

**HONG KONG SOCIETY OF ACCOUNTANTS**

**SUBMISSION**

**ON**

**CONSULTATION PAPER**

**ON**

**THE REGULATION OF**

**SPONSORS AND INDEPENDENT FINANCIAL ADVISERS**

## ANNEX 3

### SUUMMARY OF QUESTIONS

#### ACCEPTABLE SPONSOR FIRMS

(Paragraphs 50 to 52 of Part B of the Consultation Paper)

We propose that to be eligible to act as a sponsor to a new applicant or a listed issuer, the firm is required to be accepted by the Exchange for such purposes and admitted to a list of acceptable sponsors maintained by the Exchange. The Exchange may refuse an application as a sponsor or cancel a sponsor's admission to the list if the Exchange considers that the sponsor or applicant does not satisfy the criteria established in order for the firm to be included on the list of acceptable sponsors maintained by the Exchange. We propose that all first instance decisions in relation to eligibility on application; on-going eligibility and independence of a sponsor should be made by the Listing Division and subject to review, if necessary, by the Listing Committee.

*Q.1 Do you agree with our proposal?*

X No

**Registration as a sponsor or as an IFA should remain with the SFC. It would be a duplication of work if sponsors or IFAs are to be approved by two regulatory bodies. A single list of sponsors should be maintained for Main Board and GEM. Firms which are currently on the approved list of GEM sponsors should automatically be admitted to the combined list for Main Board and GEM or any separate list for Main Board.**

## ACCEPTABLE IFA FIRMS

(Paragraphs 52 to 53 of Part B of the Consultation Paper)

We propose that only firms on the list of acceptable sponsors or acceptable IFAs be eligible to act IFAs to issuers in relation to a connected party transaction. We propose that a process similar to that for admitting firms to the list of acceptable sponsors be adopted for IFA firms.

*Q.2 Do you agree with our proposal?*

✓ Yes

**We agree that only firms on the list of acceptable sponsors or acceptable IFAs be eligible to act as IFAs to issuers in relation to a connected party transaction. However, the proposal to have such a list to be maintained by the Exchange would be a duplication of the work and function of the SFC in relation to licensing matters. Any such list should be maintained by the SFC and not by the Exchange.**

## ACCEPTABLE INDIVIDUALS

(Paragraphs 54 to 59 of Part B of the Consultation Paper)

We propose that only individuals who:

- (a) are appropriately licensed/registered under the SFO;
- (b) work for a sponsor firm or IFA firm (whichever is applicable) and are eligible supervisors or perform work under the supervision of an eligible supervisor; and
- (c) are not on the list of unacceptable individuals

may do sponsor work or IFA work.

*Q.3 Do you agree with our proposal?*

✓ **Yes for (a) and (b), No for (c)**

**The supervision of the licensing regime of corporate financiers should be under the SFC as it is part of its statutory functions. There should not be a published list of unacceptable individuals.**

## CRITERIA FOR INCLUSION ON THE LIST OF SPONSORS AND IFAS

### Competence and experience of the sponsor and IFA firms

(Paragraphs 60 to 66, 73 and 79 of Part B of the Consultation Paper)

We propose that the focus of our requirements will be on the experience of the individual member of staff, rather than the sponsor firm or IFA firm and that sponsor firms have at least four eligible supervisors and IFA firms have at least two eligible supervisors.

Q.4 *Do you agree with our proposal?*

X No

**We disagree with the proposed requirement to have four “eligible supervisors”. However it is considered that a better approach is the system that is currently adopted in the GEM Listing Rules – namely to have at least two principal supervisors and two assistant supervisors. A principal supervisor should have a greater level of experience than an assistant supervisor.**

## **Qualification and experience criteria of eligible supervisors**

(Paragraphs 67 to 79 of Part B of the Consultation Paper)

We propose to merge the requirements relating to qualification and experience criteria for Principal Supervisors and Assistant Supervisors into a single new category called “eligible supervisors”. We also propose to recognize overseas experience derived from recognized overseas exchanges (such as NYSE, NASDAQ, SGX, ASX, London Stock Exchange and Toronto Stock Exchange) for the purposes of assessment of individuals. Accordingly, the experience requirement of the four eligible supervisors required in each sponsor firm is proposed to be as follows:

- must have a minimum of 4 years of relevant corporate finance advisory experience derived in respect of companies listed on recognized stock exchanges or from other channels, such as corporate finance experience gained from employment with an issuer listed on the Exchange;
- substantive involvement in at least 3 significant transactions, which have been completed. At least one of those transactions must be in respect of a company listed on the Exchange. At least one transaction must have been an IPO and at least one of the transactions must have been completed within the previous two years. These requirements will be on-going requirements.

A substantive role means a role as a member of the sponsor firm’s core transaction team in delivering or managing the delivery of one or more of the major components of due diligence work undertaken in respect of an engagement.

The definition of “significant transactions” is proposed to include: (i) IPOs; (ii) very substantial acquisitions or disposals (or their equivalent under the rules applicable to listing on other recognized stock exchanges); (iii) major transactions (or their equivalent under the rules applicable to listing on other recognized stock exchanges); (iv) connected and major transactions (or their equivalent under the rules applicable to listing on other recognized stock exchanges); (v) a rights issue or open offer by a listed company (or their equivalent under the rules applicable to listing on other recognized stock exchanges); and (vi) takeovers subject to the Takeover Code (or its equivalent in other recognized jurisdictions). Guidance will be provided to clarify that transactions involving the production of an exempt listing documents and the listing of investment companies will not be regarded as significant transactions.

We propose that the qualification and experience criteria for the two IFA eligible supervisors in an IFA firm be the same as for sponsor eligible supervisors save for the one IPO transaction experience requirement.

*Q.5 Do you agree with our proposals?*

**X No**

**As stated above in response to Q.4, we believe that there should be a two-tiered approach (i.e., modelled on the GEM system of principal supervisors and assistant supervisors).**

**We consider it more appropriate to develop a Continuing Professional Development programme for sponsors rather than having an on-going requirement to carry out a certain number of significant transactions each year after approval as a sponsor or IFA**

(in much the same way as accountants and lawyers may continue to practice once qualified provided they comply with their respective continuing professional development requirements).

The proposals are too rigid. More flexibility should be built in to allow for waivers and exemptions so as not to exclude very experienced practitioners when they are having “career breaks”. The definition of “significant transaction” could also cover more transactions such as those involving a whitewash waiver application under the Takeovers Codes, share repurchase offers and off-market share repurchases under the Code on Share Repurchases, privatization proposals (whether by scheme of arrangement or general offer), schemes of arrangement, listing by way of introduction, all transactions involving a new listing application (such as reverse takeovers and listings of investment companies) and IPOs which are approved in principle by Listing Committee even though the IPO does not proceed.

The Exchange has not included in its questionnaire a question to seek the market’s response to its proposal to modify the existing GEM requirements that the sponsor must have a minimum of two executive directors engaged in a full time capacity in the sponsor’s corporate finance business in Hong Kong and instead to only require that the sponsorship activities must be under the supervision of eligible supervisors (who may be based overseas). We strongly disagree with this proposal which we believe may lower standards.

### **Other factors relevant to the eligibility criteria**

(Paragraphs 80 to 81 and 86 to 94 of Part B of the Consultation Paper)

We propose to retain discretion for the Exchange to refuse or cancel a sponsor's acceptance. The Exchange may ask a sponsor or prospective sponsor to provide further information during the assessment of their application. To provide clarity about the circumstances in which the Exchange may consider exercising this discretion we will publish details of the factors we will take into account in making an evaluation. The proposed factors include the following:

- The eligibility criteria requirements, including minimum capital, number of eligible supervisors, experience of individual eligible supervisors, are not met;
- The applicant is unable to satisfy the Exchange that it will be able to discharge the obligations in paragraph 7 of the proposed Code of Conduct for Sponsors and Independent Financial Advisers (these obligations include having effective supervisory, monitoring and reporting controls, an effective compliance function, adequate competence, professional expertise and human and technical resources and maintaining proper books and records);
- Current suspension or revocation of regulatory status (including where this is self-imposed as a result of settlement); and
- Suspension or revocation of regulatory status (including where this is self-imposed as a result of settlement) that has expired but in relation to which, the applicant is unable to satisfy the Exchange that appropriate and sufficient remedial steps have been taken.

We propose that the same factors be taken into account in determining the acceptability of IFAs as are taken into account for sponsors, save for the minimum capital adequacy requirement.

*Q.6 Do you agree with our proposal?*

**No**

**We consider that there should be only one list or one licensing system and this should be maintained by the SFC with a proper channel for appeal purposes. The Exchange should not be duplicating the work of the SFC.**



**Minimum Capital Requirement of Sponsor Firms**  
(Paragraphs 82 to 85 of Part B of the Consultation Paper)

We propose that sponsor firms are required to meet and maintain a minimum capital requirement of “total paid-up share capital and/or non-distributable reserves of not less than HK\$10 million represented by unencumbered assets and a net tangible asset value after minority interests of not less than HK\$10 million”. Should the sponsor firm be unable to meet the capital requirement, we propose to accept as an alternative an unconditional and irrevocable guarantee from a company within the sponsor group or an authorized institution of not less than HK\$10 million.

We do not propose that IFA firms should be subject to a similar requirement.

*Q.7 (a) Do you agree with our proposal for sponsor firms?*

✓ **Yes**

*Q.7 (b) Do you agree with our proposal for IFA firms?*

**X No**

**IFA firms should have a lower capital requirement rather than no capital requirement.**

## **Undertakings to the Exchange**

(Paragraphs 95 to 97 of Part B of the Consultation Paper)

We propose that each of the sponsors and IFAs seeking to be admitted to the list of Sponsors or list of IFAs be required to declare that the contents of its application to be admitted to the list is true and does not omit any material fact. We also propose that each of the sponsors and IFAs seeking to be admitted to the list must sign an undertaking to the Exchange to comply with the relevant Listing Rules applicable to sponsors or IFAs, including the proposed Code of Conduct for Sponsors and Independent Financial Advisers; and to assist the Exchange with investigations, including by producing documents and answering questions fully and truthfully. Furthermore, we propose that eligible supervisors be required to provide the Exchange with a written undertaking in similar terms to that provided by sponsors firms and IFA firms. This will include an obligation to comply with the Listing Rules and the proposed Code of Conduct for Sponsors and Independent Financial Advisers. The proposed Code of Conduct for Sponsors and Independent Financial Advisers includes an obligation that the eligible supervisors and directors of sponsor firms and IFA firms use their best endeavours to ensure the sponsor firm or IFA firm complies with its obligations under the Listing Rules and the proposed Code of Conduct for Sponsors and Independent Financial Advisers. A breach of the undertaking will be deemed to be a breach of the Listing Rules and will be subject to disciplinary action.

*Q.8 Do you agree with our proposals?*

**No**

**The proposals are considered excessive and unnecessary. The SFC Code of Conduct for Corporate Finance Advisors already requires a licensed advisor to comply with Listing Rules, Codes etc, and is also responsible for ensuring client is aware of same and complies therewith. In addition, there should be a due diligence defence system made available for sponsors and IFAs.**

## APPOINTMENT

(Paragraphs 98 to 113 of Part B of the Consultation Paper)

We propose to retain the requirement that new applicants (including deemed new applicants) will be required to appoint a sponsor to assist them through the application process.

After the new applicant is listed, we propose that:

- (a) For Main Board: the new applicant must appoint a sponsor firm as a financial adviser for a period ending on publication of the financial results for the first full financial year after the listing.
- (b) For GEM: the new applicant must appoint as sponsor firm as a financial adviser for at least the remainder of the financial year during which the listing occurs and the 2 financial years thereafter (i.e. we propose to retain the period stipulated in the existing GEM Listing Rules).

The issuer will not be obliged to appoint the same sponsor firm who handled their IPO. During this period, the issuer will be obliged to seek, on a timely basis, advice from the sponsor in relation to a number of prescribed events. The prescribed circumstances and services are proposed to include the publication of any regulatory announcement; publication of any circular or financial report; where a notifiable transaction (connected or otherwise) is contemplated including share issues and share repurchases; and monitoring the use of the proceeds and adherence to the business plans as detailed in the prospectus.

We also propose to retain the discretion to direct an issuer to appoint a sponsor firm to provide it with advice for any period it specifies. This discretion may be used in the event of a breach of the Listing Rules or investigation of a possible breach of the Listing Rules.

We also propose to retain the requirement that listed issuers are required to appoint an IFA in relation to connected party transactions that require any shareholders to abstain from voting and transactions or arrangements that require controlling shareholders to abstain from voting. We will clarify that an IFA must be a firm either on the list of acceptable Sponsors or list of acceptable IFAs.

*Q.9 Do you agree with our proposals?*

✓ Yes

**We agree with the proposals and would suggest that the proposals be extended to situations and circumstances involving a change of ownership or where there is a new management team on the board.**

## **INDEPENDENCE**

(Paragraphs 114 to 123 of Part B of the Consultation Paper)

We propose that a sponsor must not act for any new applicant or listed issuer, whether as a sponsor or joint sponsor, from which it is not independent. The Exchange will expect a sponsor to consider a broad range of factors that might impact on its ability to act independently of an issuer. Some of these factors are considered below, but sponsors should note that this list of factors of when a sponsor will not be regarded as independent is not exhaustive and the existence of other relationships or interests which might give rise to a material interest in the success of a transaction will be considered. The specified circumstances are:

- a sponsor or any member of the sponsor's group is holding more than 5% of the issued share capital of a new applicant;
- the fair value of shareholding referred to above exceeding 15% of the consolidated net tangible assets of the sponsor group;
- a sponsor or any member of the sponsor's group is controlling the majority of the board of directors of the new applicant;
- a sponsor is controlled by or is under the same control as the new applicant;
- 15% or more of the proceeds raised from an IPO is applied to settle debts due to a member of the sponsor's group;
- a significant portion of the listing applicant's operation is funded by the banking facilities provided by a member of the sponsor's group;
- where a director or employee of the sponsor or a close family member of either a director or employee of the sponsor has an interest in or business relationship with the new applicant; and
- where the sponsor or a member of the sponsor's group is the new applicant's auditor or reporting accountant.

In addition to fulfilling the independence requirement as mentioned above, we also propose that the Exchange will generally preclude from concluding that an IFA is independent if it has served as a financial adviser to the relevant listed issuer, its subsidiaries or any of its connected persons any significant assignment within two years of appointment.

We also propose to require sponsors and IFAs to submit a declaration in respect of their independence, addressing each category of potential conflict, at the beginning of any assignment, which requires the appointment of a sponsor or an IFA.

Q.10 Do you agree with our proposals?

✓ Yes, qualified

We agree with the concept that a sponsor should not act for a new applicant or listed issuer from which it is “not independent”. We agree with the broad range of factors that might impact on a sponsor’s ability to act independently, but consider that the existence of these factors as set out above should not on their own be regarded as precluding the sponsor from acting as such for the issuer. The sponsor however should seriously consider the impact of these factors on their independence to act, and ensure adequate safeguards are in place to mitigate/eliminate the threat to independence to an acceptable level, to the satisfaction of the regulators, before accepting the appointment. This is also what we understand to be the spirit of what is proposed in the consultation paper.

## RESPONSIBILITIES

### Reasonable investigations

(Paragraphs 124 to 152 of Part B of the Consultation Paper)

We propose that the Main Board and GEM Listing Rules be amended to require sponsors to conduct reasonable investigations to satisfy themselves that:

- the new applicant is suitable for listing, the new applicant's directors appreciate the nature of their responsibilities and the new applicant and its directors can be expected to honour their obligations under the Exchange Listing Rules and the Listing Agreement;
- "non-expert sections" contained in the new applicant's listing application and listing documents are true and that they do not omit to state a material fact required to be stated or necessary to avoid the statements being misleading; and
- there are no reasonable grounds to believe that the "expert sections" contained in the new applicant's listing application and listing documents are not true or omit to state a material fact required to be stated or necessary to avoid the statements being misleading.

We propose that sponsors be required to comply with a Code of Conduct that will set out, among other things, the minimum due diligence a sponsor would be expected to undertake to satisfy the obligations to conduct reasonable investigations we propose including in the Listing Rules.

We propose that the Main Board and GEM Listing Rules be amended to require IFAs:

- to take all reasonable steps to satisfy themselves that the terms and conditions of the transaction or arrangement are fair and reasonable and in the interest of the issuer and its shareholders as a whole and that there are no grounds to believe that any expert advice or opinion relied on in relation to the transaction are not true or omit a material fact; and
- to make a declaration in their report of the due diligence they have performed in order to reach a conclusion that the terms of the relevant transaction or arrangement are fair and reasonable and in the interest of the issuer and its shareholders as a whole.

*Q.11 Do you agree with our proposals?*

X No

**While we agree that it is important that sponsors perform proper due diligence on listing applicants and support the concept of setting out guidelines to ensure a level playing field, members of the Society who are involved in corporate finance work strongly rejected the additional responsibilities proposed which are considered to be unreasonable and unrealistic to achieve in practice.**

## **CODE OF CONDUCT FOR SPONSORS AND INDEPENDENT FINANCIAL ADVISERS**

(Annex 2)

At Annex 2 we set out the proposed Code of Conduct for Sponsors and Independent Financial Advisers.

*Q.12 Do you agree with the approach adopted in the proposed Code of Conduct for Sponsors and Independent Financial Advisers?*

X No

**The Society supports the idea of having a Code of Conduct for Sponsors and Independent Financial Advisers. However, our members involved with corporate finance work consider that there is already the SFC Code of Conduct for Financial Advisers, which should be further developed if considered necessary. There should not be 2 sets of Code of Conduct. In addition, the proposed Code of Conduct is too rules specific, certain of which are impractical and impose unrealistic obligations on sponsors. Any proposed Code of Conduct should be more principle based while maintaining a fine balance between principles and rules.**

**Declaration by sponsors and lead underwriters in listing documents to be registered**  
(Paragraphs 153 to 165 of Part B of the Consultation Paper)

We propose that both sponsors and lead underwriters (where the latter are different from the former) should make a statement in listing documents regarding the extent of their due diligence which would track the form of statement currently given to the Exchange on a private basis by sponsors subject to the modification noted below. A sponsor is also expected to ensure that the document presents a fair impression of the issuer and that it has been written in plain language. The sponsor's due diligence obligation is modified in respect of reports and information published in a listing document with the consent of an expert. The form of declaration proposed recognizes this distinction. In respect of "non-expert sections" of a listing document we propose that the following statement should be made "[Sponsor firm and underwriter] confirm(s), at the date of this document, that after reasonable investigation it believes/they believe and have reasonable grounds to believe that the information set out in this listing document at [make specific references] is not materially false or misleading" and, in respect of "expert sections", an alternative test of due diligence that "it/they have no grounds to believe and do not believe that the information set out in those sections of the listing document at [make specific references], which have been prepared and authorized by [name], is materially false or misleading".

*Q.13 Do you agree with our proposals?*

X No

**Lead underwriters should not be required to sign responsibility statements like sponsors. We agree that sponsors should take overall responsibility of the listing documents but should not be required to sign responsibilities statement to the extent as proposed. Different experts should take responsibility for the part of the expertise that they are responsible for.**



**IFA Due Diligence Declaration**

(Paragraph 147 of Part B of the Consultation Paper)

We propose that IFAs are required to take all reasonable steps to satisfy themselves that the terms and conditions of the transaction or arrangement are fair and reasonable and in the interest of the issuer and its shareholders as a whole, and that there are no grounds to believe that any information, expert advice or opinion relied on in relation to the transaction or arrangement are not true or omit a material fact. IFAs should include in their reports a signed declaration setting out the due diligence they have performed in order to reach a conclusion that the terms of the transaction or arrangement are fair and reasonable and in the interest of the issuer and its shareholders as a whole.

*Q.14 Do you agree with our proposals?*

X No

**Same reasons as for Q.13.**

## REPORTING OBLIGATIONS AND MONITORING

(Paragraphs 166 to 170 of Part B of the Consultation Paper)

We propose to replace the requirement for an annual review with a certification process and a targeted programme of monitoring.

We propose to require sponsor firms and IFA firms and their eligible supervisors to submit annual confirmations that they remain eligible to act in such capacity. In addition, they are required to report to the Exchange as soon as they became aware if they no longer satisfy the eligibility criteria set out in the Listing Rules or any information provided by them in connection with their application or continued inclusion on the list of Sponsors or the list of IFAs has changed. The Exchange may also conduct a specific review in relation to the continued inclusion of the sponsor firm or IFA firm (or any of its employees) if it becomes aware or has reason to believe that the suitability of the firm/individual may be in question.

The monitoring tools we propose to use will vary according to circumstances and may include one or more of the following:

- Complaints;
- Desk based reviews of transactions;
- Reviews of referrals;
- Liaison with other agencies, professional or regulatory bodies;
- Meetings with management and other representatives from a sponsor firm or IFA firm;
- On-site visits after prior notification;
- Reviews of notifications and confirmations from sponsors or IFAs; and
- Reviews of past services provided, and documentation produced, pursuant to the Listing Rules by a sponsor or an IFA.

*Q.15 Do you agree with our proposals?*

X No

**We believe that it would be more appropriate to develop a Continuing Professional Development programme for sponsors rather than having an on-going requirement to carry out certain number of significant transactions each year after approval as a sponsor or IFA (in much the same way as accountants and lawyers may continue to practice once qualified provided they comply with their respective continuing professional development requirements).**

## COMPLIANCE AND SANCTIONS

(Paragraphs 171 to 181 of Part B of the Consultation Paper)

We propose that sponsors and IFAs and their eligible supervisors and staff all be subject to disciplinary sanction. As noted in paragraph 54 we do not propose having a list of acceptable directors and individual staff members who are not eligible supervisors. Thus, all persons licensed as representatives to advise on corporate finance will be entitled to do sponsorship or IFA work under the supervision of an eligible supervisor, unless they have been declared to be an unacceptable person.

We propose disciplinary sanctions for sponsors and IFAs similar to those under the current GEM Listing Rules, but with some variations for individuals. As with our sanctions for issuers and directors, we propose a graduated hierarchy of shaming and disabling sanctions that provide the flexibility to ensure the sanction is appropriate to the circumstances. Our proposed sanctions are:

- Private reprimand;
- Public statement with criticism;
- Public censure;
- Declaration that an individual is an unacceptable person or cannot be an eligible supervisor for a specified period of time;
- Suspension of a firm from the list of acceptable sponsors or list of acceptable IFAs for a specified period of time;
- Declaration that an individual is an unacceptable person or cannot be an eligible supervisor; and
- Removal of a firm from the list of acceptable sponsors or list of acceptable IFAs.

*Q.16 Do you agree with our proposals?*

✓ **Yes, qualified**

**We agree with the proposals except that there should not be a published list of unacceptable individuals.**

## **ABILITY OF EXISTING GEM AND MAIN BOARD SPONSORS AND IFAS TO MEET ELIGIBILITY CRITERIA FOR ACCEPTABLE LISTS**

(Paragraphs 186 to 189 of Part B of the Consultation Paper)

For those respondents to this Consultation Paper who are currently on the list of GEM Sponsors or who currently perform or who have in the past 2 years performed work as Sponsor to Main Board applicants for listing or have in the past 2 years acted as an IFA, we would appreciate your response to the following questions:

*Q.17 Would you meet the proposed eligibility requirements for sponsor firms or IFA firms (whichever is applicable), including the requirement that sponsor firms have four eligible supervisors and HK\$10 million capital or that IFAs have two eligible supervisors if those requirements:*

**N/A**

*Q.18 If your answer to any of questions 17 (a)-(d) was negative, please state which criteria would cause your firm not to meet the requirements and comment on whether the proposed transitional arrangements would give you a sufficient opportunity to meet all the requirements? Would this change if the second transition period (in which existing GEM sponsors would only be required to have 3 eligible supervisors to be on the list of acceptable sponsors) was 2 years instead of 1 year? Do you have any other suggestions or comments on how to address the issues arising out of the impact analysis at paragraphs 186 to 188 of Part B of this Consultation Paper?*

**N/A**