THE LAW SOCIETY OF SINGAPORE

GUIDANCE NOTE 4.7.1

DISCLOSURE LETTERS AND RESPONSIVENESS-TO-FORM LETTERS

1. Explanatory Note

1.1 This Guidance Note is issued to assist law practices and legal practitioners in relation to the issuance of disclosure letters ("**Disclosure Letters**") and responsiveness-to-form ("**RTF**") letters ("**RTF Letters**") in transactions involving the offering of equity in Singapore.

1.2 This Guidance Note is not intended to be the authoritative guide on Disclosure Letters or RTF letters. Instead, it aims to provide practitioners with guidance on the consequence and effect of such letters and to assist practitioners in adopting good practices when issuing such letters.

Guidance

2. Introduction

2.1 A prospectus or offer document ("**Prospectus**") issued in connection with a public offering of securities in Singapore is required to be registered by the Monetary Authority of Singapore ("**MAS**") or, in connection with a listing on Catalist, by the Singapore Exchange Securities Trading Limited ("**SGX-ST**") acting as agent on behalf of the MAS. At the close of such offerings, there have been instances where Disclosure Letters have been issued by Singapore law firms providing negative assurance on the accuracy of the material statements in the Prospectus and the absence of omissions of material facts necessary to make the statements therein not misleading. Such Disclosure Letters may also provide a confirmation of belief that the Prospectus is, on its face, appropriately and materially responsive in form (i.e. RTF) to the applicable disclosure requirements under Singapore laws and regulations.

For transactions such as documented secondary offerings (e.g. rights issues) and listings by introduction that do not involve a public offering of securities, no prospectus is issued and registered by the MAS or SGX-ST. Notwithstanding this, there have been instances where Singapore law firms have been asked to issue RTF Letters on disclosure documents (the "**Disclosure Document**") in relation to such transactions.

2.2 The issuance of Disclosure Letters and RTF Letters is borrowed from the practice of the United States ("**U.S.**"). In the U.S. context, the letters assist the underwriters in documenting the extent of their due diligence on the issuers to help establish their due diligence defence and related defences to liability under U.S. federal securities laws.

3. Purpose and Utility of Disclosure Letters and RTF Letters in the Singapore Context

3.1 In the Singapore context, where Disclosure Letters have been issued, they provide negative assurance in a due diligence context to address factual matters. They are "negative" as they do not provide a positive confirmation; but only a negative confirmation to the effect that the law firm is not aware, or has no reason to believe, that the Prospectus contains an untrue statement of a material fact or omits to state a material fact necessary to render the statements in the Prospectus not misleading. The negative statement is given based on the law firm's review of a list of specified documents (typically key contracts and local counsel diligence reports) and attendance at key all-parties meetings listed in the Disclosure Letter. To reinforce the limited nature of a negative assurance, some Disclosure Letters explicitly contain a qualification that the law firm does not accept responsibility for the accuracy or completeness of the Prospectus.

3.2 Disclosure Letters typically disclaim any opinion as to whether the Prospectus contains all information which investors and their professional advisers would reasonably require to make an informed assessment of the matters specified in section 243(3) of the Securities and Futures Act 2001 ("**SFA**") or whether a defence under section 255 of the SFA (against criminal liability under section 253 of the SFA or civil liability under section 254 of the SFA) is available, and some letters expressly qualify that no such opinion is given.

3.3 An RTF Letter, on the other hand, provides a confirmation of belief that the statements made in the Disclosure Document are ostensibly and materially responsive to the disclosure requirements under Singapore law and regulations that apply to the form of the Disclosure Document (for instance, the disclosure requirements in the Sixteenth Schedule to the Securities and Futures (Offers of Investments) (Securities and Securities-based Derivatives Contracts) Regulations 2018 that apply to offer information statements used in rights issues). The RTF Letter does not provide any confirmation as to (and hence the law firm issuing it does not pass upon or assume responsibility for) the accuracy or completeness of the disclosures in the Disclosure Document (regardless of the work done by the law firm) and, to this end, may typically include a specific assumption that the statements in the Disclosure Document are correct and complete. The lower threshold of comfort provided under an RTF Letter is due to the arguably lower risk profile for the reason that (a) in the case of a documented secondary offering, an issuer that is already listed on the SGX-ST would have already been subject to the continuing disclosure and governance requirements of the SGX-ST; and (b) in the case of a listing by introduction that does not involve the issue and registration of a Prospectus, no civil or criminal liability on the issue managers and underwriters would arise under sections 253 and 254 of the SFA in relation to the contents of the Disclosure Document that is an introductory document.

4. Developments

4.1 In February 2023, the MAS issued its Notice ("**CF Notice**") on Business Conduct Requirements for Corporate Finance Advisers ("**CF Advisers**"). Part 2 of the CF Notice sets out the due diligence requirements for various types of transactions. Paragraphs 7 and 8 of the CF Notice also imposes an obligation on a CF Adviser to prepare, maintain and retain records necessary to meet the requirements under the CF Notice. In June 2023, the MAS issued a set of Frequently Asked Questions ("**FAQs**") on the CF Notice.

4.2 Prior to, and following, the issue of the CF Notice, Disclosure Letters issued in the Singapore context typically disclaim or qualify that no opinion is given as to whether a defence under section 255 of the SFA (against criminal liability under section 253 of the SFA or civil liability under section 254 of the SFA) is available, and some letters expressly qualify that no such opinion is given.

4.3 Question 25 ("**Q25**") of the FAQs further addresses whether CF Advisers may rely on expert opinions to make an assessment of the accuracy and completeness of the information in a Prospectus or offer information statement. In this regard, MAS has made clear that:

> "*CF advisers must satisfy themselves that their reliance on the conclusions or opinions of an expert is reasonable. This includes making an assessment of and being satisfied with the knowledge, skills, experience, and qualifications of the expert, considering the scope of work conducted by the expert, and reviewing the report provided by the expert as set out in paragraph 31 to 34 of the CF Notice.*
>
> *CF advisers should <u>not</u> place undue reliance on opinions provided for which the expert does not have the necessary knowledge, skills, experience or qualifications."*

4.4 Paragraphs 31 to 34 of the CF Notice referred to in Q25 of the FAQs provide:

"***Relying on Experts***

31 A corporate finance adviser must have reasonable grounds to be satisfied with —

(a) the knowledge, skills and experience;

(b) the qualifications; and

(c) the independence, of any expert appointed by the listing applicant (or where the listing applicant is a business trust or a collective investment scheme constituted as a trust, its trustee manager or manager respectively) for the purposes of providing an expert's opinion in connection with the listing application.

32 The corporate finance adviser must —

(a) consider whether the scope of work to be undertaken by an expert mentioned in paragraph 31 and the resources to be applied by the expert to the engagement are appropriate to achieve the objective of the expert's engagement (to the extent a reasonable non-expert could make such an assessment); and

(b) propose to the customer additional services or due diligence where the corporate finance adviser is of the view that it is necessary in a particular case.

33 A corporate finance adviser must satisfy itself that its reliance on the conclusions or opinions of any report prepared by an expert mentioned in paragraph 31 is reasonable.

34 Without prejudice to the generality of paragraph 33, a corporate finance adviser must, in relation to the report mentioned in paragraph 33 —

(a) review the report critically (to the extent a non-expert could make such an assessment), and compare the information in the report against the entirety of all other information known to the corporate finance adviser obtained through due diligence and its own knowledge of and experience with —

(i) where the listing applicant is a business trust or a collective investment scheme constituted as a trust — the listing applicant, its controlling unitholders, its trustee-manager or manager (as the case may be) its key executives, and the directors and controlling shareholders of the trustee-manager or manager;

(ii) in any other case — the listing applicant, its key executives, its directors, and its controlling shareholders;

(b) where there are any material discrepancies within the report, or between the report and other information known to the corporate finance adviser, including any material omissions, conduct follow-up investigation, including, where necessary, engaging an independent party to conduct a review of the report and the information known to the corporate finance adviser to assess whether the information in the expert report can be relied upon and should be incorporated in the listing application; and

(c) assess (to the extent a non-expert could make such an assessment) whether material bases, assumptions and qualifications (such as significant accounting policies and estimates in the case of financial information) in the report are fair, reasonable and complete."

4.5 In August 2023, MAS updated the FAQs with Q24A ("**Q24A**") which provides as follows:

24A. In the conduct of an IPO, RTO or business combination by a SPAC, are 'comfort *letters' (e.g. in the style of a US 10-b-5) issued by third party service providers required? Should CF advisers rely on comfort letters provided by third party service providers in discharging their due diligence obligations under the CF Notice?*

A comfort letter is not a requirement and the existence of such a letter, by itself, is insufficient to establish that a CF adviser has met with its due diligence obligations in the CF Notice. Undue weight should not be placed on such a letter, which may give rise to concerns that a CF adviser has over-relied on the third party service provider during the due diligence process. The CF adviser remains responsible for meeting all due diligence obligations under the CF Notice.

4.6 For the purpose of Q25 of the FAQs read with paragraphs 31 to 34 of the CF Notice, Singapore law practitioners would not be experts in matters that are non-legal in nature and which do not relate to Singapore law. For instance, Singapore law practitioners would not be experts in the business or financial condition of an issuer of securities. It follows that it would not be reasonable to rely on Singapore legal practitioners in respect of such matters. The negative assurance contained in Disclosure Letters does not address or bridge any gap in respect of the sufficiency of the due diligence conducted by CF Advisers for the purposes of the CF Notice; instead, CF Advisers would have to maintain proper documentation and records of the due diligence carried out by them as required by the CF Notice.

4.7 Practitioners should also note Q24A of the FAQs, which would cover Disclosure Letters and RTF Letters. Accordingly, practitioners should be mindful that such letters are not a requirement and are insufficient to establish that CF advisers have met their due diligence obligations. Additionally, such letters, if given undue weight by CF advisers, may give rise to concerns that a CF adviser has over-relied on the lawyers during the due diligence process.

4.8 In view of the foregoing, to the extent that Disclosure Letters are provided in the limited circumstances where a Prospectus is issued and registered by the MAS or SGX-ST acting as agent on behalf of MAS in connection with a listing on the SGX-ST, and RTF Letters are only provided in the case of a documented secondary offering involving the issue of an offer information statement or a listing by introduction involving the issue of an introductory document, Singapore law practitioners should be mindful of and not undermine the intent of paragraphs 31 to 34 of the CF Notice read with Q24A and Q25 of the FAQs when they issue such Disclosure Letters or RTF Letters. It is not recommended that Disclosure Letters or RTF Letters be issued in any other circumstances.

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THE COUNCIL OF THE LAW SOCIETY OF SINGAPORE