

LEGAL UPDATE

A DREW & NAPIER PUBLICATION

LEGISLATION UPDATE

MAS ISSUES PUBLIC CONSULTATION ON UNLISTED INVESTMENT PRODUCTS

As part of its major review on investment products, the Monetary Authority of Singapore (the “**MAS**”) has issued a consultation paper (the “**Consultation Paper**”) containing its proposals to curb mis-selling and improve disclosure in relation to three product groups (referred to collectively as “**unlisted investment products**”): debentures and collective investment schemes (“**CIS**”) which are not traded on any approved exchange, and life policies (including investment-linked life insurance policies (“**ILPs**”).

The recommendations are a combination of new legal obligations and enhancements of existing requirements. They aim to promote more effective consumer disclosure and to strengthen accountability within the financial advisory industry. The proposals also seek to reinforce the principles contained in the MAS’ Fair Dealing Guidelines, a set of rules to be issued by the MAS in late March 2009.

The propositions put forward in the consultation paper may be classified generally under the following headings:

- Proposals to improve consumer disclosure: (i) in marketing and advertising, (ii) prior to completion of a transaction, and (iii) during the life of the product;
- Proposals to strengthen fair dealing practices;
- Additional proposals for certain categories of investment products; and
- Broadened scope of liability for mis-selling and misrepresentation.

The consultation is open for public feedback until **23 April 2009**.

Improved consumer disclosure

Marketing and advertising materials | The MAS proposes to introduce statutory provisions which state that marketing and advertising materials for unlisted investment products must present a fair and balanced view of the product. Some of the suggestions which the MAS has put forward include: the requirement for a minimum font size for presenting product information, restrictions on marketing the product as being similar to a bank deposit or downplaying the risks associated with the product, and developing a standard definition of the phrase “capital/principal protected”. These are intended to provide investors with a more balanced and realistic impression of an investment product and its features and risks.

MAIN OFFICE

20 Raffles Place
#17-00 Ocean Towers
Singapore 048620

t +65 6535 0733

f +65 6535 4906

mail@drewnapier.com
www.drewnapier.com

Co. Reg. No. 200102509E

Product highlights sheet | Another proposal which seeks to protect the retail investor is the requirement for a product highlights sheet to accompany each investment product. The product highlights sheet is a separate document from the prospectus and serves to highlight key information to investors in a clear, concise and effective manner. A set of draft key questions which the product highlights sheet is required to answer is set out in the consultation paper, and includes questions on product suitability, liquidity and structural safeguards. Liability for the contents of the product highlights sheet will be the same as that for the contents of a prospectus.

Requiring an additional document to the prospectus to be drawn up and imposing the same liability on its contents as that for a prospectus would undoubtedly increase the time and advisory costs spent each time an unlisted investment product is launched. Also, in drafting the product highlights sheet, it will not always be easy to strike a balance which achieves the intended brevity without material omission.

Ongoing disclosure | The MAS proposes to impose specific ongoing disclosure requirements, such as annual reports and reports on material changes, for all investment products which require prospectuses. It also proposes to require issuers to publicise on a regular basis the bid or redemption prices of their investment products. Such changes would narrow the difference between the regulatory treatment of unlisted investment products and that of listed investment products.

Strengthening of fair dealing practices

To enhance financial institutions' accountability and responsibility towards customers, the MAS has put forward certain proposals to strengthen fair dealing in the sales and advisory process. These will have impact in the areas of information collection, information assessment and provision of advice.

Information collection

Enhancement of existing advisory processes | The MAS proposes to enhance the quality of the information collected by financial advisers. Currently there are regulations which require representatives of financial advisors ("**FA reps**") to collect certain data from customers, including risk tolerance, employment status, and current investment portfolio. The MAS proposes that the FA reps should also make reasonable enquiries to find out the source and extent of the customer's regular income, whether the amount to be invested in the product is a substantial portion of the customer's assets and the regular financial commitments of the customer. Failure to comply may affect the FA rep's standing as a "fit and proper" person to conduct financial advisory activities.

Existing customer due diligence requirements are already fairly intrusive; these additional requirements will require even more information to be obtained from customers. Financial institutions may therefore find it a challenge to comply with this requirement while trying to accommodate the customer's need for privacy.

Information assessment

Due diligence for new products | Distributors of products will be required to implement policies and procedures to: (i) assess the nature of a new product, and (ii) assess its suitability for targeted customer segments. Some of the questions to be answered during this due diligence process include: who the product is intended for, what the product's investment objective is, and how the company will determine which customers the product is suited for, given the risk profile and other features of the product. The due diligence is to be approved by senior management and proper documentation and records will have to be maintained for audit trail purposes.

More details in documenting the advisory process | Currently, FA reps are already subject to regulatory guidance on documenting their basis for recommending a product to customers. However, the Consultation Paper provides for more details to be recorded to show the FA reps' analysis of the product's suitability. These include stating the customer's investment objective, explaining why the product is suitable having regard to the information obtained from the customer, and explaining possible disadvantages of the investment for the customer.

Provision of advice

Restriction on sale without advice | Under existing regulations, FA reps can choose to not offer advice to customers if the customers opt not to provide information about themselves and/or choose not to accept the FA reps' recommendations. The MAS proposes to heighten FA reps' responsibility to their customers by providing that they can only dispense with giving of advice if the customer had approached the FA rep on his own initiative to purchase the investment product and by requiring the FA rep to warn the customer in writing that he is waiving his right to receive advice on the suitability of the investment product.

Restriction on bank tellers' activities | The MAS also proposes to prohibit bank tellers from referring customers to FA reps for the purchase of investment products.

Additional proposals for certain categories of investment products

Complex investment products | The MAS proposes to impose an enhanced regulatory regime on complex investment products.

"Complex investment products" refer to:

- (a) unlisted debentures which embed derivatives; and
- (b) unlisted CIS and ILPs, where the funds have an investment approach directed at delivering returns from investments in derivatives.

The enhanced regime would impose additional requirements such as: ensuring that complex investment products are only sold to investors with financial advice, including a health warning in all marketing and advertising materials, the product highlights sheet and the

prospectus, and ensuring that the FA reps selling such products are sufficiently trained and competent.

Unlisted debentures | For this category of investment products, the MAS proposes to impose a cooling off period of seven days (similar to that currently imposed for unit trusts) and a requirement to appoint a trustee (similar to the current requirement for listed debentures and authorised CIS).

Broadened scope of liability for mis-selling and misrepresentation

The proposed changes under this broad heading are in line with the MAS' overall intention to make the Securities and Futures Act (the "SFA") and the Financial Advisers Act (the "FAA") more consistent with each other. They serve as added deterrents to breaches of the FAA.

Introduction of civil penalty regime to the Financial Advisers Act | The MAS proposes to make breaches of Part III of the FAA, which currently already attract criminal liability, subject to civil penalty liability as well.

The civil penalty regime, which already exists under the SFA for certain contraventions, enables the MAS to take civil penalty actions against persons who contravene certain SFA provisions. Civil penalty actions differ from criminal actions in that the standard of proof is based on a balance of probabilities instead of beyond a reasonable doubt (the former standard being less strict than the latter). Also, the party bringing the action is different: in criminal actions it is the Public Prosecutor; whereas for civil actions under the SFA/FAA, it is the MAS.

"Coat-tail" actions | Further to the imposition of the civil penalty regime, the MAS also intends to introduce a provision that will enable an investor to apply to court for compensation against a financial advisor or FA rep which has been convicted or ordered to pay a civil penalty under the FAA. In effect, the investor will "ride upon the coat-tails" of the conviction or civil penalty order to obtain compensation against the wrongdoer, without having to take separate legal action to prove the wrongdoing.

Widening scope of provision on false or misleading statements | The MAS also proposes to widen the scope of the provision in the FAA relating to false or misleading statements by incorporating certain elements from the SFA.

Examples of such elements in the SFA provisions are where a person: (i) makes a false or misleading statement which is likely to induce a purchase of securities, (ii) makes a statement which he ought to have reasonably known that the statement is misleading, false or deceptive, (iii) dishonestly conceals material facts, (iv) is reckless in making the statement, (v) omits to state a material fact, or (v) commits any act or practice that operates as a fraud or a deception.

References

Please click on the links below to refer to the relevant documents:

1. **MAS Press Release dated 12 March 2009**; and
2. **Full text of the Consultation Paper**.

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:

Gary Pryke

Director (Corporate & Finance)
T: +65 6531 4104
E: gary.pryke@drewnapier.com

Valerie Kwok

Director (Corporate & Finance)
T: +65 6531 2222
E: valerie.kwok@drewnapier.com

Sin Boon Ann

Director (Corporate & Finance)
T: +65 6531 2206
E: boonann.sin@drewnapier.com

Ralph Lim

Director (Corporate & Finance)
T: +65 6531 2362
E: ralph.lim@drewnapier.com

Petrus Huang

Director (Corporate & Finance)
T: +65 6531 2208
E: petrus.huang@drewnapier.com

Sandy Foo

Director (Corporate & Finance)
T: +65 6531 4118
E: sandy.foo@drewnapier.com

Yeo Wee Kiong

Director (Corporate & Finance)
T: +65 6531 2500
E: weekiong.yeo@drewnapier.com

The contents of this update are only intended to provide general information on the subject covered. Nothing in this publication should be treated as specific professional legal advice concerning any particular business, operational or other situations with which you might be faced. Drew & Napier LLC accepts no liability for, and does not guarantee the accuracy of, the information contained in this publication, and does not accept any liability for any loss or damage arising from any reliance thereon.

OUR BUSINESS GROUPS AND PRACTICE AREAS

BANKING/GENERAL FINANCE

David Ang
T +65 6531 2236
F +65 6535 4864
E david.ang@drewnapier.com

Valerie Kwok
T +65 6531 2222
F +65 6535 4864
E valerie.kwok@drewnapier.com

Sandy Foo
T +65 6531 4118
F +65 6535 4864
E sandy.foo@drewnapier.com

BIOMEDICAL SCIENCES

Tony Yeo
T +65 6531 2512
F +65 6220 0324
E tony.yeo@drewnapier.com

BUILDING & CONSTRUCTION

Tan Liam Beng
T +65 6531 4139
F +65 6533 3591
E liambeng.tan@drewnapier.com

CAPITAL MARKETS

Sin Boon Ann
T +65 6531 2206
F +65 6535 4906
E boonann.sin@drewnapier.com

Petrus Huang
T +65 6531 2208
F +65 6535 4906
E petrus.huang@drewnapier.com

CHINA BUSINESS GROUP

David Chin
T +65 6531 2304
F +65 6535 1952
E david.chin@drewnapier.com

COMPETITION LAW

Cavinder Bull, SC (contentious)
T +65 6531 2416
F +65 6533 3591
E cavinder.bull@drewnapier.com

Lim Chong Kin (non-contentious)

T +65 6531 4110
F +65 6535 4864
E chongkin.lim@drewnapier.com

CORPORATE

David Ang
T +65 6531 2236
F +65 6535 4864
E david.ang@drewnapier.com

Gary Pryke
T +65 6531 4104
F +65 6535 4864
E gary.pryke@drewnapier.com

OTHER OFFICES

Drewmarks Patents & Designs (Malaysia) Sdn Bhd
9th floor
Bangunan Getah Asli (Menara)
148 Jalan Ampang
50450 Kuala Lumpur, Malaysia
T +603 2162 2522/2162 2529
F +603 2162 2804
E drewmark@tm.net.my

CORPORATE (cont'd)

Sin Boon Ann
T +65 6531 2206
F +65 6535 4906
E boonann.sin@drewnapier.com

Yeo Wee Kiong
T +65 6531 2500
F +65 6535 4864
E weekiong.yeo@drewnapier.com

CORPORATE INSOLVENCY & RESTRUCTURING

Sushil Nair
T +65 6531 2410
F +65 6533 9029
E sushil.nair@drewnapier.com

Manoj Sandrasegara
T +65 6531 4156
F +65 6533 9029
E manoj.sandra@drewnapier.com

EMPLOYMENT & IMMIGRATION

Indranee Rajah, SC
T +65 6531 4100
F +65 6532 7149
E indranee.rajah@drewnapier.com

FAMILY & MATRIMONIAL

Randolph Khoo
T +65 6531 2418
F +65 6532 7149
E randolph.khoo@drewnapier.com

FUND MANAGEMENT, REIT & PRIVATE EQUITY

Petrus Huang
T +65 6531 2208
F +65 6535 4906
E petrus.huang@drewnapier.com

INSURANCE & REINSURANCE

Gary Pryke
T +65 6531 4104
F +65 6535 4864
E gary.pryke@drewnapier.com

INTELLECTUAL PROPERTY

Morris John (Patents)
T +65 6531 2503
F +65 6533 0694
E mj@drewnapier.com

Dedar Singh Gill (Trade Marks)

T +65 6531 2507
F +65 6533 0694
E dedar.singh@drewnapier.com

INTERNATIONAL ARBITRATION

Davinder Singh, SC
T +65 6531 2403
F +65 6532 7149
E davinder.singh@drewnapier.com

Jimmy Yim, SC
T +65 6531 2504/2505
F +65 6533 9029
E jimmy.yim@drewnapier.com

LITIGATION

Davinder Singh, SC
T +65 6531 2403
F +65 6532 7149
E davinder.singh@drewnapier.com

Jimmy Yim, SC
T +65 6531 2504/2505
F +65 6533 9029
E jimmy.yim@drewnapier.com

Indranee Rajah, SC
T +65 6531 4100
F +65 6532 7149
E indranee.rajah@drewnapier.com

PROJECT FINANCE
Gary Pryke
T +65 6531 4104
F +65 6535 4864
E gary.pryke@drewnapier.com

Valerie Kwok
T +65 6531 2222
F +65 6535 4864
E valerie.kwok@drewnapier.com

Sandy Foo
T +65 6531 4118
F +65 6535 4864
E sandy.foo@drewnapier.com

PROPERTY
Zennifa Rahim
T +65 6531 2392
F +65 6535 1952
E zennifer.rahim@drewnapier.com

SHIPPING & INT'L TRADE
Ian Koh
T +65 6531 2436
F +65 6533 3591
E ian.koh@drewnapier.com

TAX & PRIVATE CLIENT SERVICES
Ong Sim Ho
T +65 6531 2250
F +65 6535 4864
E simho.ong@drewnapier.com

TMT
Lim Chong Kin
T +65 6531 4110
F +65 6535 4864
E chongkin.lim@drewnapier.com

TRANSNATIONAL & CROSS-BORDER WORK
Julian Kwek
T +65 6531 2485
F +65 6533 9029
E julian.kwek@drewnapier.com

PT Drewmarks Konsultama
Correspondence address:
20 Raffles Place
#17-00 Ocean Towers
Singapore 048620
T +65 6531 2503/6531 2504
F +65 6533 0694
E ip@drewnapier.com

Drewmarks Philippines Inc
Correspondence address:
20 Raffles Place
#17-00 Ocean Towers
Singapore 048620
T +65 6531 2503/6531 2504
F +65 6533 0694
E ip@drewnapier.com

DrewCorp Services Pte Ltd
20 Raffles Place
#09-01 Ocean Towers
Singapore 048620
ROC No. 200102492H
T +65 6531 2266
F +65 6533 1542/6533 7649
E services@drewcorpservices.com