RESPONSE TO FEEDBACK RECEIVED - CONSULTATION PAPER ON DRAFT REGULATIONS AND GUIDELINES PURSUANT TO THE SECURITIES AND FUTURES (AMENDMENT) ACT 2005 AND FINANCIAL ADVISERS (AMENDMENT) ACT 2005

On 26 January 2005, MAS issued a consultation paper inviting comments on the draft Regulations and Guidelines pursuant to the Securities and Futures (Amendment) Act 2005 ("SF(A)A") and Financial Advisers (Amendment) Act 2005 ("FA(A)A").

The consultation closed on 25 February 2005. Comments were received from 21 respondents (listed in the Annex). MAS has carefully considered the comments received and where it has agreed with the comments, incorporated them into the relevant Regulations and Guidelines pursuant to the SF(A)A and FA(A)A.

MAS thanks all respondents for their feedback. Comments of wider interest and MAS' responses are highlighted below. MAS will publish its responses to comments received on the proposed Regulations pursuant to Part XIII of the Securities and Futures Act ("SFA") on Offers of Investments together with the issuance of those Regulations, later in the third quarter of 2005.

Comments on the Draft Securities and Futures (Licensing and Conduct of Business) (Amendment) Regulations

1. Additional Licence Fee for Establishing and Operating a Facility for Dealing in Securities

The draft Regulations had proposed to impose an additional licence fee on a holder of a capital market services licence ["CMSL"] for establishing and operating a facility for dealing in securities. This provision was intended to apply to CMSL holders who deal in shares or debentures which are not listed on a securities exchange, through a facility that is used solely by the CMSL holder to make offers or invitations for these products.

Respondents had sought clarification on the rationale for the imposition of additional fees and commented that licence fees should be "technology-neutral" and should not depend upon the platform through which dealing in securities is conducted. Further, respondents had requested that the types of facilities to which the requirement would apply be specified.

MAS' Response

MAS had considered imposing additional fees as the establishment and operation of a facility for dealing in securities would result in higher regulatory costs by MAS in exercising supervisory oversight. In view of the issues raised by respondents, and recognising that business models of CMSL holders operating dealing facilities are still evolving, MAS will study this in greater detail.

2. Exemption from Section 122 of the Act

The draft Regulations proposed an exemption from the requirement to give priority to customers' orders under section 122 of the SFA if the transaction was entered into in accordance with the business rules or practices of the securities exchange or futures exchange.

A respondent sought clarification on whether the exemption applies to transactions executed on overseas exchanges.

MAS' Response

The exemption from section 122(1) of the SFA applies to any transaction entered into in accordance with the business rules or practices of an approved exchange under the SFA. As the Singapore Exchange Securities Trading Limited and Singapore Exchange Derivatives Trading Limited will initially be the only approved exchanges under the SFA, the exemption from section 122(1) does not apply to transactions excuted on overseas securities or futures exchanges.

3. Definition of "Collateral" for Securities Borrowing and Lending Activity

Draft Regulation 45 proposed to widen the range of instruments that can be accepted as collateral for securities borrowing and lending activity.

Respondents asked for clarification of the term "collateral" and queried if banker's guarantees and letters of credit could be considered as viable sources of collateral. Respondents also sought to clarify if the expression "in the possession or control of

the holder" allows for collateral to be held by third party custodians.

MAS' Response

Our policy intent is to allow a wider range of instruments to be accepted as collateral, so long as the instrument meets the definition of "collateral" as set out in the Regulations. In regulation 45 (5), MAS has explicitly set out the acceptable forms of collateral including banker's guarantees and letters of credit. However, CMSL holders are expected to practise prudent risk management when deciding the types of collateral to accept for the purpose of securities borrowing and lending activity, even though it meets the criteria set out in the definition of "collateral".

With regard to third party custodians, MAS is of the view that whether there is possession or control by third party custodians depends on the terms of the custodial agreement. Generally, if third party custodians only have plain custody of the asset (ie. they do not have the right to exercise control over the assets), the borrower who put up the collateral is still deemed to have "possession or control".

4. Exemption from the Requirement to Hold a Capital Markets Services Licence for Fund Management on Behalf of Not More Than 30 Qualified Investors

Currently, a person who undertakes fund management on behalf of not more than 30 qualified investors is exempted from the requirement to hold a CMSL. The draft Regulations proposed to clarify that the licensing exemption was available only to persons who conduct fund management activities in Singapore.

A respondent sought clarification of the expression "undertaking fund management in Singapore", in particular, whether the following factors are relevant considerations:-

(i) whether the assets (which are subject to fund management) or part thereof are situated in Singapore;
(ii) whether the customers or part thereof are situated in Singapore; and
(iii) whether the investment decisions are made in Singapore.

MAS' Response

We are of the view that the exemption should be made available only to persons who undertake substantial portion of their fund management activities in Singapore. MAS considers the location of assets under management or customers to be less critical factors in determining whether the fund management activity is conducted in Singapore, as compared to the location where investment decisions are made. In addition, MAS would take into consideration, the following factors, including the location where business development, investment decision-making, research, trade execution and allocation, monitoring and reporting is carried out.

5. Cessation of Licensing Exemption for Holders of Capital Markets Services Licences

The draft Regulations proposed that the exemptions from licensing under paragraphs 4(1)(c), 5(1)(d) and 7(1)(b) of the 2nd Schedule to the Securities and Futures (Licensing and Conduct of Business) Regulations ["SFR(LCB)"][1] would cease if the exempted person acquires a CMSL under the SFA for any regulated activity. Some respondents sought to clarify the policy intent of the proposed amendment.

Some respondents also opined that the proposed amendment does not seem to apply to exempt persons under the SFA (such as licensed banks and merchant banks) who may continue to rely on the exemptions under paragraphs 4(1)(c), 5(1)(d) and 7(1)(b) of the 2nd Schedule to the SFR(LCB). There is therefore no level playing field between CMSL holders and such exempt entities.

The respondents further suggested that MAS consider exempting the representatives of such previously exempt persons from examination requirements that apply to licensed representatives, as a result of the cessation of licensing exemption.

MAS' Response

The rationale for disallowing CMSL holders from operating as exempt entities under paragraphs 4(1)(c), 5(1)(d) or 7(1)(b) is to minimise possible confusion to the public. We are of the view that it may be difficult for members of the public to distinguish between the activities of a CMSL holder which are regulated, from those activities of the same licensee which are exempted from licensing.

Financial institutions that are exempt under section 99 of the SFA are already regulated by MAS under other legislation administered by MAS. Although these exempt entities are exempted from licensing requirements in Para 4, 5 or 7 of the 2nd Schedule to the SFR (LCB), they are subject to certain conduct rules and regulations as set out in Regulation 54. Hence, there is a level playing field between CMSL holders and such exempt entities.

MAS will allow a transitional period of six months for CMSL holders, who have previously relied on exemptions under paragraphs 4(1)(c), 5(1)(d) or 7(1)(b), to vary their licence.

All representatives of CMSL holders and exempt financial institutions are subject to examination requirements as stipulated in MAS' Notice on Minimum Entry and Examination Requirements For Representatives of Holders of Capital Markets Services Licence and Exempt Financial Institutions. A transitional period of six months will be provided for individuals who have previously relied on exemptions under paragraphs 4(1)(c), 5(1)(d) or 7(1)(b), to pass the requisite examinations. Exemptions from certain examination modules are available for representatives who meet the criteria specified in the aforesaid Notice.

Comments on the Draft Securities and Futures (Prescribed Specific Classes of Investors) Regulations

6. Definition of "Accredited Investor"

Respondents had sought clarification on when joint accounts may be considered as "Accredited Investors". In particular, they suggested that joint accounts could be treated as accredited investors if one of the account-holders (the primary decision-maker) is an accredited investor, notwithstanding that other account holders may not be an accredited investor.

MAS' Response

As a joint account is not a legal entity, it would not be suitable to treat the joint account as an accredited investor. Instead, MAS is of the view that each account-holder should be treated as befits their status. For example, an account-holder who is an accredited investor may enjoy certain exemptions and subscribe to sophisticated offers. However, should the financial institution be dealing with an account-holder who is not an accredited investor, the relevant rules should be adhered to. This approach is consistent with our policy intent and administratively simpler as it will be able to account for the wide range of joint accounts available without the need to classify account holders as primary decision-makers.

Comments on the Draft Financial Advisers (Amendment) Regulations

7. Disclosure where Financial Advisers have been Granted Certain Exemptions

The draft Financial Advisers (Amendment) Regulations ("FA(A) Regulations") proposed requiring licensed and exempt financial advisers (collectively referred to as "FAs") and their representatives to disclose the fact that they are exempted from Sections 25, 27 and 36 of the Financial Advisers Act[2] ("FAA"), to an accredited investor or expert investor to whom the financial advisory service is being provided.

Respondents expressed concern that this would be unduly cumbersome and would not be of interest to the majority of accredited investors or expert investors. Clarification was sought on the form and extent of the disclosures that MAS expects. Respondents suggested that they be allowed to use a blanket, one-time disclosure of all applicable exemptions or to refer clients to the relevant regulations.

MAS' Response

The purpose of the disclosure requirement is to ensure that these accredited and expert investors are aware of the limited protection accorded to them under the FAA, so that they can exercise greater caution to take care of their own interests when dealing with the FAs. MAS does not intend to prescribe the exact form for which such disclosures should take. MAS expects FAs to comply with both the letter and spirit of this requirement, bearing in mind the rationale for the requirement. It is in the interest of the FAs to ensure that there is adequate disclosure to clients. In this regard, FAs should formulate their own procedures to ensure that their clients are able to fully appreciate the effect of the exemption enjoyed by the FAs.

8. Exemption for Advising Overseas Investors

The draft FA(A) Regulations proposed providing an exemption from the business conduct requirements under the FAA, except for Section 33[3], when providing financial advisory service to overseas investors.

Respondents sought clarification on the criteria for a person to be considered an overseas investor, in particular, whether the exemption would be extended to legal persons, i.e. corporations. Respondents also argued that it would be difficult to verify and monitor whether a customer was "wholly or partly dependent" on a Singapore citizen or a Permanent Resident ("PR"). They suggested that FAs be allowed to rely on customer declarations in such instances.

MAS' Response

The exemption will apply to the provision of financial advisory service to natural and legal persons who are outside of Singapore. In the case of a natural person, he must not be a citizen or PR of Singapore, and must not be wholly or partly dependent on a citizen or PR of Singapore. In the case of a legal person, it must not have a commercial or physical presence in Singapore. MAS does not intend to prescribe the means by which FAs conduct their verification of the clients' status in this regard. FAs may opt to rely on customer declarations that they are not wholly or partly dependent on a Singapore citizen or PR, so long as such declarations are reasonable considering all other available evidence.

---

[1] The licensing exemptions apply to persons who carry on a business in leveraged foreign exchange trading with accredited investors, persons who conduct fund management on behalf of not more than 30 qualified investors and persons who carry on a business in giving advice on corporate finance to accredited investors.

[2] These sections require FAs to disclose all product information to their clients, have a reasonable basis for recommendation of any investment product and disclose any interest in securities to their clients.

[3] Section 33 of the FAA states that no licensee shall, in the course of his business, negotiate any contract of insurance with an insurer, except with a registered insurer acting in the course of his business.

ANNEX

LIST OF RESPONDENTS

1. ABN AMRO Bank N.V Singapore
2. Allen & Gledhill
3. Citibank N.A., Singapore Branch
4. Citicorp Investment Bank (Singapore) Ltd
5. Ernst and Young, Singapore
6. KPMG Singapore
7. Life Insurance Association, Singapore
8. Man Financial (Singapore) Private Limited
9. Oversea-Chinese Banking Corporation Limited
10. Phillip Securities Private Limited
11. Prudential Asset Management (Singapore) Limited
12. Schroder Investment Management (Singapore) Limited
13. Securities Association of Singapore
14. Singapore Exchange Limited
15. Singapore Institute of Directors
16. Tan Kok Quan Partnership
17. The Association of Banks in Singapore
18. The Law Society of Singapore
19. The Society of Remisiers (Singapore)
20. UBS AG, Singapore Branch
21. Wong Partnership

Last modified on 30/3/2007