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**PRACTICAL COMPLIANCE AND THE PAYMENT SERVICES ACT:****PREPARING YOUR LICENSE APPLICATION – QUESTIONS TO ANSWER THOUGHTFULLY**

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8 JANUARY 2020 – HOLLAND & MARIE

*Most of the relevant forms and guidelines for the Payment Services Act (the “PS Act”), including the main license application form (“Form 1”) <sup>1</sup> have now been published by the Monetary Authority of Singapore (the “MAS”). Over the coming weeks, we intend to publish a series of articles considering various practical issues relating to applying for a license under or complying with the PS Act.*

**INTRODUCTION**

Many payment service providers (“PSPs”) are preparing to apply for a license under the PS Act. In this article, we will discuss some of the more challenging questions in Form 1 and flag particular issues PSPs should consider when answering.

**FORM 1 – KEY QUESTIONS****Question 3.7 – Letter of Responsibility**

Question 3.7 asks the PSP to provide a letter of responsibility issued by a parent company or a related entity (if any) accepting full responsibility for all the operations of the applicant. The MAS does not provide specifics as to the exact wording of the Letter of Responsibility required, whether in Form 1 or in the Guidelines on Licensing for Payment Service Providers (the “PS Act Licensing Guidelines”). However, in the Guidelines on Criteria for the Grant of a Capital Markets Services License (the “CMS Licensing Guidelines”), the letter of responsibility is described as “a commitment from the applicant’s parent company that it will maintain adequate oversight over the applicant’s operations, financial position, compliance with laws, management and other relevant issues.”<sup>2</sup> We anticipate that the wording will be substantially similar to what is expected for capital markets license holders.

Prior to submitting Form 1, we recommend that PSPs discuss with its parent or sister company (as applicable) its ability to provide this letter of responsibility and whether any particular wording will be problematic. In particular, we recommend that the parent and sister company look at any restrictive covenants contained in debt instruments or other agreements that may prevent them from issuing the Letter of Responsibility. If there are issues regarding this question, a PSP will want to highlight those issues in its initial application submission rather than later in the process.

**Question 7.8 – Transaction or process flow**

This question asks the PSP to attach a diagram to describe the beginning to end of a typical transaction, including any use of innovative technology as well as a discussion of the arrangements for customers to pay for or settle the transaction, including the payment of fees to the applicant.

First, PSPs should consider their response to this question in light of Appendix 3 to the PS Act Licensing Guidelines. In Appendix 3, the MAS sets out the details of the PSP’s business that must be disclosed as part of the PSP’s business plan. Obviously, the PSP’s answer to Question 7.8 should track the description of the transactions described in the business plan. If a PSP discloses two primary transaction types that will be effected in the PSPs business, the PSP should provide diagrams for both transaction types in response to Question 7.8.

***The diagram and “possession” of intangible assets***

Kelvin Low, formerly an associate professor at Singapore Management University, has commented

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<sup>1</sup> See <https://www.mas.gov.sg/-/media/MAS/Sectors/Forms-and-Templates/Form-1---Application-for-a-Payment-Service-Provider-Licence.pdf>

<sup>2</sup> See Footnote 5 of the CMS Guidelines.

that bitcoins “cannot be possessed”.<sup>3</sup> Similarly, the UK Jurisdiction Task Force<sup>4</sup> recently stated that under English and Welsh law “a cryptoasset cannot be possessed”.<sup>5</sup>

Notwithstanding the foregoing, under the PS Act to be licensed for the regulated activity of facilitating the exchange of digital payment tokens (“DPTs”) the PSP must come “into possession” of money or a digital payment token.<sup>6</sup> At the time of this writing, we are not sure of what it means for a PSP to come into possession of an intangible asset such as e-money or a DPT. Meanwhile, in its latest consultation paper, the MAS has said it plans to expand the PS Act to cover services that do not come into possession of money or DPTs.<sup>7</sup> As a result, we believe it is critical to understand whether a PSP’s model involves possession of money or DPTs. The answer to that question could result in the PSP not conducting a regulated activity unless and until the scope of the PS Act is expanded.<sup>8</sup>

Finally, the diagrams provided in reply to Question 7.8 will likely describe the roles of other businesses involved in a transaction. Among other things, the MAS may consider (1) whether such other businesses have applied or need to apply for a license under the PS Act or (2) if such other businesses have submitted a license application under the PS Act, whether their description is consistent with your description/diagram. Several regulated activities under the PS Act are newly regulated. Especially with regard to DPTs, the contractual relationships and legal status of the various parties involved in transactions is relatively untested compared to securities or commodities transactions. We recommend anticipating a range of questions from the MAS regarding your transaction structures, as the MAS may receive a variety of descriptions from licensees and will likely want to reconcile the different descriptions for its own purposes.

### ***Impact on your status as a major payment institution***

Under the PS Act,

- For PSPs that provide DPT services, you are required to have a major payment institution license if the average, over a calendar year, of the total value of all **payment transactions** [emphasis added] that are accepted, processed or executed by the licensee in one month exceeds (A) S\$3 million or (B) S\$6 million when combined with other activities licensed under the PS Act.<sup>9</sup>
- “payment transaction” means “the placing, transfer or withdrawal of **money**, [emphasis added] whether for the purpose of paying for goods or services or for any other purpose, and regardless of whether the intended recipient of the money is entitled to the money.”
- “money” excludes any DPT.

As a result of the foregoing, we recommend that you (i) closely scrutinize whether your DPT services involve a “**payment transaction**” and (ii) take advice on whether the DPT service involves a payment transaction prior to your submission of Form 1. That analysis may impact whether your business is

<sup>3</sup> See [https://www.smu.edu.sg/news/smuresearch/2015/12/17/making-sense-virtual-assets?fbclid=IwAR03kz\\_4NgFD07RfMCzCEn4onjHyL8K7p2zGSWPBhHubGH9avcJlyRqM5NM](https://www.smu.edu.sg/news/smuresearch/2015/12/17/making-sense-virtual-assets?fbclid=IwAR03kz_4NgFD07RfMCzCEn4onjHyL8K7p2zGSWPBhHubGH9avcJlyRqM5NM)

<sup>4</sup> The UK Jurisdiction Taskforce is one of the six taskforces of the LawTech Delivery Panel, an industry-led group that is tasked with supporting the digital transformation of the UK legal services sector.

<sup>5</sup> See Paragraph 67 of the “Legal statement on cryptoassets and smart contracts” published by the UK Jurisdiction Task Force (November 2019)

<sup>6</sup> In the PS Act, “facilitating the exchange of digital payment tokens” is defined as: “establishing or operating a digital payment token exchange, in a case where the person that establishes or operates that digital payment token exchange, for the purposes of an offer or invitation (made or to be made on that digital payment token exchange) to buy or sell any digital payment token in exchange for any money or any digital payment token (whether of the same or a different type), comes into possession of any money or any digital payment token, whether at the time that offer or invitation is made or otherwise.”

<sup>7</sup> See Paragraphs 2.8 – 2.10 of The Consultation Paper on the Payment Services Act 2019: Proposed Amendments to the Act (18 December 2019).

<sup>8</sup> The proposed new activities to be regulated include activities in which a PSP has “control” over a DPT.

<sup>9</sup> See Section 5(a) of the PS Act.

subject to the higher regulatory requirements of a major payment institution. Question 7.6 of Form 1 asks a PSP to provide its projections relating to the payment transactions that would be as part of DPT services. On the other hand, Form 6B of PSN04 Notice on submission of regulatory returns refers to “transactions” rather than “payment transactions”.

**Reminder**

How a PSP sees its transactions being effected/structured potentially impacts its:

- Regulatory status (you can only be licensed if you conduct a regulated activity);
- Contracts and terms of business with customer, counterparties and vendors;
- Tax, including GST;
- Insurance requirements;
- Liability for hacks (data breaches and custody of property); and
- Overall business in other, often unanticipated ways.

As a result, we recommend taking great care in understanding and presenting your answer to Question 7.8 of Form 1.

**Question 7.23 – Financial Projections**

Question 7.23 asks the PSP to provide revenue and profitability projections for three years. The critical aspect to the answer here is that these numbers need to tie to your (1) submitted business plan, (2) answers to questions 7.3 – 7.6 regarding your business description, (3) the answer to 7.9 regarding unregulated business activities you plan to conduct and (4) answers to questions in Form 1 regarding matters such as compliance, technology risk management, safeguarding and other matters. In particular, any internal controls that you tell the MAS you will have should be reasonably budgeted, and thus will affect your profitability projections. As a general matter, you should not be surprised if the MAS asks you questions about the merits of your business plan or compensation structures.

**CONCLUSION**

Among the criteria that the MAS considers in granting a license is the “operational readiness of the applicant, including the ability to comply with regulatory requirements.”<sup>10</sup> As a result, a well-considered, comprehensive and accurate license application is critical to maximising a PSP’s prospects to obtain a license. In this article, we have flagged three questions that PSPs should deliberate on thoughtfully.

Obviously, all the questions on Form 1 are important. Our best advice on how to handle the other questions is to let Holland & Marie buy you a coffee and explore how we can help.

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<sup>10</sup> See Paragraph 3.2.2 of the Guidelines.