Response to Feedback Received - Consultation Paper on Amendments to Securities and Futures Act

On 23 April 2003, MAS issued a Consultation Paper inviting comments from the industry and the public on proposed amendments to the Securities and Futures Act ("SFA") contained in the draft Securities and Futures (Amendment) Bill ["SF(A) Bill"]. The Consultation Paper sought comments on proposed amendments to implement recommendations made by the Company Legislation and Regulatory Framework Committee ("CLRFC") . These recommendations were accepted by the Government on 22 October 2002 and seek to facilitate capital raising and improve Singapore's international competitiveness. Amendments were also proposed to make technical amendments and institute minor policy changes.

The consultation period closed on 22 May 2003. Comments were received from 22 respondents (listed in the Annex). MAS has carefully considered the comments received and where it has agreed with the comments, incorporated them in the SF(A) Bill. The SF(A) Bill is introduced for first reading in Parliament on 14 Aug 2003.

A second phase of amendments to the SFA will be carried out in the second half of 2004 to implement more substantive policy reforms. MAS received some suggestions during the public consultation that did not pertain to amendments proposed in the SF(A) Bill. These suggestions will be studied further and considered in the second phase of amendments to the SFA.

MAS thanks all respondents for their feedback. Comments of wider interest and MAS' responses are highlighted below.

COMMENTS RELATING TO PART III - CLEARING FACILITIES

1. Definition of "Clearing Facility"

The draft SF(A) Bill proposed to amend the definition of "clearing facility" to enable MAS to regulate clearing or settlement facilities other than those that clear securities or futures contracts traded on a securities market or futures market respectively. One respondent asked whether the amendment would lead to a corresponding extension of the application of section 69 to clearing or settlement facilities that clear instruments other than securities or futures contracts traded on a securities market or futures market respectively. Section 69 grants precedence to the default proceedings of a clearing house over the law of insolvency.

MAS' Response: Section 69, and more generally Part III Division 3 of the SFA, will not apply to every facility that falls within the definition of "clearing facility" in section 2(1). When prescribing a clearing or settlement facility under section 2(1), MAS will consider applying section 69 to the prescribed facility on a case-by-case basis. MAS is currently studying and developing appropriate criteria for determining the types of facilities to which section 69 should apply. MAS expects to seek industry feedback on this issue later this year.

COMMENTS RELATING TO PARTS IV TO VII - CAPITAL MARKETS SERVICES ["CMS"] LICENCEES

2. Approval of CEO and Director

2.1 The draft SF(A) Bill proposed to amend section 96 to provide that the prior approval of MAS is required for the appointment of a CEO, a director who resides in Singapore or a director who is responsible for the business of a CMS licence holder, whether or not he resides in Singapore.

One respondent suggested that only the appointment of CEO should require MAS' prior approval. As for the directors, it should be sufficient to require the CEO to notify MAS of any new appointments within one month.

MAS' Response: As directors have direct fiduciary responsibility for the operations of the CMS licence holder, MAS considers it important for approval to be obtained prior to the appointment of all directors.

2.2 Another respondent commented that it is difficult to demarcate whether a director has responsibility for the Singapore business. A director of an offshore head office who has overall responsibility for, and general oversight of, the licensed Singapore office should not be subject to the requirements of section 96(1). Only a director who has specific day-to-day responsibilities in relation to the Singapore branch should be subject to the requirements of section 96(1).

MAS' Response: MAS recognises that in practice it may be difficult to determine what is considered to be "having responsibility for Singapore's operations". Hence, to provide more clarity, the phrase in section 96, "having responsibility for Singapore's

operations", will be amended to "directly responsible for Singapore's operations".

3. Disclosure of Interests

3.1 One respondent suggested that the requirement to preserve written communication, offer or recommendation under section 120(8) be shortened to one year, as the current period of seven years is too long.

MAS' Response: The issue of any circular or written communication by a licence holder is considered part of the licence holder's business activity. It is important to preserve such material as part of the company's records. MAS agrees with the suggestion to reduce the retention period. To align with section 102(3) which pertains to requirements on keeping of books, the retention period in section 120(8) will be reduced from seven years to six years. This is also in line with the statutory period of limitation for contractual actions under the Limitation Act (Cap. 163).

3.2 Another respondent commented that the requirement for a licence holder and its representatives to disclose interests of associated or connected persons under section 120(1) is too onerous and impractical. This requirement should be deleted and the disclosure should be confined only to that of the analyst making the decision.

MAS' Response: Section 120 is currently being reviewed in conjunction with similar requirements in the Financial Advisers Act ("FAA"). MAS will study this issue and consider the need for any further refinement in the second phase of amendments for the SFA.

3.3 The draft SF(A) Bill proposed to delete section 120(7) which requires licence holders to sign off on circulars or other written recommendations sent by them. One respondent commented that if a CMS licence holder or its representatives make any recommendations, they should be responsible for these recommendations made and be required to sign off on the recommendations in accordance with section 120(7).

MAS' Response: MAS is of the view that section 120(7) can be deleted for the reason that licence holders would be responsible for their recommendations under section 121, whether or not the recommendations are signed. This will also reduce administrative difficulties for licence holders where the recommendations are sent electronically to customers.

4. Dealings as Principal

4.1 The draft SF(A) Bill provided that licence holders would not be subject to the requirement to disclose that they are acting as principals when transacting with certain financial institutions. Some respondents suggested that licence holders should be exempted from having to declare that they are acting as principals when dealing with persons exempt under section 99 or the institutions specified in section 274. However, one respondent was of the view that for the purpose of transparency and full disclosure, licence holders should not be exempted from the requirement to disclose that they are dealing as principals even when they are dealing with institutional investors.

MAS' Response: The purpose of the requirement is to ensure that the customers of the licence holder are aware that the licence holder is acting as principal, and not agent, and hence the licence holder may not have a fiduciary duty to the customers and may not act in their best interest. Currently, exemption is given when the licence holder deals with another person who holds a licence for dealing in securities. However, it is not appropriate to extend the exemption generally to all exempt persons under section 99 or institutions under section 274, as most of these entities do not engage in securities dealing in the ordinary course of business. Hence, MAS does not consider it appropriate to provide for further exemption.

4.2 Some respondents suggested that the requirement to disclose that the licence holder is acting as principal under section 125 should only apply to off-market, direct transactions as it is not possible for the licence holder to inform the counterparty that he is acting as principal prior to the transaction if the shares are entered into and matched by the Central Limits Order Book ("CLOB"). Also, for unlisted bonds that are traded over the counter, the licence holder will always act as principal and it would not be practical to apply section 125 to such transactions.

MAS' Response: Section 125 is not intended to apply to orders entered into and matched by CLOB. MAS also recognises that section 125 may not be relevant to unquoted securities which are usually traded on a principal-to-principal basis. Hence, section 125 will be amended such that licence holders are required to disclose that they are acting as principals only when dealing with customers. In addition, section 125 will apply only to securities quoted on a securities exchange, overseas securities exchange or recognised trading system.

4.3 Some respondents commented that giving the client 30 days grace after the receipt of contract note to rescind the contract

under section 125(5) is too long and could be subject to abuse.

MAS' Response: It is important that customers are given sufficient time to file their written rescission when the licence holders fail to comply with section 125. MAS considers 30 days a reasonable period of time.

5. Register of Securities

The draft SF(A) Bill proposed to amend section 131(2) to clarify that a relevant person must enter, in the register of his interest in securities, the particulars of any change in his interest in securities within 7 days after the date of the change.

One respondent suggested that licence holders and their representatives should not be required to maintain hard copies of the register of interests while another suggested that the requirement to maintain a register of securities be completely removed. The rationale is that securities transactions are captured electronically, and information on securities transactions and holdings are stored by CDP and the brokers and are easily retrievable.

MAS' Response: It is not sufficient to rely only on the records of CDP or the brokers. The purpose of maintaining a register is to deter representatives from engaging in personal trading when conflict of interest situations exist. It also serves as an important source of information for tracking irregular trading activities. However, the register need not be maintained in hard copies. Computerized records will suffice as long as the requisite information can be easily retrieved upon demand.

6. Licensing Requirement

One respondent noted that persons specified under section 274(1) ["exempt purchasers"] are considered to be sufficiently sophisticated, and therefore would not require the protection afforded by a prospectus. However, a person who offers securities to such exempt purchasers would still be considered to be engaging in a regulated activity. This would preclude a foreign entity from offering investments to local exempt purchasers, unless such entity first obtains a CMS licence for such activity. This would have a detrimental effect on venture capital industry in Singapore. Such entity should be exempted from the requirement to hold a CMS licence.

MAS' Response: The purpose of licensing requirements is to ensure that only fit and proper persons are admitted to the industry and that CMS licence holders abide by certain business conduct rules. For this reason, licensing requirements should apply to persons offering securities to exempt purchasers, even though such offer of securities is not subject to the prospectus requirements.

COMMENTS RELATING TO PART XIII

Part XIII Division 1 and 2 - Offers of Shares, Debentures and Collective Investment Schemes ("CIS")

7. Person Lodging the Prospectus or Supplementary or Replacement Document

Sections 241(5) and (6) place the onus on "the person who lodges" a supplementary or replacement document to take steps to inform potential investors of the lodgement and make available the document to them. One respondent commented that "the person who lodges" the document is often the legal adviser to the offering, instead of the offeror himself. In such cases, the onus should not be on the legal adviser but the offeror.

MAS' Response: The comment also applies to sections 240, 242, 296, 297 and 298. It is not the intention of the Act to deem a legal adviser to the offeror as "the person who lodges" the prospectus or document. A prospectus or document may be lodged by a legal adviser on behalf of the offeror, but such mode of lodgement does not change the requirements or liabilities of the offeror under the aforementioned provisions. The lodgement forms under Division 1 and 2 will be amended to reflect this policy better.

8. Appeals against MAS' Decision to Serve Stop Order

The draft SF(A) Bill proposed to provide for the right of appeal against a stop order issued by MAS. Several respondents were of the view that there should not be any right of appeal, as it lengthens the time period during which the status of the offer is uncertain. The uncertainty would not be beneficial to the issuer, underwriter and investors.

MAS' Response: MAS agrees that on balance, the need for certainty outweighs the need of an issuer to seek further review of MAS' decision in issuing a stop order. The proposed amendment has been deleted in the revised SF(A) Bill.

9. Institutions or Persons under Sections 274 and 304

The draft SF(A) Bill proposed an amended list of institutions or persons under sections 274 and 304 to which the offer provisions

in Part XIII Division 1 or 2 would not apply. Many respondents suggested that holders of CMS licence for advising on corporate finance or leveraged foreign exchange trading and holders of a Financial Adviser's Licence should be included in the list, as they are sufficiently sophisticated.

MAS' Response: MAS takes into account the following criteria in determining whether an institution or person should be included under sections 274 and 304:-

(a) the institution or person has the expertise to make a decision whether to purchase the securities without the safeguards that would otherwise be available if the offer complied with the offer provisions in Div 1 or 2; and

(b) the institution or person is likely to purchase securities in the course of the business or activity for which he is regulated by MAS.

Criterion (b) is to facilitate the purchase of securities by financial institutions, as such transactions could be an integral part of their business. Holders of CMS licence for advising on corporate finance or leveraged foreign exchange trading and holders of a Financial Adviser's Licence are excluded from the list as they do not meet this criterion.

Part XIII Division 1 - Offers of Shares and Debentures

10. Invitation to the Public to Deposit Money with a Corporation

10.1 Section 239(3) provides that an invitation by a corporation (other than a prescribed corporation) to deposit money with or lend money to the corporation shall be deemed to be an offer of debentures to the public. Several respondents suggested that section 239(3) should be deleted, arguing that deposit-taking is already regulated under the Banking Act.

MAS' Response: The suggestion is not accepted. Section 4A of the Banking Act does not regulate deposit-taking per se; rather it prohibits (1) a person who is already carrying on a deposit-taking business (whether in Singapore or elsewhere) from accepting any deposit from any person in Singapore and (2) a person from making an offer or invitation to the public (or a section of the public) to make a deposit or enter into an agreement to make a deposit with any person carrying on a deposit-taking business (other than the exempted class). Since an invitation to take deposits by a corporation (other than a prescribed corporation) per se is not regulated under the Banking Act, an invitation to deposit money with or to lend money to such a corporation should still be subject to the prospectus requirement under the SFA.

10.2 Several respondents were of the view that section 239 is not clear on whether a prescribed corporation which issues a deposit product (such as a certificate of deposit) would need to issue a prospectus. They suggested that the definition of "debenture" be amended to make it clear that bank deposits (including certificates of deposit) are not debentures.

MAS' Response: MAS has inserted a new section 239(3A) to clarify that section 239(3) shall not apply to prescribed corporations, and certificates of deposits and other documents issued by a prescribed corporation acknowledging, evidencing or constituting an acknowledgment of the indebtedness of the prescribed corporation in respect of any money deposited with or lent to the prescribed corporation are not debentures.

11. Application of section 260 to Foreign Corporations

Section 260 prohibits an issuer from allotting securities if the minimum subscription stated in the prospectus as being necessary has not been received. Any allotment made in contravention of the section is voidable. The section currently applies only to issuers who are companies incorporated in Singapore under the Companies Act (Cap. 50). The draft SF(A) Bill included an amendment to extend section 260 to apply to foreign-incorporated corporations.

Some respondents submitted that the amendment should not be made, as the section if amended would affect the validity of the allotment of securities which should be governed by the laws of the jurisdiction in which the corporation was incorporated.

MAS' response: MAS agrees with the suggestion. The proposed amendment has been deleted in the revised SF(A) Bill.

12. Exemption for foreign takeovers

Section 273(1)(b) proposed to exempt an offer of securities to the public from prospectus requirements if the offer is made in connection with a takeover offer of a foreign-incorporated corporation which comply with the laws and requirements of the jurisdiction where the corporation was incorporated.

Under section 273(1)(b) in the draft SF(A) Bill, a "takeover offer" was defined as:

(i) an offer for acquisition of "some or all" the shares in a corporation; and

(ii) an offer to acquire "all the remaining shares" in a corporation.

Several respondents suggested that the second limb under (ii) is unnecessary as this would be covered within the scope of limb (i).

MAS' response: MAS agrees with the suggestion. This is reflected in the revised SF(A) Bill.

13. Offers made in Connection with a Proposed Compromise or Arrangement

Section 273(1)(c) proposed to exempt an offer of securities made in connection with a proposed compromise or arrangement from the prospectus requirements only if the compromise or arrangement would result in a change in effective control of the target corporation.

Some respondents pointed out that not all schemes of arrangement will result in change in control. Corporations may restructure under a scheme with no change of control, for example, when an intermediate holding company is interposed to hold shares of the corporation concerned. The respondents suggested the deletion of the condition "that the compromise or arrangement must result in a change in control".

MAS' Response: MAS agrees with the suggestion. The condition "that the compromise or arrangement must result in a change in control" has been deleted in the revised SF(A) Bill.

14. Exemption for Offers under Share Investment Offer or Schemes

14.1 Section 273(1)(f) proposed to exempt an offer of securities to qualifying persons pursuant to a corporation's employee share scheme from prospectus requirements. Several respondents suggested that the exemption under the proposed section 273(1)(f) be extended to cover offers of securities to directors who are not employees, and advisers or consultants of the corporation whose securities are offered or its related corporation, as these persons are unlikely to require the protection of a prospectus.

MAS' Response: MAS agrees with the suggestion. The definition of "qualifying person" in the proposed section 273(4) has been amended accordingly. With the amendment, the proposed section 273(1)(f) will also exempt offers to a director, former director, adviser or consultant, or the spouse or children under the age of 18 of a director or former director from prospectus requirements.

14.2 Under the draft SF(A) Bill, the exemption under section 273(1)(f) was subject to the condition that the qualifying person must not be induced to purchase the securities offered by an expectation of employment or continued employment. Feedback from several respondents suggests that this condition, which was carried over from the previous provision under the Companies Act, is outdated and should be removed. It is now common for companies to offer shares or share options to employees or prospective employees as part of their remuneration package.

MAS' Response: MAS agrees with the suggestion. The condition has been removed in the revised SF(A) Bill.

15. Subsequent Sale of Securities under section 276

Section 276 provides that securities acquired under the exemptions in sections 274 or 275 may only be sold to institutional and sophisticated investors within the period of six months from the date on which the securities were first acquired. One respondent suggested that the six-month restriction period be lifted so that the securities may be sold to any investor without a prospectus.

MAS' Response: The suggestion is not accepted. Lifting the six-month restriction would allow securities sold to institutional or sophisticated investors to be on-sold to retail investors immediately without the protection of a prospectus. This could erode the general rule that offers to the public must be accompanied by a prospectus, as an issuer could then offer securities to retail investors indirectly through institutional or sophisticated investors without having to issue a prospectus.

16. Proposed repeal of requirement to file report of invocation of exemption

The draft SF(A) Bill proposed to amend section 280(1) to remove the requirement to lodge a report (Form 3) on the invocation of an exemption under sections 273(3), 274 and 275. The proposed amendment did not, however, remove the requirement to file the report in respect of exemptions under sections 278 and 279.

Several respondents commented that the requirement should be removed for all exemptions. One respondent however commented that it is still useful to retain the requirement to lodge Form 3 for all exempted offers as it would serve as a useful gauge of the level of corporate finance activities in Singapore.

MAS' response: MAS agrees that the requirement to lodge Form 3 should be repealed for all exempted offers. While it may be useful as a gauge of corporate finance activities, the requirement to lodge Form 3 imposes considerable administrative costs to issuers. On balance, MAS agrees that the requirement does not serve any significant public interest. The requirement to lodge Form 3 has been removed for all exempted offers in the revised SF(A) Bill.

Part XIII Division 2 - Offers of CIS

17. Employee schemes which are excluded from the definition of "collective investment schemes" in section 2 of the SFA

Some respondents suggested that schemes offered to directors and former directors should also be excluded from the definition of CIS so that non-executive directors, who unlike executive directors are not employees of the company, may also participate in such schemes.

MAS' Response: MAS agrees with the suggestion. In addition, MAS will exclude CIS offered to consultants or advisers from the CIS definition. This is reflected in the revised SF(A) Bill.

18. First sale of units acquired pursuant to exemptions under sections 304 and 305

One respondent suggested adding a provision similar to section 276(3) in respect of the first sale of units in a CIS initially acquired pursuant to exemptions for offers of CIS to institutional and sophisticated investors under section 304 or 305. The effect of such a provision would be to exempt the first sale of units from the offer provisions set out in Subdivisions (2) and (3) of Part XIII Division 2 if at least six months have elapsed from the date that the units were initially acquired, even if such sale is made to retail investors.

MAS' Response: The suggestion is not accepted. The policy intent of the new sections 304A and 305A in the SF(A) Bill is to prevent units which are initially acquired pursuant to exemptions under sections 304 and 305 from being sold subsequently to retail investors without the appropriate safeguards. Offers of CIS to retail investors differ from offers of shares and debentures to retail investors in that the former are subject to authorisation requirements in addition to prospectus requirements. Even if six months have elapsed after a CIS is offered under section 304 or 305, the scheme's characteristics (e.g. not being subject to investment guidelines set out in the Code on Collective Investment Schemes) will remain and, hence, still be unsuitable for retail investors.

Comments relating to SFA, Part XV - Miscellaneous

19. Translation of instruments

The draft SF(A) Bill proposed to insert a new section 318A to require translation of documents required to be submitted to MAS, made available for inspection, maintained or kept under the SFA, into English.

One respondent noted that the requirement for a translation of documents required to be submitted to MAS, made available for inspection, maintained or kept under the Act, into English is too onerous. This is especially so in its application to CMS licence holders, whose obligations to keep books and records are extensive. It is suggested that such translations be provided to MAS on request and within a specified time.

Another respondent contended that no translation is 100% accurate unless the subject matter is simple. It is suggested that a person will not be liable for incorrect translation unless he knows the translation to be false or failed to exercise reasonable care

MAS' Response: This requirement is not new. CMS licence holders are currently required under Regulation 39 of the Securities and Futures (Licensing and Conduct of Business) Regulations 2002 to keep books in English. The new section 318A extends the requirement on translation to other parts of the Act. To give greater flexibility in complying with section 318A, MAS may, on application by a person, permit that person a longer duration to comply with the requirement under this section.

In respect of the liability issue, MAS recognises the concern raised. MAS has inserted a revised clause which affords a defence for a person if he proves that he has taken all reasonable steps to ensure that the translation was accurate and he believed on reasonable grounds that the translation was accurate.

MONETARY AUTHORITY OF SINGAPORE
14 Aug 2003

ANNEX

LIST OF RESPONDENTS TO PUBLIC CONSULTATION ON AMENDMENTS TO SECURITIES AND FUTURES ACT

ABN AMRO Bank N.V.
Allen & Gledhill
Chang See Hiang & Partners
Deloitte & Touche
Foo Kon Tan Grant Thorton
General Agents & Managers Association Singapore Chapter
General Insurance Association of Singapore
Hong Leong Finance Limited
Institute of Certified Public Accountants of Singapore
Investment Management Association of Singapore
KPMG
Loo & Partners
Schroder Investment Management (Singapore) Ltd
Securities Association of Singapore
Singapore Exchange Limited
Standard Chartered Bank
The Association of Banks in Singapore
The Development Bank of Singapore Ltd
The Hongkong & Shanghai Banking Corporation Ltd
The Law Society of Singapore
The Society of Remisiers (Singapore)
United Overseas Bank

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