

## Enhancing Investor Protection via Framework for Registration of Trustees and Issuing Houses

IN THIS ARTICLE, TAN WEI XIAN ANALYSES THE NEW GUIDELINES ON REGISTRATION AND CONDUCT OF TRUSTEES AND ISSUNG HOUSES.

### Background and application of the new guidelines

The concept of “regulated activities” under the **Capital Markets and Services Act 2007** (“CMSA”) in Malaysia presently covers the following activities:

- a. Dealing in securities;
- b. Dealing in derivatives;
- c. Fund management;
- d. Dealing in private retirement scheme;
- e. Advising on corporate finance;
- f. Advising on investments;
- g. Financial planning; and
- h. Clearing for securities and derivatives.

Pursuant to section 58 of the CMSA, the carrying out of such regulated activities by any person is subject to a Capital Market Services Licence issued under the CMSA.

With the evolution and development of capital markets, there are activities undertaken by capital market service providers that do not constitute the carrying out of “regulated activities”, but nonetheless are regarded as important to ensure the smooth and seamless operation of capital markets.

To this end, **Securities Commission Malaysia** (“SC”) in October 2018 introduced a new registration framework for capital market services providers that undertake the following activities with the objective of enhancing their standards of conduct and streamlining the registration process:

- a. any entity providing trustee services for a unit trust scheme, prescribed investment scheme, private retirement scheme, corporate bond, sukuk or any other products as may be specified by SC; and
- b. an issuing house.

Any entity providing the abovementioned capital market services are now required to be registered under the new Guidelines on Registration and Conduct of Capital Market Services Providers issued by SC on 19 October 2018 (“Registration Guidelines”), effective 2 January 2019.

From 2 January 2019 onwards, the requirements in relation to trustees in the Guidelines shall supersede the relevant requirements in the guidelines below:

- a. Guidelines on Unit Trust Funds;
- b. Guidelines on Private Retirement Scheme;
- c. Guidelines on Real Estate Investment Trust;
- d. Guidelines on Listed Real Estate Investment Trust;
- e. Guidelines on Issuance of Corporate Bonds and Sukuk to Retail Investors;
- f. Practice Note issued pursuant to the Guidelines on the Offering of Private Debt Securities, and the Guidelines on the Offering of Islamic Securities;

- g. Guidelines on Allowing a Person to be Appointed or to Act as a Trustee under Subsection 69(2) of the **Securities Commission Act 1993**; and
- h. Guidelines for the Appointment of a Related-Party Trustee.

For the avoidance of doubt, if not otherwise provided in the Registration Guidelines in relation to trustees' requirements related to a specific product, the aforementioned product-specific guidelines will still apply. For example, other requirements imposed on private retirement scheme trustees in the Guidelines on Private Retirement Scheme that are not mentioned in the Registration Guidelines are still applicable to private retirement scheme trustees.

### **Policy intent**

SC recognises the key role of trustees in safeguarding investors' assets and interest. The issuance of the Guidelines is premised on the following key policy objectives:

- a. strengthening investors' confidence and trust in the capital markets by placing greater emphasis on the board and management's responsibilities.
- b. ensuring capital market services providers prioritise investors' interest in decision-making processes.
- c. creating a level playing field among trustees and improving business efficiency.
- d. enhancing the supervision of trustees and custodians to ensure that these registered entities continue to remain fit and proper when carrying out their obligations and responsibilities in protecting investors' rights and assets.

### **Salient features of the Registration Guidelines**

The new registration framework was formulated after a consultation process which had started in 2016 and benchmarked against regulatory approaches in Australia, Hong Kong, Singapore and the UK. The features of the new registration framework introduced by SCM, are, amongst others, as follows:

- a. Featuring one-time registration to reflect activity-based regulation, instead of the current product-based approach which requires trustees to renew registration periodically.
- b. Streamlining existing prudential and financial requirements on trustees and issuing houses (shareholders' fund and paid-up capital).
- c. Introducing new registration criteria, including entry standards (for example professional indemnity insurance) and on-going conduct obligations.
- d. Duties of trustees in safeguarding the rights and interests of investors, including trustees' oversight functions over the assets held in trust for investors, ensuring segregation of assets and specific duties applicable to real estate investment trust trustees.
- e. Trustees' oversight functions, including monitoring the operation and management of the fund by the management company through independent reviews.
- f. Requirements on the appointment of related-party trustees and registration of foreign trustees through recognition framework.
- g. Fit-and-proper criteria for the registered person and individuals to be appointed to the board and as senior management under the Registration Guidelines.
- h. Greater board and senior management accountability for the conduct of the registered entities and their representatives.
- i. Requirements to put in place governance frameworks and controls to enhance the effectiveness of its oversight functions, including compliance, risk management and internal audit functions.
- j. Outsourcing and delegating arrangements, including the functions constituting material outsourcing, the requirements on the relevant service providers, prohibition of certain functions to be outsourced and notification requirements to SC on material outsourcing arrangements.

**Transitional arrangement**

Existing trustees and issuing houses will be treated as having registered under the Guidelines as at 2 January 2019 and no new application for registration is required.

However, they are required to submit updated information or any additional information as required by SC.

**Moving issuing houses from licensed entity to registered entity**

Currently, issuing houses are Capital Markets Services Representative licence holders carrying out regulated activity under the CMSA. Upon the deemed registration of the issuing houses under the new regulatory framework under the Guidelines, their licences would cease upon 2 January 2019.

The main rationale for moving issuing houses from the group of entities carrying out regulated activities to registered entities providing capital market services under section 76A of the CMSA is premised on the main service provided by issuing houses being considered as ancillary and a form of enabling services which complement a regulated activity or complete a capital market transaction. As such, the services provided by issuing houses shall not be regarded as regulated activity for purposes of the CMSA.

**Food for thought**

The latest SC data as at 2016 counts 90 custodians and trustees safekeeping approximately RM1.7 trillion worth of assets on behalf of investors<sup>1</sup>. With the introduction of the Registration Guidelines which could possibly entail stricter governance and scrutiny from SC, there is a possibility that we will see some mergers and acquisitions or expansionary activity in the trustee industry.

As the new regulatory requirements bring about cost implications and scale considerations (for example minimum shareholders' funds), players could see incentives in expanding their offerings to provide trustee services covering additional types of products. Medium-sized service providers could benefit by consolidating with other players to achieve better scale.

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<sup>1</sup> SC invites public feedback on regulatory framework for trustees and custodians, Securities Commission Malaysia, 2016, <https://www.sc.com.my/news/mediareleases-and-announcements/sc-invites-public-feedback-on-regulatory-framework-for-trustees-and-custodians>.

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