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**FOODSTUFFS (WELLINGTON) CO-OPERATIVE SOCIETY LIMITED – SUBMISSION
ON FINANCIAL MARKETS CONDUCT BILL**

Introduction

- 1 We write on behalf of Foodstuffs (Wellington) Co-operative Society Limited (*Foodstuffs*) who wish to make a submission in response to the Ministry of Economic Development's (*MED's*) request for submissions on the Exposure Draft of the Financial Markets Conduct Bill (the *Bill*).
- 2 Foodstuffs previously presented a submission (jointly with Foodstuffs South Island Limited) on 25 August 2010 to MED on the Review of Securities Law Discussion Paper (June 2010).

Submission

- 3 Foodstuffs' submission focuses on the close business associates and small offers exclusions in Schedule 1.
- 4 The Appendix to this letter sets out some suggested drafting amendments to the close business associates test and the investor limit applicable to the small offers exclusion.

General

- 5 If you have any questions, please contact the writers.

Yours faithfully



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APPENDIX

Clause Number	Clause heading	Submission
Part 3 and schedules 1 and 2	Disclosure offers of financial products	
Schedule 1, Part 1, clause 4	Offers to close business associates	<p>Background</p> <ul style="list-style-type: none"> • The amendments below have been suggested for the following reasons: <ul style="list-style-type: none"> ➤ There appears to be a gap in the close business associates test. As a body corporate could be a close business associate of the offeror under subclause (3), it seems sensible that its directors and material shareholders (and their relatives) are also close business associates. Importantly, many of those with which Foodstuffs has a close business relationship are closely held companies. Offers to shareholders and directors of these closely held companies need to be dealt with in the same way as the company itself, particularly in the context of the co-operative business model. It is expected that the same will apply in other spheres of New Zealand business. ➤ It is unclear what is the effect of subclause (3)(b) given that an assessment of the merits necessarily requires the provision of adequate information. Subclause (3)(b) is unnecessary and potentially confusing. ➤ Foodstuffs proposes an objective test that requires a reasonable person to be able to assess the merits of the offer. To assess the merits of an offer, a reasonable person would require adequate information. Put another way, without adequate information, the threshold in subclause (3)(a) (i.e. the merits of the offer) could never be achieved. ➤ In Foodstuffs' situation, a close business relationship usually commences only after an offer to become a trading member (and to be issued membership shares) is made and accepted. The following steps happen: <ol style="list-style-type: none"> 1 Foodstuffs makes a preliminary assessment of a candidate's suitability;

Clause Number	Clause heading	Submission
		<p>2 Foodstuffs makes an offer to the candidate to become a trading member and to subscribe for membership shares, which is accompanied by all relevant information relating to the offer;</p> <p>3 The candidate accepts the offer and acquires the shares;</p> <p>4 Foodstuffs commences trading and generally operating closely with the new member.</p> <p>➤ In policy terms, the key point is that at the time the potential member makes its investment decision (i.e. decides to become a trading member and to acquire membership shares) it will have received all relevant information that will enable it to assess the merits of the offer.</p> <p>➤ Foodstuffs also proposes a “material information” threshold, which is consistent with current law relating to materiality.</p> <p>Specific amendments</p> <ul style="list-style-type: none"> • The following new subparagraph should be included as clause 4(2)(e): “A is a director of, or holds or controls 5% or more of the voting products of, a body corporate which is a close business associate of the offeror under subclause (3); or” • Current clauses 4(2)(e) and 4(2)(f) should be renumbered as clauses 4(2)(f) and 4(2)(g) respectively. • The cross-references in current clause 4(2)(e) (new clause 4(2)(f)) should be changed to “paragraphs (a) to (e) or subclause (3)”. • The cross-references in current clause 4(2)(f) (new clause 4(2)(g)) should be changed to “paragraphs (a) to (f) or subclause (3)”. • Clause 4(3) should be amended as follows: “A person (A) is also a close business associate of the offeror, in relation to an offer of financial products, if A

Clause Number	Clause heading	Submission
		<p>has, <u>or A proposes to commence</u>, a close professional or business relationship with the offeror, or a director or senior manager of the offeror, <u>and that relationship, or A's proposed commencement of such a relationship</u>, allows A to obtain <u>the all material</u> information that will enable <u>a reasonable person in A's position</u> to assess—</p> <p>(a) the merits of the offer; and</p> <p>(b) the adequacy of any information provided by the offeror and any other person involved in the offer.”</p> <p>Clause 4 as amended</p> <p>“4 Offers to close business associates</p> <p>(1) An offer of financial products to a close business associate of the offeror does not require disclosure under Part 3.</p> <p>(2) A person (A) is a close business associate of the offeror if—</p> <p>(a) A is a director or senior manager of the offeror or of a related body corporate of the offeror; or</p> <p>(b) A holds or controls 5% or more of the voting products of the offeror; or</p> <p>(c) A holds or controls 20% or more of the voting products of a related body corporate of the offeror; or</p> <p>(d) A is a partner of the offeror or of a director of the offeror (under the Partnership Act 1908); or</p> <p><u>(e) A is a director of, or holds or controls 5% or more of the voting products of, a body corporate which is a close business associate of the offeror under subclause (3); or</u></p> <p>(e)<u>(f)</u> A is a spouse, civil union partner, or de facto partner of a person who is a close business associate of the offeror under any of paragraphs (a) to (de) or subclause</p>

Clause Number	Clause heading	Submission
		<p>(3); or</p> <p>(f)(g) A is a child, parent, brother, or sister of a person who is a close business associate of the offeror under any of paragraphs (a) to (ef) or subclause (3) (whether or not by a step relationship).</p> <p>(3) A person (A) is also a close business associate of the offeror, in relation to an offer of financial products, if A has, <u>or A proposes to commence,</u> a close professional or business relationship with the offeror, or a director or senior manager of the offeror, <u>and that relationship, or A's proposed commencement of such a relationship,</u> allows A to obtain <u>all material</u> the information that will enable <u>a reasonable person in A's position</u> to assess—</p> <p>(a)—the merits of the offer; and</p> <p>(b)—<u>the adequacy of any information provided by the offeror and any other person involved in the offer.</u></p> <p>(4) In this clause, control, in relation to a voting product, means having, directly or indirectly, effective control of the voting rights attached to the product.”</p>
Schedule 1, Part 1, clause 12	Small offers	<p>Background</p> <ul style="list-style-type: none"> Given the important aggregate limit of \$2 million (in respect of the amount raised from an issue of financial products), Foodstuffs considers that the actual number of investors that make up the aggregate cap is not so material. On this basis, Foodstuffs proposes the amendment below to introduce some flexibility in the application of the small offer exclusion as the 20-investor limit may be overly restrictive – in any case it is the aggregate amount raised in any 12 months that is the most important component. <p>Specific amendments</p> <ul style="list-style-type: none"> Clause 12 should be amended by deleting each reference to “20” and replacing it with “30”.