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Natalie Muir
Senior Solicitor
Securities Commission
PO Box 6011
WELLINGTON

ASFONZ SUBMISSION ON THE SECURITIES ACT (MULTIPLE PARTICIPANTS SUPERANNUATION SCHEMES) EXEMPTION NOTICE 1998

Thank you for your letter of 31 July 2009 seeking ASFONZ's comments to assist you with your review of the Securities Act (Multiple Participants Superannuation Schemes) Exemption Notice 1998, which is currently scheduled to expire on 30 November 2009.

Our comments (in the form of a submission) are attached.

Bruce Kerr and I would be pleased to answer any questions you have after reading our submission. We would also welcome the opportunity to be further involved, for example, by commenting on drafts of any proposed amendments to the exemption notice.

Thank you for the opportunity to be involved.

Yours sincerely



David Ireland
Chairman

ASFONZ

(The Association of Superannuation Funds of New Zealand)

Submission to the

Securities Commission

on the

**Securities Act (Multiple Participants Superannuation
Schemes) Exemption Notice 1998**

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ASFONZ submission on the Securities Act (Multiple Participants Superannuation Schemes) Exemption Notice 1998

About ASFONZ

ASFONZ is a national, not-for-profit, apolitical membership organisation that represents the interests of employers who offer workplace superannuation, their trustees & members, as well as superannuation industry service providers and professional advisers.

Our membership embraces all types of workplace superannuation schemes (KiwiSaver, public & corporate, union-sponsored & industry-based), as well as employers and service providers to the workplace superannuation industry. Current membership comprises around 100 major workplace superannuation schemes and around 50 organisations and individuals representing the various product and service providers for workplace superannuation.

The mission of ASFONZ is to be the Voice of Workplace Savings, advancing the sustainable, effective, and efficient delivery of workplace savings outcomes for all involved.

ASFONZ seeks to achieve that mission through:

- Promoting ASFONZ as the “Voice of Workplace Savings”
- Working with the Government to develop policies that achieve improved workplace savings and KiwiSaver outcomes.
- Identifying and promoting initiatives and reforms that will provide efficiencies and enhancements to minimise the extent to which regulatory factors impede delivery of effective and efficient workplace savings outcomes, and those that will encourage sustainable participation in workplace savings.
- Supporting employers, trustees and providers in their delivery of optimal workplace savings outcomes
- Improving public confidence in workplace savings by consistently reinforcing integrity, accountability, and professionalism within the workplace savings industry
- Serving ASFONZ members, and its supporters, by providing a range of services to meet their needs and deliver value for their participation.

Scope and summary of ASFONZ’s submission

You have asked ASFONZ to provide feedback on two specific points relating to the Securities Act (Multiple Participants Superannuation Schemes) Exemption Notice 1998 (‘Exemption Notice’):

- 1 Current reliance on the Exemption Notice; and
- 2 Any difficulties identified by the industry in relying on it.

We have sought the views of all nine master trust providers operating in New Zealand. We have supplemented these with the views of other ASFONZ members, including those of legal practitioners with experience in the area.

The Exemption Notice continues to be widely utilised by those providing workplace superannuation, and for that reason our view is that it must be renewed. Not renewing the Exemption Notice would create very substantial practical difficulties for those currently relying on it. ASFONZ believes the Exemption Notice should be renewed for a further five years, and in principle is required for so long as the Securities Act continues to treat employer participants in multiple employer superannuation schemes as 'promoters'.

In general, the Exemption Notice works well, although there are a few changes ASFONZ would like to see effected to enable the Exemption Notice to work in a more streamlined way. These changes would not undermine the policy objectives of the Exemption Notice or the Securities Act generally. ASFONZ' firm view is that the reason the Exemption Notice is required is due to technical anomaly under the Securities Act, and as such there is minimal practical benefit served by the prescriptive requirements of the Exemption Notice.

Background to the Exemption Notice – employers as 'promoters'

The reason the Exemption Notice is required is primarily due to the potential scope of the definition of 'promoter' under the Securities Act. The defined term refers to a 'person who is instrumental in the formulation of a plan or programme pursuant to which ... securities are offered to the public'. The generally accepted view in the workplace savings industry is that the definition captures employer participants in a multiple employer superannuation scheme offering who specify the terms and conditions by which their employees are able to participate in that offering. However, in practice the employer participants in question generally have very limited powers in this regard, with their ability to dictate terms heavily prescribed by the provider of the multiple employer superannuation scheme offering in question.

ASFONZ is aware of a number of multiple employer scheme offerings where the scheme has been structured so as to overcome the possible application of the statutory definition of 'promoter' to the employer participants involved. The structure of those schemes involves the employers in question simply taking the terms made available to them by the actual promoter of the scheme (if any), or where there is no promoter, by the trustees. In many cases investors in multiple employer offerings would struggle to see any practical difference in the way the schemes are operated, and yet the form of disclosure documentation received will vary markedly depending upon which regulatory model is being followed.

The ASFONZ position is that treating employer participants in multiple employer superannuation scheme offerings as 'promoters' is a statutory anomaly. We see no investor benefit in treating them as such, nor any substantive risk that would be created if they were not so classified. The position is not helped by a lack of clarity around the scope of persons who might be regarded as being 'instrumental in the formulation of a plan or programme' pursuant to which securities are offered. Nevertheless, we appreciate that amending the legislative definition to address this anomaly is not an option at this stage, and therefore we must proceed on the basis that many multiple employer superannuation scheme offerings will continue to have their employer participants classified as 'promoters' for the foreseeable future.

The practical difficulty to be addressed by the Exemption Notice is the same now as it was in November 1998 when the Exemption Notice first commenced. That is, in a multiple participant environment is not feasible to require every 'promoter' to sign the scheme's prospectus, and not

appropriate for every investor to see the full details otherwise required by regulation in relation to every 'promoter' involved in the scheme.

The key elements of the relief provided by the Exemption Notice are:

- 1 overcoming the need for every promoter (including directors of corporate promoters) to sign the registered prospectus for the multiple participant superannuation scheme;
- 2 overcoming the need for the investment statements for multiple participant superannuation schemes to contain details of promoters who have no involvement in the terms on which the securities are offered to particular groups of specified persons; and
- 3 enabling investment statements to be tailored to meet the needs of defined groups of investors, without each group of investors being confronted with the full set of terms available to every group of investors.

Current reliance on the Exemption Notice

Considerable reliance is placed on the Exemption Notice by providers of multiple participant superannuation schemes.

The table below highlights the use of the Exemption Notice by those master trust providers who responded to our request for information. Not all of the providers were able to respond before our submission needed to be finalised.

	Provider A	Provider B	Provider C	Provider D	Provider E	Provider F
Products relying on Exemption Notice	6	1	1	2	1	1
Participating employers using product(s)	165	68	640	81	33	105
Number of member investors	10,343	24,685	34,000	6,613	1,385	6,038
Total assets under management (\$M)	\$284	\$357	\$1,260	\$190	\$30	\$276

In addition to these master trusts, a reasonable number of 'stand alone' multiple participant superannuation schemes rely on the Exemption Notice.

The extent of reliance clearly demonstrates that the Exemption Notice remains useful and relevant. In our view the Exemption Notice must be renewed. We believe it should be renewed for a further five years.

The Exemption Notice is particularly important for allowing small and medium sized employers to access the benefits and diversification that larger schemes provide. This in turn benefits employees as economies of scale naturally work to their benefit.

Contrary to what might have been expected, reliance on the Exemption Notice has not been materially reduced by the introduction of KiwiSaver, which might be seen by some as an 'easier' superannuation option to provide for employees. Rather, industry experience is that the introduction of KiwiSaver has resulted in increased enquiries from employers who are looking to differentiate themselves by making alternative superannuation options available for their employees.

If the Exemption Notice is not renewed this would create very substantial practical difficulties for those providers currently relying on it. It would also result in less meaningful information for potential members of such schemes. As an example, it would no longer be possible to use an investment statement with a supplement in order to provide potential members with information that was relevant only to their employer's participation in the scheme.

Difficulties identified by the industry in relying on the Exemption Notice

The Exemption Notice has been amended a number of times since 1998. Amendments made have addressed a number of difficulties with the Exemption Notice. This means that the Exemption Notice, while complicated, does not currently give rise to many substantial difficulties for those who rely on it.

There is, however, one particular change that could be made to enable the Exemption Notice to work in a more streamlined way, without undermining the policy objectives of the Exemption Notice or the Securities Act generally.

Some technical amendments would also be necessary (or desirable) when the Exemption Notice is renewed.

Clause 15(2) – Conditions relating to the distribution of investment statement

Clause 15(2) of the Exemption Notice provides two alternative compliance requirements relating to the distribution of an investment statement. These are conditions for relying on the exemptions in clauses 3, 6, 7, 12 and 14 of the Exemption Notice, and require either:

- 1 a directors' certificate to support a Regulation 17 certificate or a certificate under clause 5 of the Exemption Notice in respect of the investment statement and relevant participant's supplement (clause 15(2)(a)); or
- 2 a signed acknowledgement from the employer participant that the specified person subscribing for interests in the scheme received an investment statement before subscribing (clause 15(2)(b)).

ASFONZ believes these conditions are unnecessary and should be removed. There is no wider requirement under the Securities Act or the Securities Regulations for confirmations/acknowledgements from a promoter or distributor to support the execution of a Regulation 17/Regulation 30 certificate. Likewise, there is no requirement for express confirmation as to the distribution of an investment statement prior to allotment.

In all other areas the issuer is left to develop appropriate compliance requirements to ensure that the substantive requirements of the Securities Act and Securities Regulations are met. There is a

strong incentive for an issuer to do so, in order to avoid (in these cases) the risk of voidable allotments or the risk of action being taken by the Securities Commission for false or misleading statements in an investment statement.

ASFONZ believes that there is no reason for the Exemption Notice to prescribe specific steps to be taken in this area by providers who rely on it. Doing so serves only to impose additional compliance costs on providers. This is because providers need to alter or supplement their usual practices in order to comply with the Exemption Notice. Further, we do not see any benefit for relevant investors in the requirements of clause 15(2), nor any greater risks faced by this group, if these requirements were to be removed when compared with the risks faced by the public at large when subscribing for securities under offers that do not rely upon the Exemption Notice.

Technical amendments

As the Commission is no doubt already aware, a number of technical amendments will need to be made to reflect wider legislative reforms if the Exemption Notice is extended. In particular, the Exemption Notice will need to be amended to refer to relevant provisions of both the Securities Regulations 1983 and Securities Regulations 2009.

With the transition to the Securities Regulations 2009 the exemption contained in clause 5 of the Exemption Notice will soon become unnecessary. Providers who wish to sign an advertising certificate by way of an authorised signatory are now able to do so under regulation 30 of the Securities Regulations 2009. In practice, we expect that many providers will elect to prepare new investment statements in accordance with the Securities Regulations 2009, rather than continuing to 'use' the Securities Regulations 1983 under the transitional provisions in Part 6 of the Securities Regulations 2009. Our view is that the clause 5 exemption needs to remain for the time being to cover the transition period, although it will cease to be necessary once the Securities Regulations 1983 are not longer able to be used.

We also have the following comments of a more technical nature:

- 1 *Clause 2, definition of 'Admission Deed'*: the definition of Admission Deed refers to a 'deed or similar document'. In practice, participants will often be admitted to a scheme relying on the Exemption Notice simply by completing an application form, which would not ordinarily be thought of as a 'similar document' to a deed. This has resulted in some artificial practices being adopted in order to bring participation arrangements within the scope of the Exemption Notice. We suggest that the definition be broadened by referring to a 'deed or *other* document *executed* by a participant', and that paragraph (a) of that definition be expanded to incorporate documents that otherwise set out the terms of participation as agreed between the participant and the superannuation scheme trustee.
- 2 *Clause 7(2)(b)*: this clause contains a transitional provision relating to the contents of investment statements prepared before the Exemption Notice came into effect. As the Exemption Notice has been in force over ten years this must no longer be necessary. We suggest that the option provided at clause 7(2)(b) be removed.
- 3 *Clause 8(2)(a)(ii) and (b)(ii)*: these conditions require that 'it is a term of the offer of interests in the superannuation scheme' that a copy of the admission deed and any

amendments are made available on request. The quoted words are superfluous and unnecessarily require that offer terms to incorporate wording to reflect the substantive condition, which leads to artificial drafting responses to bring the purported terms of the offer within the conditions stated. The requirement is inconsistent with the option provided at 8(2)(a)(i) and (b)(i) which does not require the alternative of registering a copy of the admission deed to be a 'term' of the offer. The sole condition that is appropriate in this context if the Exemption Notice is to be relied upon is that each admission deed is either registered or is available to specified persons upon request to the relevant participant. We therefore believe the words quoted at the start of this paragraph should be removed.

- 4 *Clause 8(2)(a)(ii) and (b)(ii)*: these conditions require that a copy of the admission deed and any amendments be made available to 'specified persons and prospective members of the scheme on request to the participant'. Strictly speaking, this means that any potential member of the scheme would be entitled to request a copy of the admission deed for any participant, not just for the participant through which they are eligible to join. This is clearly unintended, and as such we suggest that the clauses be amended to refer to '... specified persons on request to the relevant participant'. As drafted, the definition of 'specified persons' includes persons eligible to become members of the scheme through the relevant participant, whether or not they are actually members. Therefore, there is no need for the clauses in question to also refer to prospective members.
- 5 *Clause 13(2)(a) and (b)*: these conditions require that an investment statement state that 'no offer of interests in the superannuation scheme may be made' unless the admission deed is registered or made available on request (depending on which option the participant has chosen). We believe it is sufficient that clause 8 requires these documents to be made available in the manner chosen by the participant, as a condition of reliance upon the Exemption Notice, without requiring that condition to be spelled out in the investment statement, over and above the investment statement simply stating that a copy of the relevant admission deed is available upon request. In our view, therefore, this clause should be removed, and replaced with reference to the condition required at clause 8(2), revised as recommended above. If clause 13(2) is not replaced as submitted, then the phrase 'specified persons and prospective members ... on request to the participant' in clause 13(2)(b) should be amended in a manner consistent with point 4 above.
- 6 *Clause 14(2)*: this clause refers to 'offerors' and 'offerees' but neither word is defined. In any event, the offer of interests in a scheme relying on the Exemption Notice is strictly speaking made by the trustee of the scheme. The clear intent of this clause is to require disclosure of the classes of *participants* and *specified persons* and we suggest that the clause be amended accordingly.

Finally, we believe that some of the provisions of the Exemption Notice are complicated and would benefit from a 'plain English' redraft. However, any 'plain English' changes would need to be considered very carefully to ensure that they do not have any substantive effect on the terms of the Exemption Notice. We would be pleased to be involved in this process by reviewing the draft of any amendments proposed to be made.