THE RESPONSIBILITIES OF LAWYERS FOR THEIR CLIENTS' MISSTATEMENTS AND OMISSIONS TO THE SECURITIES MARKET IN SINGAPORE

This article examines the extent to which lawyers advising on the disclosure documents of their clients issued to the securities markets should be responsible for their clients' disclosure failures. It identifies the following problems with the current framework. First, there is a lack of objective due diligence standards which lawyers are expected to meet when they are advising on public disclosure documents. Second, except for takeovers, public enforcement actions against lawyers are inadequate even if they have not acted with due care and diligence in ensuring that their clients comply with their disclosure obligations. Third, private enforcement actions against lawyers are weak or non-existent. Fourth, the lack of clarity on the reporting obligation of lawyers, who suspect securities fraud committed by, or on behalf of, their corporate clients, to report up the ladder and the lack of obligation to report externally to a regulator, do not encourage lawyers to make the relevant inquiries. This article argues that the solution has to lie in imposing public oversight over the lawyers advising their clients on public disclosure documents. This is already the position taken for takeovers and there is no reason why such oversight should not be extended to all disclosure documents.

Wai Yee **WAN***
LLB (National University of Singapore), BCL (Oxford);
Associate Professor of Law, Singapore Management University.

I. Introduction

1 Lawyers, together with issue managers or financial advisers, underwriters and accountants, are retained by companies entering into significant business transactions, including securities offerings or significant mergers and acquisitions. Listed companies entering into such transactions or offerors making takeover offers for listed

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companies are required to issue the relevant disclosure documents to the securities market pursuant to the applicable legislative or regulatory requirements. Lawyers are engaged by these companies not only to structure, negotiate and execute the transaction but also to prepare or review the non-expert sections of the disclosure documents, which are based on information compiled and obtained from their corporate clients.

2 In theory, lawyers not only provide independent advice to, but are also in the position to monitor and control the disclosure decisions of, their clients, thereby deterring their clients from making false or misleading statements or withholding material disclosures. In some ways, they can be regarded as carrying out the function of gatekeepers to the securities market.[1] In the US, § 307 of the Sarbanes-Oxley Act of 2002[2] and the regulations promulgated thereunder[3] impose certain statutory gatekeeping responsibilities on securities attorneys.

3 In Singapore, the focus has been on increasing the regulation of the issue manager or the financial adviser, particularly in light of the recent scandals involving S-chips, which are companies listed on Singapore Exchange ("SGX") but whose operations are predominantly in China.[4] Until recently, the responsibilities of the lawyers for their clients' misstatements and omissions have not been the subject of

1 There is no universal definition of a gatekeeper. Kraakman has defined "gatekeepers" to mean private parties in the market who are able to monitor, control or influence the conduct of its corporate clients and thereby prevent or deter its misconduct by withholding co-operation with them: see Reinier Kraakman, "Gatekeepers: The Anatomy of a Third Party Enforcement Strategy (1986) 2 J L Econ & Org 53. See also Assaf Hamdani, "Gatekeeper Liability" (2003) 77 S Cal LR 53 at 63 (adopting a similar definition). On the other hand, Coffee has defined "gatekeepers" more narrowly as reputational intermediaries who provide verification and certification to investors: see John C Coffee Jr, *Gatekeepers: The Professions and Corporate Governance* (New York: Oxford University Press, 2006) at pp 2–3. In this article, gatekeepers are used in this article in the wider sense to mean the ability to disrupt or avert misconduct by management or controllers of the company, and not necessarily in the narrow sense to mean only the certification of the clients' statements.

2 Pub L 107–204; 116 Stat 745 (2002) (codified in various sections of 15 USC and 18 USC).

3 See Final Rule: Implementation of Standards of Professional Conduct for Attorneys (Securities Act Release No 33-8185; 68 FR 6296) (29 January 2003) (codified at 17 CFR §§ 205.1–205.7).

4 For example, see Singapore Exchange, *SGX-ST Listing Manual Amendments – Effective 29 September 2011: Listing Rules to Strengthen Corporate Governance and Foster Greater Disclosure* (29 September 2011), available at <http://rulebook.sgx.com/net_file_store/new_rulebooks/s/g/SGX_Mainboard_rules_September_29_2011_amended2.pdf> (accessed 15 November 2013) (requiring the financial adviser appointed to be named and the financial adviser is required to include a responsibility statement in the shareholders' circular).

intense public debate or scrutiny.[5] However, the decision of the Singapore Securities Industry Council ("Council") in *Re Jade Technologies Holdings Ltd* ("*Re Jade Technologies*")[6] has put the role of lawyers advising on disclosure documents in the spotlight; in that case, it was held that solicitors acting for the offeror could be publicly censured for its false statements in public takeover documents if they (the solicitors) have fallen short of their duty of care.

4 Part II examines the role of lawyers in relation to the disclosure documents issued by their corporate clients to the securities market in Singapore and the problems in holding the lawyers to account. The focus is on the following obligations of the lawyers: (a) the obligation to conduct due diligence and verification on disclosure documents; (b) the duty to advise the client on disclosure issues; and (c) the duty to report, up the organisational ladder, should there be any suspicion or knowledge of securities fraud by the company or its management or employees. Whether the lawyer should report externally to a regulator in the absence of the client's consent is beyond the scope of this article. Part II argues that while lawyers owe duties and are theoretically liable to their corporate clients for failing to conduct due diligence in the preparation of the disclosure document, the lack of common standards of due diligence will make it difficult for a claim based on negligence to succeed (whether by the board of the corporate client or by the shareholders pursuant to a derivative action). Contributory negligence also exists to reduce the damages payable. The lack of clarity on the reporting obligation of a lawyer who suspects securities fraud committed by, or on behalf of, his corporate client, to report up the ladder does not encourage the lawyer to make the relevant inquiries lest he is tainted with knowledge. Actions premised on dishonest assistance by the lawyers are also fraught with difficulties.

5 Part III argues that, except for takeovers, lawyers advising their clients on public disclosure documents are subject to very low risks of public enforcement action or disciplinary proceedings if they are found to be wanting in care and diligence. Part IV argues that private enforcement actions by shareholders and other investors of a listed company who have suffered losses arising from the misstatements or

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5 *Cf* Attorney-General Steven Chong, "The Lawyer, the Law and Regulations – Is There a Case for Gatekeeping?", speech for Attorney-General's Plenary Address, LAWASIA Conference, Plenary Session 1 (28 October 2013) (discussing gatekeeping roles of lawyers generally).

6 Grounds of Decision of the Hearing Committee appointed by the Securities Industry Council, *In the matter of Jade Technologies Holdings Ltd* (14 October 2008). For a general discussion on the role of lawyers in takeovers, see Wai Yee Wan, "Duties of Professional Advisers in M&A Transactions" in Wai Yee Wan & Umakanth Varottil, *Mergers and Acquisitions in Singapore: Law and Practice* (Singapore: LexisNexis, 2013) ch 10.

omissions against its lawyer are unlikely to be successful even if the lawyer has failed to act with due care and diligence.

6 Part V discusses the proposed modest solution. This article argues that reputational concerns will not be sufficient to ensure that lawyers carry out their disclosure duties properly and that public oversight over lawyers, which already exists for disclosure documents issued in public takeovers, should be extended to all disclosure documents issued to the securities market. There should also be clear prescriptive reporting obligations on the lawyers when they know or suspect securities fraud being conducted which are similar, but not identical, to those imposed pursuant to the regulations promulgated under § 307 of the Sarbanes-Oxley Act of 2002. This article also argues that the arguments against imposing such gatekeeping responsibilities are not persuasive. Part VI concludes.

7 For the purpose of this article, it focuses only on lawyers who are practising in law firms who are retained as external lawyers, and not in-house lawyers.[7] This article does not address the individual lawyer's liability if he is also a director of the company. This article also does not address situations where the lawyers have deliberately colluded with the management or third parties to actively facilitate securities fraud. Instead this article concentrates on the lawyer's responsibility for failing to identify problems and for reporting when securities fraud is suspected.[8] Disclosure documents refer to any document required to be disclosed to the stock exchange and/or the shareholders in connection with the business transaction either under the applicable legislation or regulation (including the Securities and Futures Act[9] ("SFA"), Companies Act[10] and the SGX listing rules).

7 As external lawyers, they are theoretically less conflicted than, and face incentives that are different from, in-house lawyers employed by the corporations, given that they have careers outside the corporations. They usually have less to gain and more to lose (in terms of reputation) from corporate wrongdoing. *Cf* Sung Hui Kim, "Gatekeepers Inside Out" (2008) 21 Geo J Legal Ethics 441.

8 Admittedly, the line between lack of deliberate collusion or active facilitation of securities fraud and failing to identify problems may not be so easy to draw. See paras 33–35 for a discussion as to how the line may be drawn in the criminal law context.

9 Cap 289, 2006 Rev Ed.

10 Cap 50, 2006 Rev Ed.

II. Roles and responsibilities of lawyers to clients and civil liability controls

A. Background and disclosure documents

8 When a company makes an initial offering of securities in Singapore in conjunction with its listing, it needs to issue a prospectus.[11] Once the company is listed on SGX, it is subject to continuous disclosure obligations, including the obligation to make periodic disclosures such as quarterly and annual financial reports[12] and, subject to narrow exceptions, it must announce immediately information which would likely to have a significant effect on the price of securities.[13] If the listed company issues further securities or enters into a significant business transaction (such as a merger or acquisition) pursuant to the listing rules, it may be required to make announce the transaction and/or despatch the circular to the shareholders to obtain their approval.[14]

9 In these business transactions, the boards of the companies will engage independent professional advisers such as lawyers, issue managers or financial advisers,[15] underwriters (for fund-raising activities), accountants and valuers. Accountants and valuers will prepare their respective expert reports to be included in the expert sections of the disclosure documents. The remaining information, which forms the majority of the disclosure document, will be found in the non-expert sections and are normally drafted by the lawyers. In the case of a prospectus, non-expert sections include an industry overview, a business description, a management discussion and analysis of financial information, a description of the use of proceeds, risk factors and a description on interested person transactions and conflicts of interests. In the case of a shareholders' circular relating to the approval of a merger or acquisition, non-expert sections include the rationale for the transaction and the implication of the transaction on the operations of the acquirer or target.

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11 Securities and Futures Act (Cap 289, 2006 Rev Ed) s 240. A prospectus is required for all offerings unless an applicable exemption in Pt 13 of the Securities and Futures Act applies.

12 Section 203 of the Securities and Futures Act (Cap 289, 2006 Rev Ed) read with ch 7 of the Listing Manual of Singapore Exchange: Mainboard Rules (July 2002).

13 The exceptions are set out in ch 7 read with Appendix 7.1 of the Listing Manual of Singapore Exchange (July 2002).

14 Listing Manual of Singapore Exchange: Mainboard Rules (July 2002) chs 8, 9 and 10.

15 The issue manager or a financial adviser is typically an investment bank, a boutique corporate finance firm or the corporate advisory firm of a bank. An issue manager is required to be appointed if the issuer applies for a listing on the Singapore Exchange.

B. *Duties owed by corporate lawyer to his corporate client*

(1) Background

10 The primary responsibility for the disclosure document falls on the listed company (or "issuer") and its directors.[16] In the case of a prospectus, under ss 253 and 254 of the SFA, among others, the issuer, its directors, issue manager and underwriter may be criminally and civilly liable respectively for false or misleading statements or omissions in the prospectus. It is also clear that the issuer's lawyers are not among the defendants who are liable under s 253 or s 254 of the SFA for false or misleading statements or material omission unless they elect to make statements in the prospectuses.[17] Criminal liability under s 253 is strict for the issuer and its director and the requisite *mens rea* of intention or recklessness needs to be proved for the issue manager and underwriter. Civil liability for the issuer, its directors, issue manager and underwriter under s 254 is strict. Two main defences are available: first, the defendant has made all enquiries that were reasonable in the circumstances and, after doing so, believed on reasonable grounds that the statement was not false or misleading and that there was no material omission.[18] Second, the defendant has placed reasonable reliance on information given to him.[19] Both defences are collectively known as the due diligence defence. Establishing a successful due diligence defence will enable the defendant to avoid civil liability in relation to the prospectus.[20]

11 In the case of disclosure documents which are not prospectuses, ss 199, 200 and 201 of the SFA impose criminal and civil liability for making of false or misleading statements issued to the securities market.[21] Criminal and civil liability is also imposed under s 203 of the

16 Listing Manual of Singapore Exchange: Mainboard Rules (July 2002) rr 10 and 1205 and Practice Note 12.1.

17 See Monetary Authority of Singapore, *Policy Consultation on Amendments to the SFA and FAA* (September 2003) and Monetary Authority of Singapore, *Feedback on the Consultation Paper* (26 March 2004) (The Monetary Authority of Singapore indicated that lawyers and accountants were not statutorily liable and there was no compelling reason to amend the Securities and Futures Act (Cap 289, 2002 Rev Ed) to extend prospectus liability to them).

18 Securities and Futures Act (Cap 289, 2006 Rev Ed) ss 255(1) and 255(2).

19 Securities and Futures Act (Cap 289, 2006 Rev Ed) ss 255(3) and 255(4).

20 While the due diligence defence in s 255 of the Securities and Futures Act (Cap 289, 2006 Rev Ed) does not specify who among the defendants can rely on such defence, it is most unlikely that the issuer will be able to rely on such defence. See Hans Tjio, *Principles and Practice of Securities Regulation in Singapore* (Singapore: LexisNexis, 2nd Ed, 2011) at para 6.33, fn 173.

21 Section 199 of the Securities and Futures Act (Cap 289, 2006 Rev Ed) prohibits the making of a statement that is false or misleading in a material particular and which is likely to induce other persons to subscribe or purchase securities. Section 200 prohibits the making of a statement, promise or forecast that is misleading in order

(*cont'd on the next page*)

SFA on the issuer for failing to make the requisite disclosures in compliance with the listing rules.[22] In addition, at common law, issuers may potentially be liable to purchasers of securities in contract or in tort in relation to the defective disclosure documents.

12 Due to the potential liabilities outlined in the preceding paragraphs and loss of reputation incurred in connection with the issuance of a defective disclosure document, issuers will require their professional advisers to conduct verification exercises and due diligence.

13 Verification ensures that the material statements in the disclosure document are true, accurate and not misleading. Verification usually commences when an advanced draft of the document is ready. The verification meeting will be attended by the company's senior management, directors and professional advisers.[23] Each question and answer that contains an appropriate reference to the evidence for, and the source of, the information underlying the particular answer, will be recorded in the form of verification notes, which will usually be submitted to the board of directors' review and approval.

14 Due diligence is a wider exercise than verification as it seeks to collect information about the issuer to check and to test the representations made in the disclosure documents. Generally, in a due diligence process, the issuer and its professional advisers should first agree on the material risks and the thresholds for materiality. The process then involves asking management questions and checking the underlying facts such as reviewing contracts, filings and internal records to ensure that they are consistent with the disclosure documents. The terms of reference in each letter of engagement will set out the scope of due diligence to be conducted by the issue manager, the accountants and lawyers.

15 Unlike the verification exercise which is fairly well established in Singapore, there is no similar market practice as to the scope and depth of due diligence expected to be conducted by lawyers acting for the issuer. The scope of due diligence is only a matter of contract between

to induce another to deal in securities. Section 201 is the catch-all provision which prohibits a person from, in connection with the subscription or purchase securities, engaging in any act, practice or course of business which operates as a fraud or deception (s 201(*b*)) or making a false statement or misleading omission of material facts (ss 201(*c*) and 201(*d*)). In relation to the mental requirement, ss 199 and 200 impose liability on the basis of fraud, recklessness or negligence. Section 201(*b*) is silent on whether fault is required.

22 Criminal sanctions may be imposed on the issuer if the contravention is intentional or reckless. Civil liability may be imposed if the contravention is intentional, reckless or negligent.

23 See Andrew Tuch, "Multiple Gatekeepers" (2010) 96 Va L Rev 1583 at 1658–1659.

the lawyers and the issuer, though its terms of reference may be reviewed by the issue manager.[24] The problem with relying solely on verification is that verification only checks the accuracy of the statements in the disclosure document whereas due diligence goes further in that it checks that there is no omission of material information.

16 In contrast, issue managers are expected by SGX to conduct fairly robust due diligence on the company to assess its eligibility for listing. SGX does not set out the minimum requirements on due diligence, though in the case of initial public offerings, issue managers may take guidance from the non-binding Association of Banks in Singapore ("ABS") Initial Public Offering Due Diligence Guidelines ("ABS Guidelines") issued by the ABS.[25]

17 In some initial public offerings, particularly where the securities are marketed outside Singapore, the underwriter may require the issuer's lawyers to issue a negative assurance letter that is similar to a rule 10b-5 disclosure letter used in the US registered offering or a rule 144A/regulation S offering.[26] The negative assurance letter sets out the scope of work that is performed by the law firm and confirms that no matter has come to its attention that gives it reason to believe that the prospectus contains any materially false or misleading statement or there is a material omission.[27] The negative assurance letter is not publicly disclosed to investors but is issued with the primary aim of assisting the issue manager, underwriter and the directors of the issuer to establish the due diligence defence. Negative assurance letters are not issued for disclosure documents which are not prospectuses.

24 See s 2.1.4 of the Association of Banks in Singapore Initial Public Offering Due Diligence Guidelines (effective 9 December 2013).

25 The Association of Banks in Singapore Initial Public Offering Due Diligence Guidelines (effective 9 December 2013) ("ABS Guidelines"), were first issued by Singapore Investment Banking Association in August 2004. The ABS Guidelines are available at <http://www.abs.org.sg/pdfs/Publications/ABS_IPO_Due_Diligence_Guidelines_20131209.pdf> (accessed 15 January 2014). For full sponsors acting in Catalist listings, the full sponsors are expected by Singapore Exchange to comply with the ABS Guidelines: see r 225 of the Catalist Rules of Singapore Exchange.

26 In an offering under rule 144A, 17 CFR § 230.144A, the initial sale by the issuer is made to a limited number of financial intermediaries who promptly resell the securities to "qualified institutional buyers" pursuant to the resale exemption provided by rule 144A. Regulation S, 17 CFR §§ 230.901–230.905, provides an exemption for certain offshore offerings.

27 The practice of using negative assurance letters is drawn from Australia. For a discussion on the Australian practice, see Greg Golding, "The Reform of Misstatement Liability in Australia's Prospectus Laws" (31 December 2001) at p 173 (unpublished SJD dissertation, University of Sydney, available at <http://ses.library.usyd.edu.au/bitstream/2123/607/1/adt-NU20040206.16134402whole.pdf> (accessed 15 November 2013).

(2) Lack of common standards for due diligence

18 In theory, the potential liabilities incurred by the issuer and the availability of the due diligence defence only if the requisite care is demonstrated should motivate the issuer's lawyers to engage in robust due diligence exercises so as to minimise the likelihood of the prospectus being found to be defective. However, in practice, this may not hold true. First, the scope of the due diligence defence under the SFA is imprecise and neither the legislation nor its rules prescribe what lawyers should be expected to do during due diligence and verification processes. Unlike issue managers, where the industry expects them to perform in accordance with ABS Guidelines (and which are disclosed publicly), there is no such equivalent due diligence standards set by or for lawyers.

19 In relation to the market practice, while there is a fairly clear expectation of what a verification exercise should involve, there is no similar market understanding on the level of due diligence that is appropriate for prospectuses, which then makes it difficult for a corporate client to demonstrate that the lawyer has fallen short of his duty. It was reported that a few of the larger initial public offerings in Singapore have utilised the due diligence committees, a practice which is drawn from Australia. A due diligence committee comprises management, directors, lawyers, accountants, issue managers and underwriters to check and verify the statements in the prospectus, and checklists are used to allocate the responsibility of various members of the committee for various investigations and inquiries.[28] The due diligence committee will report to the board of the company issuing the prospectus. The benefit of such a committee is that all relevant disclosure issues should be surfaced to the entire committee for the matters to be debated upon. However, the practice of due diligence committees is not widespread in Singapore[29] despite the fact that the statutory civil liability provisions for prospectuses have been in force since 2002.[30]

20 Second, detailed due diligence by professional advisers, including lawyers, is a costly exercise. It is expected that the costs of professional advisers will ultimately be passed to the issuers as the costs of raising

28 See Hans Tjio, *Principles and Practice of Securities Regulation in Singapore* (Singapore: LexisNexis, 2nd Ed, 2011) at para 6.34.

29 Hans Tjio, *Principles and Practice of Securities Regulation in Singapore* (Singapore: LexisNexis, 2nd Ed, 2011) at para 6.34.

30 In certain large initial public offerings, lawyers provide negative assurance letters in connection with the prospectus upon request from the underwriter, which are similar to the rule 10b-5 disclosure letters issued by counsel for the underwriters in US offerings. See n 36 below. However, negative assurance letters are not required in all initial public offerings.

capital in the securities markets. However, if the issuer client is unwilling to bear some of the costs, the lawyers will either bear these costs or negotiate with the issuers to reduce some of the procedures that they would otherwise have regarded as best practices in conducting due diligence. The latter is particularly likely to occur if there are no minimum standards or guidelines set by legislation, regulators, courts or industry. In particular, one key point of contention is often the extent to which professional advisers can rely on the assurances of their client's management. Issue managers are expected by the industry to go behind the assurances in some cases[31] but are lawyers required to do so when they are instructed on conducting due diligence? Lawyers who choose to pursue additional inquiries have to bear in mind that the client may not be so willing to pay those additional costs. Yet, failure to do so will result in harm to market integrity.

21 The recent spate of scandals relating to outright fraud and disclosure failures committed by recently listed S-chips, causing tremendous losses to investors, has led to the question as to the adequacy of due diligence conducted by professional advisers in the listing and the process of preparation of the prospectus.[32] A number of the outright frauds and disclosure failures occurred shortly after their listings on SGX. While it is not clear whether more effective or thorough due diligence would have led to discovery of such securities fraud, the number of these instances suggests the probability of underlying deficiencies in governance arrangements of the issuers and that some of these issuers should not have been properly admitted to listing in the first place.

22 The position in Singapore may be compared to the US where through a combination of legislation, case law and industry, there is a relatively well-developed set of standards to describe what needs to be done to establish the due diligence defence for a registered offering. Under s 11 of the Securities Act of 1933,[33] the underwriter is strictly liable for material misstatements or omissions in the non-expertised

31 See s 2.1.2 of the Association of Banks in Singapore Initial Public Offering Due Diligence Guidelines (effective 9 December 2013).

32 Between 2006 to 2011, outright fraud and accounting irregularities were found in at least 14 S-chips: see Ravi Menon, "Singapore's Approach to the Regulation of Capital Markets" in the Keynote Address at Thomson Reuters 2nd Pan-Asian Regulatory Summit, Singapore (28 September 2011), available at <http://www.mas.gov.sg/en/News-and-Publications/Monetary-Policy-Statements-and-Speeches/2011/SG-Approach-to-the-Regulation-of-Capital-Markets.aspx> (accessed 15 November 2013). More S-chips are also under investigation by special auditors: see R Sivanithy, "SGX must just hit offenders hard" *The Business Times* (24 February 2012).

33 15 USC § 77k(a)(5).

portion[34] of the registration statement containing prospectus unless he can establish the due diligence defence, that is, after reasonable investigation, the underwriter has reasonable ground to believe that the registration statement was accurate and complete in all material respects.[35]

23 In US securities offerings, lawyers, through their professional organisation, have established the key steps for due diligence in a registered securities offering or an offering under rule 144A/regulation S. US counsel for each of the issuer and the underwriter issues a rule 10b-5 disclosure letter, which is a requirement for the closing of these securities offerings. This rule 10b-5 disclosure letter provides that, among other things, based on their examination of the issuer and participation in the preparation of the offering documentation, the counsel has no reason to believe that it includes any material misstatement or omission of a material fact.[36]

24 Even though the rule 10b-5 disclosure letter is only issued to the underwriter (for registered offerings) or placement agents or financial intermediaries (for rule 144A/regulation S offerings), and not to the public, it is well accepted that these offerings will require the issuance of such letters by the law firm whose name is disclosed in the selling document, and that due diligence must be conducted before such letters are issued. As there is substantial securities litigation in the US, there are also more cases considering the obligations of underwriters and their lawyers. For example, *Escott v BarChris Construction Corp*[37] ("*BarChris*") illustrates what lawyers acting for the underwriter must do before the underwriter is held to have discharged its obligations of due diligence. In *BarChris*, while the underwriter and its counsel conducted due diligence on the issuer, it was held to be insufficient because they did not insist on notes of minutes of meeting being prepared, nor did they review customer delinquencies and related correspondence or the contracts that the company had with its customers, which would flag

34 The non-expertised portions of the registration statement are those that are not prepared by experts such as the accountants. See Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* vol 2 (US: Thomson West, 5th Ed, 2005) at para 7.3[1].

35 15 USC § 77k(b).

36 See Special Report of the Task Force on Securities Law Opinions, American Bar Association Section of Business Law, "Negative Assurance in Securities Offerings" (2004) 59 Bus Law 1513. See also Report of the Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities, ABA Section of Business Law, "Negative Assurance in Securities Offerings (2008 Revision)" (2009) 64 Bus Law 395. See Howell Jackson & Eric Pan, "Regulatory Competition in International Securities Markets: Evidence from Europe – Part II" (2008) 3 Va L & Bus Rev 207 at 220–224 (noting that for larger rule 144A offerings, two rule 10b-5 letters (from the issuer's lawyers and underwriter's lawyers are required by the underwriters)).

37 (1968) 283 F Supp 643.

underlying problems of the company. In particular, it was not sufficient to rely on management's representations at face value without doing the underlying investigations on the documents which back these representations.

(3) Takeover and other non-prospectus disclosure documents

25 There is a similar lack of objective standards of due diligence that lawyers are expected to undertake for takeover and other non-prospectus disclosure documents. In *Re Jade Technologies*, discussed below, which involved documents issued in a public takeover, Council held that there was an independent duty by the lawyers to review underlying documents of their clients when they were put on notice that certain proposed disclosures may not be accurate. It remains an open question as to whether lawyers can generally rely on their clients' representations without independent verification in the absence of notice.

26 It is also an open question as to whether more routine disclosure documents, such as shareholder circulars for fund-raising which are not issued in takeovers, should be subject to the same level of rigorous due diligence as prospectuses and takeovers. These documents are issued more frequently during the lifespan of a company and it may not be practical to insist on the same amount of level of inquiries in each case.

C. Duty to advise on disclosure issues

27 The extent of the duty of the external lawyer to his client depends on the terms of the retainer. Lawyers are generally not obliged to advise clients on the wisdom of a transaction or commercial merits of a transaction.[38] If the lawyers are engaged in preparing a disclosure document, it should follow that they would have to advise their client on the mandatory disclosure obligations of the client imposed under the relevant legislation or regulation. The question arises as to what happens if they give aggressive opinions on disclosure issues which turn out to be wrong in circulars or other disclosure documents that are not prospectuses.[39] Certainly, if the corporate client turns out to be liable, either civilly or criminally, it should ordinarily have recourse against its

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38 See *Clarke Boyce v Mouat* [1994] 1 AC 428 at 437, *per* Lord Jauncey.

39 In the case of prospectus, to rely on the due diligence defence under s 255(2) of the Securities and Futures Act (Cap 289, 2006 Rev Ed), he will have to show that he made all inquiries that were reasonable in the circumstances and after doing so, believed on reasonable grounds that there was no omission from the prospectus. Based on the provision, the defendant cannot escape liability by simply raising reliance on counsel defence to verify the document's accuracy.

lawyer, though the defence of contributory negligence may also be available if the client had contributed to the loss.[40]

D. Obligation to report up the ladder

28 This part examines whether a lawyer is under a positive obligation to report up the organisational ladder within the company in the event that he knows or suspects securities fraud being committed by the company or its management or employee. It is clear that if the lawyer acting for the company *chooses* to report up the ladder to the chief executive officer or the board if he suspects securities fraud, he is not in violation of any obligation of confidence because his "client" is the company and not its management or employees.

29 Must the lawyer report up the organisational ladder within his corporate client if he has suspicion or knowledge that securities fraud is going to be committed by the company's management or employee?[41] It is submitted that if there is *actual* knowledge of such fraud, the lawyer should be under such an obligation to report up the line to prevent harm to the client.[42] As a general rule, where information comes to the lawyer in the course of doing the work that he is instructed to do and falls within the retainer, he is obligated to disclose to the client.[43] Even if the information is outside the retainer but is nevertheless material to the client, it has been held that the lawyer is also obliged to disclose to the client in certain circumstances.[44] Securities fraud that is committed by the client's management or employees is likely to be regarded by the courts as information that is of significance to the client. What is less clear is who, within the "client" organisation, would be the appropriate body for the lawyer to report to.

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40 See *JSI Shipping (S) Pte Ltd v Teefoongwonglcloong* [2007] 4 SLR(R) 460 and *PlanAssure PAC v Gaelic Inns Pte Ltd* [2007] 4 SLR(R) 513. See *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39, where the House of Lords held that the *ex turpi causa* defence could defeat an insolvent company's claims against a third party auditor which owed duties to it. However, the decision is unlikely to apply to a publicly listed company, which has many shareholders, not all of whom are implicated in the fraud, as opposed to a company which has a sole director and sole beneficial shareholder.

41 See Joan Loughrey, *Corporate Lawyers and Corporate Governance* (Cambridge: Cambridge University Press, 2011) at pp 186–188.

42 A similar view is reached by the Law Society of England and Wales in a letter to Jonathan Katz, Secretary of the Securities and Exchange Commission (12 December 2002), available at <http://www.sec.gov/rules/proposed/s74502/ckirby1.htm> (accessed 15 November 2013).

43 See, *eg*, *Moody v Cox* [1917] 2 Ch 71 at 91, *per* Scrutton LJ; *Spector v Ageda* [1973] Ch 30 at 48, *per* Megarry J; *Boyce v Rendells* (1983) 268 EG 268 at 272, *per* Lawton LJ.

44 See *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567 (information learnt in the course of acting for another retainer); *Mortgage Express v Bowerman & Partners* [1996] 2 All ER 836 at 842.

30 If there is no actual knowledge but there are warning signs of fraud being committed by the company's management or employees, it is unclear whether there is such an obligation to report up the ladder by the lawyer. While the Singapore courts have imposed duties on auditors to detect fraud committed by the management or employees of their audit client and to report such fraud to its board of directors,[45] it appears unlikely that a similar duty will be imposed on lawyers advising on disclosure obligations since there is no case law that lawyers are to be regarded as auditors and there is no suggestion in case law that they should be in a position to detect or prevent fraud.

E. Dishonest assistance of breach of fiduciary duties

31 Equity does impose liability if the lawyer assists directors to breach their fiduciary duties owed to the company. However, the assistance in question must be dishonest. While there was some controversy over the definition of dishonesty required for liability, it is now well established in *Royal Brunei Airlines v Tan*[46] and *Barlow Clowes International v Eurotrust International*,[47] which were followed by the Singapore Court of Appeal in *George Raymond Zage III v Ho Chi Kwong*,[48] that dishonesty is an objective test, determined by reference to a normally acceptable standard of honest conduct in the light of the defendant's knowledge of the facts of the transaction and the defendant does not need to know subjectively that such conduct is dishonest.

32 The question would be directed as to how an honest person in the position of the lawyer would have acted. If an honest person would have suspicion that the transaction is one which is procured as a result of the director acting in breach of his director's duty, that person would have made inquiries to confirm his suspicions and his deliberate failure to do so would amount to acting dishonestly. The difficulty with any claim founded on dishonest assistance remains that it is difficult to prove the requisite level of dishonesty as it is clear that merely being put on inquiry is not sufficient. The lawyer has to know or suspect or be wilfully blind to the fact that that the assistance amounts to the facilitation of a breach of directors' fiduciary duty. Drawing from the

45 *JSI Shipping (S) Pte Ltd v Teefoongwonglcloong* [2007] 4 SLR(R) 460; *PlanAssure PAC v Gaelic Inns Pte Ltd* [2007] 4 SLR(R) 513.

46 [1995] 2 AC 378.

47 *Barlow Clowes International v Eurotrust International* [2005] UKPC 37 ("*Barlow Clowes*"). In *Twinsectra v Yardley* [2002] UKHL 12; [2002] 2 AC 164, the House of Lords adopted a hybrid test of dishonesty, involving objective and subjective elements, where the conduct must be contrary to the ordinary standard of honest behaviour and the defendant must be aware that it was dishonest by that standard. However, in *Barlow Clowes*, the Privy Council interpreted the decision to mean that only an objective test of dishonesty is required.

48 [2010] 2 SLR 589.

reluctance shown in imposing accessorial liability at criminal law for intentional aiding on the part of lawyers,[49] it is suggested that the courts will be cautious in imposing the liability of dishonest assistance on the part of professionals.

III. Inadequate public enforcement against lawyers on disclosure failures

A. *Public enforcement against lawyers: Takeovers* versus *non-takeover situations*

(1) General liability under criminal law

33 An argument could be made that lawyers, like any other professionals, could be held criminally liable if they have abetted their corporate clients in committing the disclosure violations pursuant to s 109 of the Penal Code[50] read with s 253 of the SFA (prospectuses), s 109 of the Penal Code read with ss 199, 200 and 201 of the SFA (for other statements made to the securities markets) or s 109 of the Penal Code read with s 203 of the SFA (for omissions). Section 107 of the Penal Code defines abetment of the doing of a thing as, among other things, "intentional aiding", by any act or illegal omission, the doing of that thing. Attempts to distinguish between intentional aiding or mere aiding is often not easy but it has been held that the accused must have knowledge of the circumstances constituting the crime, though wilful blindness may qualify as knowledge; mere suspicion or being put on inquiry is not sufficient.[51] Drafting the documents may amount to aiding, though the point is unclear. However, unless the lawyers who drafted or advised on the defective disclosures knew of the disclosure failures or had wilfully shut their eyes, and their actions are intended to assist their clients in achieving these purposes, it is very difficult for the prosecution to succeed in such a charge of abetment.

34 In the litigation context, the majority of the Singapore Court of Appeal held that that a solicitor, who was charged in the abetment of making a false claim in court, had no duty to verify instructions from a client unless they were plainly dubious or plainly without foundation.[52] It is not clear to what extent the principles, which were framed by the court in general terms, may be applied outside of litigation to disclosure

49 See nn 51–53 and accompanying text below.

50 Cap 224, 2008 Rev Ed.

51 See *Chiaw Wai Onn v Public Prosecutor* [1997] 2 SLR(R) 233; *Bala Murugan a/l Krishnan v Public Prosecutor* [2002] 2 SLR(R) 420.

52 See *Bachoo Mohan Singh v Public Prosecutor* [2010] 4 SLR 137 at [117]–[119]. This was a case where the charge was brought under s 209 read with s 109 of the Penal Code (Cap 224, 1985 Rev Ed).

documents in the securities law setting. If they do, it does not appear that the solicitor is under a positive duty to make an investigation in the face of warning signs as to the client's instructions to ensure that these instructions are not used for fraudulent end.

35 There is also a further difficulty. If the corporate lawyer provides an aggressive opinion to its listed corporate client that disclosure is not required, as in *Madhavan Peter v Public Prosecutor*,[53] the listed corporate client will not be regarded as reckless under s 203 of the SFA if the issuer has obtained and relied on legal advice even if the corporate lawyer turns out to be wrong. It then follows that their lawyers would be immune from criminal liability (at least in relation to abetment) since their clients have not committed any offence in the first place.

(2) Takeovers

36 Until the decision of Council in *Re Jade Technologies*, it was unclear whether the Singapore Code on Takeovers and Mergers ("Takeover Code")[54] regards lawyers as having the responsibility to take reasonable care to ensure the accuracy of their clients' takeover documents.[55] Under the SFA, Council performs the statutory duty to enforce and has the power to censure a person who has breached the Takeover Code.[56] Paragraph 3 of the Introduction of the Takeover Code provides that the responsibility for the contents of the takeover documents rests with the parties, their directors and their "advisers". Note 1 to r 8.2 provides that "advisers" are regarded as being responsible for guiding their clients in respect of information released during the course of the offer but it is unclear whether "advisers" are limited only to financial advisers or whether they include legal advisers.[57]

53 [2012] 4 SLR 613.
54 Monetary Authority of Singapore, *Singapore Code on Takeovers and Mergers* (9 April 2012) ("Takeover Code"). The Takeover Code applies to offers for, among others, Singapore listed public companies and unlisted Singapore public companies with more than 50 shareholders and net tangible assets of $5m.
55 See also s 139(9) of the Securities and Futures Act (Cap 289, 2006 Rev Ed) (which is drafted widely to allow the Singapore Securities Industry Council to censure "any party concerned in a takeover").
56 Securities and Futures Act (Cap 289, 2006 Rev Ed) s 139. Members of the Singapore Securities Council comprise representatives of business, the Government and the Monetary Authority of Singapore.
57 In contrast, in other parts of the Monetary Authority of Singapore, *Singapore Code on Takeovers and Mergers* (9 April 2012), specific responsibility is placed on the financial adviser, such as supervising and conducting telephone campaigns which the bidder or the target wishes to make (r 8.6) and confirming that no new material is disclosed to selected shareholders, analysts or brokers (r 9.1, note 2).

37 In *Re Jade Technologies*, Jade Technologies Holdings Ltd ("Jade") was a SGX-listed company in which S, through vehicles controlled by him, held 46% of the shares. S, through a wholly-owned company, made a takeover offer for Jade. S failed to disclose, however, that approximately 31% of his shareholding (together with the voting rights) was transferred to Opes Prime Stock Broking Ltd ("Opes") pursuant to a securities lending agreement with Opes and which he did not retain beneficial ownership in these shares. When Opes became insolvent, its creditors seized the assets of Opes, including the Jade shares transferred by S, and sold them in the market. S did not have the financial resources to complete the offer; he did not have the funds to repurchase the shares that were transferred to Opes.

38 Before the hearing committee of the Council, it transpired that at the initial kick-off meeting, S had represented to the professional advisers (including the lawyers) that the shares held by him and his vehicles were pledged under a securities lending agreement but that S retained the voting rights and beneficial ownership. The lawyers did not review the securities lending agreement; nor did they press S for a copy. However, they verified the ownership figures against previous disclosures made by S to the securities market.[58] Council held that the lawyers had breached r 8.2 of the Takeover Code in relation to their clients' failure to disclose the fact that 31% of the shareholding was subject to a securities lending agreement pursuant to which they did not have voting rights or beneficial ownership.[59] Council took the view that the offeror's lawyers were under a duty, pursuant to r 8.2, to investigate the implication of the securities lending agreement once they were put on notice of its existence. This duty exists irrespective of whether the lawyers were obliged to do so under the terms of the retainer.[60]

58 The lawyers had asked S for a copy of the securities lending document but did not follow up on the matter. See Grounds of Decision of the Hearing Committee appointed by the Securities Industry Council, *In the matter of Jade Technologies Holdings Ltd* (14 October 2008) ch 6 at [3.1]–[3.2].

59 Monetary Authority of Singapore, *Singapore Code on Takeovers and Mergers* (9 April 2012) rr 3.5(c) and 23.3(c).

60 It was argued by the lawyers that they were not required to investigate the shareholdings under the retainer but the Singapore Securities Industry Council ("Council") held that such argument was not relevant in determining whether there is a duty under the Monetary Authority of Singapore, *Singapore Code on Takeovers and Mergers* (9 April 2012) ("Takeover Code"). On the facts, the lawyers were not censured by Council; among the advisers, the financial advisers had the leading role, and the partner in charge of the matter had voluntarily abstained from acting in Takeover Code-related matters for a certain period of time.

B. Disciplinary Proceedings

39 It may be argued that there is sufficient deterrence against lawyers because they currently face potential disciplinary proceedings under s 83 of the Legal Profession Act[61] if it can be shown, among other things, that the advocate and solicitor has been guilty of "fraudulent or grossly improper conduct in the discharge of his professional duty",[62] and that the failure to act carefully in the context of verification and due diligence could amount to such conduct.

40 However, it is not clear that s 83 of the Legal Profession Act or its corresponding equivalent in other jurisdictions as having a direct deterrent impact on solicitor behaviour. First, in Singapore, there is no reported case in which a solicitor has been called to account under the provision in relation to due diligence failure in any public offering. There was only one instance where a solicitor was called to account but this was in relation to failing to advise that a prospectus was required at all.[63] The spate of scandals relating to disclosure failures committed by recently listed S-chips would suggest the probability of underlying deficiencies in governance arrangements of the issuers, though it is not clear whether the issue managers or legal advisers were at fault.

41 Second, s 83 of the Legal Profession Act is unlikely to be invoked if there is no clear norm as to the standard of care that is expected of a solicitor in a public offering.

42 Third, the experience in other jurisdictions, such as the UK,[64] has shown that lawyers are seldom called to account in relation to disclosure failures of their clients. There are occasions where it is possible to review the due diligence (or lack thereof) of the solicitors documented in the inspection reports of Department of Trade and Industry ("DTI")[65] conducted under s 432 of the Companies Act 1985[66] (and its predecessor legislation). In some of these cases, solicitors were criticised as failing to do enough to prevent the misleading statements from occurring and the matter was referred to the professional

61 Cap 161, 2009 Rev Ed.
62 Legal Profession Act (Cap 161, 2009 Rev Ed) s 83(2)(*b*).
63 *Re Chen Chung Ying Winston* [1988] 2 SLR(R) 419.
64 In the US, the American Bar Association, which drafts the Model Rules of Professional Conduct that serves as models for ethics rules of most bar associations, has historically resisted the idea that attorneys should have any gatekeeping responsibilities: see Robert Gordon, "A Collective Failure of Nerve: The Bar's Response to Kaye Scholer" (1998) 23(2) Law & Soc Inquiry 315.
65 The Department of Trade and Industry ceased to exist in 2007, replaced by the Department for Business, Enterprise and Regulatory Reform, which was replaced by the Department for Business, Innovation and Skills in 2009.
66 c 6 (UK).

organisation representing the solicitors: the Law Society of England and Wales pre-2007[67] and the Solicitors Regulation Authority post-2007. However, in these instances, where the external solicitors had not made the misleading statements[68] or facilitated the securities fraud, disciplinary action had not been taken against the relevant firm of solicitors in their capacity as external counsel. Nor were the overall standards of the law firms involved investigated, or was it felt that the then applicable solicitors' practice rules should be amended.

43 An example is the DTI's inspection report of House of Fraser Holdings plc ("HOF") that arose out of the controversial takeover of HOF by the Al-Fayed in 1985[69] ("House of Fraser Report"). In that case, the Al-Fayed brothers had launched a successful takeover of HOF for £615m for cash, and they had contended that the funds necessary to make the purchase were accumulated by them over several years. However, the House of Fraser Report found that the Al-Fayeds dishonestly represented their origins, wealth, business interests and resources to the Secretary of State, the Office of Fair Trading ("OFT"), the press, the Board of HOF, HOF shareholders and their own merchant bank and solicitors.[70] The false representation related mainly to their past business activities and the way in which they came to be in control of funds between 1984 and 1985. The Al-Fayeds' financial adviser and solicitors were criticised by the DTI inspectors as to their respective

67 The English Legal Services Act 2007 (c 29) came into force which required the separation of the functions of regulation and separation. The Solicitors Regulation Authority ("SRA") was set up to take over the regulatory function but there has yet been no referral to the SRA from a published report of the Department of Trade and Industry or its successors, the Department for Business, Enterprise and Regulatory Reform and Department for Business, Innovation and Skills, partly because these inspection reports are very rare in the last decade. The last inspection took place in 2005 and was published in 2009 relating to the Phoenix Ventures Holdings Ltd.

68 An example of direct making of misrepresentation was in the Norton Group inquiry case. See Department of Trade and Industry (Richard George Bramwell McCombe QC & John Kenneth Heywood FCA), *Norton Group plc: Investigation under Section 432(2) of the Companies Act 1985* (London: Stationery Office, 1993). In the Norton Group inquiry, the inspectors found that H, the solicitor, issued a comfort letter to the underwriters, creating an impression that a sub-underwriter was able to meet its liabilities, knowing that it was untrue. See Department of Trade and Industry (Richard George Bramwell McCombe QC & John Kenneth Heywood FCA), *Norton Group plc: Investigation under Section 432(2) of the Companies Act 1985* (London: Stationery Office, 1993) at pp 182–184. H was eventually charged under the Financial Services Act 1986 and fined £15,000. See "Solicitor Fined £15,000 for Misleading Investors" *The Lawyer* (24 February 1988).

69 See Department of Trade and Industry (Henry Brooker QC & Hugh G C Aldous QC), *House of Fraser Holdings plc: Investigation under Section 432(2) of the Companies Act 1985* (London: Stationery Office, 1991).

70 See Department of Trade and Industry (Henry Brooker QC & Hugh G C Aldous QC), *House of Fraser Holdings plc: Investigation under Section 432(2) of the Companies Act 1985* (London: Stationery Office, 1991) at paras 2.1.1 and 2.2.2.

handling of the matter.[71] The financial adviser was also found to have given comfort on behalf of the Al-Fayeds to the Board of HOF, its advisers, the public (through the media), the OFT, DTI and Secretary of State; these regulatory bodies had presumed that the financial adviser had undertaken original inquiry at the time of the bid than was in fact the case. The Al-Fayeds' solicitors, when invited by the OFT and the DTI to express their professional judgment on whether their assurances could be relied on, had made certain carefully qualified statements to OFT but OFT and DTI had an overall impression that they were vouching for the accuracy of their statements. The solicitors had also apparently accepted the veracity of the statements of the Al-Fayeds without questioning them.

44 Following the investigations, the House of Fraser Report made a number of recommendations applicable for the financial advisers and legal advisers, including the processes on taking on new clients, taking references, acceptance of written material from other advisers, acceptance of instructions from the clients and the importance of verification. After the House of Fraser Report was published, the Law Society was sent a copy thereof with a view of the possibility of disciplinary action being instituted against the solicitors. Ultimately, it was reported that the Law Society's adjudication committee, the standards and guidance committee and the company law committee took the view that there was no professional misconduct by the solicitors,[72] no evidence to justify changes to the solicitors' practice rules or to the guide to professional conduct by solicitors, and that professional guidance was inappropriate.[73]

45 The second example arose from the DTI inspectors' report on the floatation of the Mirror Group Newspapers ("MGN")[74] in 1991

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71 The financial and legal advisers to the Al-Fayeds were Kleinwort Benson and Herbert Smith respectively.

72 See Secretary of State, Peter Lilley in the response to a House of Commons parliamentary question: United Kingdom, House of Commons, *House of Commons Debates* (12 February 1992) vol 203 at col 556, stating that the Adjudication Committee of the Solicitors Complaints Bureau decided that there was no evidence of professional conduct).

73 See Secretary of State, Peter Lilley, in the response to a House of Commons parliamentary question: United Kingdom, House of Commons, *House of Commons Debates* (12 February 1992) vol 203 at col 556. The Secretary of State reported that the company law committee of the Law Society took the view that professional conduct guidance on such a technical area of practice would not be appropriate and the lessons to be learnt from such cases have been incorporated by the internal practice procedures adopted by the large City firms involved in such takeovers and mergers.

74 Department of Trade and Industry (Sir Roger Thomas & Raymond Turner), *Mirror Group Newspapers plc: Investigations under Sections 432(2) and 442 of the Companies Act 1985* (London: Stationery Office, 2001) at pp 332–333.

("MGN Report"). In that case, the controller of MGN, Robert Maxwell, decided to float MGN by selling 49% of MGN in an initial public offering. The due diligence procedures carried out in connection with the floatation failed to reveal that Robert Maxwell had been using MGN's pension funds and other cash resources to support his private companies as well as Maxwell Communication Corp, a listed company which was controlled by him. MGN was not suitable for listing and the MGN Report found that the prospectus prepared in connection with the offering was highly misleading because, among other things, the proposed system for corporate governance was not adequate and the control over the management of MGN had not passed from Robert Maxwell to the board. The solicitors to MGN,[75] who were appointed to advise MGN on the floatation, were criticised by the MGN Report for failing to investigate how MGN had operated previously and for failing to read the board minutes of MGN which would have shown that the board had delegated its power to a committee including Robert Maxwell or his son, and that such delegation had not been revoked. The description as to the board's control of management in the prospectus was thus inaccurate.[76] The MGN Report detailed a list of various disciplinary actions by self-regulatory bodies which were brought against some of the professionals involved in the floatation; however, the solicitors were not included in the list.[77]

46 In Singapore, it could be argued that there is a duty for the lawyer, who is retained to advise the listed company on disclosure obligations, to refuse to assist the client if the solicitor knows or suspects that his advice is being used to facilitate fraud. The Legal Profession (Professional Conduct) Rules[78] ("Professional Conduct Rules") requires the solicitor not to tender advice to a client when the solicitor "knows or has reasonable grounds to believe" that the client is requesting the advice to advance an illegal purpose.[79] The reference to "reasonable grounds to believe" may suggest that the solicitor should make the

75 The solicitors to Mirror Group Newspapers plc were Clifford Chance. Linklaters & Paines, the solicitors to the issue, and who were acting for the sponsors, were also found to have failed to identify the incorrect impression created by the prospectus but it was found that their responsibility was a lot more limited. See Department of Trade and Industry (Sir Roger Thomas & Raymond Turner), *Mirror Group Newspapers plc: Investigations under Sections 432(2) and 442 of the Companies Act 1985* (London: Stationery Office, 2001) at p 339.

76 Department of Trade and Industry (Sir Roger Thomas & Raymond Turner), *Mirror Group Newspapers plc: Investigations under Sections 432(2) and 442 of the Companies Act 1985* (London: Stationery Office, 2001) at pp 332–335 and Appendix 10 at pp 8–10.

77 Department of Trade and Industry (Sir Roger Thomas & Raymond Turner), *Mirror Group Newspapers plc: Investigations under Sections 432(2) and 442 of the Companies Act 1985* (London: Stationery Office, 2001) Appendix 20.

78 Cap 161, R 1, 2010 Rev Ed.

79 Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) r 22.

requisite inquiries if the circumstances raise red flags that the advice may be used for illegal purposes. However, as pointed out above, it does not appear that there is a duty on the part of solicitors to actively investigate his client's instructions to ensure that these instructions are not used for fraudulent end.[80]

IV. Private enforcement actions against lawyers by third parties are weak or non-existent

47 This part argues that lawyers face a very low risk of civil liability in respect of their clients' disclosure documents which they have drafted or prepared and which turn out to contain false and misleading statements or have material omissions that cause externalities to third parties investors or shareholders, even if they have fallen short of the standard of care and diligence.

A. Claims based on tort law

48 For prospectuses, as set out above, lawyers are not within the class of defendants under s 254 of the SFA for defective prospectuses unless they are named with their consent as having made statements included in the prospectus. Market practice is that lawyers to the initial public offering rarely make any statements in the prospectus, except on the tax position relating to the issued securities. In fact, lawyers would expressly disclaim having made any statement and would take no responsibility for the statement or omission in the prospectus.[81] Likewise, for disclosure documents which are not prospectuses, lawyers are also not liable under the relevant market misconduct provisions set out in s 199, 200 or 201 of the SFA as they normally do not make statements on behalf of their clients.[82]

49 At common law, investors face considerable difficulties in bringing any claim in the tort against the issuers' lawyers arising from the disclosure failures of the issuers. It would be difficult to establish the claim in the tort of deceit[83] if the lawyer is not the maker of the statement. While there is no direct Singapore case law on shareholders or investors bringing tortious actions against lawyers who have prepared the disclosure documents, reference may be made to the general test for

80 See discussion on *Bachoo Mohan Singh v Public Prosecutor* [2010] 4 SLR 137 at n 52 above.

81 See, *eg*, the Prospectus of Global Logistic Properties Ltd (11 October 2010) at p 203, which is available at <http://www.sgx.com/wps/portal/sgxweb/home/company_disclosure/ipos/ipo_prospectus> (accessed 15 November 2013).

82 Section 203 of the Securities and Futures Act (Cap 289, 2006 Rev Ed) will not apply as the external lawyer is not an officer of the issuer.

83 *William Derry v Sir Henry William Peek* (1889) 14 App Cas 337.

establishing duty of care in negligence. For a duty of care to arise, the Singapore Court of Appeal in *Spandeck Engineering v Defence Science Technology Agency*[84] held that there is a two-stage test of proximity and policy consideration, qualified by the threshold of foreseeability. Proximity consists of causal, circumstantial and physical proximity, and the twin criteria of voluntary assumption of responsibility and reliance. The test is to be applied incrementally, that is, with reference to decided cases in analogous situations. Given that lawyers do not directly make any statements to investors or shareholders, it is difficult to find any basis for an assumption of responsibility to these third parties.

50 As to the possibility of common law actions against the lawyer (and his corporate client) based on joint tortfeasance, the difficulty is that there needs to be some procuring or instigation of the commission of the tort. Likewise, to find an action based on unlawful means conspiracy, by participation in a joint enterprise or common design, there needs to be joining of a common design to commit the tort.[85] In either case, merely aiding in the commission in the tort without any active inducement is not sufficient. Lawyers who only provide advice (without drafting the documents) or fail to report wrongdoing are unlikely to be liable for joint tortfeasance or unlawful means conspiracy, and it is unclear whether drafting documents would be sufficient between the action and wrongdoing.[86] Tort law does not recognise a general accessorial liability for assisting in a wrong.[87]

84 [2007] 4 SLR(R) 100.

85 *Credit Lyonnais Bank Nederland NV v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep 19. In that case, C, a fraudster, knew that Credit Lyonnais could be induced to purchase bills of exchange drawn by an exporter on foreign buyers against a guarantee from the defendant ("ECGD") and that the foreign buyer would pay for the goods in due course accordance with the contract of sale. C drew up fictitious contracts of sale, supported by fictitious bills of exchange, with fake acceptances in the name of fake buyers, and induced Credit Lyonnais Bank Nederland NV ("Credit Lyonnais") to purchase the fictitious bills of exchange. He corrupted P, a senior officer of ECGD, who dealt with the underwriting of ECGD guarantees. Credit Lyonnais sued ECGD in tort, arguing that P committed the tort of knowingly assisting C in the commission of C's fraud by underwriting the guarantees (which was not in itself unlawful) and P's role in the scheme amounted to a conspiracy with C to deceive Credit Lyonnais, and that ECGD was vicariously liable for that assistance. The claim against ECGD failed because mere facilitation or knowing assistance in another's tort, did not amount to conspiracy to commit that tort if it could not be shown that this was done pursuant to and in furtherance of a common design. *Cf The Dolphina* [2012] 1 SLR 992 (the Singapore High Court questioned whether the conclusion in other aspects of the case was still correct).

86 See Joan Loughrey, *Corporate Lawyers and Corporate Governance* (Cambridge: Cambridge University Press, 2011) at pp 202–207.

87 See *Credit Lyonnais Bank Nederland NV v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep 19, n 85 above.

51 The result is that lawyers who are involved in the preparation, but have not made, statements to the securities markets, are unlikely to face civil liability from claims from third party shareholders or investors.

V. Suggestions for reforms

52 There should be appropriate incentives for the lawyer advising on due diligence obligations to test and challenge the disclosures proposed to be made by his corporate client to the securities markets. If there are red flags or warnings signs, the lawyer instructed on disclosure matters should be put on inquiry as part of the due diligence processes.

53 In comparison, other gatekeepers in the securities markets are under some kind of due diligence or reporting obligations for disclosure documents. Auditors are required to opine on their listed clients' annual financial statements[88] and as auditors of public companies, if they have reasons to believe that a serious offence involving fraud or dishonesty is being committed against the company by its officers or employees, they are required to report the matter to the Minister for Finance.[89] Case law also requires auditors to detect fraud committed on their audit client and to report to the board of directors.[90] Financial advisers advising listed companies are required to include their responsibility statements in their clients' shareholders' circular.[91]

54 This article argues that the solution has to lie in imposing public oversight over lawyers who are advising clients as to their disclosure obligations to the securities market. There needs to be (a) standards set as to the role of the lawyer in advising on disclosure obligations; and (b) clear prescriptive reporting obligations on lawyers once they know or suspect securities fraud being conducted by, or on behalf of, their clients.

88 Companies Act (Cap 50, 2006 Rev Ed) s 207(2).
89 Companies Act (Cap 50, 2006 Rev Ed) s 207(9A).
90 See n 45 above and accompanying text.
91 Where a financial adviser is appointed, the following responsibility statement is included in the circular:

> To the best of the financial adviser's knowledge and belief, this circular constitutes full and true disclosure of all material facts about the [described proposed action], the issuer and its subsidiaries, and the financial adviser is not aware of any facts the omission of which would make any statement in the document [and where the document contains a profit forecast, it is satisfied that the profit forecast has been stated by the directors after due and careful enquiry].

Listing Manual of Singapore Exchange: Mainboard Rules (July 2002) Practice Note 12.1, para 2.

A. The case for public oversight over lawyers

(1) Formulating due diligence code of practice and imposing public duties on lawyers to take reasonable care

55 The lack of uniformity and understanding as to the proper scope of due diligence in the non-expert sections of a disclosure document suggests that some standards and procedures that will govern the conduct of practice for lawyers should be formulated in a code of practice, so that the profession and the public will have a clearer perception and expectation of what the lawyer can or should do, and how these duties are connected with the duties of the issue managers and the other professional advisers. It is preferable that the standards be formulated by the profession since thus far there is a lack of judicial decisions or regulatory guidance. While the code of practice cannot specify in each situation what the lawyers should investigate, factors such as size of offering, the nature of the transaction, past history of the client and type of offerings will determine the extent of the due diligence. While it is expected that offerings of large sizes will require more comprehensive due diligence, even if the size of a particular offering is small, there must be a minimum standard of investigation that the lawyer should conduct set out in the code. As a starting point, a study would need to be done as to the situations in which disclosure failures have been occurred and how such failures could be prevented by all the gatekeepers in the transaction.[92]

56 Lawyers drafting or vetting the non-expert sections of the disclosure documents cannot merely assume that all the information supplied by the management is accurate and that there is no material omission if there are warning signs which put them on inquiry. This will, minimally, compel the lawyer to assess critically the reliability of the information obtained in the face of warning signs. Imposing public oversight will disincentivise the lawyers to agree with their corporate clients to carry out a reduced scope of due diligence.

57 Concurrently, there should be a duty, enforceable by a regulator, which is imposed on lawyers to take reasonable care in ensuring that the

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92 In the UK, the investigations ordered by the Department for Business, Innovation and Skills, and the former Department for Business, Enterprise and Regulatory Reform and Department of Trade and Industry may provide the situations in which gatekeeper failure has taken place. See, *eg*, Department of Trade and Industry (Sir Roger Thomas & Raymond Turner), *Mirror Group Newspapers plc: Investigations under Sections 432(2) and 442 of the Companies Act 1985* (London: Stationery Office, 2001); Department of Trade and Industry (Lawrence David Ziman & Walter Max Hoffman), *James Ferguson Holdings plc, Barlow Clowes Gilt Managers Limited: Investigation under Section 432(2) and Section 442 of the Companies Act 1985* (London: Stationery Office, 1993).

statements in the disclosure documents are not false or misleading or that there is no material omission. As confirmed by *Re Jade Technologies*, Council has jurisdiction to impose sanctions on advisers if in breach of the Takeover Code, they have failed to guide their clients in respect of information released in the course of the offer. As a matter of principle, there is no good reason for not extending public oversight over lawyers in respect of disclosure documents issued in other transactions.

(2) Independence of lawyer

58 In conjunction with imposing public oversight over lawyers, it is rarely appropriate for a law firm to be a client's legal adviser in circumstances where one of its partners is also a director of the client. Legal advisers advising on the disclosure obligations have to be independent and being on the board of the client may affect the adviser's ability to be objective in reviewing the proposed business transaction of the client.[93] Independent inquiries in the UK have highlighted this sort of director-solicitor potential conflict of interest on a number of occasions.[94]

(3) Clear prescriptive reporting obligations on lawyers and warning signs

59 There is a need to clearly prescribe the precise reporting obligations once the lawyer, who is advising on the client's disclosure documents, knows or suspects securities fraud being conducted by, or on behalf of, the client. In such a case, where there are warnings signs indicating ongoing fraud and the company fails to address these issues adequately, the lawyer should be obliged to report the matter up the ladder to the full board of directors of the company and cease representation if such wrongdoing is not rectified. It is not sufficient to only communicate to senior management if the senior management clearly refuses to rectify the violation. The failure to comply with the

93 The Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) does not specifically address the issue of whether a solicitor who is also a director of the company may act for the company. Rule 25(*a*) requires the solicitor to advance the client's interest unaffected by any interest of the solicitor. Rules 27–31 prohibit the solicitor from acting in certain cases but they are not relevant to lawyer-directors.

94 See Department of Trade and Industry (Richard George Bramwell McCombe QC & John Kenneth Heywood FCA), *Norton Group plc: Investigation under Section 432(2) of the Companies Act 1985* (London: Stationery Office, 1993) at para 20.13; Department of Trade and Industry (Colin Percy Farquharson Rimer QC & John White FCA), *Astra Holdings plc: Investigation under Section 432(2) of the Companies Act 1985* (London: Stationery Office, 1992) at pp 454–455; and Department of Trade and Industry (George Warren Staple & Thomas Gregory James Tress FCA), *Aldermanbury Trust plc: Investigation under Section 432(2) of the Companies Act 1985* (London: Stationery Office, 1993) at pp 55–56.

reporting obligations must be capable of enforcement by the regulatory authority.

60 In this respect, the experience of the US is instructive. In response to a series of corporate fraud scandals including Enron and Worldcom,[95] Congress enacted § 307 of the Sarbanes-Oxley Act of 2002: pursuant to § 307 and the rules promulgated thereunder, an attorney (who appears and practises before the Securities and Exchange Commission) is required to trigger up the ladder reporting if the attorney becomes aware of evidence of material violation of securities law or breach of fiduciary duty by the issuer or its director, officer, employee or agent; "material violation" is defined as credible evidence based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that a material violation of has occurred, is ongoing, or is about to incur. The appropriate body is first the chief legal counsel or the chief executive officer of the issuer and, if they do not respond appropriately to the evidence, the attorney is required to report the evidence to the audit committee, another committee of independent directors, or the full board of directors.[96]

61 The viability of the suggestion on imposing responsibility on the lawyer turns on whether lawyers can properly determine the warning signs. Cases and investigations in Singapore and other jurisdictions have illustrated that there are many situations where the warning signs are obvious and well within the lawyers' expertise. In *Re Jade Technologies*, the lawyers were put on notice that the shares controlled by their client and its associated parties were the subject of a share lending agreement and it was possible that the client no longer had beneficial ownership of the shares.

62 In the UK, obvious attempts by the listed client to avoid the shareholder approval requirements in the applicable listing rules are also obvious red flags suggesting that securities fraud is being committed.[97] Other red flags include the failure to identify the business purpose for the transaction or having clear evidence showing that certain transactions are in effect related party transactions.[98]

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95 See William C Powers, Jr, Raymond Troubh & Herbert S Winokur, Jr, *Report of Investigation by Special Investigative Committee of the Board of Directors of Enron Corp* (1 February 2002) at pp 188–190 and 201–202.

96 17 CFR § 205.3.

97 See Department of Trade and Industry (Robert Michael Owen QC & Paul Douglas Powell FCA), *The Milford Docks Company: Investigation under Section 432(2) of the Companies Act 1985* (London: Stationery Office, 1993) at pp 51–52.

98 See Department of Trade and Industry (Lawrence David Ziman & Walter Max Hoffman QC), *James Ferguson Holdings plc, Barlow Clowes Gilt Managers Limited:*

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63 The requirement to spot the warning signs on the part of lawyers and pursue up the ladder reporting should not be too onerous. It may be that in certain situations it is sufficient to report the matter to senior management rather than the full board. A recent case in Australia in *Australian Securities Investment Commission v Hellicar*[99] provides an illustrative example. In that case, Australian Securities and Investment Commission ("ASIC") brought enforcement proceedings against the directors of James Hardie Industries Ltd ("James Hardie"), a listed company which historically manufactured asbestos products. ASIC alleged that the board of directors breached their duty of care when they allowed James Hardie to issue a public announcement regarding a proposed restructure of the company which separated the asbestos liabilities of James Hardie from its other operations, with asbestos liabilities to be managed by a trust. The announcement stated that the trust would be fully funded to meet the expected liabilities, which turned out to be wholly inaccurate, since funding was based on outdated actuarial reports. The restructuring was facilitated by the external lawyers of James Hardie. One of the issues that arose on appeal to the High Court of Australia was whether the external lawyers, who were present at the board meeting that considered the draft of the public announcement, were expected to have raised their concerns as to the sufficiency of funding. Heydon J held that the lawyers acted reasonably when they, just prior to the board meeting, raised their concerns to the chief executive officer and general counsel, rather than to the whole board of directors.[100] In the circumstances, the solicitors had no reason to doubt the assurances of the chief executive officer who would have been more familiar with the actuarial reports than the lawyers.

64 It is suggested that imposing responsibility on the lawyers to make the relevant inquiries if they are put on notice should not lead to a dramatic increase in the costs. They only need to be alert to the presence of warning signs and not passively accept what their clients instruct them to do. As a matter of professional integrity, they should be obligated to resolve problems when confronted with warning signs.

(4) Refuting the critics

65 Any suggestion that greater responsibilities should be imposed on lawyers will run into the argument that lawyers should only be zealous advocates for their clients and they should advance the client's

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Investigation under Section 432(2) and Section 442 of the Companies Act 1985 (London: Stationery Office, 1993) ch 33.

99 [2012] 12 HCA 17.

100 *Australian Securities Investment Commission v Hellicar* [2012] 12 HCA 17 at [281]–[282].

position unless prohibited by law.[101] This argument fails to draw a clear distinction between the situation where the lawyer is acting for a corporate client in the transaction and as a zealous advocate for a party in an adversarial trial. In the latter, the neutral party is the one who determines who prevails when faced with opposing arguments. In a commercial setting, there is no neutral party: the lawyer structures, drafts and negotiates the transaction for his client.[102] The lawyer's role is much closer to the issue manager or financial adviser in respect of the conduct of due diligence.

B. Professional rules and civil liabilities

66 If the suggestions that there should be public oversight over lawyers advising on all public disclosure documents and clear prescriptive reporting obligations imposed on lawyers once they know or suspect securities fraud being conducted by, or on behalf of, their clients are accepted, legislation will need to be enacted to give effect to the proposal. Merely amending the Professional Conduct Rules without a corresponding legislative enactment is insufficient as breach of the Professional Conduct Rules is enforceable only by the Law Society of Singapore, and not the courts.[103] As argued above, the experience of the UK has shown that it is not entirely realistic to rely on the legal profession to impose or monitor gatekeeping responsibilities on itself in securities matters.[104] As an alternative to legislation, the Hong Kong model can be considered, where an agreement was reached between the law society and the stock exchange on the disciplinary matters that can properly fall within the purview of the stock exchange over solicitors.[105]

67 It is not proposed that non-compliance on the part of the lawyers will additionally create a private right of action for third party investors or shareholders.[106] A comparison with the positions in the US

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101 See, *eg*, Letter from American Corporate Counsel Association to Jonathan Katz, Secretary of the Securities and Exchange Commission (18 December 2002) (the proposed rules "take an unprecedented and unnecessary step toward changing the role of a corporate lawyer from one of a trusted legal counselor to one of a whistle-blowing policeman"), available at <http://www.sec.gov/rules/proposed/s74502/bnagler1.htm> (accessed 15 November 2013).

102 See John C Coffee Jr, *Gatekeepers: The Professions and Corporate Governance* (New York: Oxford University Press, 2006) at pp 192–193.

103 See *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [22].

104 See paras 39–46 above.

105 See The Hong Kong Solicitors' Guide to Professional Conduct vol 1, Appendix 1, available at <http://www.hklawsoc.org.hk/pub_e/professionalguide/volume1/pdf/2014/APPENDIX%20V1.pdf> (accessed 15 January 2014).

106 In the US, failure to comply with the up the ladder reporting in the rules promulgated under § 307 of the Sarbanes-Oxley Act of 2002 Pub L 107–204; 116 Stat 745 (2002) will result in civil penalties and remedies but not result in a

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and the UK will show that civil liability risks, in respect of claims brought by third party investors or shareholders, incurred by securities lawyers or solicitors advising issuers in the US and the UK, are very small, and there are probably good reasons.

68 In the US, in relation to registration statements containing the prospectuses, lawyers do not generally provide expert reports nor sign registration statements and accordingly will not be liable under § 11 of the Securities Act of 1933.[107] Outside of § 11, the main civil claim for any disclosure document containing false or misleading information or omission falls in § 10(b) of the Securities Exchange Act of 1934[108] and rule 10b-5.[109] Private causes of action under these provisions require, among other things, proof that the statement was false or misleading, it was made with *scienter*[110] and reliance on the statement.[111] However, despite the width of rule 10b-5, successful civil remedies against lawyers are rare in view of two Supreme Court decisions. The first is *Central Bank of Denver v First Interstate Bank of Denver*[112] which ruled that there is no private right of action for aiding and abetting a violation of rule 10b-5. This decision makes it difficult for private plaintiffs to sue law firms, who would otherwise be liable for their facilitation of a primary violation. The second is *Janus Capital Group v First Derivative Traders*[113] which clarified that primary liability under rule 10b-5 can only be imposed on a maker of false statement and the maker is the person or entity with ultimate authority over the statement.[114] Lawyers are unlikely to be such persons as having the ultimate authority over the statements, since such authority is always vested in the clients' management.

69 In the UK, for prospectuses, lawyers are outside the class of defendants who are statutorily liable for defective prospectus under s 90

private right of action: Final Rule: Implementation of Standards of Professional Conduct for Attorneys 17 CFR § 205.6 and 205.7.

107 See Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* vol 2 (US: Thomson West, 5th Ed, 2005) at para 7.4[2][A][2].

108 15 USC § 78j(b).

109 17 CFR § 240.10b-5.

110 *Scienter* has been interpreted in *Ernst & Ernst v Hochfelder* 425 US 185 (1976) to mean intent to deceive, manipulate or defraud on the defendant's part.

111 *Basic Inc v Levinson* 485 US 224 (1988).

112 511 US 164 (1994).

113 131 S Ct 2296 (2011); 2011 US LEXIS 4380.

114 In addition, the Private Securities Litigation Reform Act of 1995 Pub L 104–67 §§ 101–109 (codified as amended at 15 USC § 78u-4) made it more difficult generally for plaintiff investors to sue the law firms since plaintiffs must plead with particularity facts giving rise to a strong inference that the defendants meet the requisite state of mind (*scienter*) requirement.

of the Financial Services and Markets Act 2000.[115] For disclosure documents other than prospectuses, s 90A of Financial Services and Markets Act 2000 imposes liabilities only on the issuer (and not on its advisers) for fraudulent misstatements if reliance on the statements is shown. As is the case of common law in Singapore, there are severe restrictions on bringing any tort law in England against advisers.

70 The comparison with the US and the UK positions shows that from the perspective of civil liability, there is the bias against imposing civil liability advisers who may have prepared, but are not the makers of, statements in the disclosure documents. Such a private right of action is not necessary for the purpose of deterrence of the lawyers. Under the proposal, lawyers may be liable to be publicly censured if they fail in their duties. They will be disincentivised to act for corporate clients who insist on a reduced scope of due diligence being conducted. Reputational concerns should continue to motivate the lawyers to act prudently and carefully. They continue to be potentially liable to their corporate clients under the contract of retainer or in rare cases, to particular third parties to whom they have assumed responsibilities for particular purposes. It is not suggested that lawyers include a responsibility statement in their clients' disclosure documents[116] again, on the ground that such statement is not necessary.[117] The inclusion of the responsibility statement may also generate unwanted satellite litigation.

VI. Conclusion

71 This article has argued that lawyers do have important gatekeeping responsibilities in the securities market but the current regulatory framework in Singapore does not provide the necessary incentives for lawyers to make all of the relevant inquiries advising on their clients' disclosure documents.

72 To address these problems, it is suggested that duties be imposed on lawyers acting for corporate clients to conduct due diligence

115 c 8 (UK), read with Prospectus Rule 5.5. See Lucy Fergusson, "The Statutory Framework for Listing" in *A Practitioner's Guide to the Financial Services Authority Listing Regime: 2012/2013 edition* (UK: Thomson Reuters, 2012) ch 2 at paras 2.3.8.1 and 2.3.9.9.

116 Where a financial adviser is appointed, a responsibility statement should be included in the circular: see n 91 above. John Coffee has suggested that in the context of ongoing disclosure obligations, the securities attorney should be required to certify to the Securities and Exchange Commission along the lines of the rule 15b-5 disclosure letter. See John C Coffee Jr, *Gatekeepers: The Professions and Corporate Governance* (New York: Oxford University Press, 2006) at pp 348–350.

117 See also Joan Loughrey, *Corporate Lawyers and Corporate Governance* (Cambridge: Cambridge University Press, 2011) at pp 247–248.

on all disclosure documents to the securities market that they are instructed to draft or prepare pursuant to regulation. It is proposed that these duties are only enforceable by the regulator though they are, of course, without prejudice to any claims that may be pursued against the lawyers by their corporate clients or particular third parties to whom they have assumed responsibilities for particular purposes. Law firms whose partners sit on the boards of the listed corporate clients should generally decline acting for their clients in connection with offerings of securities or other transactions that are significant to the clients to ensure objectivity. Lawyers should also be subject to a duty to report up the organisational ladder (and ultimately to the full board of directors) if they suspect or come to know of securities fraud conducted by the company or its management or employees. Enforcement will take the form of liability for public censure by the regulator.