Charltons - Hong Kong Law Newsletter - 24 May 2012

[online version](http://www.charltonslaw.com/securities-and-futures-commission-publishes-consultation-paper-on-the-regulation-of-sponsors/)

# Securities And Futures Commission Publishes Consultation Paper On The Regulation Of Sponsors

## Introduction

The Securities and Futures Commission (**SFC**) published a consultation paper (**Consultation Paper**) in May 2012 to seek views and comments on its proposals concerning the conduct of sponsors in meeting their responsibilities in connection with new listings on the Stock Exchange of Hong Kong (**SEHK** or the **Exchange**). The consultation will end on 6 July 2012.

The proposals seek to amend the SFC’s Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (**Code of Conduct**) and the Companies Ordinance. In the first part of the Consultation Paper relating to the SFC’s licensing regime for sponsors, the SFC proposes to set out and consolidate the key standards and requirements for sponsor conduct in a new paragraph 17 of the Code of Conduct (**Provisions**). The second part of the Consultation Paper proposes clarifying that sponsors have civil and criminal liability for untrue statements in a prospectus under the Companies Ordinance.

The proposals cover the following areas: (1) due diligence; (2) reliance on experts; (3) reliance on non-expert third parties to conduct due diligence; (4) provision of information to regulators; (5) publication of first draft of listing documents; (6) record-keeping; (7) resources, systems and procedures; (8) principals; (9) multiple sponsors; and (10) prospectus liability.

The Consultation Paper is available on [the SFC’s website](https://www.sfc.hk/sfcConsultation/EN/sfcConsultFileServlet?name=sponsorrglt&type=1&docno=1).

The questions raised by the Consultation Paper can be viewed here. The SFC's summary of the proposed Provisions and applicable sources can be viewed [here](#appendixB).

## Background

In April 2012, the SFC revoked a sponsor’s licence to advise on corporate finance and fined it $42 million for failing to discharge its sponsor’s duties in relation to a listing application. The SFC’s investigation revealed a number of failures including: (1) inadequate and sub-standard due diligence work; (2) failure to act independently and impartially; (3) inadequate audit trail of due diligence work; (4) inadequate supervision of its staff; and (5) breach of its sponsor’s undertaking and filing an untrue declaration with the Exchange.[[1]](#footnote-26)

The SFC states in the Consultation Paper that standards of sponsor work have fallen short of reasonable expectations. In a number of cases, sponsors did not substantially complete due diligence before making a listing application and fundamental issues frequently only surface well after the submission of listing application. These deficiencies may have affected draft listing documents. The SFC also comments that many listing documents suffer from being too long, being difficult to read and their content being driven by a desire to avoid liability instead of a desire to inform investors. Such failures suggest that sponsors often over-rely on the regulatory commenting process in the making of listing applications and preparation of listing documents.

With the proposals, the SFC aims to provide a regulatory basis for defining the expected quality of sponsor work for the benefit of public investors and other stock market participants.

## Summary Of Proposals – New Requirements

### 1. Due Diligence

#### Work required before submission of listing application

Under the Listing Rules, a sponsor is required to conduct reasonable due diligence inquiries to enable it to make a declaration (Declaration) to the Exchange that a listing applicant fulfills principal listing requirements at the time of issue of a listing document. Under the proposals, a sponsor will be required to complete all reasonable due diligence on the listing applicant before submitting a listing application, save only any matters that by their nature can only be dealt with at a later date (e.g. material developments after the submission of listing application). In other words, a sponsor will be required to conduct due diligence work earlier in the listing application process than under the existing requirements.

To codify the current expectation in the Listing Rules that an advanced proof (**Application Proof**) of the listing document should be submitted with a listing application, it is also proposed that a sponsor should come to a reasonable opinion that the information in the Application Proof is substantially complete before submitting a listing application.

In order to resolve fundamental issues concerning eligibility criteria, internal systems and controls and the credentials of directors at an early stage of the listing process, the SFC proposes to require a sponsor to come to a reasonable opinion before the submission of a listing application that the listing applicant has complied with all applicable listing conditions, has established adequate internal systems to ensure compliance with the Listing Rules and other applicable regulatory requirements and that the directors have the necessary experience, qualifications and competence. This approach is similar to the approach in the UK, where a sponsor must not submit a listing application to the Financial Services Authority (**FSA**) unless it comes to a reasonable opinion that certain requirements are met.

In order that the Exchange and the SFC have all relevant information to consider whether a listing applicant is suitable for listing, it is proposed that a sponsor, when submitting an application, should identify and disclose to the regulators all material issues known to it which, in its reasonable opinion, are necessary to determine whether the applicant is suitable for listing and whether its listing is contrary to public interest. This requirement also exists in the UK.

#### Disclosure of expert sections and due diligence on expert reports

Under the Listing Rules, a sponsor is not required to perform the work of an expert, or to address issues in the expert sections of the listing document which only an expert with specialised knowledge and qualifications is able to deal with. The SFC however proposes that at the time of issue of a listing document, a sponsor should be in a position to demonstrate that it is reasonable for it to rely on the expert sections of the listing document based on its knowledge of the listing applicant.

The proposed Provisions set out typical steps a sponsor should take in order to demonstrate reasonable reliance on an expert report, including (among others):

1. The sponsor should confirm that the expert is appropriately qualified and experienced, the bases and assumptions adopted by the expert are fair and reasonable, the experts’ scope of work is appropriate to the opinion and the expert is independent from the listing applicant;
2. The sponsor should ensure that factual information on which an expert relies is consistent with the sponsor’s knowledge of the applicant including that derived from its other due diligence work;
3. Where factual information is solely or primarily derived from management’s representations and confirmations, the sponsor, unless the expert has done so, should make independent inquires or assessments or obtain independently sourced information to verify the accuracy and completeness of the information; and
4. The sponsor should corroborate information obtained from different sources to ensure that it is consistent.

### 2. Communications with the Regulators

The SFC proposes to create positive obligation on a sponsor to disclose to the Exchange in a timely manner any material information relating to a listing applicant or listing application concerning non-compliance with the Listing Rules or other regulatory requirements as soon as it is aware of it. If a sponsor ceases to act for a listing applicant during the listing application process, it is required to inform the Exchange in a timely manner of the reasons for ceasing to act. Under existing requirements, the obligation on a sponsor to inform the regulators only arises when it is contacted by the regulators.

### 3. Publication of Application Proof of Listing Documents

The SFC proposes that the Application Proof of a listing documents submitted with a listing application should be made available on the Exchange website when the application is made. The SFC states that it is satisfied that publication will not result in the Application Proof being considered to be a prospectus, an extract from or abridged version of a prospectus, an advertisement in relation to a prospectus or proposed prospectus under the Companies Ordinance, or a prohibited advertisement under the Securities and Futures Ordinance (SFO).

### 4. Proper Records

The SFC notes that in its inspections of sponsor activities, it has come across a number of sponsors who did not keep proper documentation and records of their due diligence work, as is required under the Listing Rules and the Corporate Finance Adviser Code of Conduct (**CFA Code**). It notes examples of sponsors recording the holding of a meeting or making of a telephone call, but failing to keep detailed notes of the discussions and rationale for decisions made.

The SFC proposes that a complete set of a sponsor’s records in connection with a listing transaction should be retained in Hong Kong for at least seven years after completion or termination of the transaction.

In addition, the SFC proposes to include in the Provisions requirement that a sponsor should maintain adequate records in relation to the sponsor’s work. These records should be sufficient to demonstrate (among others) that the sponsor has performed proper due diligence, has complied with all applicable legal and regulatory requirements and has turned its mind to the question of what inquiries are necessary and reasonable.

### 5. Management Oversight

Existing requirements in the Code of Conduct prescribe that a sponsor’s Management[[2]](#footnote-36) should assume full responsibility for the firm’s operations including the development, implementation and on-going effectiveness of the firm’s internal controls. The SFC notes in the Consultation Paper that deficiencies are commonly found in sponsors’ monitoring of the due diligence plan’s implementation, reviewing the standard and extent of due diligence and the performance of Principals and other staff, and providing guidance on handling difficult and sensitive situations. With particular regard to sponsor work and the due diligence exercise, the SFC proposes to create specific obligations on the Management to supervise key issues, including but not limited to:

1. accepting a mandate to act as a sponsor;
2. monitoring the implementation of the due diligence plan;
3. ensuring that sufficient persons with appropriate levels of knowledge, skills and experience are devoted to each assignment over the period of the assignment;
4. reviewing the standard and extent of due diligence work, and the performance of the Principals and the Transaction Team; and
5. resolving suspicious circumstances, difficult or sensitive issues, conflicting information and material non-compliance.

### 6. Fee Structure

Although not expressly covered in the proposed Provisions, the SFC is concerned that sponsors’ fees frequently fail to reflect the amount of work required of a sponsor and the responsibilities associated with being a sponsor. The SFC is of the opinion that by not allocating an appropriate amount of the overall fee to the sponsor’s role, firms may risk sending a signal to their staff and clients that the sponsor’s role is less important than the bookbuilding and other service provided on IPOs and thus compromise the standard of sponsor work.

The SFC also states its view that “no deal, no fee” arrangements should be avoided.

### 7. Sponsor Principals

Under the Additional Fit and Proper Guidelines for Corporations and Authorised Financial Institutions applying or continuing to act as Sponsors and Compliance Advisers (**Sponsor Guidelines**), the requirements for an individual wanting to qualify as a Principal of a sponsor include, among other things, that he has played a “substantial role” in advising listing applicants in the five years immediately preceding his appointment as a Principal. Such experience must be obtained in the capacity of a sponsor, in at least two completed IPO transactions on the Main Board or the GEM Board of the Exchange.

Market feedback received by the SFC as to how to address the challenge faced by sponsors in securing the services of individuals who qualify as Principals includes the following proposals:

1. that the eligibility criteria for Principals be expanded by the SFC to recognise relevant experience acquired overseas in comparable jurisdictions;
2. that there be greater emphasis on experience in the area of due diligence, either in Hong Kong or elsewhere;
3. that new examinations be introduced for Principals which test an applicant’s knowledge of sponsor work and the regulatory regime which governs the conduct of sponsors in Hong Kong; and
4. that new examination requirements be imposed on individuals seeking to be licensed as Type 6 representatives accredited to sponsors.

The SFC invites comments on the current eligibility criteria for Principals and the proposed amendments to these criteria.

### 8. Multiple Sponsors

Noting the common practice of appointing multiple sponsors for IPO transactions, the SFC raises concerns that this may have affected the standard of sponsors’ work. The SFC therefore proposes that there should only be one sponsor for an IPO transaction.

Alternatively, if more than one sponsor is allowed, the SFC proposes that all sponsors must meet the independence requirement of rule 3A.07 of the Listing Rules. At present, an entity that does not meet the independence requirement is nevertheless allowed to act as a sponsor so long as another entity meeting the independence requirement is also appointed as a sponsor.

If more than one sponsor is allowed, the SFC further proposes to clarify in the Code of Conduct that:

1. the appointment of more than one sponsor does not relieve any of the sponsors of any of their responsibilities under the Code of Conduct; and
2. all sponsors are jointly and severally responsible for complying with the requirements under the Code of Conduct in relation to the listing application.

The SFC is concerned that joint and several responsibility can imply that each sponsor should have access to and actively review each other’s work to assure themselves of the overall quality of work done. This may be difficult to achieve and as a result, it may be more effective and efficient to have just one sponsor.

The SFC also clarifies that in proposing to only allow one sponsor, it is not seeking to prescribe any limitations as to the number or identity of the institutions taking on other roles in an IPO such as global coordinators, book-runners, managers, other underwriters and financial advisers.

### 9. Prospectus Liability

The SFC proposes to amend the Companies Ordinance to state expressly that sponsors are civilly and criminally liable for untrue statements (including material omissions) in a prospectus. The SFC is of the view that this would further encourage sponsors to prepare and review prospectus disclosures critically so as to provide a high level of assurance that the information disclosed is accurate, relevant, concise and meaningful for investors.

The proposed explicit statement of sponsor liability would mean that sponsors could face legal actions brought by IPO investors and criminal proceedings. As the prospectus liability provisions of the Companies Ordinance are “relevant provisions” for the purposes of the SFO, the SFC would further be able to conduct investigations and apply to the Court of First Instance for remedial actions.

For the purpose of the proposed provisions, the SFC proposes to define “sponsor” to mean any licensed corporation or registered institution that is licensed or registered under the SFO for Type 6 regulated activity and permitted under its licence or certificate of registration to undertake work as a sponsor and that is appointed as a sponsor under the Listing Rules.

## Consolidation of Other Existing Requirements

### 10. Know-your-client Requirement

The SFC proposes to include the existing “know your client” requirement under the CFA Code in the Code of Conduct in the context of a listing application. A sponsor will be required to have a sound understanding of a listing applicant, including its history and background, business and performance, financial condition and prospects, operations and structure, procedures and systems, as well as the directors, key senior managers and controlling shareholders of the listing applicant.

### 11. Advice on Regulatory Requirements

The SFC proposes to clarify the principle that a sponsor should advise and guide a listing applicant and its directors as to their responsibilities under the Listing Rules and other applicable regulatory requirements and take all reasonable steps to ensure that they understand and meet these responsibilities at all stages of the listing application process. Moreover, the sponsor should provide appropriate advice to the listing applicant on any material deficiencies in relation to its operations and structure, procedures and systems, or its directors and key senior managers and ensure that any material deficiencies are remedied prior to the submission of a listing application. Such requirement is similar to the existing one under the CFA Code.

### 12. Overall Disclosure in Listing Documents

The SFC proposes that the Code of Conduct should require a sponsor, after reasonable due diligence, to ensure that at the time of issue a listing document contains sufficient particulars and information to enable a reasonable person to form a valid and justifiable opinion of the financial condition and profitability of the listing applicant.

The SFC also proposes to replicate in the Code of Conduct the existing requirement under the Listing Rules that a sponsor is required, after reasonable due diligence, to have reasonable grounds to believe and does believe that at the time of issue of a listing document, the information in the non-expert sections is true, accurate and complete in all material respects and that there are no material omissions.

### 13. Allocation of Sufficient Staff

The SFC proposes to include in the Provisions an obligation for a firm to ensure that, taking account of other commitments, it has sufficient staff with appropriate levels of knowledge, skills and experience to devote to the assignment throughout the period of the assignment. This is similar to the existing requirements under the Code of Conduct and the Sponsor Guidelines.

The SFC also proposes to transfer from the Sponsor Guidelines to the Code of Conduct the requirement that the Management of a firm should appoint a team comprising corporate finance staff (**Transaction Team**) with at least one Principal, with appropriate skills and expertise, to carry out each sponsor engagement having regard to the size, complexity and nature of the sponsor work. The transferred provisions will be deleted from the Sponsor Guidelines.

### 14. Overall manager of a public offer

The SFC proposes to transfer from the CFA Code to the Code of Conduct the duties of a sponsor to act as the overall manager of the public offer process and ensure sufficient arrangements are in place so that the public offer is conducted in a fair and orderly manner. The transferred provisions will be deleted from the CFA Code.

### 15. Information provided to analysts in new listings

The SFC proposes to transfer from the CFA Code to the Code of Conduct the requirement that a sponsor should take reasonable steps to ensure that all material information, including forward-looking information (whether quantitative or qualitative) disclosed or provided to analysts is contained in the relevant listing document. The transferred provision will be deleted from the CFA Code.

## How To Respond To The Consultation Paper

Any person wishing to comment on the proposals may submit written comments in following ways:

by mail to:

Securities and Futures Commission 8th Floor, Chater House 8 Connaught Road Central Hong Kong Re: Consultation Paper on the regulation of sponsors

by tax to:

(852) 2810-5385

by on-line submission at:

http://www.sfc.hk/sfc/html/EN/speeches/consult/consult.html (no longer active) (or, enter into the subsection “Consultation Papers and Conclusions” under the section “Speeches, Publications and Consultations” on [the SFC’s website](http://www.sfc.hk)

by e-mail to:

sponsors@sfc.hk

## Appendix A - Questions of the Consultation Paper

* Do you agree a sponsor should have a sound understand of a listing applicant for which it acts?

If not, why not?
	+ Do you agree that a sponsor should advise and guide a listing applicant and its directors as to their responsibilities under the Listing Rules and other applicable regulatory requirements and take all reasonable steps to ensure that all stages of the listing application process they understand and meet these responsibility?

	If not, why not?
		- Do you agree that a sponsor should provide appropriate advice and recommendations to a listing applicant on any material deficiencies identified in relation to its operations and structure, procedures and systems, or its directors and key senior managers and ensure that any material deficiencies are remedied prior to the submission of a listing application?

		If not, why not?
			* Do you agree that before submitting a listing application a sponsor should complete all reasonable due diligence on the listing applicant save only any matters that by their nature can only be dealt with at a later date?

			If not, why not?
				+ Do you agree that before submitting a listing application a sponsor should come to a reasonable opinion that the information in the Application Proof is substantially complete?

				If not, why not?

Do you agree that before submitting a listing application a sponsor should come to a reasonable opinion that the applicant has complied with all applicable listing conditions (except to the extent that waivers from compliance have been applied for), has established adequate systems and procedures and the directors have the necessary experience, qualifications and competence?

If not, why not?

Do you agree that a sponsor should ensure that all material issues known to it which, in its reasonable opinion, are necessary for the consideration of the application as described in paragraph 57 above are disclosed to the regulators when submitting a listing application?

If not, why not?

Do you agree that a sponsor, after reasonable due diligence, should ensure that at the time of issue a listing document contains sufficient particulars and information to enable a reasonable person to form a valid and justifiable opinion of the financial condition and profitability of the listing applicant?

If not, why not?

Do you agree that a sponsor, after reasonable due diligence, should have reasonable grounds to believe and does believe that at the time of issue of a listing document the information in the non-expert sections is true, accurate and complete in all material respects and that there are no material omissions?

If not, why not?

Do you agree that at the time of issue of a listing document a sponsor should be in a position to demonstrate that it is reasonable for it to rely on the expert sections of the listing document?

If not, why not?

Do you agree that the sponsor should take these steps in connection with an expert report? Are the steps set out in paragraph 17.6(g) of the draft Provisions sufficient and appropriate?

If not, why not?

Do you agree that a sponsor cannot delegate responsibility for due diligence?

If not, why not?

Are the steps we propose a sponsor should take when seeking assistance from a third party in its due diligence work sufficient and appropriate?

If not, why not?

Do you agree that a sponsor should reasonably satisfy itself that all information provided to the Stock Exchange and the SFC during the listing application process is accurate, complete and not misleading and, if it becomes aware that the information provided does not meet this requirement, the sponsor should inform them promptly?

If not, why not?

Do you agree that a sponsor should deal with all enquires raised by the regulators in cooperative, truthful and prompt manner?

If not, why not?

Do you agree that a sponsor should disclose to the Stock exchange n a timely manner any material information relating to a listing applicant or listing application of which it becomes aware which concerns non-compliance with the Listing Rules or other applicable legal or regulatory requirements?

If not, why not?

Do you agree that if a sponsor ceases to act for a listing applicant during the listing application process, it is required to inform the Stock Exchange in a timely manner of the reasons for ceasing to act?

If not, why not?

Do you agree that the Application Proof submitted with a listing application should be made publically available when the application is made?

If not, why not?

Do you agree that a sponsor’s records should be sufficient to demonstrate that the sponsor has complied with all applicable legal and regulatory requirements and in particular compliance with the Provisions?

If not, why not?

Do you agree that a complete set of a sponsor’s records in connection with a listing transaction should be retained in Hong Kong for at least seven years after completion or termination of the transaction?

If not, why not?

Do you agree that before accepting any appointment as a sponsor, a firm should ensure that, taking account of other commitments, it has sufficient staff with appropriate levels of knowledge, skills and experience to devote to the assignment throughout the period of the assignment?

If not, why not?

Do you agree that the provisions of the Sponsor Guidelines concerning the Transaction Team should be transferred to the Code of Conduct?

If not, why not?

Do you agree that a sponsor should maintain effective systems and procedures to ensure that an appropriate due diligence plan is formulated, updated as necessary and implemented in respect of each assignment and there are clear and effective reporting lines to ensure that key issues are escalated to Management for deliberation?

If not, why not?

Do you agree that a sponsor’s Management is obliged to adequately supervise the performance of due diligence including but not limited to the key issues discussed in paragraph 97?

If not, why not?

Which, if any, of the proposals in paragraph 103 would achieve the objectives enlarging the category of individuals qualified to act as Principals whilst not affecting the overall quality of sponsor work?

Do you have alternative suggestions to address the issues?

Do you agree that there should only be one sponsor on each engagement?

If you do not agree, should the number of sponsors be limited and, if so, to how many?

If you do not agree that the numbers of sponsors should be limited, why not?

* If more than one sponsor is allowed, do you agree that they should all be required to meet the Listing Rules independence requirements?

If not, why not?
	+ Do you agree that if more than one sponsor is appointed each sponsor’s responsibilities should remain unaffected and that each sponsor should comply with all the expectations of a sponsor?

	If not, why not?
		- Do you agree that the provisions of the CFA code relating to the management of a public offer should be transferred to the Code of Conduct?

		If not, why not?
			* Do you agree that the obligation in the CFA Code relating to the provision of information to analysts should be transferred to the Code of Conduct?

			If not, why not?
				+ Do you agree that the Provisions should equally apply to a listing agent appointed for the listing of a REIT?

				If not, why not?

Do you agree that it should be made clear that sponsors are liable for untrue statements (including material omissions) in a prospectus?

If not, why not?

Do you have any views on the proposed definition of “sponsor”?

Please explain your views.

## Appendix B - Summary of Proposed Provisions and Applicable Sources

Proposed Provision

Existing Requirement (Source Rule)

1

A sponsor should have a sound understanding of a listing applicant, including its history and background, business and performance, financial condition and prospects, operations and structure, procedures and systems, as well as the directors, key senior managers and (where applicable) controlling shareholders of the listing applicant. (Paragraph 17.3(a))

Unless the circumstances do not require, a CFA should understand the business of its client. In particular, a CFA should (a) obtain at the outset, information regarding its client’s background, the nature of its business, and if the client is a company, the identity of its controlling shareholders(s), and its shareholding structure; and (b) understand the financial circumstances and investment or corporate objectives in relation to the transaction under consideration. (CFA Code 6.1)

2

A sponsor should advise and guide a listing applicant and its directors as to their responsibilities under the Listing Rules and other applicable regulatory requirements and take all reasonable steps to ensure that at all stages of the listing application process they understand and meet these responsibilities. A sponsor should provide appropriate advice and recommendations to the listing applicant on any material deficiencies identified in relation to its operations and structure, procedures and systems, or its directors and key senior managers and ensure that any material deficiencies are remedied prior to the submission of a listing application. (Paragraph 17.3(b))

A CFA should use all reasonable efforts to ensure that its client understands the relevant regulatory requirements and their implications at all stages of a transaction. (CFA Code 6.3)

3

Before submitting a listing application, a sponsor should complete all reasonable due diligence on the listing applicant save only any matters that by their nature can only be dealt with at a later date. (Paragraph 17.4(a))

-

4

Before submitting a listing application, a sponsor should come to a reasonable opinion that the information in the Application Proof is substantially complete. (Paragraph 17.4(b))

The Stock Exchange expects to receive an advanced proof of the prospectus with the listing application form that is not the initial proof so that the Stock Exchange’s review can commence immediately. The Stock Exchange expects that requisite information in accordance with the relevant listing rules can only be substantially completed in the advanced proof. If the Stock Exchange considers the draft prospectus as submitted not to be in advanced form, it will not commence the review and will return all application documents, including the draft prospectus, to the sponsor. (LR 9.03(3))

5

Before submitting a listing application, a sponsor should come to a reasonable opinion that:

1. the applicant has complied with all applicable listing conditions (except to the extent that waivers from compliance have been applied for);
2. the applicant has established adequate systems and procedures to ensure compliance with the Listing Rules and other applicable legal and regulatory requirements and enable its directors to make a proper assessment of the applicant’s financial condition and prospects; and
3. the directors have the necessary experience, qualifications and competence. (Paragraph 17.4(c))

A sponsor must confirm to the Stock Exchange on or before the date of issue of the listing document that:

1. the listing applicant fulfils all listing conditions (except to the extent that compliance with those rules has been waived by the Stock Exchange);
2. the listing document contains sufficient particulars and information to enable a reasonable person to form a valid and justifiable opinion of the financial condition and profitability of the listing applicant;
3. the information in the non-expert sections is true in all material respects and does not omit material information;
4. the listing applicant has established adequate procedures, systems and controls; and
5. the directors have the necessary experience, qualifications and competence. (LR 3A.15)

6

A sponsor should ensure that all material issues known to it which, in its reasonable opinion, are necessary for the consideration of whether the applicant is suitable for listing and whether the listing of the applicant’s securities is contrary to the interest of the investing public or to the public interest are disclosed to the regulators when submitting a listing application. (Paragraph 17.4(b))

-

7

A sponsor, after reasonable due diligence, should ensure that at the time of issue a listing document contains sufficient particulars and information to enable a reasonable person to form a valid and justifiable opinion of the financial condition and profitability of the listing applicant. (Paragraph 17.5(a))

A sponsor must confirm to the Stock Exchange on or before the date of issue of the listing document that the listing document contains sufficient particulars and information to enable a reasonable person to form a valid and justifiable opinion of the financial condition and profitability of the listing applicant. (LR 3A.15 and see paragraph 5(b) above)

8

A sponsor, after reasonable due diligence, should have reasonable grounds to believe and does believe that at the time of issue of a listing document the information in the non-expert sections is true, accurate and complete in all material respects and that there no material omissions. (Paragraph 17.5(b))

A sponsor must confirm to the Stock Exchange on or before the date of issue of the listing document that the information in the non-expert sections contains all information required by relevant legislation and rules, is true in all material respects and does not omit material information. (LR 3A.15 and see paragraph 5(c) above)

9

At the time of issue of a listing document, a sponsor should be in a position to demonstrate that it is reasonable for it to rely on the expert sections of the listing document. (Paragraph 17.5(c))

-

10

In order for a sponsor to demonstrate that it is reasonable for it to rely on an expert report of a listing document, typical steps the sponsor should take in connection with the expert report include, among other things:

1. the sponsor confirming that expert is appropriately qualified and experienced, the bases and assumptions adopted by the expert are fair and reasonable, the expert’s scope of work is appropriate to the opinion and the expert is independent from the listing applicant;
2. the sponsor ensuring the factual information on which an expert relies is consistent with the sponsor’s knowledge of the applicant including the derived from its other due diligence work;
3. where factual information is solely or primarily derived from management’s representations and confirmations, the sponsor, unless the expert has done so, making independent inquiries or assessments or obtaining independently sourced information to verify the accuracy and completeness of the information; and
4. the sponsor corroborating information obtained from different sources to ensure it is consistent.

(Paragraph 17.6(g))

-

11

When seeking assistance from third parties, a sponsor remains responsible for the overall due diligence exercise. In particulars a sponsor should:

1. assess whether the third party is appropriately qualified and competent for the tasks assigned to it;
2. determine the scope and extent of tasks to be performed by the third party;
3. assess the results of the work performed by the third party and arrive at its own opinion whether the work provides a sufficient basis to determine the reasonable due diligence has been conducted and whether further due diligence is required; and
4. assess whether the results of the work should be incorporated in the listing document or brought to the attention of regulators. (Paragraph 17.6(h))

It may be appropriate for a sponsor to engage third party professionals to assist it to undertake tasks related to certain due diligence inquiries. For example, assistance in reviewing the circumstances of all current legal proceedings to which the new applicant is a party. In such cases, the Exchange expects the sponsor to satisfy itself that it is reasonable to rely on information or advice provided by the third party professional. That would include, for example: (a) being satisfied as to the competence of the professional, the scope of work to be undertaken by the professional and the methodology proposed to be used by the professional; and (b) being satisfied that the third party professional’s report or opinion is consistent with the other information known to the sponsor about the new applicant, its business and its business plans. (PN21 (5))

12

A sponsor should reasonably satisfy itself that all information provided to the Stock exchange and the SFC during the listing application process is accurate, complete and not misleading and, if it becomes aware that the information provided does not meet this requirement, the sponsor should inform the Stock Exchange and the SFC (as the case may be) promptly. In addition, a sponsor should deal with all enquires raised by the regulators in cooperative, truthful and prompt manner. (Paragraph 17.7(a) and (b))

Each sponsor must undertake to use reasonable endeavours to ensure that all information provided to the Stock Exchange is true in all material respects and does not omits any material information; and to the extent that the sponsor subsequently becomes aware of information that casts doubt on the truth, accuracy or completeness of information provided to the Stock Exchange, it will promptly inform the Stock Exchange of such information. Each sponsor should cooperate in any investigation conducted by the Stock Exchange, including answering promptly any questions and producing promptly the relevant documents. (LR 3A.04)

13

A sponsor should disclose to the Stock Exchange in a timely manner any material information relating to a listing applicant or listing application of which it becomes aware which concerns non-compliance with the Listing Rules or other applicable legal or regulatory requirements. If a sponsor ceases to act for a listing applicant during the listing application process, it is required to inform the Stock Exchange in a timely manner of the reasons for ceasing to act. (Paragraphs 17.7(c) and (d))

Where a CFA becomes aware that its client is not complying with the regulatory requirements, it should advise its client to bring the matter to the attention of the regulators at the earliest opportunity. If this is declined by the client without valid reasons, it should consider the need to cease to act. When asked by the regulators about a possible breach of a relevant regulation (whether committed by itself or its client), a CFA should respond to the regulators in a cooperative and truthful manner (to the best of its knowledge) (CFA Code 6.3)

14

A sponsor’s records should be sufficient to demonstrate that the sponsor has complied with all applicable legal and regulatory requirements and in particular compliance with the Provisions. (Paragraph 17.8(a))

A CFA should maintain proper books and records, and be able to provide a proper trail of work done upon request by the SFC. (CFA Code 2.3)

15

A complete set of a sponsor’s records in connection with a listing transaction should be retained in Hong Kong for at least seven years after completion or termination of the transaction. (Paragraph 17.8(b))

-

16

Before accepting any appointment as a sponsor, a firm should ensure that, taking account of other commitments, it has sufficient staff with appropriate levels of knowledge, skills and experience to devote to the assignment throughout the period of the assignment. (Paragraph 17.9(a))

A licensed or registered person should have and employ effectively the resources and procedures which are needed for the proper performance of its business activities. (Code of Conduct GP3) The Management has the overall responsibility to ensure that there are sufficient staff to carry out the work throughout the period when the firm acts as a sponsor. The level of human resources and expertise should be commensurate with the volume, size, complexity and nature of the sponsor work that is undertaken by the sponsor. (Sponsor Guidelines 1.1.5 and 1.1.6)

17

Taking account of the volume, size, complexity and nature of the sponsor work required to be undertaken in respect of each assignment, a sponsor should appoint a team comprising staff with appropriate levels of knowledge, skills and expertise (which should include at lease one Principal) to carry out the sponsor assignment throughout the period of the assignment. (Paragraph 17.9(b))

When a firm takes up an appointment as a sponsor pursuant to the requirements under the Listing Rules, the Management should appoint a team comprising corporate finance staff, including at least a Principal who acts as the supervisor of the team, to carry out each sponsor engagement. (Paragraphs 1.1.3, 1.1.5, 1.1.6, 1.2.4 and 1.2.5 of the Sponsor Guidelines)

18

A sponsor should maintain effective systems, controls and procedures to ensure an appropriate due diligence plan is formulated, updated as necessary and implemented in respect of each assignment and there are clear and effective reporting lines so that key issues are escalated to Management for deliberation. (Paragraph 17.9(c)-(d))

An effective management and organisational structure which ensures that the operations of the business are conducted in a sound, efficient and effective manner shall be established and maintained. (Part 1 of the Internal Control Guidelines)

19

A sponsor’s Management is obliged to assume full responsibility for the sponsor’s operations and to supervise key issues including but not limited to:

1. accepting a mandate to act as a sponsor;
2. monitoring the implementation of the due diligence plan;
3. ensuring that sufficient persons with appropriate levels of knowledge, skills and experience are devoted to each assignment over the period of the assignment;
4. reviewing the standard and extent of due diligence work, and the performance of the Principals and the Transaction Team; and
5. resolving suspicious circumstances, difficult or sensitive issues, conflicting information and material non-compliance. (Paragraph 17.9(e)-(f))

Management should assume full responsibility for the firm’s operations including the development, implementation and on-going effectiveness of the firm’s internal controls and the adherence thereto by its directors and employees. Reporting lines should be clearly identified, with supervisory and reporting responsibilities assigned to the appropriate staff members. (Part 1 of the Internal Control Guidelines)

20

A sponsor should act as the overall manager of the public offer and ensure sufficient arrangements are in place so that the public offer is conducted in a fair and orderly manner. (Paragraph 17.10)

A CFA, acting as a sponsor, should act as the overall manager to manage the public offer process and ensure sufficient arrangements are in place so that the public offer is conducted in a fair and orderly manner. (CFA Code 5.3 and 5.4)

21

The sponsor should take reasonable steps to ensure that all material information, including forward-looking information (whether quantitative or qualitative) disclosed or provided to analysts is contained in the relevant listing document. (Paragraph 17.11)

The CFA should take reasonable steps to ensure that all material information, including forward-looking information (whether quantitative or qualitative) disclosed or provided to analysts is contained in the relevant listing documents. (CFA Code 5.10)

**This newsletter is for information purposes only.**

Its contents do not constitute legal advice and it should not be regarded as a substitute for detailed advice in individual cases.

Transmission of this information is not intended to create and receipt does not constitute a lawyer-client relationship between Charltons and the user or browser.

Charltons is not responsible for any third party content which can be accessed through the website.

If you do not wish to receive this newsletter please let us know by emailing us at unsubscribe@charltonslaw.com

**Charltons - Hong Kong Law Newsletter - Issue 156 - 24 May 2012**

1. Please refer to [the Enforcement News “SFC fines and revokes the licence of Mega Capital (Asia) Company Limited” dated 22 April 2012](http://www.sfc.hk/sfcPressRelease/EN/sfcOpenDocServlet?docno=12PR39) [↑](#footnote-ref-26)
2. “Management” is defined to include a sponsor firm’s board of directors, managing director, chief executive officer, responsible officers, executive officers and other senior management personnel. [↑](#footnote-ref-36)