RESPONSE TO FEEDBACK RECEIVED - POLICY CONSULTATION ON AMENDMENTS TO THE SFA AND FAA

On 25 September 2003, MAS issued a consultation paper on key changes that were being considered for the second phase of amendments to the Securities and Futures Act ("SFA") and the Financial Advisers Act ("FAA")[1]. The Annex sets out a list of respondents to the consultation paper. We have carefully considered all comments received in our policy deliberation.

We are currently drafting the proposed amendments to the SFA and FAA in consultation with the Attorney-General's Chambers. We will seek comments on the draft Amendment Bills in the second quarter of 2004.

We thank all respondents for their feedback. Comments of wider interest and our responses are highlighted below:

PART I: OFFERS OF INVESTMENTS

Chapter 2: Liability Of Underwriters And Other Professionals For Prospectus Disclosures

2.1: Proposal to continue holding underwriters liable for prospectus disclosure

We proposed retaining underwriters' liability for the contents of a prospectus.

Most of the respondents felt that underwriters should not be subject to liability if they are not involved in preparing the prospectus. The common reason cited is that the underwriter would not have taken an active part in the due diligence process in such cases.

One respondent suggested that whilst liability should be attached to underwriters, a lower due diligence standard should be applied to them.

MAS' Response

We consider that an underwriter's liability for prospectus contents should not depend only on whether the underwriter was involved in preparing the prospectus.

An underwriter has a significant economic interest in the offer of securities, in that it has contractually committed to acquire any securities not taken up by investors in the offering. If no liability for the contents of the prospectus attaches to the underwriter, there could be an incentive for the underwriter to exploit the prospectus as a marketing tool at the expense of proper disclosure to the potential investors.

We want to avoid creating an opt-out system whereby an underwriter could choose whether to be subject to liability. This would defeat the purpose of imposing the liability.

We will therefore retain prospectus liability for underwriters. We will, however, modify the criminal liability provision for underwriters. Underwriters will be held liable only if they had intentionally or recklessly made a false or misleading statement in, or omitted information from, a prospectus. The onus would then fall on the prosecutor to show that the underwriter had acted intentionally or recklessly. The current provision requires the underwriter to demonstrate that it had conducted reasonable due diligence as a defence against criminal liability. (Please refer to MAS' response to Recommendation 2.3 for further details)

2.2: Proposal to extend prospectus liability to issue managers and other IPO intermediaries

We proposed extending prospectus liability to issue managers given the significant role they play in the offering process. We also sought feedback on whether prospectus liability should be extended to the other IPO intermediaries (such as lawyers and accountants).

Almost all the respondents who commented were in favour of extending liability to issue managers. A few respondents, however, did not agree that liability for the entire content of a prospectus should be imposed on the issue manager. One respondent suggested that all professionals involved, including the issue manager, should be held responsible for the parts that they respectively "contribute" to the prospectus. Another respondent suggested that each professional should be held liable for parts of the prospectus which it has "control" over.

Respondents were, however, against extending full prospectus liability to other IPO intermediaries. Reasons cited included the

fact that such intermediaries typically have a limited role in the IPO process as their involvement is determined by their clients (i.e., the issuer/vendor or the underwriter). It was also pointed out that no other jurisdiction makes such professionals liable for the entire content of a prospectus, and that doing so would increase costs without adding corresponding benefits to investors.

MAS' Response

The issue manager's role is by far the most extensive among the intermediaries involved in an offer. In most cases, it is the issue manager who initiates contact with a potential issuer and brings the issuer to market. The issue manager typically has overall supervision and control over the entire IPO process, including the due diligence exercise for, and the drafting of, the prospectus. The issue manager is also responsible for the overall promotion, coordination and management of the issue, including organisation of marketing activities, distribution of the prospectus and application forms, receipt of applications and allocation of securities to applicants. We will amend the SFA to extend prospectus liability to issue managers, as proposed in the policy consultation paper.

As for the other IPO intermediaries, we agree with the respondents. There is no compelling reason to extend liability for the entire contents of a prospectus to other IPO intermediaries other than the issue manager. We will not amend the SFA to extend prospectus liability to other professionals.

2.3: Proposal to modify the criminal liability provision in respect of false and misleading statements

We proposed modifying the criminal liability provision - in respect of false and misleading statements and omissions - so that a person will be guilty of a criminal offence only if the statement or omission is material. We also proposed that criminal liability, if imposed on a person other than the offeror and its directors, would arise only if that person had intentionally, recklessly or negligently made a false or misleading statement in, or omitted information from, the prospectus.

There is general agreement among respondents that a person other than the offeror should be held criminally liable only if he had intentionally or recklessly made a false or misleading statement in, or omitted required information from, a prospectus. Most respondents are, however, against our proposal to attach criminal liability to that person for his negligence.

MAS' Response

As proposed in the consultation paper, we will modify the criminal liability provision - in respect of false and misleading statements and omissions - so that a person will be guilty of an offence only if the statement or omission is material. We have taken into account respondents' comments and will not be imposing criminal liability on a person (other than the offeror and its directors) where the person had only acted negligently.

Chapter 3: Publicity For Offers Of Investments

3.1: Proposal to allow only "tombstone" advertisements for CIS before a prospectus is registered

We proposed allowing only "tombstone" advertisements for collective investment schemes ("CIS") before a prospectus is registered, stating the name of the CIS, the name of the manager and how a copy of the prospectus may be obtained.

Some respondents suggested that "tombstone" advertisements should be allowed to state the investment focus of the CIS, as the name of the scheme may not always reflect the investment focus. One respondent suggested that "tombstone" advertisements should be required to state that the prospectus has not been registered by MAS.

MAS' Response

We agree with the suggestions. "Tombstone" advertisements will be allowed to state the investment focus of the CIS and be required to state that the prospectus has not been registered by MAS.

3.2: Proposal to allow the pre-marketing of CIS offers to institutional investors

We proposed allowing pre-marketing of CIS offers to institutional investors via circulation of preliminary documents that have been lodged with MAS and roadshow presentations. This is to provide flexibility for CIS managers and distributors to conduct pre marketing activities to institutional investors before a prospectus is registered.

Some respondents commented that no significant distinction should be made between the pre-marketing of CIS to institutional and sophisticated investors, such as the accredited and other investors to be specified in section 305 of the SFA. These investors should be sufficiently sophisticated to be able to decide on the merits of the product.

MAS' Response

We agree with the respondents. We will permit pre-marketing of CIS offers via circulation of preliminary documents that have been lodged with MAS to institutional investors as well as accredited and other investors specified in section 305 of the SFA.

3.3 (i): Proposal to permit pre-deal research reports for offers concurrently made in Singapore and one or more other jurisdictions where pre-deal research reports are permitted

We proposed permitting pre-deal research reports for offers that are made concurrently in Singapore and one or more other jurisdictions where pre-deal research reports are permitted. We also sought views on whether to limit the circulation of such reports to institutional investors and to impose certain safeguards to prevent/minimise leakage to retail investors

Some respondents were of the opinion that pre-deal research reports should be permitted regardless of whether an offer is made concurrently in Singapore and another jurisdiction where such reports are permitted. The respondents also expressed views that pre-deal research reports should not be permitted for distribution only to institutional investors. The argument was that other investors (such as accredited investors) may also have the expertise to evaluate pre-deal research reports. Furthermore, retail investors should be allowed access to the reports so as to avoid selective disclosure of material information.

MAS' Response

On whether to allow the distribution of pre-deal research reports prior to an offer being made with a registered prospectus, we consider that the risk of investors, especially retail investors, being conditioned by the report instead of relying on the registered prospectus as the primary document for making their investment decisions outweighs the benefits of facilitating the marketing of offers using pre-deal research reports.

However, we recognise that where an offer is made concurrently in Singapore and one or more other jurisdictions where pre-deal research reports are permitted, institutional investors in Singapore may be placed at a disadvantage if they are not able to receive the pre-deal research reports which their foreign counterparts have access to. Hence, in such situations, the distribution of pre-deal research reports to institutional investors will be permitted. Allowing pre-deal research reports in such circumstances will prevent institutional investors in Singapore from being disadvantaged.

On the issue of the risk of selective disclosure of material information (to institutional investors and not retail investors), we consider that this is mitigated by the requirement under the SFA that the prospectus must contain all material information on the offer.

3.3 (ii): Comments on possible safeguards against leakage of information in pre-deal research reports to retail investors

MAS proposed some safeguards to prevent leakage of information contained in pre-deal research reports to retail investors.

Respondents suggested that:

a. the proposed "quiet period" starting 2 weeks before the lodgement of the prospectus (during which no pre-deal research report may be distributed) should only be imposed if the same quiet period applies in the foreign jurisdictions in which the pre-deal research report is also distributed;
b. the pre-deal research reports should be pre-numbered; and
c. the person issuing the pre-deal research report should be required to disclose its interest in the offer and its relationship with the offeror to raise the level of disclosure.

MAS' Response

We have not accepted the suggestion stated at (a). To minimise any risk of conditioning Singapore investors, we consider that the quiet period should apply in Singapore regardless of whether the same requirement applies in the foreign jurisdictions. The quiet period is also a common practice in many established jurisdictions.

We accept the suggestions stated at (b) and (c). In addition, we will require persons issuing pre-deal research reports to maintain a record of the recipients of the report.

3.4: Proposal to allow issuer and advisers to communicate with the media about an offer after the prospectus is lodged

We proposed allowing the issuer and its advisers to communicate with the media about an offer after lodgement of the prospectus. The communication is restricted to the contents of the lodged prospectus and should either be responding to news reports and comments or seeking to clarify any inaccurate or misleading information.

Two respondents commented that it may sometimes be necessary for the offeror or its advisers to clarify the inaccurate or misleading information with reference to information that is not set out in the lodged prospectus.

MAS' Response

Communication with the media is currently prohibited under the SFA. The proposal arose from MAS' recognition that it may sometimes be necessary for the offeror to clarify inaccurate or misleading information contained in news reports or comments published after the prospectus is lodged. Such inaccurate or misleading statements or comments are based on information in the lodged prospectus and should be clarified using the contents of the lodged prospectus.

While we agree that there may be circumstances when it is necessary to make clarification using information not contained in the lodged prospectus, such circumstances are rare. We will consider granting exemptions in such circumstances on a case-by-case basis.

3.7: Proposal to restrict the contents of advertisements after registration to information in the registered prospectus

We proposed that the contents of advertisements after registration of the prospectus be limited to information contained in the registered prospectus.

Some respondents commented that while the registered prospectus of a CIS is valid for 12 months, some information which may be of interest to investors (and which may or may not be included in the prospectus) is time-sensitive and may be out-dated for on-going marketing purposes. Examples of such information include the performance of the CIS, the composition of the portfolio of the CIS and the manager's outlook on the market or economy. Respondents therefore suggest that MAS permits such information to be reflected in advertisements.

MAS' Response

We agree that CIS advertisements should be allowed to state the latest performance and composition of the portfolio, as these are factual information. In addition, CIS advertisements will be allowed to state the corresponding performance of the benchmark of the scheme and information contained in the latest semi-annual or annual report of the scheme. However, non-factual information such as the manager's outlook on the market or economy will not be allowed. If such non-factual information is deemed useful and material, it should be included in the prospectus of the scheme.

PART II: MARKETS AND CLEARING FACILITIES

Chapter 4: Refining The Legislative Framework For Markets And Clearing Facilities

4.1 & 4.3: Proposal to regulate only facilities where price interaction takes place as "markets" and to delete the word "issued" from the definition of "securities market"

We proposed refining the definition of "securities market" and "futures market" (collectively referred to as "markets") to regulate only those facilities where price interaction takes place. That is, where bids or offers are exposed to competition from bids or offers of other participants. The consultation paper also proposed to delete the word "issued" from the definition of "securities market" in view of changes in industry practices and technology that have blurred the distinction between primary and secondary offerings for some instruments.

Two respondents suggested that a more precise definition of "price interaction" be adopted to provide greater certainty for businesses. Two respondents also queried if the definition of markets would continue to exclude facilities used by only one

person to make or accept orders.

One respondent expressed a concern that the deletion of the word "issued" could complicate matters and lead to unintended consequences, especially since the concept of "issued securities" remains in principle the main test and works well for most securities.

MAS' Response

We agree to provide more clarity on the concept of "price interaction" in the Guidelines on the Regulation of Markets ["Guidelines (Markets)"] issued on 11 September 2002. We do not intend to introduce the concept of "price interaction" directly into the legislative definition of markets. Several key concepts in the definition of "markets" such as centralised basis, technology-neutrality, regularity of transactions, reasonable expectations of transactions, and the exclusion of non-multilateral markets, are currently explained in the Guidelines (Markets). We intend to supplement the Guidelines (Markets) to clarify that "centralised basis" limits the operation of the market provisions to facilities where the process of price interaction takes place. Price interaction would be considered to occur on a facility where bids or offers are exposed to competition from bids or offers of other participants.

It is not our policy intent to regulate facilities used by only one person as markets. Hence, we will continue to exclude such facilities from the definition of markets in the SFA.

We agree that the deletion of the word "issued" in the definition of "securities market" may lead to unintended consequences and have decided against the deletion. To address the blurred distinction between primary and secondary offerings for some instruments, we would instead amend the definition of "securities market" to provide MAS the power to supervise entities that operate markets for securities other than "issued securities", when such markets pose risks to MAS' regulatory objectives.

4.2: Views on whether platforms that facilitate OTC trading of individually tailored and bilaterally negotiated contracts should be regulated as "markets"

We sought views on whether platforms that facilitate OTC trading of individually tailored and bilaterally negotiated contracts should be regulated as "markets".

The policy consultation paper noted that since price interaction does not take place on platforms that facilitate over-the-counter trading of individually tailored and bilaterally negotiated contracts, we would not consider such platforms as "markets" and would therefore not regulate them as markets.

There was support for this view.

MAS' Response

We will clarify in the Guidelines (Markets) that MAS will not view as "markets" platforms that facilitate the formation of individually tailored contracts that are negotiated directly and bilaterally. We will only regulate platforms where price interaction takes place, and this will typically be platforms where the contracts traded are highly standardised.

4.6: Views on the proposed designation approach for clearing facilities

We proposed introducing a designation approach for the regulation of clearing facilities. Under this approach, only facilities that are considered important in terms of their potential impact on Singapore's financial stability, public confidence in key markets and public interest would be designated and regulated by MAS.

One respondent expressed the concern that the designation approach could create regulatory arbitrage between designated and undesignated clearing facilities.

MAS' Response

We are of the view that the designation approach would not result in regulatory arbitrage, as operators of clearing facilities do not decide whether to apply to be a designated clearing facility or apply to be an undesignated clearing facility. Persons wishing to establish a clearing facility need to notify MAS, and we will decide if that facility should be designated. The regulatory requirements placed on a designated clearing facility would be commensurate with the systemic importance of that clearing facility.

Chapter 5: Re-defining "Futures Contract" to Include Over-the-Counter Derivative Products
Chapter 7: Over-the-Counter Derivatives

(We will address these two chapters together in view of their commonalities).

5.1: Proposal to amend the definition of "futures" contract and not to regulate broking in off-exchange derivative transactions under the SFA

We proposed amending the definition of "futures contract" to remove the requirement that futures contracts must be traded pursuant to the rules of a futures market. Such an amendment will help to clarify MAS' oversight of markets and clearing facilities.

We received responses that the definition of "futures contract" should not be amended as it is well understood and consistent with market participants' understanding that futures contracts are exchange-traded products. Any change would make the nomenclature confusing. The alternative is to apply the FAA to derivatives, instead of changing the definition of "futures contracts".

MAS' Response

It is necessary to change the definition of "futures contract" so as to remove the circularity in the definitions of "futures contract" and "futures market"[2], and to give MAS powers to supervise markets and clearing facilities for OTC derivatives where there are systemic concerns. However, it is not our intention to regulate broking activities on OTC derivatives. We will study further on how best to effect our policy intent through the legislative amendments, taking into account industry's concerns.

7.1: Proposal to include OTC derivative products under the FAA

We proposed including OTC derivatives as investment products under the ambit of the FAA. Where such products are offered to retail investors, they pose the same risks as other financial instruments. Advice on OTC derivatives should thus be regulated under the FAA.

One respondent felt that advice on OTC derivatives should not be regulated under the FAA. This was because OTC derivatives are used for hedging rather than investment, and their users tend to be professionals and experts rather than retail investors. Another respondent mentioned that if OTC derivatives are included under the FAA, derivatives on commodities such as oil would also be covered. Such derivatives may already be regulated under the Commodities Trading Act ("CTA").

MAS' Response

Our view is that it is not practical to differentiate between the use of derivatives for investment and hedging. MAS considers that exemptions should be based on sophistication of the users rather than on a product basis. There are existing and proposed exemptions for accredited investors under the FAA.

It is not our intention to regulate advice on all commodity derivatives under the FAA. We will only regulate advice on commodity futures contracts that are traded on MAS-regulated exchanges or futures markets. All other types of commodity derivatives will be excluded from the scope of the FAA and will come under the ambit of the CTA.

PART III: SCOPE OF THE FAA

Chapter 6: Structured Deposits

6.1: Views on whether the proposed definition of structured deposits captures all such product currently available in the market

We proposed defining a structured deposit as any deposit whose return is contingent on a credit event or a financial instrument. The definition of a financial instrument under the FAA is cross-referenced to the definition of a financial instrument under the SFA.

Several respondents felt it would be useful to expand the definition of structured deposits to include products whose performance is linked to commodities, exchange rates or interest rates.

Some respondents asked whether the proposed Guidelines for Structured Deposits ["Guidelines (Structured Deposits)"] will apply to capital-protected structured products, where protection is offered through the use of underlying instruments such as shares and bonds.

MAS' response

The definition of a financial instrument under section 2(1) of the SFA includes "any currency, currency index, interest rate instrument, interest rate index, share, share index, stock, stock index, debenture, bond index, a group or groups of such financial instruments." This broad definition should capture most of the variations suggested by respondents.

As a matter of good business practice, institutions should apply the Guidelines (Structured Deposits) in the sales and advisory process for complex deposit products including those with returns linked to a commodity price or other instrument not included in the current definition. We will continue to monitor market developments and revise the definition of a structured deposit, if required.

The Guidelines (Structured Deposits) will apply only to structured products that meet the definition of a deposit under the Banking Act. The definition of a deposit under the Banking Act requires the principal to be repaid in full at maturity. In the case of structured products where capital protection is offered through the use of underlying instruments, the full value of the principal may not be recoverable at maturity. In such cases, the FAA will apply in its entirety.

6.2 & 6.3: Views on proposed guidelines on marketing of structured products that meet the definition of a deposit in the Banking Act

We proposed regulating structured deposits as a class of investment products under the FAA. Although deposits fall outside the scope of the FAA at present because they are generally simple and well understood, structured deposits are complex products that bear many of the characteristics of an investment. As such, they warrant regulation of the sales and advisory process. Key highlights of the proposed Guidelines (Structured Deposits) include:

- Separation of the sale of structured deposits from other deposit products
- Clear and adequate product disclosures

All respondents agreed that the sales and advisory process for structured deposits should be regulated. One respondent suggested that such products be regulated under the Banking Act rather than the FAA so that deposit-taking is not regulated under two separate pieces of legislation.

Several respondents highlighted that structured deposits are not significantly different in terms of complexity and risks from other capital guaranteed products. They felt that an uneven playing field would emerge if a lighter regime were to apply to structured deposits, but not to these other essentially similar products.

MAS' response

These Guidelines (Structured Deposits) pertain to the advisory process for structured deposits, and not the act of deposit-taking which is regulated under the Banking Act. The FAA regulates the sales and advisory process for all investment products and is thus the more appropriate avenue for promulgating these Guidelines (Structured Deposits).

We agree with respondents that the Guidelines (Structured Deposits) may need to be tightened to deal with the increasingly complex structures of such deposits. We will incorporate most of the suggested enhancements in the Guidelines (Structured Deposits).

We acknowledge that structured deposits are not the only investment products that are capital guaranteed. Other products may offer similar levels of protection to investors. We will study whether the regulatory approach to structured deposits should be tightened or the regulation for other capital guaranteed products relaxed to achieve a harmonised regulatory approach to all capital-guaranteed products.

Chapter 8: Regulatory Treatment of Generally Circulated Advice

8.1 & 8.2: Proposal for other forms of "untargeted advice" to be excluded from the FAA and views on the proposed criteria for

determining when advice is considered "untargeted"

We sought views on whether to exclude other forms of "untargeted advice" from the application of section 27 of the FAA and FAA Notice on Recommendations on Investment Products.

Regulation 34 of the Financial Advisers Regulations exempts research reports intended for general circulation and issued without regard to the recipients' situation and needs from the "reasonable basis" requirement[3]. We proposed extending this exemption to any other "untargeted advice" so long as the advice:

a. is not targeted at a specified individual but is generally disseminated to the public or a section thereof; and
b. does not purport to take into account the recipient's investment objectives, financial situation and particular needs.

We proposed requiring FAs giving "untargeted advice" to inform the recipients that the advice does not take into account their specific investment objectives, financial situation and particular needs, and that section 27 of the FAA and the Notice on Recommendations will not apply to the advice provided in these circumstances.

Most of the respondents agreed with our proposal to exempt "untargeted advice" from the "reasonable basis" requirement, and for FAs to make adequate up-front disclosure. A respondent suggested that the drafting of such disclosure should focus on the fact that such advice is provided without taking into account the recipient's investment objectives, financial situation and particular needs, and need not make reference to particular provisions of the FAA.

MAS' Response

We will proceed to exclude "untargeted advice" from section 27 of the FAA and the Notice on Recommendations. Such advice will have to meet specified criteria set out by MAS - which are in line with those proposed in the consultation paper.

We agree with and accept the suggestion that the up-front disclosure that accompanies "untargeted advice" should focus on the fact that such advice is provided without taking into account the recipient's investment objectives, financial situation and particular needs, and need not make reference to particular provisions of the FAA.

8.3: Views on types of "untargeted advice" which may meet the proposed criteria

MAS sought views on other types of "untargeted advice" other than those mentioned in the consultation, i.e. research reports, talks and seminars.

The suggestions received included roadshows, newsletters, electronic transmissions, interviews and commentaries and fund manager publications. Another respondent queried whether advice given to a pre-selected group of persons could be considered "untargeted advice".

MAS' Response

We note that "untargeted advice" may be given in various ways. FAs who wish to give "untargeted advice" will have to meet the specified criteria to qualify for this exemption, regardless of the form and manner in which such advice is given. Notwithstanding the above, we are reviewing whether further guidance on specific activities is appropriate. As for the query on advice given to a pre-selected group, we take the view that advice provided in such context can be considered "untargeted advice" and will be eligible for the exemption so long as it fulfils the prescribed criteria.

(Although we use the phrase "untargeted advice" throughout this document so as to be consistent with the consultation paper, we are now referring to such advice as "generally circulated advice".)

Chapter 9: Regulatory Treatment of the Provision of Financial Advisory Services to Overseas Investors

9.1: Proposal to exempt FAs from business conduct rules in FAA when providing financial advisory services to overseas investors

We proposed exempting financial advisers from business conduct rules (except section 33) in the FAA when they provide financial advisory services to overseas investors.

Several respondents sought clarification on who would be considered an overseas investor. There was a query as to whether the exemption would apply to an FA who services its overseas investors out of Singapore.

A respondent asked whether FAs are required to get MAS' prior approval for providing financial advisory services to overseas investors.

MAS' response

For the purpose of this exemption, an overseas investor is any person who is residing outside Singapore. As an illustration, persons who are considered non-resident by the Inland Revenue Authority of Singapore for income tax purposes would be considered "overseas investors". MAS will study whether to narrow the scope to exclude Singapore citizens or permanent residents, and their dependents from the definition of "overseas investors" so that these persons will be afforded the protection under the FAA, regardless of whether they are residing in Singapore. Our final policy decision will be reflected in the Financial Advisers (Amendment) Regulations.

9.2: Views on the proposed conditions of licence or exemption relating to FAs' dealings with overseas investors

We sought comments on the proposed conditions[4] of licence or exemption with respect to an FA's dealings with overseas investors.

Several respondents took the view that it was not necessary for MAS to impose conditions for FAs to comply with the applicable laws and rules in the foreign jurisdictions in which they target overseas investors, as the act of servicing overseas investors would take place outside of Singapore's jurisdiction. There was also a question about how this condition would operate in relation to the applicable foreign laws and regulations.

There were mixed views on the proposed condition that required FAs to disclose to their overseas clients that the FAA's protections do not cover overseas investors. While there was support for our proposal, some respondents felt that this might lead to questions from such investors about the details of the FAA protections.

MAS' Response

It is important that FAs comply with applicable foreign laws and rules to avoid reputational risk to Singapore's status as a well-regulated international financial centre. Setting out this requirement as a condition of the licence or exemption does not represent any new regulatory development. It is an affirmation of existing policy as well as a move towards increased transparency[5].

It is important for FAs to disclose to overseas clients that the protection under the FAA does not extend to them. Such disclosure will enable overseas investors to judge for themselves whether and how to deal with the FAs. We do not intend to prescribe how FAs should communicate to overseas investors that the FAA protections do not cover them. FAs are, however, required to maintain the relevant documentation and records for reference and regulatory purposes.

PART IV: CHANGES AFFECTING BOTH THE SFA AND FAA

Chapter 10: Treatment of Non-Retail Investors Under the SFA and FAA

10.1: Proposal to rationalise the criteria in the SFA and FAA for an individual to qualify as an accredited investor

We proposed rationalising the criteria in the SFA and FAA for an individual to qualify as an accredited investor.

All the respondents agreed with the proposal to rationalise the criteria for an individual to qualify as an accredited investor. While the majority of respondents felt that the threshold of $2 million personal assets or $300,000 annual income was appropriate, there was a suggestion that the figure for the "net asset criterion" was too low and it might be more suitable to use $5 million net assets as the minimum for individuals to qualify as accredited investors.

Some respondents raised concerns with MAS' requirement for financial institutions to disclose to their clients who are accredited investors the kind of regulatory exemptions that would apply to them. They felt that such disclosures might be unduly cumbersome and would not be of interest to many of them.

Respondents also suggested that MAS clarifies how FAs should determine if their clients meet the requirements for being

regarded as accredited investors. They mentioned that this process could be costly and suggested that MAS could provide, in the statutory definition, that reliance could be placed upon a written declaration from their client.

MAS' Response

On balance, we take the view that the $2 million threshold is appropriate. Individuals who qualify as accredited investors but who feel that they require more disclosure may still request their FAs to provide them with the relevant information.

We consider that accredited investors should be informed by financial institutions that there are provisions in the SFA and FAA which the financial institutions are exempted from when dealing with them. With this knowledge, accredited investors can exercise their discretion to request a formal needs based process or more detailed disclosures when they deem fit.

We do not intend to prescribe in legislation how financial institutions are to determine whether their clients qualify as accredited investors. This will be too rigid. Financial institutions should put in place their own systems to ensure compliance with the relevant rules and regulations.

10.3: Views on the proposed definition of institutional and expert investors, and if there should be additional exemptions for institutions dealing with such investors

To rationalise the categories of non-retail investors in the SFA and FAA, we proposed introducing two other categories of non-retail investors, namely institutional investors and expert investors. We also sought views on whether there should be any additional regulatory exemption for institutions dealing with such investors.

Respondents had suggested a number of other types of investors that could be considered to be non-retail investors, as listed below:

a. The Government, statutory bodies, and their related entities as accredited (or expert) investors;
b. For corporations, to continue to regard them as accredited investors even where there is a temporary drop in the value of their net assets; and
c. For the purposes of commodity derivatives, to include as expert investors entities which trade in the underlying commodity.

Respondents also suggested the following additional regulatory exemptions:

i. To exempt representatives who only offer financial services to expert or institutional investors from certain examination requirements; and
ii. To extend the licensing exemption for fund management in respect of qualified investors[6] to expert and institutional investors, as this would allow a close-ended fund to enjoy the exemption.

MAS' Response

We had, in the consultation paper, proposed using the institutions listed under sections 274 and 304 of the SFA as a reference for "institutional investors". Government and statutory bodies are already included in the list of institutions in sections 274 and 304, and will remain so. However, related entities of the Government or a statutory board (e.g., Government-linked companies) are separate legal entities. Such entities should not be regarded as non-retail investors. As for the suggestion at (b), the net asset test for corporations is applied in relation to their annual accounts; short-term fluctuations should not affect their regulatory status. As for (c), we agree that entities that already trade in a particular commodity may be considered to be expert investors when they trade in derivatives of that commodity.

For the regulatory exemption at (i), we already do not require a representative to pass examinations if they possess professional qualifications or relevant work experience. For the suggestion at (ii), we note that persons managing closed-end funds already qualify for the licensing exemption if each of these funds have net assets of $10 million or more. We will study whether additional exemptions are necessary in light of the suggestions.

10.4: Proposal to extend the scope of exemption from the prospectus requirements under sections 275 and 305 of the SFA as well as safeguards for preventing circumvention

We proposed adopting a "look-through" approach for sections 275 and 305 of the SFA. Under this "look-through", any investment holding company whose beneficial shareholders would qualify for prospectus exemptions will also be exempted from prospectus requirements. This will facilitate offers to alternative investment vehicles.

Most respondents welcomed this new approach and agreed that this would be appropriate. We received several requests to extend this "look-through" approach for the general definition of accredited, expert and institutional investors (instead of just applying it to sections 275 and 305 of the SFA). Respondents also requested that MAS extend the "look-through" approach to other structures and entities, such as special-purpose vehicles (SPVs), trusts or foundations.

One respondent suggested that the shares of investment holding companies that purchased CIS pursuant to section 305 of the SFA (referred to as "restricted schemes") could be offered or sold to retail investors so long as the sales process complies with the requirements under the FAA.

MAS' response

We will review whether the "look-through" approach can be extended to other types of entities and be applied more generally. Any extension of the "look-through" approach will have to take into account the legal status of the investment vehicle, the rights and recourses available to the ultimate investors as well as the possibility that it may lead to unintended circumvention of the SFA and FAA.

Under the SFA, units of restricted schemes cannot be re sold to retail investors without a prospectus. We do not agree with the suggestion to allow the sale to retail investors, without a prospectus, of shares of investment holding companies which purchase restricted schemes even if the sales process complies with FAA requirements. Allowing this would result in a circumvention of the prospectus requirements under Part XIII Div 2 of the SFA. The offer or sale of shares of investment vehicles holding units in restricted schemes should be subject to the prospectus requirement under the SFA. In addition, the business conduct requirements under the FAA may apply.

Chapter 11: Unsecured Credit Facilities To Directors, Officers And Employees

11.1 & 11.3: Proposal to repeal section 119 of the SFA and section 24(1) of the FAA

We proposed repealing section 119 of the SFA, which prohibits holders of a capital markets service licence ("licence holders") from granting unsecured credit facilities to their officers, employees and their associated or connected persons ("relevant persons"), for the purpose of dealing in any capital markets product. A similar prohibition contained in Section 24(1) of the FAA would also be repealed.

One respondent commented that it is not prudent for licence holders and financial advisers to grant unsecured credit facilities to the relevant persons. Any form of lending to directors, officers and employees would be risky despite the adoption of a well-planned risk-based supervisory approach. This could ultimately undermine the integrity of the licence holders in the eye of the public. Another respondent commented that the proposal is not useful and the current prohibition should be retained as it gives useful comfort to the public.

MAS' Response

We are of the view that the risk to licence holders arising from the grant of any unsecured credit facilities to their officers and employees has been adequately addressed. First, licence holders will continue to be subject to certain restrictions and limits[7]. Second, licence holders are expected to set internal policy as part of their risk management procedures to ensure that any unsecured credit is granted on a prudent basis.

MONETARY AUTHORITY OF SINGAPORE
26 March 2004

LIST OF RESPONDENTS TO POLICY CONSULTATION ON AMENDMENTS TO THE SFA AND FAA

- 3i Investments plc
- Allen & Gledhill
- ASG Law Corporation
- Chio Lim Stone Forest
- Coutts & Co
- DBS Bank Ltd
- Deloitte & Touche
- Deutsche Asset Management
- Drew & Napier LLC
- Ernst & Young
- General Agents & Managers Association Singapore Chapter
- GYC Financial Advisory Pte Ltd
- Institute of Certified Public Accountants of Singapore
- Insurance & Financial Practitioners Association of Singapore
- Investment Management Association of Singapore
- IPP Financial Advisers Pte Ltd
- KPMG Singapore
- Life Insurance Association, Singapore
- Loo & Partners
- Maybank Singapore
- New Independent
- Rajah & Tann
- S L Tan & Co.
- Schroders
- Securities Association of Singapore
- Singapore Exchange
- Singapore Foreign Exchange Committee
- Singapore Investment Banking Association
- Societe Generale
- Temasek Holdings (Private) Limited
- The Association of Banks in Singapore
- The Hongkong and Shanghai Banking Corporation Limited
- The Law Society of Singapore
- UOB Asia

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[1] The first phase of amendments to the SFA and FAA culminated in the Securities and Futures (Amendment) Act 2003 and the Financial Advisers (Amendment) Act 2003, which came into effect on 22 December 2003.

[2] The definition of 'futures market' refers to a market on which futures contracts are traded, while the definition of 'futures contract' refers back to a contract traded on a futures market.

[3] This means having regard to the investment objectives, financial situation and particular needs of the person receiving the recommendation.

[4] The new conditions require financial advisers to:

a. comply with the applicable laws and rules in the foreign jurisdictions in which they target overseas investors;
b. refrain from holding out that their conduct is regulated by MAS when they provide financial advisory services to overseas investors; and
c. disclose to their overseas clients that the FAA's protections do not cover overseas investors.

[5] MAS is reviewing whether to impose the condition through conditions of licence or exemption, as the case may be, or through

written directions.

[6] Paragraph 5(1)(d) of the Second Schedule of the Securities and Futures (Licensing & Conduct of Business) Regulations.

[7] Section 24(2) of the FAA and Regulation 43 of the Securities and Futures (Licensing and Conduct of Business) Regulations.