

PROPOSED CHANGES TO THE SECURITIES & FUTURES ACT AND FINANCIAL ADVISERS ACT

Yong Yong CHIA (Ms)
Director
Goodwins Law Corporation

After months of public consultation by the Monetary Authority of Singapore (“MAS”), Singapore’s Minister for Trade and Industry moved two Bills for first reading in Parliament on 15 September 2008, namely:

- The Securities and Futures (Amendment) Bill 2008 (“SF(A) Bill”); and
- The Financial Advisers (Amendment) Bill 2008 (“FA(A) Bill”).

KEY AMENDMENTS UNDER THE SF(A) BILL

Key amendments have been proposed, impacting 5 major areas:

- (A) CAPITAL MARKETS LICENSING AND BUSINESS CONDUCT
- (B) MARKET MISCONDUCT ENFORCEMENT
- (C) NOTIFICATION OF CHANGES IN SHAREHOLDINGS OF DIRECTORS AND SUBSTANTIAL SHAREHOLDERS AND OFFERS OF INVESTMENTS
- (D) MARKETS AND CLEARING FACILITIES
- (E) REGULATORY FLEXIBILITY TO DEAL WITH MARKET INNOVATION

(A) CAPITAL MARKETS LICENSING AND BUSINESS CONDUCT

(a) *Perpetual Licensing Regime for Corporate Licence Holders*

1. The perpetual licensing regime for corporate licence holders takes away the need to apply for renewal of licences. This aligns with the proposed notification regime for representatives and the licensing regime for corporates under the Securities and Futures Act¹ (“SFA”) and the Financial Advisers Act² (“FAA”) with those of other financial institutions regulated by MAS.

¹ Securities and Futures Act (Chapter 289), Singapore Statutes

² Financial Advisers Act (Chapter 110) , Singapore Statutes

2. The proposed legislative changes above will also apply to financial advisers and their representatives through the amendments in the FA(A) Bill.

(b) Representative Notification Framework

3. Under the Representative Notification Framework, the onus will be on principals of representatives³ to certify to MAS that they have checked that their proposed representatives are fit and proper.
4. Principals will be required to notify MAS of their intentions to employ proposed representatives to carry out regulated activities on their behalf.
5. MAS will maintain a public register that will list the representatives and their relevant details. MAS may refuse to enter the name of a proposed representative into the public register if MAS has information that a proposed representative is not fit and proper. Once a representative's name is on the public register he will be permitted to conduct regulated activities on behalf of the principal.
6. The *Guidelines on Fit and Proper Criteria*⁴ continue to apply.
7. The proposed legislative changes above will also apply to financial advisers and their representatives through the amendments in the FA(A) Bill.

(c) Provisional Representative Scheme

8. The provisional representative scheme will allow experienced individuals currently or previously regulated for comparable types of regulated activities in overseas jurisdictions with regulatory regimes comparable to Singapore's to conduct SFA regulated activities pending examinations.
9. Should the provisional representative fail to satisfy the examination requirements⁵ within the grace period, they will have to immediately cease their activities under the SFA. The Representative Notification Framework will also apply to the provisional representative scheme.
10. The proposed legislative changes above will also apply to financial advisers and their representatives through the amendments in the FA(A) Bill.

³ all representatives who act for principals licensed under the SFA or the FAA and those who act for principals exempted under sections 99(1)(a), (b), (c) and (d) of the SFA, and sections 23(1)(a), (b), (c), (d) and (e) of the FAA. Representatives of other exempt persons carrying on regulated activities dealing with non-retail investors will not be governed by the notification framework capital and will continue to enjoy exemptions from complying with certain business conduct requirements.

⁴ Guideline No: FSG-G01, Guidelines on Fit and Proper Criteria issued by MAS

⁵ Examination requirements under the SFA 04-N06 Notice on Minimum Entry and Examination Requirements for Representatives of Holders of Capital Markets Services Licence and Exempt Financial Institutions under the SFA and/or the FAA-N07 Notice on Minimum entry and Examination Requirements for Representatives of Licensed Financial Advisers and Exempt Financial Advisers.

(d) Appointment of Directors by Capital Markets Services Licence Holders

11. Capital markets services licence holders incorporated in Singapore will be required to obtain MAS' approval for the appointment of chief executive officers and directors, regardless of the individual's country of residence or the nature of the director's role.
12. However, capital markets services licence holders that operate in Singapore as branch offices of foreign companies will only be required to seek MAS' approval for appointment of directors who are resident in Singapore and/or responsible for the operations of the Singapore branch.
13. MAS may impose conditions requiring licence holders to notify MAS of changes to any specified detail of its directors, such as changes in residence, or the nature of appointment as director.
14. The proposed legislative changes above will also apply to financial advisers and their representatives through the amendments in the FA(A) Bill.

(e) Requirement to Seek Approval for Take-over of Licence Holders and MAS' Power of Objection to Control of Licence Holders

15. MAS' prior approval will be required where a potential owner or controller, in or outside Singapore, wishes to enter into an arrangement which would result in him obtaining effective control⁶ of a capital markets services licence holder.
16. The proposed legislative changes above will also apply to financial advisers and their representatives through the amendments in the FA(A) Bill.

(f) Representatives to Only Act for One Principal

17. This will formalise MAS' current policy that representatives⁷ should only act for one financial institution. The exceptions to this restriction will be where:
 - (i) appointed representatives who satisfy minimum entry and examination requirements prescribed by MAS act for financial institutions that are related corporations; or
 - (ii) MAS has given approval.

(g) Prohibition Order Regime

18. Currently, MAS may only issue prohibition orders to capital markets services licence holders and their representatives to prohibit them from conducting SFA regulated activities.

⁶ A person is regarded as having effective control of a holder of a capital markets service licence if the person alone or acting together with any connected person would be in a position to control not less than 20% of the voting power in the licence holder or would hold interests in not less than 20% of the issued share capital of the licence holder.

⁷ representatives of capital markets services licensees and financial institutions, such as banks, merchant banks, financial companies and insurance companies, exempted under Section 99(1)(a), (b), (c) and (d) of the SFA.

19. Pursuant to the new regime, prohibition orders may be issued against licensed **and** exempt FIs and their representatives in a wide range of situations, including the following:
- (i) where MAS suspends or revokes the capital markets services licence held by the person;
 - (ii) where MAS has reason to believe that circumstances exist under which, if the person were a holder of a capital markets services licence, there would exist a ground on which the Authority may suspend or revoke its licence;
 - (iii) where a person is required to pay a civil penalty in respect of a market misconduct offence under Part XII of the SFA;
 - (iv) where MAS has reason to believe that a person is contravening, is likely to contravene or has contravened the SFA;
 - (v) where a person has been convicted of an offence involving fraud or dishonesty in Singapore or elsewhere;
 - (vi) where a person has been convicted of an offence involving the contravention of any law or requirement of a foreign jurisdiction relating to any regulated activity carried out by that person.
20. A prohibition order may prohibit persons from undertaking regulated activities, and/or taking part in the management of, or becoming a director or substantial shareholder of, a licensed or exempt financial institution.

(h) Confidentiality of Inspection and Investigation Reports

21. This follows MAS' policy that contents of the inspection or investigation report may not be disclosed by persons inspected or investigated by MAS to anyone other than an officer or auditor of the inspected or investigated entity.
22. The proposed legislative changes above will also apply to financial advisers and their representatives through the amendments in the FA(A) Bill.

(i) Regulatory Assistance to Foreign Regulators

23. Currently, foreign regulators are only required to seek the consent of the licence holder they intend to inspect. With the amendments, foreign regulators will be required to seek MAS' approval to inspect capital markets services licence holders and exempt financial institutions⁸ in respect of their conduct of regulated activities under the SFA. MAS will be able to impose conditions and safeguards on the conduct of such inspections.
24. The proposed legislative changes above will also apply to financial advisers and their representatives through the amendments in the FA(A) Bill.

⁸ Exempt financial institutions refer to financial institutions exempted under section 99(1)(a), (b), (c), (d) or (h) of the SFA from licensing requirements.

(B) MARKET MISCONDUCT ENFORCEMENT

(a) Transfer of Evidence between the Commercial Affairs Department of the Singapore Police Force (“CAD”) and MAS

25. Market misconduct contraventions in the SFA can attract both civil and criminal liability. The proposed amendments will allow for the transfer of information between MAS and the CAD to facilitate investigations and initiation of proceedings, whether civil or criminal.

(b) Disgorgement by Persons who Benefit from Contravening Trades Conducted on their Behalf

26. The amendments will enable MAS or any adversely affected investor to apply to the court to order an “innocent” person⁹ to disgorge gains obtained from contravening trades. The court will have the discretion not to order disgorgement against the “innocent” person if the court considers that the circumstances make it unfair to do so.

(c) Corporate Derivative Liability

27. Under the current regime, a company may not be liable for market misconduct committed by its employees unless its senior management is directly involved in the market misconduct.
28. With the amendments, a company will be liable where the market misconduct by its employees had been committed with the consent or connivance of the company, or where the company through its negligence failed to prevent or detect the employee’s market misconduct. Criminal liability, civil penalty liability and/or civil liability could arise, depending on the circumstances.

(C) NOTIFICATION OF CHANGES IN SHAREHOLDINGS OF DIRECTORS AND SUBSTANTIAL SHAREHOLDERS AND OFFERS OF INVESTMENTS

(a) Notification of Changes in Shareholdings of Directors and Substantial Shareholders

29. The requirement for directors and substantial shareholders to notify changes in interests in listed companies will be migrated from the Companies Act to the SFA.
30. Directors and substantial shareholders will no longer be required to notify the Singapore Stock Exchange of changes in their interests; and
31. The listed company¹⁰ will be required to notify investors of any changes in interests of directors and substantial shareholders.

⁹ The “innocent” person would not have been party to the market misconduct, but would have benefited from the illegal trade, for example, where a person’s trading account is used by his broker without prior authorisation to conduct illegal trades, and profits are made and credited to his account.

¹⁰ Including foreign-incorporated companies with a primary listing on the SGX

32. Similar changes will be made to the Business Trusts Act (“BTA”) in relation to the notification requirements for substantial unitholders’ interests in business trusts.

(b) *Audit of Financial Statements of Debenture Issuers*

33. The amendments will remove the requirement for an audit of half-year financial statements for debenture issuers. Notwithstanding, the un-audited financial statements will still need to be lodged with MAS and the trustee.

(c) *Lowered Minimum Investment Threshold Amount for Prospectus Exemption*

34. The amendments will lower the minimum investment amount required for prospectus exemption from \$200,000 to \$100,000.

(d) *Recognition of Foreign Business Trusts*

35. Presently, foreign-constituted business trusts are generally exempted from registration under the BTA on a case-by-case basis.

36. The amendments will allow units in foreign business trusts to be offered to retail investors under a recognition regime. Recognition of foreign business trusts will be granted if the laws and practices of the jurisdiction under which such foreign-constituted business trusts were constituted and regulated offer protection to Singapore investors that is at least equivalent to that afforded under the BTA. This aligns with the recognition regime for offers of foreign collective investment schemes.

(e) *Removal of Resale Restrictions upon Listing of Securities*

37. Currently under the SFA, securities offered to accredited or institutional investors under a prospectus exemption may not be re-sold for a six-month period from the date of acquisition of the securities, except to another accredited or institutional investor.

38. The amendments to the SFA will remove the resale restriction in cases where the issuer has listed additional securities of the same class on an approved securities exchange with a prospectus issued in connection with the offer and listing.

(f) *Enhancements to the Real Estate Investment Trusts (“REIT”) Regime*

39. An offeror making a general offer for units in a REIT will be able to compulsorily acquire the units of the dissenting minority if he has obtained acceptances in respect of more than 90% of the units offered for, whilst minority unitholders may require an offeror to acquire their units once an offeror and its nominees hold 90% of the total number of units on issue.

40. Similar changes will be made for business trusts under the BTA as consequential amendments.

41. A REIT unitholder, may, with the amendment, apply to court for an order to seek judicial redress where he has been oppressed, his interests have been disregarded, or where a resolution/act unfairly discriminates or is otherwise prejudicial to him. This aligns with Section 41 of the BTA and Section 216 of the Companies Act.

(D) MARKETS AND CLEARING FACILITIES

(a) Setting of Position Limits and Trading Limits

42. The amendments on Position Limits places the responsibility of setting individual position limits on approved exchanges and designated clearing houses, as the frontline regulators. MAS will no longer be approving individual position limits, but will be responsible for approving the overall position limit frameworks of approved exchanges and designated clearing houses.
43. As for Trading Limits, MAS will no longer regulate trading limits set by approved exchanges and designated clearing houses. The responsibility of assessing and ensuring that there are appropriate and adequate controls for the management of risks would fall upon approved exchanges and designated clearing houses.

(b) Extending the Emergency Powers of MAS

44. Given the systemic importance of approved exchanges and designated clearing houses, the amendments will enhance MAS' emergency powers to deal with emergency situations in relation to approved exchanges and designated clearing houses.
45. The amendments will allow MAS to appoint one or more statutory advisers to provide advice to an approved exchange or designated clearing house on the proper management of its business when the approved exchange or designated clearing house:
- (i) is or is likely to become insolvent;
 - (ii) has shown signs of mismanagement such that it is operating to the detriment of MAS' regulatory objectives;
 - (iii) has contravened the SFA; or
 - (iv) has failed to comply with any condition attached to its approval as an approved exchange or designated clearing house.
46. The amendments will provide MAS powers to gather relevant information under all circumstances where MAS exercises emergency powers under Sections 32, 34 and 81 of the SFA.

(c) Power to Exempt Recognised Market Operators from Provisions under Part II of the SFA

47. Part II of the SFA sets out a baseline level of regulation for recognised market operators¹¹. To enhance this flexibility, the amendments will give MAS the power to exempt recognised market operators from any provision under Part II of the SFA.

¹¹ market operators that do not pose a systemic risk to Singapore's financial system

(d) Designated Clearing House's Handling of Customers' Money

48. The amendments clarify that money or assets deposited with the designated clearing house by a member for its customers are to be held in trust for the customers and kept separate from money and assets of members. Commingling of money or assets of customers of different members will not be prohibited. However, separate books have to be kept for customers' money and assets deposited by different members.

(e) Permissible Use of Customers' Money and Assets in Event of Default

49. The SFA currently provides that in the event of a default by a member, a designated clearing house may use customers' money or assets to meet the obligations of the member (which arise from the default of a customer) as long as the designated clearing house has reasonable grounds to assess that: (i) the member's default was the result of a customer's default to that member; and (ii) the failure to use customers' money or assets may jeopardise the designated clearing house's financial integrity.
50. Amendments now will be made to allow the clearing house to use customers' money or assets when the designated clearing house has reasonable grounds to assess that:
- (i) the member's default was the result of a customer's default to that member; and
 - (ii) the designated clearing house had wholly utilised the defaulting member's available money and assets against the default or the failure to use customers' money or assets may jeopardise the financial integrity¹² of the designated clearing house.
51. The use of the conjunction "or" for the conditions is deliberate and intended to give the designated clearing house flexibility in situations of grave systemic concern. MAS normally requires the designated clearing house to take all reasonable steps to ensure that it has wholly utilised the defaulting member's available money and assets before it relies on the flexibility afforded by the last condition. Designated clearing houses will also be required to disclose the circumstances under which they may use customers' money or assets.

(f) Power to Exempt a Holding Company of an Approved Exchange or Designated Clearing House from Provisions under Part IIIA of the SFA

52. The amendments will give MAS the power to exempt a holding company from being regulated under Part IIIA of the SFA which requires all direct and indirect holding companies of approved exchanges and designated clearing houses to apply to MAS to be approved as approved holding companies.¹³

¹² The ambiguity as to when a designated clearing house's financial integrity would be considered to be in jeopardy has not been addressed.

¹³ This will be the case, for example, where a holding company is already separately subject to MAS regulation.

(g) Fidelity Funds of Securities Exchanges and Futures Exchanges

53. The amendments limit the coverage of a fidelity fund¹⁴ of an approved exchange to:
- (i) losses arising from trading on that approved exchange; and
 - (ii) losses arising from trading through a trading linkage of that approved exchange with an overseas exchange.
54. The amendments will expand the circumstances under which a claim can be made on a futures fidelity fund with those in relation to the securities fidelity fund so that claims can be made on the futures fidelity fund in the event of defalcation by a member, as well as when there is bankruptcy or insolvency of members of the futures exchange.

(E) REGULATORY FLEXIBILITY TO DEAL WITH MARKET INNOVATION

(a) Definition of "Securities" and "Futures Contract"

55. The definitions of "securities" in the SFA¹⁵ are in the form of a list of products designated as securities, and a list of products explicitly excluded as securities. The amendments will allow MAS to prescribe products as "securities" and to exclude products from the definition of "securities" as appropriate.
56. MAS may under the definition of "futures contract" in the SFA prescribe contracts as "futures contract". The amendments will allow MAS to exclude contracts from the definition of "futures contract"

- E N D -

¹⁴ Under the SFA, approved exchanges are required to establish a fidelity fund to compensate investors who suffer losses as a result of defalcation. Defalcation is defined in Section 2 of the SFA as "misapplication, including misappropriation, of any property."

¹⁵ "Securities" is defined in the SFA in Section 2(1), Section 196A, Section 214 and Section 239.