

TECHNICAL NOTE NO. 1/2014

(Issued: 19 August 2014;

Revised: 29 October 2014)

SC has received many queries from the industry seeking clarification on the application of the provisions in the Capital Markets and Services Act 2007 (CMSA). In this regard, this Technical Note intends to aid the industry's understanding of SC's policy intention and facilitate compliance of securities laws provisions. It also stays true to SC's commitment towards an efficient and effective regulatory environment by adopting an approach that facilitates development yet remains fit for purpose. This Technical Note should be read together with the relevant Schedules in the CMSA and guidelines issued by SC.

This Technical Note consists of the following sections:

Section A	Provides for the clarification or operationalisation of CMSA provisions relating to approval of capital market products under section 212 of the CMSA and prospectus requirements under section 232 of the CMSA.
Section B	Provides for the clarification or operationalisation of CMSA provisions relating to licensed and registered persons under: (a) subsection 94(3) of the CMSA for employees of a Participating Organization (PO) trading in capital market products through their own principal or other Capital Market Services Licence (CMSL) holder, under specific criteria; (b) paragraph 2 (e) of Schedule 4 of the CMSA on Islamic Banks to carry out the regulated activity of advising on corporate finance; and (c) Regulation 7 and Schedule 1 of the Capital Markets and Services Regulations 2012 on incidental activities.

Section C	Provides for the clarification or operationalisation of CMSA provisions relating to unit trust schemes under: (a) subparagraphs 256ZO(1)(a)(ii) and 298(1)(a)(ii) of the CMSA in relation to lodgement of annual report by trustee-managers and management companies; (b) subsections 288(2) and 289(1) of the CMSA in relation to the appointment of management companies and trustees for unit trust schemes;
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Section A – Clarification or operationalisation of CMSA provisions in relation to approval and prospectus requirements

Application of Section 212 of the CMSA

1.01 What is “unlisted capital market product” under subsection 212(5) of the CMSA and when does this subsection apply?

Subsection 212(5) of the CMSA does not apply to a proposal to offer capital market product outside of Malaysia. An unlisted capital market product for the purposes of subsection 212 (5) of the CMSA means a capital market product¹ that is to be offered in Malaysia, whereby such offering is not made through a listing or to be traded on a stock exchange or a derivative exchange in Malaysia..

Unlisted capital market products that are subject to the authorisation and recognition framework under subsection 212(5) are as follows:

- (a) all unlisted securities including Islamic securities, but excluding units in unit trust schemes;
- (b) all unlisted unit trust schemes; and
- (c) all over-the-counter derivatives offered to retail investors.

With regard to the above paragraphs (a) and (b), SC’s authorisation or recognition under subsection 212(5) of the CMSA is only required in relation to a unit trust scheme and not for every single unit in the scheme. The same shall be applicable in the case of an offering of units in a foreign unit trust scheme in Malaysia, i.e. the foreign unit trust scheme must first obtain recognition of SC before the units can be offered in Malaysia.

¹ As defined under section 2 of the CMSA.

1.02 In what circumstances would SC grant its authorisation or recognition under subsection 212(5) of the CMSA in relation to unlisted debenture and sukuk that is to be offered in Malaysia?

As a general rule, an authorisation by SC is required in relation to a proposal involving an unlisted debenture or sukuk that is to be offered in Malaysia.

However, SC may grant its recognition for an unlisted debenture or sukuk that is to be offered in Malaysia pursuant to a cross-border offering and where a reciprocal arrangement has been formalised between SC and the competent authority in the issuer's home jurisdiction (e.g. under a mutual recognition agreement, regional capital market initiatives, etc.).

1.03 What are the types of transactions that are not within the scope of subsection 212(2) of the CMSA?

The following are the types of transactions that are not intended to be captured under subsection 212(2) of the CMSA:

- (a) Trades in securities listed on Bursa Malaysia, effected on Bursa Malaysia;
- (b) A proposal by a shareholder of a corporation whose shares are listed on Bursa Malaysia, to distribute his shares² in the corporation, to parties outside Malaysia;
- (c) Distribution of new shares in lieu of dividends by a listed corporation³;
- (d) Distribution of securities in another corporation held by the listed corporation⁴ to its own members;

² Whether or not the distribution is made with consideration.

³ For example, where the listed corporation has declared a cash dividend and has given its shareholders the option to reinvest this dividend in new shares in that listed corporation. This issue has also been clarified previously on 21 March 2013 through the Generic FAQs on CMSA 2012.

⁴ Whether or not the distribution is made with consideration.

- (e) Issuance of new shares by a listed corporation to effect an acquisition of securities or assets and where such acquisition does not result in a significant change in the business direction or policy of the listed corporation; and
- (f) Any standalone disposal of assets resulting in a significant change in business direction or policy of a listed corporation⁵.

1.04 When does the approval requirement under subsection 212(4) of the CMSA apply in relation to a public company or a listed corporation?

Approval under subsection 212(4) shall be required where a public company or a corporation whose shares are listed on Bursa proposes to list its shares on an exchange outside Malaysia, whether through an IPO or cross-listing.

Approval under subsection 212(4) shall also be required where a public company proposes to offer its debenture, sukuk or Islamic structured product outside of Malaysia.

SC does not intend for subsection 212(4) of the CMSA to be applicable to, –

- (a) in the case of a corporation whose shares are listed on Bursa, any secondary transactions of its shares subsequent to the IPO of the shares⁶ (e.g. shares of the corporation being made available outside Malaysia under a distribution of assets by a foreign corporation, distribution of new shares in lieu of dividends by the corporation or a proposal by a shareholder of the corporation to distribute his shares⁷ in the corporation to parties outside Malaysia); and
- (b) in the case of a public company–
 - (i) the issuance of its shares not pursuant to an IPO including the subsequent offering of such shares; or
 - (ii) any secondary transactions subsequent to an IPO of the shares,

⁵ This is to be read together with paragraphs 1(d) and (e) of Schedule 5 of the CMSA

⁶ This should be read together with paragraph 7 of Schedule 5.

⁷ Whether or not the distribution is made with consideration.

that is made outside Malaysia;

- (c) in the case of a public company where its debenture, sukuk or structured products have been approved by the SC-
 - (i) a proposal for the listing of the debenture, sukuk or structured products on an exchange outside of Malaysia; and
 - (ii) the distribution of the debenture, sukuk or structured products owned by that public company to another person.

1.05 Do secondary market transactions of an unlisted capital market product require authorisation or recognition from SC under subsection 212(5) of the CMSA?

Subsection 212(5) of the CMSA is not intended to be applicable to secondary market transactions of an unlisted capital market product. Examples of such transactions include the following:

- (a) A person who is transferring his ownership of a debenture or sukuk to another person; and
- (b) A corporation that is distributing, selling or transferring a debenture or sukuk of a third party held by that corporation to another person.

1.05A Does an offering or issuance of unlisted shares (including any right, option or interest in respect thereof) of a corporation listed on the ACE Market require SC's authorization or recognition under subsection 212(5) of the CMSA?

SC's authorisation or recognition is not required under subsection 212(5) except where the offering or issuance forms part of a proposal falling under paragraph 212(2)(b).

1.06 What are the specified exchanges for the purpose of subparagraph 2(g)(A) of Schedule 5 of the CMSA and where can this list be found?

Specified exchanges refer to exchanges listed under R/R 6 of 2012, issued by Bursa Malaysia dated 15 June 2012 entitled “Directives in relation to Recognised Stock Exchanges”.

Application of Section 232 of the CMSA

1.07 Is a corporation that is listed in or outside Malaysia required to issue a prospectus for distribution of new shares in lieu of dividends to its shareholders in Malaysia?

A prospectus is not required when such a corporation distributes new shares in lieu of dividends to its shareholders in Malaysia provided that a prospectus had already been issued earlier during the IPO of the corporation’s shares. This situation falls within the scope of paragraph 29 of Schedule 7 of the CMSA.⁸

1.08 A foreign issuer has issued a debenture or sukuk to a foreign investor. In this regard, the foreign investor was given the materials in relation to the debenture or sukuk by that foreign issuer (e.g. disclosure documents, prospectus etc). Subsequently, the foreign investor wishes to sell that debenture or sukuk to an investor in Malaysia. Can the foreign investor distribute the materials to the investor in Malaysia?

The foreign investor may distribute the materials in relation to the debenture or sukuk that was issued by a foreign issuer, to a Malaysian investor. Any material distributed shall be governed by applicable requirements under securities laws relating to disclosure e.g. Guidelines on Disclosure Documents. The information disclosed in the materials must not contain any false, misleading statement or contain any material omission.

⁸ Previously clarified on 21 March 2013 through the Generic FAQs on CMSA 2012.

Section B – Clarification or operationalisation of CMSA provisions in relation to licensed and registered persons

Application of subsection 94(3) of the CMSA

2.01 As an employee of a PO, can I buy securities through another PO or a licensed holder?

Subsection 94(3) of the CMSA permits an employee of a PO to trade in any type of securities provided that such trade is transacted through the PO.

However, SC recognises that an employee of a PO may not be able to comply with this requirement in the following situations:

- (a) the employee wishes to trade in securities listed in a foreign market and such trade is only executable by a foreign broker; or
- (b) the employee wishes to trade in an unlisted unit trust scheme that is offered by a bank or a unit trust management company.

In order to facilitate trade by employees in the situations described above, compliance with subsection 94(3) of the CMSA shall be satisfied if the—

- (a) PO has in place processes or has taken the necessary steps to monitor the employee's trade for possible conflict of interest or market misconduct;
- (b) employee reports to the PO on the trades that have been executed; and
- (c) PO maintains a record of information relating to the trade (e.g. by maintaining a register).

Application of paragraph 2(e) of Schedule 4 of the CMSA

3.01 Can an Islamic Bank advise a listed corporation on its proposal to sell shares that the listed corporation holds in its subsidiary?

The above activity falls under the regulated activity of advising on corporate finance. Currently, paragraph 2(e) of Schedule 4 of the CMSA permits an Islamic Bank to carry out such activity. However, this activity may only be carried out provided that the Islamic Bank satisfies SC that it has the relevant persons with relevant competency to carry out this activity and that there are relevant controls and processes in place to manage the risk arising from this activity.

Application of Regulation 7 and Schedule 1 of the Capital Markets and Services Regulations 2012

4.01 Does a holder of a dealer's representative licence for dealing in securities need to be licensed to provide investment advice to his clients?

Regulation 7 and Schedule 1 of the Capital Markets and Services Regulations 2012 provides that any CMSRL holder who is licensed to carry out the activities stated in Column 1 is not required to be separately licensed for the activities stated in Column 2 provided that the activity in Column 2 is incidental to that licensed activity.

For example, a dealer's representative may, while taking an order from a client, give a recommendation over the phone to the client whether to buy or sell a particular share. A dealer's representative may also send their recommendations through email to his clients. These recommendations would be treated as giving investment advice. However, the dealer's representative is not required to be separately licensed for giving the investment advice as this activity is incidental to the licensed activity of dealing in securities.

To be regarded as an incidental activity, the investment advice must only be provided to the dealer's representative's client. As such, the dealer's representative is not permitted to hold himself out to the general public as an investment advisor. Further, such recommendation will also be subject to s.92 of the CMSA (i.e. requirement for a reasonable basis when making a recommendation).

Section C – Clarification or operationalisation of CMSA provisions in relation to unit trust schemes

Duty of trustee-manager to lodge annual returns, etc and duty of management company to lodge annual returns

5.01 Would compliance of section 127 of the CMSA satisfy the requirement under subparagraph 256ZO(1)(a)(ii) and subparagraph 298(1)(a)(ii) of the CMSA?

Both the trustee-manager and the management company are licensed persons. Section 127 of the CMSA requires a licensed person to lodge with SC their auditor's report within three months after the close of each financial year.

Subparagraphs 256ZO (1)(a)(ii) and 298(1)(a)(ii) of the CMSA respectively require trustee-managers and a management companies to lodge their annual report with SC within six months after the end of their financial year.

Compliance with section 127 of the CMSA will be regarded by SC to be sufficient for the purposes of compliance with subparagraphs 256ZO (1)(a)(ii) and 298(1)(a)(ii) of the CMSA. This is in view of the similar information contained in an auditor's report pursuant to section 127, which is sufficient for SC's supervision of trustee-managers and management companies.

Submission process for the approval of management companies and trustees for unit trust schemes under subsections 288(2) and 289(1) of the CMSA

6.01 What is the new approval process for management companies and trustees under subsections 288(2) and 289(1) of the CMSA?

The current submission process for the authorisation or approval of any new unit trust scheme includes the submission of the following applications to SC:

- (a) Application to Act as a Management Company (SC/MC Form); and
- (b) Application to Act as a Trustee (SC/Trustee-Form).

In order to promote efficiency, SC will now implement a one-time approval process for management companies and trustees under the CMSA.

Under this new approval process, management companies and trustees that have previously been approved by SC will be included in an Approved List and will be deemed to have complied with the requirements under section 289 of the CMSA for future issuance or offering of, or invitation to subscribe for or purchase any subsequent unit trust schemes. The Approved List is available on SC's website for ease of reference.

However, a person who has not been approved as a trustee or a management company must seek SC's prior approval under section 289 of the CMSA to be admitted to the Approved List. This application must be accompanied by an application under section 212 of the CMSA for a new unit trust scheme, and such submission must be made only during the first fund application.

SC's prior approval under section 290(4) of the CMSA is still required if a related-party⁹ intends to be appointed as a trustee for the unit trust scheme.

⁹ Related-party is as provided under paragraph 290(1)(c) of the CMSA.