

RESPONSE TO FEEDBACK RECEIVED - CONSULTATION PAPER ON DRAFT AMENDMENT BILLS TO THE SECURITIES AND FUTURES ACT AND FINANCIAL ADVISERS ACT

On 22 April 2004, MAS issued a Consultation Paper inviting comments on the draft Securities and Futures (Amendment) Bill ("draft SF(A) Bill") and the draft Financial Advisers (Amendment) Bill.

The consultation period closed on 24 May 2004. Comments were received from 20 respondents (listed in the *Annex*). MAS has carefully considered the comments received and where it has agreed with the comments, incorporated them into the Securities and Futures (Amendment No. 2) Bill 2004 ("revised SF(A) Bill") and the Financial Advisers (Amendment) Bill 2004. The Amendment Bills were introduced for first reading in Parliament on 19 October 2004.

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

COMMENTS RELATING TO PART II (MARKETS)

1. Refining the Regulatory Framework for Markets

The draft SF(A) Bill seeks to rationalise the regulatory framework for the two categories of regulated market operators - approved exchanges and recognised market operators. Approved exchanges will be subject to a higher degree of regulatory oversight than recognised market operators.

A respondent suggested that greater clarity be provided on the different rights and benefits that an approved exchange has over recognised market operators and markets that are exempted from the need to be approved or recognised. This is in view of the fact that an approved exchange is subject to the highest degree of regulatory oversight. The respondent also felt that MAS should use its exemption powers sparingly, and make public the scope of the activities undertaken by market operators.

MAS' Response

We agree with the comments and will elaborate in Regulations and Guidelines on the relationship between the regulatory category for a market operator and the scope of its permitted business activities. Generally, corporations that wish to be permitted to conduct a wider range of activities are likely to be regulated as approved exchanges, as a wide range of business activities would tend to imply increased systemic importance in relation to the markets that it operates. Corporations that operate markets that are not systemically important would be regulated as recognised markets.

We would exempt a market operator from the regulatory requirements only in exceptional circumstances, having regard to the objectives specified in section 5 of the revised Part II (i.e. fair, orderly and transparent markets; reduction of systemic risk; and to facilitate efficient markets.).

To make public the scope of the activities undertaken by market operators, we will publish (on the MAS website or in the Government Gazette or both) the types of activities that the market operator may undertake and the types of instruments that may be traded on the markets that it operates, and the regulatory category of the market operator

COMMENTS RELATING TO PARTS IV (CAPITAL MARKETS SERVICES LICENCE AND REPRESENTATIVE'S LICENCE) AND VI (CONDUCT OF BUSINESS)

1. Exemption from Licensing

Currently, financial advisers ("FAs") licensed under the Financial Advisers Act ("FAA") are exempted from the requirement to hold a capital markets services licence ("CMS licence") under section 99(1)(e) of the Securities and Futures Act ("SFA") in respect of any regulated activity that is solely incidental to their business as a financial adviser. The draft SF(A) Bill proposed removing this exemption.

A respondent commented that any person licensed under the FAA should not require a CMS licence to carry out any of the regulated activities under the SFA, and vice versa. The respondent pointed out that the exemption is critical in addressing potential incidental overlaps in the SFA and FAA and gives licensed FAs comfort as they need not worry about inadvertently breaching the SFA in their everyday business activities. The respondent noted that the removal of the exemption will force licensed FAs to seek licensing under the SFA as well.

MAS' Response

Section 99(1)(e) of the SFA was introduced at a point when the SFA and FAA were newly enacted and was meant to prevent inadvertent breaches of the SFA. For example, MAS had anticipated that the "marketing of collective investment schemes" under the FAA would be deemed as "dealing in securities" under the SFA and provided for an exemption under the Securities and Futures (Licensing and Conduct of Business) Regulations. Given MAS' experience in administering the SFA and FAA over the last two years, there does not appear to be other activities conducted by licensed FAs that should similarly be exempted.

We would like to point out that contrary to the respondent's comments, section 99(1)(e) of the SFA was not meant to allow licensed FAs to conduct SFA-regulated activities. CMS licence holders are subject to higher financial resource requirements than licensed FAs. Allowing licensed FAs to conduct regulated activities under the SFA without subjecting them to similar requirements will lead to an unlevel playing field among intermediaries. The repeal of section 99(1)(e) will eliminate any potential regulatory arbitrage.

MAS intends to implement measures (such as granting a grace period) to help ensure FAs affected by the repeal of section 99(1)(e) of the SFA transit into the new regime smoothly.

COMMENTS RELATING TO PART XIII (OFFERS OF INVESTMENT)

1. Persons Required to Sign the Prospectus or Profile Statement

A respondent commented that the proposed requirement in section 240(4A) of the draft SF(A) Bill for an issuer company's directors and proposed directors to sign on the prospectus was inconsistent with the position under sections 253 and 254 where they are not liable for material deficiencies in the prospectus. It was suggested that the issuer's directors be included in the list of liable persons under sections 253 and 254.

MAS' Response

We agree with the comment. To reconcile the requirements, sections 240(4A), 253 and 254 in the revised SF(A) Bill require the issuer's directors and proposed directors to sign the prospectus and be held liable for any material deficiencies, where:

- a) the issuer is the person making the offer; or
- b) the issuer is controlled by either the person making the offer, one or more of his related parties, or the person making the offer and one or more of its related parties.

2. Validity of a Base Prospectus Issued in Connection with a Debenture Issuance Programme

The draft SF(A) Bill proposed to amend section 250 to provide that a base prospectus issued in connection with a debenture issuance programme will be valid for a period of 12 months. A new section 241(1A) was also inserted to allow the issuer to lodge a supplementary document to update or include new information in the base prospectus without triggering the refund provisions if there was no subsisting offer.

There was overall support for the proposal. Some respondents were of the view that the validity period could be further extended to 24 months.

MAS' Response

We are agreeable to extending the validity of the base prospectus to 24 months. As issuers will be allowed to update information in the base prospectus, we are of the view that there would be sufficient safeguards to ensure that all material and current information are disclosed to investors of subsequent offers of debentures made under the programme. This is reflected in the revised SF(A) Bill.

3. Offers of Asset-Backed Securities

The draft SF(A) Bill proposed to insert a new section 262 to set out the provisions relating to offers of asset-backed securities which are currently contained in the Securities and Futures (Offers of Investments) (Shares and Debentures) Regulations 2002.

Several respondents commented that the definitions of "special purpose vehicle" and "securitisation transaction" do not cater to "two-tier" securitisation deals where a special purpose vehicle is set up to issue securities and another is set up to acquire the assets being securitised.

MAS' Response

We agree with the respondents' comments and have amended the definitions in section 262 such that they will cater to "two-tier" securitisation deals.

4. Exemption for Small Offers

The report of the recommendations of the Company Legislation and Regulatory Framework Committee ("CLRFC Report") proposed to abolish the "public offer" concept and require prospectuses for all offers of investments unless specifically exempted. In particular, Recommendation 2.10 of the CLRFC Report proposed a new private placement exemption, while Recommendation 2.11 of the CLRFC Report proposed a new small offers exemption.

The draft SF(A) Bill proposed to insert new sections 272A and 302B to introduce a new exemption for personal offers of securities or units in a collective investment scheme ("CIS") of up to S\$5 million in any 12-month period made to persons who have previous contact, previous professional or other connection with the person making the offer, or who have previously indicated that they are interested in offers of that kind.

4.1 Concept of Personal Offers

Several respondents commented that the requirement for persons to have "previous contact, previous professional or other connection" is too general and difficult to apply. A respondent was concerned that the requirement could be interpreted so widely that even a "cold call" could be argued as having "previous contact, previous professional or other connection". Another respondent requested for MAS to provide some guidance on the kinds of relationships that would satisfy the "personal offer" test.

MAS' Response

We note the respondents' concern. To avoid the provision from being interpreted too widely and to provide greater certainty to the market, MAS will issue guidance on the kinds of relationships that would (and would not) satisfy the "personal offer" test. For example, a person responding to a "cold call" would not be regarded as a person who had "previous contact, previous professional or other connection" with the offeror.

4.2 12-month Time Period

Most respondents agreed with the 12-month time period. Two respondents, however, suggested that the time period be reduced from 12 months to 6 months to provide flexibility for rapidly growing businesses which would need to raise capital more frequently.

MAS' Response

We do not agree with the suggestion. We are of the view that 12 months would strike the right balance between giving issuers sufficient flexibility and the concern that investors' interests would be compromised if repeated offers without a prospectus are allowed. The 12-month time period is also in line with the recommendation in the CLRFC Report.

5. Private Placement Exemption

The draft SF(A) Bill proposed to insert new sections 272B and 302C to introduce a new exemption for private placements of securities or units in a CIS made to not more than 20 investors (or such other number as may be prescribed by the Authority) during a 12-month period.

5.1 Limit on Number of Offerees

Many respondents commented that the 20-offeree limit was too low, considering that some offerees may refuse to accept the offer. Some respondents pointed out that the proposed limit was smaller than those in other jurisdictions e.g. Hong Kong, UK and the US, and suggested that the limit be increased to 50 offerees and that the limit should be based on the number of persons accepting the offer (as opposed to the number of offerees).

MAS' Response

We are of the view that the limit should apply to the number of persons receiving the offers. If the limit is based on the number of

persons accepting the offer, offers can potentially be made to an unlimited number of persons. This would not accord with the policy intent that private placements should be limited in reach. We note that the CLRFC had also considered the matter and had recommended that the limit be applied to the number of offerees. However, having taken into account market concerns, we are agreeable to the suggestion to increase the offeree limit to 50 persons. This is reflected in the revised SF(A) Bill.

5.2 6-month Presumption in Respect of Subsequent Sales

The proposed new sections 272B and 302C provided that where an offer was made with a view to the securities or units in a CIS being subsequently sold by the offeree, such subsequent purchasers would need to be counted towards the offeree-limit. It was also provided that an offer shall be deemed to have been made with a view to the securities or units being subsequently offered for sale to another person if the subsequent offer was made within 6 months from the date the securities or units were initially acquired under the exemption ("6-month presumption"). The intent of these provisions was to prevent offerors from circumventing the offeree limit by offering the securities or units to 20 offerees who in turn on-sell them to another 20 offerees (and so on).

A respondent was of the view that the 6-month presumption could create an implicit 6-month resale restriction that would negatively impact genuine sellers who needed to dispose of their securities or units. Another respondent commented that the presumption was unfair to the initial offeror because he could be unduly penalised if any subsequent purchaser were to on-sell the securities or units to other persons within the 6-month period without his prior knowledge.

MAS' Response

We note the respondents' concern and have removed the 6-month presumption in the revised SF(A) Bill.

5.3 "Look-through" Provision

a) For the purposes of determining whether the offeree-limit is exceeded, it was proposed in the draft SF(A) Bill that an offer made to an entity or a trustee be treated as an offer made to a single person if the entity or trust was not formed for the purpose of acquiring the securities or units being offered. Conversely, if the entity or trust was formed primarily for the purpose of acquiring the securities or units being offered, an offer made to the entity or trustee will be regarded as an offer made to the equity owners of the entity, or to the beneficiaries of the trust, as the case may be ("look-through provision").

Most respondents agreed with the proposed look-through provision. Two respondents, however, contended that the use of an investment vehicle (e.g. a private investment company) would indicate that the investor is sophisticated and does not require the protection of a registered prospectus. There may also be practical difficulties in ascertaining the beneficial owners of intermediate holding entities as investors who invest through such entities may be unwilling to disclose the information.

MAS' Response

We do not agree that investors who invest through investment vehicles are always sophisticated and would not require the protection of a registered prospectus.

The rationale for the "look-through" provision is to prevent the limit on the number of offerees from being circumvented by purchasers (to whom an offer would not qualify for an exemption individually) forming an entity or trust specifically to participate in an offer under the private placement exemption. If an entity or trust is set up for a bona fide reason and not primarily for the purpose of acquiring the securities or units, it would not be regarded as an attempt to circumvent the requirement and the "look through" provision would not apply.

Offerors will be required to obtain additional information on the number of equity owners or beneficiaries only if the purchasing entity or trust is set up primarily for the purpose of acquiring the securities or units being offered.

In any case, the offeror can also choose to rely on the exemption under section 275 or 305, as the case may be, if each of the equity owners of the entity or beneficiaries of the trust is an individual who is an accredited investor.

b) Two respondents requested for clarification on whether offerors would be required to apply the look-through provision beyond the immediate purchaser.

MAS' Response

The rationale for the "look-through" provision is to prevent purchasers from circumventing the offeree limit by forming one or

more intermediate holding entities or trusts. In this connection, we have inserted a new provision in the revised SF(A) Bill to clarify that an offer made to an entity or trustee with a view to other persons acquiring an interest in the securities or units in CIS being offered (as means to circumventing the requirement) will be considered an offer made to those other persons.

c) A respondent suggested that clarification be provided on whether an offer made to an entity that acts on behalf of other parties or provides advisory services to other parties (apart from trustees) is regarded as an offer made to a single person.

MAS' Response

An offer made to a person who is acting on behalf of other parties (whether as an agent or otherwise) will be regarded as an offer made to those other parties. This is reflected in the revised SF(A) Bill.

6. Proposal to Allow Combined Use of the Private Placement and Small Offers Exemptions

Almost all of the respondents were in favor of the proposal to allow an offeror to invoke the private placement exemption and the small offers exemption concurrently. Several respondents also requested for clarification on whether offerors can invoke the exemptions under sections 274 and 275 concurrently.

MAS' Response

Offerors will be permitted to invoke the private placement exemption, small offers exemption and exemptions under sections 274 and 275 concurrently, provided that such concurrent use does not breach any of the conditions of each exemption.

7. Proposal to Require Aggregation of Closely-Related Offers for the Purposes of the Small Offers and Private Placement Exemptions

In determining whether the applicable limit under the relevant exemption is exceeded, the draft SF(A) Bill proposed that MAS may determine that an individual, entity or trust is closely-related to the person making an offer of securities or units. It was further proposed that any amount raised by such closely-related person from a previous offer of the same securities or units, securities in such a closely-related entity, or interests in such a closely-related trust, should be aggregated.

There were mixed views on this proposal. Respondents who were agreeable to the proposed approach commented that there should be clear guidelines on when entities would be regarded as "closely-related".

A respondent expressed concern that the proposed aggregation provision may cast doubts on whether subsidiaries of a company may rely on the exemptions without their offers being aggregated.

Two respondents were against the proposed aggregation rule. These respondents contended that in cases where multiple financial institutions are appointed to offer or distribute the same securities, each financial institution may not be aware of any other financial institution marketing or distributing the same securities in Singapore. One of the respondents suggested that it be clarified that a person would not be made liable for any breach of the rule if he has no knowledge of other offers and he believes in good faith that it is the only offer in Singapore.

MAS' Response

The intent of the aggregation rule is to prevent offerors from circumventing the specified limits under the small offers or private placement exemptions by issuing or selling securities through related parties. We note the respondents' concern that the proposed approach could result in uncertainties for offerors and their related parties. Hence, we have revised the aggregation rule such that the exact criteria used to determine whether two or more entities are closely-related will be set out in Regulations.

A financial institution that is not acting as a principal to the issue or sale of securities will not be regarded as making an offer under Part XIII of the SFA. We will issue guidance to clarify that a financial institution will not be considered as having breached the aggregation rule if it proves that after making reasonable enquiries, it has no reason to believe that similar offers are being made by other unrelated financial institutions.

8. Advertising Restrictions for Offers Made Under the Small Offers or Private Placement Exemption

Given that offers made under the small offers and private placement exemptions are meant to be limited in reach, a respondent was of the view that offers made in reliance on these exemptions should be subject to advertising restrictions similar to those imposed

for offers made under section 275 and 305.

MAS' Response

We agree with the respondent's suggestion. This is reflected in the revised SF(A) Bill.

9. Renounceable Rights Issues

A respondent was of the view that the proposed section 277A is unnecessary given that section 277 already provides for renounceable rights issue to be exempted from prospectus requirements under certain conditions.

MAS' Response

We agree with the comment. Besides combining the two sections, we have also modified section 277 in the revised SF(A) Bill to allow an offer information statement to be used for all offers of securities issued by an entity whose shares are listed for quotation on a securities exchange. This would, for example, allow an entity whose shares are listed on a securities exchange to issue debentures in reliance on an exemption under section 277. However, the exemption is not intended to cover complex securities such as structured notes, which, due to their nature, may warrant a different set of disclosure requirements. The revised SF(A) Bill provides for MAS to have the power to exclude such securities from the exemption.

10. New Section 300(2B) Allowing Certain Oral and Written Material

The proposed new section 300(2B) seeks to allow certain oral or written material to be presented to institutional and accredited investors before a prospectus or profile statement was registered by MAS, if such material was on matters contained in a preliminary document which had been lodged with.

A respondent commented that it is market practice for CIS managers to conduct training sessions on the CIS for their distributors, during the period between the lodgment date and registration date of the prospectus. The respondent proposed that the new section 300(2B) should be expanded to allow such training sessions to be conducted.

MAS' Response

To equip distributors with the necessary knowledge of the CIS to be offered, we agree that CIS managers should be allowed to conduct training sessions for their distributors before the prospectus or profile statement is registered by MAS. This is reflected in section 300(2B)(b) of the revised SF(A) Bill.

11. Proposal to Allow Offerors to Send Notice to Inform Applicants of Lodgment of a Supplementary or Replacement Document

The SFA allows for a supplementary or replacement document to be lodged with MAS in the event of a material deficiency in the original document. As an alternative to sending the supplementary or replacement document ("correcting document") to applicants, the draft SF(A) Bill proposed to amend sections 241 and 298 to allow the offeror inform applicants notice in writing of how to obtain, or arrange to receive, the correcting document within two business days from the date of lodgement of the correcting document.

Though most respondents were supportive of the proposed alternative, several respondents commented that two business days may be insufficient for CIS distributors to inform scheme participants.

MAS' Response

We note the respondents' concern. We will issue guidelines to clarify that the manager of a CIS need only, within two business days from the date of lodgment of the correcting document, inform participants whose names are entered in the register of the scheme (i.e. where units are held by the distributors' nominees, the manager need only notify the nominees within two business days).

To ensure that participants who purchase units through a distributor and whose names are not entered in the register of the scheme are informed in a timely manner of material changes in the prospectus or profile statement, we will provide in the Code on Collective Investment Schemes ("CIS Code") that the manager should require its distributors to put in place arrangements for such participants to receive the notices within five business days from the date of lodgment of the correcting document.

12. Amendments to the CIS Code

In relation to the above amendments to section 298(10) and the corresponding amendments to the CIS Code, we also proposed -

- (a) setting out an explicit list of changes to a scheme which would require prior notification to unitholders pursuant to paragraph 4.2(d) of the CIS Code; and
- (b) introducing a new requirement in the CIS Code that an extraordinary resolution of participants must be obtained prior to any change being made to the trust deed of a scheme, unless the trustee gives a certification to the effect that the change does not constitute a fundamental change to the scheme.

MAS' Response

We will respond shortly to comments on the above proposals together with other comments on our Consultation Paper on Amendments to the Code on Collective Investment Schemes issued separately on 7 Apr 2004.

MONETARY AUTHORITY OF SINGAPORE
19 October 2004

ANNEX

LIST OF RESPONDENTS

1. Allen & Gledhill
2. Chio Lim Stone Forest
3. Citicorp Trustee (Singapore) Limited
4. Ernst & Young Corporate Finance Pte Ltd
5. General Insurance Association of Singapore
6. Institute of Certified Public Accountants of Singapore
7. Investment Management Association of Singapore
8. Life Insurance Association, Singapore
9. New Independent
10. OCBC Asset Management Ltd
11. Schroder Investment Management (Singapore) Ltd
12. Securities Association of Singapore
13. SG Asset Management (Singapore) Ltd
14. Singapore Exchange Limited
15. Singapore Insurance Brokers' Association
16. Tan Kok Quan Partnership
17. Temasek Holdings (Pte) Ltd
18. The Association of Banks in Singapore
19. The Development Bank of Singapore Ltd
20. The Law Society of Singapore

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