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Submission on draft NZX Guidance Notes

The Institute of Directors (IoD) appreciates the opportunity to comment on the [draft NZX Guidance Notes](#) released for consultation in October. The Guidance Notes support the recently revised NZX Listing Rules (Rules) and aim to assist directors and other stakeholders to better understand the Rules and to help with interpretation.

NZX is seeking feedback on Guidance Notes relating to governance, continuous disclosure, spread and backdoor/reverse listing transactions. The Guidance Note on governance is new, while the others are existing Guidance Notes that have been updated. Our submission focuses on the Guidance Notes relating to continuous disclosure and governance.

About the Institute of Directors

The IoD is a non-partisan voluntary membership organisation committed to driving excellence in governance. We represent a diverse membership of about 9,000 members drawn from listed issuers, large private organisations, small and medium enterprises, state 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.

Guidance Note on continuous disclosure

Continuous disclosure is a disclosure framework which seeks to ensure the timely release of material information by issuers listed on the NZX. Continuous disclosure is a fundamental obligation of issuers and boards, and directors take this very seriously.

The new Rules extend the definition of *aware* to include constructive knowledge of directors and senior managers (in addition to actual knowledge). That is, a director or senior manager will be deemed to be aware of information when they *ought reasonably to have come into possession of it* in the course of the performance of their duties. As per our previous submissions to the NZX, the IoD opposed the introduction of constructive knowledge and is disappointed that it has been included in the Rules.

However, we support the NZX providing guidance as compliance with the continuous disclosure rules can often be complex and challenging, especially for larger issuers. We welcome consistency with the ASX Listing Rules Guidance Note 8 (continuous disclosure) in respect of constructive knowledge. We think the NZX Guidance Note on continuous disclosure could be improved and we have highlighted some matters below.

Guidance on constructive knowledge

New guidance in section 4.1 (p 16) covers when a director or senior manager “ought reasonably to be aware”. Given that constructive knowledge is new to the Rules and it is very important to stakeholders, it is essential that there is sufficient guidance on it to ensure compliance with the Rules. However, the draft guidance on constructive knowledge at 4.1 is repetitive (ie in its references to policies, processes, procedures, systems and controls) and it could be made clearer and be more substantive.

In addition, it would be helpful if there was an example (eg in appendix 3) of when an issuer would be deemed to be aware of information that they ought reasonably to have come into possession of in the performance of their duties.

The Guidance Note also addresses the situation where an issuer may receive incomplete information or information about an event over a period of time. This area is a significant concern for issuers especially in the context of constructive knowledge and it would be helpful to have more detailed guidance, for example where there may be delays with information coming from international operations.

Hindsight bias

The nature of the continuous disclosure test means that there is a risk of hindsight bias in determining liability and the IoD is very concerned about this. There are several dimensions to this including when a court or regulator considers *what* directors or senior managers knew or ought reasonably to have known and disclosed, and *when*. We strongly encourage NZXR to be vigilant about hindsight bias when reviewing compliance with the Rules.

Guidance Note on governance

This Guidance Note aims to assist issuers to comply with their governance obligations under the Rules. It sets out the interaction between the Rules and the NZX Code and the governance requirements for debt, fund and equity issuers (including board and committee composition, appointment and rotation of directors, and directors’ remuneration).

We generally support the introduction of this new Guidance Note. It should be useful for directors and other stakeholders to have guidance on the governance aspects of the Rules and for the key governance requirements to be summarised in one document. We note that the Guidance Note could be improved by discussing the rules around “interested directors”.

Conclusion

It is important that the new and revised Guidance Notes provide sufficient guidance to assist directors, issuers and other stakeholders. The continuous disclosure Guidance Note could be improved to provide more useful guidance in relation to constructive knowledge and we also urge caution with hindsight bias in reviewing issuers’ compliance. We generally support the new Guidance Note on governance and note that it could be improved by discussing the rules on interested directors.

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

Yours sincerely



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