



**SECURITIES AND FUTURES COMMISSION**  
證券及期貨事務監察委員會

## **Supplemental Consultation Conclusions on the Regulation of IPO Sponsors – Prospectus Liability**

22 August 2014



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## Introduction

1. In May 2012, the Securities and Futures Commission (**SFC**) issued a consultation paper<sup>1</sup> (**Consultation Paper**) inviting comments on a number of proposals designed to enhance Hong Kong's IPO sponsor regulatory regime. The Consultation Paper invited comments on two broad areas: (i) the regulatory regime for sponsors' conduct; and (ii) legislative amendments to clarify sponsors' civil and criminal liability under existing legislation concerning misstatements in prospectuses.
2. The consultation period ended on 31 July 2012 and 71 responses were received. The SFC also met with members of the sponsor community and interested groups.
3. Taking into account respondents' comments, certain proposals were modified and refined. On 12 December 2012, the SFC issued the Consultation Conclusions on the Regulation of IPO Sponsors (**Consultation Conclusions**)<sup>2</sup>. Other than the proposals on the sponsors' regulatory regime, the Consultation Conclusions also stated that in view of responses received, the SFC would also recommend legislative amendments to address the way in which the existing criminal prospectus liability provisions are framed<sup>3</sup> in addition to amendments to clarify sponsors' civil and criminal prospectus liability.
4. Proposals relating to the regulatory regime have since been implemented. The legislative amendments are the final element which remains outstanding.
5. Since the release of the Consultation Conclusions, the SFC engaged with industry participants and other interested parties in further consultations on the proposed legislative amendments.
6. This supplemental conclusions paper sets out the SFC's position on the need for legislative amendments following these consultations and further analysis.

## Background

7. With respect to prospectus liability of sponsors, the SFC's position when the Consultation Paper was issued was that, although there was a strong argument that sponsors were already covered by the relevant legislation (which was also the SFC's view), given the fact that sponsors and others had expressed contrary views and given that there had been no Hong Kong case law on the subject, it may be helpful to specify sponsors in the relevant legislation (now the Companies (Winding Up and Miscellaneous Provisions) Ordinance (**CWUMPO**)) as a category of persons who authorize the issue of prospectuses. The amendment would have made explicit to all market participants that sponsors are potentially liable under the CWUMPO.
8. However, this amendment would be unnecessary – and therefore need not be pursued – if in fact sponsors were already persons who authorize the issue of a prospectus within the meaning of the CWUMPO. The CWUMPO provides for a broad category of persons whose roles or functions are not specified but who nevertheless are capable of falling

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<sup>1</sup> Consultation Paper on the regulation of sponsors <http://www.sfc.hk/edistributionWeb/gateway/EN/consultation/doc?refNo=12CP1>.

<sup>2</sup> <http://www.sfc.hk/edistributionWeb/gateway/EN/consultation/conclusion?refNo=12CP1>.

<sup>3</sup> Paragraph 289, Consultation Conclusions.

within a class of persons who have “authorised the issue of the prospectus” (sections 40(1)(d), 40A(1) and 342F(1) of CWUMPO), and are therefore potentially liable.

## **Subsequent consultation**

9. Following the publication of the Consultation Conclusions, the SFC held further discussions on possible legislative amendments with industry participants and other interested parties.
10. The SFC also took the opportunity to re-examine in more depth the scope and applicability of the existing provisions to sponsors. This enabled the SFC to reassess whether any legislative amendments are in fact required to address the perceived uncertainty and absence of case law on the subject. After careful consideration the SFC has concluded that no amendments are required to specify sponsors as a separate category of persons who authorize the issue of a prospectus because they are already covered by the broader category of potentially liable persons under the CWUMPO referred to in paragraph 8 above.
11. The SFC has noted that a sponsor has specific duties in relation to the preparation of a prospectus which are distinct from those of directors and experts. These include the requirement<sup>4</sup> to provide a declaration to The Stock Exchange of Hong Kong Limited stating that the sponsor believes that the prospectus contains “all information required by relevant legislation and rules”, and is “true, accurate and complete in all material respects”. The sponsor also performs other functions, duties and obligations in respect of an IPO prospectus, all of which must be discharged and the declaration provided before the prospectus is issued; it would not otherwise be authorized for registration under the CWUMPO.
12. The SFC has accordingly reaffirmed its view that its original position in the Consultation Paper – that sponsors are already covered under the existing law – is correct. Sponsors are among those persons who have potential statutory criminal and civil liability under the CWUMPO for untrue statements (including material omissions) in a prospectus. It has therefore concluded that the proposed legislative amendments need not be pursued as they would serve no purpose.

## **Concluding remarks**

13. The SFC would like to make clear that in considering whether or not to take action against any persons, including sponsors, who have authorized the issue of a prospectus containing a material untrue statement, the SFC will have no hesitation in relying on the existing criminal liability provisions in the CWUMPO in appropriate cases.
14. The SFC would like to thank everyone who took the time and effort to provide detailed and thoughtful comments about the prospectus liability of sponsors.

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<sup>4</sup> See Main Board Listing Rule 3A.13.