THE LAW SOCIETY OF SINGAPORE

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Market Conduct Policy Division
Capital Markets Department
Monetary Authority of Singapore
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No of pages: 8 (including this page)

Dear Sirs

CONSULTATION ON AMENDMENTS TO THE SECURITIES AND FUTURES ACT (CAP.289) AND THE FINANCIAL ADVISERS ACT (CAP. 110)

We refer to the letter dated 23 May 2012 from Ms Rosemary Lim, head of the Market Conduct Policy Division, Capital Markets Department of MAS, inviting the Law Society to provide our feedback on

1. the Consultation Paper on Proposed Amendments to the Securities and Futures Act and the Financial Advisers Act, and

2. the Consultation Paper I on Proposed Amendments to the Securities and Futures Act on Regulation of OTC Derivatives.

This matter was released to our Corporate Practice Committee for comments.

The response of the above Committee is enclosed in Annex A.

Thank you for giving the Law Society the opportunity to consider the matter.

Yours faithfully

Alvin Chen
Chief Legal Officer
Director, Representation and Law Reform

Encl.

ANNEX A

RESPONSE BY THE LAW SOCIETY'S CORPORATE PRACTICE COMMITTEE

Response by the Corporate Practice Committee
c/o The Law Society of Singapore

MAS Consultation Paper dated 23 May 2012 on Proposed Amendments to the Securities and Futures Act and the Financial Advisers Act

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This response sets out the various views of members of the Corporate Practice Committee of the Law Society of Singapore in June 2012 in relation to the MAS Consultation Paper dated 23 May 2012 on Proposed Amendments to the Securities and Futures Act and the Financial Advisers Act.

The response focuses on the proposed amendments to the Securities and Futures Act. There are no comments on the proposed amendments under the Financial Advisers Act.

Proposed amendment to section 95 (1) (Lapsing of licence)

The proposed drafting of the amendment to section 95 (1) to add that the capital markets services licence will lapse if " ... (ba) the Authority has reason to believe that the holder has not acted in the best interests of its subscribers or customers" needs to be improved.

It is uncertain when the licence will lapse as there is no means for the licence holder or other third persons to know when the Authority has such reason to believe that the licence holder has not acted as such.

It will be preferred if such lapsing occurs upon the Authority *notifying* the licence holder that it has reason to believe that the holder has not acted in the best interests of its subscribers or customers". [*emphasis added*]

It would also be preferred if such notification could be posted on the website of the Authority's Directory of Financial Institutions against such licence holder so that third persons would be able to ascertain that the licence of such holder has lapsed.

Alternatively, the ground itself should not justify an automatic lapsing under subsection (1), but rather empower MAS to revoke under subsection (2). Revocation typically requires the entity to be given an opportunity to be heard. In other words, the additional ground should be inserted under subsection (2) rather than (1).

Proposed new section 265A (Requirement of debenture Trustee)

The proposed new section 265A (3) (d) requires a borrowing entity to ensure that "... in respect of debentures issued by a specified financial institution, be carrying on business in Singapore unless the borrowing entity is reasonably satisfied that the trustee can and will take timely and appropriate action on behalf of the holders of debentures in the event of a default or as required by the trust deed."

This is somewhat clarified by the proposed new section 265A (4) which provides that "... for the purposes of subsection (3)(d), the borrowing entity shall, in determining whether the trustee can and will take timely and appropriate action on behalf of the holders of debentures in the event of a default or as required by the trust deed, consider among other things: (i) whether the trustee is licensed or regulated in its home jurisdiction; (ii) the contractual arrangements between the borrowing entity and the trustee; and (iii) the duties imposed on the trustee by way of the trust deed and the laws applicable to the trustee...."

The Committee is of the view that the clarification in the proposed new section 265A (4) is insufficient guidance to enable the borrowing entity to be reasonably satisfied that the [foreign] trustee can and will take timely and appropriate action on behalf of the holders of debentures in the event of a default or as required by the trust deed. It is not clear whether

either mere licensing of the trustee is sufficient, whether the usual trustee contractual arrangements are sufficient, or whether the usual laws applicable to the trustee are sufficient.

In the context of a public offering of such debentures, it is critical that such matters be clear as the liability of the offeror, underwriters, arrangers and other parties involved in such offering are dependent on such matters being clearly complied with. The status of the trustee is of critical importance in the offering. The amounts involved and the extent of liability for such offering could be very large.

It is the Committee's view that the proposed section 265A (4) instead provide that such matters be spelt out in subsidiary legislation or by a directive from the Authority in greater detail. The detailed legislation could require such foreign trustee to be licensed in a recognized jurisdiction and not have any regulatory infraction with its lead regulator, to be capitalized as to an adequate specified amount, and other matters which demonstrate the reliability and good track record of such trustee.

Proposed new section 268 A (Obligations of Offeror of Unlisted Debentures)

The proposed new section 268A (5) requires that a borrowing entity shall *immediately* disclose to holders of unlisted debentures any information which may materially affect: (a) the risks and returns; or (b) the price or value, of the unlisted debentures. [*emphasis added*]

The Committee is of the view that "immediately" is unrealistic and overly onerous as the borrowing entity necessarily would have to consult its board of directors and/or its advisers including its legal advisers as to the timing and phrasing of such disclosure. The

Committee would suggest that the borrowing entity shall "promptly" disclose instead or alternatively, there should be a period of one clear market day for such disclosure.

Proposed new section 271A (MAS may issue directions to debenture offeror and to debenture trustee)

The proposed new section 271A provides that "... the Authority may, where it appears to the Authority to be necessary or expedient in the public interest to do so, issue directions by notice in writing either of a general or specific nature to the debenture offeror or the debenture trustee. .."

The Committee is of the view that such power to give directions may create a great deal of uncertainty and may be unacceptable in the context of a public offering particularly where the funds raised are very large. The possibility of such directions being given while the offering is being made to the thousands of offerees worldwide may create an unacceptable level of uncertainty and jeopardize the entire offering. The possible failure of such offering could involve large losses. The grounds on which such directions may be made are not clearly provided. The extent and nature of such directions are also not spelt out. The consequences of failure to comply with such directions are not clear.

If the MAS is of the view that such power to give directions is necessary, it is preferable that the grounds, extent and nature of such directions and consequences of non-compliance be set out in detailed regulations, circulars, practice notes and guidelines.

The same comments apply in the business trust equivalent provision in the proposed new section 282ZG and the collective investment scheme context.

Proposed new section 309B (Obligation to classify capital markets products)

The proposed new Part XIIIA and in particular the proposed new section 309B (Obligation to classify capital markets products and notify relevant persons) requires the issuer to classify the product and inform the relevant stock exchange (if the product is listed) and/or the capital markets service licence holder or the licensed financial adviser regarding such classification.

It is noted that the prospectus exemptions in favor of exempt offers to institutional investors, accredited investors, and other exempt offerings in Part XIII Division 1 (*Shares and Debentures*) Sub-Division (4), Division 1A (*Business Trusts*) Sub-Division (3) and Division 2 (*Collective Investment Schemes*) Sub-Division (4) would not exempt the offerors from complying with the proposed new Part XIIIA.

It is odd that the various exempt offerings are required to comply with Part XIIIA particularly where the offerees are institutional investors and/or accredited investors as they have their own legal advisers and are well placed to make the determination for themselves. Such new requirement may create an unnecessary burden to exempt offerings in Singapore.

The Committee is of the view that such disclosure requirement is already implicit in the case of retail offerings as the registered prospectus is required to disclose all material information. The classification of the capital markets service product is undoubtedly material information and must be disclosed in the registered prospectus. There is no necessity to create a new Part XIIIA in the Securities and Futures Act in this regard and add to the prolixity and unwieldiness of the Securities and Futures Act.

Proposed new section 309C (Prohibited terms "capital protected" or "principal protected")

The proposed new section 309C prohibits the use of the terms "capital protected" or "principal protected" or any of their derivatives in any language in the name or within the prospectus related to the capital markets product. The Committee is of the view that an outright prohibition in every circumstance may be overly wide particularly in the context of exempt offerings to institutional investors and accredited investors who may have financial advisors and legal advisors assisting in their financial review of such potential investments.

It is not uncommon for such terminology to be set out in the exempt information memorandum relating to such capital markets product and it would be unrealistic to require the offeror to produce a redacted prospectus deleting such terminology in an exempt offering to institutional investors and accredited investors. The attendant difficulties may result in foreign offerors avoiding Singapore institutional/accredited investors and adversely affect Singapore's standing as an international financial/funds management centre.

The Committee is of the view that there should be subsidiary legislation for exempting offers to institutional investors and accredited investors from such prohibition and that such subsidiary legislation should come into effect at the same time as the coming into force of this proposed new section 309C.
