

**To: Hong Kong Exchanges and Clearing Limited**

**Codifying the waiver of company secretary professional qualifications into Listing Rule 3.28 –  
good intention gone bad?**

**A. Introduction**

We wish to respond to the August 2019 Consultation Paper (the "Consultation Paper") published by the Stock Exchange of Hong Kong (the "Exchange") regarding the codification of general waivers. Our response will cover the waiver relating to the experience and qualification of the company secretary, as stated in paragraphs 66 to 71 of the Consultation Paper.

Currently, listed issuers in Hong Kong are required to appoint a company secretary to discharge compliance and reporting obligations owed to the Exchange. Listing Rule 3.28 sets out the required professional qualifications of a company secretary, which includes a (i) chartered company secretary (ii) a certified public accountant or a (iii) solicitor. The Exchange will also take into account the relevant experience of the proposed candidate, assessing elements such as the (i) length of employment with the issuer and previous roles played with any other issuers (ii) his or her familiarity of the rules and other relevant regulations (iii) any relevant training and (iv) professional qualifications in other jurisdictions.

In today's globalised and ever-changing business world, the needs of companies around the world are also changing rapidly. Issuers have also been seizing the opportunity to hire company secretaries that are familiar with the company's development and internal affairs to ensure sound corporate governance, and inevitably not all of these candidates possess the required qualifications. As a result, the Exchange has in the past granted waivers to company secretaries who do not necessarily possess the qualifications listed out in Rule 3.28. The waiver, if granted, is on the condition that the appointed candidate be assisted by a person with the relevant qualifications for a period of not more than three years. The waiver is currently not codified into the Listing Rules.

In the Consultation Paper, the Exchange proposed to codify the option of a waiver for candidates who do not possess the qualifications into Listing Rule 3.28. The Exchange also seeks to codify the factors taken into account when granting a waiver, including (i) whether the issuer has principal business activities primarily outside of Hong Kong (ii) whether the directors consider the individual to be suitable to act as the company secretary and (iii) whether the proposed company secretary will be assisted by a qualified person for more than 3 years. We seek to explore the viability of the proposed codification focusing on the Exchange's explicit power to decide whether the proposed candidate is suitable to act as the company secretary.

**B. Our position**

In principle, the codification of any existing norms, rules or standards could serve as an effective drafting tool to perfect any oversights and to remedy any unintended consequences arising from the original drafting. Codification also provides for more clarity for the purposes of compliance and enforcement, therefore achieving more transparency and consistency. However, codification may not always be an all-encompassing tool to close the gap between any rule-drafting oversights and the commercial reality. It may, sometimes even be rendered as the justification for the exercise of excessive power by the rule drafting body. Therefore the real need behind codification should be very carefully examined and scrutinized.

The question we therefore need to ask ourselves is – is there a real need for the codification of the waiver for the professional qualifications of a company secretary? To answer this question, we should look at the difference between the status quo and the effects of the proposed codification. As mentioned above, waivers are already currently relied upon by issuers who wish to appoint company secretaries who do not fall under the requirements of Listing Rule 3.28. The codification, in fact, merely provides for the explicit availability of such option. In other words, the Exchange is still going to grant waivers as they see fit. We believe it is not the waiver itself that is problematic, the problem is the *codification* of the waiver, for reasons explored below.

### **C. Reasons against codification**

#### (i) No real need for change

Some believe that if individuals who do not possess the recognized qualifications are deemed qualified to discharge duties that require great level of technical knowledge and expertise, the standard of corporate governance will decline. This argument is not enough to challenge the validity of the waiver because the adequate appointment of company secretary is merely one element of maintaining sound corporate governance. Reiterating our position above, we believe the waiver itself is not the problem.

Interestingly, the Consultation Paper did not explicitly spell out the reason behind the *codification* of the waiver. When examining the status quo, it is evident that the Exchange is not new to granting waivers and the issuers are also familiar with the parameters of the existing rules. More importantly, there is no indication that the standard of governance has declined as a result of the Exchange allowing those who do not possess the qualifications set out in Listing Rule 3.28 to act as company secretaries. Therefore the current reality in Hong Kong does not pose any urgent need for change or improvement.

As a global financial center, we often act within the realms of the global understanding or consensus. Other jurisdictions such as Singapore, UK and the US do not provide for an explicit option of a waiver

for company secretary qualifications. Instead, the authorities focus on making clear guidelines to the issuers to ensure that company secretaries are appointed to suit their own needs, while the qualifications of the company secretaries are largely decided by the issuer. This goes to show that there is some consensus regarding the authorities' involvement in the appointment of company secretaries. Nevertheless, if the Exchange does proceed to codify the waiver, it is essentially sending an alarming signal to the global market that the Exchange is willing to be actively involved in the company's internal affairs, which is plainly against the international regulatory norms.

#### (ii) The board should take control instead of the Exchange

Sound corporate governance requires effort from both the Exchange and the issuer, where the Exchange provides a comprehensive regulatory framework for the issuers to enforce the regulations taking into account its commercial needs and circumstances. Especially when faced with difficult situations, the issuer should take the reins to make sound decisions in the best interest of the company. Understandably, it is necessarily the easiest for the issuer to agree upon a company secretary candidate. However, if the Exchange codifies the option of a waiver, one can only anticipate the issuers will seize the opportunity to divert difficult appointment decisions to the Exchange, defeating the spirit of sound corporate governance.

In fact, the Exchange very clearly spelled out its stance in the consultation conclusions published in November 2018 regarding the proposal to remove from the listing rules the requirement for a qualified accountant to be in senior management. Paragraph 63 in the 2008 consultation conclusions stated that "the board of a listed user should have both the responsibility and freedom to decide the number of personnel and their accounting qualifications for the company." The relevant rule (Listing Rule 3.24) was ultimately repealed in 2009. If the Exchange once determined that the role of setting the qualifications of the issuer's corporate personnel should lie within the board, would it then be sending inconsistent signals to the market if it now decides to give itself the explicit power to determine the qualifications of a company secretary?

#### (iii) Necessary degree of flexibility in candidate choices

Professional qualifications do not necessarily speak for one's ability to perform the duties of a company secretary. This explains why a number of issuers have appointed a senior management member or other employees that had served related roles with the issuer for a period time to act as company secretary. To accommodate this trend, relevant mechanisms and Code Provisions have been built into the Listing Rules to ensure that the issuers adhere to best practice recommendations. In 2011, the Exchange has introduced Code Provision F encouraging issuers to appoint company secretaries who have sufficient knowledge of the issuer's day-to-day affairs, explicitly granting the issuer their necessary

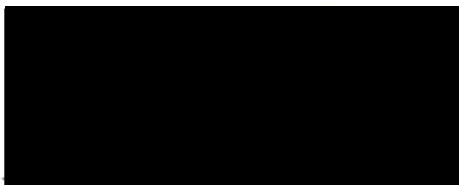
degree of flexibility. Under the general corporate governance principle of "comply and explain", issuers have already been given a large degree of flexibility to cater their appointment to their specific needs.

Ultimately, no one knows the needs of the issuer better than the issuer itself, it is only reasonable that a necessary degree of flexibility should be preserved. However, if the waiver is codified, it is foreseeable that more issuers will begin to rely it. Previously, waivers were understandably granted when compelling experience is presented to the Exchange. In contrast, the codified waiver will give the Exchange the opportunity to *frequently* exercise very subjective perception of competence, especially since the Exchange is inherently disadvantaged in assessing the real needs of the issuer. As a result, the Exchange may be able to shape new norms and inadvertently redefine the ideal "relevant experience" of company secretaries that do not possess qualifications under Rule 3.28. The subjective power vested in the Exchange poses detectable threat to the issuer's necessary degree of flexibility to appoint a company secretary according to their own specific needs.

**D. Conclusion**

When looking at the commercial reality in Hong Kong, there is no clear indication of any negative consequences brought by the status quo. The waiver for professional qualifications of company secretaries, if codified, is only going to take away the necessary degree of flexibility needed for issuers to decide on their own internal affairs and pave way for *unnecessary micro-managing* of the issuer's internal affairs by the Exchange. All in all, even though codification is in principle intended to be an effective rule-drafting tool, if applied to the waivers for company secretaries, it is only going to achieve just the opposite.

Yours faithfully



Witness

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