



RESPONSE TO FEEDBACK RECEIVED - CONSULTATION ON PROPOSED AMENDMENTS TO THE SECURITIES AND FUTURES ACT AND FINANCIAL ADVISERS ACT

1 Introduction

1.1 On 23 May 2012, MAS issued a consultation paper proposing amendments to the Securities and Futures Act (Cap. 289) ["SFA"] and the Financial Advisers Act (Cap. 110) ["FAA"]. The consultation closed on 22 June 2012. The list of respondents is at Annex 1.

1.2 MAS thanks all respondents for their feedback. MAS has carefully considered the feedback and where it agreed with the comments, incorporated them into the proposed Amendment Bills, which can be accessed at the following links:

- [Securities and Futures \(Amendment\) Bill 2012;](#)
- [Financial Advisers \(Amendment\) Bill 2012.](#)

1.3 Comments of wider interest and MAS' responses are set out below.

PART I: SECURITIES AND FUTURES (AMENDMENT) BILL 2012

COMMENTS ON:

2 CAPITAL MARKETS LICENSING AND BUSINESS CONDUCT (PART IV)

A Extension of powers to revoke capital markets services licence ("CMSL")

2.1 MAS proposed amendments to Sections 95 and 99M to extend the grounds for revoking a CMSL to situations where it appears to MAS that the CMSL holder has failed to act in the best interests of its clients.

2.2 One respondent commented that, in the interests of clarity, situations where the CMSL holder has acted in *good faith* should be explicitly excluded. Another respondent felt that the revocation power should only be exercised where there is *reasonable basis to do so*, as a revocation of a CMSL would have wider impact on subscribers and customers.

MAS' response

2.3 MAS will consider all relevant factors when deciding whether to exercise the revocation power or to impose any other appropriate sanction. For example, furnishing false or misleading information to MAS is a ground for revocation. In deciding whether to revoke the CMSL of a person in such situations, MAS will consider whether the information was provided in good faith. Depending on the specific facts of the case, other factors, such as the person's past record, may also be relevant considerations. We therefore do not deem it necessary or appropriate to explicitly exclude persons who have acted in good faith in respect of this provision.

B Conversion of Provisional Representative to Appointed Representative

2.4 The proposed amendments to Section 99H provide that a principal would not be required to lodge the documents, as set out in Section 99H(1), in respect of a Provisional Representative where (i) the Provisional Representative has satisfied the relevant examination requirements within the stipulated period; and (ii) the principal has informed MAS of that fact via Form 3D pursuant to Section 99E. Two respondents proposed for MAS to provide explicitly that, upon receipt of the document lodged pursuant to Section 99E, the name of the Provisional Representative will be reflected on the Public Register as an Appointed Representative.

MAS' response

2.5 MAS is of the view that an additional provision to specify the conversion of a Provisional Representative to an Appointed Representative is not necessary because (i) Section 99E(3)(c) of the SFA already provides that an individual shall cease to be a Provisional Representative upon his principal informing the Authority of the satisfaction of the examination requirements via Form 3D; and (ii) the definition of an Appointed Representative found in Section 99D(1) of the SFA covers a Provisional Representative who has passed the requisite examinations within the stipulated period.

COMMENTS ON:

3 SUPERVISION AND INVESTIGATION (PART IX)

A New grounds for issuance of written directions

3.1 MAS proposed amendments to Section 101 to extend MAS' general powers to issue written directions to situations where it considers it necessary or expedient to do so "in the interest of a section of the public" or for the "protection of investors". One respondent submitted that the latter should be limited to the "protection of *retail* investors" to be consistent with MAS' Consultation Papers published in March 2009 and January 2010¹ which were aimed at enhancing safeguards for "retail investors".

MAS' Response

3.2 We would like to clarify that the Consultation Papers set out specific proposals focused on enhancing safeguards for retail investors in the sale and marketing of investment products. The package of proposed legislative amendments, however, is targeted at the broader level and seeks to enhance safeguards for all investors where appropriate. They are not intended solely for the benefit of retail investors.

B Widen scope of Prohibition Order (PO) regime

3.3 The proposed amendments to Section 101A will enable MAS to issue POs against representatives who are exempted from the requirement to notify MAS under the Representative Notification Framework (RNF). It also expands the grounds for MAS to issue POs to representatives where there exists a ground for MAS to revoke their status as representatives. Two respondents sought clarification on the policy intent of these amendments.

¹ Consultation paper on Review of the Regulatory Regime Governing the Sale and Marketing of Unlisted Investment Products (P001-2009) published in March 2009 and the Consultation Paper on Regulatory Regime for Listed and Unlisted Investment Products (P003-2010) published in January 2010.

MAS' Response

3.4 Currently, the SFA exempts certain representatives from the RNF. The proposed amendments empower MAS to issue PO against such representatives where there exists a ground for revocation of the representative's status as if they were appointed, provisional or temporary representatives. The amendments will also apply to former and existing representatives of licence holders or exempt financial institutions notified under the RNF.

C Enhanced search and investigation powers

3.5 The amendments to Sections 163A, 164 and 165 will empower MAS to enter premises without a warrant in connection with an investigation under the SFA, and to apply for search warrants without having to first issue a production order to seize documents not produced. One respondent sought clarification on the circumstances that would warrant MAS' use of such powers and what opportunity individuals would have to provide the relevant information as requested by MAS before MAS proceeds to exercise its powers.

MAS' Response

3.6 The introduction of the power to enter premises without warrant is intended to allow MAS to take interim steps to preserve or prevent interference with evidence that is relevant to the investigation. Before exercising the power, the investigators will give the occupier of the premises a written notice giving at least two working days' notice of the intended entry. The mode of communication will depend on how notice can be most effectively communicated, given the circumstances of each case.

3.7 Notice may be waived only if the investigation relates to an alleged or suspected contravention of any provision under Part XII of the Act and there are a reasonable grounds for suspecting that the premises are, or have been occupied by a person who is being investigated in relation to the contravention, or if the investigator has taken all such steps as are reasonably practicable to give notice but has not been able to do so.

3.8 Similarly, search warrants may be issued without having to first issue a production order only where the Magistrate is satisfied that there are reasonable grounds for suspecting that the documents would be concealed, removed, tampered with or destroyed if notice was given.

COMMENTS ON:

4 MARKET CONDUCT (PART XII)

A *Mens rea* for false trading and market rigging provisions

4.1 MAS proposed incorporating into Sections 197 and 206 a graduated continuum of four possible mental states to clarify the required state of mind for establishing liability (*mens rea*) under the false trading and market rigging provisions.

4.2 Respondents were generally supportive of this move, but several respondents sought clarification on the elements that would constitute liability for the various limbs. Some respondents were concerned it would be difficult to distinguish a situation where a person “does not care” whether a false or misleading appearance would result, from a situation where the person “ought reasonably to have known” that a false or misleading appearance would result. This issue was of particular concern as the former could result in criminal liability while the latter would only attract civil liability.

4.3 One respondent expressed that the use of the term “does not care” was too broad and may be construed as imposing on every person a positive and active duty to determine the impact or effect of every of his trading activities. Another respondent noted that term “recklessness” was used in Section 201 and suggested that the formulation of the *mens rea* in the various market misconduct provisions be harmonised.

MAS’ Response

4.4 We note the uncertainty over the term “does not care” and that it may not always be easy to draw a clear distinction between cases where a person “does not care” or “ought reasonably to have known” that a false and misleading appearance is likely to result. Further, issues may arise if criminal sanctions applied to the former while civil liability only applied to the latter.

4.5 Given the concerns expressed, instead of the two limbs mentioned above, we will provide that a person will be liable if he is reckless as to whether his actions creates or is likely to create a false or misleading appearance. Breach of any of the provisions in Sections 197 and 206 may result in criminal or civil liability.

B Enhancement of civil remedies available to investors in cases of market misconduct

4.6 MAS proposed amendments to Section 234 to clarify and enhance the compensation that affected investors may recover in cases of market

misconduct. One respondent expressed concern that the proposed amendments, allowing claimants to seek damages for losses that result from false or misleading statements or omissions, may be construed as imposing civil liability on listed companies and/or their directors and officers for misstatements made in all public disclosures.

MAS' Response

4.7 We would like to clarify that the proposed amendments mentioned above are intended to address cases where false or misleading statements or omissions are made in connection with transactions of regulated financial products. The amendments do not seek to impose civil liability on listed companies and their directors for misstatements in all public disclosures. We will amend the drafting to clarify the intended scope of the amendments.

COMMENTS ON:

5 OFFERS OF INVESTMENTS (PART XIII)

A Product Highlights Sheet (PHS) requirements

5.1 Amendments were proposed to impose requirements on issuers to prepare a PHS for offers of asset-backed securities, structured notes and collective investment schemes (CIS) that are made with a prospectus. MAS also proposed a prohibition of production or dissemination of advertisement that resembles or may otherwise be confused with a PHS. One respondent sought clarification that the proposal does not prohibit FIs from producing risk disclosure documents intended for products targeted and sold to non-retail investors.

MAS' Response

5.2 The prohibition of other publications that resemble a PHS is intended to address the concern that investors may be confused between a PHS and a similar publication. We will amend the drafting to clarify the intent. We will also prohibit the use of the term "product highlights sheet" or any of its derivatives for offers that are not required to be accompanied by a PHS.

B Advertising Restrictions

5.3 MAS proposed to insert empowering provisions in the SFA to prescribe advertising restrictions for offers of shares, debentures, business trusts and collective investment schemes. Some respondents sought clarification on the nature of the advertising restrictions that MAS will be prescribing and queried whether MAS will be reviewing advertisements for compliance with prescribed restrictions. Other respondents sought clarification on the impact on secondary sales of listed shares and debentures which are exempt from prospectus requirements as a result of the proposed Section 273(8A).

5.4 Currently, Section 251(9)(e) provides that a news report or genuine comment by any person set out under Section 251(9)(f) does not contravene the advertising restrictions. A respondent suggested that the list of persons be expanded to include issuers and managers as they are often approached by the media for interviews and to comment on an offer.

MAS' Response

5.5 MAS will prescribe, through subsidiary legislation, requirements for advertisements to give a fair and balanced view of the product. The requirements are intended to apply to offers that are readily accessible by retail investors. This includes exempted offers that are made pursuant to the exemptions for secondary trading under Sections 273(1)(d) and 273(1)(e). Other exempt offers, such as private placement offers where there is limited reach to the public, would not be subject to the fair and balanced advertising requirements. While we do not intend to review advertisements for compliance with the prescribed requirements, a breach of the requirements would constitute an offence.

5.6 MAS will not be expanding the list of persons under Section 251(9)(f) to include issuers and managers, given the potential conflicts of interest. Issuers and managers are currently free to correct or clarify erroneous or inaccurate reports, and disseminate the prospectus as provided for in Section 251(9)(h).

C Exemption from advertising restrictions for training purposes

5.7 MAS proposed amendments to exempt from advertising restrictions certain offers under Section 251 (debentures) and Section 300 (collective investment schemes) when issuers conduct training sessions for intermediaries and their representatives on a prospectus that has been lodged but not yet registered with MAS. One respondent submitted that the limitation to offers of debentures that are Specified Investment Products (SIP) was unduly restrictive as distributors of certain Excluded Investment Products (EIP) may also benefit from preparatory training, particularly in the case of EIPs with new or hybrid features.

MAS' response

5.8 As it would be beneficial for intermediaries and their representatives to gain a better understanding of products and their risks before marketing them to investors, MAS will introduce amendments to extend the exemption to all Part XIII securities.

D Appointment of trustee for unlisted debentures

5.9 The proposed insertion of Section 265A will require issuers of debentures offered with a prospectus to appoint a trustee for the entire tenure of the debentures.

Criteria for appointment of trustee

5.10 A proposed requirement was that the appointed trustee be an entity exempt from holding trust business licence under the Trust Companies Act. One respondent noted the persons exempt from holding such a licence includes lawyers and accountants, which may go beyond what MAS envisioned.

MAS' Response

5.11 Having considered the feedback from respondents, we intend to allow a holder of a trust business licence under the Trust Companies Act (Cap. 336), a bank licensed under the Banking Act (Cap. 19), a trustee of a CIS that is approved under the SFA, and any person that MAS may prescribe, to be appointed as a trustee for the holders of debentures. Where the debentures are asset-backed securities or structured notes, we will also require the appointed trustee to be carrying on business in Singapore.

Duties of appointed trustees

5.12 Under the proposed amendments, the trustee for the holders of debentures ("debenture trustee") will be required to ensure that where there is a trustee appointed for the holders of collateral upon which the debentures are secured ("collateral trustee"), the collateral trustee is subject to duties that are equivalent to, or higher than those imposed on the debenture trustee.

5.13 One respondent argued that this provision is difficult to comply with in practice, and in many cases, the issuer or product providers do not have the ability to influence the trust documentation and obligations imposed on collateral trustees. It was further submitted that imposing such a requirement effectively limits the universe of collateral available for debentures which may not be in the best interests of investors.

MAS' Response

5.14 The key role of the debenture trustee is to safeguard the rights and interests of investors at all times. MAS expects the debenture trustee to be able to exercise control over the collateral, or otherwise be satisfied with arrangements made in relation to the safekeeping of the collateral. We are of the view that the collateral trustee has a similar obligation to exercise due diligence and vigilance in carrying out its functions and duties, and in safeguarding the rights and interests of debenture holders. We therefore maintain the position that such specific duty needs to be imposed on the collateral trustee to take the necessary action for the protection of

investors. We will amend the drafting to provide clarity that the collateral trustee is subject to such minimum duty.

E Ongoing disclosure requirements for unlisted debentures

5.15 MAS proposed the addition of Section 268A to require timely and meaningful ongoing disclosure to be made to investors in unlisted debentures. Amongst these were the requirements for immediate disclosure of information which may materially affect the risks and returns or price or value of the unlisted debentures to investors and for issuers (and distributors, where redemption option is made available through them) of unlisted debentures to publish bid or redemption prices on its website.

Requirement to "immediately disclose" material information

5.16 Several respondents sought clarification on what is expected to be done to "immediately disclose" information. One respondent queried whether disclosure by way of update on borrowing entity's website or sending updates via electronic mail would fulfil this requirement. Some also commented that "immediate" disclosure is unrealistic and overly onerous. Suggestions included disclosing such information "promptly", "as soon as practicable" or "one clear market day".

MAS' Response

5.17 MAS would like to clarify our expectation of a borrowing entity in fulfilling the requirement to disclose material information. The intent of requiring borrowing entities to "immediately disclose" material information is to ensure that investors receive timely updates on their investments. This is similar to the continuing obligations that require immediate announcement of certain information under the Singapore Exchange Limited's Listing Rules. We expect a borrowing entity to disclose the information on the website designated by the borrowing entity as the principal channel of communication with debenture holders, and also provide the information to the debenture holders in electronic or printed form. We will prescribe the requirements in subsidiary legislation.

Requirement to publish bid or redemption prices

5.18 One respondent noted that where the issuer is a single purpose or special purpose vehicle, it is unlikely that the issuer has the infrastructure to maintain a website to publish bid or redemption prices. In such cases, it would be the arranger or dealer who facilitates the buy-back of such debentures and would be in a better position to publish the prices on its website.

5.19 Where redemption options are made through distributors, it was submitted that distributors merely act as a conduit to facilitate the buy-back of debentures and would have to rely on bid or redemption prices that are provided by the arrangers or dealers. Furthermore, there may be more than one distributor in respect of a debenture issuance and each of the

distributors may not update their websites at the same time, which may cause confusion for investors. Given this, it was suggested that distributors should not be required to comply with this requirement as long as the relevant prices were already made available on the issuer's website (or the dealer's or arranger's website on the issuer's behalf).

MAS' Response

5.20 MAS will require bid or redemption prices to be disclosed on the website designated by the borrowing entity as the principal channel of communication with debenture holders. We will prescribe this requirement in subsidiary legislation.

COMMENTS ON:

6 Offers of Capital Markets Products (Part XIII A, renumbered Div 4 of Part XIII)

A Obligation for issuers to classify capital markets products

6.1 MAS proposed the insertion of Sections 309A and 309B to formalise obligations on issuers in respect of the classification of capital markets products. Issuers will be required to classify products as MAS may prescribe and will be required to notify the approved exchange, in the case of listed products, and/or intermediaries through which the products are offered of this classification.

6.2 Some respondents sought guidance on the term "issuer" in respect of the various types of capital markets products and the list of products that MAS will prescribe. A few respondents suggested that there should be an exemption for issuers having to comply with the obligations for offers made to non-retail investors. Some respondents also suggested exempting offers made by foreign issuers, citing practical reasons.

MAS' Response

General response

6.3 We would like to clarify the list of capital markets products that MAS will prescribe in Regulations for the purposes of Section 309B will replicate the EIP list as set out in the Notice on Sale of Investment Products (SFA 04-N12) ["SFA Notice"].² The obligations on issuers apply in respect of all offers of capital markets products, and apply in addition to existing requirements set out in Divisions 1, 1A, 2 and 3 of Part XIII in respect of those capital markets products.

² The requirements that apply to financial advisers are set out in the Notice on Recommendations on Investment Products (FAA-N16) issued under the Financial Advisers Act (Cap. 110).

Definition of "issuer"

6.4 The term "issuer", in relation to an offer of a CIS, refers to the responsible person of a CIS. For futures, being contracts issued on an exchange, the futures exchange will be the issuer. For contracts or arrangements for the purposes of leveraged foreign exchange trading, the CMSL holder for leveraged foreign exchange trading that is the counterparty to that contract or arrangement will be considered the issuer. Similarly, for over-the-counter contracts which are made between a broker and a retail investor such as contracts for differences (CFDs), the issuer will be the broker who is the counterparty to that contract.

Scope of application of Section 309B

6.5 Given that obligations in respect of SIPs as set out in the SFA Notice only apply to offers of capital markets products made to individual retail investors, we will not require issuers to classify products for offers made to non-retail investors. However, intermediaries³ will not be able to subsequently offer a capital markets product to a retail investor without first obtaining a classification from the issuer of the capital markets product. We will provide for the relevant exemptions in subsidiary legislation.

6.6 However, we do not agree that foreign issuers should be exempt from complying with these obligations. Foreign issuers who engage in regulated activities in Singapore are required to obtain the relevant licence to do so, or they will have to offer the products through an entity regulated by MAS. We expect that foreign issuers will have systems in place to ensure that they abide by our regulations when offering capital markets products to investors in Singapore.

B Prohibition on use of terms "capital protected" and "principal protected"

6.7 The proposed Section 309C prohibits use of the term "capital protected" or "principal protected" or any derivatives of such terms to describe a capital markets product within the prospectus related to the capital markets product. "Prospectus" was defined (in Section 309A) broadly to include disclosure documents, PHS and advertising materials used in respect of a capital markets product.

6.8 Some respondents suggested that the prohibition should not apply to offerings of capital markets products to non-retail investors, considering these investors may have financial advisors and legal advisors assisting in their financial review of such potential investments. A few respondents sought guidance on what variations would be accepted in place of the terms "capital protected" and "principal protected", which they noted were commonly used terms to describe investment products with features aimed at preserving capital.

³ Intermediaries refer to persons to whom the Notice on Sale of Investment Products (SFA 04-N12) and Notice on Recommendations on Investment Products (FAA-N16) apply.

MAS' Response

Exemptions for non-retail investors

6.9 We do not agree that this prohibition should be limited to offerings of capital markets products made to retail investors. The terms "capital protected" and "principal protected" are misleading when used in isolation, and we are of the view that this is likely to be difficult for all investors to understand regardless of whether they have received professional advice. Nonetheless, we will continue to monitor implementation of this prohibition and may provide exemptions where necessary.

Acceptable derivatives of the terms "capital/principal protected"

6.10 We will not be prescribing terms that will be considered acceptable derivatives of the terms "capital/principal protected". In general, any derivatives which are likely to be confused with the terms "capital guaranteed" or "principal guaranteed" will not be acceptable. For the avoidance of doubt, the prohibition does not extend to the use of the terms "capital guaranteed" or "principal guaranteed".

PART II: FINANCIAL ADVISERS (AMENDMENT) BILL 2012

7 GENERAL COMMENTS

7.1 We note that a number of provisions in the FAA mirror proposed amendments to the SFA. Insofar as the comments received replicate those that have been addressed in Part I of this response paper, we will not be providing a response under this Part.

7.2 Specifically, these are in relation to the following proposed amendments:

- Section 23F, mirrored in Section 99H of the SFA, addressed at paragraphs 2.4-2.5;
- Section 59, mirrored in Section 101A of the SFA, addressed at paragraphs 3.3-3.4; and
- Sections 72A and 73, mirrored in Section 163A and 164 of the SFA, addressed at paragraphs 3.5-3.8.

COMMENTS ON:

8 CONDUCT OF BUSINESS (PART III)

A To extend civil liability to the Financial Adviser's (FA's) obligation to furnish product information to investors

8.1 MAS proposed amendments to extend civil liability to the FA's obligation to furnish product information to investors under Section 25. One respondent expressed concern that as a result of the amendments, a licensed FA who fails to disclose any material risk, regardless of knowledge or intention on the part of the licensed FA, could be liable for losses suffered by the client. Another respondent suggested that the provisions be amended to exclude situations where the client may have been contributorily negligent and/or had acted or refrained from acting based on other factors unrelated to the licensed FAs' actions.

MAS' Response

8.2 The FA's obligation to disclose all material information relating to an investment product that he recommends to a customer is an important part of the due care and diligence, which MAS expect all FAs to exercise. Currently, a FA that contravenes Section 25 incurs criminal liability. In our view, investors that have suffered loss should also have avenues of recourse under the FAA. We will therefore proceed with the proposal to widen the application of civil liability to Section 25 of the FAA. Under the provisions, civil liability will not be incurred if the claimant's loss or damage cannot be attributed to the contravention.

B Wider scope of provision on false and misleading statements

8.3 MAS proposed to amend the false or misleading statements provision under Section 26 to widen the range of prohibited conduct and provide for civil liability on licensed FA.

8.4 A number of respondents were unsure of the scope of the amended provision and sought clarification on the level of due diligence expected from a licensed FA/representative. Some respondents suggested amending the provision to give greater flexibility to the court in determining damages so as to better cater for different case circumstances.

MAS' Response

8.5 In general, FAs are expected to exercise due care and diligence in their dealings with their customers. This includes not being reckless or negligent when making representations to their customers. The proposed Section 26(1) sets out this duty and does not seek to impose liability on FAs that have acted honestly, carried out the necessary due diligence and have reasonable basis for the statements they make. In addition, FAs will only be liable for damages which resulted from the contravening act.

8.6 The formulation of the proposed amendments with regard to false and misleading statements is similar to Section 199 of the SFA, which has been applied and judicially interpreted by the courts, including the High Court in *PP v Wang Ziyi Able* [2007] SGHC 204 and *Madhavan Peter v PP and other appeals* [2012] SGHC 153. These cases can therefore provide guidance on the interpretation of the proposed provisions. In addition, interested parties may wish to refer to MAS Notice FAA-N03 (Notice on Information to Clients and Product Information Disclosure) which sets out the general principles that apply to all disclosures by a financial adviser to its client.

MONETARY AUTHORITY OF SINGAPORE

15 Oct 2012

ANNEX 1

LIST OF RESPONDENTS TO CONSULATION ON PROPOSED AMENDMENTS TO THE SECURITIES AND FUTURES ACT AND FINANCIAL ADVISERS ACT

1. Financial Planning Association of Singapore
2. United Overseas Bank Limited
3. The Society of Remisiers (Singapore)
4. Investment Management Association of Singapore
5. Life Insurance Association, Singapore
6. Chan & Goh LLP
7. DBS Bank Ltd
8. Baker & McKenzie, Wong & Leow
9. Stamford Law Corporation
10. Citibank, N.A., Singapore Branch
11. Wong Partnership LLP
12. The Law Society of Singapore
13. Financial Services Managers' Association
14. The Association of Banks in Singapore

*This list includes only the names of respondents who did not request that their submissions be kept confidential.