

I'm writing to seek SFC's clarification on the licensing requirement for OC in case the proposal set out in the Consultation put through.

Reference is made to section "Sponsor coupling proposal" of the Consultation. It is mentioned therein (under note 32) that SFC thinks that the sponsor coupling proposal would work because over 90% sponsor firm have or has a group company has Type 1 RA license. Accordingly, my understanding on this note is that SFC believes that OC should be a Type 1 RA licensee.

However as mentioned in earlier sections of the Consultation, OC is expected to advise the issuer on (quoted from Q5) "(i) syndicate membership and fee arrangements; (ii) marketing strategy; and (iii) pricing and allocation" as well as performing all the functions set out in the Consultation (refers to as "Duties of OC" hereafter). Therefore I am given the impression that, based on the Consultation, the OC should be a Type 1 RA licensee in order to perform the Duties of OC.

According to the Schedule 5 of the SFO, the extracted relevant definition for Type 1 RA (dealing in securities) and Type 6 RA (advising in corporate finance) are as follow:

dealing in securities (證券交易), in relation to a person, means making or offering to make an agreement with another person, or inducing or attempting to induce another person to enter into or to offer to enter into an agreement—

(a) for or with a view to acquiring, disposing of, subscribing for or underwriting securities; or

...

by the person, except where the person—

...

(vii) issues a prospectus which complies with, or is exempt from compliance with, Part II of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) or, in the case of a corporation incorporated outside Hong Kong, Part XII of that Ordinance; (Amended 28 of 2012 ss. 912 & 920)

(viii) issues a document relating to the securities of a corporation incorporated in Hong Kong which is not a company, being a document which—

(A) would, if the corporation were a company, be a prospectus to which section 38 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) applies, or would apply if not excluded by section 38(5)(b) or 38A of that Ordinance; and (Amended 28 of 2012 ss. 912 & 920)

(B) contains all the matters which, under Part XII of that Ordinance, would be required to contain if the corporation were a corporation incorporated outside Hong Kong and the document were a prospectus issued by the corporation;

(ix) issues a form of application for the shares or debentures of a corporation, together with—

(A) a prospectus which complies with, or is exempt from compliance with, Part II of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) or, in the case of a corporation incorporated outside Hong Kong, Part XII of that Ordinance; or (Amended 28 of 2012 ss. 912 & 920)

(B) in the case of a corporation incorporated in Hong Kong which is not a company, a document which contains the matters specified in paragraph (viii)(B);

...

(xiii) is licensed or registered for Type 4 or Type 6 regulated activity and, solely for the purposes of carrying on that regulated activity, he issues a document under section 175(1)(a)(i) or (ii) of this Ordinance, the content of which complies with the requirements of section 175(1)(b) and (c) of this Ordinance; (Amended L.N. 197 of 2005)

advising on corporate finance (就機構融資提供意見) means giving advice—

(a) concerning compliance with or in respect of rules made under section 23 or 36 of this Ordinance governing the listing of securities and the code published under section 399(2)(a) or (b) of this Ordinance;

(b) concerning—

(i) any offer to dispose of securities to the public;

(ii) any offer to acquire securities from the public; or

(iii) acceptance of any offer referred to in subparagraph (i) or (ii), but only in so far as the advice is given generally to holders of securities or a class of securities; or

...

but does not include such advice given by—

...

(ii) a person who is licensed for Type 1 regulated activity who gives such advice wholly incidental to the carrying on of that regulated activity;

(iii) an authorized financial institution which is registered for Type 1 regulated activity which gives such advice wholly incidental to the carrying on of that regulated activity;

...

Since the definition of Type 1 RA has already excluded activities with a prospectus being issued (like Hong Kong IPO as well as Hong Kong listing bond and debentures under exclusion (vii) (viii) and (ix)), I am concerned that whether a Type 1 licensee could rely on the exclusion (ii) and (iii) set out in the definition of Type 6 RA and perform the Duties of OC, which falls within the scope of definition (b) of Type 6 RA, solely rely on his/her Type 1 license.

On the other hand, a Type 6 licensee could rely on the exclusion (xiii) set out in the definition of Type 1 RA to advise the issuer on Type 1 RA should the Type 6 licensee does not possess a Type 1 license. Therefore, I am in serious concern whether it is correct or not for the SFC assessed the feasibility of the sponsor coupling proposal based on the holding of Type 1 license by the sponsor firms.

Based on the above, I would like to invite the SFC to clarify the licensing requirement for OC in the conclusion of the Consultation to avoid inadvertent unlicensed performance of RA under the SFO.