



NZX Regulation Issuer Update: COVID-19 and approach to disclosure

This update provides guidance to issuers on the approach to disclosure, in light of COVID-19.

NZX Regulation (**NZXR**) has had a number of discussions with issuers and their advisers following New Zealand's move to Alert Level 4. In light of those discussions, NZXR seeks to confirm its expectations, and clarify guidance on NZX's existing disclosure policy, on a number of disclosure scenarios that may be relevant to issuers in the current environment.

Please contact NZX Regulation if you have any questions in relation to the matters outlined in this update.

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Introduction

On 3 and 16 March 2020, NZXR contacted issuers and their advisers to acknowledge the challenges associated with COVID-19, and their implications for issuer obligations under the NZX Listing Rules (**Rules**).

NZXR will continue to work pragmatically with issuers to provide support and guidance, and consider relief under the Rules if appropriate. By way of example, NZXR recently granted temporary class waivers in relation to financial reporting and equity capital raisings.

With regards to continuous disclosure, NZXR emphasises that the relevant Rules, in particular Rule 3.1, continue to apply, as does NZXR's Guidance Note on Continuous Disclosure (**Guidance Note**), which can be accessed online here -

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

The comments in this update should be seen as providing more specific recommendations in light of COVID-19 related concerns, but as always the Rules themselves and the Guidance Note are the primary reference for issuers. As stated in the Guidance Note, the obligation to disclose material information promptly and without delay is a fundamental obligation placed on issuers under the Rules. Issuers should be guided by the principle that, if in doubt as to whether information is material, they should disclose the information.

Assessing materiality in a volatile market

Capital markets in New Zealand and internationally are currently experiencing considerable volatility. For NZX issuers, this volatility has sometimes resulted in significant intra-day and inter-day share price movements, with higher than average value, volume and trade count.

A key question for issuers and their advisers is how materiality should be assessed in this environment, for the purposes of determining whether information may be “material information” and require disclosure under Rule 3.1 (unless an exception from disclosure applies). For the purposes of that Rule, “material information” is information that *“reasonable person would expect, if it were generally available to the market, to have a **material effect on the price of quoted financial products of the listed issuer**”* (emphasis added).

We are aware, anecdotally, that some issuers and their advisers are placing considerable importance on the % thresholds mentioned in the Guidance Note (at page 8). NZXR reminds issuers that those thresholds are a general point of reference used by NZXR itself when exercising its own review function and is not a benchmark for issuers themselves.

We note that while investors will be generally aware of market wide matters such as Government announcements or economic data in relation to COVID-19, the operating or financial impacts for individual issuers will not be known. That means, for the purposes of assessing “material information”, that information about those impacts is not “generally available to the market”.

Against the backdrop of current market volatility, it is also worth noting that a material effect on price may arise where information would result in an issuer’s share price remaining relatively unchanged while other comparative stocks move materially up or down.

Issuers are encouraged to be cautious in taking a view that the market will have correctly and fully deduced, concluded or inferred the impact of certain matters on the issuer as a justification for the conclusion that the information is not “material information” or is already “generally available to the market”.

NZXR reiterates that the assessment of materiality must be forward looking, and will vary depending on factors such as the liquidity and size of the issuer. The Guidance Note provides an illustrative (but not comprehensive) list of matters that we would usually consider to be material at pages 6 and 7.

In the particular context of COVID-19, an issuer making decisions that will have significant OpEx or CapEx impacts should assess whether those decisions would be likely to have a material effect on the price of the issuer’s quoted financial products and require disclosure. Such decisions could include cost saving initiatives, such as:

- Deferring capex projects
- Reducing employee numbers and/or labour costs, through redundancies, wage reductions, furlough or extended leave arrangements
- Ceasing or suspending certain operations and business units

We note issuers may make a number of such decisions over time, as the duration or potential implications of COVID-19 become clearer. Those decisions should be considered for materiality as and when they are made, and NZXR acknowledges this may require issuers to make a number of announcements. While issuers cannot delay the release of material information (unless it fits within an exception in Rule 3.1.2), issuers should also consider the cumulative impact of these decisions – it may be that an individual cost saving initiative is not material information, but it becomes material information when combined with other initiatives, and the relevant initiatives should all be disclosed. We repeat also the advice from the Guidance Note, that issuers should err on the side of caution in identifying information as material.

Material deviations from financial projections or market expectations

NZXR notes that many issuers have revised or withdrawn previous financial forecasts or projections in light of COVID-19 related developments.

In respect of issuers that have not amended or withdrawn their own forecasts or projections, NZXR considers that the market should be able to assume that those forecasts or projections remain valid. This may also extend, for some issuers, to consider third party expectations such as projections by analysts, in setting market expectations. Issuers who have not published forecasts to the market should also consider whether there is a variation between market expectations, including expectations that may arise as a result of performance in prior comparable periods, and their internal view of COVID-19 related developments that requires disclosure. As with the note above, issuers should be cautious in taking a view that the market will have already correctly and fully inferred the impact of COVID-19 on the issuer compared to prior comparable periods.

Issuers are encouraged to regularly assess their past and forecast financial performance in light of current statements to market and prevailing conditions. As stated in the Guidance Note (at page 12): *“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”*.

If an issuer determines (or is reasonably able to determine) that it holds material information based on 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. This includes situations where an issuer has reasonable certainty of a material impact, but the exact extent or quantum of that impact has not yet been identified. They cannot simply wait until they have received all information concerning a material event before a disclosure obligation will arise

Insufficient information

In a time of considerable uncertainty, NZXR acknowledges that many issuers consider that they have insufficient information to provide market updates. NZXR accepts this, and does not expect issuers to release information if that information is not sufficiently definite. This reflects one of the existing carve outs from disclosure under Rule 3.1.2, if *“the information contains matters of supposition or is insufficiently definite to warrant disclosure”*.

NZXR reminds issuers and their advisers, however, that they are still obliged to seek out information to the extent possible, as noted at pages 10 and 11 of the Guidance Note. In some cases an incomplete set of information may be sufficient to conclude that an issuer has material information, and we would expect issuers to disclose such information. While

we do not expect issuers to make predictions in the absence of information, where there is sufficient information available to form a view we do not expect issuers to leave investors in a vacuum while they wait for a complete picture.

Covenant breaches – actual or potential

NZXR is aware that some issuers may face actual or prospective breaches of lending or financial covenants, given actual or potential COVID-19 impacts on, for example, issuers' revenue, debt position, or market capitalisation. An actual or prospective covenant breach may constitute material information, requiring disclosure. Where an issuer is considering whether a covenant breach may be likely to occur, we note that the Guidance Note treated this as an example of assessing materiality, setting out criteria at page 11.

Cancellation or deferral of dividends

In recent weeks a number of listed issuers have decided to defer or cancel dividends that had already been announced to market. The basis of a decision to defer or cancel a dividend is primarily a corporate law matter. Such decisions do, however, have implications under the Rules.

NZXR considers that any decision to cancel or defer a dividend is likely to constitute material information, and require disclosure to the market promptly and without delay. This may require explanation of the reasons and basis for the cancellation or deferral. NZXR also considers that a general decision to suspend future dividends for a period of time or indefinitely, where the issuer has previously regularly paid dividends, is likely to constitute material information, and require disclosure to the market promptly and without delay.

In addition to the materiality assessment, the Rules also contain a specific obligation (at Rule 3.14.4) for issuers to release over MAP an announcement that fully explains the reasons if the board recommends or pays dividends other than in accordance with the issuer's published dividend policy. NZXR notes that issuers should also consider the potential application of this Rule.

Cancellation or deferral of interest payments

The Rules contain an express obligation on debt issuers (at Rule 3.14.4) to inform the market promptly and without delay if a decision is made not to pay interest on a due date.

In addition, any such decision by an issuer would raise the same issues as noted above for cancelled or deferred dividends. NZXR expects that any announcement on cancellation or deferral of interest payments sets out the contractual basis for that decision, by reference to the terms and conditions of the securities.

Announcements by the Government or other third parties

In some cases, announcements by Government agencies and other third parties may be highly relevant to issuers. Issuers are not required to re-release that information via MAP on the disclosure by that third party, if it is generally available, as it is no longer material information.

NZXR encourages issuers to be vigilant in considering whether such third party announcements may give rise to further material information specifically in relation to the issuer and its financial products. In the current circumstances, we expect that the most likely situation where this would apply would be where an issuer identified material operating or financial impacts as resulting from the third party announcement. Such impacts may require

some time to assess, and issuers are encouraged to engage with NZXR urgently to discuss whether a trading halt may be required to enable the issuer to assess the information.

Capital raising

As noted above NZXR has worked to extend capital raising options for issuers during the COVID-19 event. NZXR anticipates that a number of issuers will undertake secondary capital raisings in the near term to strengthen their balance sheets.

The fact of a decision to undertake a capital raising may itself be material information requiring disclosure, although equally such a decision is generally likely to remain confidential and an incomplete proposal until the offer is formally approved and launched (and therefore falling within the exception in Rule 3.1.2). In addition, NZXR reminds issuers the Rules provide for a number of administrative announcements relevant to capital raises. Do not hesitate to contact NZXR if you have any queries on those requirements – we are happy to work with issuers to manage this process.

Releasing announcements through MAP, and timing of announcements

NZXR takes this opportunity to remind issuers that material information announcements should continue to be made through MAP in the usual manner, and to NZX before release through other means – including media.

If possible, and where within issuers' control, issuers should continue to release announcements outside trading hours to assist with informing the market. NZXR acknowledges that in some cases issuers may have to respond during market trading hours due to urgent developments, or as information crystallises.

Concluding remarks

NZXR and NZX's Production Operations teams continue to work to normal standards and service levels, albeit with most staff working remotely. We are available for issuers and their advisers to discuss queries, proposed transactions or engage on guidance.

NZXR will take a pragmatic approach given the current situation, noting the fundamental nature of issuers' continuous disclosure obligations.