



JONES DAY  
**COMMENTARY**

## NEW HONG KONG REGIME ON OBLIGATIONS OF SPONSORS

The Hong Kong Securities and Futures Commission (the “SFC”) on 12 December 2012 published its consultation conclusions on the regulation of Hong Kong IPO sponsors (the “Consultation Conclusions”). As a result, key obligations of sponsors will be consolidated and centralized in a new paragraph 17 (the “Provisions”) of the Code of Conduct for Persons Licensed by or Registered with the SFC (the “Code of Conduct”). This *Commentary* provides an overview of these key changes.

### AMENDMENTS AND EFFECTIVE DATES

- The Provisions are expected to become effective on 1 October 2013. A sponsor that submits a listing application after 1 October 2013 is required to comply with the Provisions.
- The amendments to the Corporate Finance Adviser Code of Conduct (the “CFA Code”) and the Additional Fit and Proper Guidelines for Corporations and Authorized Financial Institutions

applying or continuing to act as Sponsors and Compliance Advisers (the “Sponsor Guidelines”) will take effect on the same date.

- The Stock Exchange of Hong Kong Limited (the “HKEx”) will make appropriate amendments to the Rules Governing the Listing of Securities on HKEx (the “Listing Rules”), and details will be announced separately.
- The SFC will recommend amendments to the Companies Ordinance in relation to the civil and criminal prospectus liabilities of the sponsors, but the proposed legislative amendments will follow a separate timetable.

### SPONSOR OBLIGATIONS

The SFC will require:

- A sponsor to be formally appointed two months before the A1 filing to allow the sponsor to have sufficient time to meet its obligations and responsibilities and conduct due diligence on the listing applicant.

- A sponsor to notify the regulators and the HKEx when it is formally appointed or when it ceases to act for the listing applicant at any time after its formal appointment, regardless of whether a listing application has been submitted.
- Sponsor fees to be specified in a sponsor's terms of engagement. The sponsor fees should appropriately reflect the role and responsibilities to be discharged by a sponsor and should not be confused with other services, notably book-building, pricing, and similar functions governed by underwriting and related agreements. The sponsor fee should not be contingent on the success or the final size of the offering, and any staged payments should be proportional to the amount of work done up to that stage.
- If appointed, a financial adviser to a listing applicant should cooperate fully with the sponsor and should not engage in conduct that could adversely affect the sponsor in discharging its duties. This is designed to address any misalignment of responsibilities between a sponsor and a financial adviser.
- A sponsor who becomes aware of any material information relating to a listing applicant or listing application that concerns noncompliance with the Listing Rules or other legal or regulatory requirements relevant to the listing, to report the matter to the HKEx in a timely manner. Such duty continues after the sponsor ceases to be the sponsor of the listing applicant, if the material information came to the knowledge of the sponsor while it was acting as the sponsor.
- The proposal to publish the application proof was introduced primarily to encourage the submission of a quality first draft.
- The SFC will work with the sponsors and the HKEx on other operational matters and consequential amendments to the Listing Rules to ensure smooth implementation of the new regime and to minimize administrative burdens.

## EXPERT REPORTS

- The SFC considers that sponsors should act proactively when assessing expert reports.
- At the time of issue of a listing document, a sponsor, as a non-expert, should have no reasonable grounds to believe and should not believe that the information in the expert report is untrue, misleading, or contains any material omission.
- The SFC has refined the guidance on the work expected of sponsors to explain that in reaching its conclusion regarding an expert's report, a sponsor should consider four main aspects: (i) the expert's qualification, experience, and independence; (ii) the expert's scope of work; (iii) the bases and assumptions underlying the report; and (iv) the expert's opinion together with the rest of the information contained in the report.

## DISCLOSURE OF FINANCIAL INFORMATION

- The SFC provided additional guidance on the preparation of management and discussion and analysis of financial performance and condition (the "MD&A"). A sponsor is expected to work closely with the management of a listing applicant on relevant adequate and comprehensible MD&A and to avoid excessive or irrelevant disclosure that might overwhelm investors or obstruct them from easily identifying and understanding material and critical information.
- The sponsor should also consider whether there were any matters that have materially affected the historical financial performance, whether any material factors or events are likely to affect the applicant's future financial performance, and whether there were any exceptional items or unusual accounting treatment.

## MULTIPLE SPONSORS

- The SFC has decided not to amend the current rules and regulations relevant to the appointment of multiple sponsors or to make amendments to the existing requirements that only one sponsor will be required to be independent.

## PUBLICATION OF APPLICATION PROOF

- A listing applicant will be required to publish the application proof of the prospectus on the HKEx web site at the time the listing application is submitted.

## PROSPECTUS LIABILITIES

- The SFC recommended that the current statutory liability provisions (i.e., civil liability under section 40 of the Companies Ordinance and criminal liability under section 40A of the Companies Ordinance) be amended so that a person who has authorized the issue of a prospectus includes a sponsor.
- Under section 40 of the Companies Ordinance, a defense against liability is provided if the person had reasonable grounds to believe that the statement was true. If a sponsor has conducted reasonable due diligence, it is difficult to see how it could be found liable under section 40.
- A sponsor may have criminal liability together with an issuer and other persons if there is evidence that each of them knowingly or recklessly participated in issuing a prospectus containing false or misleading information. It is not, however, intended that a due diligence failure will of itself involve criminal liability under the Companies Ordinance.
- The SFC clarifies that the criminal liability provisions under section 40A will apply directly only to a sponsor firm. Nevertheless, in situations where there is evidence that an individual (not limited to directors or senior management) in the sponsor's firm has colluded in the making of an untrue statement in a prospectus, or where a director or other officer has participated in or consented to the commission of the offense, it is possible for these individuals to be prosecuted for aiding and abetting, consenting, or conniving to commit an offense under general law.

The appendices to the Consultation Conclusions are set out in the revised paragraph 17 of the Code of Conduct, the CFA Code, and the Sponsor Guidelines. The full text of the Consultation Conclusions and the refinements to the Provisions are available on the SFC's web site at: <http://www.sfc.hk/edistributionWeb/gateway/EN/consultation/conclusion?refNo=12CP1>.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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