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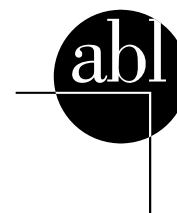
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Dear Ms Eccleston

Consultation Paper 105 - Facilitating equity capital raising

Please find below Arnold Bloch Leibler's submission in response to ASIC's Consultation Paper 105 - Facilitating equity capital raising.

1 Removing the 10% discount limit on placements for certain managed investment schemes

We understand that ASIC proposes to remove the 10% discount limit on placements for listed managed investment schemes.

1.1 General Comments

We agree with the proposal to remove the 10% discount limit on placements for the following reasons:

- (a) removing the limit will increase a managed investment scheme's ability to raise equity;
- (b) no similar discount limit applies to companies and there is no reason why managed investment schemes should be treated in a different manner to companies;
- (c) the current 10% discount limit is arbitrary; and
- (d) the responsible entity of a registered scheme, and its officers, have a duty to act in the best interests of the scheme's members. This duty is the most appropriate mechanism to regulate the quantum of any discount on a placement.

Further, we encourage ASIC to extend its proposal and remove the 10% discount limit on all security issues by managed investment schemes for the reasons stated above.

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In order to raise sufficient equity in the current market, managed investment schemes may need to conduct placements at a discount of more than 10% to the current market price of interests in the same class.

Unlike managed investment schemes, companies can conduct placements at any discount rate the directors consider to be in the best interests of the company. There is no reason why different limitations should apply to managed investment schemes to those which apply to companies.

Where the securities of a managed investment scheme are “stapled” to shares in a company, the discount limit on placements of interests in the scheme will apply to prevent a placement of the stapled securities at a discount of more than 10% to the current market price. In other words, the limitation on managed investment schemes has the practical effect of limiting placements of stapled securities.

The responsible entity of a registered scheme, and its officers, have a duty to act in the best interests of the scheme’s members. This duty is sufficient to limit unconscionable discounts in placements.

We recognise that eliminating the 10% discount limit may cause more issues to be conducted via placements rather than rights issues, which may have the effect of diluting retail investors. Therefore, we encourage ASIC to extend its relief, eliminating the 10% discount limit for all security issues by managed investment schemes. However, even if ASIC chooses to only eliminate the 10% discount in relation to placements, we believe any risk of retail investor dilution is mitigated by the overall benefit provided to the scheme via the additional equity which will be able to be raised. Even if the increase of placements causes some initial dilution of retail investor holdings, it will allow for needed capital to be obtained by the scheme, therefore benefitting all members over time.

The 10% discount limit is not a statutory limit, but is a limitation derived by ASIC based on its interpretation of section 601GA(1) of the Corporations Act. ASIC considers that adequate provision has been made, in accordance with section 601GA(1), when a constitution provides for an “independently verifiable price” to acquire an interest in the scheme. Nonetheless, it is possible that the courts would consider a less prescriptive provision to be compliant with the section. We find no policy reason why a provision in a constitution which stipulates that, for instance, an interest in the scheme may be acquired for such consideration as is determined by the responsible entity of the scheme from time to time would not be “adequate provision”.

In other words, it is possible that “adequate provision” merely requires the constitution to stipulate a mechanism by which the required consideration will be determined, as opposed to an independently verifiable price.

Ultimately, the discount limit acts to circumscribe the legitimate business judgements of responsible entities ostensibly to protect retail investors.

In our view, the level of additional protection to retail investors is negligible, while the increased burden on legitimate enterprise is significant.

1.2 ASIC Questions

We would like to comment on the following questions posed in the Consultation Paper:

- (a) *B1Q1: Do you agree with our proposal to relax the condition that imposes a discount limit of 10% for placements by listed registered schemes? Why?*

Yes, for the reasons outlined above.

- (b) *B1Q2: What conditions do you consider appropriate were we to remove the 10% discount limit? For example, do you consider it appropriate that we impose an requirement that the scheme has not been suspended for a defined period of time?*

We do not consider it appropriate that ASIC impose a requirement that the scheme has not been suspended for a defined period of time. We also do not believe any other conditions are appropriate. The responsible entity has a duty to act in the best interests of its members, which we believe is a sufficient protection for members. Further, where a person is issued interests under a placement, and wishes to on-sell those interests, the secondary sale provisions in section 708A of the Corporations Act will apply in effect to require the scheme to ensure that the market is fully informed.

- (c) *B1Q3: Do you perceive any difficulties that entities may face in relying on [the] relief? For example, where the issue price has already been stipulated in the scheme's constitution?*

We do not believe that any substantial difficulties will exist. If an issue price has already been stipulated in the scheme's constitution, and the members wish to access the increased flexibility of the new regime, they can amend the constitution. We note that if a scheme's constitution currently mirrors ASIC's interpretation of section 601GA(1) and contemplates a 10% discount limit, the members may vote to change the constitution to avail themselves of the proposed class order relief.

- (d) *B1Q4: Do you consider that the proposed relief will be of wide commercial benefit, particularly in relation to facilitating equity capital raisings? Why?*

Yes, for the reasons stated above.

- (e) *B1Q5: Is the ability to refer concerns about control transactions to the Takeover Panel sufficient or are conditions of relief required to deal with those concerns? Why?*

We believe that having the ability to refer concerns about control transactions to the Takeover Panel is sufficient. The responsible entity of the scheme has a duty to act in the best interests of members. Ultimately, if there are control implications for a placement that are not in the best interests of members, then members can seek redress through either the Takeovers Panel or the courts.

2 The maximum 5-day suspension period

We understand that ASIC proposes to use its modification powers to extend the maximum suspension period beyond the current 5 day limit for rights issues and secondary sales not requiring a prospectus. Such relief is to be granted on a case-by-case basis.

2.1 General comments

We support ASIC's proposal to extend the maximum suspension period for rights issues and secondary sales to a period of greater than 5 days.

We agree with the proposal for the following reasons:

- (a) the proposed extension will benefit retail investors by allowing for additional rights issues;
- (b) under the proposal the market remains fully informed; and
- (c) the current provision is arbitrary.

Further, we encourage ASIC to lessen the time limit relative to any suspension from the preceding 12 months to the preceding 6 months. The current 12 month period is arbitrary and in any event is too long. We believe that, because companies are required to file updated accounts every 6 months, this is a more appropriate limit.

Extending the five day period will allow additional companies to utilise sections 708AA and 708A(5), which will benefit retail investors by providing additional opportunities for participation in rights issues (insulating retail investors' interests from dilution via placements) whilst still requiring full disclosure and maintaining an informed market via a cleansing notice.

Despite our broad agreement with ASIC's proposal we do caution that the provision of case-by-case relief by ASIC could have a number of adverse consequences. First, ASIC's workload will increase, as it will be required to review additional applications for relief. Second, ASIC will essentially be acting in a semi-judicial capacity in making case-by-case relief. That is, ASIC will effectively determine whether or not the suspension of a company's shares is sufficiently 'innocent' or 'innocuous' to warrant relief, or whether the company is, in a sense, culpable of wrongdoing and should be denied relief. Even if the criteria for relief are set out by ASIC, the ultimate determination of whether or not relief will be granted will fall to ASIC.

The involvement of ASIC in this semi-judicial role, could adversely impact on ASIC's role as investigator and regulator of corporate malfeasance and could also impact the objectivity of the law. Instead of ensuring that their conduct is in compliance with the law, as stated in the Corporations Act, companies could become more concerned with predicting or appeasing ASIC's interpretation of the law.

Further, the grant by ASIC of relief to a particular company is likely to give retail investors the impression that the company is "in compliance" with the law, or is a good corporate citizen, or has fully informed the market, or has been audited by government and cleared. In essence, the grant of relief could give the false impression to investors that the securities on offer are safe. Where no ASIC relief is required, investors will likely tend to rely on their own judgement (or that of their advisers) as to the frankness of the company's disclosures. This will lead to increased market-based pressure on management to make full and frank disclosure.

While we support the relief suggested by ASIC, our view is that a better reform of the law would be to replace the 5 day limit with a generic requirement that, for instance, a rights issue or secondary sale *may not be carried out in a market that is not fully informed* (the "**Fully Informed Market Test**"). The Fully Informed Market Test would be in addition to the requirement for a "cleansing notice". ASIC could then establish the requisite factors that, in its view, make a market "fully informed", which could, in part, include the factors set out in paragraph 43 of Consultation Paper 105.

By focussing on the "end" (being full disclosure), rather than the means (being case-by-case relief), ASIC could act as an investigator and enforcer, rather than an adjudicator. ASIC's workload would also decrease as it would not be required to pre-vet each rights issue or secondary sale, but would instead only investigate possible breaches. The lack of ASIC clearance would also encourage investors to rely on their own judgement (and that of their advisers) as to the fulsomeness of the relevant company's disclosures, rather than relying on a stamp of approval of a government body.

2.2 ASIC Questions

We would like to comment on the following questions posed in the Consultation Paper:

- (a) *C1Q1: Do you agree that we should increase the maximum 5-day suspension period for rights issues? Why?*

Yes, we agree for the reasons stated above. The proposal will benefit companies by allowing additional capital raisings without requiring a prospectus. Additionally the proposal will benefit investors by allowing participation in rights issues that may not have been conducted previously due to costs associated with the issue of a prospectus.

Further, because companies must comply with the continuous disclosure scheme and issue a cleansing notice prior to conducting a rights issue under section 708AA, the market will continue to be fully informed.

- (b) *C1Q2: Do you agree that we should increase the maximum 5-day suspension period for secondary sales where the shares are initially issued without disclosure (e.g. under a placement)? Why?*

Yes, we agree for the reasons stated above. We believe that this proposal will benefit both companies and investors whilst continuing to promote a fully informed market.

- (c) *C1Q3: Do you agree with the factors that we propose to take into account when granting case-by-case relief? Are there any other factors that are relevant?*

As stated above, we do not believe that a case-by-case approach to the proposed relief is favourable. Instead we believe that ASIC should establish a type of Fully Informed Market Test and should set out factors which a company should employ in determining whether the market is fully informed at the time of a rights issue.

We believe that several of the factors proposed by ASIC in relation to the case-by-case relief analysis should instead be used to test whether the market is, in fact, fully informed under a Fully Informed Market Test. We propose that the factors under a Fully Informed Market Test should include:

- (i) that the entity is no longer suspended from trading;
 - (ii) that the entity has made adequate announcements to the market since the time of the suspension to ensure that the market is fully informed;
 - (iii) that the announcements to the market since the time of the suspension have addressed the reason for the suspension; and
 - (iv) that the entity has taken adequate actions since the suspension to rectify the reason for suspension.
- (d) *C1Q4: Are there any factors that should disqualify an entity from relief if it has been suspended for more than 5 days? What are those factors and why are they relevant?*

Yes. If a company is currently suspended from trading it should not be allowed to utilise sections 708AA or 708A(5). We believe that current trading data (which is not available if a company is suspended) is important information for retail shareholders to assess whether or not they wish to take up their rights under a rights issue. Further, an existing suspension may imply that

regulatory investigations or actions are underway. In both cases, an existing suspension would imply that the market is likely not fully informed.

- (e) *C1Q5: Do you consider it appropriate that relief, to permit a suspension period of greater than 5 days, be limited to entities that have lodged audited accounts for the relevant financial year after that suspension period? Why?*

No. This fact should not conclusively determine whether relief should be granted. However, if a company has lodged audited accounts for the relevant financial year after suspension, this is a factor which would be considered in determining whether the entity has made adequate announcements to the market since the time of the suspension and therefore may form part of the Fully Informed Market Test. The provision of audited accounts does not, of itself, imply that the market is fully informed in relation to a company's securities. If ASIC were to require the provision of such accounts, it would appear to imply that ASIC regards the provision of audited accounts as a "cure all" in relation to disclosure issues, or at least a pre-requisite to full disclosure. In our view, whether or not a company has made full disclosure is not necessarily dependent on whether it has provided audited accounts.

- (f) *C1Q6: Do you consider that the proposed relief will be of wide commercial benefit, particularly in relation to facilitating equity capital raisings?*

Yes. Allowing additional rights issues and secondary sales without requiring a formal disclosure document will save company resources whilst allowing and encouraging rights issues.

3 Broadening the takeovers exception for rights issues

We understand that ASIC proposes to grant class order relief to listed entities from the takeover thresholds for shares acquired via accelerated rights issues and shortfall facilities as long as certain information about such issues is made available to shareholders.

3.1 General Comments

- (a) We agree with ASIC's proposal to grant class order relief in respect of listed entities from takeover provisions triggered by shares acquired under either shortfall facilities or via an accelerated rights issue. Shortfall facilities

We agree with ASIC's proposal to grant class order relief to listed entities from takeover provisions triggered by shares acquired via shortfall facilities because it:

- (i) allows for companies to raise additional equity via non-traditional rights issues;
- (ii) increases flexibility for companies seeking to raise funds;
- (iii) enables companies to appeal to their shareholder base as a source of funding, rather than external investors;
- (iv) allows for increased participation by retail investors and insulates against dilution of retail investor holdings;
- (v) aids in securing commitments from underwriters, providing enhanced certainty for issuers; and
- (vi) compliments CO 08/35, which allows a disclosure exemption for non-traditional rights issues.

The proposal will allow additional non-traditional rights issues thereby benefiting both companies and investors. In our experience, many potential rights issues have not proceeded or proceeded without a shortfall facility on the basis that, under a shortfall facility, one or more shareholders may violate the takeovers provisions by obtaining a relevant interest in over 20% of the shares in the company without the application of section 611(10). This hinders rights issues in general forcing companies to raise equity via other methods, such as placements or by proceeding with rights issues that are not structured in the more effective manner.

Because the proposed relief is conditional upon companies providing shareholders with adequate information regarding the terms of any shortfall facility and the effect that such facility will have on the control of the entity, shareholders will have adequate information to evaluate their position in light of the offering.

Eliminating the takeover thresholds for shares acquired via a shortfall facility may eliminate the need for a rights issue to be underwritten and therefore may decrease the potentially dilutionary effect of an underwriting. The existence of a shortfall facility may also aid in attracting underwriting of a rights issue as this may lessen the number of shares an underwriter would have to take up, therefore lessening the underwriter's contingent liability.

ASIC granted disclosure relief for non-traditional rights issues such as shortfall facilities in CO 08/35 with a goal of encouraging companies to raise equity via rights issues. Granting an exception from the takeover thresholds in these same circumstances compliments CO 08/35 and supports the goal of increasing the number of rights issues by lessening regulations.

- (b) Accelerated rights issues

We agree with ASIC's proposed class order relief from the takeover provisions for accelerated rights issues that meet the conditions of Class Order 08/35 because the proposal:

- (i) advances the purposes of chapter 6;
- (ii) aids in creating a more efficient market; and
- (iii) compliments CO 08/35.

Broadening the takeover exceptions for shares obtained via an accelerated rights issue furthers the purposes of chapter 6. The purposes of chapter 6 are to ensure that the acquisition of control in a company takes place in an efficient, competitive and informed market, that shareholders have a reasonable and equal opportunity to participate in offerings and that shareholders are provided with adequate information to allow them to evaluate control proposals.

Chapter 6 is concerned with restricting control transactions. Generally the purpose of a rights issue is not to gain control of a company. Therefore, an exception for rights issues currently exists. Item 10 of s 611 allows for an exception to the takeover thresholds when shares are acquired in relation to a standard rights issue (i.e. a rights issue which is offered to all shareholders pro-rata on the same terms). Because accelerated rights issues are offered first to one group of shareholders, typically institutions, then secondly to another group of shareholders, the terms of the offers differ causing accelerated rights issues to fall outside of the item 10 exception.

However, the theory behind the item 10 exception applies equally to accelerated rights issues where timing is the only difference between offers to certain shareholders or groups of shareholders. Further, the time period between the initial tranche of securities offered in an accelerated rights issue and the retail offer is typically short, therefore the differing terms of the offer only subsist for a minimal period of time.

Generally, a shareholder is no more likely to gain control from an accelerated rights issue than from a standard rights issue. The goal of an accelerated rights issue is not to obtain control of the company (any more so than in a standard rights issue) and therefore an exception from the takeover thresholds should extend to such issue in the same manner that it extends to standard rights issues.

If it becomes clear that the purpose of any accelerated rights issue is for control purposes (rather than fundraising), the members can refer the matter to the Takeover Panel for review. In fact, the Takeovers Panel, in Guidance Note 17 stated that it may declare unacceptable circumstances in the case where a proposed rights issue affects or is likely to affect control or

potential control of a company more than is reasonably necessary for fundraising purposes.

Conducting an accelerated rights issue allows a company to obtain necessary financing in a more efficient and quicker fashion and provides certainty as to price prior to the commencement of the retail offer period. Allowing a company to obtain equity financing quickly whilst still conducting a rights offering works to benefit both the company as well as its members. Allowing the proposed relief will encourage companies to conduct accelerated rights offerings, rather than placements, which may have the effect of diluting retail shareholders.

3.2 ASIC Questions

We would like to comment on the following questions posed in the Consultation Paper:

- (a) *D2Q1: Do you agree that we should grant class order relief to enable members to take up any shortfall in rights that other members have not accepted under a rights issue (through a shortfall facility), even if in doing so they exceed the takeover threshold? Why?*

Yes. We agree with this proposal for the reasons outlined above.

- (b) *D2Q2: If so, do you agree that relief should be conditional on all members being able to participate in the shortfall facility on a pro rata basis, on equal terms? Why?*

We do not believe that relief should be conditional on all members being able to participate in the shortfall facility on a pro rata basis. In our experience, many company boards determine that a rights issue, in which a shortfall facility is only offered to either retail or institutional shareholders, is in the best interests of members. This is typically the case when a shortfall facility is incorporated as part of an accelerated rights issue. A company could, for instance, only wish to apply a shortfall facility to the retail component of an offer (where there is less certainty for the company that a certain amount of funds will be raised).

In our view, so long as the initial entitlement offer is made on a pro rata basis, there should be no subsequent requirement for a shortfall facility to be made on pro rata terms.

- (c) *D2Q3: If so, do you agree that relief should be conditional on the proposed disclosure? Why?*

Yes. Proper disclosure is necessary in order to advance the purposes of chapter 6. The offer documents should provide investors with enough information to weigh the consequences of participating in the offer or choosing not to participate.

- (d) *D2Q4: Are there other conditions you consider appropriate (e.g. voting restrictions, or a requirement to sell shareholdings exceeding a certain threshold over a period of time, or conditions to stop abuse of the proposal for control purposes)? Why?*

No. The ability for Takeover Panel referral and intervention should adequately stop any abuse of the proposal undertaken to gain control of the company.

- (e) *D2Q5: Do you consider that the proposed relief will be of wide commercial benefit, particularly in relation to facilitating equity capital raisings? Why?*

Yes. It is our experience that a number of equity capital raisings have been conducted via alternative methods rather than as rights issues with shortfall facilities due to potential violation of the takeover thresholds. We believe that broadening the exceptions for rights issues will facilitate additional capital raisings and will be of commercial benefit.

- (f) *D2Q6: Should class order relief from the takeover provisions be granted for accelerated rights issues that meet the conditions of CO 08/35? Why?*

Yes. For the reasons stated above.

- (g) *D2Q7: Should our proposed relief be extended to entities which are not listed but have more than 50 members? Why?*

Yes. The same principles that we have discussed above in relation to listed entities equally apply to non-listed entities with more than 50 members.

- (h) *D3Q1: Is there any reason why the relief should not be extended to managed investment schemes?*

No. We believe that this proposal should be extended to managed investment schemes. The regulatory framework governing managed investment schemes should, as far as possible, mirror the framework governing companies.

4 Broadening the takeovers exception for dividend reinvestment plans

We understand that ASIC proposes to grant class order relief to listed entities from takeover provisions triggered by dividend reinvestment plans (“DRPs”) by allowing underwriters of DRPs to take up any shortfall under the dividend reinvestment plan, even if doing so would cause the underwriter to exceed the takeover threshold.

4.1 General Comments

We agree with the proposal for the following reasons:

- (a) the proposal will aid in securing underwriting for DRPs which will allow for additional issues via DRPs;
- (b) the proposal will provide certainty to listed entities in relation to the amount of equity raised via DRPs;
- (c) the proposal is conditional on adequate information being shared with the market; and
- (d) the provision provides the same exception for issues under DRPs as is currently provided in relation to rights offers and the two circumstances are substantively analogous.

Allowing an exception from the takeover thresholds for underwriters will aid in securing underwriting for DRPs by broadening the pool of investors who can serve as underwriters. In our experience, listed entities sometimes have difficulty sourcing underwriters who can underwrite a DRP plan without exceeding the takeover threshold and a company is then limited from issuing under a DRP for this reason. The proposal will allow for additional DRPs to take place as they can be underwritten by current holders, which will benefit both listed entities and retail investors.

Securing underwriting for a DRP provides a company with certainty on the outcome, making the DRP more efficient.

Because the proposal is conditional upon adequate information being provided regarding key terms of the underwriting, the identification of the underwriters and any associations between underwriters and controllers or substantial shareholders, the market remains fully informed and shareholders have the necessary information to determine whether or not they will participate in the plan.

Item 10 of s 611 currently allows an exception for underwriters from the takeover thresholds in relation to a rights issue. These two provisions are substantially similar and should be treated consistently.

We note that ASIC needs to consider whether this relief will extend to sub-underwriters and, if so, what conditions will apply.

4.2 *ASIC Questions*

We would like to comment on the following questions posed in the Consultation Paper:

- (a) *E1Q1: Do you agree with our proposal to grant class order relief to broaden the dividend reinvestment plan takeover exemption to extend to acquisitions by a person as underwriter? Why?*

Yes. For the reasons stated above and because we believe that the exception will aid companies in securing underwriters therefore allowing for issues under DRPs and will provide

certainty in relation to the amount of capital raised via a DRP whilst still providing for full pro rata participation by members.

- (b) *E1Q2: If so, do you agree with our proposed conditions? Are there other conditions you consider appropriate (e.g. voting restrictions, or a requirement to sell shareholdings exceeding a certain threshold over a period of time, or conditions to stop abuse of the proposal for control purposes)? Why?*

Yes. We agree with the proposed conditions as they provide necessary information to investors. We do not believe that any other conditions are necessary or beneficial. We believe that it is adequate that the Takeover Panel may intervene to stop any potential abuse for control purposes.

- (c) *E1Q3: Should our proposed relief limit the percentage the underwriter is able to acquire? Why?*

No. Any percentage limitation would be arbitrary and therefore, should not be implemented. The directors of the company have a duty to ensure that the terms of the underwriting is in the best interest of members - it is possible that directors may determine that an underwriter can increase its stake to a relatively high percentage of the company's issued capital. This may be beneficial if, for instance, the company is in dire need of funding. Further, the goal of most underwriters is to on-sell any shares it holds to the market, therefore this is not a necessary condition for relief. If an underwriter acts in bad faith or abuses this exception, the Takeover Panel can intervene.

In circumstances where a substantial holder and the board of the company, seek to implement a control transaction under the guise of a DRP, concerned members or interested parties should be entitled to take the matter to the Takeovers Panel. Further, we suggest that the approach of the Takeovers Panel in relation to control transactions effected through DRPs should mirror its approach in relation to rights issues.

- (d) *E1Q4: Do you consider that the proposed relief will be of wide commercial benefit, particularly in relation to facilitating equity capital raisings? Why?*

Yes. For the reasons stated above and because we believe that the proposal will encourage additional underwritings of DRPs and add to efficiency of equity markets.

- (e) *E1Q5: Does the ability of underwriters to rely on the 3% creep exemption in item 9 of s611 mean that this relief is not needed? Why?*

No. Underwriters may wish to increase above the current 3% creep limitation and may therefore need the additional relief proposed. Further, the 3% creep exemption should apply in

addition to any increase under the underwriting. Without the additional relief proposed, the increase under the underwriting could "use up" the increase permitted under the 3% creep exemption.

- (f) *E1Q6: Should our proposed relief be extended to entities that are not listed but have more than 50 members? Why?*

Yes. The same principles that we have discussed above in relation to listed entities equally apply to non-listed entities with more than 50 members.

- (g) *E1Q7: Should our proposed relief be extended to underwriting of bonus share plans? Why?*

Yes. All underwriting of share plans should be exempt from the takeover thresholds in order to improve efficiency. Any abuses of the underwriter can be examined by the Takeover Panel.

- (h) *E2Q1: Is there any reason why the relief should not be extended to managed investment schemes? Why?*

No. We believe that this proposal should be extended to managed investment schemes. The regulatory framework governing managed investment schemes should, as far as possible, mirror the framework governing companies.

Thank you for your consideration of our submission.

Yours sincerely
Arnold Bloch Leibler