ICMA
International Capital Market Association

15 February 2022

ICMA response to Monetary Authority of Singapore Consultation Paper P020-2021

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Introduction of Due Diligence Requirements for Corporate Finance Advisers

1. **Introduction** – ICMA is responding to the MAS consultation *Introduction of Due Diligence Requirements for Corporate Finance Advisers* from the international syndicated bond issuance perspective (focusing only on Part I of the proposed MAS Notice, since Part II explicitly relates to IPOs, reverse takeovers and very substantial acquisitions rather than debt transactions).

Question 1. MAS seeks comments on the proposed requirements in the Notice as set out in Annex A. Where you disagree with any of the proposed requirements, please explain why and provide alternative options.

2. **International consistency** – International syndicated bond issues[1] typically involve a borrower hiring a syndicate of banks (that tend to be from various jurisdictions) to underwrite and manage the transaction internationally. The banks commonly operate across several jurisdictions to facilitate their borrower clients' access to funding in the global capital markets. In this respect the individual banks and transaction must comply with applicable regulation in more than one jurisdiction, and often several. Thus far, banks have adopted fairly consistent practices although it is not subject to prescriptive requirement of any particular jurisdiction.

   Materially onerous inconsistencies in individual jurisdictions (such as Singapore) may hamper local issuer, underwriter and investor participation in cross-border financings (see further #2).

   Incidentally in this respect, ICMA would respectfully submit that any local regulatory changes consequent to IOSCO's work on conflicts of interest and associated conduct risks during the debt capital raising process should be delivered in a globally consistent manner.

3. **Singapore consequently at competitive disadvantage** – The Part I proposals potentially put Singapore-licensed banks (and individual bankers) at a competitive disadvantage, as they will be subject to requirements more onerous than either market norms or standards imposed by any other Asia-Pacific jurisdiction.

[1] International syndicated bonds issues are normally issued based on Reg S or Reg S /Rule 144A format of the US. In the context of Singapore, they will be distributed to institutional, accredited and/or other specified investors without any prospectus via safe harbour provided by s.274 and s.275 of the Securities & Futures Act 2001.

These provisions could potentially also have an adverse impact on market access for Singapore investors (and attractiveness of SGX as a foreign debt listing venue). The adverse impact could be especially pronounced in transactions that have a limited Singapore nexus but are still technically subject to the requirements (due to even just one Singapore-licensed banker being involved). For example, there could be transactions run outside of Singapore by affiliated bank entities in Hong Kong or Europe for a Singapore borrower looking to list foreign debt outside of Singapore, but a Singapore-licensed banker remains involved due to having general relationship responsibility for the borrower client.

4. **Application to international transactions** – ICMA is of the view that the Part I proposals are too granular and prescriptive, and that such level of detail is not consistent with established regulation and best practice for due diligence conducted in cross-border syndicated bond issues.

   (A) **Due diligence not prescriptive in form –** The Part I proposals are notably too granular and prescriptive regarding:

   (i) the requirement for “senior management” to have oversight over prescribed matters;

   (ii) the requirement to have a due diligence plan for each specific transaction and for “senior management” to have oversight over any material departures from such due diligence plan; and

   (iii) the requirement that corporate finance advisers must conduct the appropriate verification of information and in prescribing in detail record keeping requirements.

   (B) **Due diligence not prescriptive in substance** – Furthermore, due diligence has been a long-standing practice in the context public offerings of both debt and equity securities where parties face civil liability for material misstatements and omissions made in the context of the offering disclosure. The appropriate level of bond underwriter duties in relation to issuer disclosure has been the subject of decades’ worth of statute and case-law. Issuers are the ones primarily responsible for making proper disclosure in relation to their bond issues. Underwriters however may well find themselves being pursued whenever an issuer becomes insolvent and are acutely conscious of the dynamics surrounding due diligence defences in such cases.

   In this respect, due diligence is impacted by the varying facts and circumstances of each case (including, inter alia, the nature and timing of an offering, respective roles of underwriters, whether the offeror is a new equity issuer seeking an IPO or an existing listed issuer and whether the securities being offered are equity or debt).

   (C) **ICMA guidance** – The ICMA Primary Market Handbook has included ICMA Recommendation 3.3 and related item 3.4 since January 2000 that provide guidance to market participants on the nature and extent of due diligence for bond offerings. These are set out below.

   << *Due diligence R3.3*

   The appropriate level of due diligence to be performed in the context of each issue should be considered carefully.

   3.4 It is impossible to prescribe whether or what due diligence procedures would be appropriate in the circumstances of each issue, and procedures will vary greatly from issue to issue (depending, for example, on the type of securities being issued, the rights attached to those securities and the nature of the issuer and its business). >>

5. **Differences between debt and equity** – Investor focus is more on an issuer’s profitability and growth prospects for an equity offering, while for debt offerings investors look to the specific bond terms and the issuer’s solvency and creditworthiness. Moreover, bonds are normally distributed in Reg S or Reg S / 144A format, including (in the context of Singapore) to institutional, accredited and/or other specified investors based in Singapore via s.274 and s.275 of the Securities and Futures Act 2001. In addition, bond offerings are often conducted under shorter timelines than equity offerings, particularly where the

issuer is a publicly listed company and/or a frequent issuer. Therefore, the practice of due diligence undertaken by banks has evolved over time, depending on the prevailing facts and circumstances of the case to meet their duties and legal liabilities. In this respect, the notably concerning aspects of the Part I proposals (highlighted in #4(A) above) are inconsistent with established market practice for debt offerings.

6. **Debt transactions, particularly wholesale/ prospectus-exempt bond offerings, can be executed in various forms** – A large proportion of bond offerings in the OTC market are offered to wholesale investors pursuant to prospectus exemptions and as such, there are no regulated disclosure requirements and no fixed market practice on due diligence conducted for such transactions. The process for such transactions can differ widely and, whilst some such transactions may be based on formal disclosure documentation under a borrower's issuance programme, it is not uncommon for other such transactions to be sold privately on the basis of no disclosure document, i.e. on an undocumented basis, with 'big boy letters' provided by investors and launched and executed over very compressed timelines (e.g. overnight placements).

   In addition, the roles of the financial institutions / banks as managers in an offering can also differ widely, from lead managers that are involved from the start to completion of the transaction to passive / lower-tier managers who join the transaction at a late stage and who are not actively involved in the marketing and distribution of the offering.

   The Part I proposals in the Notice, which contain prescriptive requirements for due diligence as set out in #4(A) above, make no differentiation of the various forms that OTC / wholesale bonds can be executed and the various roles that the corporate finance adviser may undertake in the transaction. This will result in significant challenges and lack of clarity on how the prescriptive requirements are to apply across the board on all transactions.

7. **Restriction on dealings** – The Part I proposals may be inconsistent with other local domestic regulatory requirements and practice/policy. Beyond the notably concerning aspects (highlighted above), an example regarding conflicts management is the proposal to restrict directors/employees/representatives of a bank from dealing in capital markets products for their own account where such dealing is "in conflict with the interests of the corporate finance advisor's customer", which is broad and ambiguous. It is further noted that many banks already have in place established policies for trading in securities by employees.

8. **Responses on specific detail** – It is our understanding that ICMA members who have expressed specific interest in this consultation have been contributing their detailed input via the law firm of Allen & Gledhill. ICMA is consequently not responding in further detail to the consultation.

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