

25 March 2013

**NZX Regulation Decision**  
**Diligent Board Member Services Inc**  
**Application for Waiver from NZSX Listing Rules 10.5.1 and 10.6.1**

**Background**

1. Diligent Board Member Services Inc (“**DIL**”) is a Delaware incorporated company governed by US law, and is listed on the NZX Main Board.
2. DIL, as a US company, must prepare its accounts in accordance with US law. DIL applies US Generally Accepted Accounting Principles (“**US GAAP**”), as permitted by New Zealand law.
3. Under section 15(2) of the New Zealand Financial Reporting Act 1993 (“**FRA**”), DIL, as an issuer, must have its financial statements audited by a licensed auditor or a registered audit firm (as defined in the Auditor Regulations Act 2011 (the “**ARA**”).
4. Holtz Rubenstein Reminick LLP (“**HRR**”) has audited DIL’s accounts since 2008 in accordance with US GAAP. HRR is registered with the Public Company Accounting Oversight Board (“**PCAOB**”) and the American Institute of Certified Public Accountants (“**AICPA**”). HRR is not, however, licensed in New Zealand under the ARA and, as a limited liability partnership (“**LLP**”), it cannot be registered under the ARA. Until a change to the FRA requirements in July 2012, HRR’s audit has been in compliance with New Zealand law. However, following the change to the FRA requirements, DIL is now required to have its accounts audited by a licensed auditor or registered audit firm, as defined in the ARA. HRR’s lead audit partner would be deemed to be registered under the transitional provisions of the ARA. However, as it is the firm that signs the audited accounts and not the individual, neither HRR nor the lead partner consider it appropriate to change its practice in this regard and have the individual audit partner sign the audited accounts. DIL’s financial statements audited by HRR will therefore not comply with the FRA, as they will not have been audited by a licensed auditor or registered audit firm.
5. DIL applied to the Financial Markets Authority (“**FMA**”) for an exemption from the requirements in sections 15 and 18 of the FRA to have its financial statements audited by a registered audit firm. The FMA advised that it did not believe there were sufficient policy reasons to grant an exemption, but it would in the circumstances issue a “no action” letter if the financial statements were audited by HRR instead of a registered audit firm. The FMA also noted that it may take this breach into account if other financial reporting breaches occur in the future.

6. DIL is required to file its 10-K in the US (which includes its financial statements for the year ended 31 December 2012) by 18 March 2013, and its annual report with NZX by 31 March 2013.
7. NZSX Listing Rule (“**Rule**”) 10.5.1 requires that an Issuer’s financial statements be audited and be accompanied by an audit report in accordance with the requirements of the FRA.
8. Rule 10.6.1 requires the financial statements of each Issuer to comply with the provisions of the FRA.

### Application

9. DIL has applied to NZX Regulation (“**NZXR**”) for a waiver from the requirement in Rules 10.5.1 and 10.6.1 to have its financial statements audited and accompanied by an audit report in accordance with the FRA, so that its financial statements for the year ended 31 December 2012 may be audited by HRR.
10. In support of its application DIL makes the following submissions:
  - (a) Due to an oversight, DIL only identified in the week beginning 11 March 2013 that HRR needed to be registered or licensed under the ARA to undertake DIL’s audit;
  - (b) The financial statements will comply with the FRA in all respects other than that they will be audited by HRR (a firm which is not licensed or registered under the ARA) and that the audit report will be prepared by HRR;
  - (c) It is not possible for HRR to be registered under the ARA, as it does not permit the registration of limited liability partnerships;
  - (d) HRR is registered with recognised international accounting bodies, namely the PCAOB and the AICPA, and has audited DIL’s financial statements in accordance with US GAAP since 2008;
  - (e) The objective of Rule 10.5.1 is to have financial statements audited. That objective is met here, as the financial statements are audited, just not by an auditor licensed or registered under the ARA;
  - (f) If a waiver is not granted, it will be virtually impossible for DIL to be able to comply with the requirements of the Rules in relation to its financial statements for the year ended 31 December 2012. It is simply impracticable to seek to appoint a new auditor that meets the technical requirements of the ARA and have DIL’s financial

statements completed within the timeframe required by the US regulatory authorities and NZX;

- (g) DIL doubts it will be possible to find in the timeframe a firm that is registered under the ARA that can audit DIL. From its searches of the auditors register, DIL was unable to find any US audit firms or US natural persons recorded as registered audit firms or licensed auditors respectively. DIL assumes this is because the ARA does not allow registration of an LLP audit firm and most overseas audit firms are LLPs;
- (h) Shareholders will not be harmed by NZX granting the waivers sought. HRR has been DIL's auditor for many years and is a licensed audit firm in the US; and
- (i) Shareholders will be harmed if DIL needs to delay filing its financial statements while it seeks to appoint a new auditor. Furthermore, DIL does not consider it reasonable to ask its shareholders to have to incur the additional cost associated with appointing a new auditor at this late stage.

## Rules

11. Rule 10.5.1 provides that:

*Subject to Rule 10.5.2 each Issuer shall within three months of the end of each Issuer's financial years:*

- (a) *Deliver to NZX electronically, in the format specified by NZX from time to time; and*
- (b) *Make available to each Quoted Security holder in accordance with Rule 10.5.3, an annual report.*

*That annual report shall be delivered to NZX before or at the same time as it is made available to Quoted Security holders in accordance with Rule 10.5.3, and shall contain all information:*

- (c) *required by law;*
- (d) *required in a preliminary announcement by Rule 10.4.2; and*
- (e) *required by Rules 10.5.4 and 10.5.7.*

*The financial statements in that annual report shall be audited and shall be accompanied by an audit report in accordance with the requirements of the Financial Reporting Act 1993.*

12. Rule 10.6.1 provides that:

*The financial statements of each Issuer shall comply with the provisions of the Financial*

*Reporting Act 1993.*

## **Decision**

13. On the basis that the information provided to NZXR is full and accurate in all material respects, NZXR declines to grant DIL the waiver sought from Rules 10.5.1 and 10.6.1.

## **Reasons**

14. In coming to this decision, NZXR has considered the following matters:

- (a) NZXR expects Issuers to have processes in place to identify changes in legislative requirements that affect its compliance obligations. DIL's inability to comply with Rules 10.5.1 and 10.6.1 is a result of it having overlooked the FRA requirement, which has been in place since July 2012. DIL's non-compliance with those Rules could have been avoided if DIL had had adequate processes in place to identify changes in New Zealand legislation that would affect its compliance obligations;
- (b) The policy behind Rules 10.5.1 and 10.6.1 is to ensure that financial statements of Issuers released to the market comply with the FRA, and have been audited according to the standards set out in the FRA. Those Rules regarding FRA compliance are accordingly of fundamental importance, and are in place to ensure there is a properly informed market; and
- (c) As a matter of policy, NZXR should not waive compliance with a Rule that requires compliance with a statutory requirement applicable to an Issuer and, in particular, where the relevant regulator has not granted an exemption from that statutory requirement, irrespective of the severity or impact of non-compliance with the statutory requirement.

ENDS.