

**Panel on Financial Affairs  
Follow-up to meeting on 3 June 2013**

**Information on common law jurisdictions in relation to civil and criminal liability of sponsors for contents of a prospectus issued by a listing applicant**

**Liability for prospectus disclosures in major overseas jurisdictions**

1. When preparing for the proposed legislative amendments on the regulation of sponsors, the Securities and Futures Commission (SFC) has studied the liability regimes in four major common law jurisdictions – the United Kingdom (UK), Singapore, Australia and the United States (US). The regulatory principle in these overseas markets is that a person who is involved in formulating the disclosures in a prospectus is in general liable for errors and omissions.
2. As the initial public offerings (IPO) ecosystem of markets differs, laws in different jurisdictions therefore vary as they are developed to cater for the needs of the particular market. For example, Australia and US do not require sponsors to be appointed for IPOs. Singapore and UK both have the concept of sponsors. Despite this, different jurisdictions have clear laws that hold liable those who perform a role similar to that performed by sponsors in a Hong Kong IPO with a view to render adequate protection to investors.
3. In Singapore, a listing applicant must appoint an “issue manager” for the applicant’s listing. An issue manager in a Singapore IPO plays the same role as a sponsor does in a Hong Kong IPO. Under Singapore law<sup>1</sup>, an issue manager is expressly named as a person who is subject to both civil and criminal liability for the contents of a prospectus. Although there are no reported Singapore cases on civil and criminal liability of issue managers for the contents of a prospectus, the liability of issue managers is clear.
4. Under UK legislation<sup>2</sup>, any person responsible for the prospectus has civil liability. Persons responsible for the prospectus include persons who have authorised the issue of the prospectus<sup>3</sup>. There is no specific criminal liability provision for defective disclosures in a prospectus or offer document. UK relies on section 89 of the Financial Services Act 2012 in which a person is guilty of an offence if he knowingly or recklessly makes a

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<sup>1</sup> Sections 253 and 254 of the Securities and Futures Act 2005, Singapore

<sup>2</sup> Section 90 of the Financial Services and Markets Act 2000, UK

<sup>3</sup> Rules 5.5.3 and 5.5.4 of the Prospectus Rules, UK

defective statement or dishonestly conceals any material facts. There are no reported UK cases on civil or criminal liability of sponsors in respect of prospectus<sup>4</sup>.

5. Both Australia and the US do not require sponsors to be appointed in IPOs. However, in both jurisdictions, underwriters who play a similar role to that performed by sponsors in a Hong Kong IPO, are subject to both civil and criminal liability for the contents of a prospectus under the respective Australian and US legislation<sup>5</sup>. SFC's research revealed that there is a lack of case law in both jurisdictions on the civil and criminal liability of underwriters in this regard.

### **The SFC's proposal**

6. As explained at the Panel meeting on 3 June 2013 and in the paper submitted for discussion at that meeting, sponsors play a critical role in maintaining the quality and integrity of the IPO market by being centrally involved in the conduct of intensive due diligence, with a view to ensure that the prospectus contains sufficient information to enable public investors to form a justifiable opinion on its business and prospects. Sponsors have clear responsibilities for the contents of a prospectus in a Hong Kong IPO. There is therefore merit to remove the ambiguities by clearly identifying sponsors as being among the specified persons<sup>6</sup> who are liable for untrue statements in prospectuses, so as to render adequate protection to our investors.
7. However, as noted from responses to the public consultation conducted in May – July 2012, the market has divergent views as to whether the existing legislation applies to sponsors. These divergent views and the lack of case law on the issue demonstrate the need to clarify whether sponsors are subject to existing civil and criminal prospectus liability provisions.
8. The proposed regime of holding sponsors liable, as one of the specified

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<sup>4</sup> General criminal law offences of dishonesty such as conspiracy to defraud may apply.

<sup>5</sup> Section 729 and 1308 of the Corporations Act 2001, Australia; sections 11 and 24 of the Securities Act 1933, US.

<sup>6</sup> Section 40 of the Companies Ordinance specifies four categories of persons who have civil liability for the contents of a prospectus –

- (a) directors of the company at the time of the issue of the prospectus;
- (b) persons who have authorized themselves to be named and are named in the prospectus as directors or as having agreed to become one;
- (c) promoters of the company; and
- (d) persons who have authorized the issue of the prospectus.

Section 40A specifies that persons who authorized the issue of the prospectus have criminal liability for the contents of the prospectus.

persons, is largely in line with the regulatory principle adopted in the other major markets as discussed in paragraphs 1 – 6 above, i.e., that a person who is involved in formulating the disclosures in a prospectus is to be held liable in general for errors and omissions.

9. In addition, many respondents in the consultation exercise carried out by the SFC were concerned with the way in which the current criminal liability provisions in the Companies Ordinance are structured, i.e., the prosecution only has to prove that a prospectus contains an untrue statement, and in response the defendant has to prove either that the statement was immaterial or that he had reasonable grounds to believe, and did believe up to the time of the issue of the prospectus, that the statement was true. After considering these responses, the SFC concluded that it would be appropriate to seek the amendment of the criminal liability provisions so that the prosecution will bear the burden of proving that a defendant knowingly or recklessly made the untrue statement which must be material to a reasonable person who is likely to consider acquiring the shares or debentures. The defendant will not be liable if, at the time of issuing the prospectus, he did not know or was not reckless as to whether the statement was untrue, or the untrue statement is not material. This proposed formulation is consistent with that in analogous provisions in the SFO such as sections 107<sup>7</sup> and 298 and will address most of the comments relating to the burden of proof and apparent absence of a specific requirement for “mens rea” or mental element of the offence as currently drafted in the Companies Ordinance.

**Securities and Futures Commission  
June 2013**

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<sup>7</sup> Section 107 of SFO creates an offence of fraudulently or recklessly induce others to invest money; section 298 of SFO creates an offence of disclosure of false or misleading information inducing transactions