

TECHNICAL NOTE NO. 1/2014

CLARIFICATION OR OPERATIONALISATION OF CMSA PROVISIONS IN RELATION TO APPROVAL AND PROSPECTUS REQUIREMENTS, LICENSED PERSONS, REGISTERED PERSONS AND UNIT TRUST SCHEMES

(Issued: 19 August 2014)

1st Revision: 29 October 2014

2nd Revision: 20 June 2017

3rd Revision: 21 October 2019

4th Revision: 18 March 2022

The 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 the SC's policy intention and facilitate compliance of securities laws provisions. It also stays true to the 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 the 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, disclosure document requirement under paragraph 212(5)(b) 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) [Deleted]; (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 <i>Capital Markets and Services Regulations 2012</i> on incidental activities.
Section C	Provides for the clarification or operationalisation of CMSA provisions relating to unit trust schemes under– (a) [Deleted]; (b) subsections 288(2) and 289(1) of the CMSA in relation to the appointment of management companies and trustees for unit trust schemes.

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 to persons in Labuan or 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), the 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 the SC before the units can be offered in Malaysia. *[Amended on 18 March 2022]*

1.02 In what circumstances would the 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 the SC is required in relation to a proposal involving an unlisted debenture or sukuk that is to be offered in Malaysia.

However, the 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 the SC and the competent authority in the issuer’s home jurisdiction (e.g. under a mutual recognition agreement, regional capital market initiatives, etc.).

¹ As defined under section 2 of the CMSA.

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 persons in Labuan or outside of 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;
- (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.

[Amended on 18 March 2022]

1.04 *[Deleted as this paragraph has been superseded by Technical Note No. 1/2020]*

1.05 Do secondary market transactions of an unlisted capital market product require authorisation or recognition from the 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.

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.

⁵ This is to be read together with paragraphs 2(d) and (e) of Part 2A(i), Schedule 5 of the CMSA.

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 the SC's authorisation or recognition under subsection 212(5) of the CMSA?

The 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 securities exchanges outside Malaysia for the purpose of paragraph 14 of Schedule 5 of the CMSA and where can this list be found?

The securities exchanges outside Malaysia refer to the 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 15 of Schedule 5 of the CMSA⁶.

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.

⁶ Previously clarified on 21 March 2013 through the Generic FAQs on CMSA 2012.

1.09 Is the requirement to lodge a disclosure document pursuant to paragraph 212(5)(b) of the CMSA applicable to an offering of shares or units via a rights issue by a foreign listed corporation or foreign listed unit trust scheme/prescribed investment scheme (collectively referred to as “foreign listed entity”) to shareholders or unit holders in Malaysia, where Schedule 5 of the CMSA has exempted the requirement to obtain authorisation/recognition for such offering under paragraph 212(5)(a) of the CMSA?

The SC had set out exemptions from prospectus requirements in paragraph 32 of Schedule 6 and paragraph 32 of Schedule 7 of the CMSA in respect of rights issue by a foreign listed entity having gained admission on an exchange outside Malaysia. These exemptions were granted on the basis that the SC recognises that in such circumstances a prospectus may not be necessary, given that shareholders or unit holders in such foreign listed entity are already well-informed of the activities of the foreign listed entity through disclosure made to them e.g. announcements or circular to shareholders or unit holders. Further, the exemption is also premised on the fact that the offering document for such rights issue had been approved, registered or lodged with the foreign supervisory authority of the foreign listed entity. The exemption is to facilitate shareholders or unit holders of such foreign listed entity to exercise their entitlement.

Premised on the above, it is not the SC’s intention to require lodgement or registration of a prospectus, disclosure document or any other offering document in relation to a rights issue by a foreign listed entity under paragraph 212(5)(b) of the CMSA, where Schedule 5 of the CMSA has exempted the requirement to obtain authorisation/recognition for such offering under paragraph 212(5)(a) of the CMSA. *[Inserted on 20 June 2017; Amended on 21 October 2019]*

1.10 In instances where the offering of shares/units via a rights issue by a foreign listed entity is premised on a non-renounceable basis, does the exemption from the prospectus requirements in paragraph 32 of Schedule 6 and paragraph 32 of Schedule 7 of the CMSA be applicable?

Yes, for offering of a non-renounceable rights issue by a foreign listed entity where there is no prospectus or disclosure document or any other offering document approved or registered by, or lodged with, the foreign supervisory authority of such foreign listed entity, the exemption provided in paragraph 32 of Schedule 6 and paragraph 32 of Schedule 7 of the CMSA is applicable. *[Inserted on 21 October 2019]*

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 [Deleted]

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 the 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 section 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 [Deleted]

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

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

The management company is required to submit the Application to Act as a Management Company (SC/MC Form) to the SC under the current submission process for the authorisation or approval of any new unit trust.

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

Under this approval process, management companies that have previously been approved by the 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 the SC's website for ease of reference.

However, a person who has not been approved as a management company must seek the 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. *[Amended on 18 March 2022]*