

LEGISLATION UPDATE

EXTENSIVE CHANGES TO THE SECURITIES AND FUTURES ACT AND FINANCIAL ADVISERS ACT INTRODUCED

Introduction

The **Securities and Futures (Amendment) Bill** (the "**SFA Bill**") and the **Financial Advisers (Amendment) Bill** (the "**FAA Bill**") were read for the first time in Parliament on 15 September 2008.

This follows a major consultation exercise carried out over the last two years, in which public feedback was obtained on significant proposed changes to the Securities and Futures Act (the "**SFA**"), the Financial Advisers Act (the "**FAA**") and their respective regulations. An outline of the last public consultation held in October 2007 is available [here](#).

The key changes to the SFA may be broadly classified under the following headings:

- (I) Capital Markets Licensing and Business Conduct;
- (II) Market Misconduct Enforcement;
- (III) Notification of Changes in Shareholdings of Directors and Substantial Shareholders;
- (IV) Offers of Investment;
- (V) Markets and Clearing Facilities; and
- (VI) Regulatory Flexibility to Deal with Market Innovation.

The key changes to the FAA are similar to those under the heading (I) and will be dealt with under that section.

A brief summary of the changes proposed under the SFA Bill follows.

(I) Capital Markets Licensing and Business Conduct

- (a) *Perpetual licensing regime for Capital Market Services ("CMS") licence holders*

The proposed new perpetual licensing regime will remove the requirement for CMS licence holders to renew their licences every 3 years.

- (b) *Representative notification framework*

The regime for representatives of CMS licensees and exempt financial institutions ("**FIs**") will be revamped. Currently, representatives of CMS licensees have to be licensed while representatives of exempt FIs do not. Moving forward, all representatives will be subject to the same notification framework. Their principals will have to ensure that they meet the

requisite qualifications and notify the Monetary Authority of Singapore (the “MAS”) of their proposed appointment. The MAS will maintain a public register of all representatives and their relevant details.

(c) *Provisional representative scheme*

The amendments will introduce a provisional representative scheme to allow individuals who have overseas experience in regulated activities similar to those under the SFA to carry out SFA-regulated services in Singapore, without first having to satisfy examination requirements. They will be given a grace period to clear the examination requirements and if they fail to meet the examination requirements, they will have to cease carrying on the regulated activity.

(d) *Appointment of directors by CMS licence holders*

The amendments clarify that the MAS' approval is required for the appointment of any chief executive officer or director, regardless of his country of residence or the nature of the director's role, but CMS licence holders that operate in Singapore as branch offices of foreign companies will only be required to seek the MAS' approval for the appointment of directors who are resident in Singapore or who are responsible for the operation of the Singapore branch.

(e) *The MAS' approval for take-over of licence holders and power of objection to licence holders' control*

The amendments will introduce a requirement for the MAS' prior approval where a potential owner or controller, in Singapore or elsewhere, wishes to enter into an arrangement which would result in him obtaining effective control of a CMS licence holder. In addition, the MAS, under certain circumstances, will be able to require an existing or potential owner or controller to relinquish effective control of a licence holder, or prevent him from entering into an arrangement to obtain effective control.

(f) *Representatives to only act for one principal*

Currently, it is the MAS' policy that representatives should only act for one FI. The new framework will formalise this policy, with 2 exceptions, namely: (i) where the appointed representatives act for FIs that are related corporations; or (ii) where the MAS has given its prior approval.

(g) *Prohibition Order (“PO”) regime*

Under the existing law, POs can only be used to prohibit CMS licence holders and their representatives from conducting SFA-regulated activities. Pursuant to the new amendments, the PO regime will be extended such that POs may be issued in a wide range of situations, including the following:

- (i) against exempt FIs and their representatives;
- (ii) where the MAS has reason to believe that a person has contravened the SFA;
- (iii) where a person is required to pay a civil penalty in respect of a market misconduct offence under Part XII of the SFA; or

(iv) where a person has been convicted of an offence involving fraud or dishonesty in Singapore or elsewhere.

(h) *Confidentiality of inspection and investigation reports*

The amendments will codify the MAS' current policy that persons inspected or investigated by the MAS are not allowed to disclose the inspection or investigation report to anyone other than an officer or auditor of the inspected or investigated entity.

(i) *Foreign regulators' inspections*

The SFA and FAA currently do not expressly give the MAS authority to deal with requests from foreign regulators to inspect CMS licence holders and exempt FIs whose parent entities they supervise. The proposed amendments clarify that foreign regulators which are considered to be exercising MAS-equivalent jurisdiction and functions as regards the industries they regulate will be required to seek the MAS' approval before carrying out any inspection.

(j) *FAA Bill amendments*

The proposed legislative changes in paragraphs (a), (b), (c), (d), (e), (h) and (i) above will also apply to financial advisors and their representatives through the amendments in the FAA Bill.

(II) **Market Misconduct Enforcement**

(a) *Transfer of evidence between the Commercial Affairs Department (the "CAD") and the MAS*

The proposed amendments will allow for the transfer of information from the MAS to the CAD and *vice versa* for civil and criminal investigations respectively, under Part XII of the SFA.

(b) *Disgorgement of benefits*

Under the new remedy of disgorgement, where an "innocent" person has benefited from market misconduct (for example, where his trading account has been used without his authorization) the court may order that gains may not be retained, but paid into court.

(c) *Corporate derivative liability*

Currently, a company may not be liable for market misconduct conducted by its employees unless its senior management is directly involved in the misconduct. Therefore, a company could – without liability – benefit from the market misconduct of its employees simply by delegating decisions to lower-level employees.

The SFA Bill proposes to hold a company liable where market misconduct by its employees was committed *with the company's consent or connivance*, or where the company, through its *negligence*, failed to prevent or detect the employees' market misconduct.

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

The requirement for directors and substantial shareholders to notify their shareholding interests to the listed company will be migrated from the Companies Act to the SFA. The listed company will be required to notify its investors of changes to such shareholding interests. The above requirements will also apply to foreign-incorporated companies with a primary listing on the Singapore Exchange Securities Trading Limited.

(IV) Offers of Investments

(a) *Audit of financial statements of debenture issuers*

The requirement for an audit of the half-year financial statements of debentures issuers will be removed.

(b) *Minimum investment threshold amount for prospectus exemption*

The minimum investment amount required for a prospectus exemption will be lowered from the existing \$200,000 to \$100,000.

(c) *Recognition of foreign business trusts*

Foreign-constituted business trusts need not be registered under the Business Trusts Act (the "BTA") unlike local business trusts. Instead they can rely on a recognition regime where they will be recognised by the MAS if the laws and practices in their country provide protection to Singapore investors which is at least equivalent to that provided under the BTA.

(d) *Removal of resale restrictions upon listing of securities*

The current 6-month resale restriction imposed on securities offered to accredited or institutional investors under a prospectus exemption will no longer apply where the issuer lists additional securities of the same class on an approved securities exchange and a prospectus is issued in connection with such offer and listing.

(e) *Enhancement of the Real Estate Investment Trusts ("REIT") regime*

Two new changes to the REIT regime have proposed as a result of industry feedback.

First, the units of dissenting unitholders may be compulsorily acquired under circumstances where a general offer has been made and acceptances in respect of more than 90% of the units offered for obtained, pursuant to a framework similar to that applicable to companies under section 215 of the Companies Act. Minority unitholders may also require an offeror to purchase their units if the offeror acquires not less than 90% of the total number of issued units. A similar framework will be put in place in respect of business trusts.

Next, unitholders will be permitted to seek redress in the event of oppressive or unfairly discriminatory or prejudicial conduct by REIT managers or trustees pursuant to a framework

similar to that applicable to companies and business trusts under section 216 of the Companies Act and section 41 of the BTA respectively.

(V) Markets and Clearing Facilities

Amendments have been proposed to delegate the setting of position limits and trading limits from the MAS to approved exchanges and designated clearing houses, to extend the emergency powers of the MAS, and to grant certain powers and discretions to market operators, securities and futures exchanges and designated clearing houses.

(VI) Regulatory flexibility to deal with market innovation

The definitions of "Securities" and "Futures Contract" in the SFA will be widened to allow the MAS to both prescribe what is, or is not, a "Security" or a "Futures Contract". This will improve the time-to-market for new products and enable the regulatory framework to keep pace with market developments.

If you have any queries about the Bills or wish to discuss how it may potentially affect you or your business, please feel free to contact the banking and corporate lawyers in Drew & Napier LLC (please refer our **Directors' Profiles**), or any of the following lawyers:

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The content of this article does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances.

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