



23 July 2009

Megan Blenkarne
Securities Commission
PO Box 1179
WELLINGTON 6011

By email: megan.blenkarne@seccom.govt.nz

Dear Ms Blenkarne

Proposed Class Exemption Notice for Portfolio Investment Entities (PIEs)

Thank you for your letter of 8 July 2009. The Society's Commercial and Business Law Committee welcomes the opportunity to comment in response.

1. The basis for the proposed class exemption is that the securities offered in certain types of PIE funds (as referred to below) should, for disclosure purposes, be able to be treated in the same manner as debt securities issued by the guaranteeing registered bank.
2. The Securities Act (ASB Group Investments Limited) Exemption Notice 2008 (the ASB exemption) is the only example of this type of exemption. The Commission is proposing to extend the ASB exemption to apply generally to PIE funds offered by subsidiaries of registered banks, provided they meet the criteria set out below.

Scope of exemption

3. The qualifying criteria will relate to both the nature of the PIE fund and to the nature of the issuer.
4. In connection with the PIE fund:
 - it must qualify as a portfolio investment entity under section YA1 of the Income Tax Act 2007;
 - all subscription monies must be invested in debt securities issued by the parent bank; and
 - the obligations of the issuer to repay the holders of units in the PIE fund must be unconditionally and irrevocably guaranteed by the parent bank.

5. In connection with the issuer itself:
 - it must be a wholly owned subsidiary of the parent bank;
 - it must be controlled by the parent bank; and
 - it must, in the ordinary course of its business, continuously offer units in the PIE fund to members of the public for subscription.
6. The Commission can see that there is a case to be made for such a class exemption.
7. Your letter states that there has been a suggestion that it may be appropriate to extend the range of qualifying issuers, for example, to companies that are not subsidiaries of registered banks. It is unclear whether this extension would also entail the corresponding guarantee from the parent of the manager being from an entity other than a registered bank. If this is the proposal, a distinction should be made between a guarantor that is a registered bank and a guarantor that is a corporate entity. For the most part, a corporate entity will have some charges over its assets, either to a trustee in connection with its public funding lines or to its bankers in connection with private funding lines. Accordingly, a guarantee by a corporate parent in connection with units in a PIE issued by its subsidiary would be unlikely to have the same ranking in point of security as the obligations of a bank guarantor. If the intention is to allow for an issuer that is not technically a subsidiary of a registered bank, but to still have the guarantee coming from the registered bank, a case can be made for this, and a Schedule would be a sensible way to deal with this.
8. The criteria for consideration in relation to a Schedule should include the character of the issuer and the control of the issuer. While being a subsidiary of a parent bank would not be a required characteristic of the issuer, control by the parent bank is important.

Proposed exemption and conditions

9. In relation to call units, the definition contained in section 2B(2) of the Securities Regulations 1983 (adapted as necessary) is a good starting point. In relation to term units, they should have a guaranteed principal or redemption amount to qualify for the exemption.
10. In paragraph 9 there is a suggestion that where units are guaranteed by a registered bank, they should be treated in a similar manner to the debt securities which they reflect. It is not clear whether this would remove the need for any prospectus relating to a PIE fund, on the basis that there was a guarantee from a registered bank.

Section 37A(1)(a) of the Securities Act

11. The ASB exemption provides an exemption, subject to conditions, from s37A(1)(a) of the Securities Act for both the ASB call units and term units. The operation of clauses 5, 6 and 7 of the ASB exemption appear to be appropriate for a general exemption notice.

Section 52(1)(3) of the Securities Act

12. Clause 8 of the ASB exemption deals with this matter in a satisfactory fashion and would be suitable for a general exemption.

Section 54 of the Securities Act

13. Clause 9 of the ASB exemption deals with this. The only comment is that, in connection with a holder being able to request a copy of a statement, this right should be required to be specified in the investment statement.

Guarantee from registered bank - clause 16(a) and (b) of the letter

14. For the reasons raised in paragraphs 17 and 18, these two conditions are desirable in connection with the proposed class exemption. In connection with the nature of the guarantee, as well as this being specified as being irrevocable and unconditional, it should be able to be severally enforced against the guarantor by each of the holders of units in the relevant PIE.

If you have any queries regarding this submission please contact Diana Brown, Committee Secretary, on 04 463 2967 or email diana.brown@lawsociety.org.nz.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Horner', written in a cursive style.

John Horner
Convener, Commercial and Business Law Committee