Financial Services & Regulatory

Asia Pacific

Welcome to the tenth edition of **Baker & McKenzie's Asia Pacific Financial Services and Regulatory Newsletter**. This edition highlights some of the key regulatory developments in Australia, Hong Kong, Singapore, Thailand and Vietnam.

This newsletter aims to give you a snapshot of the updates and changes in local laws and practices throughout the Asia Pacific, which will be contributed from time to time by our offices across the region.

We hope you find this newsletter informative. For inquiries, suggestions, or subscribe/unsubscribe requests, please e-mail the Asia Pacific Publication Coordinator, Karla Maquiling.

Newsbites

Australia

ASIC Seeks Feedback on Proposed Rules for Derivatives Trade Reporting

By Bill Fuggle, Astrid Raetze, and Diane Sylvester

The Australian Securities & Investments Commission (ASIC) recently released Consultation Paper 205 *Derivative transaction reporting* (**CP 205**), seeking feedback on its proposals to implement a derivative transaction reporting regime under Part 7.5A of the Corporations Act 2001 (Cth).

Background

To improve transparency, mitigate systemic risk and protect against market abuse, the G20 nations have agreed that all over-the-counter (OTC) derivative transactions should be reported to derivative trade repositories. Part 7.5A enables the ASIC to issue rules for mandatory OTC derivative transactions reporting (**Reporting Rules**). The Reporting Rules will apply to all entities that trade in OTC derivatives, including financial institutions as well as end-users, and the prospective operators of trade repositories. The Reporting Rules for end-users will be subject to further public consultation later this year.

Key Issues

- Reporting obligation— ASIC proposes that all *reporting entities* must report the details of OTC derivatives to a trade repository if the transaction is a reportable transaction. They must also report any subsequent modification, termination or assignment of the OTC derivative. A reporting entity may delegate reporting to a third person (such as a central clearing counterparty, trading platform, service provider, or other counterparty to the transaction) but they continue to remain responsible for information reported.

- Reporting entities — ASIC proposes that *reporting entities* include Australian entities, foreign subsidiaries of Australian entities, foreign authorized deposit-taking institutions (ADIs) with branches in Australia, and foreign companies required to be registered in Australia.

- Reportable transactions — ASIC proposes that, for Australian entities and foreign subsidiaries of Australian entities, all OTC derivatives are *reportable transactions*, regardless of where they are entered into. For other reporting entities, only OTC derivatives either executed by them in Australia or booked to the profit or loss account of an Australian branch of the entity are *reportable transactions*. ASIC proposes to limit the reporting obligation to OTC derivative transactions. This includes centrally cleared and non-centrally cleared OTC derivative transactions.

- Deadline for reporting — ASIC proposes that reporting entities must report the execution, amendment, termination or assignment of an OTC derivative transaction to a trade repository by no later than the business day following the day on which it occurs (T+1).

- Reporting to overseas trade repositories — ASIC proposes to allow foreign ADIs, registered foreign companies and foreign subsidiaries of an Australian entity to meet reporting obligations by reporting to a trade repository outside Australia in accordance with an overseas regime, subject to certain conditions.

- Information to be reported — The draft Reporting Rules specify the data fields to be reported to trade repositories. ASIC has sought to achieve international consistency, while reducing compliance costs for market participants.

- Reporting mark-to-market valuations and collateral information —ASIC proposes that reporting entities report up-to-date mark-to-market valuations (but they need not undertake valuations other than as required under other rules) and report on whether the transaction is collateralised and the value of collateral.

- Timing of implementation — Proposed phased implementation is as follows: (a) opt-in: from I July 2013; (b) major financial institutions: 31 December 2013 for credit derivatives and interest rate derivatives and 30 June 2014 for other asset classes; and (c) other financial institutions: 30 June 2014 for credit derivatives and interest rate derivatives and 31 December 2014 for other asset classes.

Comment

ASIC has issued draft Reporting Rules with CP 205 for comment by stakeholders. The closing date for comments is 1 May 2013. Both CP 205 and the attached draft Reporting Rules are available here.

Hong Kong

Hong Kong Court Rejects Another Mis-selling Claim

By Cynthia Tang and Bryan Ng

Following the judgment *Selina Kwok v. HSBC Private Bank (Suisse) SA1*, the Hong Kong Court has delivered another robust judgment dismissing the mis-selling claims by a sophisticated private bank. The judgment should be welcomed by banks in the industry, although the law in this area is yet to be settled.

DBS Bank (Hong Kong) Limited v. San-Hot HK Industrial Company Limited and Hao Ting

The Hong Kong Court of First Instance, in the recent judgment of *DBS Bank (Hong Kong) Limited v. San-Hot HK Industrial Company Limited and Hao Ting* (HCA 2279/2008), found in favour of DBS Bank (Hong Kong) Limited (**DBS**) in relation to mis-selling claims made by the Defendants.

Facts

DBS claimed against (i) San-Hot HK Industrial Company Limited (**San-Hot**) for the sums of HK$92,648,489.83 and JPY23,545,784.77 due and owing from San-Hot (with contractual interest), arising out of activities and transactions undertaken in San-Hot's private banking account with DBS and (ii) Hao Ting (**Madam Hao**) as a guarantor of the liabilities of San-Ho towards DBS.
The debts resulted from losses incurred on accumulator contracts in San-Hot's account. San-Hot alleged that DBS staff had misrepresented the accumulator contracts, inducing Madam Hao (acting on behalf of San-Hot) to enter into them. San-Hot counterclaimed damages for losses and rescission of certain accumulator contracts.

The Court's Conclusions

The Court entered judgment in favour of DBS and rejected San-Hot's claims based on these conclusions:

- As to the terms governing the banker-customer relationship, the Court looked at the basic principles for incorporation of contractual terms, and in particular that, if the person receiving the contract knew that the writing or printing contained or referred to conditions, he is bound by them and it is not necessary that the conditions should have been read by the person receiving it. The fact that Madam Hao did not bother to read the documents is not grounds for holding that the terms and conditions set out in those documents were not binding on San-Hot.

- Madam Hao knew and understood the essential features of the accumulator contracts. She was an experienced and

sophisticated investor and was aware of the financial exposure involved. She had an appetite for risk and was aiming at high returns. It was unnecessary for DBS to rely on the principle of "contractual estoppel" to defeat the allegations that Madam Hao relied on DBS's representations. The claim under s.108 of the Securities and Futures Ordinance (**SFO**) was similarly rejected based on these factual findings.

- The Court found that, on a proper interpretation of the legal relationship between DBS and San-Hot, DBS did not owe the seven "*Professional Duties*", many of which were repugnant to the express terms in the agreements. The Court held that, absent exceptional circumstances, no fiduciary relationship was created in commercial settings.
- Even though DBS's agreement with San-Hot contained a clause that made its relationship subject to applicable laws and regulations in Hong Kong, the *Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission* is relevant only in proceedings under the SFO.
- Madam Hao exercised her independent judgment and decision, leading to her loss. There was no duty on DBS to stop Madam Ho from making an independent decision, and the Court held that DBS had not breached any of the alleged "*Professional Duties*" even if they existed.
- Further, the Court was of the view that accumulator contracts were suitable for Madam Hao and San-Hot. Accordingly, the counterclaims for rescission and damages failed.

Our Observations and Points of Interest

- The judgment, together with *Selina Kwok v. HSBC Private Bank (Suisse) S.A.* are first instance decisions. The Court of Appeal has not had a chance to consider the issues and principles. We wait to see what the higher courts will have to say about the law in this area.
- Nevertheless, this judgment is the first Hong Kong judgment in which the Court extensively discussed and applied the line of *JP Morgan Chase Bank v. Springwell Navigation* authorities (both the first instance decision and the Court of Appeal's decision). Much of the analysis in those decisions, in particular the principle of "contractual estoppel" and the use of disclaimers, was adopted. The judgment demonstrated once again the importance of using documentation to define the scope of the bank's services and hence duties to the customers.
- Every mis-selling case is fact-sensitive. The judgment contains a detailed analysis of the agreements and dealings between the bank and the customers. The peculiar features of the San-Hot/Madam Hao and their dealings with DBS would probably restrict the application of this judgment in other cases.
- It is noteworthy that the judgment contained criticism of how San-Hot/Madam Hao pleaded their cases. The Court hinted that there were problems with their pleaded case ("*nebulous*" was the word used). Had San-Hot and Madam Hao pleaded their case differently, it would probably lead to a different result.
- The Court considered that the *Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission* is relevant only in proceedings under the SFO (*c.f.* the Honourable Mr Justice Barma's judgment in *Susan Field v. Barber Asia Limited*, which does not seem to have been considered in the judgment).

The judgment is an interesting one which provides useful guidance as to how financial institutions should conduct their business and draft their client agreements. We wait with interest to see if the higher courts have the opportunities to consider these issues and settle the law in this area.

Court of Final Appeal Confirms Section 213's Free-standing Remedies to Combat Market Misconduct

By Cynthia Tang and Bryan Ng

In a recent landmark ruling, the Court of Final Appeal (**CFA**) dismissed the appeal of Tiger Asia Management LLC and three of its officers (collectively **Tiger Asia**) against legal proceedings brought by the Securities and Futures Commission (**SFC**) under section 213 of the Securities and Futures Ordinance (**SFO**).

Section 213 of the SFO gives the Court power to order a wide range of remedies where a person has contravened any relevant provision of the SFO. These remedies include injunctions; orders restraining or prohibiting the acquisition, disposal or

dealing in property; and orders unwinding transactions and declaring that contracts are void or voidable.

In its reasons for judgment handed down on 10 May 2013, the CFA confirmed section 213 relief as "free-standing" and not contingent or conditional on there being other proceedings. It held that while there are two procedures under the SFO to deal with market misconduct, namely the criminal procedure and civil procedure through the Market Misconduct Tribunal (**MMT**), they are not jointly exhaustive of the procedures of determining whether there is contravention of prohibited acts.

Implications of CFA Decision

1. The recent CFA decision has put it beyond doubt that the SFC can rely on section 213 of the SFO to obtain remedies without a ruling by the MMT or criminal court. The CFA decision has confirmed the following:

   - The Court has a free-standing jurisdiction to grant remedies in proceedings under section 213, where it is appropriate to do so.
   - Criminal sanctions and MMT proceedings are not the only means for determining whether there has been market misconduct.
   - The remedies under section 213 of the SFO serve a different purpose from the penalties that can be imposed under the criminal and MMT processes.

2. The SFC's use of its section 213 remedies has an important bearing on the market, in particular in view of the availability of drastic asset freezing injunctions. We are seeing a trend of the SFC aggressively pursuing potential wrongdoers in both the criminal and civil courts and taking advantage of its wide-ranging powers under section 213 to seek injunctive and other relief to combat market misconduct and other offences.

3. The CFA decision has also made it clear that those operating offshore are not immune. To date, several section 213 proceedings have been instituted against local and overseas individuals and corporations. One of the more prominent section 213 proceedings was against Hontex International Holdings Company Limited, a Chinese high-tech fabric manufacturer listed on the Stock Exchange of Hong Kong. The SFC alleged that Hontex had contravened a market misconduct provision prohibiting the distribution of materially false or misleading information that is likely to induce another person to subscribe or buy securities if the person knows or is reckless as to whether the information is false or misleading. The CFI made interim orders pursuant to section 213 freezing up to HK$997.4 million held by Hontex and two of its subsidiaries following an urgent application by the SFC. After two years of litigation, Hontex was eventually ordered to make a repurchase offer to the investors.

Background

Court of First Instance

1. Tiger Asia is a New York-based asset management company that specialises in equity investments in China, Japan and Korea. It has no physical presence in Hong Kong.

2. The SFC commenced legal proceedings in 2009 in the Court of First Instance (CFI) under section 213 of the SFO seeking remedial orders and injunctions. The SFC alleged that Tiger Asia had contravened Hong Kong's insider dealing and market manipulation laws in dealing in shares of Bank of China Limited and China Construction Bank Corporation Limited during 2008 and 2009.

3. SFC sought orders under section 213, including orders freezing Tiger Asia's assets, prohibiting them from trading in listed securities and derivatives in Hong Kong in similar circumstances, and unwinding the relevant transactions.

4. The SFC argued that section 213 provides for a free-standing remedy and that the legislation intended remedial and preventative orders to be available separately from criminal sanctions.

5. Tiger Asia argued that the Court had no jurisdiction under section 213 to find that there had been a contravention of these laws without a pre-existing criminal conviction or an MMT finding.

6. The CFI held that it did not have jurisdiction to determine whether Tiger Asia contravened the market misconduct provisions (section 291 of the SFO) on applications under section 213.

Court of Appeal

7. Upon appeal by the SFC, the Court of Appeal (CA) had to determine the question of whether the SFC could obtain a final order under section 213 otherwise than on the basis of a finding of such market misconduct by the MMT or the criminal court.
8. The CA allowed the appeal and considered that section 213 provided “much needed ammunition” to the SFC to protect investors. Section 213 was meant to augment the SFC’s ability to protect the investing public and provide remedies for contraventions for the protection of investors as there may be cases where investors cannot be expected to take proceedings individually to enforce their legal rights.
9. The CA further held that section 213 provides valuable tools to the SFC to protect the investing public. Section 213 is focused primarily upon remedial consequences and the orders specified in subsection (2), including injunctions, restitution, orders protecting property and avoiding contracts (so as to restrain, reverse or compensate for the mischief in question), are by their nature designed to ensure that the relevant provisions are complied with, maintain and promote confidence in the industry, protect investors and suppress illegal practices.

Court of Final Appeal

10. The CFA upheld the decision of the CA and dismissed Tiger Asia’s appeal.

11. The CFA held that the remedies provided under section 213 serve a different purpose from the remedies which can be imposed by a criminal court or the MMT. The latter are imposed in the general public interest, while the former provided remedies for the benefit of parties involved in the impugned transactions.

12. In proceedings brought under section 213, the CFA considered that “the SFC acts not as a prosecutor in the general public interest but as protector of the collective interests of the persons dealing in the market who have been injured by market misconduct.”

13. The CFA also observed that section 213 proceedings are not a substitute for a criminal prosecution or MMT proceedings, but are plainly civil proceedings and do not attract the protection accorded to criminal defendants. Further, the question of whether Tiger Asia committed a criminal offence remained entirely a matter for the criminal court.

Conclusion

With the CFA confirming the free-standing and remedial nature of section 213, it is expected that the SFC will continue to invoke section 213. We are seeing a trend where the SFC continues to leverage its wide-ranging powers to seek remedies in different enforcement contexts.

SFC Proposals to Enhance Professional Investor Regime and Client Agreement Requirements

By Karen Man and Grace Fung

On 15 May 2013, the Securities and Futures Commission (**SFC**) issued the *Consultation Paper on the Proposed Amendments to the Professional Investor Regime and the Client Agreement Requirements* (**Consultation Paper**), which proposes to seek comments from market participants and interested parties on proposed measures to enhance the existing professional investor regime and the client agreement requirements.

This follows the *Report on the Thematic Inspection of Selling Practices of Licensed Corporations* issued by the SFC in October 2012 (**Thematic Inspection Report**), and the two recent court cases, *Kwok Wai Hing Selina v. HSBC Private Bank (Suisse) SA (formerly known as HSBC Republic Bank (Suisse) SA)* HCCL 7/2010 and *DBS Bank (Hong Kong) Limited v. San-Hot HK Industrial Company Limited and Hao Ting* HCA 2279/2008.

Professional Investor Regime

The consultation on the professional investor regime covers the following two aspects: product offering in private placements and regulation of intermediaries’ conduct.

"*The SFC recognizes that the Suitability Requirement is regulatory in nature and breaches of such requirements alone do not enable clients to claim compensations from the intermediaries.*"

(a) Private Placements

Under the existing regime, in private placement activities where offers are made to professional investors only, market participants are able to rely on exemptions from both the prospectus contents and registration requirements under the *Companies Ordinance* and the authorisation requirements on product offerings under the *Securities and Futures Ordinance*.

The SFC has not proposed any change to the current private placement regime. The SFC considers that the existing regime is well established and is in line with the stance taken in other major overseas jurisdictions. However, the SFC would like to seek views on whether high net worth individuals and corporate professional investors should continue to be allowed to participate in private placements and whether the monetary thresholds set out in the *Securities and Futures (Professional Investor) Rules* (**Professional Investor Rules**) should be increased.

(b) Conduct of Intermediaries

Licensed or registered intermediaries are subject to the conduct requirements under the *Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission* (**Code**). Under the current regime, intermediaries are exempted from certain Code requirements when serving (i) institutional professional investors (such as banks and financial intermediaries) and (ii) high net worth professional investors who meet the monetary thresholds under the Professional Investor Rules; are assessed to have sufficient knowledge, experience and expertise in the relevant products and markets; and consent to be treated as professional investors for the purposes of the Code. One of such Code requirements that may be exempted is the requirement under paragraph 5.2 of the Code that the intermediaries should, when making a recommendation or solicitation, ensure the suitability of the recommendation or solicitation for a client is reasonable in all the circumstances (**Suitability Requirement**).

The proposals include amending the Code such that no exemptions from the Code requirements (including the Suitability Requirement) will be available to intermediaries when serving (i) individual professional investors, (ii) investment vehicles wholly owned by these individuals, and (iii) investment vehicles that meet the monetary thresholds under the Professional Investor Rules and are wholly owned by family trusts. The vast majority of mis-selling cases the SFC dealt with involved individual investors and therefore the SFC takes the view that in general individual professional investors merit greater protection than corporate professional investors.

The other proposals include amending the criteria under the Code in assessing the knowledge and experience of corporate professional investors. The objective of the assessment is to ensure that corporate professional investors are sufficiently sophisticated to dis-apply those specified Code protections. Instead of having a “bright line” test such as 40 transactions per annum as in the current Code, it is proposed that the criteria should be “principles-based” and cover factors such as the corporate structure, the investment process and controls of the corporation (i.e., how investment decisions are made, including whether the corporation has a specialised treasury or other function responsible for making investment decisions) as well as the background of the relevant person responsible for making investment decisions on behalf of the corporation (e.g., investment experience, relevant work experience, training and qualifications).

The Consultation Paper also discusses the application of the Suitability Requirement in the context of transaction-by-transaction advisory services, discretionary portfolio management services and non-advisory services of intermediaries, when serving clients where the Code exemptions are not available.

For transaction-by-transaction advisory services, intermediaries would need to comply with the Suitability Requirement and provide the client with copies of the investment rationale for each transaction. Likewise, for discretionary portfolio management services, intermediaries would need to comply with the Suitability Requirement on an overall portfolio basis, but where intermediaries do not obtain prior client approval for each transaction and do not inform the client of each transaction carried out under a discretionary mandate, intermediaries are not required to provide the client with copies of the investment rationale for each transaction. For non-advisory services where intermediaries do not make any recommendation or solicitation, the Suitability Requirement does not apply. However, intermediaries must still comply with other applicable Code requirements such as the General Principles and know your client requirements on derivatives products under paragraph 5.3 of the Code. The question on whether the services provided are “advisory” or “non-advisory” should be determined by the actual services provided.

Client Agreement Requirements

The SFC also proposes amendments to enhance the client agreement requirements under the Code.

The proposals include requiring the Suitability Requirement to be incorporated into client agreements as a contractual term

without qualification, requiring clear descriptions of the actual services to be provided, and prohibiting inclusion of any clauses which are inconsistent with the Code obligations or any clauses which mis-describe the actual services to be provided.

These proposals follow the Thematic Inspection Report where the SFC found that some intermediaries insert clauses, disclaimers, declarations and acknowledgements in the client agreements or account opening documentation to restrict the purposes and effect of certain investor protection measures under the Code and potentially distort the true relationship between the intermediaries and the client. Also, there are recent court cases where the Court found that the Code could not impose a contractual duty (including a duty to ensure suitability) which the intermediary had not undertaken by the terms of the client agreement. The SFC recognises that the Suitability Requirement is regulatory in nature and breaches of such requirement alone do not enable clients to claim compensations from the intermediaries. The SFC therefore seeks to address these issues by the proposed amendments to the client agreement requirements under the Code.

Singapore

New Regulatory Framework for Capital Markets Services License Holders

By Stephanie Magnus and Eunice Tan

Following a series of consultation papers and responses to feedback received on the consultation paper issued by the Monetary Authority of Singapore (MAS), the MAS has implemented a new regulatory capital framework for capital markets services licence (CMSL) holders. The new regulatory capital framework is now contained in the amended Securities and Futures (Financial and Margin Requirements for Holders of Capital Markets Services Licenses) Regulations (Financial Regulations) and a new MAS Notice on Risk-Based Capital Adequacy Requirements for Holders of Capital Markets Services Licences (Financial Notice). The new Financial Regulations and Financial Notice came into effect on 3 April 2013. Certain transitional provisions apply, as further detailed below.

The summary below is prepared on the basis that the CMSL holder is a Singapore-incorporated company (as opposed to a branch). There are certain differences in respect of the applicable requirements for a branch.

1. Base capital

The existing minimum "base capital" requirements that apply to each class of CMSL holders continue to apply.

The definition of "base capital" has been amended to refer to the following:

(i) the following items in the latest account of the corporation: (a) paid-up ordinary share capital; (b) paid-up irredeemable and non-cumulative preference share capital; and (c) reserve fund maintained under regulation 19 of the Financial Regulations (applicable to CMSL holders for dealing in securities and/or trading in futures contracts who are members of designated clearing house); and

(ii) any unappropriated profit or loss in the latest audited accounts of the corporation, less, any interim loss in the latest accounts of the corporation, and any dividend that has been declared since the latest audited accounts of the corporation.

In particular, under the new framework, only paid-up irredeemable and noncumulative preference share capital that satisfies certain prescribed requirements can be included as part of the "base capital."

CMSL holders have a duty to notify the MAS when their base capital falls below the prescribed requirement.

2. Ongoing risk-based capital requirements (RBC Framework)

The RBC Framework requires CMSL holders to ensure that their "**financial resources**" do not fall below their "**total risk requirement**." Where the financial resources fall below 120% of the total risk requirement, the CMSL holder will be required to notify MAS immediately. In such cases, the MAS has certain powers to direct the CMSL holder to carry out/restrict from carrying out certain prescribed matters, or revoke the licence of the CMSL holder.

The RBC Framework now extends to all classes of CMSL holders. For the purpose of determining the "financial resources" and "total risk requirements," CMSL holders are further divided into two main categories, being the following:

(i) CMSL holders who do not fall under (ii) below (**Category I CMSL**).

(ii) CMSL holders who are licensed to carry out one or more of the following:

- fund management;
- REIT management;
- advising on corporate finance;
- providing custodial services for securities;
- dealing in securities, where the CMSL is a “limited activity CMSL”; or
- trading in futures contract, where the CMSL is a “limited activity CMSL.”

“***Limited activity CMSL***” refers to CMSL holders who, in carrying on business in dealing in securities or trading in futures contracts, as the case may be:

- do not carry any customer’s position, margin or account in their own books;

- do not hold any customer’s moneys or assets, and do not accept moneys or assets from any customer as settlement of, or as margin for, or to guarantee or secure, any contract for the purchase or sale of securities or futures contract by that customer. For the avoidance of doubt, a CMSL that receives moneys or assets of customers from its customers or other persons, and then forwards or delivers the moneys or assets to other persons or to its customers, would not be a “limited activity CMSL holder”; and

- is not a member of an approved exchange or designated clearing house.

Category II CMSL

The key difference between Category I CMSL and Category II CMSL is in the calculation for and components comprising “financial resources” and “total risk requirements.” Generally, Category I CMSL will need to deduct certain noncurrent and illiquid assets from their "financial resources," in addition to other prescribed items applicable to both classes of licence holders. Category II CMSL are only required to compute total risk requirements as the operational risk requirement and any other risk requirement that MAS may impose, if their "average adjusted assets" do not exceed a certain threshold. If the average adjusted assets exceed the threshold, the CMSL holder will have to compute the total risk requirement as the sum of the operational risk requirement, counterparty risk requirement, position risk requirement, large exposure risk requirement, underwriting risk and any other risk requirements as imposed by the MAS. It is notable that CMSL holders for dealing in securities and trading in futures contract who deal solely with accredited and institutional investors do not automatically enjoy the simplified total risk requirement, but will need to satisfy the conditions under (ii) (a) to (c) for Limited Activity CMSL in order to enjoy the “exemption.”

3. Other requirements

Various other ongoing capital adequacy related requirements also apply. Some of them have been prescribed under the previous regulations, with certain changes implemented under the new framework. In summary, these include, but are not limited to, the following:

- CMSL holders for dealing in securities and/or trading in futures contracts who are members of a Singapore-approved securities exchange or futures exchange (with certain exceptions), or any CMSL holders who are members of designated clearing houses, will also be subject to the requirement of ensuring that its aggregate indebtedness does not exceed the prescribed threshold of its aggregate resources;

- maintenance of reserve funds by CMSL holders for dealing in securities and/or trading in futures contracts who are members of designated clearing house;

- any reduction of paid-up ordinary share capital or paid-up irredeemable and non-cumulative preference share capital by any CMSL holders will be subject to the prior written approval of the MAS;

- any issuance of preference share, redemption and repurchase by any CMSL holders will be subject to prior notification to the MAS and certain other conditions;

- any drawdown or repayment of “qualifying subordinated loan” by a CMSL holder will be subject to the prior notification to

the MAS and subject to certain other conditions;

- CMSL holders for dealing in securities and/or trading in futures contracts which are members of Singapore-approved exchanges or designated clearing house shall not, without the prior written approval of the MAS, and the approved exchange or designated clearing house, make unsecured loan, payment of dividend or directors fees of increase in directors remuneration;

- CMSL holders for securities financing will be subject to certain margin requirements;

- where a CMSL holder enters into contract for differences with its customers, it will be required to obtain margin from its customers, in the form of acceptable collateral; and

- reporting of under margined accounts by CMSL holders will also apply.

4. Reporting/filing requirements

Pursuant to amendments to the ongoing capital framework, corresponding changes have also been implemented in respect of the quarterly and annual filing requirements for CMSL holders.

Quarterly Filings: Briefly, all CMSL holders will be required to file, on a quarterly basis:

- statement of assets and liabilities (Form 1); and
- statement of financial resources, total risk requirement and aggregated indebtedness, where applicable (Form 2).

Additional filings apply to CMSL holders for securities financing.

Annual Filings: All CMSL holders will be required to file, on an annual basis:

- profit and loss account and balance sheet together with an auditor's report (Form 5);
- auditor's certification (Form 6);
- statement relating to the accounts of the CMSL holder (Form 3);
- statement relating to further information of the accounts of the holder (Form 4);
- statement of assets and liabilities (Form 1); and
- statement of financial resources, total risk requirement and aggregate indebtedness (Form 2).

5. Transitional provisions

The requirements under sections (2), (3) and (4) shall collectively be referred to as the "**Ongoing Requirements**."

The following classes of CMSL holders will be able to enjoy the transitional periods as set out below to comply with the new requirements. Before the end of the applicable transition period, the existing requirements before 3 April 2013 will continue to apply.

(i) Existing CMSL holders

For existing CMSL holders (i.e., CMSL holders who have been granted CMSL prior to 3 April 2013):

Base capital requirements (based on amended definition) - the expiry of 6 months after 3 April 2013; or the date of commencement of compliance, whichever is earlier;
Ongoing Requirements - the expiry of 24 months after 3 April 2013; or the date of commencement of compliance, whichever is earlier.

(ii) New CMSL holders (other than (iii) and (iv) below) who have made an application for a CMSL before 3 April 2013, and are granted CMSL within 6 months after 3 April 2013 for the purpose of the new base capital requirements, and 24 months after 3 April 2013 for the purpose of the Ongoing Requirements

Same as (i)

(iii) Existing Exempt Fund Managers

For existing exempt fund managers who have applied for a licence for fund management in accordance with the applicable rules 1, and are granted the licence within 6 months after 3 April 2013 for the purpose of the new base capital requirements, and 24 months after 3 April 2013 for the purpose of the Ongoing Requirements:

Ongoing Requirements - the expiry of 24 months after 3 April 2013; or the date of commencement of compliance, whichever is earlier.

(iv) Existing Registered Fund Management Companies

For existing registered fund management companies who immediately before 3 April 2013 is a registered fund management company and has at any time, whether before, on or after 3 April 2013, applied for a licence for fund management and the application is granted within 24 months after 3 April 2013:

Ongoing Requirements - the expiry of 24 months after 3 April 2013; or the date of commencement of compliance, whichever is earlier.

For the purpose of this section 5, "**date of commencement of compliance**" refers to the date where the entity gives notice to the MAS of the date (falling during the transitional period) from which it will commence compliance. Such notice will need to be given 14 days before that date.

Amendments to the Securities and Futures (Offers of Investments)(Collective Investment Schemes) Regulations 2005 and Regulatory Treatment of Closed-end Funds

By Stephanie Magnus and Eunice Tan

The Monetary Authority of Singapore (**MAS**) has issued new regulations relating to the offering of restricted schemes and closed-end funds.

The new regulations are summarised below.

1. Offering of new collective investment schemes

With effect from 1 July 2013, any offer of collective investment schemes (CIS) to "relevant persons" (which includes "accredited investors") in Singapore, or to any persons in Singapore who acquire interests in the CIS as principal where the offer is made on terms that the units may only be acquired at a consideration of not less than $200,000 for each transaction, will need to:

- register the CIS as a restricted foreign scheme (where the scheme is constituted outside Singapore) prior to the offer; and
- the offer will need to be made in or accompanied by an information memorandum (IM), which contains information as set out in the Schedule, and a copy of which is submitted to the MAS for record purposes.

Therefore, any proposed registration of CIS as a foreign restricted scheme on or after 1 July 2013 will need to be accompanied by an IM which contains the prescribed information. Where there is an existing IM for the fund, the IM should be reviewed to ensure that it contains the prescribed information; otherwise, a revised IM, supplementary IM or a wrapper incorporating the relevant prescribed information will be required where it is intended that the CIS be registered as a restricted scheme on or after 1 July 2013.

For the avoidance of doubt, there is no need to resubmit the IM for the purposes of annual declarations for funds registered as restricted foreign schemes on or after 1 July 2013, unless there are changes to the previous IM submitted during the initial registration.

2. Existing registered restricted foreign schemes

In respect of restricted schemes that have already been registered with MAS prior to 1 July 2013, the following transitional rules apply.

A copy of the IM containing the prescribed information will need to be submitted in the immediate next annual declaration that falls due on or after 1 July 2013. For annual declarations thereafter, the IM need not be resubmitted, unless there are changes to the previous IM submitted in the first-mentioned annual declaration.

Therefore, a review should be conducted on the existing IMs to determine if it contains all the prescribed information. If not, a revised IM, supplementary IM or a wrapper incorporating the relevant prescribed information should be prepared in time for the immediate next annual declaration.

3. Closed-end funds considered as CIS

Going forward, for **closed-end funds constituted on or after 1 July 2013**, such funds will be considered to be "collective investment schemes" for the purposes of Singapore legislation. This would mean that the licensing requirements in respect of the marketing of CIS, and the prospectus/registration requirements (including the requirement to register restricted schemes) in respect of the offering of CIS to any persons in Singapore, willapply to closed-end funds constituted on or after 1 July 2013.

Thailand

Thai Non-institutional Investors Now Enjoy More Offshore Investment Opportunities

By Komkrit Kietduriyakul, Benja Supannakul, and Kullarat Phongsathaporn

The Bank of Thailand further relaxed the exchange control laws and regulations on the portfolio investment of non-institutional Thai investors on 17 January 2013, allowing them offshore portfolio investment opportunities similar to those that institutional investors have long been enjoying. This was an attempt to reduce Thai investors' regulatory burden and expand their investment opportunities.

Thai non-institutional investors can now invest in certain offshore instruments and derivatives through private funds or securities companies, without requiring prior approval from the Bank of Thailand as before, in accordance with the criteria set out in the regulation, as summarized below.

1. **Alternatives** — Non-institutional investors may invest in offshore permissible investments through:

a private fund managed by an asset management company licensed to operate business in Thailand; or
a securities company with a full-service securities and derivatives license in Thailand.

2. **Permissible Investments** — In summary, an investment through a private fund gives broader investment opportunities to non-institutional investors than an investment via a securities company.

    - Through Private Funds — Thai non-institutional investors, subject to certain conditions under this regulation and the SEC regulations, can invest through private funds in the following permissible investments: foreign currency denominated instruments offered outside of or in Thailand (e.g. offshore government/corporate bonds, stocks listed on an offshore exchange, FX bonds offered in Thailand); derivatives transactions (including (i) offshore exchange-traded derivatives, (ii) derivatives with non-residents, (iii) non-FX derivatives with Thai commercial banks, and (iv) FX derivatives with Thai commercial banks); securities lending and borrowing transactions; repo transactions; and deposits pending investments in the stated transactions.

    - Through Securities Companies — Thai non-institutional investors, subject to certain conditions under this regulation and the SEC regulations, can invest through securities companies in the following permissible investments: foreign currency denominated instruments offered outside of or in Thailand (e.g. offshore government/corporate bonds, stocks listed on an offshore exchange, FX bonds offered in Thailand); derivatives transactions (only (i) offshore exchange-traded derivatives and (ii) FX derivatives with Thai commercial banks for hedging purposes); and deposits pending investments in the stated transactions.

3. **Investment Limit** — Thai non-institutional investors can invest in the permissible investments in an amount of not more than the offshore investment quota that the asset management company or securities company obtains from the Office of the SEC, on its behalf, which will not be more than USD 50 million per investor.

4. **Payment** — In principle, the payment of the aforementioned transactions must be made in foreign currencies, subject to certain conditions.

This relaxation was one of several policies set out in the Bank of Thailand's Master Plan on Capital Movement (**Master Plan**), which has the main purposes of supporting diversification of investments, creating an environment appropriate for balanced fund flows, and stimulating the development of financial markets.

The Bank of Thailand plans to continue implementing the other policies in the Master Plan, such as allowing non-institutional investors to invest directly in offshore instruments and derivatives; this will include cancelling the requirement that non-institutional investors must invest through intermediaries like private funds and securities companies, and also, allowing both institutional investors and non-institutional investors to invest in offshore securities and derivatives without a maximum offshore investment quota.

Vietnam

Draft Decree on Foreign Investors Buying Shares in Local Credit Institutions, Open to Feedback

By Frederick Burke, Oanh H.K. Nguyen, Simon Taylor, Linh Chi Dang

In order to collect feedback from the private sector, the State Bank of Vietnam (**SB**) has posted a draft decree on the purchase of shares in Vietnamese credit institutions by foreign investors (**Draft Decree**) on its website, as well as a draft circular implementing the Draft Decree (the **Draft Circular**). The Draft Decree is intended to replace Decree No. 69/2007/ND-CP on the purchase of shares in Vietnamese commercial banks by foreign investors (**Decree No. 69**).

Below, we’ve listed key changes that the Draft Decree introduces to the current regulations under Decree No. 69 and the Draft Circular.

1. Limits to the ratio of share ownership in local credit institutions by foreign investors

According to the Draft Decree, it appears that the SBV will allow a foreign strategic investor to hold a maximum stake of 20% of a local credit institution’s charter capital (without requiring approval from the Prime Minister).

More specifically, the Draft Decree sets out that:

- A foreign individual’s shares may not exceed 5% of a Vietnamese credit institution’s charter capital (this is undefined in Decree No. 69, which only contained provisions for affiliated persons; see the fourth bullet point below);

- A foreign organization’s shares may not exceed 15% of a Vietnamese credit institution’s charter capital (this is also unregulated in Decree No. 69);

- A foreign strategic investor’s shares may not exceed 20% of a Vietnamese credit institution’s charter capital (as opposed to 15% per SBV approval and 20% under PM approval under Decree No. 69);

- A foreign investor and his/her/its affiliated persons’ shares may not exceed 20% of a Vietnamese credit institution’s charter capital (under the Draft Decree, this has been increased from 5% for a foreign investor other than a foreign credit institution, and 10% for a foreign investor, which is a foreign credit institution under Decree No. 69);

- Foreign investors and their affiliated persons’ shares may not exceed 30% of a Vietnamese credit institution’s charter capital (this ratio remains unchanged in comparison to Decree No. 69); and

- In special cases, which may be needed in order to restructure the credit institution system in Vietnam, the Prime Minister may regulate an increase in shareholding percentage beyond the 30% currently allowed on a case-by-case basis, for foreign investors and their affiliates to purchase shares in weak credit institutions.

2. Conditions for ownership of shares for foreign investors

In comparison with Decree No. 69, the Draft Decree provides the following additional conditions for a foreign investor to

purchase shares and become a foreign strategic investor in these credit institutions:

- Have enough financial resources to purchase shares based on its audited independent financial statements for the year prior to the year of application;

- Not cultivate a bad influence on the safety and stability of Vietnamese credit institutions and not form a monopoly or break any competition restrictions in the Vietnamese credit institution market;

- Not seriously violate the laws on currency, banking operations or the stock market of Vietnam as well as the laws in the country where the foreign investor has been established for a period of at least 12 months prior to the time of application for the purchase of shares;

- Be a foreign bank, foreign financial company or foreign financial leasing company that has been permitted to carry out banking activities under the law of the country where its head office is located;

- Not own 10% or more of any other credit institution's charter capital in Vietnam;

- Commit to own or have already owned 10% or more of a Vietnamese credit institution's charter capital;

- Have had international operational experience in the banking and finance sector for at least 5 years; and

- Be rated by international credit-rating organizations as "stable or better."

As is the case with Decree No. 69, the Draft Decree also requires that a foreign strategic investor must:

- Have minimum total assets equalling US$20 billion in the year prior to the year of application for purchase of shares;

- For a foreign investor to purchase shares which equate to the ownership of 10% or more of a Vietnamese credit institution's charter capital, such foreign investor must also have minimum total assets equalling US$10 billion (if such foreign investor is a foreign bank, foreign financial company or foreign financial leasing company) or

- Have a minimum charter capital equalling US$1 billion (if such foreign investor is another type of organization) in the year prior to the year of application for the purchase of shares.

In addition, under the Draft Decree, a foreign investor may participate or delegate the representatives of its shareholdings to participate on the Board of Management (**BOM**) of one Vietnamese credit institution only, an exception to this case being that the representative may also participate on the BOM of a subsidiary of the credit institution.

LawInContext

Cross-border Conduct: Marketing & Distribution Rules for Financial Institutions

Law in Context's Financial Product Distribution Helpdesk (www.lawincontext.com/financialproducts) is an online multi-country database covering the "do's" and "don'ts" in the cross-border retail marketing and distribution of financial products and services into **60 countries** around the world. A key feature in the Financial Products Distribution Helpdesk is the practical Relationship Manager (or "RM Checklists"), which focus on a range of prospecting, acquisition and post-acquisition activities in respect of banking and securities financial products distribution. Asia Pacific jurisdictions included in the Helpdesk: Brunei, China, India, Indonesia, Korea (South), Malaysia and Taiwan, with Vietnam and other jurisdictions forthcoming soon!

LawInContext is also pleased to announce the launch of a **new online global e-learning program** on **Cross-Border Conduct**, which is designed to efficiently train and test client advisors and other financial institution personnel on key cross-border conduct issues from a global perspective. The e-learning program is seamlessly customizable for integration of an institution's cross-border conduct policy, including its core market specific guidance, with tracking and reporting of personnel completion and compliance certification.

For a complimentary demonstration or more details on LawInContext's Financial Products Distribution Helpdesk and/or Cross

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