



MAS ISSUES RESPONSE TO FEEDBACK RECEIVED ON THE PROPOSED FRAMEWORK FOR VARIABLE CAPITAL COMPANIES

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On 10 September 2018, the Monetary Authority of Singapore (“**MAS**”) issued its response to feedback received during the public consultation on the proposed regulatory framework and draft legislation for Singapore Variable Capital Companies (which is now proposed to be called Variable Capital Company (“**VCC**”)) from March to April 2017 (“**Response**”). The Response can be accessed [here](#). The consultation paper and draft legislation to the VCC regime was published by MAS in March last year (“**Consultation Paper**”), which we reported earlier [here](#). The Variable Capital Companies Bill was moved for Second Reading and approved in Parliament on 1 October 2018. The VCC Bill can be accessed [here](#). The VCC regime is expected to be operational in Q1 2019.

In brief, the VCC regime will be a useful addition to the existing structures available for use as a collective investment scheme (“**CIS**”), namely, a company under the Companies Act (Cap. 50) (“**Companies Act**”), a unit trust, and a limited partnership. It is envisaged that the VCC framework will provide investment managers great operational flexibility in the constitution of funds in Singapore, further strengthening Singapore’s position as a full-service international fund management centre. Attractive features of the VCC include the ability to redeem shares at the fund’s net asset value (“**NAV**”) and to pay dividends from capital – unlike a fund constituted as a company. It can also be set-up as an umbrella structure with multiple sub-funds, which can be cost effective. Sections 13R and 13X tax

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exemption schemes are extended to VCCs. The Inland Revenue Authority of Singapore treats a VCC as a company and single entity for tax purposes - eliminating the need to file multiple tax returns for sub-funds. Unlike companies, VCCs' shareholder registers are not required to be made public – thus offering privacy to investors. Singapore fund managers with offshore fund domiciles will now have an option to co-locate fund domiciliation and management activities in Singapore. The existing “Small Company Requirements” that apply under the Companies Act will not apply to VCCs, potentially allowing more offshore funds to re-domicile.

MAS' Response

Some of the key points raised in the Response are as follows:

Structure Governing VCCs

(a) Legislative Structure and the VCC Bill

MAS said it would proceed with the proposal for ACRA to administer the VCC legislation, and for MAS to administer the anti-money laundering and countering the financing of terrorism (“**AML/CFT**”) requirements under the VCC legislation.

Some respondents suggested that the proposed requirement for a VCC to have at least two members should be removed or amended to allow for master-feeder fund structures. In response, MAS agreed to the removal of the requirement for at least two members as MAS recognises that the requirements for at least two members would prevent VCCs from being used in fund structures with only a single member, but many underlying investors, such as a master-feeder structure, or a fund with a single nominee account.

As for feedback regarding the provision of a legislative regime to facilitate conversion of existing CIS structures like partnerships to VCCs, MAS pointed out that such CIS structures can adopt the VCC structure through corporate mechanisms such as mergers with VCCs. Therefore, MAS would not provide such a legislative regime for conversion at this point in time but may consider doing so in the future.

MAS has made clear in its response that a VCC would only need to be registered once at incorporation. Renewals will not be required. Each sub-fund will, similarly, need to be only registered once. A VCC, like any company under the Companies Act, may issue different classes of shares. However, the constitution of the VCC must clearly detail the rights attaching to each such share class.

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(b) Permitted use of the VCC Structure and Name

Most respondents were agreeable to MAS' proposal for VCCs to be used as a vehicle for CIS only although some respondents suggested widening the scope to include insurance products, special purpose vehicles for asset securitisation and family offices. To that point, MAS said that at this juncture the VCC shall be catered for use as a vehicle for CIS only but it may consider widening the scope in the future.

(c) Open-ended and Close-ended Funds

A majority of the respondents supported MAS' proposal that VCCs and their sub-funds may be open-ended or close-ended funds. MAS further clarified in its response that it would be possible for an Umbrella VCC (as described in the following paragraph) to consist of both open-ended and closed-ended sub-funds. Further, VCCs will be entitled to have flexibility in their use of liquidity management tools provided that any rights and limits to redemption of shares are clearly set out in the constitution of the VCC.

Segregation of Assets and Liabilities of Sub-Funds

(a) Cellular Structure

In the Consultation Paper, MAS had proposed a cellular structure for VCCs, in which a VCC is a single legal entity that can choose to set up cells known as sub-funds. Each sub-fund does not have a separate legal personality, but is a CIS that forms part of the VCC. A VCC that chooses to set up sub-funds will be an Umbrella VCC. MAS also proposed certain safeguards to ensure that there would be segregation of assets and liabilities across sub-funds in an Umbrella VCC.

Some respondents suggested that each sub-fund be given its own legal personality, with the view that such a structure would be more straightforward and effective method to ring-fence each sub-fund's assets and liabilities. To that, MAS pointed out that a structure in which sub-funds have separate legal personalities have fewer precedents internationally and would be unable to reap the economies of scale. In this regard, MAS will proceed with its proposed cellular structure framework as respondents were generally supportive of its proposal. Further, there will be safeguards provided in the VCC Bill to mitigate the risk of cross-cell contagion. Any additional safeguards required of Authorised and Restricted Schemes in VCC will be set out in amendments to the SFA, its subsidiary legislation and/or the CIS Code.

With regard to situations where a VCC invests in assets located in another jurisdiction, MAS said that it will require the directors and the fund manager of a VCC consisting of Authorised

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Schemes to take reasonable measures to manage cross-cell contagion risks. The measures which would be considered reasonable will depend on the facts and circumstances in each case.

(b) Winding Up of Sub-Funds in a VCC

Respondents supported MAS' proposal to segregate assets and liabilities of sub-funds in a VCC during insolvency, such that each sub-fund would be wound up as if it were a separate legal person. Thus, the claims of creditors of a sub-fund may only be discharged out of the assets of that sub-fund and not from the assets of the Umbrella VCC or other sub-funds in the VCC. In response, MAS agreed and will proceed as proposed.

Some respondents queried the operational aspects of the winding up of sub-funds as if they were separate legal persons, namely, whether assets could be transferred to other sub-funds during insolvency and whether a liquidator needed to be appointed for a sub-fund of a VCC in a voluntary winding-up. In response, MAS clarified that the process of winding-up each sub-fund would be similar to winding up a VCC, which, in turn, mirrors that under the Companies Act. In particular, a liquidator must be appointed in a voluntary winding-up of a VCC, or a sub-fund of a VCC. Also, a liquidator of a VCC or sub-fund, similarly to a liquidator of a company under the Companies Act, will be conferred certain powers in winding-up.

Shares and Share Capital

Respondents agreed with MAS' proposal that valuation and redemption of shares in a VCC be carried out at NAV, save for listed closed-end VCCs, with one respondent asking if the issuance of shares in a VCC would be required to be carried out at NAV as well. To that, MAS responded that the VCC Bill would imply into the constitution of each VCC that the shares of a VCC shall be issued, redeemed or repurchased at a price equal to the proportion of NAV represented by each share.

Further, in response to suggestions that a VCC be given additional flexibility to adjust the NAV to accommodate fees and charges in certain situations and whether there would be limits on the maximum adjustments to NAV, MAS stated that a VCC would have flexibility to adjust the price for fees and charges in accordance with its constitution. MAS also clarified that such fees and charges are not subject to any prescribed limits and are intended to accommodate normal operation needs of funds such as liquidity risk management, transaction costs, default remedies and tax or regulatory restrictions.

Various respondents also enquired whether: (a) NAV needed to be calculated by an independent party; (b) information on share allotments and redemptions needed to be lodged with the Registrar; (c) subscription and redemption could be in-kind; (d) members of

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a VCC could switch from one sub-fund in the VCC to another; and (e) current MAS requirements on valuation errors would continue to apply.

To each of the points mentioned in the preceding paragraph, MAS clarified that, first, NAV need not be calculated by an independent party. However, MAS emphasised that under the Guidelines on Licensing, Registration and Conduct of Business for Fund Management Companies, fund managers are expected to ensure that assets under management are subject to independent valuation. Second, information with respect to share allotments and redemptions will not be required to be lodged with the Registrar but a VCC will be required to maintain such information in its register of members. Third, in-kind subscription or redemption, or switching of shareholdings between sub-funds of a VCC are not prohibited (provided that this is in accordance with the VCC's constitution). Lastly, reporting requirements under the CIS Code in respect of valuation errors will apply to Authorised Schemes in VCCs and additional reporting to the Registrar will not be necessary.

Meetings Accounts and Shareholder Register

(a) Meetings

A majority of the respondents were supportive of MAS' proposal not to require a VCC to hold an AGM where, among other things, its directors elected to dispense with the AGM by giving 60 days' written notice to the shareholders before the date by which an AGM would have been required to be held. However, shareholder(s) with 10% or more of the total voting rights may require an AGM by giving 14 days' notice to the VCC before the date by which an AGM would have been required to be held.

Some respondents sought guidance on whether 10% of the voting rights would be based on the total voting rights of the VCC or a relevant sub-fund, and whether it would be possible to have meetings of shareholders of a particular sub-fund. To this point, MAS clarified that the 10% threshold applied to the voting rights of the VCC as a whole. Further, MAS clarified that it is possible for meetings of shareholders of a particular share class (which could represent a sub-fund) to be convened. Such rights are envisaged to be set out in the VCC's constitution.

As to the query from one respondent asking whether members of a sub-fund will be entitled to access to minutes of meetings of other sub-funds, MAS stated that such rights would need to be governed by the VCC's constitution.

(b) Audit and Accounting

Most respondents agreed with MAS' proposal to require all VCCs to appoint an accounting entity to audit their accounts annually prepared in accordance with a single set of

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accounting standards from the Accounting Standards Council (“**ASC**”) or the IFRS which shall be separate for each sub-fund and made available to all shareholders of the VCC. Authorised Schemes will need to use the RAP 7 accounting standard (currently required for unit trusts under the CIS Code). There is also no requirement to have an audit committee for VCCs.

As to suggestions from a majority of respondents to allow VCCs to adopt US GAAP to prepare their financial statements, MAS stated that it will only allow VCCs which do not consist of Authorised Schemes the option to prepare their financial statements in accordance with US GAAP in addition to an ASC Standard or IFRS.

There were some suggestions to allow VCCs or their fund managers discretion over the accounting standards to be used to prepare a VCC’s financial statements. Further, respondents were divided as to whether all sub-funds in a VCC should be required to prepare their financial statements using the same accounting standards. To address these points, MAS said that in line with international practice, neither VCCs nor their fund managers will have the discretion to choose any accounting standards to prepare a VCC’s financial statements. They will have to use an accounting standard under the VCC Bill or the CIS Code as the case may be. Further, all sub-funds in a VCC will be required to prepare financial statements using the same accounting standards.

(c) Register of Members, Controllers and Nominee Directors

Most respondents were supportive of MAS’ propose to include requirements for VCCs to maintain a register of members. MAS stated that it will include requirements to maintain a register of controllers and nominee directors under the MAS AML/CFT Notice for VCCs but will consult the industry further on the implementation details at a later date. MAS also clarified that where a VCC engages another party to form the register of members on its behalf, the register may be kept at that party’s office at which the work of forming the register is done provided that office is in Singapore.

In response to concerns by a few respondents as to making the constitution of a VCC publicly available, MAS confirmed that there is no requirement for a VCC’s constitution to be made publicly available but such constitutional documents must be lodged with the Registrar.

Corporate Governance

(a) Board of Directors

Respondents were split on whether the proposal for at least one director of a VCC to be a

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director of the VCC's fund manager. While some respondents were conscious that this was a common practice in the funds space, others expressed concerns that having such a requirement would be overly restrictive especially for fund managers who manage multiple funds. In response to that, MAS said that it will amend its proposal and instead require at least one director of a VCC to be either a qualified representative or director of its fund manager.

Most respondents were concerned about the additional costs of procuring an independent director for VCCs consisting of Authorised Schemes. While MAS said that it was cognizant of the additional operational costs to have at least one director, MAS opined that an independent director plays an important oversight role. In this regard, MAS reasoned that in tune with global corporate governance practice and on balance, it will require VCCs consisting of Authorised Schemes to have at least three directors, one of whom must be independent.

Most respondents agreed with MAS' proposal to require all directors of a VCC to be fit and proper person.

(b) Residency and Naming Requirements

MAS noted the support from respondents for its proposal concerning the residency and naming requirements, which mirror those in the Companies Act. In particular, (a) the registered office of a VCC must be in Singapore, (b) at least one of the VCC's directors must be resident in Singapore, (c) a VCC must appoint a secretary who must be resident in Singapore, and (d) a VCC's name must not be undesirable, identical or misleadingly similar to any name of any other company or business, or be a restricted name.

(c) Permissible Fund Manager

Most respondents suggested allowing other types of fund manager to manage VCCs, specifically single family offices, as well as fund managers exempted from licensing for managing immovable assets or managing the monies of related parties.

In response to that suggestion, MAS stated that the requirement to have a Permissible Fund Manager that is regulated by MAS was intended to mitigate the risk of abuse of the VCC structure for illicit and fraudulent purposes. Expanding the scope of Permissible Fund Managers to include entities not subject to MAS' oversight would increase risks. Therefore, MAS will only allow VCCs to appoint a Permissible Fund Manager for now.

MAS has also clarified that Permissible Fund Managers can invest in VCCs they manage. They may also delegate fund manager and operational duties to other parties (e.g. a sub-manager) that are regulated as fund managers in other jurisdictions. However, the

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Permissible Fund Manager must retain overall responsibility for the fund management duties and must mitigate any conflicts of interests that may arise. In addition, venture capital fund managers, being licensed by MAS, are also Permissible Fund Managers.

(d) AML/CFT

Respondents were generally agreeable to MAS' proposal to (a) impose AML/CFT requirements on VCCs, which would be supervised by MAS for compliance, and (b) require a VCC to outsource the performance of its AML/CFT duties to its fund manager and to hold the VCC ultimately responsible for compliance with its AML/CFT requirements.

Concerning (a), MAS will proceed as proposed. As for (b), MAS said that instead of restricting such delegation only to its fund manager, a VCC will be allowed to delegate such responsibilities to a financial institution regulated and supervised by MAS for AML/CFT purposes (i.e. a bank acting as a fund distributor). The delegated financial institution may in turn outsource the functions to another entity which may or may not be regulated by MAS for AML/CFT purposes (i.e. a fund administrator). MAS emphasised that notwithstanding the delegation of AML/CFT duties, the VCC will remain ultimately responsible for fulfilling its AML/CFT obligations.

Custodian

Most respondents disagreed with MAS' proposal to require Authorised or Restricted Schemes within a VCC to have a custodian that is an Approved Trustee, and to align the duties of the custodian with those of an Approved Trustee under the SFA, except where such duties are already imposed on the VCC or its directors under the VCC legislation. The respondents were concerned about costs, overlap of duties imposed on VCC directors, and that these requirements may be overly restrictive, especially for Restricted Schemes within a VCC.

In response, MAS stated that it will proceed with the proposal to appoint a custodian that is an Approved Trustee. However, MAS will not impose a general obligation on the custodian of Authorised Schemes in a VCC to safeguard the rights and interests of shareholders of the VCC given that the VCC's directors will already be subject to fiduciary duties.

As for limiting the custodian for Restricted Schemes within a VCC to an Approved Trustee, MAS recognised the practical difficulties and will instead require these schemes to maintain their assets in trust or custody accounts with prescribed entities.

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Re-domiciliation

All respondents were supportive of MAS' proposed re-domiciliation regime for a foreign equivalent VCC to re-domicile as a VCC in Singapore, similar to the re-domiciliation regime under the Companies Act. Some respondents raised concerns that the minimum requirements under the Companies Act imposed on foreign equivalent VCCs may be prohibitive. In response, MAS has confirmed that it will adopt the re-domiciliation regime for VCCs without those minimum requirements, since it may be prohibitive to certain funds such as those investing in venture capital or those used to seed and launch a new strategy. Once re-domiciled these foreign companies will have to follow the VCC legislation.

Winding-up of VCCs

Some respondents commented that the proposed winding-up regime for VCCs may be burdensome and that an option for the VCC to be voluntarily wound up without a shareholders' resolution should be provided. In this regard, after taking into consideration other comparable funds jurisdictions, MAS has decided that VCCs may only be wound up voluntarily with a shareholders' resolution.

Debentures and Receivership

Most respondents were supportive of MAS' proposal to allow VCCs to issue debentures, including allowing VCCs to issue debentures in relation to sub-funds, and to adopt a receivership regime similar to that under the Companies Act for VCCs and their sub-funds.

MAS has also clarified that, in the case of an Umbrella VCC, assets and liabilities of a sub-fund are segregated from those of the Umbrella VCC and its other sub-funds. Therefore, a receiver and manager appointed over the property of an Umbrella VCC which is not attributable to any sub-fund would not be able to look to the sub-funds' assets.

Arrangements, Reconstructions and Amalgamations

Most respondents were supportive of MAS' proposal to not adopt the mechanisms for arrangements, reconstructions and amalgamations under the Companies Act, and to require the constitution of a VCC to clearly set out shareholders' rights in respect of a scheme of arrangement, merger, reconstruction or amalgamation involving the VCC and any of its sub-funds. Some respondents suggested that the mechanisms for arrangements, reconstructions and amalgamation be set out under law as they concern the rights and obligations of creditors.

To this point, MAS said that while it recognises that the approach for restructuring

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procedures to be governed by the VCC's constitution would not bind third parties such as creditors, this approach is in line with industry practice and accords flexibility to allow VCCs and sub-funds to restructure under the terms of each VCC's constitution. Further, since the rights of shareholders' may be impacted, the constitution of the VCC should set out such rights in respect of such restructuring procedures clearly.

One respondent asked whether mergers of a VCC with another VCC or other funds such as unit trusts would be permitted. If so, whether these mergers would require the approval of shareholders. In response, MAS clarified that mergers with other VCCs and other CIS structures are not prohibited. However, VCCs must not as a result conduct business outside the scope of its permitted use as a vehicle for CIS only.

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