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Annex 4

Technical Issues relating to Offers of Investments

MAS

Monetary Authority of Singapore

TECHNICAL ISSUES RELATING TO OFFERS OF INVESTMENTS

1 Private Placement and Small Offering Exemptions

Introduction

1.1 In its October 2002 report, the Company Legislation and Regulatory Framework Committee (“CLRFC”) recommended replacing the existing distinction between public and private offers with an approach which requires a prospectus for all offers of securities, unless the offer is specifically exempted under the SFA.

1.2 To supplement the existing “safe harbours” under the SFA, the CLRFC recommended the following:

- (a) a private placement exemption for offers to up to 20 pre-identified offerees to raise unlimited funds without resale restrictions; and
- (b) a small offering exemption for offers up to S\$5 million (computed based on the funds raised) in any 12-month period to offerees who have –
 - (i) previous contact with the person making the offer; or
 - (ii) some professional or other connection with the person making the offer; or
 - (iii) indicated that they are interested in offers of that kind through some statements or actions.

Resales of securities which were acquired pursuant to the small offering exemption will, for a period of 6 months after the initial acquisition, be confined to persons with similar relationships with the offeror.

1.3 MAS will be amending the SFA to implement these recommendations. MAS would like to seek your views on whether:

- (a) an offeror should be allowed to invoke the private placement exemption to make an offer and concurrently use the small offering exemption for another offer;

- (b) an offer to an entity, a trustee or persons acquiring the securities jointly should be treated as an offer to a single person for the purposes of the private placement exemption;
- (c) the number of offerees or amount raised via multiple offers of the same securities by the same person should be aggregated for the purposes of determining whether an offer is exempted under the private placement or small offering exemption; and
- (d) the number of offerees or amount raised via multiple offers of the same securities by different persons or multiple offers of different securities by the same person should be aggregated for the purposes of determining whether an offer is exempted under the private placement or small offering exemption.

Combined Use of the Private Placement and Small Offerings Exemptions

1.4 Under the current framework, the concept of a “public offer” determines whether the scope of an offer of securities is such that a prospectus should be required for the protection of potential investors. Where an offer is not “public”, a prospectus is not required as the impact of the offer is considered small and the cost of providing a prospectus outweighs the resulting protection to investors.

1.5 With the abolition of the “public offer” concept, the private placement and small offering exemptions, amongst others, will determine whether prospectuses are required for offers of investments. The objective nonetheless is still to exempt from prospectus requirements only those offers where, due to their limited scope in terms of the number of offerees and the amount raised, the cost of providing a prospectus outweighs the resulting protection to investors.

1.6 In view of this objective, it is relevant to consider whether an offeror should be allowed to invoke the private placement exemption to make an offer and concurrently use the small offering exemption for another offer. The question is whether such combined offers could be of such a magnitude that a prospectus should be required for investor protection.

1.7 If both the private placement and small offering exemptions are invoked concurrently, the potential size and scope of the offer using both exemptions will be as follows:

up to \$5 million to an unlimited number of connected persons¹
+
unlimited amount to no more than 20 pre-identified persons

1.8 The “small offering” portion of the combined offer can be offered to an unlimited number of persons but will be restricted to persons with the required connections and subject to a \$5 million limit. There will also be a resale restriction on the securities in the “small offering” portion². The “private placement” portion can be of an unlimited amount but may be offered to no more than 20 persons.

1.9 It will not be possible to make an offer of an unlimited amount of securities to an unlimited number of unconnected persons by invoking both exemptions. As the general public would still be excluded from investing in such combined offers, the overall impact, in terms of the scope and number of potential investors, would still be small. Therefore, MAS proposes to allow an offeror to invoke the private placement exemption to make an offer and concurrently use the small offering exemption for another offer³.

1. MAS seeks your views on the proposal to allow the combined use of the private placement and small offering exemptions.

¹ See paragraph 1.2 above on the connection required.

² See paragraph 1.2 above on the resale restrictions.

³ For comparison, the UK Financial Services and Markets Act 2000 does not allow the combined use of its private placement and small offerings exemptions: see Financial Services and Markets Act 2000, paragraphs 2, 4 and 9.

The U.S. exempts from registration requirements certain limited offers and sales of securities through Regulation D under the Securities Act of 1933. Rule 504 under Regulation D exempts offers of up to US\$1 million to an unlimited number of purchasers. Rule 505 exempts offers of up to US\$5 million to no more than 35 purchasers. Rule 506 exempts offers of any amount to no more than 35 purchasers provided they have such knowledge and experience in financial and business matters that they are capable of evaluating the merits and risks of the prospective investment. There is no rule preventing an issuer from using two or more of these exemptions concurrently.

The Australian Corporations Act 2000 exempts small scale offerings of up to A\$2 million that are made to no more than 20 investors. As there is no equivalent of the private placement exemption, the issue of combining the two exemptions does not arise.

Offers to Entities, Trustees and Persons Acquiring Securities Jointly

1.10 A corporation, partnership or other entity can be considered as a single person or a group of persons. Similarly, we may look through to the number of beneficiaries for whom a trustee acts. On the other hand, two or more persons acquiring securities jointly can be considered as a single person to the extent that they own the securities jointly, each person having the right of survivorship. It is necessary to consider whether an offer made to an entity, a trustee or persons acquiring securities jointly should be counted as an offer to one person for the purposes of the private placement exemption.

1.11 MAS proposes to adopt the following approach for calculating the number of offerees when the private placement exemption is invoked:

- (a) an offer to a corporation, partnership or other entity, or an offer to a trustee will be treated as an offer to a single person provided that the corporation, partnership, entity or trust is not formed primarily for the purpose of acquiring the securities being offered; and
- (b) an offer to a corporation, partnership or other entity, or an offer to a trustee will be treated as an offer to the equity owners or the members of the corporation, partnership, or entity, or to the beneficiaries of the trust, as the case may be, if the corporation, partnership, entity or trust is formed primarily for the purpose of acquiring the securities being offered.

1.12 For an offer to a corporation, partnership or other entity or to a trustee to be treated as an offer to a single person, MAS is of the view that it is necessary to include a condition that the corporation, partnership, entity or trust must not be formed primarily for the purpose of acquiring the securities being offered. This is to prevent the circumvention of the 20-person limit by separate purchasers forming a corporation, partnership or other entity or trust specifically to participate in the offer.

1.13 The proposal is consistent with the practice in the US, where a corporation, partnership or other entity would normally be regarded as one purchaser under the Regulation D exemptions. However, if the entity is organised for the specific purpose of acquiring the securities being offered, then each beneficial owner of equity securities or interests in the entity will count as a separate purchaser.

1.14 MAS proposes to treat an offer to two or more persons who will own the securities acquired as joint owners as an offer to a single person. As each joint owner will have the right of survivorship, it is unlikely that unrelated persons will be willing to purchase securities jointly in order to assist the offeror in circumventing the 20-person limit.

1.15 This is similar to the UK Financial Services and Markets Act 2000, which treats an offer of securities to any two or more persons jointly as an offer to a single person⁴.

2. MAS seeks your views on the approach proposed in paragraphs 1.11 and 1.14 for determining the number of offerees when the private placement exemption is invoked.

Whether Multiple Offers of the Same Securities by the Same Person should be Treated as a Single Offer

1.16 The CLRFC's proposed private placement exemption will allow offers to no more than 20 persons to be made without a prospectus. To prevent an offeror from circumventing the 20-person limit by breaking up an offer into separate tranches to be offered on different dates to no more than 20 persons each time, MAS proposes the following test in determining whether the 20-person limit under the private placement exemption has been exceeded. An offer would be regarded as the same offer which was made earlier if –

- (a) it is made by the same person at any time within 12 months of the first offer; and
- (b) the earlier offer was an exempted offer only because of the private placement exemption⁵.

1.17 In other words, an offer of securities would qualify for the private placement exemption only if the number of offerees for the offer, taken together with the number of offerees for all other offers of the same securities made by the same person within 12 months prior to the first-mentioned offer and which were exempted under the private placement exemption, does not exceed 20.

⁴ See Financial Services and Markets Act 2000, Schedule 11, paragraph 4(3).

⁵ This approach is similar to those adopted in the UK and US. In the UK, an offer of securities made to no more than 50 persons is an exempt offer under the Financial Services and Markets Act 2000. To determine whether the 50-person condition is satisfied, the offer is taken together with any other offer of the same securities which was made by the same person and was open within the period of 12 months ending on the date of the offer and which was exempted under the same exemption: see Financial Services and Markets Act 2000, Schedule 11, paragraph 4. In the US, a similar approach is adopted (but with a 6-month time limit) for offers exempted under Regulations D from registration under the Securities Act of 1933: see *Rule 502(a) of Regulation D under the Securities Act 1933*.

1.18 In considering what time limit should be imposed, it is necessary to balance the need to allow issuers sufficient flexibility to raise funds under the private placement exemption with the concern that investors' interests would be compromised if repeated offers are allowed to be made without a prospectus. MAS believes that the proposed 12-month limit strikes the right balance. A 12-month limit is also consistent with the time limit recommended by the CLRFC in respect of the small offering exemption.

1.19 MAS also proposes to adopt a similar approach for the small offering exemption. That is, in determining whether the amount raised by an offer exceeds \$5 million, the amount raised from the offer will be taken together with the amounts raised through any other offer of the same securities which –

- (a) was made by the same person at any time within the period of 12 months ending with the date on which the first mentioned offer is made; and
- (b) was an exempted offer only because of the small offering exemption.

1.20 This means that an offer of securities would qualify for the small offering exemption only if the amount raised from the offer, taken together with the amount raised through all other offers of the same securities made by the same person under the same exemption within a 12-month period, does not exceed \$5 million.

3. MAS seeks your views on the proposals at paragraphs 1.16 and 1.19 relating to multiple offers of the same securities by the same person.

Whether Multiple Offers of Securities Offered by Different Persons or Issued by Different Issuers should be Treated as a Single Offer

1.21 MAS recognises the risk that issuers or vendors may try to circumvent the conditions of the exemptions by issuing or selling securities through related parties or to a number of intermediaries who may then resell the securities.

1.22 On the other hand, MAS notes that aggregation of multiple offers may not always be warranted and that overly prescriptive rules could render the exemptions to be of limited use in practice.

1.23 On balance, MAS proposes to adopt the following treatment for multiple offers of securities which are issued by different entities and/or offered by different persons:

- (a) Offers made by different persons as agents of a single issuer or vendor will be treated as a single offer;
- (b) Offers made by different persons of the same securities that were issued with a view to them being offered for sale will be treated as a single offer if they are made within 6 months of the issue of the securities⁶;
- (c) Any offer of securities made by an individual, entity or trust which is closely related to the offeror or of securities of, or interests in, such entity or trust, will be taken together when determining whether the applicable limit under the relevant exemption has been exceeded.

1.24 The proposed approach is similar to that adopted in Australia⁷. To provide certainty to the market, MAS proposes to issue guidance on when parties would be regarded as “closely related”. For instance, MAS would require offers of the same securities by related corporations to be aggregated if they were made under the same exemption within a 12-month period.

4. MAS seeks your views on the proposed treatment in paragraph 1.23 of multiple offers of securities which are issued by different entities and/or offered by different persons.

2 Supplementary And Replacement Prospectuses And Profile Statements

Current Provisions

2.1 Under section 241(1) of the SFA, a person making an offer of shares or debentures may lodge a supplementary or replacement prospectus or profile statement (“correcting document”) when he becomes aware of any defect in the registered prospectus or profile statement (“original document”) or to reflect any new circumstance that has arisen since the lodgment of the original document that is materially adverse from the point of view of an investor. Where an application has been made under the original document,

⁶ This approach is similar to the Australian provisions except that it does not go as far as to disallow offerors of securities that were purchased with the purpose of selling them from using the exemptions altogether. Excluding such offerors from using the exemptions would amount to putting a general resale restriction which is not the intention here.

⁷ Section 740 of the Australian Corporations Act 2001 provides ASIC with the power to aggregate offers of securities by entities which are closely related.

section 241(8) requires the person either to refund all application monies or to send a copy of the correcting document to the applicant and to give him the option to withdraw his application or return the issued shares or debentures.

2.2 Section 298(1) similarly provides for the lodgment of a correcting document for an offer of units in a collective investment scheme (“CIS”). Section 298(10) requires such correcting document to be sent to all applicants and all existing participants of the CIS.

Feedback

2.3 We have received industry feedback that the requirement to send the correcting document to all applicants is onerous and that it should suffice to alert applicants to the availability of the correcting document. Some practitioners have suggested that for CIS prospectuses, it should not be necessary to provide the correcting document to existing participants who did not subscribe for units on the basis of the original document being corrected.

Practices in Other Jurisdictions

2.4 In Australia, the offeror is required to give applicants the correcting document (if it corrects a materially adverse deficiency) and the option to withdraw their applications and be repaid (unless the offeror chooses simply to refund all monies to the applicants). This is largely similar to the current requirement under section 241(8) of the SFA. In the UK, reasonable steps must be taken to bring corrections to the attention of applicants and potential investors before a responsible person can be exempted from liability to pay compensation for false or misleading statements in, or omissions from, prospectuses under the Financial Services and Markets Act 2000 and the Collective Investment Schemes Sourcebook.

Proposals

(A) Informing applicants of availability of a correcting document

2.5 As an alternative to sending a copy of the correcting document, MAS proposes allowing under sections 241(8) and 298(10) the option to send applicants⁸ a notice (e.g. a letter) advising them of how to obtain a copy of the correcting document. Where such a notice is sent, the offeror or responsible person is expected to send a copy of the correcting document, at no cost, to an applicant upon request. The sending of a notice, rather than the correcting document itself, may delay the receipt of the correcting document by interested

⁸ In the case of a CIS, “applicants” includes participants who had earlier subscribed for their units on the basis of the original document being corrected..

applicants. This may disadvantage applicants as they must exercise their option to withdraw or to return the issued securities within 14 days from the date of lodgment of the correcting document. To minimise any delay, MAS proposes that the notice should be sent within 2 business days from the date of lodgment of the correcting document.

2.6 The intent is to ensure that all applicants are made aware on a timely basis that there has been a material change in the prospectus. MAS does not consider that advertisements in newspapers or other media in lieu of sending a notice to all applicants would be adequate to achieve this intent. Firstly, not all applicants may view the advertisements. Secondly, it would place an unfair onus on applicants to look out for changes to prospectuses by monitoring newspapers or other media.

5. MAS seeks your views on the proposal to allow a person who lodges a correcting document to send applicants a notice advising them of the availability of the correcting document instead of the correcting document itself. MAS also invites your comments on the proposal to require such notice to be sent within 2 business days from the date of lodgment of the correcting document.

(B) Removing the need to send CIS correcting documents to existing participants who did not subscribe for units on the basis of the original document

2.7 MAS proposes to remove the requirement in section 298(10) for correcting documents in relation to CIS to be sent to existing participants of the scheme who did not subscribe for units on the basis of the original document being corrected. As such participants would not have relied on the original document in deciding whether to invest in the scheme, there should not be a need to send the correcting document to them.

2.8 Paragraph 4.2(d) of the Code on Collective Investment Schemes (CIS Code) already requires the manager of a CIS to inform existing participants of significant changes to the scheme not later than one month before the change is to take effect. With the removal of the requirement in section 298(10) to send correcting documents to participants who did not subscribe for units on the basis of the original document, we intend to amend paragraph 4.2(d) to clarify the circumstances that will constitute significant changes for which prior notification is required. We have considered the requirements in other jurisdictions concerning prior notification or investor approval of a change in a CIS, and have identified the following as examples of significant changes that require advance notification:

- (a) a change in the investment objective or focus of the scheme or in the investment approach of the manager as stated in the prospectus or trust deed;
- (b) an increase in the remuneration payable to the manager or trustee (even where the remuneration is not increased beyond the maximum amount provided for in the trust deed or prospectus) or a change in the basis upon which such remuneration is determined;
- (c) an increase in any other fees or charges payable out of the scheme property that amount to 0.1% or more of the scheme's NAV or in any fees or charges payable by the participants;
- (d) an amendment to the trust deed or prospectus to allow a new form of remuneration or expense payable out of the scheme property;
- (e) the appointment of a new manager, sub-manager, investment adviser or trustee to the scheme;
- (f) a variation in the rights or obligations of a participant as set out in the trust deed and prospectus;
- (g) a change in the method of calculating the value of units in the scheme;
- (h) a change referred to in sub-paragraphs (a) to (g) in relation to an underlying fund into which the scheme feeds substantially (i.e. 30% or more of the NAV of the scheme).

The above examples represent situations that may cause a participant to reconsider his participation in the scheme. Sufficient prior notification of such changes would allow an investor to redeem his units before the changes take effect if he so chooses.

6. MAS seeks views on whether the list of changes to the scheme that require prior notification is appropriate and whether other examples should be included.

2.9 In addition to the notification requirement in paragraph 4.2(d) of the CIS Code, we propose making it mandatory to obtain an extraordinary

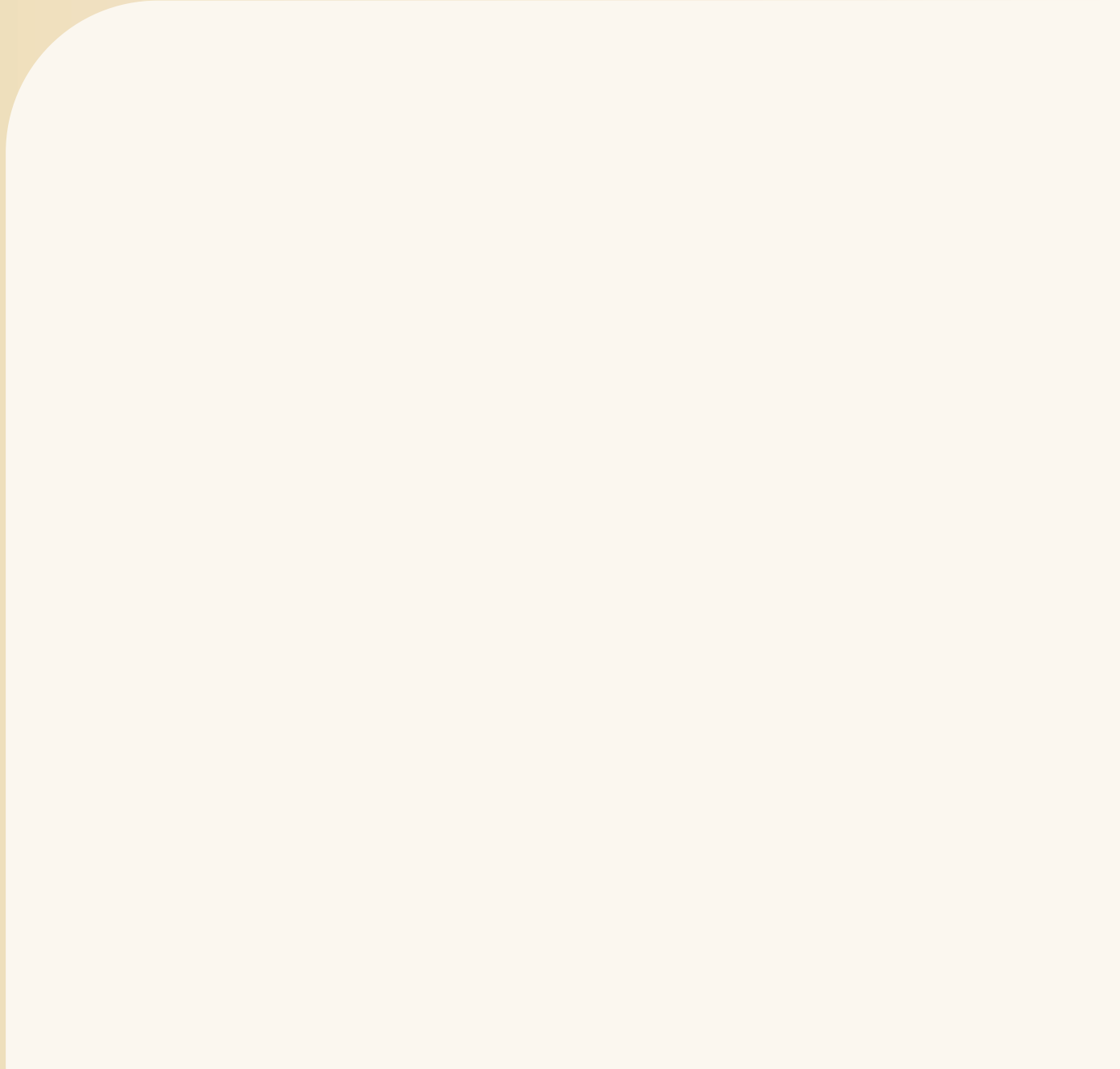
resolution of participants⁹ for any modification of the trust deed unless the trustee certifies that the modification –

- (a) does not materially prejudice the interests of participants and does not release to any material extent the trustee or manager from any responsibility to the participants; and
- (b) is necessary in order to comply with applicable fiscal, statutory or official requirements (whether or not having the force of law) or is made to remove obsolete provisions or to correct manifest errors.

2.10 We consider that any modification to the trust deed for which the trustee’s certification is not given would represent a fundamental change that may materially prejudice the interests of participants. We are therefore of the view that the approval of participants should be obtained for any such fundamental change. This would include any change to the investment objectives of the scheme, the maximum remuneration payable to the trustee or manager and the fees or charges payable by the scheme. Many trust deeds already contain such a requirement for participants to approve fundamental changes. Making it an express legal requirement would ensure consistency among schemes. The proposal is also broadly in line with similar requirements in other jurisdictions including Australia, Hong Kong and the United Kingdom.

7. MAS seeks your views on the proposal to require an extraordinary resolution of participants for changes to the trust deed of a scheme unless the trustee’s certification is obtained. MAS also invites your feedback on whether there are other fundamental changes to the scheme that would not involve modifying the trust deed but should nonetheless be subject to the approval of participants.

⁹ Section 295 of the SFA currently requires an extraordinary resolution of participants to wind up a CIS where the manager is in liquidation or, in the opinion of the trustee, has ceased to carry on business or has, to the prejudice of the participants, failed to comply with any provision of the trust deed in respect of the scheme.



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