

Capital Markets | Mergers & Acquisitions

Guidelines for Independent Financial Advisers (IFAs) and Directors in Procuring IFA Advice for SGX-Listed Issuers

Introduction

On 3 July 2023, the Singapore Exchange Regulation ("**SGX RegCo**") issued a set of "[Guidelines on Independent Financial Advisers](#)" ("**Guide**") and an accompanying [Regulator's Column](#) setting out SGX RegCo's expectations and guidance for independent financial advisers ("**IFAs**") and their opinions and the role and expectations on directors in procuring an IFA opinion, in the context of the Singapore Exchange ("**SGX**") Listing Rules.

The SGX Listing Rules require the appointment of an IFA and an IFA opinion for exit offers, interested person transactions ("**IPTs**") and, in some cases, under a Notice of Compliance ("**NOC**"), to direct the issuer to undertake certain actions or review transactions as required by SGX.

This Update briefly highlights the key aspects of the Guide, focusing on guidance for directors in appointing an IFA, the requirements of an IFA opinion under the SGX Listing Rules, the independence of the IFA and the objectivity of the IFA opinion. The Guide also includes guidance in the context of exit offers and IPTs.

It should also be noted that there are practice statements ("**Take-over Guidance**") issued by the Securities Industry Council ("**SIC**") in relation to the appointment and advice by IFAs in connection with offers, whitewash transactions and disposals which fall within the ambit of the Singapore Code on Take-overs and Mergers ("**Take-over Code**"). Such guidance provided by SIC will continue to apply to transactions governed by the Take-over Code and are not overridden by the Guide.

Expectations of Directors in Appointing IFA

The IFA opinion forms an important part of the decision-making process for directors and shareholders. When directors are presented with an offer or a proposed transaction, they are expected to evaluate it and make a recommendation to shareholders. The IFA opinion provides the directors with an independent analysis of the offer or transaction. The shareholders, in turn, take into account the IFA opinion and the directors' recommendations and their individual circumstances and conditions to decide whether to accept an offer, or to approve a transaction.

Accordingly, key factors directors are expected to consider when appointing an IFA include:



Client Update: Singapore

2023 JULY

Capital Markets | Mergers & Acquisitions

- Independence of the IFA (including the professionals involved in preparing and approving the IFA opinion) and the IFA's ability to provide competent independent advice. No party should take any action which could fetter or compromise the independence of the IFA.
- The directors should:
 - o Review the suitability of professionals involved in preparing and approving the IFA opinion (including their relevant experience and competency).
 - o Be aware of the constraints that the IFA may face, including the tight transaction timeline, and seek to enable the IFA to best deliver its analysis and opinion within the stipulated timeline.
 - o Carefully assess the IFA opinion for reliability, accuracy and reasonableness of information. The directors should also critically engage the IFA on the IFA's analysis and resulting opinion, particularly where the analysis appears to be insufficient or to warrant further elaboration or substantiation.
- The issuer should:
 - o Provide the IFA with unimpeded access to persons, premises, documents, reports, information and valuations as the IFA reasonably requires to undertake its analysis and to issue its opinion.
 - o Ensure that the relevant valuation reports, expert reports and financial reports contain the necessary disclosures for the IFA to issue its opinion.

Expectations of IFA and IFA Opinions under SGX Listing Rules

An effective IFA opinion requires: (1) the IFA to be independent; and (2) the IFA opinion to represent the objective views of the IFA.

Independence of IFA

When considering the independence of an IFA, SGX RegCo will have regard to the following principles:

- An IFA must have a sufficient degree of independence from the issuer and the directors. This is to ensure that the advice that the IFA provides will be objective and free of any undue influence.
- In deciding whether to accept or decline an engagement, an IFA must decide on the basis of its relationships and interests:
 - o An IFA should prominently disclose in its opinion the business or professional relationships with a commissioning party or any other interested party, any financial or other interest that could reasonably be regarded as capable of affecting the IFA's ability to give an unbiased opinion on the matter being opined on, and any fee or benefit (whether direct or indirect) to be received in connection with the issuance of its opinion.

Capital Markets | Mergers & Acquisitions

- If, at any point in time, the IFA is unable to give an unbiased opinion, it must withdraw itself from being the IFA.
 - An IFA will be disqualified from its role if fee arrangements create a conflict of interests, for instance if the payment of fees is dependent on the outcome of the transaction.
- For offers, the "Public Statement on Requirement for Independent Advice on Take-over Offers" dated 7 August 2002 by the SIC should also be referred to when assessing an IFA's independence. The [Appendix](#) to the Practice Statement in particular provides a checklist of considerations to assess whether a person proposing to act or be appointed as IFA is independent for purposes of the Take-over Code. For IPTs and the review of transactions under an NOC, these do not fall under the ambit of the Take-over Code. However, the Guide has indicated that for the purposes of consistency, the principles in the Take-over Code and the Take-over Guidance to assess the IFA's independence should, where relevant, be taken into account.

Objective view of IFA and appropriate methodologies and valuation

- An IFA must exercise due care, skill and professional judgement to prepare an objective opinion. This includes selecting the most appropriate methodology or methodologies for the given circumstances when conducting their analysis. An IFA should justify its choice of methodology or methodologies and describe the methods used in the IFA opinion. Where challenged, the IFA must be prepared to stand by or justify its recommendation to the directors. The Guide sets out various expectations of SGX RegCo at Paragraph 3.3 that IFAs must undertake in their evaluation of a proposed transaction, as well as examples of what methodologies may generally be appropriate.
- An IFA must have a reasonable basis for its opinion, i.e. the opinion must be properly substantiated with detailed analysis and disclosure. Details of what an IFA is expected to do in order to arrive at its opinion are also set out in the Guide.
- The IFA opinion must also contain a minimum amount of information, which includes a clear and unequivocal conclusion, factors considered and explanations, and methodologies used in arriving at its opinion, among other things. We discuss more regarding providing a clear and unequivocal conclusion in the context of exit offers and IPTs in the sections below.
- An IFA must not tailor its opinion to support the views of a commissioning party or any other interested party, or to arrive at a desired outcome.

IFA Opinion in the Context of Exit Offers

Under Rule 1309 of the SGX Mainboard Rules and Rule 1308 of the SGX Catalist Rules, an issuer may voluntarily delist from SGX if a "fair" and "reasonable" exit offer is made to the issuer's shareholders. The SGX Listing Rules require the issuer to appoint an IFA to advise on the exit offer and provide a clear and unequivocal conclusion on whether the offer is "fair" and "reasonable".

Capital Markets | Mergers & Acquisitions

Distinct concepts of "fair" and "reasonable"

- An offer is "fair" if the value of the offer price or consideration is greater than or equal to the value of the securities subject to the offer. To determine whether an offer is "fair", an IFA should, among others:
 - o assess the value of the securities based on the methodologies and factors set out in the Guide; and
 - o provide a range of values of the securities which are subject to an offer. In the case of exit offers, the range of values should be consistent with the requirements in the Take-over Code.
- When considering whether an offer is "reasonable", an IFA should give regard to other matters as well as the value of the securities subject to the offer. Please refer to the Guide for further elaboration on these factors.

Possible opinions

- An offer can be assessed to be: "fair and reasonable"; "not fair but reasonable"; "not fair and not reasonable"; or "fair but not reasonable".
- SGX RegCo does not rule out a "fair but not reasonable" opinion, but states that such an opinion should not be given unless there are strong and exceptional grounds. This is because an offer would normally be considered "reasonable" if it is assessed to be "fair".
- Hence, it is possible under this framework for an IFA to recommend shareholders to accept the offer even if the IFA is of the view that the offer price is at a discount to the value of the company's securities (i.e., the quantitative assessment of offer is that it is not "fair"). This is because there may be other factors (e.g. the securities are illiquid and the offer provides an exit opportunity that might not otherwise be available) that outweigh the price considerations. However, for an exit offer made in connection with a delisting proposal, the voluntary delisting requirements stipulate that the exit offer needs to be both "fair" and "reasonable". As such, even though a "not fair but reasonable" exit offer is recommended by the IFA to accept, it would not fulfil the stipulated requirement of an exit offer needing to be both "fair" and "reasonable" under the SGX Listing Rules.

Practical observations by SGX RegCo

- Cases where the offer price is below the net asset value per security, or its revalued net asset value per security, typically receive greater scrutiny by investors. Therefore, where the IFA has chosen an asset-based approach, and the offer price is below the net asset value per security or the revalued net asset value per security, the IFA should clearly explain the fairness and reasonableness of the offer (as appropriate) in relation to this point, when queries are raised.

Client Update: Singapore

2023 JULY

Capital Markets | Mergers & Acquisitions

- If there are any material changes to the traded price of an issuer's assets since announcements were made in relation to a proposed transaction, the IFA should include and consider these changes in its opinion.

IFA Opinion in the Context of Interested Person Transactions

Under the SGX Listing Rules, depending on the applicable thresholds, an issuer may be required to obtain shareholders' approval for IPTs. In such circumstances, the circular to shareholders must include an IFA opinion stating whether they are on normal commercial terms and whether they are prejudicial to the interests of the issuer and its minority shareholders.

- In assessing whether the IPT is on normal commercial terms, the IFA should consider similar transactions involving unrelated parties and apply "common experience, commercial prudence and usual terms of trade as reference" in considering if the terms of the IPT would prevail in the open market for similar transactions between unrelated parties.
- The Guide further sets out certain non-exhaustive factors which an IFA may consider when assessing whether an IPT is prejudicial to the interests of the issuer and its minority shareholders. Examples of such factors include the rationale and benefit of the transaction to the issuer or issuer group, the financial situation and solvency of the issuer and the issuer's bargaining position.

For recurrent IPTs which are of a revenue or trading in nature or necessary for its day-to-day operations, an issuer may also seek a shareholder general mandate (subject to annual renewal at its annual general meeting). An IFA should disclose in its opinion whether the methods or procedures in determining transaction prices are sufficient to ensure that the transactions will be carried out on normal commercial terms and will not be prejudicial to the interests of the issuer and its minority shareholders.

Our Comments

As stated in the Regulator's Column, SGX RegCo is issuing the Guide as a starting point to improve the standards, clarity and consistency of advice that IFAs render in their opinions. The Guide comes at an opportune time as IFAs have come under additional scrutiny of late over their opinion and valuation methodologies. As stated above, the Guide highlights that directors should carefully assess the IFA opinion and critically engage the IFA on the IFA's opinion. The Guide, together with the Take-over Guidance, would serve as essential tools in providing directors with clarity as they critically examine IFA opinions before making their recommendation to their shareholders.

If you have any queries on the above developments, please feel free to contact our team members below who will be happy to assist.

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Client Update: Singapore

2023 JULY



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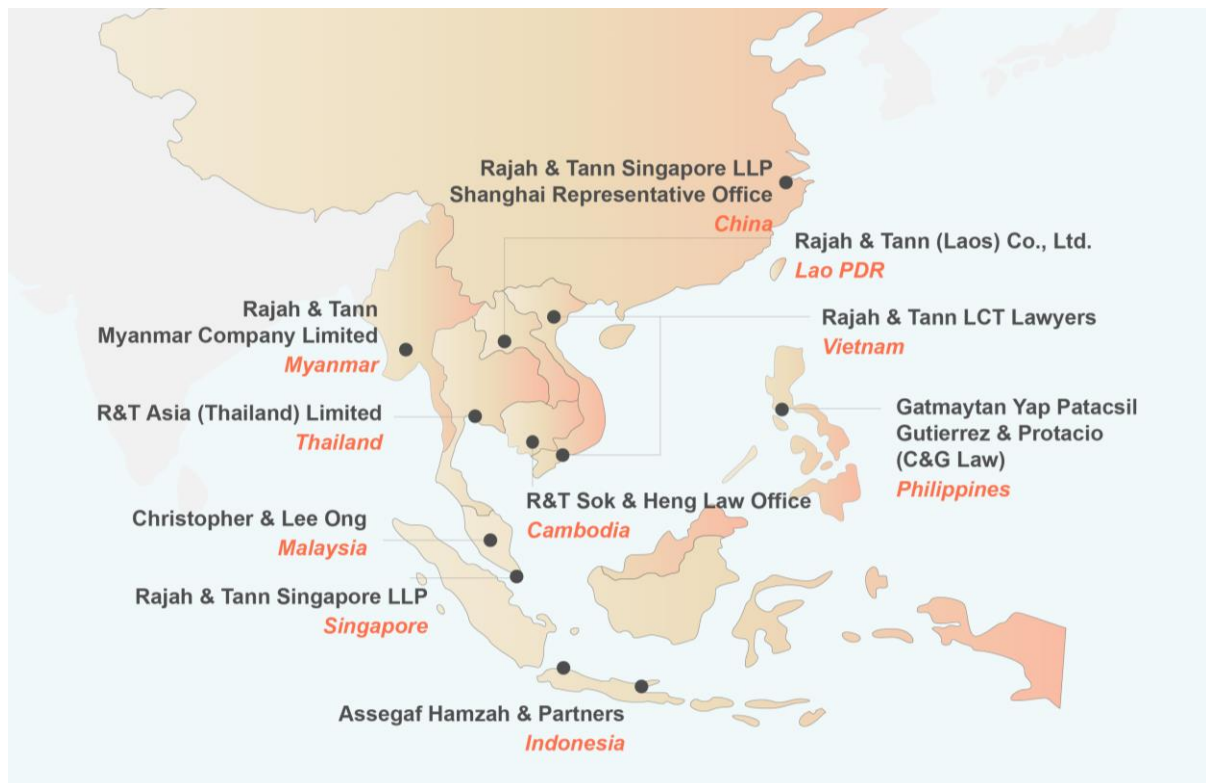
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