

## **SFC's Proposed Guidelines on Market Soundings**

On October 11, 2023, the Hong Kong Securities and Futures Commission ("SFC") [launched](#) a consultation on proposed guidelines for market soundings. The consultation period concluded on December 11, 2023. The SFC is considering the feedback received and will publish a consultation conclusions paper together with the final guidelines, which will become effective upon gazettal. The SFC proposes to provide a six-month transition period after gazettal to allow time to update their internal procedures and controls to ensure compliance.

### **Who is Impacted?**

The proposed guidelines apply to market soundings, being the communication by a licensed or registered person of non-public information (irrespective of whether it is price-sensitive inside information) with potential investors prior to a securities transaction being announced, either to gauge interest in the transaction or to assist in determining a potential transaction's specifications such as its size or price.

The proposed guidelines apply to a licensed or registered person:

- Disclosing information during the course of a market sounding ("Disclosing Person") – generally a sell-side broker acting on behalf of a client, an issuer or an existing shareholder selling in the secondary market (Market Sounding Beneficiary) in a possible securities transaction, irrespective of whether the appointment has been formalised; or
- Receiving information during the course of a market sounding ("Recipient Person") – generally a buy-side firm that is sounded out by a Disclosing Person in relation to a possible securities transaction.

### **Nature of the requirements**

The proposed guidelines provide guidance to licensed or registered persons in their compliance with the general principle to conduct their business activities honestly, fairly, and in the best interests of their clients and the integrity of the market during market soundings.

There are 6 core principles, covering:

- Market integrity;
- Governance;
- Policies and procedures;
- Information barrier controls;
- Review and monitoring controls; and
- Authorised communication channels.

The proposed specific requirements for Disclosing Persons are:

- **Pre-sounding procedures** – requiring an assessment of the information to be disclosed to identify any that is non-public, obtaining the consent of the “market sounding beneficiary” to the market sounding and advance determination of various aspects such as the standard set of information to be shared, the timing for market soundings and the suitable number of investors to be contacted.
- **Standardised script** – requiring a pre-approved standardised script to be used that is regularly reviewed by senior management or independent functions (such as legal and compliance). The proposed guidelines set out the minimum expected content for the script and the sequence of the information flow.
- **Cleansing** – requiring best endeavours assessments to be made to determine whether information has ceased to be non-public (e.g., following the transaction being announced or called off) and informing the recipient in writing of this.
- **Record keeping** – requiring records in relation to market soundings covering various specified compliance requirements to be kept for not less than seven years.

The proposed specific requirements for Recipient Persons are:

- **Handling of market sounding requests** – requiring a Recipient Person to designate a properly-trained, specified person to receive market soundings and to inform the Disclosing Person as to whether it wishes to receive market soundings (either generally or for particular transaction types).
- **Record keeping** – requiring record keeping, again for seven years, of specified compliance requirements relating to the market soundings.

### Key operational impacts/challenges

The proposed guidelines apply to the disclosure of “non-public information”, which may or may not be material or price sensitive, and is much broader than “inside information” as defined under the Securities and Futures Ordinance, creating a mismatch with the statutory regime for insider dealing.

“Non-public information” is not defined in legislation or the proposed guidelines or interpreted in case law, which makes it difficult for firms to assess what information is included in this concept, and creates challenges in implementation.

Many Hong Kong-licensed/registered persons participate in off-shore market soundings and transactions, and also engage in such soundings/transactions with market participants which are not licensed/registered by the SFC. The application of the proposed guidelines to Hong Kong-licensed/registered persons only would create an unfair playing field, given that the guidelines are not in line with the market sounding regimes in other key jurisdictions (such as Singapore, Australia and the UK/EU).



Overall, the above would create a material risk that some international capital market activities can no longer be conducted from Hong Kong by licensed/registered persons.

**Contact**

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