



Guidance Note

Governance

January 2019



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1. Introduction

This Guidance Note seeks to assist issuers to comply with their governance obligations.

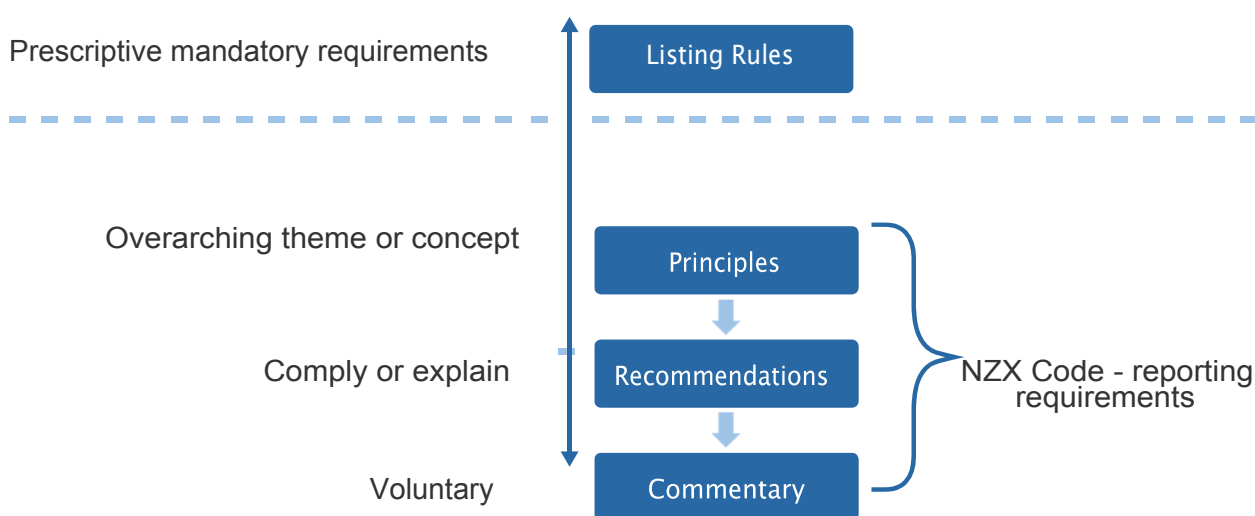
Section 2 of the NZX Listing Rules (effective 1 January 2019) (Rules) sets out the governance requirements for the different issuer types:

- (a) Equity security issuers (Rules 2.1 to 2.14);
- (b) Debt security issuers (Rule 2.15);
- (c) Fund security issuers (Rule 2.16); and
- (d) issuers of other financial products (Rule 2.17).

The Rules relating to governing documents are set out separately at Rules 2.18 to 2.23.

In addition to the mandatory requirements under the Rules, the NZX Corporate Governance Code provides recommendations for equity issuers, which are subject to a mandatory “comply or explain” reporting regime.

The interaction between these requirements is illustrated below.



2. Governance requirements for Debt and Funds issuers

The governance requirements under the Rules for issuers of debt securities and fund securities recognise the requirements set out in Part 4 of the Financial Markets Conduct Act 2013 (**FMC Act**). The FMC Act provides a comprehensive framework for governance of these issuers so the Rules do not need to replicate existing investor protections.

Debt

An issuer of debt securities must comply with Part 4 of the FMC Act to the extent required by law. In particular, this requires the issuer to have a supervisor, to provide reports to the supervisor and to hold meetings of security holders in particular circumstances.

In addition, an issuer of debt securities that is a company incorporated under the Companies Act 1993 will be required to comply with that Act.

Funds

An issuer of fund securities must comply with Part 4 of the FMC Act to the extent required by law. In particular, this requires the issuer to register the managed investment scheme (if it is making a regulated offer under the FMC Act), to have a licensed manager, a licensed supervisor, and to meet particular scheme management requirements such as a statement of investment policy and objectives.

If an issuer of fund securities is not subject to Part 4 of the FMC Act, NZX may require, by prior written notice to the issuer, to comply with any requirement in Part 4 of the FMC Act as if the issuer were subject to Part 4 of the FMC Act.

In either case, the board of the manager of quoted fund securities must include at least one director who is ordinarily resident in New Zealand or Australia. In addition, if the manager is a company incorporated under the Companies Act 1993, it will be required to comply with that Act as applicable.

3. Governance requirements for equity issuers

The Rules relating to governance for equity issuers fall into three broad categories:

- (a) board and committee composition (including director independence);
- (b) The appointment and rotation of directors; and
- (c) Directors' remuneration.

These requirements are intended to provide security holders with certain safeguards and protections, and are considered to be fundamental obligations.

Board and committee composition

NZX recommends that issuers have in place adequate arrangements to ensure they can act swiftly to resolve any issues arising from unexpected director resignations. An issuer should be alert to the risk of failing to meet its minimum director obligations where a board is constituted with the minimum number of directors. Issuers should consider appropriate contingency plans, such as succession planning or ensuring an additional director above the minimum requirement. board

Independent directors

It is widely recognised that independence is an important consideration and that independent views add value to boards. Independence must be determined in accordance with the test outlined in the Rules¹ and with regard to the factors outlined in the NZX Code².

Test for independence

A director can only be independent if he or she is not in a disqualifying relationship with the issuer. **Disqualifying relationship** means any direct or indirect interest, position, association or relationship that could reasonably influence or could be perceived to influence, in a material way, the director's capacity to:

- bring an independent view to decisions in relation to the issuer.
- act in the best interests of the issuer, and
- represent the interest of its Financial Product holders generally,

including, having regard to the factors described in the NZX Code.³

The board must identify which directors it has determined to be independent directors, having regard to the factors described in the NZX Code that may impact director independence.

Factors that may impact a director's independence include:

¹ Rule 2.1.1(c).

² Recommendation 2.4.

³ Glossary 'Disqualifying Relationship'

- being currently, or within the last three years, employed in an executive role by the issuer, any of its subsidiaries, and there has not been a period of at least three years between ceasing such employment and serving on the board;
- currently, or within the last 12 months, holding a senior role in a provider of material professional services to the issuer or any of its subsidiaries;
- a current, or within the last three years, material business relationship (e.g. as a supplier or customer) with the issuer or any of its subsidiaries;
- a substantial product holder of the issuer, or a senior manager of, or person otherwise associated with, a substantial product holder of the issuer;
- a current, or within the last three years, material contractual relationship with the issuer or any of its subsidiaries, other than as a director;
- having close family ties with anyone in the categories listed above;
- having been a director of the entity for a length of time that may compromise independence.⁴

In each case, the materiality of the interest, position, association or relationship needs to be assessed to determine whether it might interfere, or might reasonably be seen to interfere, with the director's capacity to bring an independent judgement to bear on issues before the board and to act in the best interests of the issuer and to represent the interests of its financial product holders generally.

The issuer must make a determination under rule 2.6.1 as to whether the director is an independent director. The outcome of that determination must be released through the Markets Announcement Platform (**MAP**) no later than 10 Business Days after any director's initial appointment. The issuer is responsible for ensuring that the director provides information to the board to make a determination regarding that director's independence.⁵

If, at any time, the board makes a decision regarding a director's independence that differs from the position most recently released to the market (for example, that a director is no longer independent), that information must be released through MAP promptly and without delay..

Alternate directors

An alternate director acts in place of the permanent director that has appointed them, and only when doing so does the alternate have the full power, responsibilities and duties of a director.

The Rules define a director of an issuer that is a company incorporated in New Zealand as "a director within the meaning of section 126(1)(a) of the Companies Act 1993". Section 126(1)(a) states that a director is "*a person occupying the position of director of the company by whatever name called.*" However, the Rules carve out alternate directors from certain tests, in order to avoid double counting. In particular, alternate directors should not be counted as part of the test for determining the composition of the board. An alternate director that is an independent

⁴ Recommendation 2.4.

⁵ Rule 2.6.3.

director should not be counted towards the number of independent directors sitting on the board of an issuer.

Audit committee

Financial reporting is important for an issuer. audit committees and audit processes are important tools to ensure effective disclosure. Under Rule 2.13.1 any issuer seeking admission to the NZX must have an audit committee. The audit committee must meet the following requirements:

The NZX Corporate Governance Code provides a number of recommendations relating to the composition of the audit committee:

The NZX Code also provides commentary regarding the audit committee under Principle 7 and its relationship with auditors. It notes that the board should facilitate regular and full dialogue between its audit committee, the external auditors and management. More details can be found under Principle 7 of the NZX Code.

Accounting or financial background

A member of the audit committee will be deemed to have an adequate accounting or financial background if they:

- (a) are a member of the Institute of Chartered Accountants Australia and New Zealand (**CA ANZ**); or
- (b) has held a Chief Financial Officer position at an issuer for a period greater than 24 months; or
- (c) has successfully completed a course approved by NZX for audit committee membership; or
- (d) has the experience and/or qualifications deemed satisfactory by the board.

As at the date of this Guidance Note, NZX has not approved any courses. Any approved courses will be notified here [include link to guidance page on reg section of website].

Appointment and election of directors

Rule 2.2.1 sets out the different ways in which a person can be appointed as a director. NZX has prepared a diagram to assist issuers in applying the Rules for appointing directors, at Appendix One. A timetable to assist issuers in preparing for appointment and re-appointment of directors at an annual or special meeting is at Appendix Two.

Issuers must provide security holders with an opportunity to nominate directors, and to vote on those nominations at the annual meeting. The timing requirements for this process are set out in Appendix Two. A director who is appointed by this process must then retire and stand for election at the third annual meeting following their appointment, or after three years (whichever is longer).

If a director was appointed by the board, that director must retire and stand for election at the next annual meeting. The practical effect of this Rule is that the board must appoint any new directors in enough time to permit the resolution for the re-appointment to be included in the Notice of Meeting for that annual meeting.

If a director was appointed by an equity security holder using a right under the issuer's Constitution, then that director is not required to stand for election or re-election.

All other directors must stand for re-election by the third annual meeting following the director's appointment or after 3 years (whichever is longer). This applies equally to Executive and Non-Executive directors.

Director Remuneration

Issuers should have an open, transparent and fair process to determine director remuneration.

There are several ways in which directors might receive remuneration, for example:

- (a) A monetary sum;
- (b) An issue of equity securities;
- (c) A lump sum payment or pension to a director or former director, or to his or her dependents, on retirement or cessation of office.

All of these must be authorised by shareholders via an ordinary resolution. Directors are disqualified from voting on resolutions that relate to their remuneration.

Payment of remuneration as a monetary sum

Listing Rule 2.11.1 states that no remuneration may be paid by an issuer, or its subsidiaries (unless such subsidiary is listed), to a director in his or her capacity as a director without prior authorisation by an ordinary resolution by shareholders. A resolution of this kind must express directors' remuneration as a monetary sum payable per annum to either:

- (a) all directors of the issuer in aggregate (sometimes referred to as a **remuneration pool**);
or
- (b) any person who from time to time holds office as a director of the issuer (**individual amounts**).

An ordinary resolution of shareholders is required to approve remuneration and for any increase, except in limited circumstances where an issuer is utilising the remuneration pool approach.

If an issuer is using the remuneration pool approach, and the number of directors increases from the number when the remuneration was originally approved by an ordinary resolution, the issuer can increase the size of the remuneration pool. The amount of the increase per director cannot be any larger than the amount required to allow the additional director to be paid the average amount being paid to each non-Executive director (other than the Chairperson) of the issuer

Payment of remuneration in equity securities

A resolution for the purposes of Rule 2.11.1 may provide that the remuneration may, in whole or in part, be through an issue of equity securities provided the issue is made in compliance with Rule 4.7. In order to comply with Rule 4.7, the issue must be:

- (a) Of a Class of equity Securities already on issue;
- (b) Made after the end of the period to which that remuneration is payable; and
- (c) At an issue price that is not less than the Average Market Price before the issue is made.

4. NZX Corporate Governance Code and Reporting Obligations within the Listing Rules

Reporting

Rule 3.8 requires an equity issuer to include in its annual report either a corporate governance statement that meets the requirements of the rule or the URL of the page on its website where such a statement is located. It should also include the extent to which an issuer has followed the recommendations of the NZX Corporate Governance Code (the NZX Code) during the relevant financial year, and the date at which the corporate governance statement is current.

If an issuer's corporate governance statement is not included in its annual report, the issuer must give NZX a copy of its corporate governance statement at the same time as it provides its annual report.

There are separate obligations under the Companies Act 1993 concerning other matters, such as incorporation and issue of shares. For example, the Companies Act 1993 allows auditors to report directly to shareholders where reappointment is not sought, or where the entity seeks to remove an auditor.

NZX Corporate Governance Code

An equity issuer seeking admission to the NZX Main board must provide a statement disclosing the extent to which the entity will follow the recommendations set in the NZX Code. The Code has commentary to support the recommendations and can be found here [<link>](#). The manner in which the NZX Code operates is explained in more detail below.

If the issuer will not follow a recommendation for part of the reporting period, its corporate governance statement should separately state information to provide context as to why the issuer will not follow the recommendation, such as:

- which recommendation, or recommendations, will not be followed,
- the period this will occur,
- the issuer's reasons for not following the recommendation,
- which, if any, alternative governance was adopted in lieu of the recommendation during that period, and
- the alternative governance practice has been approved by the board.

Issuers do not need to state this for any period prior to first Quotation of a Class of its equity Securities.

The NZX Code applies to issuers of quoted equity securities on the NZX Main board. It does not apply to issuers of funds or debt securities only.

The policy objective of Rule 3.8 is to provide transparency on the corporate governance practices an issuer has adopted so that investors can:

- have a meaningful discussion with the board and management about corporate governance;
- factor that information into their decision about how to vote on resolutions;

- factor that decision on whether to become an investor in a certain issuer or not;

There are specific recommendations intended to give effect to general principles, as well as explanatory commentary in relation to both the principles and recommendations. Listing Rule 3.8.1 requires issuers to compare their corporate governance practices to the NZX Code recommendations and where a recommendation has not been met, to explain why it has chosen not to adopt the recommendation and any alternative measures it has in place instead. It is not enough simply to state that a rule has not been followed and to not provide context to why that is. It may be appropriate for an issuer to explain what it is doing to work towards achieving a certain recommendation.

The eight principles underpinning the NZX Code are:

- 1) Code of ethical behaviour – directors should set high standards of ethical behaviour, model this behaviour and hold management accountable for these standards being followed throughout the organisation.
- 2) board composition and performance – to ensure an effective board, there should be a balance of independence, skills, knowledge, experience and perspectives.
- 3) board committees – the board should use committees where this will enhance its effectiveness in key areas, while still retaining board responsibility.
- 4) Reporting and disclosure – the board should demand integrity in financial and non-financial reporting and in the timeliness and balance of corporate disclosures.
- 5) Remuneration – the remuneration of directors and executives should be transparent, fair and reasonable.
- 6) Risk management – directors should have a sound understanding of the material risks faced by the issuer and how to manage them. The board should regularly verify that the issuer has appropriate processes that identify and manage potential and material risks.
- 7) auditors – the board should ensure the quality and independence of the external audit process.
- 8) Shareholder rights and relations – the board should respect the rights of shareholders and foster relationships with shareholders that encourage them to engage with the issuer.

The NZX Code outlines recommendations under each principle recommending areas of good practice (the recommendations, not the principles, are what issuers must report against). NZX encourages issuers to think about disclosure on a continuous basis and not simply as an annual event. An issuer can keep its disclosure up-to-date on certain obligations via MAP by releasing updated information using the platform. For instance, information regarding its directors and board independence.

5. Contact us

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

Appendix 1

Board Composition

The board must satisfy the following requirements at all times (excluding alternate directors):

✓	
There must be at least three directors	
At least two of the directors must be ordinarily resident in New Zealand	
At least two of the directors must be Independent directors	

Audit Committee

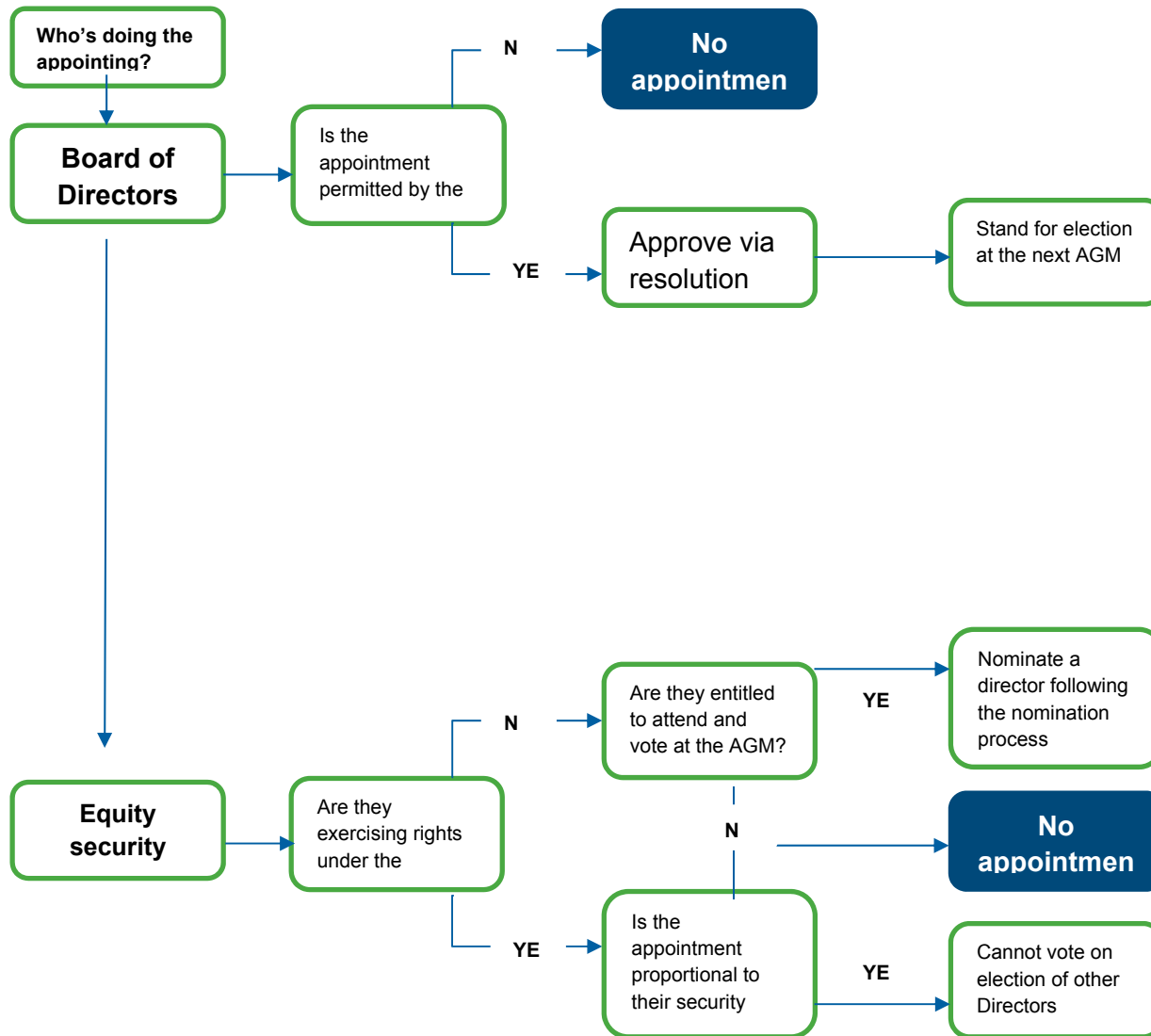
✓	
Be comprised solely of directors of the issuer	
Have a minimum of three members	
Have a majority of members that are Independent directors	
Have at least one member with an accounting or financial background	

✓	
Operate under a written charter	
Membership should comprise solely of non-executive directors of the issuer	
The Chair should be an independent director	
The Chair should not be the Chair of the board	

Payment of remuneration as a monetary sum

✓	
The issuer is utilising the remuneration pool approach	
The number of directors has increased since the date at which remuneration was approved	
The issuer has calculated the average amount currently being paid to each non-Executive director (excluding the Chairperson)	
The amount of the increase does not exceed the amount required to allow the additional director(s) to be paid that average amount	

Appendix 2: appointment of Directors



Appendix 3: timetable for appointment and re-appointment at annual or special meetings

Business days		✓
T-50	Announce closing date for nominations at least 10 business days before such date	
T-40	Latest closing date for nominations by Equity Security Holders	
T-30	Latest date for sending Notice of Meeting to NZXR for approval (if required)	
T-20	Recommended date for circulating Notice of Meeting to Equity Security Holders	
T-20	Latest date for circulating Notice of Meeting to Equity Security Holders	
T+0	Annual or Special Meeting is held Speeches or presentations must be released to the market Outcome of voting must be released to the market if Material Information	
T+1	Outcome of voting must be released to the market (unless Material Information, then release on T+0)	