

# LEGAL UPDATE

A DREW &amp; NAPIER PUBLICATION

## LEGISLATION UPDATE

### NEW REGULATORY REGIME FOR REPRESENTATIVES OF CMS LICENSEES AND FAA LICENSEES

#### Description of the new framework

##### *Introduction*

The Securities and Futures (Amendment) Bill and the Financial Advisers (Amendment) Bill of 2009 were passed by Parliament on 19 January 2009. They will effect a very significant change to the regulatory regime for representatives employed by holders of capital markets services (“**CMS**”) licences and financial advisers (“**FA**”) licences under the Securities and Futures Act (the “**SFA**”) and Financial Advisers Act (the “**FAA**”) respectively.

Representatives are the individual persons who actually perform the activity that the licensees are engaged in and for which they are regulated by the Monetary Authority of Singapore (the “**MAS**”).

Currently, the licensing and regulatory regime for representatives is operated on the basis that each representative of a CMS licensee or FA licensee has to be himself licensed to engage in the activity for which his company (the “**principal**”) holds a licence from the MAS. Thus, the individual who seeks a representative’s licence has to make an application to the MAS under the SFA or FAA (as the case may be) and the application has to be supported by the principal.

The MAS has to evaluate the suitability of the individual to be licensed. The SFA or FAA specifies the various grounds on which an application for a representative’s licence can be refused.

Such a regime resulted in long turn-around times for processing of representative licence approvals, and with the large number of capital markets and financial advisory firms in Singapore, utilised a considerable level of staff resources at the MAS. Significantly, it also implied that the MAS bore a certain degree of responsibility, at least in the public eye, over the individual’s suitability and fitness to hold a representative’s licence.

##### *New framework*

The new framework (to be found in the new Division 2 to Part IV of the SFA, and in the new Division 2 to Part II of the FAA) will shift a substantial part of the function of evaluating the representative’s qualifications to the principals who will employ them. The onus is now on principals to accept only qualified individuals as representatives.

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This change also brings the regime for licensed CMS representatives and FA representatives in line with the prevailing regime for representatives that are employed by exempt financial institutions under the SFA and FAA.

Underpinning the new framework are the Public Registers of Representatives (the “**Public Registers**”) that will be established under the new section 99C of the SFA and section 63A of the FAA for representatives engaged in SFA-regulated activities and financial advisory services respectively. The Public Registers will list the names of the representatives and also specify other relevant information about them, such as the types of regulated activities they are allowed to conduct, and their past employment history.

### *Representatives*

No individual will be allowed to act as a representative or to hold himself out as a representative of a CMS licensee or FAA licensee unless:

- he meets the entry and examination requirements specified by the MAS for the relevant type of SFA-regulated activity or financial advisory service (as the case may be); and
- his name is entered in the Public Register for the SFA or the FAA (as the case may be).

An individual who contravenes the above rule commits an offence. Under the SFA, he will be liable on conviction to a fine not exceeding \$50,000 or to a jail term not exceeding 12 months or to both and, in the case of a continuing offence, to a further fine not exceeding \$5,000 for every day or part thereof during which the offence continues after conviction (new section 99B(4) of the SFA). Under the FAA, he will be liable on conviction to a fine not exceeding \$25,000 or to a jail term not exceeding 12 months or to both and, in the case of a continuing offence, to a further fine not exceeding \$2,500 for every day or part thereof during which the offence continues after conviction (new section 23B(4) of the FAA).

Likewise, a CMS licensee or FAA licensee as principal commits an offence if it permits any such individual to carry on business in any type of SFA-regulated activity or any financial advisory service.

Under the SFA, the penalty for the principal is a fine not exceeding \$150,000 and, in the case of a continuing offence, a further fine not exceeding \$15,000 for every day or part thereof during which the offence continues after conviction (new section 99B(5) of the SFA). Under the FAA, the penalty for the principal is a fine not exceeding \$50,000 and, in the case of a continuing offence, a further fine not exceeding \$5,000 for every day or part thereof during which the offence continues after conviction (new section 23B(5) of the FAA).

There are three classes of representatives:

- (a) appointed representatives: those who meet in full the entry and examination requirements prescribed by the MAS;

- (b) provisional representatives: those who meet the entry requirements but have not yet cleared the requisite examinations; and
- (c) temporary representatives: those who are taken on by the principal on a temporary basis and hold their positions for a limited time.

The category of provisional representatives is being introduced to accommodate the relocation of experienced individuals currently licensed in an overseas jurisdiction. As a policy, the MAS would give them a grace period of 3 months to pass the requisite examinations.

The category of temporary representatives (introduced to accommodate experienced individuals that would conduct regulated activities in Singapore on a temporary basis to complement the existing staff of a CMS licensee) exists within the SFA regime and is not available under the FAA. Given the temporary nature of their activity within Singapore, they are not required to satisfy examination requirements.

#### *Notification procedure*

Procedurally, a principal who wishes to employ a particular individual as a representative will be required to notify the MAS by lodging certain documents. These include:

- (a) a notice of intent to appoint the individual as an appointed, provisional representative or temporary representative;
- (b) a certificate by the principal that the individual is a fit and proper person to be appointed; and
- (c) in the case of a provisional or temporary representative, an undertaking by the principal to undertake such responsibilities in relation to the representative as may be prescribed.

Fees are payable for the lodgement. According to the MAS, these fees will be comparable to the existing licensing fees.

On receipt of the documentation, the MAS will enter the name of the individual into the relevant Public Register and also specify the type of representative he will be, the relevant SFA-regulated activity or financial advisory service and such other particulars as it considers appropriate.

In the case of a temporary representative, the duration of the individual's status will also be indicated on the Public Register. Currently, licences issued to temporary representatives have an initial validity period of 3 months, extendable for a further 3 months, but subject to an overall limitation of 6 months within a 24-month period. The MAS has indicated that this policy will be maintained in the new framework.

### *Refusal to enter name in register, revocation and suspension*

The MAS has a residual discretion to refuse to enter a representative's name into the Public Register. The grounds on which the MAS may refuse to enter a representative's name are set out in the new section 99M of the SFA and section 23J of the FAA, and are substantially similar to the existing grounds for refusing an application for a representative's licence.

Where an a representative is already recorded in the Public Register, the MAS may also refuse to enter an additional type of SFA-regulated activity or financial advisory service (as the case may be) and/or revoke his status as a representative on similar grounds.

Instead of revoking the status of the representative, the MAS is also able to suspend his status for a period of time.

Any such revocation or suspension will be notified in the relevant Public Register.

When the proposed policy was first announced, a suggestion was put to the MAS that it would not be necessary for the MAS to play a gate-keeper role within the new framework. The MAS, however, replied that while it would no longer be the primary gate-keeper, it nevertheless had to reserve for itself a gate-keeper role in the broader public interest. The primary burden will be on the principals to ensure that the individuals meet the "fit and proper" criteria.

To ensure that transactions entered into by a representative who is revoked or suspended by the MAS are not invalidated by the revocation or suspension, both the SFA and the FAA will provide that any revocation or suspension is not to operate so as to avoid or affect any agreement, transaction or arrangement entered into by the representative (or any right, obligation or liability arising thereunder), whether the agreement, transaction or arrangement was entered into before, on the same day as or after the revocation or suspension.

To bolster the integrity of the information in the Public Register, there are provisions criminalising the submission of information that may be false or misleading in a material particular.

### **Impact Assessment**

#### *Shift of responsibility for making probity checks?*

The new notification regime involves an obvious shift of legal responsibility from the regulator to the principals when it comes to the appointment of suitably-qualified representatives. According to the MAS, the advantage of this new regime is the significant shortening of the administrative turn-around time, from the current 40 days needed before a licence is issued to the proposed 7-14 days for the individual's name to appear on the Public Register.

It is clear that there will be a shift in the responsibility for checking the qualifications of representatives. However, if the existing framework is compared with the new framework, it would be seen that the change is not as substantial as one might have initially thought.

Under the current framework, where a representative's licence issued by the MAS must be applied for, the statute provides that the application must be supported by the principal. In practice, however, the relevant form for the application (Form 3 of the Securities and Futures (Licensing and Conduct of Business) Regulations, or Form 6 of the Financial Advisers Regulations, as the case may be) already provides for the principal to certify to the MAS that it is satisfied that the individual is a fit and proper person for appointment.

Even without the requirement for a certificate, as a matter of prudence, it would be advisable for licensed financial institutions to conduct their due diligence enquiries to make sure that the representatives they employ to conduct the regulated activities on their behalf are up to the mark. To support a licence application that is subsequently rejected by the regulator would reflect badly on the financial institution, and may possibly cast doubt as to the judgement of that financial institution's management.

The new regime, with its heavier emphasis on the role and responsibility of principals, may give rise to questions as to the precise nature of the probity checks principals should carry out in order to discharge their duty. Such concerns are understandable because many regulatory or law enforcement agencies across the world still do not have a practice of disclosing negative information about licensed individuals. When the proposed policy was first announced in 2006, the MAS had indicated that they would issue further guidance on this; it is yet to be seen what guidelines they will prescribe. It has also been recognised that due diligence enquiries can only be made on a "best efforts" basis and, for this purpose, a "due diligence" defence has been provided for to protect the position of principals in respect of their certification of the proposed representatives (new section 990(4) of the SFA and new section 23L(4) of the FAA).

#### *Levelling the playing field*

A large segment of both the capital markets industry and the financial advisory industry is already subject to less stringent regulatory requirements for representatives. These are the exempt entities under the SFA and FAA.<sup>1</sup> Their representatives are currently already not required to hold a representative's licence. The exempt financial institutions are required to certify to the MAS that their representatives meet the "fit and proper" criteria. Apart from this, the MAS does not actively take part in assessing the suitability of individuals who serve as their representatives. The new legislative amendments thus bring the treatment of representatives of licensed financial institutions in line with the existing treatment of representatives of exempt financial institutions.

Dispensing with the need for a physical document known as a representative's licence benefits the individual who seeks employment as a representative in that he no longer needs to comply with additional regulatory requirements when he seeks employment with a licensed entity as compared with an exempt entity.

A useful development of the new legislative initiative is the creation of the Public Registers, which will set out information on the representative's employment history over the past 3

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<sup>1</sup> As at the date of writing, there are, according to the MAS website, 320 exempt financial advisers, 551 exempt fund managers, 137 exempt corporate financial advisers and 4 exempt leveraged FX traders. Compare these figures with 224 CMS licensees and 72 FA licensees.

years. The Public Registers are fully consonant with the MAS' stated philosophy of promoting greater transparency within the financial sector, while encouraging consumers to take their own initiative in verifying the status of the representatives they are dealing with. Few consumers would go to the extent of demanding to see a representative's licence, and would probably find it more convenient to look up the name against a publicly-accessible register (which would also specify if formal regulatory disciplinary action had been taken against the person over the past 3 years).

The concept of having a public register of representatives is not new. A system of public registration is used by the Australian Securities & Investments Commission and by the Hong Kong Monetary Authority and the Hong Kong Securities and Futures Commission.

#### *Transitional arrangements*

It is unclear what the regulatory position for transitional arrangements would be. As far as licensed entities are concerned, their representatives are already in possession of paper licences and so it is likely that the licensed representatives would simply have their names transposed into the Public Register. A more difficult issue arises with respect to exempt entities - would they be required as principals to carry out retrospective due diligence checks for the purpose of certifying to the MAS that their representatives are fit and proper? Some of these concerns were raised in public feedback when the proposed policy was announced and the MAS has indicated that it would work out an appropriate transitional regime for exempt principals.

#### References

1. [Securities and Futures \(Amendment\) Bill](#)
2. [Financial Advisers \(Amendment\) Bill](#)

If you have any queries about the Bills or wish to discuss how the changes may potentially affect you or your business, please feel free to contact the corporate and finance lawyers in Drew & Napier LLC (please refer to the Directors' Profiles on our [website](#)), or:

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