MAJOR CHANGES TO SINGAPORE CAPITAL MARKETS REGULATORY FRAMEWORK IMPLEMENTED

The Securities and Futures (Amendment) Act 2017 (SF(A)A), passed by Parliament on 9 January 2017, introduces major changes to the Singapore capital markets regulatory framework. Most of the amendments in the SF(A)A are operative from 1 and 8 October 2018, save for two provisions[1]. Transitional provisions are in place to allow capital markets intermediaries time to comply with some of the changes.

Some of the key changes include:

- Expanding the scope of regulation of OTC derivatives contracts, including the regulation of the activity of dealing in OTC derivatives contracts
- Changes to definitions of regulated products and activities
- Lifting of secrecy provisions in relation to derivatives trade reporting obligations
- Regulatory regime for markets to include operators of OTC derivatives markets
- Extending the regulatory regime to non-conventional investment products
- New regulatory regime for financial benchmarks
- New short selling regime
- Refinements to "institutional investors" and "accredited investors" investor classes
- Introducing an "opt-in" regime for accredited investors
- Fine-tuning of offering regime for investments
- Enhancement of enforcement regime applicable to market misconduct

INTRODUCTION

The SF(A)A introduces wide-ranging amendments to the Securities and Futures Act (SFA) to implement policy proposals aimed at ensuring that the capital markets regulatory framework in Singapore keeps pace with market developments and is aligned to international standards and best practices.

The SF(A)A takes into consideration various proposals consulted on by the Monetary Authority of Singapore (MAS) from 2012 and introduces, amongst other things: amendments to complete the MAS' implementation of over-the-counter (OTC) derivatives regulatory reforms, the expansion of the SFA's scope of coverage in respect of OTC derivatives contracts as well as non-conventional investment products, new definitions for regulated products and activities, new regulatory regimes for financial benchmarks and short selling, refinements to non-retail investor classes, provisions to fine-tune the offering regime for investments, and provisions to enhance the enforcement regime applicable to market misconduct.

REGULATION OF OTC DERIVATIVES

While the SFA (prior to the changes implemented in October 2018) already covered the reporting and clearing of derivatives contracts and the regulation of trade repositories, the updates to the SFA have further extended its scope of coverage in respect of OTC derivatives. Market operators and capital markets intermediaries are now regulated in respect of their OTC derivatives activities. Regulatory oversight of commodity derivatives, which was previously under the purview of Enterprise Singapore under the Commodity Trading Act, has also been transferred to MAS under the SFA.

In line with these changes, the SFA has been re-organised to use simpler, principles-based definitions of securities and derivatives products. For

[1] Sections 198 and 203 of the SF(A)A

instance, the definition of "securities" has been simplified, and a new definition of "securities-based derivatives contracts" (which covers derivatives contracts of which the underlying thing is a security or securities index) has been introduced. The definition of "capital markets products" has also been amended to include securities, units in a collective investment scheme (CIS), derivatives contracts and spot foreign exchange contracts for the purposes of leveraged foreign exchange trading.

The categories of “regulated activities” for capital markets services licence holders have been refined, and a new regulated activity of "dealing in capital markets products" has been introduced to cover dealing in securities, units in a CIS, derivatives contracts (including OTC derivatives contracts) and spot foreign exchange contracts for the purposes of leveraged foreign exchange trading.

With respect to the licensing of intermediaries dealing in OTC derivatives contracts, unregulated entities that, prior to 8 October 2018, were dealing in OTC derivatives contracts referencing the new asset classes (i.e. interest rate, credit, commodity, CIS or foreign exchange where not traded on margin) that have been brought into the scope of the updated SFA, will be able to rely on a two-year transition period to apply for a capital markets services (CMS) licence, or in the case of an existing CMS licence holder, apply to vary its CMS licence, or in the case of an exempt bank, merchant bank or finance company, submit a notification to MAS.

However, entities that only start dealing in OTC derivatives after 8 October 2018 will need to (as the case may be) apply for and be granted a CMS licence, or seek MAS' approval for a variation of its CMS licence prior to commencing such activities, or submit a notification no later than 14 days prior to commencing such activities.

The Securities and Futures (Licensing and Conduct of Business) Regulations (SF(LCB)R) have also been updated to support the changes to the SFA. In particular, certain licensing exemptions and business conduct requirements for intermediaries dealing in OTC derivatives contracts have been introduced. The customer moneys and assets rules have also been enhanced to subject moneys and assets received from or on account of retail customers to more safeguards. The enhanced requirements include due diligence, record keeping, and disclosure requirements. The use of title transfer collateral arrangements has also been limited to non-retail customers. There are transition periods (of up to two years) for some of the new SF(LCB)R business conduct requirements.

OTC DERIVATIVES – REPORTING, TRADING AND CLEARING OBLIGATIONS

To complete MAS' implementation of OTC derivatives reforms, the updated SFA introduces a new Part VIC setting out the framework provisions relating to mandatory trading obligations in respect of derivatives contracts. These provisions will empower MAS to require derivatives contracts that meet prescribed criteria to be traded on organised trading facilities or exchanges (i.e. an organised market operated by an approved exchange (AE) or recognised market operator (RMO), or on a prescribed facility), instead of over-the-counter.

Further, there are certain updates to the existing reporting obligations for OTC derivatives contracts. Notably, the secrecy provisions under Singapore law have been lifted to permit financial institutions to report information for the

purposes of complying with their reporting obligations under the SFA. The SFA has also been updated to provide that persons who furnish information to MAS in connection with the relevant provisions on reporting, trading or clearing of OTC derivatives contracts do not breach any secrecy requirements under Singapore law.

In addition, the Securities and Futures (Clearing of Derivatives Contracts) Regulations 2018, which operationalise mandatory clearing obligations in respect of certain OTC derivatives contracts, and the related amendments to the SFA, came into operation on 1 October 2018.

NON-CONVENTIONAL INVESTMENT PRODUCTS

The updated SFA has also expanded its scope of coverage to include non-conventional investment products which are in substance capital markets products. Buy-back arrangements involving gold, silver and platinum have been prescribed as debentures, expanding the regulatory regime for debentures to such arrangements. The definition of a CIS has also been expanded to capture collectively-managed investment schemes, even if there is no pooling of investors' contributions or profits of a scheme.

ORGANISED MARKETS

The updated SFA introduces a new definition of "organised market" which replaces the previous definitions of "market", "securities market" and "futures market". The regulatory regime applies to operators of all organised markets, including operators of organised markets for the trading of OTC derivatives.

MAS considers price discovery and formation to be a key element of an organised market. MAS will also update its Guidelines on the Regulation of Markets to set out its interpretation of the new definition of "organised market".

Requirements on the admission of corporations operating organised markets as AEs and RMOs, as well as the ongoing requirements applicable to AEs and RMOs, are set out in the new Securities and Futures (Organised Markets) Regulations 2018.

FINANCIAL BENCHMARKS

The updated SFA introduces a new Part VIAA which provides for the regulatory framework for financial benchmarks. MAS may designate a financial benchmark as a designated benchmark if it is satisfied that the financial benchmark has systemic importance in the financial system of Singapore, if a disruption in the determination of the benchmark could affect public confidence in the financial benchmark or the financial system of Singapore, the determination of the financial benchmark could be susceptible to manipulation, or it is otherwise in the public interests to do so. SIBOR and SOR have been designated as designated benchmarks.

Benchmark administrators and benchmark submitters of designated benchmarks are required to comply with the provisions in Part VIAA of the SFA and the new Securities and Futures (Financial Benchmarks) Regulations. They must be authorised by MAS, unless exempted. Generally, financial institutions regulated by MAS are exempted from the requirement to be authorised as an authorised benchmark submitter.

The requirements under the SFA and the regulations applicable to benchmark administrators and benchmark submitters of designated benchmarks include, amongst others, managing risks associated with their businesses and

operations prudently, ensuring that their systems and controls in relation to the designated benchmark are adequate, and to maintain proper records.

In terms of the transition arrangements, generally, benchmark administrators and benchmark submitters of designated benchmarks are given 12 months from the commencement of the regime to comply with their obligations. However, benchmark administrators must submit their application to MAS to be authorised as an authorised benchmark administrator, within three months from the commencement of the regime. Existing benchmark submitters which are regulated by MAS must notify MAS of their activity as a benchmark submitter, within three months from the commencement of the regime.

SHORT SELLING REGIME

Part VIIA of the SFA sets out the legislative framework for the new short selling regime, which commenced on 1 October 2018. The SFA and the Securities and Futures (Short Selling) Regulations 2018 set out requirements relating to the marking of short sell orders for in-scope products, and the reporting of short positions equal to or exceeding the prescribed threshold to MAS via the Short Position Reporting System.

To provide guidance on the short selling regime, MAS has released its Guidelines on the Regulation of Short Selling.

REFINEMENTS TO NON-RETAIL INVESTOR CLASSES

The definitions of "institutional investor" (II) and "accredited investor" (AI) have been refined to better reflect categories of non-retail investor classes identified based on their wealth or income and financial knowledge.

The II definition has been widened to include persons professionally active in the capital markets such as financial institutions regulated by foreign regulators, foreign central governments and sovereign wealth funds. Statutory bodies, other than prescribed statutory boards, will, however, no longer be deemed as IIs.

The wealth criteria for an individual to qualify as an AI has been tightened such that the net equity of the individual’s primary residence can only contribute up to S$1 million of the current S$2 million net personal assets threshold. Alternatively, individuals will be able to qualify as an AI if they have S$1 million of financial assets (net of any related liabilities).

Under MAS’ capital markets regulatory framework, the full suite of regulatory safeguards is aimed primarily at retail investors. Intermediaries are exempted from certain requirements when dealing with non-retail investors who are generally considered better able to look after their own interests.

A new “opt-in” regime to give investors who meet the prescribed AI wealth or income thresholds the choice as to whether to benefit from the regulatory safeguards afforded to retail investors will be introduced through the new Securities and Futures (Classes of Investors) Regulations 2018. This "opt-in" regime will commence on 8 January 2019.

OFFERS OF INVESTMENTS

The offering regime for investments has been fine-tuned to implement proposals which were previously consulted on.

Changes to the offering regime for CIS include, amongst other things: (a) introducing additional factors MAS may take into account when recognising a foreign fund offered to retail investors; (b) setting out the conditions a Physical

Assets Fund must satisfy to rely on the exemption from prospectus and authorisation/recognition requirements under Section 305 of the SFA for offers to accredited investors; (c) allowing Real Estate Investment Trusts (REITs) to publish pro forma financial information; and (d) allowing restricted schemes in the form of REITs to have managers who are licensed or regulated to carry out REIT management activities in their principal place of business.

Requirements relating to offers of shares, debentures and units of business trusts have been collapsed into the new Securities and Futures (Offers of Investments) (Securities and Securities-based Derivatives Contracts) Regulations (SF(OI)(SSDC)R). The SF(OI)(SSDC)R operationalise changes to Part XIII of the SFA, namely, to: (a) extend the prospectus requirements in Part XIII of the SFA to cash-settled securities-based derivatives contract (this includes OTC derivative contracts with securities as underlying); (b) provide appropriate exemptions for certain cash-settled securities-based derivatives contracts from the prospectus requirement where the underlying is listed and where disclosure requirements apply to the contracts; and (c) collapse the prospectus requirements for securities and units of business trusts into one division (new Division 1 of Part XIII of SFA).

The SF(OI)(SSDC)R also introduce new provisions relating to the disclosure of financial information in prospectuses, allow the incorporation of specific information into a prospectus by reference, prescribe the form and content of the offer information statement required for the prospectus exemption for an offer of securities by a subsidiary of a listed company under the new Section 277(1AB) of the SFA, and enhance the prospectus disclosure requirements.

ENFORCEMENT REGIME APPLICABLE TO MARKET MISCONDUCT

A new market misconduct offence of benchmark manipulation is created in the updated SFA.

In addition, the updated SFA clarifies that it prohibits disclosures where a material aspect of the statement is false or misleading and likely to have an effect on the market price of securities, securities-based derivatives contract or CIS unit, regardless of the significance of the price effect.

In relation to insider trading, a statutory definition of the term "persons who commonly invest" has been introduced, which is defined as the "section of public that is accustomed, or would be likely to deal in" the relevant products (i.e. Common Investors). MAS has issued a set of Guidelines on the Interpretation of “persons who commonly invest” in Division 3 of Part XII of the Securities and Futures Act (Cap. 289), to elaborate on their policy stance behind this definition and to provide guidance on its interpretation, which makes clear that Common Investors may comprise different classes of investors depending on the product in question.

The updated SFA also confers priority on MAS' civil penalty claims over private unsecured claims that accrue subsequent to the contravention of the SFA and standardises the maximum penalty that can be awarded for civil penalty cases to the greater of S$2 million or three times the amount of profit gained or losses avoided.

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