

Chapter 4 Scheme registration

Template for submissions

Name of respondent	Robert <u>Garton Smith</u>
Organization	Primary Securities Ltd
Email	rob@primarysecurities.com.au
Phone	(08) 9430 5262

4.1 Criteria for determining whether a scheme should be registered

Question 4.1.1

Should all schemes require registration? If not, what should be the criteria for exemption from registration (for instance, should the numerical test be retained in its current form or with a higher or lower numerical threshold)?

Submission

The requirement that a professional promoter must register all its schemes should not apply to a professional RE because its activities are already regulated by ASIC, an RE is used to due diligence and proper disclosure and carries PI insurance for all its activities.

An RE should be allowed to form any number of schemes with less than 20 members or if each member has paid \$1,000 or less without having to register those schemes. The \$1,000 or less exception is to facilitate crowd sourced funding.

There should be a minimum amount which ASIC should not concern itself with for any investment, such as \$1,000 per investment, similar to the principle at law that the law does not concern itself with trifles.

Question 4.1.2

If an exemption from registration along the lines of the professional promoter test is retained, does the test require amendment? If so, how should it be amended?

Submission

Permit a responsible entity to form any number of syndicates of 20 persons (retail or wholesale) (or an unlimited number of persons who invest \$1,000 or less) without having to register the syndicate as a scheme.

The exception should be the situation in which each of the sub-schemes in fact comprise a larger scheme, such as forestry lots.

Question 4.1.3

Does special provision need to be made for wholesale-only schemes and, if so, what? For instance, should there be a separate class of registered scheme for wholesale-only schemes or, alternatively, should wholesale-only schemes be exempt from regulatory requirements and, if so, what requirements and why?

Submission

Wholesale schemes should be exempt from the regulatory requirements.

Unfortunately, these requirements are due to change on 1 July 2014 by the introduction of the requirement of custodians for wholesale schemes. This is a backward step. Why not let the promoter and investors decide whether to have a custodian or not? If there is no custodian and the institutional investors require one, then one will be appointed. Otherwise, why insist when investors are wholesale investors, presumed to be able to look after themselves.

One change which would make the process simpler is to remove the requirement to file notices in relation to the appointment of authorised representatives, if the authorised representatives are only involved with wholesale schemes or in giving general advice.

4.2 ASIC's role in scheme registration

Question 4.2.1

Should ASIC's role in relation to scheme registration be brought more closely into line with its role in relation to company registration by:

- permitting it to register schemes without requiring active consideration of the registration criteria in each case, but giving it stop order powers to prevent the operation of non-compliant schemes
- giving it the same powers to refuse registration on the basis of name or a potential breach of the law as it has in relation to companies?

Submission

Yes. Scheme registration is not as simple a procedure as you indicate.

The Discussion Paper omits to mention the requirement before registration (or transfer) of a new scheme for the holder of the AFSL to vary the AFSL of the RE (assuming the holder of the AFSL holds their licence on a scheme by scheme basis).

Primary's AFSL only grants us the right to operate schemes on a scheme by scheme basis. If you have an AFSL authorising the RE to operate 16 registered schemes and the RE wants to add a 17th, there must first be an application for variation of the AFSL.

Variation of an AFSL is a tedious, expensive and time consuming process, and quite unnecessary if the RE already has appropriate key persons or responsible officers for the new scheme. Primary Securities Ltd has applied 50 or so times to vary its AFSL. There should be no requirement to vary an AFSL if the RE has an appropriate approved responsible officer.

Relevant to the topic of registration is the fact that there is no procedure for registration of a scheme which is unregistered but which should be registered. ASIC's only power is to apply to have an unregistered scheme wound up. Suppose there is an unregistered forestry scheme comprising 200 investors who each have separate leases of the same kind with the one manager, which has been in existence for 30 years and now as the trees are to be harvested, the manager has become insolvent. There is currently no procedure to regularise such a scheme, whereas to wind the scheme up would cause complete loss to the investors.

Question 4.2.2

Should ASIC have the power to refuse to register a scheme if it considers that the scheme's name may mislead investors? If so, should ASIC also have:

- a power to refuse to amend the register in the case of a notification of change of name where it believes that the proposed name may be misleading
- a power to issue a direction to change the name of a scheme if it considers it to be misleading?

Submission

Yes.

Question 4.2.3

Should ASIC have a power to refuse to register a scheme if circumstances exist in relation to the scheme that create a potential risk that the affairs of the scheme would not be conducted 'efficiently, honestly and fairly'?

Submission

Isn't this a licensing matter? If ASIC formed the view that the RE could not operate a scheme within its competence "efficiently, honestly and fairly" it should remove the AFSL.

Question 4.2.4

Should ASIC have a power to require schemes that fall within a particular class to have specific terms in their name?

Submission

If ASIC wishes.

Question 4.2.5

Are there any other grounds on which ASIC should be permitted to refuse to register a scheme?

Submission

ASIC should always retain the power not to register a scheme.

Other comments

Please insert any other comments you may have on the matters covered in this chapter.

Submission