

Submission

to the

Ministry of Justice

on the

Proposed Ministerial Class Exemption for Registered Banks issuing debt securities

22 August 2017

About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.
2. The following sixteen registered banks in New Zealand are members of NZBA:
 - ANZ Bank New Zealand Limited
 - ASB Bank Limited
 - Bank of China (NZ) Limited
 - Bank of New Zealand
 - Bank of Tokyo-Mitsubishi, UFJ
 - Citibank, N.A.
 - The Co-operative Bank Limited
 - Heartland Bank Limited
 - The Hongkong and Shanghai Banking Corporation Limited
 - Industrial and Commercial Bank of China (New Zealand) Limited
 - JPMorgan Chase Bank, N.A.
 - Kiwibank Limited
 - Rabobank New Zealand Limited
 - SBS Bank
 - TSB Bank Limited
 - Westpac New Zealand Limited

Background

3. NZBA welcomes the opportunity to provide feedback to the Ministry of Justice on the proposed Ministerial class exemption for registered banks ("**Class Exemption**") and commends the work that has gone into developing the Class Exemption.
4. If you would like to discuss any aspect of the submission further, please contact:

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Introduction

5. Thank you for the opportunity to comment on the Class Exemption under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 ("**AML Act**"). NZBA and its members support the Class Exemption.
6. NZBA has three substantive comments on the Class Exemption and some suggested drafting amendments. Our suggested amendments are included in the **enclosed** mark-up to the Class Exemption.

Scope of Application

7. The Class Exemption is currently limited to registered banks. While we agree that registered banks should receive the benefit to the Class Exemption, we think it should also be extended to special purpose vehicles ("**SPVs**") that raise regulatory capital for a registered bank. This approach would be consistent with the approach taken under the Non-bank Deposit Takers Act 2013 and the Non-bank Deposit Takers (Declared-out Entities) Regulations 2015. Under that Act and the Regulations neither a registered bank (section 5(2)(a)) nor an SPV that meets the criteria set out in Regulation 11(3) are non-bank deposit takers.
8. Extending the scope of the exemption in the manner suggested maintains the current position for such SPVs and would be consistent with the approach under the Non-bank Deposit Takers Act 2013.

Scope of permitted distribution network

9. As discussed on NZBA's call with the Ministry of Justice on 4 August 2017, we understand that previous conditional waivers issued by the Reserve Bank included a definition of "Intermediary" that included each NZX participant, registered bank and intermediary that was a reporting entity and received an allocation of the relevant securities for distribution to its clients.
10. The proposed definition ("NZX Participant") tracks the definition of "Distribution and Underwriting Sponsors" in the NZX Participant Rules. This therefore narrows permitted distributors to persons that are approved and designated by NZX to assist a prospective issuer in distributing and/or underwriting the issuer's debt securities on a market provided by NZX.
11. We do not believe it is necessary to narrow the scope of the Class Exemption to NZX Participants (as defined above). The narrowing will reduce the utility of the Class Exemption and limit the distribution networks available to registered banks and SPVs from those used under the existing conditional waivers. Our members have confirmed that they have and continue to use non-NZX Participants to distribute debt securities. For example, authorised financial advisers are used provided they meet the conditions of the existing conditional waivers. From an AML perspective, the key point is to ensure that registered banks and SPVs are using **reporting entities** to distribute the debt securities and comply with the conditions proposed at clause 3 of the Class Exemption. The proposed conditions, together with the intermediary's status as a reporting entity, give sufficient comfort that the registered bank or SPV will ensure that relevant intermediary will comply with the customer due diligence obligations imposed on it.

Definition of "specified subscriber"

12. We also believe the definition of specified subscriber needs some refinement. Our suggested refinements reflect:
 - recent conditional waivers where a simpler definition was used; and
 - a distribution mechanism that is sometimes used by registered banks for its retail offers of debt securities.

Simplified definition of specified subscriber

13. Recent conditional waivers have simply required the specified subscriber to have acquired the debt securities from an intermediary (being an NZX participant, registered bank or another intermediary, in each case that is a reporting entity).
14. We do not believe sub-clause ii. of the proposed definition of specified subscriber is necessary and think it makes managing the Class Exemption more complicated for the registered banks. Requiring the registered bank to check whether an investor is an existing customer adds no value from an AML perspective as the relevant intermediary will have either conducted customer due diligence ("**CDD**") on the investor previously or will do so before the debt security is issued. That means CDD is always conducted on the investor by a reporting entity (in this case the intermediary) before the issue of the debt securities. Requiring the registered bank to check whether it also has an existing relationship with the investor does not alter the intermediary's CDD obligations nor does it improve the quality of CDD conducted. It simply adds an administrative burden on the registered bank with no incremental improvement in the quality of CDD information obtained.
15. To the extent a new SPV is used for an offer of regulatory capital, that limb of the definition is redundant for the SPV.
16. Finally, in many cases, the registered bank or SPV will not have visibility on the relevant potential investors until very late in the offer process.

Distribution mechanism

17. To date registered banks and SPVs have distributed debt securities in one of two ways, being:
 - through intermediaries where the intermediary's customer is the initial subscriber of the debt securities. For example, this occurs in offers of regulatory capital by registered banks and SPVs. The definition of specified subscriber in the Class Exemption reflects this distribution mechanism; or
 - through intermediaries where the intermediary is the initial subscriber of the debt securities, but on acquiring the debt securities promptly sells the debt securities on to its retail clients. That is, the retail investor does not subscribe directly for the debt securities. While we understand conditional waivers have been granted for this distribution mechanism, the definition of specified subscriber in the Class Exemption does not reflect this distribution mechanism.
18. Accordingly, we have suggested amendments to the definition of specified subscriber in the Class Exemption to reflect these two points. Our amendments are consistent with previous conditional waivers granted in relation to these points.
19. We would be very happy to meet with the Ministry of Justice and the Reserve Bank to discuss our suggested amendments.