

# CONSULTATION PAPER

P020 - 2006  
December 2006

## Chapter 6: Amendments to Miscellaneous Provisions in the SFA and the FAA

MAS

Monetary Authority of Singapore

## **CHAPTER 6: AMENDMENTS TO MISCELLANEOUS PROVISIONS IN THE SFA AND THE FAA**

### **Section A: Power to make Regulations to Charge for Expenses Incurred under the SFA and the FAA**

The SFA and the FAA provide MAS the power to make regulations with respect to the fees to be paid in respect of any matter required for the purposes of these Acts<sup>1</sup>. Currently, the applicable fees to be charged for various matters are set out in the respective Regulations under the SFA and the FAA. For instance, fees relating to the application for a Capital Markets Services licence (“**CMSL**”) and for renewals and variations of a CSML are prescribed in Regulation 6 of the Securities and Futures (Licensing and Conduct of Business) Regulations.

2 MAS in carrying out its functions, for example in processing licence applications and renewals, would also in certain circumstances incur expenses that are paid out by MAS to third-parties and/or other agencies. At present, such expenses are not separately charged.

3 MAS is considering inserting a new provision under Section 341 of the SFA, and a similar provision under Section 104 of the FAA to enable MAS to make regulations to charge such expenses incurred to relevant applicants in respect of any matter required for the purposes of the SFA or the FAA. MAS considers that it would be beneficial to provide for this flexibility in the SFA and the FAA.

---

<sup>1</sup> Refer to Section 341(2)(s) of the SFA and Section 104(2)(j) of the FAA.

4 Should such a provision be included in the SFA and the FAA, it is not intended that changes will be made to the relevant Regulations to charge expenses separately without prior public consultation. At such point in time that it is considered necessary and appropriate to change the current fee structure, MAS intends to consult publicly on any proposed changes.

**6.1 MAS seeks views on the proposal to insert a new provision under Section 341 of the SFA, and a similar provision under Section 104 of the FAA to enable MAS to make regulations to charge such expenses incurred to relevant applicants in respect of any matter required for the purposes of the SFA or the FAA.**

## **Section B: Amendments to the SFA**

5 This section addresses drafting and technical amendments across the SFA which MAS intends to effect, and are set out for informational purposes.

### ***Investigations and Market Conduct***

6 To correct and clarify the drafting of some provisions in the SFA that relate to investigations and market misconduct, MAS intends to make the amendments described below.

### Section 153 of the SFA: Perjury

7 Section 153 of the SFA confers the right against self-incrimination on a witness who is giving a statement to MAS. Although the witness is not entitled to withhold information that may incriminate him, once he indicates that the information will incriminate him, that statement can only be used in civil penalty proceedings and not in criminal proceedings *“other than proceedings under this section”*.

8 This section was intended to carve out an exception to allow the use of the statement in criminal proceedings for perjury under Section 162 of the SFA where the statement given to MAS is false or misleading. The present language is therefore inaccurate and could lead to confusion.

9 To correct this, we will amend Section 153(2)(a) of the SFA by substituting the phrase *“other than proceedings under this section”* with the phrase *“other than proceedings for an offence under Section 162”*.

### Sections 204(2), 212(2) & 221(2) of the SFA: Double Jeopardy

10 Sections 204, 212 and 221 of the SFA are the offence-creating sections for market misconduct. All three provisions prescribe identical penalties.

11 Subsection (2) of each of those sections states that where an order of civil penalty under Section 232 of the SFA has been made against a person, criminal proceedings cannot be brought against him. These provisions seek to prevent double jeopardy. That is, a person

who has paid a civil penalty should not be subject to further criminal prosecution.

12 But subsection (2) only precludes criminal action “*after a court has made an order ... for payment of civil penalty under Section 232*”. Subsection (2) as it is currently worded does not preclude subsequent criminal proceedings where a civil penalty is paid under a civil penalty settlement concluded with MAS. As this does not accord with our policy intent, we will be amending subsection (2) to also preclude criminal proceedings in the event of a settlement with MAS to pay a civil penalty.

#### Section 331 of the SFA: Individual Derivative Liability for Civil Penalties

13 Section 331 of the SFA attributes individual liability to an officer of the company or unincorporated association, or a partner of a partnership (as the case may be) where his consent, connivance or neglect had resulted in “*an offence*” by the company, unincorporated association or partnership.

14 The use of the word “*offence*” limits the application of Section 331 of the SFA to criminal proceedings and excludes civil penalty proceedings. This is a drafting oversight as the section was intended to cover both criminal and civil penalty proceedings. We will correct this by amending Section 331 to make it clear that it also applies to civil penalty proceedings.

### ***Prohibition of the Use of the Term “REIT”***

15 Section 283A of the SFA prohibits the use of the term “**REIT**” (Real Estate Investment Trust) for arrangements not authorized as Collective Investment Schemes (“**CIS**”) under the SFA. This is in line with MAS' previously articulated position<sup>2</sup> where REITs have the option of either being regulated as a CIS under the CIS regime, or of structuring themselves as a Business Trust (“**BT**”) under the BT regime.

16 If REITs choose the option to be structured as BTs, such REITs are not allowed to use the term "REIT" in the name or to hold themselves out as "REITs" in the marketing of the trust, in order to avoid confusion. The intention is to maintain two separate regimes - the CIS regime and the BT regime, and to prevent overlap with respect to the use of the term "REIT".

17 However, Section 284B of the SFA states that the entire Division 2 of Part XIII (which includes Section 283A of the SFA) does not apply to a CIS that is also a registered BT. The effect of Section 284B of the SFA is to exclude the application of Section 283A of the SFA such that BTs are no longer caught under Section 283A of the SFA. BTs would appear to be permitted to use the term “REIT” which is contrary to MAS' intention. This has given rise to some confusion among the industry stakeholders who may be unclear as to whether the term "REIT" falls under the ambit of the CIS or BT regime. In addition, consumers may also be misled by BTs marketing themselves as "REITs".

18 MAS' policy intent remains unchanged and MAS would like to clarify that Section 283A of the SFA should still apply to Section 284B of

---

<sup>2</sup> MAS' Policy Consultation Paper on Business Trusts (“**BTs**”) dated 10 December 2003.

the SFA, and will be effecting amendments to reflect this. BTs in the business of managing property are intended to be prohibited from using the term "REIT".

19 In addition, MAS also intends to effect amendments to Section 283A of the SFA to allow the use of the term "REIT" if the offer is restricted to institutional and accredited investors. Consequently, the class exemption order issued on 22 October 2005 would be repealed.

### ***Part XIII of the SFA***

20 To fine-tune and streamline requirements under Part XIII of the SFA, MAS also intends to make a number of technical and drafting amendments as follows:

- (a) Refining the definition of "information memorandum" under Section 275 of SFA to cater to structured notes;
- (b) Refining Sections 277, 282ZB and 305B of SFA to clarify that advertising restrictions under the SFA do not apply to an offer of securities made using an offer information statement;
- (c) Amending Sections 280, 282ZC and 305C of the SFA (exemption for offers made using automated teller machine or electronic means) to include offers made using offer information statements; and
- (d) Incorporating a pre-condition that offerors relying on prospectus exemptions (i) shall not register any prospectus

in respect of the securities to be offered pursuant to the exemption; or (ii) if a prospectus has been registered, MAS has been informed of the offeror's intent to make an exempt offer and proper disclosure is made to investors. Consequently, there is no longer a need for offerors to submit undertakings at the time of lodgement of the prospectus that it will inform MAS of its intent to make an exempt offer.

### **Section C: Amendments to the FAA**

21 This section addresses drafting and technical amendments across the FAA which MAS intends to effect, and are set out for informational purposes.

#### ***Introducing a Penalty Provision for the Contravention of Condition or Restriction Imposed on Exempt FAs or their Representatives***

22 Section 23(1) of the FAA specifies the classes of persons who are exempt from holding a FA licence to act as a FA in Singapore in respect of any financial advisory service. Such classes of persons are referred to as "**exempt FAs**". Exempt FAs and their representatives are required to comply with certain requirements under the FAA such as business conduct rules and the fit and proper criteria. In addition, MAS has powers under the FAA to impose conditions or restrictions on exempt FAs and their representatives in relation to the provision of any financial advisory service, either by regulations or written directions.



23 The corresponding provision in the SFA incorporates a penalty provision for any contravention of the conditions or restrictions. Due to a drafting error, however, no such penalty provision has been included in the FAA. To correct the drafting error, MAS intends to introduce a penalty provision in the FAA for the contravention of any condition or restriction imposed on exempt FAs or their representatives.

***Licensing Exemption for Persons Giving Advice to Accredited Investors in Connection with Leveraged Foreign Exchange Trading***

24 Under the FAA, a person who provides advice on contracts or arrangements for the purposes of leveraged foreign exchange (“LFX”) trading is required to be licensed under the FAA unless he is otherwise exempted<sup>3</sup>.

25 The relevant predecessor provision under the repealed Futures Trading Act had provided for licensing exemption to a person who provides advice to accredited investors in connection with their LFX trading with such investors. This provision was not migrated to the FAA due to an oversight. MAS intends to rectify the drafting error by providing licensing exemption in the FAA for persons giving advice to accredited investors in connection with their LFX trading with such investors.

***Amendments to the First Schedule to the FAA***

26 MAS also intends to make the following amendments to the First Schedule to the FAA:

---

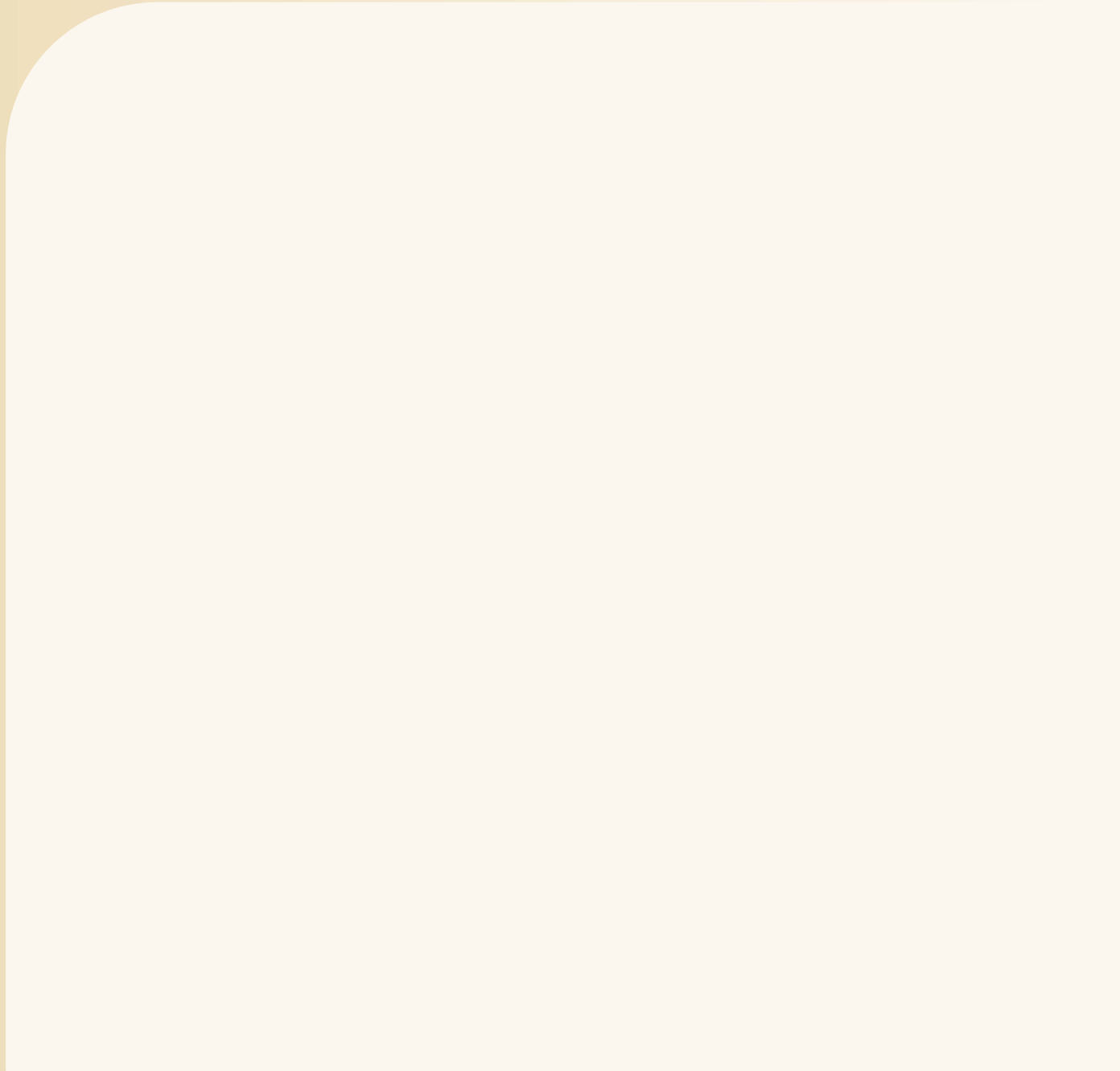
<sup>3</sup> Currently, persons listed under section 23(1) are exempted from licensing requirements under the FAA. These include persons who provide advice on LFX to not more than 30 accredited investors as prescribed under regulation 27(1)(d) of the Financial Advisers Regulations.

- (a) To substitute the word “registered” with “licensed” in line 3 of paragraph 2. This is to correct a drafting error in the existing provision; and
- (b) To exclude the application of Paragraph 11<sup>4</sup> to foreign related companies of exempt FAs under Section 23(1)(ea)<sup>5</sup> of the FAA. This is to correct a drafting error arising from the amendment to the FAA in 2005.

---

<sup>4</sup> Paragraph 11 allows a foreign related company of a licensed FA or exempt FA under Section 23 (other than subsection 23(1)(f)) to provide financial advisory services through an arrangement between the foreign related company and the licensed/exempt FA, where such arrangement is approved by MAS.

<sup>5</sup> Refers to a securities exchange, futures exchange, recognised market operator, or approved holding company, in respect of the provision of any financial advisory service that is solely incidental to its operations of a securities market, a future market, or to its performance as an approved holding company, as the case may be.



Monetary Authority of Singapore