

REGULATION UPDATE

MAS' RESPONSE TO FEEDBACK RECEIVED ON CONSULTATION ON UNLISTED INVESTMENT PRODUCTS (PART II)

Introduction

This update focuses on the second part of the response (the "**Part II Response**") by the Monetary Authority of Singapore (the "**MAS**") to the feedback on its consultation paper on unlisted investment products issued on 12 March 2009 (the "**12th March Consultation**").

The Part II Response was released together with a new consultation paper (the "**New Consultation**"), which relates to both listed and unlisted investment products, on 28 January 2010.

Part I of the MAS' response to feedback (the "**Part I Response**") was published on 8 September 2009.

Our updates on the **12th March Consultation**, the **Part I Response** and the **New Consultation** can be accessed by clicking on the respective links.

Part II Response

The Part II Response addresses the following issues from the 12th March Consultation:

- definition of "complex investment products" and requirements for mandatory advice;
- remuneration structures for sale of investment products;
- requirement to appoint an approved trustee for unlisted debentures; and
- strengthening of the MAS' investigative and regulatory powers.

It also contains the MAS' updates on some issues first addressed in the Part I Response.

Complex investment products, mandatory advice and health warning

In the 12th March Consultation, the MAS had proposed a definition of "complex investment products" based on whether derivatives are embedded in the investment product. It also proposed that complex investment products should not be sold to retail investors except with advice, and that "health warnings" should be required in all disclosure

documents and advertising materials relating to such complex investment products.

After considering the feedback received, the MAS has decided not to proceed with the definition of “complex investment products” and its associated proposals. It has instead replaced them with the new proposals on “non-excluded investment products” in the New Consultation.

Remuneration structures for sale of investment products

The MAS had asked for suggestions as to how remuneration structures for representatives of financial advisors could be modified to align their interests with that of their customers. Feedback on this subject was divided - while many respondents suggested commission-based models, many others advocated fee-for-advice models.

The MAS has decided not to prescribe any further regulation in this area for now. It will instead monitor the steps taken by financial institutions in respect of the Guidelines on Fair Dealing – Board and Senior Management Responsibilities for Delivering Fair Outcomes to Customers, which emphasise that financial institutions’ boards of directors and senior management should work towards achieving fair outcomes for their customers.

Requirement to appoint approved trustee for unlisted debentures

The MAS had proposed that issuers of unlisted debentures, where the offer requires a prospectus to be issued, be required to appoint a trustee approved by the MAS.

The MAS has decided to proceed with this proposal, and proposes also to extend this requirement to listed debentures. However, no MAS approval will be required for the debenture trustee’s appointment.

If the debentures are issued by special purpose vehicles or are secured by collateral, the MAS will also require the trustees to be based in Singapore.

All debenture trustees will have duties based on the MAS’ current approval criteria for trustees of authorised collective investment schemes. These include ensuring that:

- (i) the trustee company has a minimum level of paid-up capital, shareholders’ fund, a sound financial position and a sufficient number of qualified personnel with relevant experience;
- (ii) the trustee company and each of its officers is a “fit and proper person” as defined in the Securities and Futures Act (“SFA”); and
- (iii) the trustee company obtains the necessary professional indemnity insurance or provides the MAS with a performance bond or similar instrument.

The MAS is also considering providing statutory protection to such trustees for liabilities incurred while performing their duties in good faith.

Strengthening of the MAS' investigative and regulatory powers

Civil penalty regime for the FAA

The MAS had proposed a civil penalty regime for breaches of the Financial Advisers Act (“FAA”). After assessing the feedback, the MAS has decided not to proceed with this proposal and will consider other more appropriate ways to sanction breaches of the FAA. It will, however, look into amending the FAA legislation to more clearly set out its investigative framework and procedures, and to clarify the safeguards and rights available to a person during the examination process.

Remedies for investors

Currently, section 27 of the FAA (on the requirement for recommendations to be made with reasonable basis) prescribes civil liability for its breach. The MAS will proceed with its proposal to extend civil liability to section 25 of the FAA which obliges a financial adviser to furnish product information to investors, and section 26 of the FAA which relates to false or misleading statements. It will also insert a provision in the FAA to enable a court, in making an order in a civil action under the FAA, to have regard to whether an investor had made a reasonable effort to resolve the dispute with the financial adviser before commencing the action.

The MAS had also proposed to include a “coat-tail” provision in the FAA which would enable investors to ride upon a criminal conviction or civil penalty award in filing a claim against financial advisers. On further consideration, the MAS has decided not to proceed with the insertion of this provision in the FAA.

Instead, the MAS has decided to enhance the remedies in the SFA for false and misleading statements. It proposes to make it an explicit offence for a person to make false or misleading statements in marketing and advertising materials for investment products. The MAS also proposes to allow affected investors to claim damages upon a breach of this provision and to pursue “coat-tail” actions against financial advisers who have been convicted or have had a civil penalty award made against them.

The MAS will also proceed to strengthen the prohibition against making false and misleading statements under the FAA by making it an offence to make false and misleading statements in relation to a wider range of issues. Currently, section 26 of the FAA only applies to statements in relation to amounts payable in respect of the contract or the effect of a provision under the contract. The MAS proposes to widen the scope of the prohibition using elements of the provisions in the SFA relating to false and misleading statements as a guide.

Power to apply to court for injunctions under the FAA

The MAS will proceed with its proposal to amend the FAA to include more comprehensive powers to enable the MAS to apply for injunctions and similar court orders.

Updates on issues discussed in Part I Response

Product Highlights Sheets

The MAS has developed sample Product Highlights Sheets and is currently consumer-testing them. It intends to extend the application of such Product Highlights Sheets to include all debentures in the form of asset-backed securities and structured notes (including exchange-traded notes), collective investment schemes (including exchange-traded funds), and sub-funds of investment-linked life insurance policies, for which the offer requires a prospectus to be issued.

Mandatory risk rating system for investment products

The MAS has decided not to proceed with its proposal to develop a mandatory risk rating system for investment products sold to retail investors.

References

Please click on the links below to refer to the full text of the relevant documents:

1. **The Part II Response**; and
2. **The 12th March Consultation**.

If you have any queries on this update, or wish to discuss how it 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 any of the following lawyers:

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