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Significant amendments to the Securities and Futures Act (Cap. 289) ("SFA") take effect – what are the implications for your business?

The Securities and Futures (Amendment) Act 2017 ("**SF(A)A**") took effect on 8 October 2018.

Together with new and revised underlying regulations, notices and guidelines that were simultaneously released, the SF(A)A introduces changes to rules in connection with licensing, prospectus requirements, conduct of business and market misconduct.

In this client alert, we will summarise five key (non-exhaustive) areas at a high level:

If you work in a bank, fund house, asset manager, broker dealer or any other business that is involved in the securities and derivatives markets, these developments will have wide-ranging and significant impact on your business. They will also impact unregulated entities which wish to do regulated business in Singapore, including on a cross-border basis.

We outline below certain practical steps you may wish to take to deal with these changes for your business. Do feel free to get in touch if you have any queries.

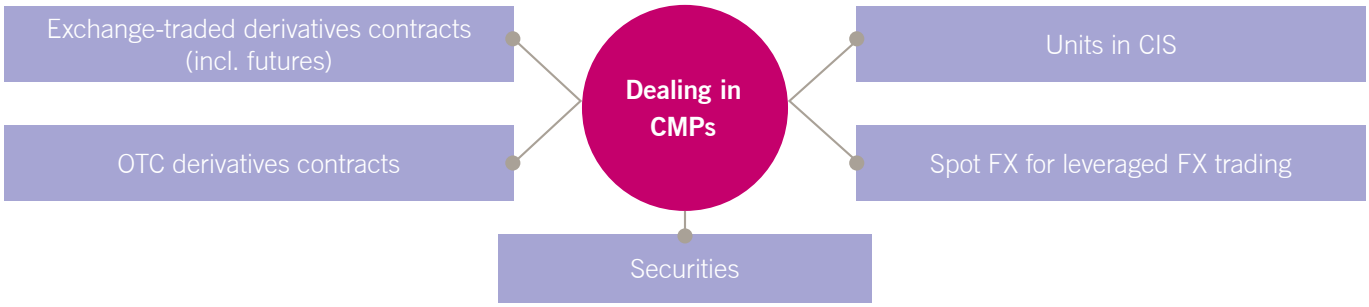
Capital markets services licensing regime

The SF(A)A:

(a) extends the scope of the SFA to OTC derivatives by empowering MAS to regulate market operators and capital markets intermediaries in respect of their OTC derivatives activities; and

(b) streamlines the licensing regime for dealing in units of collective investment schemes ("**CIS**"), which was formerly regulated as the marketing of collective investment schemes under the Financial Advisers Act (Cap. 110) ("**FAA**"). Note that if an institution were to advise on collective investment schemes, this activity remains regulated under the FAA.

The existing regulated activities of "dealing in securities", "dealing in futures contracts" and "leveraged foreign exchange trading" have been amalgamated into a single regulated activity of "dealing in capital markets products", which also encompasses a new activity of "dealing in OTC derivatives" and dealing in units in CIS. Corresponding new licensing exemptions have also been introduced to the Securities and Futures (Licensing and Conduct of Business) Regulations ("**SF(LCB)R**").



Investor categorisation

Revised definitions of "accredited investor" ("**AIs**") and "institutional investor" ("**IIs**") took effect on 8 October 2018. The overriding policy objective is to enhance investor protection.

For AIs who are individuals:

(a) the net equity of an individual's primary residence can now only contribute up to S$1m of the current S$2m net personal assets threshold; and

(b) AIs newly include individuals with S$1m of "financial assets" (broadly, deposits and investment products) excluding related liabilities.

Existing definitions of AIs are "grandfathered" until 8 January 2019. From that date, the following additional persons or entities will qualify as AIs:

(a) a trustee of a trust:

i. all the beneficiaries of which are AIs; or

ii. all the settlors of which:

> are AIs;

> have reserved to themselves all powers of investment and asset management functions under the trust; and

> have reserved to themselves the power to revoke the trust; or

iii. the subject matter of which exceeds S$10 million (or its equivalent in a foreign currency) in value;

(b) any corporation the entire share capital of which is owned by one or more persons, each of whom is an AI (no longer limited to corporations, the sole business of which is to hold investments); and

(c) a person who holds a joint account with an AI, in respect of dealings through that joint account.

An opt-in/opt-out regime for AIs also becomes effective on 8 April 2019. The purpose is to ensure that AIs are able to consciously decide to be treated as an AI in their dealings with institutions:

(a) an opt-in regime will become immediately effective for new AI-eligible clients, and will allow them the choice to remain a retail investor entitled to avail itself of the full suite of regulatory protections under the SFA and FAA; and

(b) an opt-out approach will be permitted for existing AI-eligible clients, subject to certain conditions and limitations. In particular, the opt-out approach in respect of individuals will only be effective until 8 July 2020 (meaning, if an institution wishes to continue to treat AI-eligible individuals as AIs after that date, it will need to obtain a specific opt-in from the client).

Certain procedural steps are involved in the opt-in/opt-out approach – for example, an institution will need to explain, in a clear and easily understood manner, the regulatory safeguards which would be waived if an entity decides to opt-in to be treated as an AI.

Here is a high-level overview of practical steps required for AI-eligible existing clients.

AI-eligible existing client	Steps required now	Steps required by 8 April 2019
Individuals	Ascertain if such individuals still qualify as AIs as a result of the changes to the AI definition which are immediately effective.	Ensure that opt-out notification has been sent, which informs the client that they will be treated as an AI until 8 July 2020, and that appropriate written records have been kept.
Corporations	No steps required, as the AI definition remains the same.	Ensure that opt-out notification has been sent and appropriate written records have been kept.
Entities other than corporations (e.g. trusts, partnerships)	No steps required - the AI definitions have been expanded.	Ensure that opt-out notification has been sent and appropriate written records have been kept.

A revised II definition also took effect on 8 October 2018, to now (amongst others):

(a) **include** persons professionally active in the capital markets such as financial institutions regulated by foreign regulators, foreign central governments and sovereign wealth funds; and

(b) **exclude** statutory bodies (for example, town councils), other than prescribed statutory boards.

Conduct of business requirements

Conduct of business requirements were amended, and certain new requirements were simultaneously added to the SF(LCB)R on 8 October 2018.

Enhancements have been made to rules around customer's money and assets, in particular in respect of money and assets held by capital markets services licensees (and, in the case of assets, banks) for retail investors:

(a) new disclosure requirements apply (e.g. on where the customer's money and/or assets are held, and what happens in the event of insolvency of the holder); and

(b) new prohibition on title-transfers of money and assets will apply, except title transfers for securities lending (with certain conditions).

Further incremental changes have been made to existing regulations, to align conduct of business rules with the new scope of licensing rules. Accordingly, requirements under the SF(LCB)R (such as contract notes, record keeping and provision of statements of accounts) now apply to the full range of OTC derivatives (subject to transitional periods for certain entities, such as banks and capital markets services licensees who were dealing in newly regulated OTC derivatives prior to 8 October 2018).

A new regulation 54B of the SF(LCB)R will require banks and merchant banks dealing in non-centrally cleared derivatives contracts on behalf of non-retail investors to implement certain risk mitigation measures. There is a two-year grace period for compliance, until 8 October 2020, which initially applied only in respect of any business in dealings in capital markets products **other than** "specified contracts" (which generally refers to OTC derivatives contracts which were brought within the scope of "capital markets products" in the amendments to the SFA (e.g. FX forwards, interest rate swaps and cross currency swaps)). However, the MAS has now clarified that it is their intention for the grace period to apply also in respect of all classes of non-centrally cleared OTC derivatives contracts, and will amend the regulations to reflect this.

Market operator regime

Certain new or revised obligations in the SFA, which are relevant to an approved exchange ("**AE**") or Recognised Market Operator ("**RMO**"), have become effective immediately.

A number of these seek to enhance the RMO regime by introducing obligations more akin to those previously applicable only to AEs in Singapore, including that:

(a) RMOs must manage risks prudently; and

(b) RMOs must maintain user confidentiality;

The previous product approval obligation in the SFA is replaced with a notification framework – AEs and locally-incorporated RMOs will be able to list or delist products after notifying MAS, provided they have met certain criteria.

The MAS had previously proposed in the draft Securities and Futures (Organised Markets) Regulations ("**SF(OM)R**") to require market operators to facilitate fair and objective execution of orders. This requirement is no longer specifically set out in the SF(OM)R, and will be published separately in a Notice. The MAS clarified that they will provide further guidance on these requirements in the Guidelines on the Regulation of Markets.

Regulation of financial benchmarks

New Part VIAA of the SFA has taken effect with the objectives:

(a) to promote fair and transparent determination of financial benchmarks; and

(b) to reduce systemic risks.

Benchmarks designated by MAS ("**designated benchmarks**") are, initially, Singapore Interbank Offered Rate (SIBOR) and Singapore Dollar Swap Offer Rate.

Administrators of, and submitters to, designated benchmarks will need to be authorised by the MAS, or otherwise exempted. There is a grace period of 12 months (until 8 October 2019) to apply for authorisation, if needed.

New market misconduct offences in connection with financial benchmarks (such as manipulation of financial benchmarks) have also been introduced to Part XII of the SFA, and take immediate effect.

Concluding thoughts

Clients

Financial institutions should review and **update their client-facing documentation and processes** in light of the changes. For example,

(a) Is proper documentation in place comply with opt-in/opt-out requirements that will come into effect on 8 April 2019, and are systems and processes to accurately monitor and track such requests sufficiently robust?

(b) Have you ascertained if individuals previously qualifying as AI still qualify as AIs as a result of the changes to the AI definition which came into effect on 8 October 2019?

Servicing models

Financial institutions relying on current licensing exemptions or paragraph 9/11 arrangements, or who have been thus far unregulated (e.g. institutions dealing in certain OTC derivatives) must ascertain if any licensing exemptions can be relied upon or if they should amend any paragraph 9/11 arrangements.

If no licensing exemptions are available, entities without a capital markets services licence who wish to deal in OTC derivatives that were not regulated under the SFA have until **8 October 2020** to apply for the necessary licence, and will further be allowed to continue dealing in OTC derivatives unless or until the application is rejected or withdrawn.

Governance

Financial institutions should review and ascertain if their procedures, systems and infrastructure are adequate, for example, to ascertain what new compliance/business conduct requirements have to be complied with now that the scope of regulated activities are expanded (taking into account the applicable transitional periods), and to comply with them.

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