

A Hong Kong SFC's market soundings consultation: ICMA response

On 11 October 2023, the Hong Kong Securities and Futures Commission (SFC) published its [Consultation Paper on the Proposed Guidelines for Market Soundings](#). The proposed regime impacts market sounding communications between the sell side and the buy side in relation to in-scope transactions. ICMA submitted a [response](#) to the consultation which closed on 11 December 2023.

The consultation and proposed rules follow on from a thematic review in 2022 by the SFC, with the help of an external consultant, of market sounding practices and controls implemented by intermediaries in Hong Kong. As a part of that thematic review, ICMA engaged with the external consultant to provide information on market soundings in the debt capital markets (DCM) as opposed to equity capital markets (ECM) context, but the proposed guidelines seem to address market soundings communications primarily from the ECM perspective. A key part of ICMA's response to the consultation has been to highlight differences between the DCM versus ECM contexts.

Proposed guidelines

As proposed, the market sounding guidelines apply to communication of any non-public information for in-scope transactions, regardless of whether the information is price-sensitive inside information or not. The guidelines apply to SFC licensed intermediaries as a disclosing person or as a recipient of the non-public information, even if the sounding is in relation to non-Hong Kong securities. This is different from market soundings under other regimes such as the EU Market Abuse Regulation (EU MAR), where the key trigger is where the security is admitted to trading (see Article 2(1), EU MAR) as opposed to where the disclosing or recipient person is licensed. Cleansing (where the disclosing person notifies the recipient that the non-public information communicated through market sounding has ceased to be non-public) is mandatory. The proposed guidelines do not apply to communications relating to: (i) speculative transactions or trade ideas put forward by a disclosing person without consulting the potential market sounding beneficiary (eg issuer) or without any level of certainty that the transaction will materialise, (ii) transactions of such size, value, structure or selling method that are commensurate with ordinary day-to-day trade execution, and (iii) public offerings of securities.

ICMA consultation response

Following engagement with members and informal discussions with the SFC, ICMA's consultation response highlighted, among other things, the following:

(1) *"Price sensitive inside information"*: There should be a distinction made between "non-public information" and

"price sensitive inside information" under the proposed guidelines, and the latter should be the trigger for wall-crossing under the market sounding regime, which would also be consistent with the market sounding regimes of other jurisdictions such as EU MAR.

- (2) *Clarification of "non-public information"*: If "non-public information" is retained as the relevant trigger for wall-crossing under market soundings, clear guidance is required in relation to the definition of "non-public information" and other aspects of the proposed guidelines, in particular (i) the differences between ECM and DCM transactions, (ii) the scope of the excluded transactions under paragraph 1.3 of the proposed guidelines, and (iii) the cleansing arrangements in relation to "non-public information" (these aspects are set out in further detail below).
- (3) *Differences between DCM and ECM*: The requirements for market soundings should take into account the differences between DCM and ECM transactions. For example, DCM transactions by frequent issuers, SSA issuers and new market issuers involve investors that are not typically wall-crossed in market soundings, while tap issuances and issuances by occasional issuers are more likely to see wall-crossed investors.
- (4) *"Speculative transactions" or "trade ideas" exclusion*: This exclusion should be broadened to capture communications relating to typical issuances by SSAs and new transactions that do not have a price/value relationship with existing listed or traded securities.
- (5) *"Ordinary day-to-day trade execution transactions" exclusion*: This exclusion should be expanded to cover private placements and small transactions that are relatively immaterial as compared to an issuer's total outstanding debt securities and are more commensurate with its ordinary course of issuance or trading.
- (6) *"Public offerings" exclusion*: This exclusion should be expanded to include DCM transactions offered "publicly" to professional investors through wholesale market channels, and where the information disclosed to investors is limited to information generally known to, or anticipated by, such professional investors through Bloomberg or other information services providers (for example, in the case of bond refinancings of existing debt securities).
- (7) *Cleansing*: As recipients of non-public information may have been sounded by multiple sources on multiple potential transactions, they should have the ability to make their own independent determination of whether they are still in possession of any information which would restrict them from trading in the relevant securities. In the context of DCM transactions, disseminating information via information channels that professional investors are reasonably expected to have access to, such as Bloomberg and other subscription-

based information service providers, should be included as acceptable methods of public dissemination of non-public information for the purposes of cleansing.

- (8) *Applicability to overseas persons*: Clarity is needed on how the proposed guidelines apply to overseas persons as DCM transactions are generally cross-border transactions. ICMA recommends that certain market sounding activities should be excluded from the guidelines to the extent either the disclosing or recipient person is not regulated by the SFC or is located outside of Hong Kong.
- (9) *“Level of certainty”*: ICMA gave comments on how the meaning of “level of certainty” (when determining whether a potential transaction will materialise) needs further clarification.
- (10) *Transition period*: ICMA requested an extension of the proposed six-month implementation period to 12 months.

ICMA looks forward to the opportunity for further discussions with the SFC prior to finalisation of the proposed guidelines.



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