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**Disclaimer**

This Guidance Note has been issued to promote commercial certainty and assist Market Participants. It provides guidance to Issuers and their advisors on NZX's interpretation of its Conduct Rules. This Guidance Note sets out NZX's general approach to the subject, but is not to be regarded as a definitive statement of the application of the Rules in every situation. Guidance Notes do not constitute legal advice and are only a guide to NZX's policy and practice. NZX recommends that Issuers take advice from qualified professionals.

NZX may replace Guidance Notes at any time. Issuers should ensure that they have the most recent version of the Guidance Note. Guidance Notes are posted to NZX's website at [www.nzx.com](http://www.nzx.com)

## GUIDANCE NOTE – SHARE PURCHASE PLANS

### Introduction

The Securities Act (NZX – Share and Unit Purchase Plans) Exemption Notice 2005 (the “SPP Exemption”) facilitates Issuers undertaking limited capital-raising of up to \$5,000 per security holder in each 12 month period from their existing security holders. These fund raisings are effected by way of a Share Purchase Plan or a Unit Purchase Plan (“SPP”).

The SPP Exemption permits the capital-raising without the need for a registered prospectus and investment statement on various conditions, including the requirement for a limited offer document. The Issuers' obligations under the continuous disclosure regime mean that full disclosure will have been made at the time of the initial issue so that shareholders will have access to Material Information. Accordingly, the absence of a prospectus does not leave shareholders uninformed.

NZX sought the SPP Exemption because it wanted to facilitate SPPs in New Zealand. SPPs provide a low cost way for Issuers to raise capital and enable Issuers to include smaller shareholders in the type of offer that is often only made to institutions by way of a placement.

Since November 2005 several Issuers have relied on the SPP Exemption Notice to raise capital by way of a SPP. As with many new developments, compliance with the requirements can raise questions. NZX has prepared this Guidance Note to assist Issuers comply with the legal requirements for a SPP. That said, as noted in the Disclaimer, Guidance Notes do not constitute legal advice. As NZX is unable to ensure that this Guidance Note addresses all issues relating to SPPs, including matters specific to particular Issuers, NZX strongly recommends that Issuers take advice from qualified professionals.

### Interpretation

For the purpose of this Guidance Note capitalised terms not otherwise defined will have the meaning set out in the NZSX Listing Rules (“Listing Rules”), except for the content under the “Participant Rules Compliance” heading where capitalised terms not otherwise defined have the meaning set out in the NZX Participant Rules (“Participant Rules”).

In this regard, we emphasise that the term Listed Issuer means an issuer which is listed on a market operated by NZX.

## SPP Exemption Notice – Requirements

The SPP Exemption exempts Listed Issuers from sections 37 and 37A of the Securities Act 1978 and the Securities Regulations 1983 (except regulation 8) in respect of specified securities, essentially allowing Listed Issuers who comply with the terms of the SPP Exemption to offer up to \$5,000 share parcels to existing shareholders without registering a prospectus or providing an investment statement. The SPP Exemption contains the following requirements:

TICK ONCE ATTAINED	SPP GENERAL REQUIREMENTS
	The right to subscribe for the specified securities must be offered to all security holders holding securities of the same class as the specified securities, except a security holder in a jurisdiction outside New Zealand who is excluded by the Listed Issuer to avoid a risk of breaching the law in that jurisdiction; and
	The right to subscribe for the specified securities must be offered on the same terms and conditions to all the security holders to whom the offer is made; and
	The right to subscribe for the specified securities must not be renounceable; and
	The specified securities issued under the SPP to security holders of the same class must enjoy the same rights: <ul style="list-style-type: none"> <li>(i) as each other; and</li> <li>(ii) as the securities that qualify a security holder to subscribe for the specified securities; and</li> </ul>
	The subscription price must be less than the average end of day market price of securities of the same class as the specified securities during a period specified in the SPP that falls within the period of 30 days immediately before either: <ul style="list-style-type: none"> <li>(i) the date of the offer to subscribe for the specified securities; or</li> <li>(ii) the date of the issue of the specified securities; and</li> </ul>
	The subscription price must be fixed before allotment of the specified securities; and
	The subscription price must be disclosed in accordance with clause 7(2) of the SPP Exemption Notice before allotment of the specified securities; and
	In any 12 month period, the total issue price of the specified securities issued to a security holder must not be more than \$5,000.

## Offer Document

In addition, the SPP Exemption Notice requires a disclosure document to be provided to security holders and the disclosure document must:

- (a) be signed by each of the directors of the NZX Issuer or his or her agent authorised in writing; and

- (b) contain the offer to subscribe for specified securities under the share purchase plan or the unit purchase plan; and
- (c) describe the procedure for fixing the subscription price; and
- (d) specify the subscription price if the subscription price was fixed before the document is sent to the person; and
- (e) state when the subscription price was or will be fixed; and
- (f) describe when and how payment of subscription monies is to be made; and
- (g) describe the relationship between the subscription price and the market price of the specified securities; and
- (h) warn that the market price of the specified securities may change between the date of the offer and the date when the specified securities are allotted, and describes the effect this would have on the price or value of the specified securities that a subscriber would receive; and
- (i) state that a subscriber may obtain from the NZX Issuer free of charge:
  - (i) in the case of an NZX Issuer that is not the manager of a unit trust, the NZX Issuer's most recent annual report and financial statements; and
  - (ii) in the case of an NZX Issuer that is the manager of a unit trust, the most recent annual report and financial statements of the unit trust.

#### **Beware of the difference between New Zealand and Australian treatment with respect to custodians**

Since November 2005 several Listed Issuers have relied on the SPP Exemption Notice to raise capital by way of a SPP offer to its shareholders resident in Australia and New Zealand. When drafting the limited offer document it is important to be aware of and reflect the difference between the Australian and New Zealand law regarding custodians.

The Australian Securities and Investments Commission ("ASIC") have granted a similar exemption to the SPP Exemption (the "Australian Exemption"). In a similar fashion to the SPP Exemption, the Australian Exemption allows companies or invested schemes that are listed on the ASX to offer existing security holders small numbers of securities without the need for a prospectus (this exemption does not apply to NZX Issuers that are not listed on the ASX). ASIC has clarified who can receive offers under the Australian exemption and has stated that a trustee or nominee expressly noted on a company or scheme register may receive an offer of securities for each occasion they are separately recorded as a trustee or nominee for a different beneficiary named on that register. This approach reflects provisions of the Australian Corporations Act 2001, which provide for recognition of trustees of a trust on Australian Security Registers.

However, the Australian approach to custodians holding securities for beneficiaries cannot be applied in the New Zealand context. Section 92 of the Companies Act 1993 and section 51(4) of the Securities Act 1978 do not permit notice of a trust to be entered on a securities register.

In order for a custodian to pass on to beneficial holders the ability to subscribe for parcels of shares up to \$5,000 per beneficial holder, clause 5.2 of the SPP Exemption Notice must be complied with. Clause 5(2) requires a custodian to certify a number of facts in writing to the Listed Issuer. The specific certification requirements are set out in the following table.

TICK ONCE ATTAINED	CERTIFICATION REQUIREMENT
	That the custodian holds securities of the same class as the specified securities directly or indirectly as a custodian for beneficial owners.
	The number of those beneficial owners.
	In respect of each of the beneficial owners, how many specified securities the beneficial owner, or its agent, has instructed the custodian to accept on behalf of that beneficial owner.
	That the custodian undertakes not to accept on behalf of any of those beneficial owners for which it acts directly or indirectly as a custodian, in any 12 month period, specified securities in any one Listed Issuer, the total issue price of which is more than \$5,000.

It is also important to bear in mind that the SPP Exemption requires all security holders to whom the offer is made to be treated equally. This would include Australian and New Zealand custodians and beneficial holders.

### Subscription Price Statement

In addition to a disclosure document Issuers must also provide to NZX for comment a statement containing the subscription price (as soon as the subscription price is fixed). Importantly, the subscription price is not required to be fixed before the disclosure document is sent to security holders, although it must be fixed before the securities are issued. The statement must:

- (a) specify the subscription price; and
- (b) be signed by each of the Directors of the Listed Issuer or his or her agent authorised in writing; and
- (c) certify that when the subscription price was fixed the Listed Issuer had no information not publicly available that would, or would be likely to, have a material effect on the market price of the specified securities if the information were publicly available. Issuers should note that this may mean material information being withheld under the exceptions to the continuous disclosure rules would first need to be released.

### Listing Rule Compliance

The following Listing Rules generally apply to SPPs:

APPLICABLE RULES	REQUIRED ACTION
6.1.1, 6.1.2 and 7.1	NZX approval of SPP (Terms and Conditions).
8.1.3, 8.1.4	NZX approval if it is possible that the price for the shares issued pursuant to the SPP could be less than 90% of the Average Market Price at the time the SPP is announced.
7.11.1	Allotment Date within 5 Business Days after the latest date on which application closes.
1.1.2, 7.10.10, 7.12.2,	Provide notice to NZX of the Record Date at least 10 Business Days

APPLICABLE RULES	REQUIRED ACTION
	prior to the Record Date.
7.12.1	Provide an allotment notice to NZX forthwith on issuing securities.

### Approval Requirements

#### Rules 6.1.1, 6.1.2(e) and 7.1

The SPP Offering Document must be approved by NZX under Rule 6.1.1. Rule 6.1.1 provides that the documents listed in Rule 6.1.2 shall be subject to the approval of NZX, and shall not be circulated to holders of securities, executed, or otherwise given effect to in any way, until the written approval of NZX is obtained.

Rule 6.1.2(e) provides that: “The documents referred to in Rule 6.1.1 are... (e) any Offering Document or prospectus...” An SPP Offering Document is classified as an Offering Document under Rule 7.1 which provides that: An Issuer “... shall prepare and issue an Offering Document... If the Issuer or applicant is required (or but for an Exemption granted by the Securities Commission under section 5 of the Securities Act 1978, would have been required) to register a prospectus under the Securities Act 1978...”

In light of the reduced compliance requirements of a SPP, NZX approval under Rule 6.1.1 would generally not take long and in the course of approving the documents any further Listing Rule compliance issues will be identified.

#### Rules 8.1.4

As noted above, Rules 8.1.3 and 8.1.4 might apply if it is possible that the price of the shares issued pursuant to the SPP could be less than 90% of the Average Market Price of the Listed Issuer’s shares at the time that the SPP is announced. An example of this might be where an Issuer wishes to offer shares to shareholders at the same price it has offered shares to institutions under an earlier placement.

The policy objective behind Rule 8.1.3 is to ensure that one group of prospective investors are not issued new shares on advantageous terms to the detriment of other shareholders, whose interest in the Issuer is thereby diluted. Generally NZX does not consider that that policy objective will be offended by a SPP that is open to all existing investors and that is likely to represent only a non-material (around 1%) proportion of the Issuer’s total share capital.

NZX will generally be prepared to approve an SPP Issue Price at a discount greater than 10% of the Average Market Price where it is satisfied it would be fair, and consistent with the policy of the Rules. NZX will consider the following matters from a fairness and process perspective:

- Has the Issuer made a deliberate decision to undertake the SPP in order to give its small shareholders the opportunity to participate in a capital raising which may be required to complement a placement to institutional investors?
- Is the SPP being offered to all eligible shareholders including, for example, those shareholders resident in Australia or New Zealand?

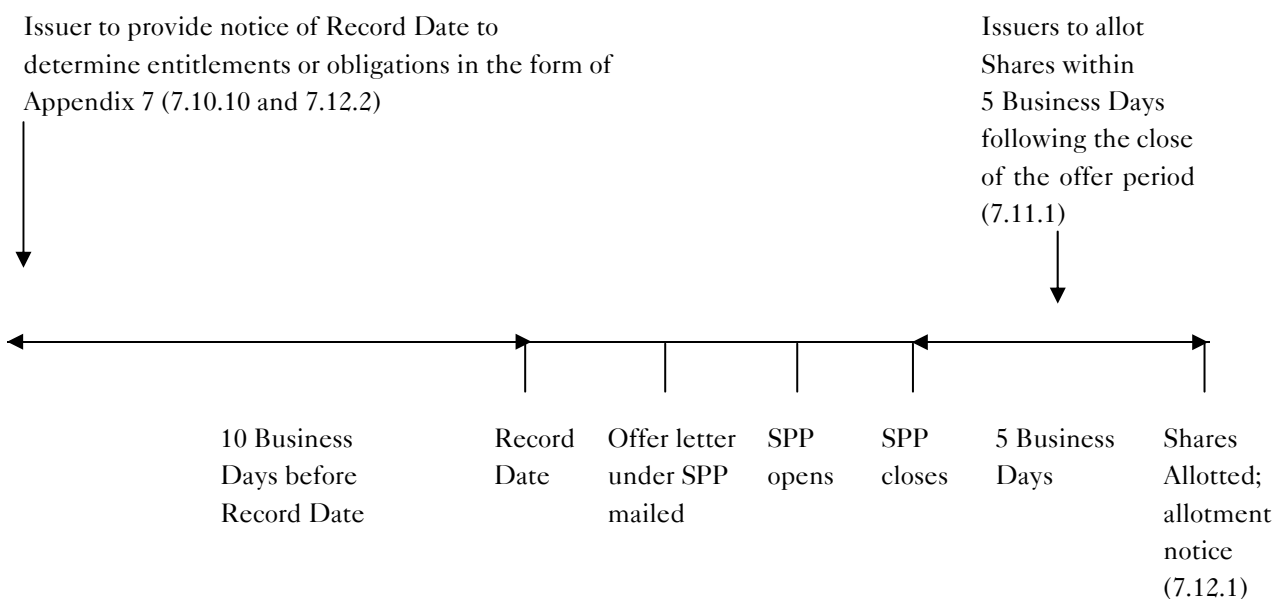
Issuers are most likely to require NZX approval of the SPP Issue Price where the SPP Issue Price is calculated over a pricing period after the close of the offer, as the Average Market Price is calculated over a period before the announcement. There is always the possibility that an Issuer’s share price could fall such that the SPP Issue Price (if calculated after the closing period for the SPP) may represent a greater than 10% discount to the Average Market Price of the Listed Issuer’s ordinary shares. In that case, NZX will consider the following matters:

- Is the SPP Issue Price intended to offer a small discount to the average price applying over the period immediately before the price is calculated, or perhaps to never be more than the price paid by institutional investors under a placement undertaken in conjunction with the SPP or as part of the same capital raising as the SPP? Put another way, if approval is not granted, the Listed Issuer cannot guarantee to shareholders that the SPP Issue Price will be less than the then-current market price of the shares. This may be potentially unfair to the Listed Issuer’s small shareholders.
- From a process perspective, is the SPP offer document required to be finalised and sent to the printer on the day the event associated with the capital raising is announced and the SPP offer document sent to shareholders? If the SPP Issue Price is to be calculated over a period after closing, then the Listed Issuer will need certainty that the price to be offered is approved in order to complete this process. It is unlikely that the Issuer would want to wait until after the price is calculated to determine whether approval under Rule 8.1.4 is required.

If the Issuer elects to calculate the SPP Issue Price before the SPP is announced, then this will require the issuer to ensure that the price fulfils both the requirements of the SPP Exemption and the Listing Rules. It may be possible to set the price (over an appropriate pricing period) so as to avoid the need for approval under Rule 8.1.4.

**Timing Requirements: Rules 7.10.10 7.11.1, 7.12.1 and 7.12.2**

The Rules include the following timing requirements relevant to SPPs:



Issuers should keep these timeframes in mind when planning for an SPP. The above timeframes do not address the requirement of Rule 8.1.3 and the SPP Exemption as to pricing, which has been discussed above.

Where the timing of announcement of the SPP is linked to a confidential corporate action (e.g., acquisition) and cannot be announced prior to the corporate action an Issuer may seek relief from the general application of the timing rules. NZX will consider providing relief from the requirement in Rules 7.10.10 and 7.12.2 for notice 10 Business Days prior to the Record Date if the Listed Issuer can show that eligible shareholders (including beneficial owners who hold via a registered custodian) have a sufficient time period to consider whether or not to invest in the SPP and there is sufficient time to allow all administration. Legal requirements for custodians must be fully met. Note comments above in respect of custodians. In addition any application for waiver should be made in time to allow the 10 day notice period to be complied with should NZX decline to grant a waiver.

We note that the offer under an SPP is not pro-rata and so may not be “priced” by the market into the price of the existing shares to the same extent as a rights issue. Accordingly, at least in respect of Rule 7.10.10 the policy is not infringed by a reduced period between the announcement and the Record Date as the market does not require, in the context of an SPP, time to “price” any payment, distribution or right.

NZXR will consider providing relief from the request to allot within 5 Business Days after the SPP offer closes to lengthen the period to allotment (for example if the SPP Issue Price is to be calculated over a fixed period after the offer closes), if the Issuer can show:

- Proposed time will ensure pricing of offer remains fair and reasonable.
- No significant amount of interest by a participating eligible shareholder will be lost as a result of the extended allotment period.

## Participant Rule compliance

The Participant Rules impose certain obligations on Market Participants regarding the protection of shareholders in respect of benefits, rights and entitlements.

The objectives of these obligations include ensuring that investors who have purchased securities on a cum entitlement basis, and who are not the registered holder of the securities on record date, either have that entitlement conferred to them by the selling Participant (at the cum entitlement price) or have the purchase price adjusted to the ex entitlement price.

The following Participant Rules generally apply to the protection of shareholders:

APPLICABLE RULES	OBLIGATION
A10.1.2 and 11.17	Where existing Security holders are given the right to apply for new Securities offered prior to the delivery of Securities sold for cash a Participant must take such action as may be required by Good Broking Practice to protect the rights of the buyers in respect of the Securities so offered.
A10.1.3 and 11.17.2	Each Participant must take such action as may be required by Good Broking Practice to protect the rights of the clients of Buyers and Sellers in respect of entitlement to dividends, interest, or capital distributions and in regard to settlement.
A10.1.4 and 11.17.3	The rights and obligations of the clients of Buyers and Sellers with

APPLICABLE RULES	OBLIGATION
	regards to calls made on Securities which are being sold shall be recognised by Good Broking Practice.
13.19.1	The Seller must protect the rights of the client of the Buyer by taking up an Accrued benefit, entitlement or right, unless the Buyer instructs the Seller otherwise in writing.
13.19.2	If the client of the Buyer does not wish to take up all or part of an Accrued benefit, entitlement or right, the Buyer must advise the Seller prior to the Record Date for that benefit, entitlement or right.
13.19.3	Any outstanding unsettled Trades or contracts in FASTER as at the Record Date or Adjustment Date for a benefit, call or instalment payment, entitlement or right of conversion on a Security will be adjusted automatically in accordance with the rules of FASTER.
13.19.4	Where there are benefits, entitlements, or rights of conversion in relation to outstanding unsettled Trades or contracts in FASTER, the Seller shall not be entitled to require settlement from the Buyer until a COD has been made for the original contract and the benefit, entitlement right or new deliverable Security can be delivered (as the case may be).

While the above Participant Rules exist to protect shareholders in respect of benefits, entitlements or rights and Market Participants use their best endeavours to meet these obligations, there are circumstances where it may be impractical, if not impossible, to afford this protection. SPPs are one such example where it may not be possible for the selling Participant to protect the purchasing client. An anomaly exists where a benefit accrues by virtue of being a registered shareholder (on register at Record Date), as is the case with SPPs, as opposed to a benefit that accrues in proportion to the number of shares a shareholder has on register. The entitlement to participate in an SPP cannot be distributed across multiple holders, which may occur on a sale by that existing shareholder. That is, the entitlement to participate in an SPP can not be proportionally split on sale (e.g. were three investors purchase some of an existing holders shares and such sale was not settled prior to record date each purchaser would not be entitled to be protected for \$5,000 each, the entitlement being for one single \$5000 offer).

Although there may be situations where the existing shareholder sells their entire holding to a single buyer and protection can be arranged, this will not always be the case. The selling Participant is encouraged to provide protection where possible, however NZX acknowledges that in some circumstances, where there are multiple purchasers of a single sale order there is no practical way of the selling Participant protecting the buying Participant.