

**To**

Investment Law Team  
Ministry of Economic Development  
Email: investment@med.govt.nz

**Date**

6 September 2011

Dear Sir/Madam

**Financial Markets Conduct Bill**

**1. Introduction**

- 1.1 Established in 1869, SBS Bank is New Zealand's largest building society and is believed to be the only building society in the world to have achieved bank registration while maintaining its mutual structure of being owned by its members. SBS Bank officially received bank registration on 7 October 2008. As a mutual building society, clients that borrow, save or invest with SBS Bank, and in most instances are known as 'legal owners' or 'members'. Because we don't have to pay dividends, our primary obligation is to share the results of our success with our members.
- 1.2 SBS Bank offers a wide range of banking services and products, including transactional banking, phone and internet banking, investments, residential and commercial lending, managed funds, agribusiness, consumer finance and insurance.
- 1.3 SBS Bank welcomes the opportunity to submit on the exposure draft of the Financial Markets Conduct Bill (the "**Bill**").

**2. Confidentiality**

- 2.1 We confirm that we have no objection to the Ministry of Economic Development (the "**Ministry**") publishing this submission on the Ministry's website.

**3. Submission**

- 3.1 We wish to submit on the following matters:
  - (a) The financial products definitions;
  - (b) The different obligations relating to "regulated", "limited" and "non-regulated" offers;
  - (c) Expert statements;
  - (d) Defective disclosures;
  - (e) Unsolicited offers;
  - (f) Advertising;

- (g) Client paperwork;
- (h) "In the business"; and
- (i) Transitional measures.

3.2 In addition, SBS Bank's wholly-owned subsidiary Funds Administration New Zealand Limited ("**FANZ**") manages funds products, including KiwiSaver and Cash PIE products. FANZ has also been involved in preparing the Investment Savings and Insurance Association ("**ISI**") submission on the Bill.

3.3 Other than the matters outlined in 3.1, we express no opinion as to the remainder of the Bill.

#### **4. Financial products**

4.1 The four "financial products" are defined in clause 8 of the Bill, but there is uncertainty around the distinctions between different financial products (for example, where a product could be considered either debt or a managed investment product, it is difficult to ascertain which category it will fall into). We have particular concerns regarding the following categorisations:

- (a) Notwithstanding the express inclusion of shares in building societies at paragraph (a)(iii) of the equity security definition, such shares are typically redeemable. This means they are also subject to paragraph (b)(iii) of the debt security definition (which trumps the equity security definition, per paragraph (b) of the equity security definition). This is further complicated by the fact that SBS Bank is also a registered bank and therefore subject to Schedule 1, clause 18; and
- (b) While cash PIE unit trusts offered by FANZ appear to fall under the debt security definition, we assume the intention is for these to be regulated as a managed investment scheme to enable such products to continue to utilise the PIE tax regime.

4.2 We suggest that these issues need to be clarified.

#### **5. Regulated, limited and non-regulated offers**

5.1 As a registered bank, we understand that SBS Bank will be exempt from providing disclosure under Part 3 of the Bill where it offers debt securities or category 2 products (this is one of the exclusions in Schedule 1 of the Bill). Instead we will be required to provide "limited disclosure". The content and rules of this limited disclosure is to be prescribed in regulations.

5.2 SBS Bank submits it would be very helpful to clarify the content of the "limited offer", along with the differences in the various disclosure regimes for regulated offers, limited offers and non-regulated offers. At the moment the three disclosure regimes appear to be as follows (but it is hard to be sure as the different requirements are spread throughout the entire Bill):

<p style="text-align: center;"><b>Regulated offers</b></p>	<ul style="list-style-type: none"> <li>• PDS disclosure</li> <li>• Register entry disclosure</li> <li>• Lodgement rules</li> <li>• Publication of lodgement</li> <li>• Expiry</li> <li>• Subscriptions on trust</li> <li>• Unsolicited offers</li> <li>• The default advertising rules</li> <li>• Ongoing disclosure</li> <li>• Governance (i.e. trustees and trust deeds)</li> <li>• General false/misleading/deceptive conduct</li> </ul>
<p style="text-align: center;"><b>Limited offers</b></p>	<ul style="list-style-type: none"> <li>• A disclosure document that contains the prescribed information and documents</li> <li>• Comply with any other prescribed restrictions (e.g. advertising)</li> <li>• Do so in the prescribed manner</li> <li>• General false/misleading/deceptive conduct</li> <li>• Unsolicited offers</li> </ul>
<p style="text-align: center;"><b>Non-regulated offers</b></p>	<ul style="list-style-type: none"> <li>• General false/misleading/deceptive conduct</li> <li>• Unsolicited offers</li> </ul>

5.3 The Ministry should clarify these provisions and release drafts of the proposed regulations as soon as possible, and in any event, prior to the Bill being introduced to Select Committee; this will enable informed submissions to be made at the Select Committee stage.

**6. Expert statements**

6.1 Clause 41 of Part 3 of the Bill proposes removing the "expert statement" rules and the concept of "promoter", and replacing these with the general false/misleading prohibition and by requiring any statement attributed to a person to have the consent of that person.

6.2 SBS Bank submits that this should not apply to publicly available information as this would be too onerous on issuers. There should also be an exemption for any internally-generated "expert" statements.

## **7. Defective disclosures**

- 7.1 Clause 62 of part 3 of the Bill proposes adopting the Australian "cure period" approach for defective disclosures. In the event that disclosure is defective (e.g. a PDS is misleading/deceptive), then the issuer may (i) repay the subscriptions; or (ii) give a supplemental disclosure and a one-month cooling off period. After one month, the subscriber is deemed to have accepted the new disclosure.
- 7.2 SBS Bank supports this proposal. This seems to be a significant improvement on the Securities Act's current approach of treating defective offers as voidable (or even void).

## **8. Client paperwork**

- 8.1 FANZ provides a range of financial services including offering deposit products, regulated offers (e.g. managed funds, cash PIEs, DIMS) and financial advice on these products. We are concerned at the possible proliferation of paperwork that this may involve, particularly in light of the Bill's stated intent that all disclosures should be "clear, concise and effective" (clause 42).
- 8.2 The licensing regime at Part 6 of the Bill sets out a range of new disclosure obligations, and well as requirements for written client agreements. These documents are in addition to product disclosure under Part 3 of the Bill, personal and QFE financial adviser disclosure under the Financial Advisers Act 2008, bank disclosure statements under Reserve Bank rules, and ordinary bank terms and conditions.
- 8.3 SBS Bank therefore submits that a streamlined approach to all this documentation be available for clients, particularly for registered banks where a range of financial products and services may be provided. This could perhaps be implemented as part of the QFE licensing regime.

## **9. Unsolicited offers**

- 9.1 Clause 69 of part 3 of the Bill proposes banning unsolicited offers of financial products in the course of physical meetings, telephone calls and electronic communications. This prohibition seems too broad to us.
- 9.2 In our view:
- (a) "Unsolicited" should be further defined. In particular, what would amount to a "solicited" offer? Can potential clients opt-in to receiving notice of new products generally, or is specific consent required?
  - (b) Clause 69(1)(b) refers to electronic communications. This appears to duplicate the regime in the Unsolicited Electronic Messages Act 2007 (the "Spam Act"); and

- (c) Offers of new financial products to existing clients should be excluded from the prohibition. It seems to us that SBS Bank should be able to make this offer directly, and not have to go through a QFE adviser per clause 69(3)(c),

## **10. Advertising**

10.1 The advertising regime in the Bill, set out at clauses 71 and following, should be clarified. In our view:

- (a) The definition of "advertisement" in clause 6 contains several words that are not defined, for example "made to", "public/section of the public" and "promoting". This makes it difficult to work out what an advertisement is confined to and whether it is meant to be narrower or wider than the current definition;
- (b) Compounding the previous point, the term "advertisement" is not used in clause 71(1) and other parts of the Bill, but instead words such as "advertise" and/or "publish a statement" are used. This makes the definition of "advertisement" more uncertain as it is unclear whether it should be confined/extended to these concepts or whether these concepts should be removed and there should only be references to "advertisement"; and
- (c) Related to the previous points, the subpart uses a range of phrases including "advertise", "publish a statement", "advertisement may be distributed" and "publication may be distributed". It is unclear whether all these phrases refer to the same thing or not;

10.2 We are also unclear, what, if any additional requirements will be prescribed by regulation. In particular, has the Regulation 30 certificate regime been abolished? As noted above at paragraph 5, we submit that the Ministry provide drafts of the proposed regulations relating to limited offers as soon as possible. It appears that a significantly different advertising regime could apply to limited offers.

## **11. In the business**

11.1 We suggest the definition of "in the business of" at clause 6 of the Bill (and section 6 of the Financial Service Providers (Registration and Dispute Resolution Act) 2008) be clarified. In particular, we are unclear whether or not one-off or occasional transactions amount to "being in the business of" providing such transactions. By way of example, SBS Bank occasionally issues or arranges derivatives for certain of its related parties. It is unclear to us whether this amounts to "being in the business of" a derivatives issuer. While SBS Bank is undoubtedly in the business of offering other financial products, it is not clear to us the status of such occasional transactions.

11.2 We note that derivatives issuing is not likely to be relevant to SBS Bank in practice. As the counterparties to the derivatives will always be related parties, it is likely that such transactions would be excluded as they are not "regulated offers". We do however submit that this is an issue worth clarifying.

**12. Transitional measures**

12.1 Clause 572 of the Bill proposes a transitional period of 6 months. Given the fundamental changes proposed by the Bill, SBS Bank submits that a 12 month period would be more realistic.

**13. Conclusion**

13.1 We would be happy to discuss any matters of our submission or the impact of the Bill on SBS Bank and other building societies, mutuals or banks. If you would like to discuss, in the first instance please contact:

Chris Rout  
SBS Bank Risk & Compliance  
51 Don Street  
PO Box 835  
Invercargill 9840  
Phone: 0800 502 442  
Email: [chris.rout@sbs.net.nz](mailto:chris.rout@sbs.net.nz)

Yours sincerely



Mark McLean  
General Manager - Risk and Support  
SBS Bank