NEW ZEALAND BANKERS ASSOCIATION

Submission

to the

NZX

on the

Second Stage of the NZX Listing Rule Review – Consultation Paper and Exposure Draft

8 June 2018

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About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.

2. The following seventeen registered banks in New Zealand are members of NZBA:

- ANZ Bank New Zealand Limited
- ASB Bank Limited
- Bank of China (NZ) Limited
- Bank of New Zealand
- MUFG Bank, Ltd
- China Construction Bank
- Citibank, N.A.
- The Co-operative Bank Limited
- Heartland Bank Limited
- The Hongkong and Shanghai Banking Corporation Limited
- Industrial and Commercial Bank of China (New Zealand) Limited
- JPMorgan Chase Bank, N.A.
- Kiwibank Limited
- Rabobank New Zealand Limited
- SBS Bank
- TSB Bank Limited
- Westpac New Zealand Limited

Background

3. NZBA welcomes the opportunity to provide feedback to NZX on the Consultation Paper and Exposure Draft released in the Second Stage of the NZX Listing Rule Review (*Review*).

4. If you would like to discuss any aspect of the submission further, please contact:

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Introduction

5. NZBA continues to support NZX's policy goals of the Review, in particular to simplify the Listing Rules, remove unnecessary administrative costs and expand the functionality of the NZX markets. The Exposure Draft addresses a large number of existing issues and increases flexibility for future market expansion. This submission

focuses on additional improvements that can be made to further these goals, in relation to the Quotation of Debt Securities.

6. This submission considers the Exposure Draft from the perspective of NZBA members both as Issuers and as arrangers/managers and market makers of Debt Securities.

7. Submission points are arranged in the order of the relevant Exposure Draft Sections (in particular, Sections 1 to 3 and 7 to 9), with a comment on the Glossary at the end. Capitalised terms that are used but not defined have the same meaning as in the Exposure Draft.

Section 1 – Listing and Quotation

NZX Foreign Exempt Listings

8. NZBA supports the increased flexibility proposed for "NZX Foreign Exempt Issuers" (Rules 1.6 and 1.7). For debt issuances, it should be made clear (either through NZX guidance or drafting in the Listing Rules) how this interacts with the proposed wholesale debt market.

9. As it is currently only feasible to Quote NZD denominated retail Debt Securities on the NZX Debt Market, in many instances the only practical way for NZX Foreign Exempt Issuers to obtain a secondary debt listing on NZX will be through the wholesale debt market.

10. Please also refer to our submission below in relation to the proposed requirements for a New Zealand or Australian director for debt-only Issuers.

Listing Wholesale Debt Securities

11. NZBA generally supports the intention to allow Wholesale Debt Securities to be Listed (Rule 1.9), as a step towards the wholesale markets that are provided on many international stock exchanges.

12. However, NZX should be aware that because (under current law) such a wholesale Listing will not satisfy AIL zero-rating requirements, its general usefulness will be more limited. By contrast, a wholesale listing on other markets (such as ASX or the professional securities market of the London Stock Exchange) will typically be sufficient to remove domestic withholding taxes.

13. The market's design should:

    (a) be flexible to ensure it provides material advantages in contrast to unlisted securities. For instance, it should provide a clear platform for Issuers to make and distribute announcements where the Issuer so chooses, and allow similar designations to the NZX Debt Market (e.g. green bond designations). This would help provide a centralised hub for access to information on such products (whether wholesale or retail) and disclosure of ESG and other materials; and

    (b) include sufficient features to make it clear that it is intended for marketable and tradeable securities. This would be expected to assist with both satisfying investor mandates, and facilitating potential future changes to the AIL zero-rating laws. For instance, although a common feature is the

relaxation or removal of continuous disclosure requirements given the experience of the investor base, the ASX equivalent still requires the relevant offering document (or equivalent) to be provided to the exchange. Many other international equivalents instead focus on facilitating trading of the instruments.

14. In addition, as a technical matter, we would suggest amending the definition of "Wholesale Debt Securities" in the Glossary:

    (a) Wholesale selling restrictions are typically limited to offer restrictions (in accordance with the FMC Act), rather than ongoing transfer restrictions. This is in part because clearing systems typically do not recognise or permit ongoing transfer restrictions (other than restrictions on denominations and multiples).

    (b) Further, we submit that the definition should focus on excluding New Zealand retail investors (rather than retail investors in other jurisdictions). For instance, an offshore Kauri Issuer may issue securities in a format that can be offered to retail investors in the European Union, but which are limited to wholesale investors in other jurisdictions (including New Zealand). It should be possible for such Kauri securities to be wholesale Listed on the NZX.

Designation of Green Bonds

15. NZBA supports NZX's proposed approach to designating green bonds (Rule 1.14.2(d)). As a practical matter it will be important to clearly highlight, and facilitate easy searching of, green products on NZX's internet page.

16. As green bonds become more prominent in the market, we also encourage NZX to work with FMA to determine consistent, appropriate New Zealand market definitions for green products.

Other technical submissions for Section 1

17. As a drafting point, we submit that Rule 1.3.1 should be amended to clarify the exclusion of Rules for Issuers of Debt Securities. In the Exposure Draft, this Rule implies that the various Rules mentioned do not apply to any Issuer of Debt Securities. This should be amended to state that the specified Rules do not apply to "Issuers that have no Quoted Financial Products other than Debt Securities".

18. As a more general point, there are a number of instances throughout the Exposure Draft that refer to "Debt Securities" or "Financial Products", that should be amended to refer to "Quoted" Debt Securities/Financial Products for clarity. This includes, for example, Rule 1.3.1 (as mentioned above), as well as Rule 2.21 (which should relate to Governing Documents governing Quoted Debt Securities) and Rules 3.16 and 3.17 (which should relate to announcements of offers of Quoted Financial Products). We would be happy to provide further specific examples of this if needed.

19. We also query whether the application information required under Rule 1.14.2(c) should be retained (the requirement to specify "arrangements to ensure trading can occur on quotation"). Typically, this will be a straight forward matter satisfied by issuance and quotation of the relevant Debt Securities, rather than through specific or bespoke arrangements put in place for particular issuances.

20. NZBA also notes the removal of the requirements to appoint an Organising Participant for applications for Listing and Quotation. Under the current Listing Rules, particular importance is placed on the Organising Participant's role in preparing an Issuer for Listing, however there is no commentary in the Consultation Paper explaining the removal of the Organising Participant role. We submit that clarification of NZX's rationale for removing this role should be provided. In the absence of an Organising Participant, it would be helpful to understand who NZX sees as playing the role of ensuring an Issuer is suitable to be Listed, particularly when it is a first time Issuer.

Section 2 – Governance Requirements

Rule 2.15.2 should not apply to Bank Issuers or other situations where an express FMC Act exemption has been provided

21. As drafted, Rule 2.15.2 allows NZX to require compliance with the governance requirements in Part 4 of the FMC Act, where those requirements would not otherwise apply.

22. Under the FMC Act, Banks are expressly excluded from the standard requirements in Part 4 of the FMC Act, and this was the subject of detailed consultations. Any perceived intention from NZX to reverse that policy decision would strongly discourage Banks from Listing on NZX.

23. NZBA submits that Rule 2.15.2 should not act to override policy decisions made in relation to the FMC Act. It should not apply to offers of Bank Debt Securities or in other situations where a Schedule 1 Offer Document is permitted under the FMC Act.

The requirement for a New Zealand or Australia based Director should not apply to offshore debt Issuers

24. The proposed requirement for a Director ordinarily resident in New Zealand or Australia (Rule 2.15.3) is inappropriate for Issuers of Debt Securities that are incorporated in other jurisdictions. Including this requirement will effectively prohibit such offshore Issuers (such as international Kauri Issuers) from seeking a Quotation of their Debt Securities in New Zealand.

25. To the extent that jurisdictional Director requirements are retained for Debt Securities, they should generally not go further than Companies Act requirements. That is, they should only apply to Issuers of Debt Securities incorporated in New Zealand.

Other technical submissions for Section 2

26. NZBA submits that the Review provides an opportunity to further modernise the Governing Document requirements (Rule 2.21.1). In particular:

    (a) The requirement in Rule 2.21.1(a) (to repay without requiring holder notice) is effectively redundant and confusing. Governing Documents in the market invariably provide for repayment at maturity, and this Rule may be taken to imply that an express statement is needed that no holder notice is required. It is also potentially confusing in situations where Debt Securities are to be

"put on call" on maturity, as this situation – by definition – contemplates holders needing to call for the redemption amounts.

(b) The requirement in Rule 2.21.1(b) (to repay no more than a maximum amount on redemption) is similarly not necessary. The consideration provided on redemption of Quoted Debt Securities is invariably a set amount, or calculated by a set formula. As this Rule effectively provides an upper limit on the amount that holders may receive, it is also unclear why it is needed from a holder protection perspective.

(c) Rule 2.21.1(d) (extraordinary resolutions) should be aligned with the "special resolution" requirements of the FMC Act. That is, it should not expressly require voting by poll, and should be clearly based on 75% of nominal amount rather than number of votes. In addition, we query if this Rule should refer to "votes" rather than "Votes", as matters relating to Debt Securities are typically carved out of the definition of "Vote" in the Glossary (refer to the provisos in that definition).

27. As a minor related point, we would suggest amending the Glossary definition of Governing Document to refer to a "trust deed or other deed constituting the Debt Securities", rather than a deed poll, as there may be occasions where multiple parties sign.

Section 3 – Disclosure

Clear guidance is needed for the changes to continuous disclosure requirements

28. NZBA notes the expansion of the definition of "Aware" in the Glossary, to include information of which Directors or Senior Managers "ought reasonably" to have come into possession of for the purpose of continuous disclosure (Rule 3.1). We understand this is intended to ensure appropriate governance frameworks are put in place by Issuers.

29. As compliance with continuous disclosure is a core requirement of the Listing Rules, it is vital that clear NZX guidance is provided (or existing guidance is updated) to assist Issuers, and their Directors and Senior Managers, to understand and implement the new requirements.

30. The Listing Rules (and relevant guidance) should also make it clear that implementation of reasonable corporate governance frameworks will be sufficient to satisfy this extended definition of "Aware". That is, Issuers should be responsible for maintaining a reasonable corporate governance framework to help ensure disclosure of material information. Where such procedures are implemented and maintained but do not identify information in any particular instance that front-line employees do not recognise as "material" (whether due to its unusual nature or otherwise), it should be clear that Directors and Senior Managers would not be seen as having constructive knowledge of such information.

Support of exemption to allow Banks to rely on RBNZ disclosure statements without requiring a specific waiver

31. NZBA strongly supports NZX's addition of a general Bank exemption allowing reliance on RBNZ disclosure statements, rather than preparing separate preliminary announcements and annual reports for NZX (Rule 3.9).

32. To ensure that this appropriately caters for potential future market markets, it would also be helpful to cater for situations where the Issuer is an SPV or a Bank subsidiary, and the Debt Securities are either guaranteed by a Bank, or the cash flows are effectively supported by Debt Securities issued by the Bank.

Unnecessary announcement requirements for Issuers of Debt Securities

33. NZBA submits that the announcement requirements should be reviewed further, as some are do not provide relevant information in relation to Issuers that only have Debt Securities Quoted, given the general fixed income nature of such products. For instance:

    (a) For Rule 3.18.1(a) and (b), decisions to sub-divide, consolidate or issue non-Quoted Securities (such as Equity Securities) are not relevant to holders of Quoted Debt Securities.

    (b) Information on changes in Directors or auditors (Rule 3.20) and Issuer details and balance date (Rule 3.21) are also of limited practical relevance in relation to Debt Securities.

    (c) Relevant Interest information (Rule 3.24) is largely focused on substantial product holders, which is typically not relevant to non-Convertible Debt Securities as they do not provide relevant voting rights.

Further changes to the announcement requirements

34. NZBA notes that the requirement to mark information as "material" in MAP has been incorporated into the Exposure Draft (Rule 3.26.2(c)). Adding this administrative aspect as a strict requirement may unnecessarily delay release of information, as it may encourage Issuers to wait until they are completely certain that information is material. We submit that the current approach (which addresses this in guidance) should be maintained. Alternatively, Rule 3.26.2(c) should be amended to provide that a failure to mark information as "material" on MAP would not be seen as a breach of the Listing Rules or a failure to disclose material information under Rule 3.1.

35. NZBA submits that further changes to the announcement requirements should be made to reduce unnecessary administrative costs, and clarify practical requirements:

    (a) There are a number of instances where Banks (or their Subsidiaries) may acquire their own Debt Securities on a temporary basis. Such activities are typically undertaken on the instruction of, or for the benefit of, third parties and assist market liquidity. It is impractical to require such acquisitions to

be announced to the NZX, and they should be excluded from the disclosure requirements in Rule 3.13.1. Such activities include:

(i) market making;

(ii) acquisitions as custodian; and

(iii) acquisitions as intermediary (that is, temporary acquisitions for subsequent on-sale to an identified client).

(b) Various announcement requirements (including Rules 3.14.5, 3.15.1(a)(ii) and 3.15.2) still refer to "immediate" disclosure. This should be amended to either "promptly and without delay", or to a set time requirement. This would be consistent with the changes to continuous disclosure requirements and other provisions of the Exposure Draft.

(c) There should be no strict requirement to announce the percentage of over-subscriptions (Rule 3.17). This can be difficult to determine (as it is unclear whether this refers to a percentage of the base offer size or a percentage of the potential oversubscriptions). This requirement should be removed in relation to Debt Securities or, alternatively, announcements should be permitted to disclose either a percentage or the principal amount of the oversubscriptions.

(d) Rule 3.19.2 should be amended to make it clear what information is required to be announced for a meeting of Quoted Financial Product holders. In particular, this should be limited to prepared announcements and presentations that relate to the Issuer, the Quoted Financial Products or the matters for which resolutions have been called. It should be clear that prepared announcements on conduct of the meeting and administrative matters (fire safety procedures etc) do not need to be provided to NZX.

(e) In relation to Rule 3.20.2 (and noting our submission above that Rule 3.20 should not apply in relation to Debt Securities), NZX's ability to require further disclosure should be limited to information that is necessary or desirable to maintain a properly informed market, to provide certainty to Issuers. This would also be consistent with the limits elsewhere in the Exposure Draft (such as Rule 1.17.2).

Section 7 – Requirements for Documents

Support of removal of requirement to review same class terms sheets and limited disclosure documents

36. NZBA strongly supports removing NZX Regulation review of same class terms sheets and limited disclosure documents (Rule 7.1.2(b)(i)). To ensure a smooth transition and prevent confusion, it would be helpful for NZX to provide clear market guidance on the required timing for Quotation applications where no review is required.

General review period should be shortened for Offer Documents for Debt Securities

37. Where review of Offer Documents for Debt Securities (including Convertibles) is required, the proposed 20 Business Day review period (Rule 7.2.2) will be too long to be manageable:

    (a) timetables for Debt and Convertible products typically will not have enough lead time to accommodate such a long period, particularly given the typical reduced disclosure requirements when compared to an equity offering that requires a product disclosure statement. Offers of such securities are often made on relatively short timetables, in response to market conditions. An extended review period is likely to discourage debt issuers from seeking a listing on NZX, or delaying listing until after issuance. Such an increase in the review time would effectively undercut all the benefits provided in NZX's various proposed administrative simplifications; and

    (b) in respect of Debt Securities, the current 10 Business Day review period is manageable from an issuer/lead manager perspective, and we have not sensed that NZX has had difficulty in meeting that timeline. In a number of cases NZX has provided comments prior to the 10 Business Day deadline.

Other technical submissions for Section 7

38. NZBA submits that the Listing Rules, and the definition of "Offer Document" in the Glossary, should maintain flexibility for alternative documentation structures seen in the market. For instance:

    (a) 'Continuous issuers' may issue Debt Securities under a programme-level product disclosure statement/limited disclosure document, plus a terms sheet with specific terms for the issuance. The Listing Rules should expressly contemplate this structure in the "Offering Document" definition, and remove any NZX Regulation review requirement at the time of issuance when the programme-level product disclosure statement has been reviewed earlier (such as under an initial issuance from the programme).

    (b) The concept of a Schedule 1 Offer Document should also be clarified to ensure it include situations where an offer is permitted to be made under a terms sheet or limited disclosure document due to a class or specific exemption provided by the FMA that relates to the offer.

39. The requirement for an Offer Document to include a CSN field in the subscription application (Rule 7.4.2(c)) should only apply where a subscription application is included in the Offer Document.

Section 8 – Transfers and Statements

Common minimum denomination transfer restrictions should be permitted

40. The common transfer restrictions applicable to debt securities (minimum of $5,000 or $10,000, and multiples of $1,000) should be permitted under Rule 8.1 without requiring NZX approval. Such restrictions are extremely common in the market, and

requiring a specific waiver in each case increases administrative cost. The need for such NZX approval may also effectively undo much of the benefit created by eliminating NZX review of same class terms sheets (as discussed above). If specific NZX approval is still invariably required for Debt Securities, issuance timetables will still need to incorporate time for this.

41. Allowing common transfer restrictions could be achieved by:

(a) amending Rule 8.1.6 to permit (without requiring NZX approval) a Governing Document provision restricting the transfer of Relevant Interests of Quoted Debt Securities to minimum denominations of up to $10,000 and multiples thereafter of up to $1,000; and

(b) amending Rule 8.1.4 to allow an Issuer to decline registration of transfers in accordance with transfer restrictions included under Rule 8.1.6.

The Minimum Holding changes should be clarified for Debt Securities

42. It is not clear whether the "Minimum Holding" concept is still intended to apply to Debt Securities in the Exposure Draft (particularly if the separate changes described in the above submission on transfer restrictions are made). To the extent the "Minimum Holding" concept is intended to apply to Debt Securities:

(a) The definition of "Minimum Holding" needs to be determined for Quoted Debt Securities by reference to principal/nominal amount, and not "value" or "Average Market Price". Debt Securities are quoted on a yield basis and traded in principal/nominal amounts. A small rise in market interest rates could decrease the value such that a (for example) $5,000 holding has a "value" of less than $5,000. In addition, there is no formula for calculating Average Market Price in relation to Quoted Debt Securities.

(b) The change in the Exposure Draft to reduce the "Minimum Holding" amount to $1,000 will affect existing Quoted Debt Securities that rely on this but are set at $5,000. There may need to be a transitional provision permitting minimum holding provisions (and related transfer restrictions) in existing Governing Documents to continue.

(c) We are also concerned that if future issues under existing Governing Documents are required to adopt the new Minimum Holding definition, there may be a risk that Issuers cannot rely on the "same class"/QFP rules under the FMC Act. This could usefully be clarified with the FMA, as one view would be that the Minimum Holding is not a term of the financial product that needs to be identical to the existing quoted product in order be considered "same class".

Other technical submissions for Section 8

43. Rule 8.1.3(b) provides that an Issuer generally may not require any information relating to a transferee of Quoted Financial Products. This Rule should be clarified to permit the Issuer to require such information as may be needed in order to register the transferee as holder and make payments to the transferee. The Issuer should also be permitted to refuse to register a transfer under Rule 8.1.4 where such information is not provided.

44. The requirements to include details of Debt Securities and other Financial Products in Statements (Rules 8.3.1(c), 8.1.3(d) and 8.3.5) should be removed. This information is provided in the Offer Document (and notices of any amendment to conditions). Requiring Issuers to prepare separate summaries of product detail adds administrative costs to Quotation without materially assisting holders.

Section 9 – Powers

45. NZBA notes the requirement in Rule 9.12.1 for Issuers to "take all steps to ensure that no Subsidiary or person acting in concert with the Issuer or any of its Subsidiaries for purposes relevant to the Rules does anything that would put the Issuer in breach of the Rules".

46. We are concerned that this requirement remains too broad to be applied by Issuers in practice. It may not be possible to control the actions of Subsidiaries or persons acting in concert, and this Rule appears to have been expanded even further when compared to the existing Listing Rules (which refer to all steps within the Issuer's power).

47. We submit that this requirement should be redrafted to reflect these practical difficulties, and reflect that practical compliance will need to be addressed through relevant processes and monitoring. This could be achieved through an approach similar to that used for due diligence processes under the FMC Act to require "all reasonable and proper steps" to be taken by the Issuer.

Glossary – Part B

48. As drafted, the Rules make extensive reference to specific sections of the FMC Act and other pieces of legislation. We therefore submit that it would be useful for the Glossary, Part B, paragraph 2 to include a rule of interpretation that references in the Rules to any legislation include (a) a modification and re-enactment of that legislation, (b) legislation enacted in substitution for that legislation, and (c) a regulation, order-in-council and other instrument from time to time issued or made under that legislation.