

EXPLANATORY MEMORANDUM

This Explanatory Memorandum explains the notification dated 7 September 2009, issued by the Info-communications Development Authority of Singapore (“**IDA**”) to Nucleus Connect Pte Ltd (“**Nucleus Connect**”), notifying Nucleus Connect of the necessary modifications to be made to Nucleus Connect’s proposed Model Confidentiality Agreement (“**MCA**”).

Introduction

1. Nucleus Connect submitted its proposed MCA to IDA for approval on 17 August 2009, whereupon IDA proceeded to conduct a consultation on the proposed MCA on 18 August 2009. At the close of the consultation on 28 August 2009, IDA received comments from two respondents.
2. In reviewing Nucleus Connect’s proposed MCA and the comments received from the consultation, IDA adopted the following approach and principles:
 - (a) IDA conducted a general review of Nucleus Connect’s proposed MCA to ensure that the terms and conditions would be: (i) fair and reasonable; (ii) promote the principles of the OpCo Interconnection Code 2009; and (iii) contain reasonable safeguards to protect and govern the preservation of commercially-sensitive information disclosed by parties during negotiations on the provision of services by Nucleus Connect;
 - (b) In striking a balance, IDA is cognisant that the protection afforded under the MCA should be sufficient and adequate to allow the negotiating parties to comfortably disclose confidential information to each other, yet not extend beyond what is necessary to protect the parties’ legitimate commercial interests. In this respect, parties to the MCA should only be subject to obligations that are feasible and practicable, and neither party should be burdened with any unnecessary or overly onerous obligations;
 - (c) Where respondents submitted comments on specific terms and conditions in the proposed MCA, IDA has carefully considered whether these comments were reasonable and necessary, and will determine if any modification was required; and
 - (d) In considering these comments, IDA also took into consideration that the MCA could potentially apply beyond the negotiation of a Customised Agreement (e.g., situations where parties need to discuss the provision of services by Nucleus Connect via its

ICO), as it is possible for Confidential Information to be disclosed between the parties in such instances¹.

3. Unless otherwise provided, all capitalised terms used in this Explanatory Memorandum shall have the same meanings as in the accompanying notification and/or the proposed MCA.

Required Modification to Recital B of the MCA

4. IDA is of the view that the proposed MCA does not lend sufficient clarity on what the Receiving Party could use the Confidential Information for. In this regard, IDA considers that there is merit in revising Recital B, to further clarify the purpose for which the Confidential Information can be used by the Receiving Party (i.e., for the purpose of negotiating the provisioning of services by Nucleus Connect to Contracting QP). Accordingly, IDA requires Nucleus Connect to amend Recital B to reflect the above. For Nucleus Connect's reference, IDA considers the following amendment as acceptable:

“The Receiving Party agrees to maintain the confidentiality and not disclose the Confidential Information (hereinafter as defined below) to any other person, and only use that Confidential Information for the limited purpose of negotiating the provisioning of services by Nucleus Connect to Contracting QP, and subject to the terms and conditions of this Agreement.”

Required Modification to Clause 9 of the MCA

5. One respondent has commented that it is inconsistent for the Receiving Party's obligation under Clause 9 to be limited to only two of the four classes of Authorised Persons in Clause 8 (namely, the Receiving Party's professional and financial advisers under Clauses 8(b) and 8(c), respectively).
6. IDA considers that there is merit in this comment, and that there is no justifiable basis for limiting the application of Clause 9 to only Authorised Persons contemplated under Clauses 8(b) and 8(c) of the MCA. Hence, IDA requires Clause 9 to be modified to apply to all classes of Authorised Persons under Clause 8.
7. IDA also notes that the steps to be taken by the Receiving Party under Clause 9 for the protection of Confidential Information disclosed to Authorised Persons are reasonable and necessary. Where the Receiving Party discloses Confidential Information to its Authorised Persons to further its own purpose, the Receiving Party must accept

¹ While the NetCo MCA currently applies only when parties are negotiating a Customised Agreement, IDA is currently considering whether amendments to the NetCo MCA are required to align the approach for both NetCo and OpCo.

the corresponding duty to ensure that its Authorised Persons adhere to the same confidentiality safeguards. Further, these steps themselves are neither onerous nor burdensome. Under Clause 9, the Receiving Party is required to notify its Authorised Person(s) that he is obliged to protect Confidential Information in a manner consistent with the MCA, as well as take reasonable steps to ensure that the Authorised Person(s) safeguards this confidentiality.

8. Accordingly, IDA requires Nucleus Connect to amend Clause 9 to apply to all classes of Authorised Persons contemplated under the MCA. For Nucleus Connect's reference, IDA considers the following amendment as acceptable:

“The Receiving Party may disclose some or all of the Confidential Information to the Authorised Person(s) provided that prior to a disclosure ~~under clauses 8(b) and 8(c)~~, the Receiving Party must inform the Authorised Person(s) that he is obligated to protect the Disclosing Party's Confidential Information in a manner consistent with this Agreement and shall take reasonable steps to ensure that the Authorised Person(s) safeguards the Confidential Information. In any event, the Receiving Party shall remain liable for any disclosure by the Authorised Person(s) to any other person.”

Required Modification to Clause 10 of the MCA

9. One respondent has commented that Clause 10 should be modified to include explicit reference to the Related Corporation's employees, as well as render the Related Corporation and the Receiving Party jointly and severally liable for a breach by the former's employees.
10. With regard to the comment on Related Corporation's employees, IDA does not consider this necessary because the Related Corporation's undertaking under Clause 10 already binds its employees to maintain confidentiality. On the comment to make the Receiving Party jointly and severally liable, IDA notes that the Receiving Party is the entity that is ultimately held responsible for any breaches of confidentiality. Therefore, in the event of breach by the Related Corporation (or its employees), the Disclosing Party's has recourse against the Receiving Party. IDA takes the view that this is adequate remedy for the Disclosing Party.
11. Nevertheless, IDA recognises that Clause 10 can be modified to make clear beyond a doubt that the Disclosing Party will have recourse against the Receiving Party for breaches by its Related Corporation.
12. Therefore, IDA requires Nucleus Connect to modify Clause 10 to clarify that the Receiving Party remains liable to the Disclosing Party for any

breaches by its Related Corporation. For Nucleus Connect's reference, IDA considers the following amendment as acceptable:

"A Receiving Party may disclose Confidential Information to a Related Corporation to the extent necessary to facilitate discussions on the Proposed Transaction, subject to the Related Corporation undertaking to comply with obligations equivalent to those contained in this Agreement. Notwithstanding, the Receiving Party shall at all times remain liable to the Disclosing Party for any disclosure by the Related Corporation of Confidential Information to any other person."

Required Modification to Clauses 22, 23, 24 and 29 of the MCA

13. There are editorial errors in the reference to "parties" and "party" in these clauses. IDA requires Nucleus Connect to make the necessary editorial amendments by replacing "parties" with "Parties", and "party" with "Party", where appropriate.