The Securities and Futures Commission
54/F One Island East
18 Westlands Road
Quarry Bay, Hong Kong

11 December 2023

Re: Consultation Paper on the Proposed Guidelines for Market Soundings

Dear Sir/Madam,

The International Capital Market Association ("**ICMA**") welcomes the opportunity to engage with the Securities and Futures Commission ("**SFC**") in relation to the Consultation Paper on the Proposed Guidelines for Market Soundings (the "**Consultation Paper**").

ICMA promotes well-functioning cross-border capital markets, which are essential to fund sustainable economic growth. It is a not-for-profit membership association with offices in Zurich, London, Paris, Brussels, and Hong Kong, serving over 620 member firms in 67 countries. Among its member firms are private and official sector issuers, banks, broker-dealers, asset managers, pension funds, insurance companies, market infrastructure providers, central banks and law firms. It provides industry-driven standards and recommendations, prioritising four core fixed income market areas: primary, secondary, repo & collateral and sustainable finance. ICMA works with regulatory and governmental authorities, helping to ensure that financial regulation supports stable and efficient capital markets. www.icmagroup.org.

ICMA and its member firms support the objectives of the Proposed Guidelines to provide tailored guidance to assist capital market intermediaries in their compliance with the general principle to conduct their business activities honestly, fairly, and in the best interests of its clients and the integrity of the market during market soundings. Reflecting ICMA's role in facilitating market practice standards for international bond transactions, these responses focus on the industry practices related to market soundings in the context of debt capital markets ("**DCM**") transactions, with discussions and proposed amendments aimed at reducing practical uncertainties and challenges in members' compliance with the Proposed Guidelines. Unless otherwise defined, capitalised terms used in these responses have the same meaning as those used in the Consultation Paper.

In addition to these responses, ICMA and its member firms also appreciate opportunities for further discussions with the SFC, including formal or informal discussions with ICMA and its member firms, and further consultation prior to the publication of the final text of the Proposed Guidelines.

Yours faithfully,

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1 ***Question 1: Do you agree with the scope of application of the Proposed Guidelines? If not, please explain.***

ICMA: While our members support the overall objectives of the Proposed Guidelines, they would like to highlight certain key observations and areas of concern on the current scope of application of the Proposed Guidelines:

1.1 Clarifications on the meaning of "non-public information":

1.1.1 Our members note that the Proposed Guidelines are intended to apply to the communication of "non-public information" used in a market sounding, even when the "non-public information" is not "price-sensitive inside information". The concept of "non-public information" is very broad in scope and the Proposed Guidelines and the Consultation Paper do not currently elaborate on what types of information would be considered non-public information.

1.1.2 The Proposed Guidelines do not correspond with the existing practice of capital market intermediaries in the context of DCM transactions. Currently, capital market intermediaries already have procedures in place to assess whether information is "inside information" for the purposes of the market misconduct offences under the Securities and Futures Ordinance (Cap. 571 of the laws of Hong Kong) (the "**SFO**") and to apply market sounding and trading requirements to the sharing of "inside information". Therefore, introducing a new concept of "non-public information" and other related measures under the Proposed Guidelines is likely to adversely affect capital market intermediaries' ability to conduct investor outreach and is likely to discourage both capital market intermediaries and investors from discussing potential bond transactions, which would be detrimental to price discovery process for DCM transactions. Our members believe that there should be a distinction between "non-public information" and "price sensitive inside information" under the Proposed Guidelines, which is also consistent with the practices currently adopted by capital market intermediaries under the market sounding regimes of other jurisdictions such as the EU Market Abuse Regulation ("**MAR**").

1.1.3 However, if the SFC wishes to retain "non-public information" as the relevant threshold for market soundings, clear guidance is required in relation to the definition of "non-public information" and other aspects of the Proposed Guidelines. In particular, our members have requested further clarifications in the Proposed Guidelines to address (i) 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", as elaborated in further detail below.

1.2 Requirements for market soundings should take into account the differences between DCM transactions and equity capital markets ("ECM") transactions:

1.2.1 Our members have specifically noted that the current Proposed Guidelines do not make any distinction between its application to ECM transactions and DCM transactions. However, the DCM and ECM markets are different in important ways, especially in the nature of the transactions, the more diverse range of transaction types and more frequent issuances for DCM transactions. Notwithstanding difficult market conditions, the issuance volume of international bonds in Asia amounted to

US$346 billion [1] in 2022 with only about US$21 billion [2] coming from debut international issuances. In addition, a substantial proportion of these Asian international bond deals would have been arranged and executed through Hong Kong capital market intermediaries and SFC-licensed persons, given Hong Kong's role as a key global financial centre[3]. Our members recommend that the SFC should consider a similar approach as adopted for the Consultation Conclusions on (i) the Proposed Code of Conduct on Bookbuilding and Placing Activities in Equity Capital Market and Debt Capital Market Transactions and (ii) the "Sponsor Coupling" Proposal (October 2021), where appropriate distinctions were made between DCM and ECM transactions.

1.2.2 There are certain types of DCM transactions, for example, those of (i) well-known issuers in the global or regional international bond markets who conducts frequent issuances ("**Frequent Issuers**"), (ii) sovereigns, supranational and agencies ("**SSA Issuers**"), and (iii) debut issuers of international bonds or a bond issuance from an issuer which currently has no outstanding shares or listed/traded international bonds ("**New Market Issuers**"), where investors would not typically be wall-crossed in market soundings. Conversely, there are also other types of DCM transactions, such as (i) issuances where a issuer plans to increase the size of an existing bond by issuing new bonds which are fungible with such existing bonds ("**Tap Issuances**"), or (ii) those involving occasional bond market issuers planning to issue bonds of a material size relative to their total outstanding debt securities ("**Occasional Issuers**"), where investors would more likely be wall-crossed in market soundings. In addition, issuers will often have a diverse overall debt funding mix, including bonds, bank loans, certificate of deposits, and commercial papers, and will not just rely on funding from the bond market as their single funding channel. Issuers will typically have discussions with capital market intermediaries as well as bank lenders on a regular basis to discuss latest market conditions and latest transaction options to address their ordinary course of business funding needs. In contrast, equity issuances by issuers tend to be closely tied to the issuers' long-term capital and strategic needs and thus should be regulated differently under the Proposed Guidelines.

1.3 Request for further clarifications on Excluded Transactions under paragraph 1.3 of the Proposed Guidelines:

1.3.1 Our members have also requested further clarifications regarding the "excluded transactions" provided for in paragraph 1.3 of the Proposed Guidelines (the "**Excluded Transactions**"). In particular, the current proposed Excluded Transactions appear to be focused on ECM transactions and are not sufficiently proportionate to cover the diverse range of DCM transactions as elaborated in further detail below.

[1] International Capital Market Association, The Asian International Bond Markets: Development and Trends, Third Edition, March 2023, page 4

[2] International Capital Market Association, The Asian International Bond Markets: Development and Trends, Third Edition, March 2023, page 21

[3] International Capital Market Association, The Asian International Bond Markets: Development and Trends, Third Edition, March 2023, page 8

1.3.2 **Paragraph 1.3(a) of the Proposed Guidelines:** In relation to paragraph 1.3(a), our members believe the current exception for "speculative transactions" or "trade ideas" is not sufficiently broad considering:

(i) The DCM markets are used as an ongoing source of funding by a broad range of issuers including many SSA Issuers to meet regular "ordinary course of business" debt financing requirements, including general corporate purposes, refinancing of upcoming bond maturities and refinancing of other types of indebtedness (e.g. bank loans, certificate of deposits, commercial papers).

(ii) The form such debt transactions take can also vary widely, with issuers frequently weighing up different bond options across different currencies (e.g. USD, EUR, GBP, HKD, SGD, AUD, CNY), tenors (e.g. from less than 1 year to up to 50 years and perpetual bonds), rankings (e.g. secured senior, unsecured senior, subordinated), features (e.g. fixed-rate, floating rating, interest step-up features, early redemption options) and transaction types (e.g. private placements, international public offerings etc.).

(iii) This is particularly the case for Frequent Issuers and SSA Issuers that many SFC-licensed persons regularly work with, including the Hong Kong Mortgage Corporation ("**HKMC**"), the Export-Import Bank of Korea ("**KEXIM**"), the Commonwealth Bank of Australia ("**CBA**") and the World Bank Group ("**World Bank**"). For 2023 year-to-date, (a) HKMC made 175 bond issuances with a combined total amount of US$12.0 billion (or its equivalent in other currencies), (b) KEXIM made 82 bond issuances with a combined total amount of US$14.9 billion (or its equivalent in other currencies), (c) CBA made 86 bond issuances with a combined total amount of US$25.6 billion (or its equivalent in other currencies), and (d) World Bank made 166 bond issuances with a combined total amount of US$46.3 billion (or its equivalent in other currencies)[4].

(iv) Communication among capital market intermediaries and these types of issuers happen on a regular basis to, amongst other things, discuss latest market conditions and latest transaction options. Similarly, investors would also generally expect that these types of issuers will continue to use the DCM markets to meet their ongoing funding needs and would request capital market intermediaries to reach out to investors to explore potential financing options on an indicative or general basis without constituting a market sounding. At the time of investor communication, such issuers' specific plans are not necessarily publicly announced, capital market intermediaries may or may not have been mandated, and precise timing of potential transaction is unknown. Hence, current DCM market practice would generally not apply market sounding requirements to these type of DCM transactions even if the investor communications may involve some prior consultation with the Market Sounding Beneficiary (as defined in the Consultation Paper) or where there is only a low "level of certainty" (as defined in the Consultation Paper) of the corresponding potential transaction materialising.

[4] Source: Bloomberg, deal volumes and deal count represent data for 2023 year-to-date up to 8 December 2023

(v) In addition, even for communication of information regarding transactions that are more than speculative transactions or trade ideas, our members believe there should be a price/value relationship between the new transaction and existing listed or traded securities before the investor communications become subject to the market sounding requirements. As mentioned in our responses elsewhere, potential financing solutions of an issuer can span across a range of scenarios, including different currencies, tenors, rankings, structures and transaction types and there are many types of transactions where there is no meaningful price/value relationship with existing listed or traded securities. For example, the price/value of a new issuance of debt securities would not normally depend on/have a meaningful effect on the price/value of the issuer's listed equity shares. In addition, for New Market Issuers, there would be no price/value relationship as there is no existing listed or traded securities of such issuers. Hence, our members believe that new transactions that do not have a price/value relationship with existing listed or traded securities should also be an Excluded Transaction for the purposes of the Proposed Guidelines, which is in line with the market sounding regimes in other jurisdictions such as MAR.

(vi) Accordingly, our members would recommend modifications to the paragraph 1.3(a) as follows:

Modified paragraph 1.3(a):

"(a) speculative transactions or trade ideas put forward by a Disclosing Person without ~~consulting with~~ receiving specific, clear and actionable information from the potential Market Sounding Beneficiary or without a reasonable ~~any~~ level of certainty of such transactions materialising or transactions where the price or value of which do not depend/do not have a meaningful effect on the price or value of other existing listed or traded securities of the same obligor;"*

** Note: See our comments to "level of certainty" in our response to Question 3.*

1.3.3 **Paragraph 1.3(b) of the Proposed Guidelines:** In relation to paragraph 1.3(b), our members believe that the current exception for "ordinary day-to-day trade execution transactions" is primarily aimed at ECM secondary market transactions and is not sufficiently broad to cover the DCM secondary market transactions and other DCM primary market transactions which are not trying to gauge investor interest but are actually trying to conclude the transaction or are more to ordinary course of business financing. Please see our further analysis below:

(i) Private placement transactions involving issuers issuing bonds to a small group of investors on a pre-determined basis at a pre-determined price ("**Private Placements**") usually form part of an issuer's ordinary course of business funding activities and are not material in the context of the total size of outstanding debt securities of the relevant issuer and should not be treated differently from an issuer approaching commercial banks for an ordinary course of business bank loan facility. Many of these private placement transactions are executed for issuers (such as the Frequent Issuers and SSA Issuers mentioned above) with a "shelf" MTN programme designed to allow

bespoke and quickly executed bond issuances based on specific investor demand. In addition, even though Private Placements can be used frequently by issuers and provide an important funding source for issuers, the average size of each Private Placement will not typically be material to the relevant issuer's total size of outstanding debt securities.

(ii) For example, for 2023 year-to-date, Private Placements contributed (a) approximately 79.2% of HKMC's total bond issuance volume (even though 98.3% in terms of HKMC's total number of bond issuances were Private Placements), with an average size of each Private Placement of approximately U.S.$55.2 million, (b) approximately 24.8% of KEXIM's total bond issuance volume (even though 78.0% in terms of KEXIM's total number of bond issuances were Private Placements), with an average size of each Private Placement of approximately U.S.$60 million, (c) approximately 28.5% of CBA's total bond issuance volume (even though 76.7% in terms of CBA's total number of bond issuances were Private Placements), with an average size of each Private Placement of approximately U.S.$106 million, and (d) approximately 19.0% of World Bank's total bond issuance volume (even though 89.8% in terms of World Bank's total number of bond issuances were Private Placements), with an average size of each Private Placement of U.S.$59.1 million[5].

(iii) Current DCM market practice would generally not apply market sounding requirements to these type of DCM transactions as capital market intermediaries are not trying to "gauge the interest of potential investors in a possible transaction" but rather trying to conduct bilateral negotiations with one or more counterparties to conclude a transaction. In addition, even if there are certain circumstances where such private placements may involve some gauging of investor interest, our members believe that such private placements are typically not material in the context of the total size of outstanding debt securities of the relevant issuer and the investor discussions should nonetheless be an Excluded Transaction for the purposes of the Proposed Guidelines.

(iv) In addition, where the size of the potential new transaction is relatively immaterial as compared to an issuer's total outstanding debt securities and more commensurate with its ordinary course of issuance or trading, there would only be a low risk of information relating to such transactions being abused regardless of whether it is a Private Placement or involves some gauging of investor interest. Therefore, our members consider that the Proposed Guidelines should also exclude these types of ordinary course of debt financing transactions.

(v) Accordingly, our members would recommend modifications to the paragraph 1.3(b) as follows:

Modified paragraph 1.3(b):

"(b) transactions, in such size (eg, in relation to average trading volume or market capitalisation <u>or, in the case of debt securities, the size of</u>

[5] Source: Bloomberg, deal volumes and deal count represent data for 2023 year-to-date up to 8 December 2023

the total outstanding debt securities or the usual benchmark issuance size of the debt issuer), value, structure, or selling method, that are commensurate with ordinary day-to-day trade execution (eg, a broker sourcing potential buyers or sellers to execute a trade after receiving an actual order instruction placed by a client with a genuine intent for execution) or, in the case of debt securities, transactions in such size in relation to the total size of outstanding debt securities of the relevant issuer that are commensurate with its ordinary course of issuance or trading or bilateral negotiations with one or more counterparties to conclude a transaction (without gauging investor interest); and"

1.3.4 **Paragraph 1.3(c) of the Proposed Guidelines:** In relation to paragraph 1.3(c), our members understand that the current exception for "public offerings" is primarily aimed at ECM initial public offerings and is not sufficiently broad to cover DCM public offerings. Please see our further analysis below:

(i) Although many DCM transactions are offered "publicly" to all applicable professional investors (as defined in the SFO) through wholesale market channels, our members would not currently consider such DCM transactions as "public offerings" based on the SFC's normal usage of the term. In addition, retail debt offerings are uncommon in the Hong Kong market context which further limits the use of the "public offering" exception to DCM transactions.

(ii) Hence, our members believe there is a need for the "public offering" exception to be further clarified to specifically include DCM transactions offered to professional investors where there is some gauging of investor interest but 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. To require such "generally known" information to be subject to market sounding requirements would have little benefit to Core Principle 1 – Market Integrity since there would only be a low risk of such "generally known" information being abused and would likely be detrimental to price discovery process for DCM transactions as investor feedback would likely be unnecessarily and adversely impacted.

(iii) For example, some bond refinancings by issuers looking to refinance their existing debt securities ("**Refinancing Issuers**") are primarily aimed at rolling over the maturity of the existing debt securities which do not necessarily involve raising new funds for the Refinancing Issuers, and any investor communications would often target the holders of such existing debt securities. The maturity profile of these Refinancing Issuers would be generally known to market participants and the possibility of them issuing new debt securities to refinance their existing debt securities would be generally anticipated by the market. Transactions involving Refinancing Issuers comprise a substantial market share and our members believe that where the investor communications are limited to information generally know or anticipated by target investors, such investor communication should be outside of the scope of the Proposed Guidelines.

(iv) Our members would recommend modifications to the paragraph 1.3(c) as follows:

Modified paragraph 1.3(c):

"(c) public offerings of securities or, in the case of debt securities offered to professional investors only, discussions involving information that is generally known to, or anticipated by, such persons who are accustomed to or would likely deal in the relevant securities."

1.4 Cleansing arrangements on "non-public information": The definition of "non-public information" and the requirement for cleansing of non-public information rather than price sensitive inside information is one of the key areas of concern among our members.

1.4.1 As explained in our responses to Question 1, the current scope of the Proposed Guidelines covering all "non-public information" is overly broad and may have negative implications on capital market intermediaries' abilities to conduct capital markets activities in accordance with their established inside trading policies and procedures. In addition, capital market intermediaries are aware that under the SFO, the SFC generally requires inside information to be publicly disseminated through the electronic news publication system of The Stock Exchange of Hong Kong Limited ("**SEHK**") to ensure equal, timely and effective access by the public and that other forms of information disclosure, such as companies issuing a press release through news or wire services, holding a press conference in Hong Kong and / or posting an announcement on its own website, would not of themselves be sufficient to satisfy such obligations.

1.4.2 However, the international DCM market largely involves offerings to professional investors only (rather than retail investors) and these professional investors generally have significant resources as well as access to information on issuers from Bloomberg and other subscription-based information service providers (including information on the issuer's total indebtedness, the issuer's most recent bond terms and conditions, the current market yield on the issuer's existing bonds, upcoming bond maturities, issuer bond credit ratings etc.). However, if such information "generally known" to professional investors is nevertheless treated as "non-public information" (as it is not known to all members of the public) this would be detrimental to price discovery process for DCM transactions as investor feedback would likely be unnecessarily and adversely impacted. Cleansing would also be difficult to implement on DCM transactions as such "generally known" information may not require any form of disclosure at all through the SEHK's electronic news publication (e.g. in the case of unlisted bonds or bonds listed on other stock exchanges) or only post-transaction announcement disclosure on the SEHK (e.g. in the case of post-completion announcements for SEHK listed bonds). Accordingly, our members would recommend a revised dual track approach to the treatment of non-public information, which will depend on whether inside information is shared in the market sounding along similar lines to the approach taken under the MAR. Under MAR, if inside information forms part of the market sounding, this should be made clear at the outset of a market sounding with necessary trading restrictions and cleansing requirements being applied. Whereas, if a market sounding only disclosed non-public information and no inside information, there would not be any automatic trading restrictions and no cleansing requirement imposed and it is for the investor to assess whether the non-public information it has received from one or more

sources on one or more potential transactions would collectively result in it having inside information and restrict its own ability to trade.

1.4.3 Our members also believe that the cleansing obligation should not fall solely on the Disclosing Person (as defined in the Consultation Paper) as the Recipient Persons (as defined in the Consultation Paper) may have been sounded out by one or more sources on one or more potential transactions. While Disclosing Persons should conduct their own assessment of when relevant information discussed during market soundings are expected to become public, Recipient Persons, based on the sum of information they have received about a potential transaction from various sources including but not limited to market soundings, should also 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

1.5 **Applicability to overseas persons:** Given DCM transactions are generally cross-border transactions (and not limited to Hong Kong based issuers, capital market intermediaries and/or investors), there will be instances where the market sounding regimes from multiple jurisdictions will simultaneously apply and SFC-licensed persons would need to comply with different regulatory requirements. If the jurisdictional reach of the Proposed Guidelines is unclear or too wide, there could be increased risk of regulatory arbitrage by the market participants, and firms may elect to shift the market sounding process outside of Hong Kong, which may in turn affect Hong Kong's competitiveness as an international financial market. Hence, our members request additional guidance on the applicability of the Proposed Guidelines to: (i) SFC-licensed persons located in Hong Kong who conduct market sounding activities with non-Hong Kong based investors and/or for non-Hong Kong listed securities, (ii) SFC-licensed persons located outside Hong Kong (for e.g. SFC-licensed persons based in Singapore engaging in market soundings on behalf of a Singapore issuer) and (iii) non-SFC licensed persons located outside of Hong Kong who conduct market sounding activities with Hong Kong-based investors and/or for Hong Kong listed securities. Our members recommend that market sounding activities mentioned in (i), (ii) and (iii) above should not be covered by the Proposed Guidelines (or should be subject to appropriate carveouts) to the extent either the Disclosing Persons or Recipient Persons are not regulated by the SFC or located outside of Hong Kong.

2 ***Question 2: Do you consider the definition of "market soundings" to be clear and appropriate? If not, please explain.***

ICMA: As explained in our responses to Question 1, the DCM market in general already has accepted practice standards around market soundings and price sensitive inside information and the Proposed Guidelines may not be entirely consistent with the current industry practice for DCM transactions. However, if the SFC wishes to retain "non-public information" as the relevant threshold for market soundings, then our members will need further clarifications in the Proposed Guidelines to address (i) differences between ECM and DCM transactions, (ii) the scope of the Excluded Transactions under paragraph 1.3 of the Proposed Guidelines, and (iii) the definition and treatment of "non-public information" and cleansing arrangements.

3 ***Question 3: Do you have any comments on the examples of factors to consider when determining the level of certainty of the corresponding potential transaction***

materialising in connection with a market sounding?

ICMA: Our members agree with the drafting note to paragraph 1.2 of the Proposed Guidelines that the "level of certainty" requires a case-by-case consideration of the facts and circumstances of the relevant communications made and the corresponding transaction and is not dependent on whether a written agreement between the Disclosing Person and the Market Sounding Beneficiary has been entered into. However, our members believe that the meaning of "level of certainty" requires further clarification:

3.1 **Threshold of "expressed an interest with the Disclosing Person in proceeding with a possible transaction" too low:** Our members' key concern is that the term "expressed an interest" is not sufficiently clear and potentially sets a very low threshold for the "level of certainty" requirement. As DCM transactions often only form a part of the issuer's overall debt funding mix, capital market intermediaries will be in frequent discussions with issuers on potential financing solutions across a range of scenarios, including different currencies (e.g. USD, EUR, GBP, HKD, SGD, AUD, CNY), tenors (e.g. from less than 1 year to up to 50 years and perpetual bonds), rankings (e.g. secured senior, unsecured senior, subordinated), structures (e.g. fixed-rate, floating rating, interest step-up features, early redemption options) and transaction types (e.g. private placements, international public offerings etc.). However, such discussions with issuers should only constitute an "interest" if the Market Sounding Beneficiary has "expressed a "specific, clear and actionable" interest with the Disclosing Person in proceeding with a possible transaction", as opposed to any indicative interest or general interest from the Market Sounding Beneficiary in exploring financing options. In addition, if the interest expressed from the Market Sounding Beneficiary is expressly contingent on first obtaining investor feedback for further evaluation, our members understand that this should not be deemed to be pass the "level of certainty" threshold until further subsequent investor outreach is conducted.

3.2 **Meaning of "shared any particulars with the Disclosing Person in relation to the possible transaction (eg, timing, size, pricing or structure)" too broad:** As mentioned in our responses to Question 1, the international DCM market largely involves professional investors (rather than retail investors) who generally have significant resources as well as access to information on issuers from Bloomberg and other subscription-based information service providers. Accordingly, the fact that a Market Sounding Beneficiary has provided timing, size, pricing or structure particulars to capital market intermediaries is only relevant where such particulars are "specific, clear and actionable". Otherwise, our members would consider the meaning of "shared any particulars" to be too broad and catch investor discussions not intended to be covered by the Proposed Guidelines. In addition, issuers will frequently share indicative preferences of transaction sizes or price ranges during preliminary discussions with one or more capital market intermediaries, over an extended period of time before the issuer expresses any "specific, clear and actionable" interest in proceeding with any potential transaction. It would therefore not be practical to make communications with investors based on an issuer's indicative interest or general interest being subject to the market sounding requirements in the Proposed Guidelines, as Recipient Persons may become restricted from trading for an unknown duration without a clear method or time by which they could be cleansed.

3.3 **Meaning of "mandated, requested or consented to the gauging of investor appetite by the Disclosing Person":** Whilst our members agree that the receipt of a client mandate is a clear indication of a transaction materialising, our members are of the view that the Proposed Guidelines should not be applicable to (i) "reverse enquiries" from investors

proactively contacting capital market intermediaries to indicate interest in certain hypothetical transactions; or (ii) where investor feedback is sought on a capital market intermediaries' own initiative and not at the issuer's request (for example, to enable itself to participate in an issuer pitch); or (iii) where an issuer provides details of its potential funding levels to a group of capital market intermediaries (e.g. MTN dealers or relationship banks) and where responding to such levels is entirely optional and at the discretion of such capital market intermediaries.

3.4 **Time horizon of a potential transaction:** Our members understand that "the time horizon of such possible transaction" should be amongst the factors to be considered when determining the "level of certainty", as a longer time horizon usually indicates less "level of certainty" of such possible transaction materialising.

3.5 **Proposed amendments to paragraph 1.2 of the Proposed Guidelines:** Taking into account the above clarifications, our members have proposed the following amendments to paragraph 1.2 of the Proposed Guidelines:

"*Whether a Disclosing Person is conducting market soundings on behalf of a Market Sounding Beneficiary will depend on whether there is some "level of certainty" established of the corresponding potential transaction materialising, which requires a case-by-case consideration of the facts and circumstances. Examples of the factors to take into account include the time horizon for such potential transaction materialising and the extent to which the Market Sounding Beneficiary has orally or in writing:*

- *expressed a specific, clear and actionable ~~an~~ interest with the Disclosing Person in proceeding with a possible transaction;*
- *shared any specific, clear and actionable particulars with the Disclosing Person in relation to the possible transaction (eg, timing, size, pricing or structure); ~~or~~ and*
- *mandated, requested or consented to the gauging of investor appetite by the Disclosing Person.*

For the avoidance of doubt, if the interest expressed is explicitly contingent, for example, on first obtaining investor feedback for further evaluation, this will not be deemed to be pass the "level of certainty" threshold until further subsequent investor outreach is conducted."

4 ***Question 4: Do you agree that a Market Sounding Intermediary has a duty to maintain the structures of confidentiality of non-public information passed or received during market soundings? If not, please explain.***

ICMA: Our members generally agree. Most of our members believe that they have appropriate safeguards in place for this purpose, as the members have procedures for assessments of the facts and circumstances around information that is received and/or that is to be shared. In light of this, the members do not believe that additional safeguards for confidentiality on non-public information are required.

5 ***Question 5: Do you agree that, from the standpoint of the Code of Conduct, a Market Sounding Intermediary should not trade on or use any non-public information passed or received during market soundings for its own or others' benefit or financial advantage? If not, please explain.***

ICMA: Please see our response to Question 1 and the concerns on the use of "non-public information" as the applicable threshold. However, if the SFC wishes to retain "non-public

information" as the relevant threshold for market soundings, then our members generally agree with Core Principle 1, provided that our members' recommendations on paragraphs 1.2 and 1.3 of the Proposed Guidelines can be incorporated.

6 ***Question 6: Do you have any comments on the Core Principles in the Proposed Guidelines?***

ICMA: Subject to our members' recommendations on paragraphs 1.2 and 1.3 of the Proposed Guidelines being incorporated, our members generally agree that the Core Principles 2 to 6 are consistent with international DCM accepted practice standards. However, some of our members continue to share the specific concerns raised by other industry bodies in relation to Core Principles 2 to 6.

7 ***Question 7: Are there any other areas which you think the Core Principles in the Proposed Guidelines should cover? If so, please provide examples.***

ICMA: No. Our members are generally of the view that the main areas have been covered by the Core Principles and generally welcome the standardisation of the market sounding process across intermediaries.

8 ***Question 8: Do you agree with the proposal for Disclosing Persons to adopt the use of a standardised script? If not, please explain.***

ICMA: Our members generally agree.

9 ***Question 9: Do you have any comments on the minimum content and sequence of information set out in the standardised script?***

ICMA: Subject to our members' recommendations on paragraphs 1.2 and 1.3 of the Proposed Guidelines being incorporated, our members generally agree with the minimum content and sequence of information set out in the standardised script. However, given DCM transactions are generally cross-border transactions (and not limited to Hong Kong based issuers, capital market intermediaries and/or investors), there will be instances where the market sounding regimes from multiple jurisdictions will simultaneously apply and SFC-licensed persons would need to comply with different regulatory requirements. Hence, our members have requested that the requirement for a "pre-approved standardised script during all market sounding communications" be clarified to allow the Disclosing Persons some flexibility to make reasonable revisions to the standardised script without seeking further internal approvals. In addition, professional investors in their capacity as Recipient Persons may have their own internal requirements when being market sounded, and may from time to time, require the Disclosing Persons to make reasonable revisions to their standardised scripts or may require the Disclosing Persons to provide additional information before accepting a market sounding.

10 ***Question 10: Do you agree that Disclosing Persons should not provide specific information that may allow the Recipient Person or potential investor to identify the subject security before receiving relevant consent from the Recipient Person or potential investor? If not, please explain.***

ICMA: Our members generally agree that this should be the case where possible. However, please see our responses to Question 1 and the concerns on the use of "non-public information" as the applicable threshold.

11 ***Question 11: Do you agree that Disclosing Persons have an obligation to determine if non-public information disclosed by them during market soundings has been cleansed? If not, please explain.***

ICMA: Cleansing under the Proposed Guidelines is one of the key areas of concern among our members. Our members have raised the following points requiring further clarification from the SFC:

11.1 **Burden on Disclosing Persons:** Under the Proposed Guidelines, the Disclosing Person must conduct assessments as to whether the information has ceased to be non-public, and it must also inform the Recipient Person as soon as possible in writing that the information has ceased to be non-public. As "non-public information" is broad in scope, this could have the effect of requiring Disclosing Persons to be engaged in frequent assessments of a very wide range of information which have been disclosed during a market sounding and which may not be price sensitive. Also, it would require Disclosing Persons to monitor a large number of news and information channels to the extent that non-public information can be made public through Bloomberg and other subscription-based information service providers This has the potential to discourage capital market intermediaries from engaging with investors and could be detrimental to price discovery process for DCM transactions. In addition, this could encourage firms to shift the market sounding process outside of Hong Kong, which may in turn affect Hong Kong's competitiveness as an international financial market.

11.2 **Use of "non-public information" threshold:** As noted in our response to Question 1, there should be a distinction between "non-public information" and "price sensitive inside information". However, if the SFC wishes to retain "non-public information" as the relevant threshold for market soundings, clear guidance is required in relation to the definition of "non-public information" in order for members to properly assess whether information will need to be cleansed, and if so, how. For example, with price-sensitive inside information, it is generally a more straightforward process as there will be no inside information once the seller no longer wishes to proceed with the transaction, as price sensitive terms of the securities such as the timing and pricing remain unknown. It will be much harder to assess if the obligation to cleanse also expands to "non-public information" that is not price-sensitive without specific additional guidance on what this entails. This will be especially problematic in situations such as:

11.2.1 private placement transactions, where information will almost always remain non-public, even when the private placements are successfully completed; and

11.2.2 market soundings for transactions that do not proceed, such that no public announcements are made, and firms may be prohibited from trading for extended periods of time.

11.3 **Obligation on Recipient Persons:** Our members suggest that the Proposed Guidelines should specify that Recipient Persons shall also make their own assessment as the Recipient Persons may have been sounded out by one or more Disclosing Persons on one or more potential transactions. While Disclosing Persons should conduct their own assessment of when relevant information discussed during market soundings are expected to become public, Recipient Persons, based on the sum of information they have received about a potential transaction from various sources including but not limited to market soundings, should also 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. For the avoidance of doubt, this is a separate obligation on the Recipient Persons and does not absolve the Disclosing Persons' obligation to conduct their assessment as to whether the relevant information has been cleansed.

11.4 **Clarification on public dissemination and deemed cleansings:** Given most DCM transactions are offered to professional investors only, our members would like to point out that the public dissemination "safe harbours" specified in Hong Kong and other regulatory regimes involving designated information services (such as the SEHK website) are mainly equity market-focused and would be impractical for DCM transactions. Rather, in the context of DCM transactions, capital market intermediaries would typically use information channels that professional investors are reasonably expected to have access to, such as Bloomberg and other subscription-based information service providers, to disseminate information even though such channels might not be accessible by all members of the public and may require subscription fees. Our members believe that the Proposed Guidelines should include such information channels used by professional investors as acceptable methods of public dissemination of non-public information (including term sheets, offering documents published through such information channels). In addition, our members also believes that when relevant information has been made known to the public by other parties (e.g. the issuer), such information should be deemed to be cleansed without requiring future action from the Disclosing Persons.

Our members also believe that the Disclosing Persons should be allowed to include a "long-stop date" in relation to the non-public information and/or price sensitive inside information disclosed in a market sounding so that, if the Recipient Persons do not receive any further updates from Disclosing Persons on the relevant transaction, then the Recipient Persons are deemed to be cleansed and no longer subject to the relevant market sounding restrictions imposed under the Proposed Guidelines.

12 ***Question 12: Do you agree with the proposed periods of record keeping and details of the records to be kept by Disclosing Persons? If not, please explain.***

ICMA: Our members generally agree.

13 ***Question 13: Do you agree that a Recipient Person should designate a properly trained person(s) to receive market soundings? If not, please explain.***

ICMA: Our members generally agree.

14 ***Question 14: Do you agree with the proposed periods of record keeping and details of the records to be kept by Recipient Persons? If not, please explain.***

ICMA: Our members have made a general comment that the record keeping periods for Disclosing Persons should be substantively similar to the record keeping periods for Recipient Persons.

15 ***Question 15: Do you think a six-month transition period is appropriate? If not, what would be an appropriate transition period? Please set out your reasons.***

ICMA: Our members would like to propose an extension of the implementation period to 12 months to account for likely significant changes to internal documentation, systems and training requirements.