

NZX Regulation Decision
Botry-Zen Limited
Application for Waiver from NZAX Listing Rule 7.10.1

Background

1. Botry-Zen Limited (“BOZ”) is Listed on the NZAX market.
2. At a special general meeting of BOZ on 6 November 2009 BOZ shareholders approved, pursuant to NZAX Rule (“Rule”) 7.3.1, an offer by BOZ of up to \$15,000 of new ordinary shares (“Shares”) to existing BOZ shareholders under the Securities Act (NZX - Share and Unit Purchase Plan) Exemption Notice 2005 (“Exemption Notice”) (“Offer”).
3. On 26 November 2009, BOZ sent to each of its shareholders an offer document containing the terms of the offer (“Original Offer”). The terms of the Original Offer were reviewed for compliance with the NZAX Listing Rules (“Rules”) and approved by NZX Regulation (“NZXR”) prior to distribution to shareholders. Under the terms of the Original Offer shareholders were required to submit applications prior to closing of the offer at 5.00pm on 22 December 2009 (“Closing Date”). The Closing Date for the Offer was set by BOZ to ensure that sufficient capital is raised under the Offer prior to Christmas, in order to fund BOZ’s ongoing working capital requirements. If sufficient subscriptions are not received prior to Christmas, the directors of BOZ will need to consider other funding alternatives which may have serious consequences for BOZ.
4. BOZ currently only has ordinary shares Quoted on the NZAX market. Included in the terms of the Original Offer was the option for subscribers to pay half of the subscription price by the Closing Date, and the balance of the subscription price on 31 March 2010, and to have Shares subscribed for allotted within five Business Days of the Closing Date. This provided an option for subscribers to subscribe for partly paid shares, resulting in some uncertainty as to whether the Original Offer was made in compliance with the terms of the Exemption Notice, as the Exemption Notice only allows issues of securities of the same class and with the same rights as securities quoted on the market of a registered exchange. As a result, BOZ decided to amend the Original Offer to remove the ability for partly paid shares to be issued and to clarify that only fully paid ordinary shares, being those securities Quoted on the NZAX market, could be issued to subscribers.
5. Therefore, on 4 December 2009, BOZ determined to allow applicants to subscribe for the new ordinary shares in BOZ in two tranches (“Modified Offer”). The terms of the Modified Offer require applicants to return completed application forms by the Closing Date. However, applicants are able to decide whether to take up their entitlement (or part of their entitlement) in a single tranche or in two equal tranches.
6. If an applicant determines to take up his or her entitlement (or part of his or her entitlement) in two equal tranches then:
 - (a) half of the subscription price must be paid by the Closing Date and half of the Shares allotted within five Business Days of the Closing Date; and
 - (b) the second half of the subscription price must be paid by 31 March 2010 and the second half of the Shares subscribed for must be allotted within five Business Days of the 31 March 2010.

7. The Modified Offer allows subscribers to subscribe for their full entitlement at the price offered under the Modified Offer, but to pay the purchase price and receive Shares in two installments. Shares will be allotted, following payment, within five Business Days of either 22 December 2009 or 31 March 2009.
8. Rule 7.10.1 requires that an Issuer proceed to allotment within five Business Days after the latest date on which applications for securities close. Under the Modified Offer, BOZ intends to allot all Shares within five Business Days of 31 March 2010, a period of more than three months after the last date on which applications for securities close.

Application

9. BOZ has approached NZXR seeking a waiver from the requirement contained in Rule 7.10.1 that an Issuer must proceed to allotment within five Business Days after the latest date on which applications for securities close.
10. BOZ makes the following submissions in support of its application:
 - (a) The policy of Rule 7.10.1 is to prevent a time delay between the receipt of subscription money by an Issuer and the receipt by subscribers of securities, and to ensure immediate enjoyment by investors of the economic benefit obtained from investment of their money. Granting a waiver in this instance will not impinge on the policy of the Rule as no subscriber will be prejudiced by the extended allotment period, nor will any significant income on their subscription money be lost, as subscribers will be allotted their Shares within five Business Days of paying their subscription money.
 - (b) The offer document clearly explains to shareholders how the two tranche allotment process will occur under the Offer. Subscribers are fully aware that they will not receive their second-tranche Shares until they have paid their subscription monies in full in March 2010. The offer document provides subscribers with sufficient explanation of the terms of the Modified Offer to make a fully informed decision as to whether or not to subscribe for Shares.
 - (c) The Directors of BOZ consider that the inclusion of the two tranche payment process will assist shareholders to subscribe for their full entitlement who would not otherwise have sufficient capital funds to fully subscribe due to the pre-Christmas timing of the Offer. Furthermore, the two tranche offer is advantageous for subscribers as it allows subscribers to subscribe for BOZ securities at a discount to the market price for those securities, without having to pay the full subscription price at the Closing Date.
 - (d) BOZ considers the Modified Offer will assist BOZ to raise greater capital than under a normal standard single tranche offer, which will ensure the success of the capital raising as a whole. BOZ urgently requires the proceeds from the Modified Offer prior to the Christmas period in order to fund its working capital requirements. If sufficient subscriptions are not received, the directors of BOZ will need to consider other alternatives which may have serious consequences for BOZ.

Rule 7.10.1

11. Rule 7.10.1:

7.10.1 ALLOTMENT

- 7.10.1 An NZAX Issuer making an issue shall proceed to allotment, within five Business Days after the latest date on which applications for Securities close.

Decision

12. On the basis that the information provided to NZXR is full and accurate in all material respects, NZXR grants BOZ a waiver from the requirement contained in Rule 7.10.1 that BOZ must proceed to allotment within five Business Days after the latest date on which applications for Shares close, to allow BOZ to allot Shares in accordance with the terms of the Modified Offer.
13. The decision to grant BOZ a waiver from Rule 7.10.1 is subject to the condition that BOZ will only accept subscription payments for tranche two Shares during the period from 9.00am Friday 26 March 2010 until 5.00pm Wednesday 31 March 2010.

Reasons

14. In coming to the decision to grant BOZ a waiver from Rule 7.10.1, NZXR has considered that:
- (a) The policy underlying Rule 7.10.1 is to ensure that investors receive the benefit of their investment without inappropriate delays. Under the Modified Offer subscribers will receive their Shares within five Business Days of the last date for payment of either tranche.
 - (b) The condition contained in paragraph 12 will ensure that no significant income is lost by subscribers on subscription money as BOZ will not receive subscription money until a short period immediately before allotment.
 - (c) BOZ made the Original Offer to investors that included in its terms a deferred payment mechanism, which resulted in uncertainty as to whether the terms of the Original Offer met the requirements of the Exemption Notice. NZXR wishes to facilitate BOZ's desire to undertake a deferred payment mechanism, in this instance, given BOZ's urgent need for capital.
 - (d) NZXR has had the opportunity to review the offer document for the Modified Offer to ensure that the terms of the Modified Offer are clearly explained to potential subscribers.
 - (e) BOZ has submitted that the Modified Offer is necessary to ensure that BOZ is able to meet its ongoing working capital requirements, and that being unable to provide the Modified Offer may have serious adverse consequences for BOZ. These circumstances for the Issuer mitigate against a strict application of Rule 7.10.1 in this instance.

ENDS.