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## ASIFMA SEA ECM Sub-Committee – Summary of Industry Discussions and Consensus View with respect to the application of the MAS Fair Dealing Guidelines to advising on corporate finance<sup>1</sup> by financial institutions

### **ASIFMA Southeast Asia ECM Subcommittee members (as of the date of the document):**

BNY Mellon, BNP Paribas, CICC, CIMB, Citi, Clifford Chance, CITIC CLSA, DBS, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan, Morgan Stanley, UBS

## **1. Introduction**

On 30 May 2024, the Monetary Authority of Singapore (the “**MAS**”) issued an updated set of the Guidelines on Fair Dealing (the “**Guidelines**”). A key change in the updated Guidelines is that the scope of the Guidelines has been expanded to apply to all financial institutions (“**FIs**”), and all products and services they offer to their customers. ASIFMA received feedback from members of the SEA ECM Sub-Committee regarding the applicability and relevance of certain parts of the Guidelines in the context of transactions under which FIs advise on corporate finance (“**Relevant Transactions**”).

It is noted from the MAS’ response paper dated 30 May 2024 in connection with the Guidelines that the MAS recognises the varied nature of FIs and their business models, and that some aspects of the Guidelines may be calibrated accordingly. MAS also notes that the Guidelines were written primarily from a retail customer lens; however, FIs are expected to apply the principles to all customers. As such, each FI should consider how best to achieve the outcomes in the Guidelines in a manner that is proportionate to its business model, the types of products and services it provides, and the potential harm to customers. Each FI should consider the needs and interests of customers, especially those who are more vulnerable. Participants noted that there are existing legislation, regulations, rules, notices and guidelines which apply to Relevant Transactions, which FIs would already be subject to.

Participants noted that the profile of clients which FIs are engaged by for Relevant Transactions, to whom such FIs provide advice on corporate finance, are typically corporate entities which could also include institutional investors<sup>1</sup> and/or accredited investors<sup>1</sup>. Corporate customers are not generally regarded as vulnerable market participants, but are typically more sophisticated (compared to retail customers) with experienced directors and management teams, and are typically separately advised by legal and other professional advisors.

Accordingly, with the above context and background in mind, certain key topics and issues were discussed among the participants of the SEA ECM Sub-Committee and the consensus reached in relation to the Relevant Transactions are set out below.

## **2. Key Issues Discussed**

### **2.1 Fair Dealing Outcomes One, Three and Five**

As the guidelines under these Outcomes are general in application to all products and services offered by FIs across their respective businesses and thus “product agnostic”, participants agreed

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<sup>1</sup> As defined in the Securities and Futures Act 2001 of Singapore.

that these Outcomes would be more appropriately implemented by each FI across their respective products and services as they deem appropriate and proportionate. Participants acknowledged that FIs would, in general, have already established codes of ethics/conduct, complaints management procedures and other policies and procedures designed to ensure that business is conducted in accordance with the principles set out in the Outcomes, and a specific consensus among participants is not required.

Participants also noted that certain parts of Outcomes One, Three and Five of the Guidelines are not relevant to Relevant Transactions. For example, paragraph 3.3.4 of the Guidelines set out certain steps which should be taken by FIs to comprehensively and robustly review sales conducted by the FI's representatives, which is not relevant in the context of Relevant Transactions given that FIs are not conducting sales to their corporate entity clients. Another example raised is paragraph 5.2.2 of the Guidelines, which states that customers should be made aware of the option to go to the Financial Industry Disputes Resolution Centre Ltd ("**FIDReC**"). Participants noted that, under the terms of reference of FIDReC, "Eligible Complainants" which may bring complaints before FIDReC include individual customers, sole proprietors, an insured person and other parties such as trustees, personal representatives, beneficiaries or persons entitled to bring a claim against a FI under a certain product. Given that customers of FIs in Relevant Transactions are typically corporate entities, participants agreed that this paragraph would generally not be relevant.

## 2.2 Fair Dealing Outcome Two: FIs offer products and services that are suitable for their target customer segments

Fair Dealing Outcome Two is based on the rationale that making financial decisions can be a complex process with significant impact on the livelihood of customers, some of whom find it difficult to make appropriate financial decisions when faced with a wide variety of financial products and services. It is therefore important for FIs, when designing, developing, and marketing new products and services, to focus on the needs and interests of their target customer segments, and to pay special attention to those who have been identified as being more vulnerable.

Participants agreed that, in the context of Relevant Transactions, as the relevant clients are corporate entities engaging in mergers and acquisitions, capital raising or other strategic corporate action transactions as advised by their management teams and boards of directors, the relevance of the guidelines set out under Fair Dealing Outcome Two should be tempered accordingly. For example, in the context of an M&A transaction, a FI would act as a financial advisor to a corporate client, providing financial advice and analyses to assist the corporate client in consummating the M&A transaction. In the context of a capital raising transaction such as an initial public offering or other offering of securities (including equity, debt and equity-linked securities), the FI would act as an issue manager, bookrunner and/or underwriter engaged by the corporate client issuing or selling securities in such transaction – participants emphasized that in such transactions, the FI's client is not the investor/subscriber to such securities<sup>2</sup>. In those cases, as well as other examples of FIs providing corporate finance advisory services, the FI does not design, develop or market a *product* to the corporate client in the manner contemplated under the Guidelines (hence paragraphs 2.2 (relating to the design and governance of products and services) and 2.3 (relating to conducting

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<sup>2</sup> Participants acknowledged that the focus of this summary is on Relevant Transactions and Relevant Customers, and the application of the Guidelines in respect of the subscriber/purchaser of such securities relevant to other functions/divisions/businesses of each FI would be addressed separately.

product due diligence), in particular, would not be relevant). To the extent an FI is deemed to have designed, developed or marketed its *services* to a corporate client, such services are typically tailored for that specific Relevant Transaction (as opposed to being a generic investment product) and participants agreed that existing regulations and internal policies and procedures would generally address the treatment of clients or potential clients in a manner which would be aligned with the Guidelines.

### 2.3 Fair Dealing Outcome Four: Customers receive clear, relevant and timely information to accurately represent the products and services offered and delivered

Fair Dealing Outcome Four is based on the rationale that clear, relevant and readily accessible information enables customers to make informed decisions and form realistic expectations. In addition, timely updates help customers maintain an accurate understanding of the product or service. Accordingly, in developing its marketing and disclosure documents, financial institutions should ensure that the information presented in the documents is consistent with the information from the product or service provider.

In addition, the Guidelines state that a financial institution should provide customers with clear and relevant information, which should be given before, during and after the sales process. This includes after-sales updates on product performance and/or any material developments relating to the financial product so that customers can take steps to protect their interests.

In particular, Participants agreed that paragraph 4.4 of the guidelines would generally not be relevant to FIs executing Relevant Transactions as such engagements typically end at the closing of the subject transaction. For example, where a FI acts as an underwriter in connection with an IPO, its engagement by its customer, the corporate issuer, ceases upon completion of the IPO. Subsequent to such completion, the FI would not continue to be engaged by the customer in the same role, and such FI would not have access to information relating to the issuer of the securities which were purchased by investors. Accordingly, save as required under existing relevant laws and regulations (in which case such responsibilities as to updates for product performance or material developments are separately regulated post-completion of the transaction), there are no updates to be provided by such FI on product performance and/or any material developments relating to the securities after closing of the Relevant Transaction. With respect to M&A transactions, the engagement term of a FI acting as a financial adviser to a corporate client would also cease upon completion of the transaction as the agreed scope of work undertaken by the FI would have been completed.

In addition, with respect to paragraph 4.5 of the Guidelines, participants acknowledged that customary documentation for Relevant Transactions (e.g., M&A or corporate finance advisory engagement letters and underwriting/placement agreements) are typically bilaterally negotiated agreements, and do not typically permit parties, whether the FI or the corporate client, to unilaterally amend terms, including provisions relating to the scope of services and fees.