. NZXR does not consider that the fact of the involvement of the parent company necessarily places the information outside this exception. Whether information falls within the exception will depend on the facts and the particular involvement of the parent company in the internal management of the subsidiary.

Confidentiality

The second clause 3.1.2(a) of the safe harbour provision requires the information to be confidential and its confidentiality must be maintained. In this context "confidential" has the sense "secret".

For this clause to apply, the information must be kept in confidence. Whether information is kept in confidence is a question of fact. The information cannot be in the public domain. Once 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 the exception no longer applies and the information must be disclosed to NZX. This is the case even if the Issuer has entered into confidentiality arrangements and/or the information has come from a source other than the Issuer. NZX accepts that information provided by the Issuer to:

- a professional advisor;
- a party negotiating on the Issuer's behalf;
- a third party negotiating with the Issuer; or
- a regulatory authority,

does not lose its confidentiality, provided that in each case the information was provided with an obligation to maintain its confidentiality and such information is used by the party to whom it was provided solely for the purpose for which it was provided.

Where an issuer is involved in confidential negotiations, the other party must also keep the fact of, and content of, those negotiations in confidence for the exception to apply. Once information is received by a person who is not bound by an obligation of confidence, or is unlikely to keep the information in confidence, the exception no longer applies and the information must be disclosed to NZX. For example, the exception will not apply where there has been a breach of a written confidentiality agreement. Please see examples 3 and 4 within appendix 3 for further guidance on the application of the rules in this area.

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. For example, media speculation on a matter may not require disclosure if those privy to the information have not breached confidence and the speculation is inaccurate, lacking in specific detail and from a source which does not lend substantial credence to the speculation.

NZXR notes that issuers may disclose material information to related parent or subsidiary

companies (or other similar entities) in the course of their decision-making and reporting processes. Where the disclosure of information to parent or subsidiary companies will not, in itself, result in confidence being lost, this may satisfy the confidentiality sub clause. However, in order to fall within the exception in rule 3.1.2, the information must also be information that a reasonable person would not expect to be disclosed.

NZX also accepts that information provided by the Issuer to a holding company for the purposes of enabling that holding company to comply with its financial reporting obligations does not lose its confidentiality, provided that the information is provided subject to an obligation to maintain its confidentiality and use the information solely for financial reporting purposes, and such information is used by the party to whom it was provided solely for the purpose for which it was provided and is kept confidential.

Reasonable person

Rule 3.1.2(c) provides that the information must be information that a reasonable person would not expect to be disclosed. 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.

This requires an objective assessment of the circumstances relating to the information concerned to determine whether a reasonable person would expect the information not to be disclosed.

If a reasonable person would expect the information to be disclosed, the information must be disclosed promptly and without delay, regardless of whether the other sub clauses discussed above apply.

NZXR considers that this reasonable person sub clause of the "safe harbour" provision has a narrow application in practice because, generally, information which falls within one of the prescribed categories set out in 3.1.2(a) and which also satisfies the confidentiality requirement set out in 3.1.2(b) will also satisfy the reasonable person sub clause.

Therefore, it is likely that the question of whether a reasonable person would not expect disclosure would follow the determination of whether the other sub clauses apply (i.e. whether the information remains confidential and falls within one of the specific exemptions outlined in sub-paragraph 3.1.2 of the rules).

The first part of the test identified above requires consideration of the prejudice that disclosing information could have to the issuer and, by extension, to investors. This does not mean that issuers can simply choose to withhold unfavourable news from the market.

The reasonable person test has a narrow focus. It will only be triggered if there is something in the surrounding circumstances sufficient to displace the general rule described.

6. The requirement to disclose "promptly and without delay"

6.1 What does "promptly and without delay" mean?

Once an issuer becomes aware of material information, it must be immediately released to the market (subject to certain exceptions).

There will inevitably be a period of time between a director or senior manager of an issuer becoming aware of material information and the release of that information to the market. This does not mean, by default, that an issuer has failed to release information promptly and without delay. How promptly an issuer is able to release an announcement will depend on the particular circumstances and the particular nature of the material information. NZXR will consider these factors when determining whether an issuer has complied with the requirement to release material information promptly and without delay. For example, it may depend on:

- The nature, amount and complexity of the information concerned;
- Where the information originated from and whether the information needs to be checked or verified by a senior manager or director; and
- How long it takes the issuer to draft the necessary announcement, including to ensure the announcement is complete, accurate and not misleading.

Issuers need to have appropriate systems and procedures in place to meet their continuous disclosure obligations. This point is discussed further below under the 'Compliance Procedures' section of this guidance note. Note also the interaction with the use of trading halts in this area, as discussed in section 6.4.

Board oversight

Issuers must disclose material information as soon as they become aware of it, regardless of when the next board meeting is scheduled. For example, where an issuer becomes aware that it has breached a material financial covenant, the issuer must disclose this information as soon as it becomes aware of it, and may not wait until the next scheduled board meeting to address the issue.

Where a decision or recommendation is incomplete until it is signed off or approved by an issuer's board, the issuer should prepare an announcement in advance, so that it can be released promptly and without delay after board sign-off. NZXR considers that an issuer will generally meet the requirement to release information promptly and without delay by releasing it immediately after the conclusion of the relevant board meeting.

Board oversight of continuous disclosure is important, but issuers need to balance the requirement to disclose material information promptly and without delay with the practical issues relating to the operation of a board. That means that arrangements need to be in place to ensure timely disclosure, and it may not be possible for the board as a whole to be involved in decision making in relation to disclosure where the issuer has unexpectedly become aware of material information. Please refer to the section 7 below titled, 'Compliance Procedures' for further commentary in relation to board oversight of continuous disclosure.

6.2 Release of information outside of NZX hours

Issuers still have an obligation to release material information promptly and without delay, even where this obligation arises outside of NZX's operating hours.

Where there is a need for an issuer to make an announcement to the public, other stakeholders (i.e. employees) or to another stock exchange outside of NZX's operating hours, the issuer is required to provide the announcement to NZX through the market announcement platform at the same time as it is released publicly or, if that is not practicable in the circumstances, as soon as reasonably practicable after that time, provided that the announcement is provided for release prior to next market open.

However, announcements submitted outside business hours are held within the market announcements platform and are released at 8:30 am on the next trading day. In a fast moving situation, issuers may need to react to other events. The market is not, and cannot, trade on the information until the market re-opens, so there is no risk of information asymmetry arising. Accordingly, while Rule 3.1.1 requires an issuer to provide the market announcement via MAP prior to announcing it elsewhere even when the market is not trading, in this specific scenario the announcement must be submitted prior to 8:30 am on the next trading day.

The exception to this approach is where the issuer is also listed on another exchange. Where an issuer with more than one listing venue is aware of material information but only one market is open for trading, it should disregard the possibility that investors in one jurisdiction may be able to trade with the benefit of the material information before investors in the other jurisdiction, and instead:

- Issuers should comply with their obligation to release material information to their Home Exchange immediately; and
- Release the information to the other listing venue as required by the relevant Rules.

6.3 Third Party disclosures

It is not unusual for a third party to publicly release material information relating to an issuer (for example, a regulatory authority). Issuers are not required to re-release that information via MAP on receipt from the third party, if it is generally available, as it is no longer material information.

However, issuers are likely to be required to release an announcement if:

- The manner in which the third party has released any information that is material information is such that the information is not generally available (for example, if it is behind a paywall);
- Having assessed the third party information, the issuer identifies further material information (for example, relating to the financial impact of the matter disclosed); or
- The information arises from a credible source and is false or misleading.

An issuer may have particular connections or associations with certain third parties, including regulatory bodies, where information (such as the outcome of a material application) will be released to the public by the third party.

On occasion, the third party will provide an issuer with a copy of the public statement it intends to make, under embargo. This is intended to ensure that the issuer is able to promptly provide its comments when the announcement is made available to the public. NZXR has developed protocols with a number of regulatory bodies to encourage them to release information to issuers outside of trading hours, to enable issuers to consider the information and prepare a response.

However, should an issuer receive a copy of a draft or final public statement during trading hours,

the issuer must:

- Engage with NZXR urgently, to discuss whether a trading halt is required while the issuer assesses the information it has received;
- Promptly and without delay assess whether the embargoed public statement gives rise to material information. As the statement has not yet been released, it is not generally available and therefore it may still be material information; and
- If there is material information, immediately determine whether that information is subject to an exception from the Listing Rules and, if not, notify the third party that the issuer is required to release that material information promptly and without delay.

It should be noted by issuers that material information cannot be embargoed, and that issuers cannot contract out of their continuous disclosure obligations by entering into confidentiality arrangements. However, if the information is confidential and the release of that information would be a breach of law, it is likely that the information can be withheld under that exception from the Listing Rule.

6.4 Trading halts

An issuer may need to request a trading halt to meet its continuous disclosure obligations in certain circumstances. Although the listing rules require an issuer to release material information promptly and without delay upon becoming aware of it, subject to limited exceptions, the circumstances may require an issuer to request a trading halt until such time as an announcement can be prepared and released.

A trading halt may also be necessary if there is information in the public arena that an issuer needs to respond to because it needs to confirm, deny or clarify information of a material nature that has been released by another party or explain the impact of that information on the issuer. In situations where an issuer must respond to information released by a third party it may need time to consider the likely impact before a response can be provided. This is particularly the case if the issuer needs to respond to a sudden or unexpected event. In these cases a trading halt may be necessary to ensure there is not a false or disorderly market prior to the issuer releasing a material announcement.

However, an issuer should not request a trading halt simply as a tactic to delay release of information and therefore NZXR will consider all requests for trading halts on a case-by-case basis. NZXR encourages early engagement on such requests. Issuers should refer to NZX's Guidance Note *Trading Halts and Suspensions* for guidance about requesting a trading halt.

7. Compliance procedures

As indicated above, it is recommended that issuers put in place appropriate systems and processes to enable release of material information promptly and without delay after they become aware of it. This will allow issuers to manage continue disclosure obligations. These systems and processes should deal with the following matters:

- Enabling identification of price sensitive information in different areas of the business, including appropriate policies for escalation as discussed in section 7.2 below;
- Considering information generated by the issuer as a matter of routine, such as monthly trading metrics, to determine whether a market update is required;
- Responding to sudden or unexpected events in a timely manner;

- Enabling issues and incidents to be appropriately escalated to directors and senior managers so that disclosure obligations are considered by responsible individuals;
- Identifying individuals who have authority to agree and sign off urgent market announcements;
- Identifying individuals who have responsibility for discussing disclosure issues with NZX i.e. individuals with sufficient knowledge of the business and sufficient authority to agree the release of an announcement or to request a trading halt where necessary;
- Preparation of draft announcements in advance of board meetings or other planned events, such as entering into agreements;
- Enabling appropriate board oversight of issuers' compliance with continuous disclosure.
- Where possible, releasing material information prior to market open. However, NZXR notes that an issuer's ability to release prior to market open will partly depend on where the material information originates from (i.e. whether information originates from the issuer itself or in response to information from a third party) and does not negate the requirement to disclose all material information promptly and without delay.

Systems and processes will likely vary depending on the size and available resources of the issuer but they need to be adequate to enable the issuer to meet its obligations - for example, some issuers may have a disclosure committee to consider some of the matters identified above but this will not be the case for all issuers. Issuers should ensure that internal policies and procedures are designed to enable prompt disclosure, e.g., a disclosure committee should be composed of members who can be quickly and easily convened. Issuers should also ensure that boards properly document their decisions and reasoning where appropriate.

Under recommendation 4.1 of the NZX Corporate Governance Code, an issuer is recommended to have a written policy that explains how it complies with its continuous disclosure obligations to ensure all investors have access to relevant information.
Recommendation 4.2 recommends that the continuous disclosure policy be made available on an issuer's website.

Issuers can also take other steps to meet continuous disclosure obligations by scheduling of board meetings or the execution of legal agreements. For example, a material proposal will generally be complete at the time the parties sign an agreement to implement or give effect to the transaction (and therefore disclosure would be required promptly and without delay following signing of the agreement). Issuers should therefore prepare an announcement in advance so that they are able to make a release following signing promptly and without delay. Refer to section 3.3 for further information about incomplete negotiations and proposals.

If an issuer needs to respond to information to be released by a third party, it may be possible to obtain an embargoed copy of the information in advance of release so that the issuer has an opportunity to consider and prepare a response for immediate release following publication by the third party. However, the issuer must be satisfied that an exception to disclosure promptly and without delay applies in the meantime. Examples of the types of processes that an issuer may choose to implement to deal with the matters raised in the list above are set out in Appendix 4 of this guidance note.

7.1 Content of announcements

There is no prescriptive list of information that issuers need to include in their market announcements. The level of detail that should be included in an announcement will vary depending on the content and the reason for the announcement. Issuers should ensure that announcements contain sufficient information for investors to understand and assess the implications of the

announcement and to assess the potential impact on the price or value of the issuer's financial products. However, it is important that proper emphasis is given to key items and these are not buried in the details. Rule 3.26.2 requires long and complex announcements to be prefaced by a summary of salient points.

Where an issuer discloses a transaction as material information, Rule 3.1.1 will generally require disclosure of all material details of the transaction, including:

- 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 transactions:
    - Are to become unconditional; and/or
    - Are to be settled by payment.

7.2 Issuer Policies for Escalation

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 supported by other policies and procedures to address disclosure matters, such as a delegated authority policy and/or more detailed disclosure procedures, which seek to manage obligations in this area. This achieves two aims:

- In the event of a continuous disclosure event, the issuer has a clear process to follow, ensuring a smoother response in a time-criticalscenario; and
- It ensures all investors have access to relevant information about how the issuer complies with its continuous disclosure obligations. The continuous policy should be available on the issuer's website.

Each issuer will need to give specific thought to what its policy should contain. However, at a minimum it should be designed to ensure that information which may be material information and which may require disclosure under Listing Rule 3.1:

- is brought to the attention of its directors and senior managers promptly and without delay;
- is assessed to determine whether it requires disclosure under Listing Rule 3.1; and
- if it does require disclosure, that it is promptly released through MAP with the appropriate flag.

In the event that the issuer does breach its obligation under Rule 3.1.1, NZX Regulation will likely have regard to the fact that the issuer has such a policy, and the degree to which this was effective in the particular scenario (and why it was or was not effective). Further information about NZX Regulation's approach to investigating potential breaches and the matters that are considered can be found in NZX's *Our Approach to Enforcement.*

8. Disclose to NZX first

This section is intended to provide guidance on the release of announcements to NZX. For NZX's approach to announcements that need to be released to the public, other stakeholders or another stock exchange outside of NZX operating hours, please refer to section 6.2.

Rule 3.1.1(b) provides that issuers shall not disclose any material information to the public, other recognised stock exchanges (except as provided for under the rules) or other parties without first disclosing that material information to NZX.

If an issuer is required to make disclosure under the rules, no information may be released to any other parties about the matter until the information has been provided to NZX via the market announcement platform. If an issuer wishes to release information to the media on an embargoed basis, this can only be done after the information has been released via MAP. As material information cannot be embargoed, due to the obligation to release it promptly and without delay, it will be released immediately over MAP.

Issuers should allocate responsibility to a particular individual (or individuals) for making announcements through MAP. No further public statement should be made about the matter which is the subject of release until the information has been released via MAP.

To avoid a breach of this rule, directors and senior managers of the issuer should be particularly careful about what they say when speaking publicly (including at analyst or institutional investor briefings) about the issuer. NZXR notes that it is best practice for issuers to release to NZX any information that will be discussed at an analyst or investor presentation no later that the time of commencement of that presentation. They should only talk about information that has already been disclosed, or information that is not material.

Rule 3.26.2(d) provides that all announcements by a Foreign Exempt Issuer released via MAP must be released through MAP at the same time as, or promptly and without delay after release to, the Issuer's Home Exchange and at least 10 minutes before public release in any other jurisdiction.

9. False Markets

In certain circumstances issuers are required to prevent the development of a false market for the issuer's financial products, being a market that is influenced by false or misleading rumours in the media. These circumstances are prescribed in rule 3.2.1. Under this rule, issuers are required to release material information 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, whether or not rule 3.1.1(a) applies.

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. Some issuers may wish to address the false or misleading statement proactively, even where they do not have specific material information to release, by advising the market that the statement is not considered by the issuer to be accurate. However, this is not required.

9.1 Material influence on market

For rule 3.2 to apply, the rumours need to have a material influence on the market price or traded volumes of an issuer's quoted securities. The meaning of material in this context is likely to include where rumours are likely to influence the market in trading the securities. In considering whether the market has been materially influenced by false or misleading information, it may assist to consider the effect of the rumours on the price of the issuer's securities.

9.2 Persons who give the information substantial credibility

For rule 3.2 to apply, the information must come from the issuer or its associates, or other persons who give the information substantial credibility. This may include members of the media, particularly the financial media. It may depend on who the media is quoting. However, the rule specifies that whether the person disseminating the information would give the information substantial credibility depends on the circumstances in each case. NZXR notes that mere speculation, disseminated by the media, without being backed by a credible source would not have the requisite degree of substantial credibility.

9.3 Release information

Where the rule applies, the issuer should release material information to NZX to the extent necessary to prevent development or subsistence of a market that is materially influenced by false or misleading information. The duty to correct false information in the market is limited so that parties cannot force information out of an issuer simply by generating a false rumour. The market's interest in requiring correction of false rumours is intended to be limited to those which are of a reasonably specific nature and from a source which lends substantial credibility to them.

The following are suggested responses for compliance with rule 3.2.1:

1. The issuer to respond, through standard language that "[The issuer] is in full compliance with its continuous disclosure obligations".

2. If further clarification is needed the issuer should approach NZXR with additional information for NZXR to review. If approached, NZXR may consider making a statement as to whether, on the basis of the information provided, it considers that the issuer has complied with the Rules.

3. Alternatively, the issuer may release such clarification to the market as is needed.

4. If necessary, the issuer may request a trading halt under rule 9.9.1 to prevent development of a false market.

These suggestions are intended to enable issuers to comply with rule 3.2.1 obligations as appropriate, while avoiding the problem noted above.

If the rumours are true, an issuer will need to consider whether disclosure of material information is required due to loss of confidentiality. We suggest that issuers consider using the suggested responses outlined above (where they are not required under the rules to respond fully).

Where NZX becomes aware of rumours in the media, we may contact the relevant issuer for an explanation. In appropriate cases, NZXR may consider imposing a trading halt to prevent a false market developing.

10. No Contracting Out

Issuers are not permitted to contract out of their continuous disclosure obligation. An issuer must comply with its continuous disclosure obligations under Rule 3.1, even when it is party to a confidentiality or non-disclosure agreement that might otherwise require it to keep information confidential.

It is good practice for any issuer entering into a confidentiality or non-disclosure agreement to insist upon an express carve out for the disclosure of information that is require by law or under the rules of NZX so as to not create a conflict with its disclosure obligations under listing rule 3.1. However, even if such an express carve out is not included, it is highly likely that one will be implied in any event, on the basis that a commercial contract cannot require a party to act in a manner contrary to the general law.

11. Additional information

In each case, rule 3.1 is supported by rule 3.28.1 which provides that NZX may, following receipt of an announcement, in consultation with the issuer, require any amendment, addition or alteration to the announcement (for example, to correct an announcement that may be false or misleading), or require the issuer to disclose such further material information following release of the announcement as NZX determines.

NZXR has powers of inspection under rule 9.12.1, which empowers NZXR to request any document, or require the issuer to appear for an interview for the purpose of ascertaining whether an issuer is complying or has complied with the rules.

12. Price enquiries

NZXR will from time to time make formal price enquiries of issuers if trading prices or volumes cannot be adequately explained by reference to information considered generally available to the market.

In-depth analysis is undertaken by the Surveillance team of anomalous market conduct, which may include analysis of activity by security, by participant or by client. The team uses market- monitoring software, market information from NZX's trading platform and other trading and market information including from third parties and from NZX's historical databases. There is not one automatic trigger that would result in a price enquiry being issued, rather it is a more holistic view of other factors that may be relevant, if NZX considers it to be appropriate in the circumstances. This is not a strictly formal approach, and NZX will take into account changes in price and volume, in the context of the liquidity of the stock. Where NZX does make a price enquiry, this will be released to the market together with the issuer's response to the price enquiry.

13. Contact us

If you have any questions on the matters in this guidance note, please contact NZXR at regulation@nzx.com or (04) 495 2825. However, it is the issuer's obligation to comply with the continuous disclosure rules and any assistance from NZXR should not be taken to constitute legal advice on the issuer's obligations

Appendix 1: Relevant Listing Rules

Continuous disclosure

3.1 **Disclosure of Material Information**

3.1.1 Once an Issuer becomes Aware of any Material Information relating to it, the Issuer must:

(a) promptly and without delay release that Material Information through MAP, and

(b) not disclose any Material Information to the public, any other stock exchange (except as provided for in Rule 3.26.2(d)) or any other party without first releasing that Material Information through MAP.

3.1.2 Rule 3.1.1 does not apply when:

(a) one or more of the following applies:

(i) release of the information would be a breach of law,

(ii) the information concerns an incomplete proposal or negotiation,

(iii) the information contains matters of supposition or is insufficiently definite to warrant disclosure,

(iv) the information is generated for internal management purposes, or

(v) the information is a trade secret,

(b) the information is confidential and its confidentiality is maintained, and

(c) a reasonable person would not expect the information to be disclosed.

3.2 **False Market**

3.2.1 An Issuer must promptly and without delay release Material Information through MAP to the extent necessary to prevent development or subsistence of a market for its Quoted Financial Products which is materially influenced by false or misleading information emanating from:

(a) the Issuer or any Associated Person of the Issuer, or

(b) other persons in circumstances in each case which would give such information substantial credibility,

and which is of a reasonably specific nature whether or not Rule 3.1.2 applies.

3.3 **No Contracting out**

3.3.1 An Issuer must avoid entering into any obligation which may prejudice its ability to comply freely with the provisions of Rule 3.1 or Rule 3.2 to the extent that is reasonably possible without causing a material adverse effect on the Issuer's business.

3.4 Related Party Transactions

3.4.1 Every Issuer must promptly and without delay release through MAP sufficient details to inform the market upon entering into a transaction or related series of transactions with a Related Party under which the Issuer:

(a) purchases, acquires, gains, leases (as lessor or lessee), sells or otherwise disposes of, assets having an Aggregate Net Value above 5% of the Issuer's Average Market Capitalisation,

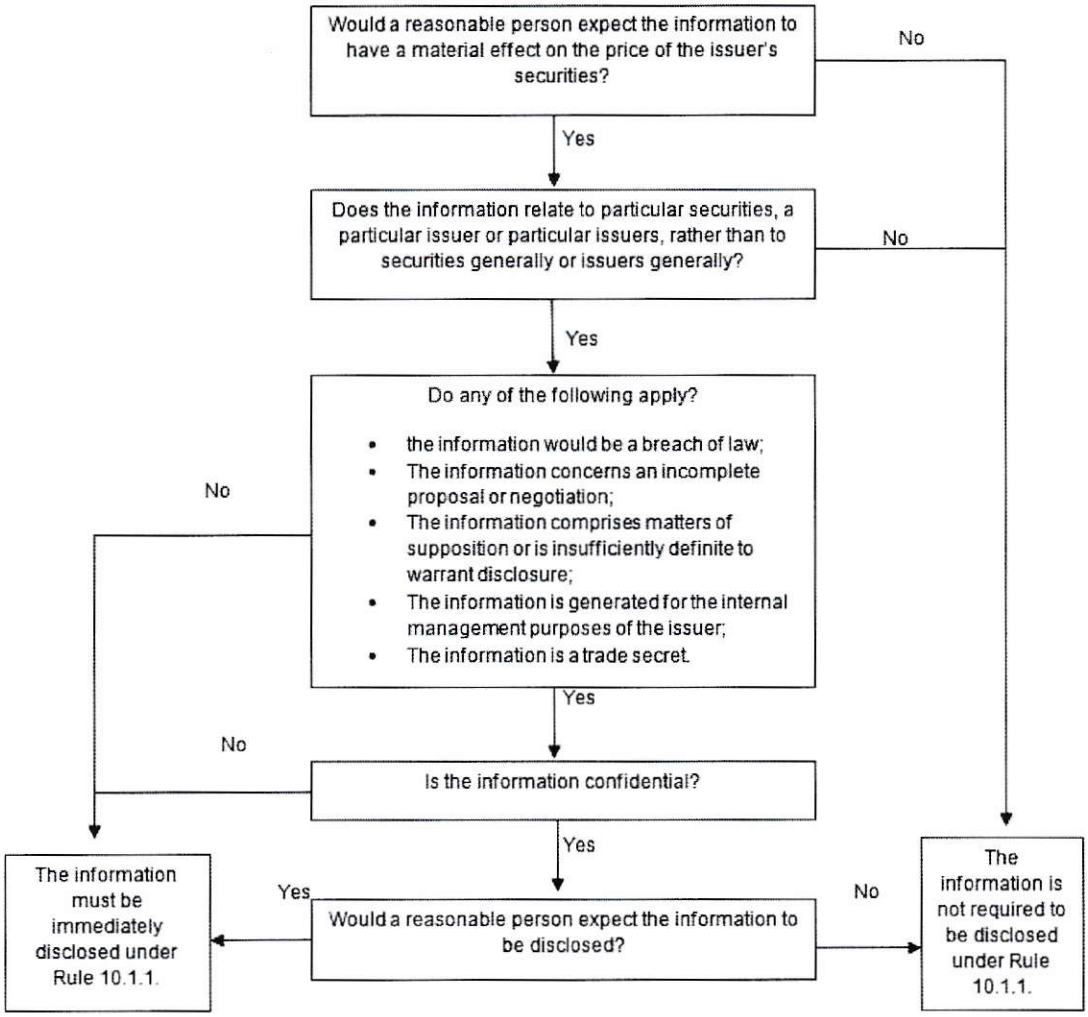
(b) issues its own Financial Products or acquires its own Equity Securities, having a market value above 5% of the Issuer's Average Market Capitalisation (except where Rule 4.5 applies or for an issue of Debt Securities, in which case only the market value of Financial Products being issued to any Related Party or to any Employees of the Issuer are to be taken into account),

(c) borrows, lends, pays or receives money, or incurs an obligation, of an amount above 5% of the Issuer's Average Market Capitalisation (except for an issue of Debt Securities, in which case only the nominal amount of Debt Securities being issued to any Related Party or to any Employees of the Issuer are to be taken into account), or

(d) enters into any guarantee, indemnity, underwriting or similar obligation, or gives any security, which could expose the Issuer to liability above 5% of the Issuer's Average Market Capitalisation.

3.4.2 Rule 3.4.1 does not apply to a transaction to which Rule 5.2.1 applies.

Appendix 2 – The continuous disclosure process



Appendix 3: Examples

The following examples are illustrative only and relate only to the obligations of an issuer under the Rules. These examples should not be regarded as having any effect on the Rules.

For the purposes of this working example we have developed the following fact scenario, concerning an issuer, X Limited.

NZX Listed Issuer	Since January 2002	
sMarket Capitalisation	$500 million	
Shareholders' Funds	$200 million	
Current Share Price	$1.00	
Shareholder Information	Y Limited – an infrastructure investment firm. Members of the Public	51% 49%
Balance date:	30 June	

X Limited is an NZX Listed Issuer, engaged in the business of running airports that connect major centres in New Zealand and around the world.

X Limited has achieved considerable success by providing luxurious airport environments.

X Limited has interests in airports based in Auckland, Christchurch, Wellington, Sydney, Canberra, Hong Kong and New York.

A large part of the success of this Issuer is due to the utilisation of new technology enabling aircraft to land and take off on very short runways. Coupled with development in whisper technology, X Limited has been able to place airports in prime locations closer than usual to the central business district in cities.

X Limited is used by wealthy business people and travellers who are willing to pay a premium to arrive and depart from locations that are convenient.

Example 1

X Limited is considering expanding its operations and has determined to do so via acquisition. It has identified 3 airport businesses, A, B and C that may be suitable. X Limited decides to hire a consultancy firm to take the lead role in reviewing the suitability of the 3 targets. If X Limited comes to a positive view on the project the likely acquisition cost could see $50 million being paid by X Limited for the target. X Limited and the consultancy firm enter into a contract. Confidentiality is maintained.

Is the signing of the consultancy contract material information?

The project is non-public. Is X Limited required to disclose the consultancy contract?

This question can be broken into separate parts: (i) entry into the consultancy contract and) the fact that X Limited is considering acquiring an airport business with an approximate value of $50m.

The fact of entry into the consultancy contract itself is unlikely to be material information because it is simply a contract to get advice on a proposal that is currently insufficiently definite or incomplete and which remains confidential. The fact that X Limited is considering acquiring an airport business with an approximate value of $50m is also unlikely to be required to be disclosed because the proposal is currently incomplete or insufficiently definite and remains confidential.

Example 2

After receiving positive advice from the consultancy firm concerning C Limited, X Limited decides to proceed with the plan to acquire C Limited subject to negotiating appropriate terms. X Limited commences negotiations with C Limited and due diligence is underway. X Limited expects to pay $55 million although a number of important issues remain outstanding that could affect X Limited's decision to proceed. The negotiations have not yet been made public.

Is this information material?

When should the information be disclosed?

Clearly, the fact of the acquisition, which at a cost of $55 million is over 10% of the company's market capitalisation, is likely to be material information.

If, however, the negotiations are confidential and that confidentiality is maintained, NZXR considers that disclosure would be unlikely to be required as the negotiations are incomplete and a reasonable person would be unlikely to expect the information to be disclosed while the negotiations are incomplete.

Example 3

The same facts as in Example 2 apply except that a respected and widely read business column contains specific information from a credible source that X Limited and C Limited have been in discussions and X Limited is about to acquire C Limited and that this will have a positive impact on the financial results of X Limited.

Disclosure of the fact that negotiations are taking place would be required. While the proposal is clearly one that is incomplete, it is apparent that the negotiations have not remained confidential and X Limited would be expected to confirm to the market that it is in discussion with C Limited, but that no decision has been made whether or not to proceed.

Example 4

X Limited and C Limited are close to reaching agreement, but have yet to resolve one outstanding aspect of the transaction. It is expected that this could take up to 24 hours. The following day, a daily newspaper publishes an article stating that X Limited is about to make a significant acquisition and comments on the effect of the proposal.

Disclosure would be required. While the proposal is still one that is incomplete, it is clear that the negotiations have not remained confidential. In circumstances where entry into the agreement is imminent, it would be appropriate for X Limited to apply for a trading halt, pending the release of an announcement concerning the outcome of the negotiations.

Example 5

The negotiations between X Limited and C Limited reach a stalemate and the parties determine that the proposed acquisition will not proceed. Discussions have been terminated. The Securities of X Limited are still in a trading halt.

Disclosure would be required. An announcement of the fact that the negotiations with C Limited have collapsed would be required to lift the trading halt that is currently in place, given the market expectation that agreement was about to be reached.

Example 6

X Limited has completed negotiations with C Limited to purchase its business. The terms of the agreement between X Limited and C Limited are finalised and the agreement is executed. At C Limited's insistence the finalised agreement contains confidentiality provisions under which the terms of the acquisition cannot be disclosed.

Disclosure of the main terms of the finalised agreement would be required. The confidentiality provisions of the agreement do not override the disclosure obligation of X Limited in the Listing Rules. In this instance disclosure of the following would be required.

- Details about C Limited's business, including the type of business, length of operation, financial history, numbers of staff and details of directors or owners;
- The total consideration paid; and
- Composition and method of payment.

X Limited must disclose the main terms of any agreement that it has entered into that is material under the Rules promptly and without delay.

Example 7

On reviewing management accounts part way through a half year period, the CFO and CEO of X Limited (i.e. senior managers of X Limited) become aware that actual revenues and profits for the period will vary from one or more of the following to a material extent:

- The financial results for the previous corresponding period;
- Prospective financial information such as forecasts or projections previously provided to the market.

Disclosure would be required because the information is material and a reasonable person would expect disclosure, such that the safe harbour provisions do not apply. In making such disclosure, the entity must provide some details, however qualified, of the extent of the variation. For example a statement by an entity may indicate that based on internal management accounts, its expected net profit or EBIT will be an approximate amount (e.g. approximately $10m) or alternatively within a stated range (e.g. between $9m to $11m). Alternatively, the entity may indicate an approximate percentage movement (e.g. "up (or down) by 25% on the previous corresponding period"). NZXR accepts that this information may not be precise and may be changed or amended on completion of the final accounts.

The disclosure required would be limited to information known to the issuer – for example, close to or following the end of the reporting period.

Example 8

On reviewing management accounts part way through a half-year period, the CEO and CFO of X Limited (i.e. executive officers of X Limited) become aware that X Limited will incur a large trading loss for the half year. Due to projected revenues from a new airline taking up landing rights in the second half year, X Limited still expects to achieve full year results broadly in line with that of the previous full year.

Disclosure would be required because the information is material and a reasonable person would expect disclosure, such that the safe harbour provisions do not apply. As the half-year result differs materially from the previous corresponding period, the market would not be expecting that result and must be informed promptly and without delay. X Limited should confirm to the market that despite this result it still expects to achieve full year results broadly in line with that of the previous full year.

Example 9

During the second half of its financial year, and due to unforeseen circumstances, X Limited becomes aware that the new airline will not be able to land as previously expected in the second half of the year and that the revenues expected from the landing rights will now be received in the next accounting period. As a result X Limited will not achieve its expected full year result and the variation is expected to be material.

Disclosure would be required.

Example 10

It is two weeks prior to the due date for lodgement of a preliminary annual report. While the trading results for X Limited are broadly in line with the previous corresponding period, year end adjustments and write-downs will result in a significant reduction in the company's result.

Immediate disclosure would be required. It is not appropriate for X Limited to delay the release of this information until the time of lodgement of the preliminary final report.

Example 11

X Limited now proposes to acquire D Limited, a listed entity in the same industry. Although the acquisition has been contemplated by the board of X Limited for some time no formal approach has previously been made. X Limited and D Limited have just begun confidential negotiations with a view to X Limited affecting a "friendly" takeover of D Limited. Information about the negotiations is strictly limited to the parties and their advisors. Coincidentally a small item appears in the Financial News speculating about rationalisation in the industry, and mentioning both X Limited and D Limited among others, as potential targets.

NZXR would normally not require a response. The comment appears to be speculative and based on generally known circumstances about the industry and industry analysis of that information rather than the specific circumstances of X Limited.

Example 12

Discussions between X Limited and D Limited proceed as before but are significantly advanced. Only one significant issue remains unresolved. After a few days of intense discussions it becomes apparent that neither party will concede and the proposal is abandoned. A day or so later, two of D Limited's advisers are in a lift discussing the failed proposal. Only part of their conversation is overhead by a senior reporter with the Business Herald and on the following day, that paper features an article about a proposed deal between the parties under the headline "X Limited to make bid for DLimited".

Both entities should confirm to the market that following negotiations there is no intention to proceed with a bid. In the absence of any clarification from the entities, the inaccurate media comment would be likely to create a false market in the Financial Product of both entities, as investors would not know whether the comment is accurate or not.

Example 13

After a number of months and a change in circumstances relating to the "road-block" issue, the discussions between X Limited and D Limited are resumed. After working late one night, two of X Limited's advisers go to a Wellington city bar and restaurant, and over several drinks discuss a number of key details of the negotiations. They are overheard by a freelance analyst and author of a popular Financial Products newsletter available by subscription only. Early the next morning, the analyst prepares a report on X Limited which includes details of the negotiations and circulates the report to his subscribers by e-mail. Both X Limited and D Limited are alerted to the existence of the report by enquiries from shareholders. The price of X Limited's Financial Products decreases by 5% and the price of D Limited's Financial Products increases by 10% promptly and without delay upon the market opening.

NZXR would require both entities to disclose the fact that negotiations are taking place. Such disclosure would be required as the negotiations are no longer confidential and their existence has been disseminated to a sector of the market. It is irrelevant who disclosed the details of the negotiations or how dissemination occurred. Details of the terms of the proposed takeover need not be revealed until they are finalised.

It would be appropriate for both entities to request a trading halt pending the release of announcements by the entities.