

MAS consults on proposed changes to financial regulatory framework

The Securities and Futures Act (SFA) was amended in 2012 to, amongst other things, implement over-the-counter (OTC) derivatives reforms in relation to reporting and clearing of OTC derivatives transactions and the regulation of OTC derivatives trade repositories and clearing facilities.

Further to the 2012 amendments and as a continuation of the OTC derivatives reform agenda, the MAS is now proposing amendments to strengthen its enforcement powers with regard to OTC derivatives markets, trading and licensing of OTC derivatives intermediaries and transfer the regulatory oversight of commodity derivatives from the Commodity Trading Act (CTA) to the SFA.

The MAS has also taken the opportunity to carry out a comprehensive review of the SFA and is proposing a number of other amendments which are discussed in more detail below.

Proposals outlined in the Consultation Paper

Regulation of OTC derivatives

The MAS proposes to extend its regulatory regime to OTC derivatives trading platforms and intermediaries, and introduce a simplified and principles-based definition of "derivative contract" which aims to describe the key elements of derivatives.

In connection with the proposed definition of a "derivative contract", the MAS is proposing to:

- (a) replace references to "futures contracts" with "derivatives contract" throughout the SFA;
- (b) simplify the definition of "securities" and introduce a new "securities-based derivative contract" to be a sub-set of the "derivative contract" definition;
- (c) introduce a catch-all term "capital markets products" for the purposes of making references to all regulated products; and
- (d) introduce a new definition of "organised market" to replace the existing definitions of "market", "securities market" and "futures market" under Part I and in the First Schedule to the SFA.

In relation to the new definition of "organised market", the new definition will define a market by its underlying function of facilitating the exchange, sale or purchase of specified products regulated under the SFA, including derivatives contracts.

Key proposals

- Effect reforms on the regulation of OTC derivatives in relation to derivatives markets, mandatory trading and licensing of OTC derivatives intermediaries
- Transfer the regulation of commodity derivatives from the Commodities Trading Act to the Securities and Futures Act
- Strengthen the MAS' enforcement regime in relation to market misconduct
- Enhance the transparency of short selling activities
- Re-mapping the regulatory perimeter of "fund management"
- Providing flexibility to the MAS in relation to criteria for recognising foreign collective investment schemes

New regulated activities

The MAS will be introducing a new regulated activity of "dealing in OTC derivatives" as well as another regulated activity of "dealing in capital markets products", which will encompass the existing regulated activities of "dealing in securities", "trading in futures contracts" and "leveraged foreign exchange trading".

Reporting of OTC derivatives

The MAS proposes to amend provisions in Part VIA of the SFA concerning reporting of information on a specified derivatives contract, by a specified person, who acts as an agent of a party to that contract (where that party is not a specified person). Specifically, the MAS proposes to make amendments to clarify that for such contracts which are booked in Singapore, they would have to be reported even if these contracts were not traded in Singapore. This amendment will allow the MAS to have oversight over all specified derivatives contracts which are booked in Singapore and enhance the MAS' ability to oversee the OTC derivatives markets.

The MAS also proposes to lift banking confidentiality by making amendments in the SFA to permit financial institutions to report customers' information for the purposes of complying with the MAS' and specified foreign jurisdictions' trade reporting obligations.

No trading mandate

While the MAS has assessed that it is not necessary at the moment to mandate a trading regime for OTC derivatives, it will exercise its powers to implement a trading regime if it considers that necessary in the future.

Transfer of regulation of commodity derivatives

In line with the earlier policy consultation in February 2012, the MAS proposes to transfer regulatory oversight of commodity derivatives from the CTA, currently administered by International Enterprise Singapore, to the SFA. The regulatory oversight of spot commodity trading will be retained under the CTA, and will continue to be administered by International Enterprise Singapore.

Strengthening the MAS' enforcement regime

Section 199 of the SFA prohibits the making of false and mis-leading disclosures so that investors can have confidence in the accuracy of information that is disseminated to the market.

In this regard, the MAS seeks to make clear the policy intent behind section 199 and proposes to clarify that there is no requirement of material price impact under section 199 before a contravention can be established.

Under section 232 of the SFA, the maximum amount of civil penalty that can be imposed for a contravention of the market conduct provisions under Part XII of the SFA is dependent on whether a contravening person's conduct resulted in him:

- (a) gaining a profit or avoiding a loss (collectively, obtaining a "**Benefit**"); or
- (b) not obtaining a Benefit at all.

If the contravening person obtained a Benefit, the maximum amount of civil penalty payable is presently capped at the higher of three times the amount of Benefit obtained or S\$50,000. If the contravening person did not obtain a Benefit, then the maximum amount of civil penalty payable is presently capped at S\$2 million. The MAS proposes to amend section 232 of the SFA to increase the civil penalty ceiling in all cases, regardless of whether or not a Benefit was obtained.

Short selling

The MAS proposes to introduce a new Part VIIA on short selling in the SFA. The new Part VIIA will set out the regulatory framework for (i) marking of short sell orders and (ii) short position reporting. Detailed requirements will be provided in secondary legislation, which will be separately consulted on at a later date.

Fund management

The MAS proposes to amend the definition of "fund management" to mean "undertaking on behalf of a customer (whether on a discretionary authority granted by the customer or otherwise) – (a) the management of a portfolio of capital markets products; (b) the management of a collective investment scheme; or (c) entering into spot foreign exchange contracts for the purpose of managing the customer's funds, but does not include real estate investment trust management".

The MAS intends to license and regulate managers of a collective investment scheme (CIS) that invests in physical assets only if the CIS is offered to retail investors. The MAS proposes to grant a class exemption to managers of CIS that are offered only to accredited or institutional investors.

Criteria for recognising foreign CIS

Currently, the SFA allows the MAS to recognise a foreign CIS for offer to retail investors only if the laws and practices of the jurisdiction (that the CIS is constituted and regulated under) provides retail investors with a level of protection that is equivalent to locally constituted CIS.

The MAS is proposing to amend section 287 of the SFA to provide flexibility for factors (other than the laws and practices under which a foreign CIS is governed) to be taken into account, when considering whether to recognise the CIS.

Feedback on the Consultation Paper

The MAS consultation paper is available from the MAS' website and the closing date for the public to submit comments and feedback is **24 March 2015**. We will be submitting comments to the MAS. If you have any comments to include in our submission, please contact us before **5 March 2015**.

Contacts

Lena Ng

Counsel

T: +65 6410 2215
E: lena.ng
@cliffordchance.com

Paul Landless

Partner

T: +65 6410 2235
E: paul.landless
@cliffordchance.com

Kai-Niklas Schneider

Partner

T: +65 6410 2255
E: kai.schneider
@cliffordchance.com

Nish Shetty

Partner

T: +65 6410 2285
E: nish.shetty
@cliffordchance.com

Janice Goh

Senior Associate

T: +65 6661 2021
E: janice.goh
@cliffordchance.com

Esther Foo

Associate

T: +65 6410 2203
E: esther.foo
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance Pte Ltd, 12 Marina Boulevard, 25th Floor Tower 3, Marina Bay Financial Centre, Singapore 018982

© Clifford Chance 2015

Clifford Chance Pte Ltd
501675-4-1475-v0.4

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

501675-4-1475-v0.4
Linda Widyati & Partners in association with Clifford Chance.