

CONSULTATION PAPER

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Regulation of Business Trusts

MAS

Monetary Authority of Singapore

PREFACE

The Ministry of Finance (“MOF”) and the Monetary Authority of Singapore (“MAS”) intend to recognise business trusts as a new business structure. Units in business trusts can be offered to the public. MAS will administer a governance regime for such business trusts under a new Business Trusts Bill, and regulate the offers of such business trusts under the Securities and Futures Act.

2 Business trusts are businesses set up with a trust structure, as opposed to a corporate structure. Assets of the business, which are held in trust by a trustee, are beneficially owned by investors through the holding of units in the business trust.

3 A study team, comprising members from MOF, MAS, the Registry of Companies and Businesses and the Ministry of Law, was formed to recommend an appropriate regulatory framework for business trusts. This consultation paper contains the study team’s key proposals relating to the governance and offers of business trusts. It also includes the draft Business Trusts Bill, which encapsulates the governance framework for business trusts. Our proposed amendments to the Securities and Futures Act relating to the regulation of offers of business trusts will be issued for public consultation at a later date.

4 MAS invites interested parties to forward their views and comments on the issues outlined in the consultation paper and the draft Bill. Parties who do not wish to comment on all of the issues may confine their responses to the specific sections that are of interest.

5 Please submit your written comments to MAS by 12 Jan 2004, indicating whether confidentiality is requested, addressed to:

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Monetary Authority of Singapore
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6 Please note that all submissions received may be made public unless confidentiality is specifically requested for whole or part of the submission.

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PART I: INTRODUCTION

INTRODUCTION

The Ministry of Finance (“MOF”) and the Monetary Authority of Singapore (“MAS”) intend to recognise business trusts (“BTs”) as a new business structure in Singapore. A study team, comprising members from MOF, MAS, the Registry of Companies and Businesses (“RCB”) and the Ministry of Law (“MinLaw”), was formed to make recommendations on an appropriate regulatory framework for BTs.

2 This consultation paper sets out the study team’s recommendations on the following areas:

- a) regulation of governance of BTs (in Part II of the paper);
- b) regulation of offers of units in BTs (in Part III of the paper); and
- c) regulatory treatment of Real Estate Investment Trusts (“REITs”) (in Part IV of the paper).

3 A draft Business Trusts Bill has also been formulated, incorporating the recommendations of the study team on the governance of BTs, as set out in Part II of the paper. The draft Bill is at **Annex 1**. Comments are sought on both the policy issues highlighted in the consultation paper, and the draft Business Trusts Bill.

BACKGROUND

4 BTs are essentially businesses structured in the form of trusts instead of corporations. The trustee of the BT has legal ownership of the assets of the underlying business in its capacity as a trustee. Investors take on beneficial ownership of the trust assets by acquiring units in the trust. Unitholders are granted economic benefits in the form of dividends paid out by the BT.

5 An advantage of the BT structure is the ability of a trust to pay dividends to unitholders out of its cash profits. This is in contrast to the corporate structure, whereby a company can only pay dividends out of its

accounting profits (i.e. after deducting non-cash expenses such as depreciation). The BT structure is therefore particularly suited to businesses with stable growth and high cash flow. Introducing the BT structure in Singapore will create a new asset class for investors and add depth and vibrancy to Singapore's capital markets.

OBJECTIVES OF GOVERNANCE FRAMEWORK

6 The main objectives guiding the formulation of the recommended governance framework for BTs are to:

- a) set out the fundamental rights of investors (or unitholders in the trust) as well as creditors; and
- b) clearly establish the duties and accountability of trustees and their directors and to manage potential conflict of interest situations.

APPROACH FOR REGULATING BUSINESS TRUSTS

7 BTs are akin to companies in that they actively undertake business operations. Businesses structured as companies are subject to the Companies Act, which provides a comprehensive governance framework setting out the rights and obligations of the directors, shareholders and creditors. There is currently no similar framework for BTs. In developing the governance framework for BTs, consideration was given to the company law regime and the rights and protection afforded to shareholders under company law. The regulatory frameworks in other jurisdictions, in particular, the Managed Investment Scheme ("MIS") regime in Australia, were also considered.

8 Similar to companies, MAS proposes to regulate BTs under a registration regime. The proposed registration regime entails setting out, in

statute, the fundamental rights, duties and obligations of the parties involved in the BT.

9 BTs differ from passive investment instruments such as unit trusts, which are regulated as Collective Investment Schemes (“CIS”) under the Securities and Futures Act (“SFA”), in that they actively undertake business operations. The CIS regime under the SFA would be inappropriate for BTs. As CIS investors entrust their monies with a financial intermediary for management, the CIS regime seeks to ensure that the financial institution observes prudential safeguards to protect those monies. CIS are authorised by MAS and are subject to certain regulatory requirements, such as the requirement that the manager and trustee are separate and independent. MAS also approves the trustee, and licenses the manager of the CIS. CIS are also subject to investment guidelines which are based on the principle of risk spreading, such as a limit on exposures to a single party.

10 The activities of BTs, on the other hand, are more akin to that of companies. There is no active regulation of the business decisions of a company; listed companies are subject to prospectus and disclosure requirements but the business operations of such businesses are not regulated. We have sought to align the BT regime with that for companies as much as possible.

PART II: GOVERNANCE OF BUSINESS TRUSTS

SECTION 1: SCOPE OF GOVERNANCE FRAMEWORK

PROPOSAL 1

Any trust may register under the proposed Business Trusts Bill. However, a trust which “offer units to the public” in Singapore¹ will be required to register with MAS as a BT under the Business Trusts Bill, unless it is authorised or recognised as a CIS under the SFA. Trusts registered under the Bill will be subject to the regulatory requirements in the Bill.

Rationale

1 We propose that all trusts which offer units to the retail public, except trusts which are authorised or recognised as a CIS under the SFA, will be required to register as a BT under the BT regime and be subject to the regulatory requirements in the Business Trusts Bill. Any other trust may also voluntarily register as a BT under the BT regime. A registered BT must comply fully with the regulatory requirements in the Business Trusts Bill. It is important to require BTs that raise funds from the public to be subject to the BT regime to ensure that the obligations and rights of stakeholders are adequately addressed and set out.

Q1 Do you agree with our proposed scope of regulating BTs? Do you think that the requirement to register and comply with the framework should be limited to BTs that offer units to retail investors?

¹ The terms “offers units to the public” and “offers to the public”, as used in this consultation paper, are subject to change, in light of the impending SFA amendments to enact the CLRFC recommendations to do away with the boundaries between public and private offerings, and to provide “safe harbours” by way of a list of exempted offers.

SECTION 2: REGULATORY TREATMENT OF FOREIGN BUSINESS TRUSTS

PROPOSAL 2

Foreign BTs that will otherwise require to be registered under the Business Trusts Bill may apply under a recognition regime in order to offer units in Singapore. Alternatively, they may opt to be registered in Singapore under the Business Trusts Bill. In deciding whether or not to recognise a foreign BT, MAS will consider whether the protection afforded by the foreign BT to unitholders is comparable to that provided under the proposed regulatory regime for registered BTs in Singapore.

Rationale

2 We propose to provide a recognition regime for foreign BTs. Only foreign BTs subject to a regulatory framework under a foreign regulator that affords comparable protection to unitholders of the BT will be recognised and be allowed to offer units to the public. A recognised foreign BT will be exempted from the other provisions of the Business Trusts Bill. However, recognition by MAS may be subject to conditions imposed by MAS. Alternatively, the foreign BT may opt to be constituted under the provisions of the Bill.

3 Trust laws in most jurisdictions may not address governance issues adequately. This is in contrast with the situation for companies. As company law in most jurisdictions is generally more developed, foreign-incorporated companies may list on the Singapore Exchange ("SGX") without having to register under the Companies Act.

Q2 Do you agree with the proposal to provide a recognition regime for foreign BTs that would otherwise be required to be registered? Do you agree that recognition of a foreign BT should be subject to MAS

being satisfied that unitholders are afforded comparable protection to that provided under the proposed governance framework in Singapore?

SECTION 3: STRUCTURE OF RESPONSIBLE ENTITY FOR BUSINESS TRUSTS

PROPOSAL 3

The responsible entity of a registered BT will be required to be a single entity, i.e. the roles of the trustee and manager will be merged into a single responsible entity, known as a “trustee-manager”.

Rationale

4 There are two alternatives for the structure of the responsibility entity for BTs. The first is a dual-responsible entity model with a trustee and a separate manager. The trustee is responsible for safeguarding the rights and interests of unitholders. The manager, whose investment mandate is specified in the trust deed, is responsible for the management of the trust and the execution of investment transactions.

5 The second is a single-responsible entity model, in which the roles of the trustee and manager are undertaken by a single entity – a “trustee-manager”. The trustee-manager (“TM”) will have the dual responsibilities of safeguarding the interests of unitholders, as well as managing the BT.

6 The single-responsible entity model addresses the difficulty of apportioning fiduciary responsibility between the trustee and the manager by ensuring that there is only one entity that is clearly liable. Also, it is unlikely that an independent person will possess sufficient knowledge of the business to supervise the manager’s business decisions, or be willing to take up such responsibilities with the potential liabilities.

7 The dual-responsible entity model is more suitable to structures where the responsibilities of the trustee and manager can be more clearly set out, such as in the case of CIS, whereby the manager has a specific investment mandate. This model is less suitable for BTs. It will be difficult for an independent trustee to set similar operating mandates for a BT as it is actively engaged in running a risk-enterprise, much like a company.

8 The single-responsible entity model is used in Australia's MIS regime, under which BTs in Australia are regulated. In Canada, BTs are commonly structured with a single responsible entity.

Q3 Do you agree with the proposal to require a single-responsible entity for BTs?

PROPOSAL 4

The TM must be a public company incorporated in Singapore.

Rationale

9 The TM of a registered BT must be a public company incorporated in Singapore and thus subject to the provisions of the Companies Act. As a public company, the TM will be required to prepare audited financial accounts. This will ensure that the audited financial accounts of the TM responsible for the BT are available to unitholders.

Q4 Do you agree with the proposal to require the TM to be a public company incorporated in Singapore?

SECTION 4: DUTIES AND LIABILITIES OF THE TRUSTEE-MANAGER

10 In the single-responsible entity model, the board of directors of the TM has two potentially conflicting sets of duties – fiduciary duties owed to the shareholders of the TM to manage the trustee-management company in the best interests of the company; and duties to unitholders of the trust to manage the assets of the trust in the best interests of the unitholders. The potential for divergence of interests is highlighted in the following two instances:

- a) An independent trustee will earn fees from fulfilling its role of safeguarding the interests of unitholders. The TM, in the case of BTs, earns additional revenue through management fees and expenses charged to the trust and paid out of trust assets. The TM may seek to maximise its revenue from this function to the benefit of its shareholders, but to the detriment of unitholders. It may also have a reduced interest in minimizing operating expenses as these are reimbursed by the trust.
- b) The sponsor that is divesting the business as a BT will tend to retain full ownership or be a controlling shareholder of the TM. This sponsor can influence the TM to conduct the business of the trust or engage in related party transactions to the sponsor's advantage at the expense of the trust and the unitholders.

In order to address these potential conflicts, the proposals in this section clarify the duties and accountability of the TM to unitholders.

PROPOSAL 5

The TM and its directors will have a statutory duty to:

- a) act honestly and exercise the degree of care and diligence that

a reasonable person in such a position would exercise;

- b) act in the best interests of the unitholders and, if there is a conflict between the unitholders' interests and interests of the TM, give priority to the unitholders' interests.

Directors will have civil and criminal liability for breach of their duties.

Rationale

11 Currently, the board of directors of the TM owes fiduciary duties only to its shareholders. It is therefore necessary to impose a statutory duty on the TM and its directors, to act in the interests of the unitholders of the trust. Unitholders' interests will be given priority over the interests of the TM and its shareholders. This is in line with the approach in Australia's MIS regime. The recourse afforded to unitholders, against directors of the TM, will be similar to that afforded to shareholders of companies, as set out in Section 216 – "Personal remedies in cases of oppression and injustice", and Section 216A – "Derivative or representative actions", of the Companies Act.

Q5 Are the proposed duties and liabilities of the TM and its directors appropriate? What additional duties and responsibilities should be imposed on the TM and its directors?

PROPOSAL 6

The TM will be restricted to running only a single BT. The trust deed should define the business scope of the BT.

Rationale

12 A BT is effectively a business enterprise, with its business being managed by the TM. If a TM is allowed to manage several BTs, the TM will have the duty to act in the interests of multiple and differing sets of

unitholders. Requiring each TM to run only a single BT, with fiduciary duties owed to one set of unitholders, is akin to the case of companies, in which the board of directors is responsible for a single company, and owes fiduciary duties to only a single group – the shareholders of that company.

13 Also, as trusts have no legal existence, the TM is the legal entity contracting with creditors of the trust. Should a BT be in financial difficulty, this may lead to creditors winding up the TM. If the TM is allowed to run more than one BT, this will have a knock-on effect on the other BTs operated by that TM, and their unitholders, as these other trusts will be left without a TM. Restricting a TM to running only a single BT will prevent such situations from occurring.

14 The trust deed should provide information sufficient to define the business scope of the BT, as the TM will be expected to manage the trust assets according to the business scope set out in the trust deed.

Q6 Do you agree that the TM should be restricted to running only a single BT and that information sufficient to define the business scope of the BT should be provided in the trust deed?

PROPOSAL 7

A majority of the board must be independent of the management of, and business dealings with, the TM and substantial shareholders of the TM.

Further, the TM must form an audit committee, with a majority of independent directors, including the Chairman. The audit committee will have additional duties on matters concerning the interests of unitholders.

Directors in the audit committee will have both civil and criminal liabilities for breach of their statutory duties.

Rationale

15 The proposed mandatory requirements on the independence of the board of the TM seek to provide a further level of protection for the interests of unitholders of the BT. The requirement is more stringent than that for listed companies, in view of the conflicting duties faced by the board of the TM. The mandatory requirement for a majority of independent directors is warranted as unitholders will have to rely on the board of the TM to safeguard their interests. As unitholders are not shareholders of the TM, they will not be able to vote on the appointment of individual directors to the board of the TM.

16 The requirement for the TM to establish an audit committee is analogous to the requirement for listed companies under the Companies Act. The audit committee will perform similar functions with respect to the audit and reporting of the BT's financial accounts. In addition, its functions will be extended to include the review of policies and practices undertaken by the TM:

- a) to act in, and accord priority to, the interests of unitholders;
- b) to ensure compliance with laws and regulations, and the trust deed;
- c) to ensure that trust property is clearly identified and held separately from property of the TM; and
- d) to ensure that related party transactions are not prejudicial to unitholders.

Q7.1 Do you agree that the board of the TM should be majority-independent of the management of, and business dealings with, the TM and substantial shareholders of the TM? If not, how else can unitholders' interests be safeguarded?

Q7.2 Do you agree with the additional duties of the audit committee as proposed in Para 16? What other duties, if any, do you think should be imposed on the audit committee?

PROPOSAL 8

The TM must disclose its governance practices in relation to the trust in the annual report of the trust. This disclosure will comprise two limbs:

- a) disclosure of its governance practices. This will be similar, with appropriate modification, to the disclosure of corporate governance practices that listed companies are required to provide with reference to the Code of Corporate Governance in their annual reports; and
- b) description of the policies and measures of the TM to ensure that it acts in the interests of unitholders, for example, policies to ensure compliance with the laws, regulations and the trust deed; policies on determination of management fees and cost allocations; and policies on related party transactions.

There must also be full disclosure of fees and charges paid to the TM.

Rationale

17 The disclosure by the TM of its governance practices will serve to enhance market discipline and enable unitholders to assess the adequacy of the governance practices of the BT.

Q8 Do you agree that the TM should be required to disclose: a) its governance practices; and b) the policies and measures it has in place to ensure that the TM acts in the interests of unitholders?

PROPOSAL 9

The Board and the Chief Executive Officer (“CEO”) of the TM will be required under the legislation to certify in the annual report that they have reviewed the relevant policies and measures to ensure that the TM has managed the trust in the interest of unitholders as required by the Bill and are satisfied that these are adequate. Where the Board or the CEO are unable to provide the certification or where there is a divergence of views, this should be disclosed and explained in the annual report.

Rationale

18 The proposed certification by the Board and the CEO of the TM will make the Board and the CEO more acutely aware of their responsibility to put adequate governance practices in place to ensure that unitholders’ interests are safeguarded. This is warranted in the case of BTs because of the inherent conflict of duties of the TM.

Q9 Do you agree with the proposal to require the board and the CEO of the TM to certify that they have reviewed the policies and measures of the TM to ensure priority of unitholders’ interests, and are satisfied that these are adequate? Do you think that other safeguards are required? If so, please describe and explain.

PROPOSAL 10

MAS and unitholders will be granted the right to apply to the court to direct the TM to perform his duties in accordance with the trust deed.

Rationale

19 This is to provide recourse to unitholders in the case where the TM fails to act in accordance with the trust deed. It will also allow MAS to intervene where necessary.

Q10 Do you agree that MAS and unitholders should be granted the right to apply to the court to direct the TM to perform his duties in accordance with the trust deed?

PROPOSAL 11

For a BT to be listed on the SGX, the directors and managers should satisfy a fit and proper test and demonstrate sufficient experience and capability in running the business of the proposed BT.

Rationale

20 This is intended to be similar to the listing criteria for the listing of shares of companies on the SGX.

Q11 Do you agree that directors and managers of a BT applying to list on the SGX should be subject to a fit and proper test?

SECTION 5: RIGHTS OF UNITHOLDERS**PROPOSAL 12**

The liability of unitholders will be limited so that unitholders will not incur any

personal liability for obligations of the trust. Creditors of unitholders will not be able to claim on the assets of the BT.

Rationale

21 Presently, unitholders, being beneficial owners of the trust, may be exposed to unlimited liability for the obligations of the trust. The proposal will accord limited liability to unitholders, as is the case for shareholders of companies. This provides protection and certainty to unitholders.

Q12 Do you agree that unitholders should have limited liability, similar to shareholders of companies, and should not incur any personal liability for obligations of the trust?

PROPOSAL 13

Unitholders will have the right to vote on significant matters.

Rationale

22 Unitholders will be accorded voting powers on significant matters, as they are the beneficial owners of the trust. As is the case for shareholders of companies, we consider it important to set out the voting rights in statute or the listing rules of the SGX, depending on the nature of the issue being put to vote. These voting powers are the minimum rights that unitholders should have; the trust deed may choose to accord further voting rights to unitholders.

23 The fundamental relationship between unitholders and the TM is that of owners and management. As part of this relationship, the unitholders should have the right to remove the TM should it fail in fulfilling its management function. In addition, the trust deed sets out the obligations of both parties to this relationship. The process for amending the trust deed should achieve a

balance between providing for amendments to be made when the need arises, and ensuring that the interests of both the TM and unitholders will be considered. In light of this, we propose providing for the following:

- a) unitholders to have the power to remove the TM, subject to a special resolution (75% of votes of unitholders present and voting). The 75% threshold is to reduce the risk of the TM being frivolously removed by some unitholders; and
- b) amendments to the trust deed must be approved by:
 - (i) unitholders by special resolution; or
 - (ii) the trustee-manager, so long as the amendment will not adversely affect the rights of unitholders.

24 On the voting threshold, we are considering whether to impose an additional requirement that, where unitholders vote to remove the TM or approve amendments to the trust deed, the unitholders voting in favour represent at least 50% of the total outstanding units of the BT. This would be in addition to the requirement set out in sub-paras (a) and (b) above. This is to deter the frivolous removal of the TM or amendment of the trust deed, to ensure continuity in the operations of the BT.

25 We propose that unitholders be accorded the following additional voting powers:

- a) to approve the appointment of a new TM, subject to an special resolution;
- b) to appoint the auditor annually and to remove the auditor of the trust, subject to an ordinary resolution (50% vote);
- c) to call a meeting of unitholders, if 5% of unitholders agree;
- d) to approve the issue of new units, subject to an ordinary resolution;

- e) to approve material interested party transactions subject to an ordinary resolution²; (to be provided for under SGX listing rules, similar to listed companies); and
- f) to approve major acquisitions and realizations, subject to an ordinary resolution (to be provided for under SGX listing rules, similar to listed companies).

Q13.1 Do you agree with the list of matters on which unitholders should be allowed to vote, as set out above? What other matters do you think unitholders should have a right to vote on?

Q13.2 Do you think that unitholders' rights to vote on the matters set out in Para 23 a) and b)(i) should be subject to the additional threshold set out in Para 24?

PROPOSAL 14

A distribution may be made to unitholders out of trust property by the TM only if:

- (i) the directors of the TM are satisfied on reasonable grounds that the value of the trust property of the registered BT would exceed the liabilities (including contingent liabilities) incurred by the trustee-manager in its capacity as trustee-manager for that trust; and
- (ii) the TM will be able to pay such liabilities in the normal course of business as they come due.

Rationale

26 One of the advantages of a BT structure for businesses with high

² Interested parties to the transaction are not allowed to vote.

capital investment, such as infrastructure businesses, is that BTs are not restricted to paying distributions only out of accounting profits, but may make distributions out of their cash profits (without deducting non-cash expenses such as depreciation). This is unlike the case for companies whereby dividends are payable only out of profits of the company. However, the payment of distributions to unitholders should be subject to certain conditions, to ensure that distributions would not unduly jeopardise the ability of the BT to continue its normal course of business. We propose that distributions to unitholders should be made only if directors of the TM are satisfied on reasonable grounds that:

- (i) the value of the trust property of the registered BT would exceed the liabilities (including contingent liabilities) incurred by the trustee-manager in its capacity as trustee-manager for that trust; and
- (ii) the TM will be able to pay such liabilities in the normal course of business as they come due.

This is to prevent the situation of a TM borrowing on behalf of a BT merely to make distribution payments, despite the inability to fund the distribution from the operation of the BT's business.

Q14 Do you agree that a distribution may be made to unitholders out of trust property of the TM only if the directors of the TM are satisfied on reasonable grounds that certain requirements, as set out above, would be met? What alternative conditions would you suggest?

PROPOSAL 15

The legislation will provide for the mechanisms for the replacement of a TM, as well as the appointment of a temporary TM.

Rationale

27 We propose to provide for the replacement of the TM, as well as the appointment of a temporary TM. This is to allow for continuity of the trust. The proposed provisions are as follows:

- a) Where the TM voluntarily retires, the incumbent TM or the unitholders may propose a replacement TM, whose appointment must be approved by unitholders via a special resolution. If unitholders do not choose a company to be the new TM, the incumbent will be required to apply to the court to appoint a temporary TM, nominated by the incumbent.
- b) Where unitholders vote to remove the incumbent TM, they should, at the same meeting, nominate a company to be the new TM, whose appointment must be approved via a special resolution. If unitholders fail to appoint a replacement TM, any unitholder or MAS may apply to the court to appoint a temporary TM.
- c) The TM, any unitholder or MAS may apply to the court to appoint a temporary TM. Where a temporary TM is appointed by the court, this will be for a period of three months, and may be extended on application to the court. The temporary TM will be responsible for calling unitholders' meetings to vote on the appointment of a replacement TM. If the period of appointment expires without the appointment of a new TM by unitholders, the temporary TM may apply to the court to wind up the trust or act on any further orders that the court may make.

Q15 Do you agree with the provisions proposed above relating to the replacement of the TM and the appointment and functions of a temporary TM?

PROPOSAL 16

BTs will be subject to similar financial reporting and disclosure requirements as companies. Listed BTs will also be subject to similar financial reporting and disclosure requirements as listed companies under the listing rules of the SGX.

Rationale

28 As BTs will be raising funds from the public, we propose that BTs be subject to similar financial reporting and disclosure requirements as companies. This will include the requirement for the accounts of the BT to be audited. Listed BTs will be subject to the periodic reporting and continuous disclosure requirements under the listing rules of the SGX, similar to the requirements for listed companies.

29 On the preparation of financial accounts, companies are required in statute to prepare their financial statements in compliance with the Singapore Financial Reporting Statements ("SFRS") under the Companies Act. We seek comments on whether it would be practical to require in statute that financial statements of BTs be prepared in compliance with SFRS, given that certain concepts and terms (eg share capital) under the SFRS are intended for the corporate structure and may not be directly applicable to trusts, unless modifications are made. An alternative approach is to require in statute that the trustee-manager prepare financial statements of the BT that present a true and fair view of the affairs of the BT.

Q16 Do you agree that BTs should be subject to similar financial reporting and audit requirements as for companies? What requirements should apply, in your view, to the preparation of financial statements of the BT by the TM?

PROPOSAL 17

Unitholders who hold a beneficial interest of 5% or greater in the units of the trust will be required to report their interest, and changes in their interest to the TM, and in the case of a listed BT, to the SGX.

Rationale

30 This is similar to the requirement for companies. This will provide for transparency as to the beneficial ownership of units of BTs.

Q17 Do you agree that substantial ownership of 5% or greater of the units in a BT should be reported to the TM and, in the case of a listed BT, to SGX?

SECTION 6: RIGHTS OF CREDITORS

PROPOSAL 18

Creditors to the trust will have the right of subrogation to the TM's right of indemnity on trust assets (ie. the creditor can claim from the assets of the BT only via the rights of indemnity of the TM), provided that the TM has acted properly in the incurrence of the liability.

Rationale

31 This is consistent with the existing case law position on creditors' rights for trusts. It is also consistent with the existing approach in other major jurisdictions, such as Australia, Canada, the UK and Hong Kong.

32 The alternative of allowing creditors a right to claim directly on trust assets was also considered. This recognises that the case law position increases uncertainty for creditors. Creditors dealing with the BT and its TM in good faith will be denied the right to claim on trust assets if the TM had acted improperly. Also, where the creditor's claim is via subrogation to the TM's right of indemnity, it will be subject to set-off against any liabilities owed by the TM to the trust. Creditors dealing with BTs will have reduced protection, vis-à-vis creditors who deal with companies. This may in turn make it difficult for the BT to do business.

33 However, this will be a departure from the case law position, and is inconsistent with the position that a trust is not a separate legal entity. This also disadvantages unitholders, as the trust fund will be more susceptible to claims – even where the TM has acted improperly, and consequently increase the likelihood of insolvency. Unitholders will then have to sue the TM to recover such sums. Also, the TM will be able to address creditors' concerns about uncertainty of repayment through various other means, such as providing security on trust assets or guarantees. Accordingly, it is proposed that the legislation should codify the existing case law position on creditors' rights, rather than to deviate from it.

Q18 Do you agree that creditors of the trust should be granted the right of subrogation to the TM's right of indemnity on the trust assets? Do you agree that this should be subject to the TM acting properly in incurring the liability?

SECTION 7: WINDING UP AND INSOLVENCY OF A BUSINESS TRUST

PROPOSAL 19

The legislation will provide for conditions under which winding up of the BT can be initiated.

Rationale

34 The legislation will provide for winding up of the BT to be initiated in the following situations:

- a) the court may order a winding up of the trust if it is just and equitable to do so, on the petition of the TM, a unitholder, or the Minister (on the grounds of public interest);
- b) the court may order a winding up, on the application of a creditor, if within 3 months before the application for the order, an execution was issued on an order obtained in a court in favour of a creditor of, and against, the responsible entity, and the execution has been returned unsatisfied;
- c) unitholders may vote to wind up the trust, subject to a special resolution;
- d) the TM may wind up the trust if the trust deed provides that the trust be wound up at a specified time or in specified circumstances, and that time is reached or those circumstances occur.

35 This is similar to the approach under Australia's MIS regime. It is also consistent with the regime for companies, whereby shareholders may vote to

wind up a company or the court may order a winding up on the petition of certain parties, including the Minister.

36 We are also considering imposing an additional requirement that, where unitholders vote to wind up the BT (as set out in Para 34 c) above), the unitholders voting in favour represent at least 50% of the total outstanding units of the BT. This is to deter the frivolous winding up of the TM and to ensure continuity in the operations of the BT.

Q19.1 Do you agree with the above list of conditions under which winding up of the BT can be initiated? Are there any conditions under which winding up of the BT should be, or should be allowed to be, initiated?

Q19.2 Do you think that unitholders' rights to vote on the winding up of the BT, as set out in Para 34 c), should be subject to the additional threshold set out in Para 36?

PROPOSAL 20

The trust deed must adequately provide for winding up of the trust, including the priority ranking of claims and appointment of the liquidator. The court may, by order, give directions about how a trust is to be wound up if the court thinks it necessary to do so, including for the reason that the provisions in the trust deed are inadequate or impracticable.

Rationale

37 This approach is akin to the Australian approach, which relies on the trust deed provisions and court orders for the winding up proceedings. We considered the possibility of setting out detailed statutory provisions on winding up proceedings, similar to those in the Companies Act. However, the

Companies Act provisions cannot be transposed wholesale to BTs, as trusts have no legal existence and the TM is liable to creditors for all debts incurred in administration of the trust. Furthermore, as case law is still ambiguous and developing on such matters, it will be difficult in practice to codify provisions on winding up proceedings for trusts.

Q20 Do you agree that the trust deed should provide for the winding up of the trust and that provisions should be made for the court to give directions on how a trust is to be wound up?

PROPOSAL 21

The legislative framework will not provide for judicial management of the trust. A judicial manager may, however, be appointed to the TM of the trust under existing provisions in the Companies Act.

Rationale

38 It will be difficult to implement a judicial management scheme for the trust per se, as the trust does not have legal existence. Legal ownership of trust assets rests with the TM and the TM is liable to creditors for debts incurred. The Companies Act provides for the appointment of a judicial manager to the TM of the trust. Furthermore, the other major jurisdictions have not introduced provisions relating to judicial management of a trust. The Australian experience shows that it is more common for a creditor to realise security on trust assets or take action against and/or seek to wind up the TM to recover its debts.

Q21 Do you agree with the proposal to exclude judicial management from the scope of the Business Trusts Bill?

PART III: OFFERS AND TAKE-OVERS OF UNITS IN BUSINESS TRUSTS

SECTION 8: OFFERS OF UNITS IN BUSINESS TRUSTS - PROPOSED AMENDMENTS TO PART XIII OF THE SECURITIES AND FUTURES ACT

PROPOSAL 22

There will be a new Division in Part XIII of the SFA to regulate the offers of units in BTs. This new Division will comprise provisions adapted from the existing Division 1 of Part XIII of the SFA, which regulates the offer of shares in companies.

Rationale

1 As BTs are operating businesses just like companies, MAS proposes to regulate offers of units in BTs by way of disclosure requirements in prospectuses in the same way that offers of shares in companies are regulated.

2 As with prospectuses of issuers that are companies, it will be required that the prospectus of a BT sets out all information that investors and their professional advisers would reasonably require to make an informed assessment of the merits of investing in the BT. MAS will work with industry to issue a checklist of information that must be included in the prospectus of a BT. As the trust is not a legal entity, it is proposed that:

- (i) the directors and proposed directors of the TM will be required to sign the prospectus; and
- (ii) the criminal and civil liabilities for prospectus disclosure will be attached to the TM and directors and proposed directors of the TM.

Q22 Do you agree with the proposal to regulate offers of units in BTs by way of disclosure requirements in prospectuses, through the introduction of new provisions in Part XIII of the SFA similar to the existing provisions for offers of shares? Are there practical issues that may arise in applying the existing share provisions to BTs?

SECTION 9: TAKE-OVER OFFERS FOR UNITS IN BUSINESS TRUSTS

Proposal 23

The definition of “take-over offer” in the SFA and the Singapore Code on Take-overs and Mergers (“Take-over Code”) will be amended so that take-over offers for units in BTs will be subject to the provisions under Part VIII of the SFA and the Take-over Code.

Rationale

3 As ownership of units in a BT bestows beneficial ownership of the underlying business, it is possible to take over the business of a BT by purchasing a significant portion of the outstanding units of that BT. Provisions need to be in place to govern the take-over of units in a BT. The proposal will put in place requirements similar to those for companies and would ensure a fair, efficient and orderly market for takeovers.

Q23 Do you agree that the Take-over Code should apply to take-overs offers for units in BTs?

PART IV: REGULATORY TREATMENT OF REAL ESTATE INVESTMENT TRUSTS

SECTION 10: REGULATORY TREATMENT OF REAL ESTATE INVESTMENT TRUSTS (“REITS”)

Background

1 REITs are currently regulated under the CIS regime. REITs can be considered passive investment vehicles as they engage in investment in real estate for collection of rental. At the same time, there is an element of active business management insofar as they engage in managing tenant mix and upgrading facilities. MAS has considered how best to regulate REITs in the context of the proposed BT legislation.

PROPOSAL 24

MAS proposes that existing REITs be given the choice to continue to be regulated as a CIS under the CIS regime – retaining their dual-responsible entity structure with an independent trustee and continuing to be subject to borrowing limits and operational restrictions, or structure themselves as a BT under the BT regime. New trusts investing in real estate may also choose to be structured and regulated as a CIS under the CIS regime or as a BT under the BT regime.

Rationale

2 Existing REITs will have the option of restructuring themselves as BTs under the BT regime, subject to unitholder approval. REITs that opt for the CIS structure will continue to be subject to the regulatory requirements under the CIS regime, such as borrowing limits and operational restrictions. REITs that opt for the BT structure will not be subject to the same borrowing limits and operational restrictions but will not be allowed to use the term "Real Estate Investment Trusts" (or similar terms to be specified) in their name or hold themselves out as “REITs” in the marketing of the trust, in order to avoid investor confusion. They would have to adhere to the BT framework and

structure themselves with a single-responsible entity. Providing the option of being structured and regulated as a CIS or a BT will allow offerors flexibility in their structuring of trusts investing in real estate. Retaining REITs under the CIS framework will also facilitate the offer, in Singapore, of foreign REITs structured with a dual-responsible entity structure and regulated as such in their home jurisdictions.

Q24 Do you agree that trusts investing in real estate should be given the flexibility to be regulated under the CIS regime or the BT regime?

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