CONSULTATION PAPER

P004 - 2015

February 2015

Consultation Paper on Proposed Amendments to the Securities and Futures Act

Monetary Authority of Singapore

PREFACE

In November 2012, the Securities and Futures Act ("SFA") (Cap. 289) was amended to implement over-the-counter ("OTC") derivative reforms in relation to reporting and clearing of OTC derivative transactions, and the regulation of OTC derivatives trade repositories and clearing facilities. Amendments were also made to promote more effective disclosure of information and strengthen fair dealing in the sale and advisory process for investment products.

ii MAS is proposing amendments to the SFA to complete the expansion of its scope to regulate OTC derivatives (including the transfer of regulatory oversight of commodity derivatives from the Commodity Trading Act ("CTA") (Cap. 48A)). MAS previously consulted on these issues in February 2012[1].

iii Given the inclusion of OTC derivatives in the SFA involves amendments throughout the legislation, MAS has taken the opportunity to undertake a comprehensive review of the SFA to ensure that it remains current in view of market and international developments. This consultation thus also includes proposed amendments to strengthen MAS' enforcement regime, enhance the transparency of short selling activities as well as amendments to the criteria for recognising foreign collective investment schemes.

iv The proposed amendments set out in this consultation are —

(a) Part A: Amendments arising from the OTC Reforms
(b) Part B: Transfer of Regulation of Commodity Derivatives from CTA to SFA
(c) Part C: Other Amendments to the SFA

v MAS invites interested parties to provide their comments and feedback on the draft legislative amendments to —

Capital Markets Policy Division
Markets Policy & Infrastructure Department

[1] Consultation Paper on Proposed Regulation of OTC Derivatives: http://www.mas.gov.sg/News-and-Publications/Consultation-Paper/2012/Consultation-Paper-on-Proposed-Regulation-of-OTC-Derivatives.aspx.
Consultation Paper on Transfer of Regulatory Oversight of Commodity Derivatives from IE to MAS: http://www.mas.gov.sg/News-and-Publications/Consultation-Paper/2012/Consultation-Paper-on-Transfer-of-Regulatory-Oversight-of-Commodity-Derivatives-from-IE-to-MAS.aspx.

Monetary Authority of Singapore
10 Shenton Way
MAS Building
Singapore 079117

Email: SFA_FAA_LegisConsult@mas.gov.sg
Fax: (65) 6225 1350

MAS requests that all comments and feedback be submitted by 24 Mar 2015.

vi Please note that all submissions received may be made public unless confidentiality is specifically requested for whole or part of the submission.

TABLE OF CONTENTS

1 INTRODUCTION

1.1 Following the last amendment to the SFA in November 2012, MAS is proposing further amendments to complete the expansion of its regulatory ambit to OTC derivatives, as well as to ensure that it remains current with market and international developments.

1.2 In the 2012 amendments, MAS has implemented key proposals set out in the policy consultation on OTC derivatives such as reporting and clearing obligations; the extension of the regulatory regime for clearing facilities to OTC derivatives; and the introduction of a new regulatory regime for trade repositories. To implement the remaining proposals set out in the policy consultation on OTC derivatives and the transfer of regulatory oversight of commodity derivatives from International Enterprise ("IE") Singapore to MAS, issued on 13 February 2012, MAS is proposing the following key amendments:

(a) Amendments to the product definitions in Part I of the SFA;
(b) Amendments to Part II of the SFA to extend the markets regime to OTC derivatives;
(c) New provision in Part VIA of the SFA to ensure that banking confidentiality does not restrict the efficacy of the trade reporting regime;
(d) New Part VIC of the SFA to introduce powers to set out requirements under the trading obligation;
(e) Amendments Part IV and the Second Schedule to the SFA, and the Second Schedule to the Securities and Futures (Licensing and Conduct of Business) Regulations ("SF(LCB)R") to extend the capital markets services licensing regime to OTC derivatives; and
(f) Consequential amendments to the remaining parts of the SFA, the Financial Advisers Act ("FAA") and the CTA arising from the key proposals above.

1.3 MAS is also proposing further amendments to various parts of the SFA to strengthen Singapore's securities market:

(a) Introduction of a new Part VIIA on short selling, which sets out requirements on short selling disclosures[2];

[2] This follows a joint consultation with the Singapore Exchange on "Review of the Securities Market Structure and Practices" issued in February 2014:

(b) Amendments to Part XII of the SFA to strengthen the effectiveness of the enforcement regime in deterring market misconduct; and

(c) Amendments to Part XIII of the SFA to widen the range of factors that may be taken into account when considering whether to recognise a foreign collective investment scheme ("CIS") for offer to the public.

1.4 All draft legislative amendments to the SFA, FAA, CTA and the Second Schedule to the SF(LCB)R are set out in Annex 1, 2, 3 and 4 respectively.

http://www.mas.gov.sg/News-and-Publications/Consultation-Paper/2014/Review-of-Securities-Market-Structure-and-Practices.aspx.

2 PART A: AMENDMENTS ARISING FROM OTC REFORMS

2.1 AMENDMENTS TO PART I (PRELIMINARY) OF THE SFA

2.1.1 A "derivatives contract" definition was introduced in the 2012 SFA amendments, for use in certain Parts of the SFA, including Part III (Clearing Facilities), Part VIA (Reporting of Derivatives Contracts) and Part VIB (Clearing of Derivatives Contracts). This definition sits alongside the existing definitions of "securities" and "futures contracts".

2.1.2 In extending the regulation of OTC derivatives to the rest of the SFA, there is a need to review the definitions of "securities", "futures contract" and "derivatives contract", and how they interact with one another. Currently, the overlap in the definitions of "securities" and "futures contract" in the SFA is removed by excluding "futures contract" from the definition of "securities". With the introduction of "derivative contract", there could be even more areas of overlap as OTC derivatives on equity and debt-based instruments may be caught under "securities" while derivatives traded on exchanges could also be caught under "futures contract". In order not to complicate the legal readings of the product definitions by providing complicated exclusions in each of the definitions, MAS is taking this opportunity to introduce simpler, principles-based definitions which are more easily understood by the industry and general investing public.

(a) REVISED DEFINITION OF "DERIVATIVE CONTRACT"

2.1.3 In providing flexibility for MAS to regulate OTC derivatives which may evolve in complexity and structure, MAS is proposing to introduce a principles-based definition of "derivative contract" which aims to describe the key elements of derivatives.

2.1.4 Under the proposed "derivative contract" definition, the two main elements which will constitute a derivative are – (a) the discharge of obligations at some future time by a party to the contract; and (b) the value of such obligations are determined with reference to any underlying asset (i.e. equity, interest rate, foreign exchange, credit or commodity[3]).

[3] The definition of "commodity" will be amended to reference "any produce, item, goods, article" and is intended to encompass all tangible commodities including agricultural products, minerals and precious metals. This would include commodities such as gold and oil.

2.1.5 With the revised definition of "derivative contract", MAS is proposing to clarify that "derivative contracts" are not intended to capture contracts that are transacted at the current spot price and intended for actual delivery of the underlying asset. As "futures contracts" are essentially "derivative contracts", MAS is also proposing to replace references to "futures contract" with "derivative contract" throughout the SFA. MAS will ensure that provisions in the SFA are generally applicable to all "derivative contracts". Requirements that necessitate a distinction for futures contracts or exchange-traded derivatives will be specified in subsidiary legislation.

(b) REVISED DEFINITION OF "SECURITIES"

2.1.6 The current definition of "securities" in the SFA follows a list-based approach i.e. shares, debentures, CIS, and certain derivatives of these products. As securities-based derivatives will come under the proposed new definition of "derivative contract", MAS further proposes to simplify the definition of "securities" to conform to a simple understanding of "securities", comprising solely of either equity instruments representing legal or beneficial ownership interests, or debt instruments. To maintain references to derivatives of the new definition of "securities", a new "securities-based derivative contract" will be introduced as a subset of the proposed "derivative contract" definition. With the proposed definition of "securities", CIS will no longer fall within the definition and will be defined separately.

(c) DEFINITION OF "CAPITAL MARKETS PRODUCTS"

2.1.7 Overlaying the individual product definitions, the "capital markets products" definition provides a catch-all term when making references to all regulated products in the SFA. With the proposed amendments to the various definitions above, MAS will amend the definition of "capital markets products" to include derivative contracts.

(d) DEFINITION OF "ORGANISED MARKET"

2.1.8 MAS proposes to introduce a new definition of "organised market" to replace the existing definitions of "market", "securities market" and "futures market" under Part I (Preliminary) and in the First Schedule to the SFA. The new definition of "organised market" will define a market by its underlying function of facilitating the exchange, sale or purchase of specified products regulated under the SFA, including derivative contracts.

2.2 AMENDMENTS TO PART II (MARKETS) OF THE SFA

2.2.1 The new Part II will extend the existing regulatory regime for market operators to entities which intend to establish or operate facilities for the trading of OTC derivatives. Under the new Part, a corporation seeking to operate a market in Singapore for the trading of "securities", "derivative contract" or units in a CIS, may

do so only if it is either approved as an Approved Exchange ("AE") or recognised as a Recognised Market Operator ("RMO"). Under this framework, only locally-incorporated corporations operating organised markets that are systemically-important will be regulated by MAS as AEs. Other corporations, including foreign-incorporated corporations, will be regulated as RMOs.

2.2.2 In addition, MAS has reviewed the RMO regime to ensure that internationally-aligned requirements continue to apply to market operators recognised by MAS. In this respect, MAS proposes to introduce certain enhancements to the RMO regime, in particular, imposing requirements for an RMO to ensure appropriate governance arrangements and providing assurance that failure to comply with business rules would not affect the rights of RMO participants. MAS will conduct further consultation on the detailed requirements for RMOs and the transition arrangements for market operators in due course.

2.2.3 MAS notes that there are operators that facilitate transactions in OTC derivatives through "voice-assisted" or "telephone-assisted" means, instead of through an electronic order-booked-based system for processing "requests-for-quotes" or "indications-of-interests". Unlike an electronic trading facility, facilitation of transactions in OTC derivatives via voice or telephone-assisted means does not necessarily entail participants trading pursuant to the rules of any organised market. MAS thus considers the facilitation of transactions in OTC derivatives through "voice or telephone-assisted" means as a form of broking services. Accordingly, any persons facilitating OTC derivative transactions solely through "voice or telephone-assisted" means will be regulated as capital markets intermediaries, and not market operators. Please refer to Section 2.5 below on the licensing scope for capital markets intermediaries dealing in OTC derivatives. MAS will continue to monitor the way such facilities evolve, having regard to international practices. For now, MAS intends that only electronic trading facilities will be regulated under Part II of the SFA.

2.3 AMENDMENTS TO PART VIA (REPORTING OF DERIVATIVE CONTRACTS) OF THE SFA

2.3.1 MAS proposes to amend certain provisions within Part VIA which concern reporting of information on a specified derivative 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, 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 MAS to have sight over all specified derivative contracts which are booked in Singapore and enhance MAS' ability to oversee the OTC derivatives markets.

2.3.2 With the progressive implementation of reporting obligations globally, MAS has received feedback that the industry may not be able to report counterparty information to meet the reporting obligations, due to the confidentiality laws under section 47 of the Banking Act ("BA") and section 49 of the Trust Companies Act ("TCA").

2.3.3 MAS recognises the importance of ensuring that data reported pursuant to trade reporting regimes serves to enhance transparency in the OTC derivative markets and helps identify areas of risk build-up by counterparties. For the effective implementation of reporting regimes globally, it is thus crucial that counterparties do not cite confidentiality laws as a reason for not disclosing the requisite data in reporting OTC derivative trades. Hence, MAS is proposing to lift banking confidentiality in the SFA to permit financial institutions to report customers' information for the purposes of complying with MAS' and specified foreign jurisdictions' trade reporting obligations.

2.4 NEW PART VIC (TRADING OF DERIVATIVE CONTRACTS) OF THE SFA

2.4.1 A key component of the OTC derivatives reforms is the mandatory trading of all standardised transactions on exchanges or electronic trading facilities, where appropriate. MAS notes that the appropriateness of imposing a trading mandate still has to be carefully studied. While MAS has assessed that it is not necessary to mandate a trading regime for OTC derivatives for now, MAS is proposing to introduce a new Part VIC to put in place the necessary legislative framework for implementing a trading mandate if it was deemed appropriate to do so.

2.4.2 The new Part VIC sets up the empowering legislation for MAS to identify derivative contracts to be subject to the trading mandate. MAS also proposes to provide for powers to request for information from relevant persons, to facilitate the process of determining the products and entities to be subjected to the trading mandate.

2.4.3 MAS will continue to monitor developments and conduct detailed analysis to determine the appropriate conditions to impose a trading mandate, taking into consideration the stage of development of the OTC derivatives markets in Singapore and the region. We will further consult the public on any proposal to identify products for mandatory trading.

2.5 AMENDMENTS TO PART IV AND THE SECOND SCHEDULE (REGULATED ACTIVITIES) TO THE SFA, AND THE SECOND SCHEDULE TO THE SF(LCB)R

2.5.1 To extend the regulation of OTC derivatives to capital markets intermediaries, and given the proposed changes to the product definitions set out in section 2.1 above, MAS intends to make changes to the definitions of certain regulated activities and their licensing exemptions. In particular, MAS proposes to –

(a) introduce the 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" as well as the new regulated activity of dealing in OTC derivatives; and

(b) amend the definition of the regulated activity of "fund management".

(a) DEALING IN CAPITAL MARKETS PRODUCTS

2.5.2 MAS proposes to collapse the current regulated activities of "dealing in securities", "trading in futures contracts" and "leveraged foreign exchange", as well as the new dealing in OTC derivatives activity under a new activity: "dealing in capital markets products". A capital markets services ("CMS") licensee will be required to indicate the specific class of capital markets products (namely, securities, CIS, exchange-traded derivatives, OTC derivatives and spot foreign exchange contracts traded on a margin basis) that it or its representative will be dealing in. A CMS licensee which intends to expand its dealing activity into another product class will need to seek MAS' approval by way of an application for variation of licence[4]. Similarly, an appointed representative of a CMS licensee which intends to expand his dealing activity into another product class will need to notify MAS of the additional capital markets products that he intends to deal in.

2.5.3 MAS will amend section 90 of the SFA in relation to the variation of a CMS licence, and the relevant sections in relation to representative notifications in the SFA to give effect to these changes. MAS intends to publish information on the product classes which a CMS licensee and its appointed representatives are allowed to deal in on the Financial Institutions Directory and the Register of Representatives respectively on the MAS' website.

[4] Exempt financial institutions, such as banks licensed under the Banking Act or merchant banks approved under the MAS Act, will also be required to indicate in their notification to MAS upon commencement of business under the SFA the product class that they wish to deal in. Similarly, they will be required to notify MAS when they wish to expand their dealing activity into another product class.

2.5.4 MAS is also making consequential amendments to the definitions of other regulated activities such as "securities financing" and "providing custodial services for securities". As MAS intends to maintain the scope of these regulated activities, a revised definition of "futures contracts" will be introduced. The proposed amendments are found in Annex 1.

(b) LICENSING EXEMPTIONS

2.5.5 MAS is proposing to exempt certain persons from the requirement to hold a CMS licence for "dealing in capital markets products" in respect of OTC derivatives. These exemptions include persons which deal for their own account in OTC derivatives with a regulated financial institution, and do not receive or derive a commission, spread or other remuneration in return (e.g. corporates which use OTC derivatives for risk management), and persons which deal in OTC derivatives but which do not take on any principal position in OTC derivatives, do not handle or hold any customer's position, margin or account in their books, and which deal only with institutional and corporate accredited investors. Given that the latter group (e.g. inter-dealer brokers) plays an intermediating role in the derivatives market, these persons will be required to register with MAS upon commencement of business, and comply with certain requirements.

2.5.6 In addition, arising from the futurisation of OTC derivatives contracts, MAS is proposing to introduce a similar licensing exemption for persons which deal in futures contracts, and do not take on any principal position, customer's position, margin or account and which deal only with institutional and corporate accredited investors, subject to such persons registering with MAS and meeting certain conditions and requirements. The proposed licensing exemptions are set out in the Second Schedule to the SF(LCB)R under Annex 4.

2.5.7 MAS will make consequential amendments to the licensing exemptions which currently exist for "dealing in securities", "trading in futures contracts", "leveraged foreign exchange" and the other regulated activities. MAS intends to maintain as far as practicable the scope of the existing licensing exemptions. These amendments will be separately consulted on at a later date.

(c) FUND MANAGEMENT

2.5.8 MAS proposes to amend the definition of fund management as set out in Annex 1. The amendments will map the regulatory perimeter governing fund management activity to all capital markets products and all managers of CIS[5]. In line with the revised definition of "derivative contract", persons managing CIS that invest solely in derivatives of physical assets will now be subject to the provisions of the SFA for carrying on the regulated activity of fund management.

2.5.9 MAS intends to license and regulate managers of CIS that invest in physical assets only if the CIS is offered to retail investors. MAS proposes to grant a class exemption to managers of CIS that are offered only to accredited or institutional investors. The proposed class exemption is set out in the draft SF(LCB)R in Annex 4. Affected CIS managers can continue to manage their CIS for existing investors. However, these managers will need to be licensed before they offer additional units of their existing CIS to existing or new investors, or offer any new CIS.

2.5.10 Currently, there are safeguards in the SFA for assets under management by a licensed or registered fund management company to be custodised with an independent custodian. Independent custodians include prime brokers, depositories and banks that are licensed or authorised in their respective jurisdictions. As the custody of physical assets is currently unregulated, the types of providers and their business practices may be different from regulated financial institutions. Additional safeguards would be necessary when CIS managers appoint unregulated persons to provide custody services for their physical assets. These measures could include –

(a) minimum financial or capital requirements;
(b) insurance coverage for the custodised assets; and
(c) segregation of assets under custody.

MAS welcomes feedback on additional or alternative measures that could be imposed where CIS managers custodies the physical assets of the CIS with unregulated service providers.

[5] MAS has separately consulted on proposals to extend the CIS regulatory regime to schemes which exhibit all characteristics of a regulated CIS but for the pooling of participants' contributions and profits of the scheme. MAS is currently reviewing feedback from that consultation. The Consultation Paper on Proposals to Enhance Regulatory Safeguards for Investors in the Capital Markets (P012-2014), published on 21 July 2014, available at: http://www.mas.gov.sg/News-and-Publications/Consultation-Paper/2014/Consultation-on-Proposals-to-Enhance-Regulatory-Safeguards-for-Investors-in-the-Capital-Markets.aspx.

2.6 CONSEQUENTIAL AMENDMENTS TO THE SFA

2.6.1 Following the proposed amendments set out above, consequential amendments would need to be made throughout the SFA. The key amendments are discussed below.

(a) AMENDMENTS TO PART II (MARKETS) OF THE SFA

2.6.2 As mentioned in paragraph 2.1.5, with the replacement of references to "futures contracts" and "derivative contract" throughout the SFA, existing requirements that apply only to "futures contracts" will now apply to all "derivative contracts". Accordingly, requirements that necessitates a distinction for certain types of "derivative contracts" will be moved to the Regulations. In particular, MAS will be moving to Regulations the requirements to seek MAS' approval on position limits (sections 16A and 59 of the SFA), and the listing, delisting, or trading of products (sections 29 and 42). These amendments do not represent an intention to do away with these requirements. MAS will consult on the appropriate amendments to the Regulations at a later date.

(b) AMENDMENTS TO PART IX (SUPERVISION AND INVESTIGATION) AND PART XII (MARKET CONDUCT) OF THE SFA

2.6.3 The consequential amendments to Part IX and Part XII of the SFA will involve (i) the inclusion of the terms "securities-based derivative contract" and "any unit in a collective investment scheme" along with the term "securities"; and (ii) the use of the term "derivative contract" in place of the terms "futures contracts" and "leveraged foreign exchange trading". In making these consequential amendments, MAS has also taken the opportunity to rationalise some of the provisions relating to the exercise of our supervisory powers under Part IX and to market conduct under Part XII.

2.6.4 First, the supervisory powers that MAS exercises when it suspects that misconduct has taken place distinguishes between situations involving securities of, or made available by, a corporation (section 143 of the SFA) and situations involving futures contracts (section 144). In order to ensure that our supervisory powers are consistent for all financial products that fall within our regulatory purview, MAS proposes to merge sections 143 and 144 so that there is a single provision setting out our supervisory powers in relation to "capital markets products" generally.

2.6.5 Second, both Divisions 1 and 2 of Part XII of the SFA concern similar types of prohibited market conduct. As such, MAS intends to rationalise Division 1 and Division 2, thereby consolidating our market conduct provisions to cover "capital markets products" in general. This will also allow for a more consistent treatment of market misconduct involving all types of derivative contracts.

(c) AMENDMENTS TO PART XIII (OFFERS OF INVESTMENTS) OF THE SFA

2.6.6 Part XIII of the SFA currently relies on a definition of "securities" set out in section 239. In order to maintain a consistent definition of "securities" throughout the SFA, MAS will - (i) delete the definition of "securities" in section 239; (ii) replace references to "securities" in Part XIII with "investments", which comprise "securities", "securities-based derivative contract" and certain promissory notes; and (iii) collapse the prospectus requirements for "securities" and units of business trusts in Division 1 and Division 1A of Part XIII into Division 1 of Part XIII.

2.6.7 As a result of the inclusion of the term "securities-based derivative contract", the scope of the prospectus requirements will extend to cash-settled derivative contracts with securities as the underlying. These include cash-settled structured warrants, extended settlement securities contracts and securities-based contracts-for-differences ("CFDs"). Appropriate exemptions will be provided to exclude such contracts from prospectus requirements, including where the instruments or the underlying are listed and where disclosure requirements already apply to these contracts, such as CFDs.

3 PART B: TRANSFER OF REGULATION OF COMMODITY DERIVATIVES FROM CTA TO SFA

3.1 In the joint consultation paper issued on 13 February 2012, IE Singapore and MAS proposed to transfer the regulatory oversight of commodity derivatives under the CTA to the SFA. The regulatory oversight of spot commodity trading will be retained under the CTA, and will continue to be administered by IE Singapore.

3.2 To effect the policy positions contained in the February 2012 consultation paper, the three main areas relating to commodity derivatives under the CTA will be transferred to the SFA:

(a) Regulation of markets;
(b) Regulation of clearing facilities; and
(c) Regulation of intermediaries.

3.3 As set out in the February 2012 consultation paper, the intent is to exclude physically-settled commodity forward contracts from the scope of regulation under the SFA. Certain commodity contracts which may contain some form of optionality will also be excluded, where such contracts are executed for commercial purposes, for example contracts for the regular purchase of raw material which contains options for non-delivery. The exclusion of such contracts will be set out in Regulations, on which comments will be sought at a later date.

3.4 As set out in MAS and IE Singapore's joint response issued on 11 February 2015 to feedback on the policy consult on Transfer of Regulatory Oversight of Commodity Derivatives from IE Singapore to MAS, MAS is proposing, in consultation with IE Singapore, to migrate the relevant licensing exemptions under the CTA to the SFA. In particular, MAS proposes to migrate the exemptions for persons which deal in OTC commodity derivatives only with accredited investors, and persons which are approved as a "Global Trading Company" within the meaning of the Income Tax Act (Cap. 134)[6] in respect of their dealing in OTC commodity derivatives. Please refer to Annex 4 for the proposed exemptions.

3.5 As for persons which are currently licensed to deal in OTC commodity derivatives under the CTA (e.g. holders of a commodity's broker licence to deal in OTC derivatives), the transitional arrangements for such persons will be set out in Regulations, on which MAS will seek comments at a later date.

[6] Previously known as an "Approved oil trading company" or "Approved international commodity trading company" within the meaning of the Income Tax Act (Cap. 134).

4 PART C: OTHER AMENDMENTS TO THE SFA

4.1 AMENDMENTS TO PARTS II (MARKETS) TO IIIA (APPROVED HOLDING COMPANIES) OF THE SFA

4.1.1 The SFA currently requires an AE, approved clearing house ("ACH"), Licensed Trade Repository ("LTR") and Approved Holding Company ("AHC") to notify MAS when it operates a business or acquires a substantial shareholding in a corporation that is not a market, clearing facility, trade repository or holding company respectively, or that is not operating a business incidental to its current operations.

4.1.2 In line with these entities' current practice of notifying MAS whenever they operate a business or acquire a substantial shareholding in corporations, including those operating markets, clearing facilities or trade repositories, MAS will be amending sections 16, 46K, 58 and 81ZA to require that MAS should be notified whenever a regulated entity operates or acquires any new business, regardless of the type of business. This formalises the existing practice of providing MAS with a holistic view of the types of risks that a regulated entity is exposed to, as well as the adequacy of its resources to support its businesses.

4.2 AMENDMENTS TO PART XII (MARKET CONDUCT) OF THE SFA

4.2.1 Besides the amendments that have been proposed in relation to the regulation of OTC derivatives, MAS also proposes to make the following amendments to Part XII of the SFA to strengthen the effectiveness of the enforcement regime in deterring market misconduct.

(a) REVISION OF PROVISION PROHIBITING FALSE & MISLEADING STATEMENTS

4.2.2 Section 199 of the SFA seeks to protect our market against the making of false and misleading disclosures, so that investors can have confidence in the accuracy of information that are disseminated to the market. In *Madhavan Peter v PP* [2012] 4 SLR 613 ("***Airocean***"), the High Court held that in order to establish an offence under section 199(c), the false or misleading particular must be material in the sense of significantly affecting the price or value of the securities in question, i.e. "materially price-sensitive information". However, section 199 ought to protect against any false or misleading disclosures that is likely to affect the market, regardless of whether that price effect is significant. The term "material" in section 199 is attached to the word "particular" and describes the false and misleading particular vis-à-vis the rest of the statement, *i.e.* an important or significant aspect of the statement must be false or misleading; it does not refer to the price impact of the disclosure. In this regard, 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.

(b) DEFINITION OF "PERSONS WHO COMMONLY INVEST IN SECURITIES"

4.2.3 In *Lew Chee Fai Kevin v MAS* [2012] 2 SLR 913 ("***Kevin Lew***"), the Court of Appeal interpreted the phrase "persons who commonly invest in securities" under sections 215 and 216 of the SFA to be equivalent to the "reasonable investor" as set out in the Sarawak High Court decision of *Public Prosecutor v Chua Seng Huat* [1999] 3 MLJ 305. The elements of professional knowledge which the Sarawak Court has attributed to a "reasonable investor" are of a high standard and include the ability to determine the quality and the prospect of shares as well as the ability to do technical and fundamental analysis on information.

4.2.4 In order for the concept of the Common Investor (specifically the standard of market knowledge attributed to such a hypothetical investor) to better reflect the realities of the Singapore market, MAS proposes to –

(a) introduce a definition for "persons who commonly invest in securities" under section 214 of the SFA; and
(b) issue guidelines to provide MAS' policy intent and guidance as to the interpretation of that definition.

(c) REVISION OF CEILING FOR CIVIL PENALTY QUANTUM

4.2.5 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 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 3 times the amount of Benefit obtained or $50,000. If the contravening person did not obtain a Benefit, then the maximum amount of civil penalty payable is presently capped at $2 million.

4.2.6 There may be cases where the market misconduct is egregious even though the Benefit obtained is small. In such cases, capping the civil penalty at 3 times the amount of Benefit obtained may not adequately reflect the culpability of the offender or achieve sufficient deterrence. Therefore, in order to ensure that the civil penalty quantum is commensurate with the gravity of the misconduct, MAS proposes to amend section 232 to provide that the civil penalty ceiling will be the greater of either $2 million or 3 times the amount of Benefit obtained, in all cases. This would mean that all contravening persons will now be subject to a civil penalty benchmark of between $50,000 to $2 million, unless 3 times the amount of Benefit obtained is greater than $2 million, regardless of whether or not a Benefit was obtained.

(d) PRIORITY FOR MAS' CIVIL PENALTY CLAIMS

4.2.7 Even though our civil penalty claims under the SFA take the procedural form of civil actions brought by MAS, these claims are in substance claims that are pursued in the interest of the investing public and our markets, specifically for deterrence against market misconduct. That being the case, MAS proposes to confer priority on its civil penalty claims in the same way as government claims under the Government Proceedings Act (Cap. 121).

4.2.8 Such priority is important in cases where MAS obtains a freezing order under section 324 of the SFA. A freezing order serves a public purpose. It prevents a suspect from dissipating his assets while he is being investigated for possible contraventions of Part XII of the SFA, and ensures that those assets can be used to meet any liabilities that he may incur as a result of such contraventions. However, a third party may apply to vary or discharge a freezing order, such that the underlying assets can be used to satisfy a private debt that is owed by the suspect. The purpose of a freezing order will be frustrated if it can be so readily varied or discharged. Giving priority to MAS civil penalty claims over debts that accrue subsequently will enhance the robustness of such freezing orders.

4.3 NEW PART VIIA (SHORT SELLING) OF THE SFA

4.3.1 In the 7 February 2014 consultation jointly issued with the Singapore Exchange ("SGX") on the "Review of Securities Market Structure and Practices"[7], MAS proposed to introduce a short position reporting regime, under which participants with net short positions above certain thresholds would have to report the positions to MAS. These positions would be aggregated and published. MAS is of the view that a short position reporting regime would enhance the transparency into the level of short selling activities in Singapore's securities market. The regime would complement the existing requirement to mark short sell orders, as it would give participants an indication of the extent of outstanding interests in a given stock.

4.3.2 To effect the regime, 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 Regulations, which will be separately consulted on at a later date.

4.3.3 Under the new regime, a seller will be regarded as having a short position if his interest in a capital markets product is less than what he has sold. MAS is

[7] http://www.mas.gov.sg/News-and-Publications/Consultation-Paper/2014/Review-of-Securities-Market-Structure-and-Practices.aspx

proposing to introduce a new definition of "interest" for the purposes of Part VIIA. This would make clear that interest in a specified capital markets product means the person has ownership over or authority to dispose of the specified capital markets product. The definition would also clarify how interest is to be determined under specified circumstances, such as if the person is pending delivery of the capital markets product or if the person holds the capital markets product as part of a securities lending arrangement.

(a) MARKING OF SHORT SELL ORDERS

4.3.4 As stated in the existing Guidelines on Short Selling Disclosure, the onus to mark short sell orders lies with the market participant initiating the orders. We note that the requirements to mark short sell orders for SGX-listed securities are implemented via business rules, whereby members are required to ensure that all sell orders entered into the system are marked as short sells or otherwise. MAS proposes to amend the SFA to give regulatory certainty to the current practice and clarify that the onus to mark short sell orders lies with the market participant. There is no change to the policy intent and the operational aspect of short sell order marking. SGX will continue to administer the requirement to mark short sell orders.

(b) REPORTING OF NET SHORT POSITION VALUE

4.3.6 As announced previously[8], MAS will introduce aggregate net short position reporting in 2016. MAS proposes to amend the SFA to define a net short position, as well as set out reporting requirements for participants whose net short position exceeds a threshold prescribed by MAS. For the dissemination of information on aggregate short positions, MAS proposes to vest itself with the power to publish information furnished to MAS.

4.3.7 Detailed requirements on the calculation of net short positions, reporting thresholds and exemptions will be set out in Regulations, for which we will seek comments on at a later date.

4.4 AMENDMENT TO THE CRITERIA FOR RECOGNISING FOREIGN CIS

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

[8] On 1 August 2014, MAS and SGX published the response to feedback received on the joint consultation on "Review of the Securities Market Structure and Practices": http://www.mas.gov.sg/News-and-Publications/Consultation-Paper/2014/Review-of-Securities-Market-Structure-and-Practices.aspx

4.4.2 The level of investor protection associated with a CIS depends primarily on the laws and practices governing it. However, where a jurisdiction's laws and practices do not impose certain investor safeguards, such safeguards could nevertheless be provided for in the CIS' legally constitutive documents or investment mandate. For example, unlike in Singapore, a foreign jurisdiction may not impose investment diversification requirements on its CIS. Nevertheless, exchange-traded funds from such a jurisdiction that aims to replicate an index may achieve a level of investment diversification that is equivalent to locally constituted CIS, even if the laws and practices governing such funds do not contain investment diversification requirements.

4.4.3 MAS is proposing 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.

Monetary Authority of Singapore