

CONSULTATION PAPER

P015 - 2017

August 2017

Proposed Amendments to the Payment and Settlement Systems (Finality and Netting) Act

MAS

Monetary Authority of Singapore

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1 Preface

1.1 **The Payment and Settlement Systems (Finality and Netting) Act (“FNA”) was enacted in 2002 to ensure the finality and irrevocability of transactions made through payment and settlement systems** designated by the Monetary Authority of Singapore (“MAS”) by “carving out” the relevant insolvency rules. The FNA also provided for the enforceability of netting arrangements in these designated systems¹ (“DS”). These legal protections promoted confidence in a DS in order to enhance Singapore’s position as a major financial centre.

1.2 **Since 2002, both international practices and domestic circumstances have evolved considerably**, with improved insolvency protection and coverage over system wide important retail payment systems. In order for our laws to remain ready and relevant to the new landscape, MAS proposes to amend the FNA to incorporate global best practice developments from leading jurisdictions such as the United Kingdom, European Union, Canada and Australia; industry feedback from both local and global participants of payment and settlement systems; and developments in Singapore’s payment and settlement landscape.

Proposed Amendments to the FNA

1.3 The proposed amendments cover three main policies:

1.3.1 **Improve protection** by extending insolvency protection to transfer orders, netting and settlement in a DS, immunity to officers and employees of an operator, settlement institution (“SI”)², or collateral holder of a DS, insolvency protection to collateral security and inserting/clarifying key legal terms to allow for more comprehensive insolvency protection and payment finality;

1.3.2 **Set out clear designation criteria** for payment and settlement systems; and

1.3.3 **Strengthen administrative powers** of MAS.

¹ The list of designated systems is in Annex B.

² The FNA defines a settlement institution of a DS as a body corporate which (i) provides accounts for the participants of the DS, or facilitates the settlement of transfer orders between these DS participants; and (ii) is specified in the designation order to be the SI of the DS. The settlement institutions are MAS (for SGD Cheque Clearing System, Interbank GIRO System and Fast And Secure Transfers System) and Citibank NA (for USD Cheque Clearing System).

1.4 We shall elaborate on these three areas in Parts 2, 3 and 4 below. **Annex C** (in a separate document) sets out the **proposed legislative amendments to the FNA** in the form of an Amendment Bill³.

1.5 MAS invites comments from banks, non-bank financial institutions, legal counsels, payment system operators, settlement institutions, collateral holders and other interested parties.

Please note that all submissions received will be published and attributed to the respective respondents unless they expressly request MAS not to do so. As such, if respondents would like (i) their whole submission or part of it, or (ii) their identity, or both, to be kept confidential, please expressly state so in the submission to MAS. In addition, MAS reserves the right not to publish any submission received where MAS considers it not in the public interest to do so, such as where the submission appears to be libellous or offensive.

1.6 Please submit comments via email by 31 August 2017 (4 weeks) to:

FNA Consultation
FinTech and Innovation Group Department
Monetary Authority of Singapore
10 Shenton Way, MAS Building
Singapore 079117
Fax: (65) 62203973
Email: fnaconsult@mas.gov.sg

1.7 Electronic submission is encouraged. We would appreciate that you use the suggested format provided in **Annex D** (separate file) for your submission to streamline our collation efforts.

³ The proposed amendments to the FNA are still in draft form and are subject to clearance by the Attorney General's Chambers.

2 Improve protection to DS

2.1 Under the current FNA, finality protection for transfer orders does not apply beyond 2359Hr Singapore time on the day of insolvency⁴ even though some DS may operate beyond the day of insolvency to process, net and settle transfer orders.

2.2 MAS proposes to enhance protection of key elements in a payment cycle, such as extending insolvency protection of transfer orders, netting and settlement in a DS by one business day after the day of insolvency. This extended protection will comprehensively cover a wider range of scenarios such as insolvency being declared over the weekend or where a local DS participant is impacted by insolvency of its global parent headquartered in a different timezone. The extended protection also gives additional protection to a DS which operates across multiple timezones (e.g. Continuous Linked Settlement System) or a DS which operates 24 by 7 to process transfer orders but only nets and settles them during working hours (e.g. Fast And Secure Transfers System (“FAST System”)). With the enhanced insolvency protection, a DS will have sufficient time to close out, net and settle transfer orders. This proposal is consistent with the laws of European Union and is aligned with feedback received from domestic and international payment and settlement systems.

Question 1. Extended insolvency protection. MAS seeks comments on the proposed extension of insolvency protection for transfer orders, netting and settlement in a DS by one additional business day after the day of insolvency.

2.3 The officers and employees of DS operators, settlement institutions (“SI”) and collateral holders rely on a variety of rules, arrangements and by laws to effect smooth functioning of the DS during normal business-as-usual and default situations. MAS proposes to confer protection from personal liability on officers and employees of DS operators, SI and collateral holders for anything done or omitted to be done with reasonable care and in good faith in the execution of any function, duty or power of that individual under the FNA or under the rules of a DS. This allows the officers and employees of DS operators, SI and collateral holders to effectively carry out their functions in accordance with these rules, allowing for swift action during times of crisis, without potential litigation risk. Foreign jurisdictions also provide similar protection from personal liability.

⁴ The day on which (a) a court made an order for bankruptcy, judicial management or winding up in respect of the participant; or (b) a resolution for the voluntary winding up of the participant was passed.

2.4 MAS proposes to insert/amend the definitions of new/existing terms in the FNA, including:

2.4.1 “business day” – a new definition which defines a business day as that set out in the Rules of a DS or, where the Rules of a DS does not specify what constitutes a business day, any day other than a Saturday, Sunday or public holiday;

2.4.2 “book entry securities” – an amendment to the existing definition to include protection for transactions involving non-government securities;

2.4.3 “collateral security” – a new definition inserted into the FNA to recognise collateral held by or deposited with a collateral holder in the context of a DS;

2.4.4 “Rules” – a new definition inserted into the FNA to recognise the rules, arrangements, regulations or by laws of a DS;

2.4.5 “system” – an amendment to the existing definition to include systems which are established for the clearing, settlement or transfer of non-government securities; and

2.4.6 “transfer order” – an amendment to the existing definition to include an instruction by a participant to transfer non-government securities.

2.5 These new and amended definitions will provide greater certainty and clarity. For example, the definition of “collateral security”⁵ will allow for the explicit protection of a DS which utilises collateral for settlement.

Question 2. Provision of immunity to officers and employees of DS operators, SI and collateral holders from personal liability. MAS seeks comments on this proposal to provide protection to the officers and employees of the DS operators, SI and collateral holders, in the course of carrying out their functions, duties or powers in accordance with the FNA or the DS’ Rules.

Question 3. Definition of “business day”. The insertion of such a definition seeks to align the definition of a “business day” with that set out in the rules of the respective DS. MAS seeks comments on the inclusion of such a definition.

Question 4. Definitions of “book entry securities”, “system” and “transfer order”. The existing definitions will be amended to allow for protection for non-Government-issued securities such as those issued by a corporation. MAS seeks inputs on the expanded protection of securities beyond Government-issued securities.

⁵ “collateral security” means any property held by or deposited with a collateral holder for the purpose of securing any liability arising directly in connection with ensuring (a) the clearing or settlement of payment obligations by the DS; or (b) the clearing, settlement or transfer of book-entry securities by the DS.

Question 5. Definition of “Rules”. The insertion of such a definition is to clearly recognise the various rules, arrangements, regulations, by laws, or other similar body of statements, that govern the activities and conduct of the DS and the persons related to the DS. MAS seeks inputs on the inclusion of such a definition.

Question 6. Protection of collateral security. MAS seeks comments on according protection to collateral security by the DS.

3 Clarify designation criteria

3.1 FNA protection is conferred when MAS designates a specific payment and settlement system for protection under the FNA. We propose to set out the broad criteria for the designation of a DS under the FNA to provide clarity and certainty to the industry and stakeholders⁶. The broad designation criteria is proposed to cover systemically important payment systems (“SIPS”), where the absence of insolvency protection could cause wider systemic risks to the greater financial system. The broad designation criteria will also cover system-wide important payment systems (“SWIPS”), upon which a disruption could impact the public’s confidence in Singapore’s payment systems and financial systems. Setting out the designation criteria by way of legislation is a common practice in key foreign jurisdictions with insolvency protection as well as in other domestic legislation which adopt a designation regime. The proposed broad designation criteria is in Annex C, clause 3(1) of the draft Amendment Bill. For ease of reference, it is also footnoted below⁷.

3.2 Taking into account the legal significance attached to designation of SIPS and SWIPS, MAS proposes to prohibit undesignated systems from claiming to be a DS. This prevents system entities from financially benefiting from such misrepresentation and causing confusion to the industry and stakeholders.

3.3 In addition, because the DS’ SI is a key entity, MAS proposes that the designation order should identify the SI and indicate that certain relevant powers and obligations under the FNA will apply to the SI.

<p>Question 7. Designation criteria for DS. MAS seeks comments on the inclusion of broad designation criteria for SIPS and SWIPS to provide clarity and certainty to the industry and stakeholders.</p> <p>Question 8. Prohibition on undesignated systems from claiming to be a DS. MAS seeks views on prohibiting an undesignated system and its entities from claiming to be a DS.</p> <p>Question 9. Identifying the SI in the designation order, and indicating the powers and obligations which are relevant to the SI under the FNA. MAS intends to</p>

⁶ The criteria and guidance on the designation of payment and settlement systems under the FNA may be set out in regulations or guidelines.

⁷ Draft Amendment Bill – Designation Criteria – clause 3.—(1) The Authority may, by order in the Gazette, designate a system to be a designated system for the purposes of this Act, if the Authority is satisfied that a disruption in the operations of the system may —

- (a) trigger, cause or transmit disruption to other participants;
- (b) trigger or cause systemic disruption to the financial system of Singapore; or
- (c) affect public confidence in the payment systems of Singapore or in the financial system of Singapore.

identify the SI in the designation order and indicate that certain relevant powers and obligations under the FNA will apply to the SI (e.g. information gathering powers or immunity being conferred on the SI's officers and employees). MAS seeks views on this proposed change.

4 Strengthen administrative powers of MAS

4.1 MAS proposes to introduce administrative powers in the FNA to enable MAS to address potential risks and ensure effective administration of the FNA. These powers include information gathering powers and direction making powers to the operator, SI, collateral holder and participant. This will allow MAS to monitor a DS' exposure or system status and require the necessary action to be taken to comply with regulatory requirements. MAS also proposes requiring a DS to notify MAS of certain events, such as material changes to the DS' exposure or increased likelihood of default. These proposed powers and obligations are common among foreign jurisdictions and in other domestic legislation.

Question 10. Information gathering powers, direction making powers and obligation to inform MAS of certain events. MAS seeks comments on introducing these standard regulatory powers for the effective administration of the FNA.

4.2 MAS proposes to impose a requirement on the DS operator, SI and collateral holder to seek MAS' approval before implementing or amending any DS' rules, including its netting and settlement rules, default arrangements, by laws and arrangements for collateral security. The application⁸, submitted by the DS operator, SI or collateral holder to MAS for the approval of the DS' rules, must be accompanied by a written legal opinion from a solicitor who is qualified to practise law in Singapore.

4.3 MAS proposes to introduce a general penalty clause in the FNA to apply to a breach by a DS operator, SI, collateral holder or participant, of any FNA provision for which no specific penalty applies. For instance, the failure by a participant to notify the DS operator of the occurrence of an order for bankruptcy, judicial management or winding up of itself, will result in a penalty. As the FNA currently does not provide any penalties for such breaches, a general penalty clause is proposed.

Question 11. Approval of DS rules. MAS seeks comments on imposing a requirement on a DS operator, SI and collateral holder to obtain MAS' approval before implementing or amending any DS rules.

Question 12. General penalty. MAS seeks comments on the introduction of a general penalty to ensure compliance with the FNA. The general penalty is relevant where a FNA provision does not have a specific penalty set out therein.

⁸ In reviewing the application, MAS will consider how the rules will be implemented to allow for insolvency protection and the robustness of such rules, amongst other criteria.

4.4 MAS will introduce an exemption power for MAS to disapply relevant FNA provisions on a class or case-by-case basis upon application by a DS operator, SI, collateral holder or participant.

4.5 In line with the approach in the Payment Systems (Oversight) Act and from a regulatory practicality perspective, MAS will be exempted from the application of certain provisions with respect to any DS operated by the MAS, taking into account the internal governance arrangements in place within MAS. In addition, to facilitate the efficient and timely administration of the FNA, MAS also proposes to allow for the delegation of the exercise of powers by the Managing Director to appointed MAS officers.

ANNEX A

LIST OF QUESTIONS

For responses to MAS, please use the separate document Annex D – Response Template.

- Question 1. Extended insolvency protection.** MAS seeks comments on the proposed extension of insolvency protection for transfer orders, netting and settlement in a DS by one additional business day after the day of insolvency.....5
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ANNEX B

LIST OF DESIGNATED SYSTEMS

No.	Designated System under FNA	System Type	Operator	Settlement Institution
1	CLS System	Gross Settlement / Multilateral Netting	CLS Bank International ("CLS")	CLS
2	MEPS+	Real Time Gross Settlement	MAS	MAS
3	SGD Cheque Clearing System	Multilateral Netting	Banking Computer Services Private Limited ("BCS")	MAS
4	USD Cheque Clearing System	Multilateral Netting	BCS	Citibank N.A.
5	Interbank GIRO System	Multilateral Netting	BCS	MAS
6	USD Cheque Settlement System	Multilateral Netting	Citibank N.A.	Citibank N.A.



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