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ASIFMA ECMC – MAS Notice on Business Conduct Requirements for CF Advisors – Minutes

Date:	**15, 22 and 29 August 2023**
Time:	**4:00 PM – 5:00 PM HKT**
Venue:	**Zoom meeting**
Bank Participants:	**Barclays, BofA, BNP, CICC, Citi, CITIC CLSA, Crédit Agricole, Credit Suisse, DB, DBS, GS, Haitong, HSBC, Jefferies, JPM, Macquarie, MS, Natixis, Nomura, OCBC, Standard Chartered, UBS**

1. INTRODUCTION

A submission was made to the Monetary Authority of Singapore ("**MAS**") to request for, *inter alia*, a six (6)-month extension to the implementation date of Notice SFA 04-N21 on Business Conduct Requirements for Corporate Finance Advisers (the "**Notice**"). Additional queries were also submitted to the MAS in relation to the Notice which included, *inter alia*, questions specific to Part 2 of the Notice.

With respect to the applicability of the Notice to mergers and acquisitions ("**M&A**") transactions, it was noted that due diligence is not typically conducted by the financial advisers themselves and questions were raised in relation to the extent of the requirements under paragraph 19 of the Notice and how due diligence should be conducted.

Based on queries collated on the Notice, there are two (2) main categories of questions. First is whether the due diligence requirements under paragraph 19 of the Notice (the "**General DD Requirements**") apply in the context of specific transactions. Second, if the General DD Requirements do apply, the extent of due diligence that is required. As the MAS has not prescribed specific requirements regarding the extent of due diligence, it is likely that the extent of due diligence required will be dependent on the facts of each transaction.

The working group then proceeded to discuss the various categories of transactions that may be relevant for the purpose of paragraph 19 of the Notice.

2. FINANCIAL ADVISERS FOR M&A TRANSACTIONS

2.1 Private M&A Transactions

Where the parties to an M&A transaction are all private companies, the General DD Requirements would not apply. Please refer to limb 1 of the annexed flow chart on the applicability of paragraph 3(a) of the Notice (the "**Flow Chart**").

While it is noted that the exemption in paragraph 3(a)(i) of the Notice does not explicitly state that M&A transactions between private companies are exempted from the General DD Requirements, in view of (a) MAS' Response to Feedback Received on the Introduction of Due Diligence Requirements for Corporate Financial Advisers dated February 2023 stating, *inter alia*, that transactions not involving any listed companies will not be required to comply with the General DD Requirements, (b) feedback received from the MAS that its primary rationale for the Notice was the protection of the Singapore retail public, and given that such M&A transactions do not involve or affect the retail public in Singapore, the working group reached a consensus that the General DD Requirements would not apply to such transactions.

2.2 Public M&A Transactions

Under paragraph 3(a)(i) of the Notice, a financial adviser advising on a takeover transaction is not required to comply with the General DD Requirements if (a) its advice is not specifically given for the

making of any offer of specified products to the public, and (b) where the customer is listed in Singapore, its advice is not circulated to the customer's shareholders or made known to the public. Please refer to limb 2b of the Flow Chart. In view of feedback received from the MAS that its primary rationale for the Notice was the protection of the Singapore retail public, the working group reached the following consensus:

(i) **Financial adviser to the offeror**

(A) Where the financial adviser is advising a SGX-ST listed offeror with respect to a takeover offer or scheme of arrangement made in cash, **paragraph 19 will not apply** as (1) while the advice is provided for a takeover or arrangement, (2) there is no offer of specified products to the public by the offeror, and (3) the financial adviser's advice is typically not circulated to shareholders or made public. Please refer to limb 4 of the Flow Chart.

(B) Where the financial adviser is advising an unlisted or foreign listed offeror with respect to a takeover offer or scheme of arrangement made in cash, **paragraph 19 will not apply** as (1) while the advice is provided for a takeover or arrangement, (2) there is no offer of specified products to the public by the offeror, and (3) the offeror is not listed on a Specified Approved Exchange, so there is no need to consider the other factors set out in paragraph 3(a)(i)(B) of the Notice as they only apply to persons listed on a Specified Approved Exchange. Please refer to limb 5 of the Flow Chart.

(C) Where the financial adviser is advising an offeror (whether unlisted, SGX-ST listed or foreign listed) with respect to a takeover offer or scheme of arrangement that is a securities exchange offer with an offer of securities to the retail public in Singapore (i.e. where securities are offered as consideration), **paragraph 19 will apply** as (1) the advice is provided for a takeover or arrangement, and (2) there is an offer of specified products to the retail public in Singapore by the offeror. Please refer to limbs 4 and 5 of the Flow Chart.

For the avoidance of doubt, in the event the offer of securities in a securities exchange offer is made in Singapore only and to persons who are accredited investors, expert investors or institutional investors (and therefore not to the retail public in Singapore), paragraph 19 will not apply. Please refer to limb 2a of the Flow Chart.

(ii) **Financial adviser to the offeree**

Where the financial adviser is advising an SGX-ST listed offeree with respect to a takeover offer or scheme of arrangement (whether in cash or a securities exchange offer), **paragraph 19 will not apply** as (A) while the transaction involves a takeover or arrangement, (B) there is no offer of specified products to the public by the offeree, and (C) the financial adviser's advice is typically not circulated to shareholders of the offeree or made public. Please refer to limb 4 of the Flow Chart.

(iii) **Transactions involving public unlisted companies**

Where the financial adviser is advising on a transaction involving a public unlisted company (e.g. an arrangement, reconstruction or takeover of a public unlisted company) and the Singapore Code on Take-Overs and Mergers (the "**Code**") is not applicable to such transaction (or the Securities Industry Council has granted a waiver from compliance with the salient provisions of the Code), the working group reached a consensus that **paragraph**

19 will not apply as the Singapore retail public will not be impacted[1] and the target company is not listed on a Specified Approved Exchange.

In the event that the Code applies to the transaction, the working group reached a consensus that **paragraph 19 will apply** unless any of the exemptions in paragraph 3(a) of the Notice applies.

(iv) **Foreign transactions**

Question 6 of the Frequently Asked Questions on the Notice published by the MAS on 21 June 2023 states that the Notice applies when a financial adviser enters an engagement to advise on corporate finance, whether the transaction or client is in Singapore or overseas.

In view of the MAS' emphasis that its primary rationale for the introduction of the Notice was the protection of the Singapore retail public, the working group reached a consensus that the requirement in paragraph 3(a)(i)(A) of the Notice is satisfied as long as the transaction does not involve the making of any offer of specified products to the Singapore retail public. Accordingly, where the transaction involves an offer by a foreign listed customer of specified products to foreign retail shareholders (and not the Singapore retail public), **paragraph 19 will not apply**. Please refer to limb 5 of the Flow Chart.

In the context of a public takeover in a foreign jurisdiction, each foreign jurisdiction would have implemented its own rules and regulations to govern such transactions, which their respective regulatory bodies would have deemed sufficient and which may conflict with the applicable requirements in Singapore. With respect to transactions undertaken in a foreign jurisdiction which do not have a Singapore nexus but to which paragraph 19 of the Notice may otherwise apply, in view of the MAS' emphasis that its primary rationale for the introduction of the Notice was the protection of the Singapore retail public, the working group reached a consensus that the provisions in paragraph 19 of the Notice were sufficiently broad to be interpreted to permit financial advisers to follow the foreign practice, rules and regulations governing such offshore transactions.

(v) **Financial adviser to a selling shareholder**

Where the financial adviser is advising a selling shareholder in a cash transaction for shares in a listed or public unlisted company, **paragraph 19 will not apply** if the transaction does not involve an offer of securities to the Singapore retail public and the selling shareholder is not listed on the SGX-ST (or where it is listed on the SGX-ST, the financial adviser's advice is not made public).

Where the parties involved are accredited investors, expert investors or institutional investors only, there is also an additional exemption from the General DD Requirements under paragraph 3(a)(ii) of the Notice. Please refer to limbs 2a and 5 of the Flow Chart.

(vi) **Transactions involving a sale or purchase of assets**

The exemption in paragraph 3(a)(i) of the Notice covers advice on "the arrangement, reconstruction or take-over of a corporation or any of the corporation's assets or liabilities". Accordingly, where a financial adviser is advising a customer on an asset sale or purchase, **paragraph 19 will apply** if (A) the transaction involves an offer of specified products to the Singapore retail public, or (B) the customer is listed on the SGX-ST and the financial adviser's advice is circulated to the shareholders of the company or made known to the retail public. Please refer to limbs 4 and 5 of the Flow Chart.

[1] The Code applies to unlisted public companies with more than 50 shareholders and net tangible assets of S$5 million or more.

However, in transactions involving the sale and purchase of assets where all parties involved are private companies, or where neither of the requirements in sub-paragraphs (A) and (B) above are satisfied, in view of the MAS' emphasis that its primary rationale for the introduction of the Notice was the protection of the Singapore retail public, the working group reached a consensus that **paragraph 19 will not apply**.

(vii) **DeSPAC Transactions**

Where the financial adviser is advising on a transaction involving a business combination entered into or to be entered into by a SPAC listed on a Specified Approved Exchange, based on the wording of the exemption in paragraph 3(a)(i) of the Notice:

(A) where the financial adviser is acting for the SPAC listed on the Specified Approved Exchange, **paragraph 19 will apply** as (1) the advice is provided for a takeover or arrangement, and (2) the financial adviser's advice is typically circulated to the shareholders of the company and made known to the retail public; and

(B) where the financial adviser is acting for the target company, **paragraph 19 will not apply** as (1) while the advice is provided for a takeover or arrangement, (2) there is no offer of specified products to the public by the target company, and (3) the target company is not listed on a Specified Approved Exchange, so there is no need to consider the other factors set out in paragraph 3(a)(i)(B) of the Notice.

Notwithstanding that the wording of paragraph 3(b)(iii) is broad enough to cover financial advisers acting for both the listed SPAC and the target company, the working group reached a consensus that the requirements of the rest of Part 2 of the Notice should apply only to the financial adviser to the SPAC (and not the financial adviser to the target company), on the basis that there is substantial overlap between the work carried out by both financial advisers and the Singapore retail public would be sufficiently protected by ensuring that appropriate due diligence is carried out by the financial adviser to the SPAC.

2.3 Extent of Due Diligence

Where the General DD Requirements apply, the working group reached a consensus that the scope of due diligence to be undertaken by a financial adviser would be centred around, in the case of a takeover offer or a scheme, the disclosures in the offer document, scheme document or offeree circular (as the case may be) required under the Code.

As to whether the General DD Requirements extend beyond the disclosures required under the Code, the working group reached a consensus that from a plain reading of paragraph 19 of the Notice there is nothing to suggest so, but it is ultimately up to the financial adviser to make a determination as to the nature and extent of the due diligence required, taking into account the specific corporate actions proposed by the listed company.

2.4 Cash Confirmation

The working group reached a consensus that the provision of a cash confirmation as the financial adviser to an offeror in a takeover offer or scheme would not constitute the circulation of advice to shareholders or otherwise constitute making of advice known to the public for the purpose of the Notice. The provision of a cash confirmation is not advice to the shareholders nor the public, as the financial adviser is only providing a confirmation that the offeror has sufficient financial resources to undertake the offer, as required under the Code.

3. INDEPENDENT FINANCIAL ADVISERS

Independent financial advisers ("**IFA**") advising SGX-ST listed customers on engagements would generally be required to comply with the General DD Requirements as (a) their advice is typically made public, and (b) the customer is listed on a Specified Approved Exchange.

With respect to the level of due diligence, the working group reached a consensus that an IFA would generally be required to undertake due diligence in connection with the statements and information made or referred to in its IFA opinion, and the level of additional due diligence required would depend on the nature of the transaction and the content of the IFA opinion.

Is the company conducting the regulated activity of **providing advice on CF**[1] in its capacity as financial adviser, etc?

NO → **CF Notice does not apply**

YES → **1** Are all parties to the transaction private companies?

NO → **2a** Is the advice for offers made only to AI/II/EI?

NO → **Limb 2b applies.**

YES → **Para 19 does not apply.**

YES → **2b** Is the advice for a arrangement, reconstruction or take-over?

YES → **Para 19 does not apply.**

- Financial adviser to a share / asset sale or purchase between private companies

NO → **3** Is the company advising a customer listed on an SAE[2]?

YES → **4** Is the advice given for offers of specified products to the public by the customer?

Is the advice circulated to SHs[3] or made public?[4]

If YES to either → **Para 19 applies.**

- Independent financial adviser to SGX-ST listed company
- Financial adviser to SGX-ST listed offeror on securities exchange offer
- Financial adviser to SGX-ST listed company on share/asset sale or purchase where securities offered or public advice (e.g. responsibility statement) is given

If NO to both → **Para 19 does not apply.**

- Financial adviser to SGX-ST listed offeror on cash offer
- Financial adviser to SGX-ST listed offeree
- Financial adviser to SGX-ST listed company on share/asset sale or purchase where no securities offered or public advice given

NO → **5** Is the advice given for offers of specified products to the public[5] by the customer?

YES → **Para 19 applies.**

- Financial adviser to unlisted / foreign listed offeror on securities exchange offer

NO → **Para 19 does not apply.**

- Financial adviser to unlisted / foreign listed offeror on cash offer
- Financial adviser to foreign listed company on offer of securities overseas
- Financial adviser to unlisted / foreign listed selling shareholder on sale of shares in SGX-ST listed company (see also 2a)

NO → **2c** Does Limb 2a apply?

NO → **Para 19 applies.**

YES → **Para 19 does not apply.**

Notes

[1]Advising on CF includes advising on the arrangement, reconstruction or take-over of a corporation or any of its assets or liabilities. Corporate actions such as change of company name or amendments to the constitution are not likely to constitute advising on CF (see FAQ 8)

[2]Specified Approved Exchange

[3]Shareholders

[4]FAQ9 and 10 suggest that the provision of a responsibility statement constitutes public advice; but paragraph 19 does not apply where the adviser is named in the shareholders' circular / other transaction document but its advice is not made public

[5]Refers to the Singapore public