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Feedback on correcting consensus guidance

The Institute of Directors (IoD) appreciates the opportunity to provide feedback on NZX's consultation paper on correcting consensus guidance. The paper includes proposed amendments to NZX's Guidance Note on continuous disclosure (the **Guidance Note**).

About the Institute of Directors

The IoD is a non-partisan voluntary membership organisation committed to driving excellence in governance in all areas of business and society in New Zealand. We represent a diverse membership of around 8,000 members drawn from NZX-listed corporations, private companies, small to medium enterprises, public sector organisations, not-for-profits and charities.

Our chartered membership pathway aims to raise the bar for director professionalism in New Zealand, including through continuing professional development to support good corporate governance.

Overview

The Guidance Note on continuous disclosure currently provides that NZX expects disclosure where there is a material risk that an issuer's actual financial results will materially differ from the issuer's *own public forecasts*.

Analysts and other third parties track the performance of NZX issuers and publish guidance that can have a significant effect on market expectations. NZX's proposed amendments to the Guidance Note are intended to assist issuers in managing the situation where third party guidance does not align with issuers' *internal forecasts*.

There is no general obligation on issuers to correct analyst or third party guidance. However, under the proposed amendments, issuers would be expected to correct analyst or third party guidance where they are sufficiently certain that a material deviation (between market expectations and actual financial performance) will arise.

General comment

We generally support disclosure to correct analyst or third party guidance where a material deviation is sufficiently certain. We also support better alignment, where practicable, with ASX Guidance Note 8 on market sensitive earnings surprises. However, we have some concerns and we discuss these below together with NZX's consultation questions.

Material information

The NZX Listing Rules govern when issuers must disclose “material information” to NZX. “Material information” is defined as 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 securities and
- relates to particular securities, a particular issuer, or particular issuers, rather than to securities generally (“particular information”).

The Guidance Note explains the concepts of “reasonable person”, “material effect” and “particular information”.

Where an issuer has not published its own forecasts, market expectations in respect of the issuer’s performance will be influenced by public information, including analyst and third party guidance. The market will generally price in those performance expectations. As a result, issuers may experience a material effect on their share price where they release financial results that materially deviate from market expectations. It is for this reason that we consider that an expected material deviation can be *material information*.

NZX considers that issuers will need to be sufficiently certain that a material deviation will arise. This disclosure obligation is more likely to arise later in an issuer’s reporting period, once information about actual performance has crystallised (although there will be exceptions). The obligation is ultimately a judgment call and as set out in ASX’s Guidance Note 8:

- there are many variables that can affect issuers’ earnings during a reporting period
- issuers may adapt their business plans in response to matters that may affect earnings
- issuers may not have sufficient certainty to make disclosure until they prepare their financial statements, after the relevant period has ended.

Education, monitoring and clarification

NZX has requested feedback about issuers managing market expectations via education and monitoring and clarifying third party analysis.

Encouraging issuers to manage the risk of having to announce a material deviation by the above means is good for the markets generally and in reducing potential volatility. However, we have concerns about the commentary including the lack of guidance around issuers choosing to “educate the market” and provide “additional information”.

Impact on small issuers

We note that smaller issuers have less analyst coverage in New Zealand than in Australia.
We are concerned about the impact on small issuers not routinely covered by analysts because they may:

- face increased compliance costs and be required to spend a disproportionate amount of time on conformance rather than performance (in having to educate, monitor and clarify matters)
- have a greater risk of non-compliance due to having less resources
- inadvertently become non-compliant if they are not aware of a one-off review.

Scope

The consultation paper refers to *analyst and third party guidance*. However, it is not clear which analysts/third parties and guidance should be monitored. For example, are issuers expected to monitor *all* analysts - including small analysts and overseas analysts – and third party guidance/forums? With this in mind, we encourage NZX to:

- define the scope, for instance, limit to analysts and third party guidance in New Zealand and Australia
- define *analysts and third parties*. Many people and bodies may fall into this category at present. For instance, journalists may be included and issuers will not generally seek to change their views. We suggest that journalists should be specifically excluded from any definition in the Guidance Note.

Analysts are often briefed or given guidance from issuers. However, they may or may not change their views (eg on forecasts) as a result. Issuers should not be responsible for *making* analysts change their views and this should be noted in the Guidance Note.

Disclosure

NZX expects issuers to promptly and without delay disclose that their performance is expected to materially differ from expectations (to correct analyst and third party guidance).

We support this expectation where issuers are sufficiently certain that a material deviation is expected. This aligns with ASX Guidance Note 8. However, we encourage NZX to clarify what needs to be disclosed, ie should issuers disclose that there is expected to be a material deviation and/or the reason why the deviation is expected.

Conclusion

We appreciate the opportunity to comment on behalf of our members and would be happy to discuss this with you.

Yours sincerely

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