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Chapter 5: Offers of Investments

Monetary Authority of Singapore

CHAPTER 5: OFFERS OF INVESTMENTS

Section A: New Prospectus Exemption for Offers Made to Persons Who Satisfy the "Knowledge Test"

Under a disclosure-based regime, it is paramount for investors to be provided with full, timely and accurate information to allow them to make informed investment decisions. In the context of securities offerings, the SFA requires all material information to be disclosed in prospectuses to potential investors and imposes criminal and civil liabilities on issuers and their advisers to ensure that they exercise due care in gathering and providing such information.

Safe Harbours

2 There are, however, circumstances where the cost of issuing a prospectus outweighs the benefits of greater disclosure and investor protection. In this connection, the SFA provides for safe harbours in respect of offers made to a restricted group of persons (e.g. private placements and small offers not made to the public at large) or to persons who have the means to look after their own interests (eg. institutional and accredited investors). These prospectus exemptions are available to offers of all forms of securities including shares, debentures, collective investment schemes, business trusts as well as rights, options or derivatives in these financial instruments.

3 To further develop the Singapore capital market, the industry has requested that MAS considers expanding the range of investors to whom offers may be made without a prospectus.

"Knowledge Test" Prospectus Exemption in Australia and the UK

4 Australia and the UK have introduced prospectus exemptions for offers made to individuals who have sufficient knowledge and skill to invest in securities ("**knowledge test**") but who do not satisfy the requisite value in assets to qualify as an accredited investor.

5 Australia provides prospectus exemptions for offers made to persons "qualified" by financial services licensees. Such persons would have to be assessed to have previous experience in securities investment which enables them to evaluate the merits, risks and value of the securities offered, as well as their own information needs and the adequacy of the information given to them by the person making the offer. A financial services licensee must give to the person a written statement of his reason for being satisfied of those matters and the person must sign a written acknowledgement that he has not received a prospectus in relation to the offer.

6 In the UK, offers of securities made to persons who meet two of the following three criteria are exempted from prospectus requirements:

(a) Carried out transactions, each of which is at least EUR1,000 (S$2,000) in size, on securities markets at an average frequency of at least 10 per quarter over the previous four quarters;

(b) Have a securities portfolio size exceeding EUR0.5 million (S$1 million);

(c) Worked for at least a year in the financial sector in a

professional position which requires knowledge of securities investment.

7 Persons referred to in paragraph 6 above have to apply to be listed on a central register maintained by the UK Financial Services Authority ("**Qualified Investor Register**") through a self-certification process. Each year, registered investors have to specifically request that their details continue to appear on the list.

Proposed "Knowledge Test" Prospectus Exemption

8 Ensuring that investors are provided with full, timely and accurate information material for well-informed decisions is a cornerstone of our disclosure-based regime. When considering any safe harbours that issuers may rely on, due care must be exercised so as to ensure that the interests of investors at large are not prejudiced. Considering the arguments put forward by the industry, MAS has concluded that, on balance, there is scope for introducing a "knowledge test" prospectus exemption, drawing on the approaches adopted in Australia and the UK, for investors who are sufficiently sophisticated to protect their own interest. We propose to exempt an offer of securities from prospectus requirements if:

(a) The offer is made through a securities dealer or financial adviser;

(b) The offer is made to "pre-qualified" individuals who meet two of the following three criteria:

i. Carried out at least 40 transactions, totaling at least

S$200,000[1] in value, on securities markets in the preceding 12 months;

ii. Have a securities portfolio size of at least S$300,000[2], excluding investments using CPF monies;

iii. Have at least three years experience in a professional position which requires knowledge of securities investment or finance or such other relevant experience as may be prescribed by MAS;

(c) The dealer or adviser is satisfied on reasonable grounds that the individual is able to properly evaluate the risks, merits and value of the securities offered, as well as his own information needs and the adequacy of the information given to him about the offer, in light of the knowledge gained from the transactions or experience referred to in limb (b) above;

(d) The dealer or adviser gives the individual before or at the time when the offer is made, a written statement of the dealer's or adviser's reason(s) for being satisfied as to those matters; **and**

(e) The individual signs a written acknowledgement before or at the time when the offer is made, that the offer is not accompanied by a prospectus.

[1] Or such other number or amount as may be prescribed by MAS.
[2] Or such other amount as may be prescribed by MAS.

9 The requirement for securities dealers and financial advisers to verify investor's status ensures that securities dealers and financial advisers do not take a liberal interpretation of compliance with the prescribed criteria, resulting in a large group of investors without the requisite know-how not having the protection of a prospectus. Statutory liability will be imposed on securities dealers and financial advisers to ensure that they take reasonable measures to verify investors' status. They would be expected to make due and careful enquiries and would not be able to fulfill this obligation by relying solely on self-declarations from investors.

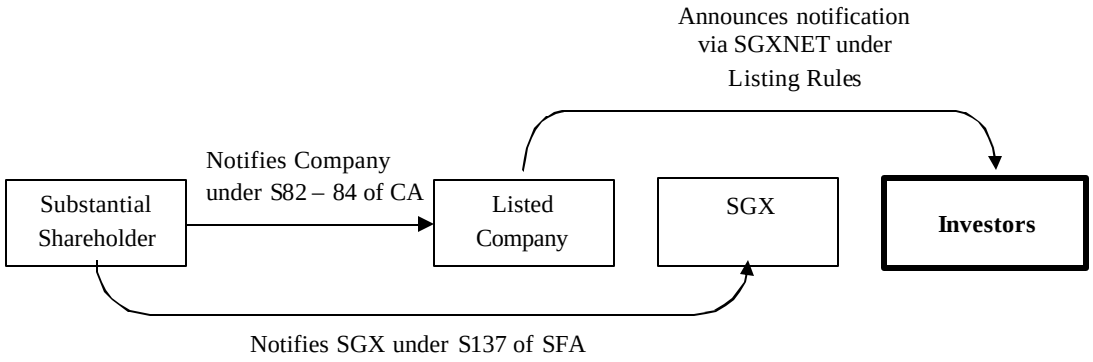
10 MAS considered the possibility of introducing a central register similar to that in the UK. We are of the view that this could discourage the use of the proposed prospectus exemption due to investors' concerns over privacy. We note that securities dealers and financial advisers would still have to perform know-your-client and anti-money laundering checks. Therefore, we do not propose to require investors to register on a central list.

5.1 MAS seeks views on the proposal to introduce a new prospectus exemption for offers of securities made to persons who satisfy the proposed "knowledge test". Specifically, MAS seeks comments on the proposed "knowledge test" criteria, the requirement for securities dealers and financial advisers to take reasonable measures to verify the investor's status, and the proposal to extend the exemption to all forms of securities including collective investment schemes.

Section B: Notification of Changes in Substantial Shareholdings

11 Provisions requiring substantial shareholders and Singapore-incorporated listed companies to properly notify the market of substantial shareholding changes now reside in the CA, the SFA and the SGX Listing Manual. Substantial shareholders are required under Sections 82 to 84 of the CA to notify the listed company of any change in their substantial shareholdings within 2 days from the change. Upon receipt of the notification, the listed company is required to make an announcement to the market in accordance with the SGX Listing Rules. Apart from informing the company under the CA, substantial shareholders are also required under Section 137 of the SFA to notify SGX of such changes in shareholdings within 2 days.

Current notification process



12 The objective of having the market properly informed of substantial shareholding changes would be better served if the relevant provisions are rationalised and consolidated in the SFA to facilitate compliance. The rationalisation of substantial shareholders' notification

requirements is in line with initiatives to bring together securities market provisions under the purview of MAS as the securities regulator. As part of the rationalisation, the requirement for substantial shareholders to separately notify SGX under Section 137 of the SFA would be removed as substantial shareholders would be required to notify the listed companies of such changes which in turn are obligated to notify the market.

13 MAS proposes to streamline the current notification process by:

(a) Migrating the requirement for substantial shareholders to notify the listed company under the CA to the SFA such that one single set of the notification requirements under the SFA applies;

(b) Removing the requirement for substantial shareholders to notify the SGX under the SFA; and

(c) Making it a legal requirement under the SFA for the listed company to notify investors.

Proposed notification process

5.2 MAS seeks views on the proposal to:

(a) Rationalise the substantial shareholdings notification requirements for listed companies currently residing in both the Companies Act and the SFA such that one single set of requirements under the SFA applies;

(b) Remove the requirement for substantial shareholders to notify the SGX under the SFA; and

(c) Make it a legal requirement under the SFA for the listed company to notify investors.

14 Currently, the requirements for notification of changes in substantial shareholdings under the CA and the SFA apply only to Singapore-incorporated companies. Changes in substantial shareholdings constitute material information and should be made known to investors regardless of whether the listed company is incorporated in Singapore or not. Given the increasing number of foreign companies listed on the SGX, there are good arguments for extending the requirement to foreign companies. This would ensure a level playing field between foreign and local companies and enhance investors' protection.

15 For companies with a secondary listing on the SGX, however, it is noted that their substantial shareholders are already subject to the requirements of the primary market and it may be too onerous to subject them to another different set of notification requirements. Hence, MAS proposes to extend the requirement for notification of changes in substantial shareholdings only to foreign-incorporated companies with **primary listing** in Singapore. In Hong Kong, the substantial shareholdings notification requirement is similarly extended to foreign

listed companies listed there, but exemptions may be granted where the principal trading market of the listed company's shares exists elsewhere.

5.3 MAS seeks views on the proposal to extend the substantial shareholdings notification requirements to substantial shareholders of foreign companies with a primary listing on the SGX.

16 Where a substantial shareholder fails to notify SGX of a change in shareholdings, MAS may offer to compound the offence. The composition amount, however, is subject to a cap of S$25,000, being the maximum fine imposed under Section 137 of the SFA.

17 On the other hand, failure to comply with continuing disclosure obligations under Section 203 of the SFA could attract civil penalties. Given that notification of changes in substantial shareholdings is similarly a disclosure requirement, MAS is considering introducing a civil penalty regime for breaches of the notification requirement. This will allow MAS to take enforcement action proportionate to the seriousness of the offence.

5.4 MAS seeks views on the proposal to introduce civil penalties for breaches of the substantial shareholdings notification requirement.

Section C: Recognition of Foreign Business Trusts

18 Section 282C(1)(a) of the SFA currently requires business trusts ("**BTs**") offered to retail investors to be registered under the Business Trusts Act (the "**BTA**")[3]. This ensures that the BT is subject to a proper governance framework and investors' rights are adequately safeguarded.

19 Where a BT is foreign-constituted, MAS recognises that it would be administratively difficult for the BT to comply with overlapping provisions under the law of its place of constitution and the BTA. In this regard, MAS has granted certain foreign BTs exemptions from the BTA registration requirement provided that it is subject to a regulatory framework and corporate governance provisions that are broadly comparable to provisions under the BTA. The current approach of exempting foreign BTs from the BTA registration requirement on a case-by-case basis, however, is inefficient and does not provide market certainty.

20 MAS proposes to establish a recognition regime for foreign BTs such that recognised foreign BTs would not need to be registered under the BTA before their units can be offered to retail investors. MAS intends to recognise a foreign BT only if the laws and practices of the jurisdiction under which it is constituted and regulated affords protection to Singapore investors equivalent to that provided under the BTA. The definition of "trustee-manager" would correspondingly be amended to refer to the equivalent of a trustee-manager in the case of a recognised BT. This approach is similar to the recognition regime for offers of collective investment schemes.

[3] The BTA sets out, amongst others, the duties and accountability of the trustee-manager.

5.5 MAS seeks views on the proposal to establish a recognition regime to exempt foreign BTs offering units to retail investors from the BTA registration requirement subject to the foreign BT being constituted in a jurisdiction whose laws and practices affords protection to Singapore investors equivalent to that provided under the BTA.

Section D: Removal of Resale Restrictions upon Listing of Securities

21 Under Section 276 of the SFA, securities offered by an issuer to an accredited or institutional investor ("**AI**") under the AI prospectus exemption are not allowed to be sold by the AI without a prospectus to persons other than AIs for a period of six months. This resale restriction continues to apply even if the issuer subsequently embarks on a public offering (with prospectus issued) and has its securities listed within six months from the offering under the AI exemption.

22 Where the issuer has issued a prospectus in connection with its public offer and is subject to continuous disclosure obligations after listing, all investors are placed on equal footing and there is adequate information for investors to make an informed decision with respect to the issuer's securities in the secondary market. That being the case, there is no strong reason to continue imposing the resale restriction on securities held by the AI. Accordingly, MAS proposes to lift the resale restriction for securities acquired under the AI exemption when the issuer lists additional securities of the same class on an approved securities exchange and a prospectus is issued in connection with the offer and listing.

5.6 MAS seeks views on the proposal to lift the resale restriction for securities acquired under the AI exemption when the issuer lists additional securities of the same class on an approved securities exchange and a prospectus is issued in connection with the offer and listing.

Section E: Audit of Financial Statements of Debenture Issuers

23 Where a trustee has been appointed for a debenture issuance, a debenture issuer is required under Section 268 of the SFA to present and lodge half-year and full-year audited financial statements with MAS and the trustee. Although it is provided that such financial statements need not be audited or the audit may be of a limited nature if the trustee's consent is obtained, the industry's experience has been that trustees are uncomfortable with exercising such discretion in light of the statutory requirement. Issuers have commented that the requirement is onerous, particularly for special purpose vehicles incorporated in jurisdictions where statutory audit is not required, and have requested for a removal of at least the requirement for a half-year audit.

24 The requirements for half-year and full-year audited financial statements were migrated from the CA when the SFA was enacted. While full-year audited financial statements are similarly required for share issuers, no equivalent requirement exists for a share issuer to have its half-year financial statements audited. As there is no good reason for such an inconsistent approach, MAS agrees to remove the requirement for audit of half-year financial statements for debenture issuers. Such financial statements, albeit not audited, must still be

presented and lodged with MAS and the trustee so as to ensure that the issuer keeps proper financial records.

5.7 MAS seeks views on the proposal to remove the audit requirement for half-year financial statements of a debentures issuer.

Section F: "Materiality" Qualification for Civil Liability

25 The SFA imposes criminal and civil liability for false or misleading statements or omissions in a prospectus. While the SFA provides that a person would be criminally liable only if the statement is materially adverse, there is no corresponding "materiality" qualification for civil liability. Some practitioners have requested that a "materiality" qualification be introduced for civil liability, similar to that in the US[4].

26 The SFA civil liability provision is modeled after that of the Australian Corporations Act 2001. While there is no specific "materiality" qualification, an investor is required to demonstrate that he has suffered a loss as a result of that statement or omission.

27 Introducing a "materiality" qualification for civil liability would mean instituting an additional hurdle of requiring investors to demonstrate that the statement or omission is material before they are able to proceed with the claim. This could potentially make it more difficult for investors to seek compensation for losses caused by

[4] In the US, liability under Section 11 of the Securities Act depends on there being an untrue statement of a material fact or the omission of a material fact.

deficient prospectuses. Besides, the UK and the European Union ("**EU**"), like Australia, do not have a materiality qualification in their civil liability provisions. MAS is of the view that the materiality test is already implicit in the civil liability provision and there are sufficient safeguards within the legal framework (e.g. no provisions for class actions or contingency fees) to deter frivolous suits or claims from being filed. MAS does not consider it necessary to introduce a "materiality" qualification.

5.8 MAS invites comments on the opinion that a "materiality" qualification would not be necessary as there is already an implied need for the statement to be material to cause an investor to suffer a loss or damage large enough to justify the costs of a lawsuit.

Section G: Change of Regulatory Regime for Restricted Schemes

28 Fund managers offering restricted schemes (i.e. collective investment schemes offered to accredited investors under Section 305 of the SFA) in Singapore are currently required to seek MAS' authorisation or recognition[5] for each scheme at least 14 days before the proposed commencement of the offer.

29 When authorising or recognising restricted schemes, MAS performs checks to confirm that the managers are licensed or regulated and are fit and proper. Given that accredited investors are in a position to protect their own interests, restricted schemes are not subjected to any other investor protection safeguards found under the retail

[5] A scheme is to be authorised if it is constituted in Singapore, and recognised if it is constituted outside Singapore.

regulatory regime. MAS is concerned that the authorisation or recognition of such schemes may result in false expectations by investors on the extent of regulation.

30 The 14-day approval period has also led to a longer time-to-market in Singapore, compared to similar offers in UK, Hong Kong, the US or Australia where such schemes are exempted from registration requirements. In this connection, the industry had recently requested MAS to consider shortening the approval period for restricted schemes.

31 MAS proposes to remove the requirement for restricted schemes to be authorised or recognised. Under the proposal, managers would only be required to lodge with MAS a notification (the "**Notification**") of their intent to make an offer at least 7 days before the commencement of the offer. As safeguards, MAS proposes that:

(a) Managers be required to declare in the Notification that they are licensed or regulated in their home jurisdiction as well as are fit and proper, and to inform MAS within 14 days if there is a change in information provided in the Notification;

(b) MAS be given the powers to issue directions to prohibit a manager who is not fit and proper from making or continuing to make an offer of units in a restricted scheme; and

(c) Managers be required to provide warning statements to investors that such schemes are not authorised or recognised by MAS and the risks associated with investing in unregulated schemes.

32 Under the proposal, to make it clear to investors that restricted schemes are not subject to our authorisation or recognition, MAS would publish on the MAS website the list of restricted schemes for which notifications have been received, with a prominent warning statement that such schemes are not regulated by MAS.

5.9 MAS seeks views on the proposal set out above for regulating restricted schemes. In particular, MAS invites comments on the proposals for notifying MAS of proposed offers of restricted schemes and the powers MAS would have to stop offers by managers who are not fit and proper.

33 While offers of restricted schemes to accredited investors are exempted from prospectus requirements, Section 305 of the SFA provides that such offers must be made in or accompanied by an information memorandum.

34 Unlike retail investors, accredited investors have the ability and resources to demand information to assess the risks involved and seek recourse if aggrieved. For this reason, regulators in UK, Hong Kong, US and Australia do not prescribe an offering document to accompany such offers. The current requirement for an offer of a restricted scheme to be accompanied by an information memorandum is therefore out of line with the practice other developed jurisdictions and inconsistent with the position that MAS has taken for offers of shares, debentures and business trusts to accredited investors .

35 Accordingly, MAS proposes to remove the requirement for an offer of units in a restricted scheme to be accompanied by an information memorandum.

5.10 MAS seeks views on the proposal to remove the requirement for an information memorandum to accompany an offer of units in a restricted scheme.

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