

16 September 2019

By Email: response@hkex.com.hk
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Dear Sirs

Consultation Paper on Codification of General Waivers and Principles Relating to IPOs and Listed Issuers and Minor Rule Amendments (Consultation Paper) – Strong objection to proposed Note 3 to Rule 3.28 and the general grant of waivers from strict compliance with Rule 3.28

Terms and expressions used in this Submission shall have the meanings under the Consultation Paper unless the context requires otherwise.

About HKICS

The Hong Kong Institute of Chartered Secretaries (Institute) is an independent professional institute representing Chartered Secretaries and Chartered Governance Professionals as governance professionals in Hong Kong and Mainland China with over 6,000 members and 3,200 students. The Institute originates from The Institute of Chartered Secretaries and Administrators (ICSA) in the United Kingdom with 9 divisions and over 30,000 members and 10,000 students internationally. The Institute is also a Founder Member of Corporate Secretaries International Association Limited (CSIA), an international organisation comprising 14 national member organisations to promote good governance globally.

Strong Objection – Rule 3.28 Waivers

Our Institute strongly objects to the proposed codification of the general principles for waiver from strict compliance with Rule 3.28 of the Listing Rules set out under paragraphs 66–71 of the Consultation Paper and the general grant of waivers from strict compliance with Rule 3.28 going forward.

In 2012, Section F was added to the Corporate Governance Code (CG Code). This states that '*the company secretary plays an important role in supporting the board by ensuring good information flow within the board and that board policy and procedures are followed. The company secretary is responsible for advising the board through the chairman and/or the chief executive on governance matters and should also facilitate induction and professional development of directors.*'

Since the addition of Section F to the CG Code in 2012 there have been the major governance related initiatives by HKEX relating to trading halts; disclosure of inside information; board diversity; connected transaction rules; risk management; financial disclosures; weighted voting rights; ESG; dilutive stock options; listing regulations; GEM Board rules; delisting; capital raising; emerging and innovative sectors; continuing listing requirements; listing committee structure; adverse audit opinions; and uncertificated regime amongst other governance topics.

HKEX will no doubt recognise that this Institute and its Members are major supporters of HKEX's governance initiatives and frequently contributed views that shaped various regulatory reform proposals as staunch supporters of governance. The Institute has also issued many researches and trainings on these topics, including through collaborations with many leading industry participants. But more importantly, all these regulatory reforms require the day-to-day implementation by Members of the Institute well-versed on regulatory compliance, related practical workings of company law and other laws and regulations, and communication skills with relevant internal and external stakeholders - including the chairmen, boards of directors, shareholders, investors and others for the necessary buy-in and implementation of the Listing Rules.

The Institute points out that the role that Members of the Institute performs as company secretary as to implementation of day-to-day listed company regulatory compliance is a central one. This is supported by the Institute's empirical research. In 2012, Dr Bob Tricker, an Oxford scholar and leading governance figure found that the company secretary was responsible for regulatory compliance under '*The Significance of the Company Secretary – in Hong Kong's listed companies*'. The research data set shows that the company secretary has primary and/or significant responsibility as to regulatory compliance in almost all listed issuers that they work for.

https://crm.hkics.org.hk/files/publication/2336/Research%20Report%202012_Eng.pdf

The company secretary is responsible for regulatory compliance

Company secretaries in Hong Kong listed companies carry a fundamental responsibility for regulatory compliance, with 94% reporting a primary or significant responsibility (98% in the 'H-share' companies). Specifically, the respondents described their compliance responsibility as:

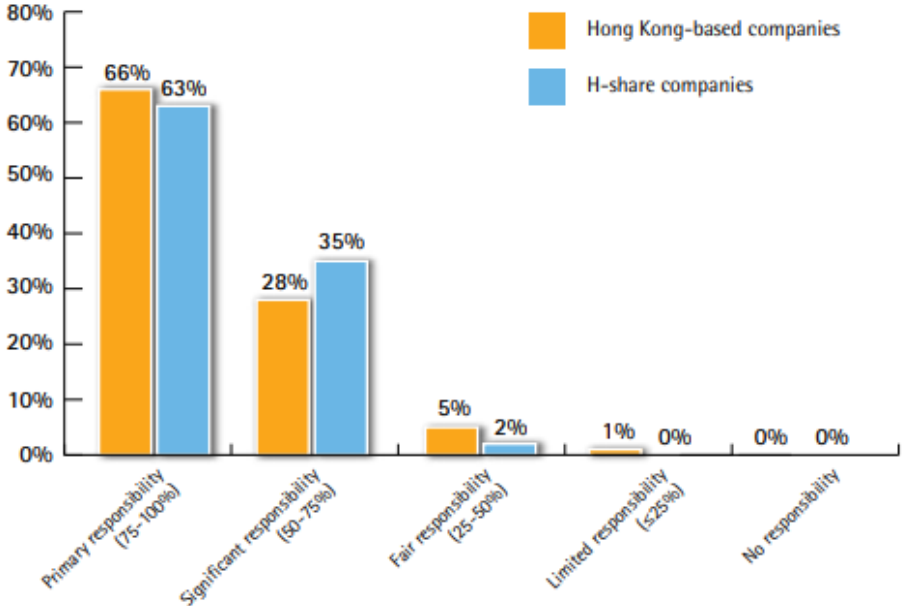


Figure 3 Significance of company secretaries on compliance

In the same report, it was also noted that aside from regulatory compliance, the company secretary was also involved in many other governance related areas including: communications with the independent non-executive directors; company law; crisis management; directors' and officers' liability; directors' training; encouraging systems research; and organising annual meetings. As the report was published back

towards the end of 2012, the Institute can add that in line with the HKEX driven regulatory developments identified above that the company secretary's skill sets have expanded. For example, the company secretary has a central role on facilitation of risk management and ESG reporting.

In a nutshell, there is no doubt that the company secretary performs roles requiring undoubted professionalism, local knowledge and making of critical decisions germane for investor protection through day-to-day practical governance implementation and holistic understanding of many areas of regulatory concerns bringing together of many moving parts. Further, there is need for attention to details, materiality in reporting and addressing of issues that Members of the Institute are trained upon to deal with.

Having regard to the regulatory developments driven by the HKEX and the related complexity for achieving compliance, the roles of the company secretary of a Hong Kong listed issuer would over time become more and more challenging and important. In the context, it is wholly inappropriate and inconsistent with the regulatory developments for persons who are not professionally trained, qualified, and subject to continuous developments and professional discipline as qualified professionals to take on the role of the company secretary.

These bring us to the proposed codification of the general principles for waiver from compliance with Rule 3.28. The Institute submits that while there may have been some specific, and to emphasize, limited cases in the past where waivers were granted, these could hardly amount to the establishment of any general principles for the purpose of codification into a new Note 3 to Rule 3.28. These waivers are to be regarded as the exceptions rather than the norm to the unequivocal position that only qualified professionals should take up the role of the company secretary of listed issuers. In this connection, HKEX will be aware that consistent with this position, the Institute has formally questioned the exercise of the discretion in a recent case where there was a grant of a waiver from strict compliance with Rule 3.28 upon learning of the same from the media – given the lack of any formal consultation mechanism with the relevant professional bodies.

The original intention and spirit of Rule 3.28 is to ensure a listed company to have a company secretary who is a Qualified Person to ensure the listed issuer's regulatory compliance and to uphold the corporate governance standard. All HKEX listed companies are obliged to observe the Listing Rules irrespective of where their principle business activities are located. In fact, the Institute and our Members generally do not follow why a listed issuer with principal business activities primarily outside Hong Kong should not be subject to the same rules and regulations. We have surveyed our membership, and – backed by some 1,363 or over 96% of our Members completing the survey – we strongly object to any future waiver being granted to strict compliance from Rule 3.28. Only proper qualified professionals should be acceptable as company secretaries of listed issuers. They need to pay their membership dues, be part of a professional body, and be properly qualified and subject to continuous professional development and professional discipline requirements to take on the involved role of the company secretary of listed issuers.

The Institute and our Members generally also do not follow how up to three years of waiver could be provided for the person to be named company secretary subject to hand-holding by a locally qualified company secretary (i.e. Qualified Person). It is further not clear if the intent is that upon the expiry of the waiver period, the person could be regarded as a person with relevant experiences for the purpose of Note 2 and thereby become a full-fledged company secretary. If this is the intent, it is difficult to see how within up to three years could an unqualified person acquire the skill sets necessary to comply with the important functions of the company secretary under the Listing Rules. Only true Hong Kong qualified professionals under Rule 3.28 should take up the appointment as company secretary of listed issuers listed in Hong Kong.

In case of regulatory requirements requiring an overseas listed issuer to have the equivalent of the company secretary within its home jurisdiction, the proper course for Listing Rules compliance and investor protection is for there to be a joint appointment with a Qualified Person as company secretary, and it should be the Qualified Person that should be primarily responsible for complying with the relevant corporate laws and regulations in Hong Kong (such as Listing Rules, Takeovers Code, Companies Ordinance, etc.) and considered to be the company secretary for the purposes of the Listing Rules. The non-qualified person would not be regarded as the company secretary for the purposes of the Listing Rules, and more importantly, should not, simply because of any hand-holding by the Qualified Person for a period of not more than 3 years be reckoned to have acquired sufficient "relevant experience" for the purpose of Note 2 to Rule 3.28. The main avenue for a non-qualified person to become a company secretary is to seek the necessary professional training and qualifications under Note 1 to the rule. In our view, the "relevant experience" limb under Note 2 lacks an objective assessment basis, and should only be recognised in very exceptional cases. The Institute stress that this is a matter that goes to the status of Hong Kong as a leading international financial centre – as the proposition is simple – only properly qualified professionals should perform professional roles and responsibilities which is the cornerstone of Hong Kong where it is professionalism that stands Hong Kong apart from its competitors.

We add that as HKEX is now considering regulation of the company secretary – to subject them to sanctions for breaches of the Listing Rules – the case is all the more reason for the position of the Institute that only qualified professionals should be permitted to take up the appointment as company secretary listed under Listing Rules 3.28, including Member of this Institute and no waiver should be granted from strict compliance to Rule 3.28 of the Listing Rules. The Institute reiterates its strong objection to the purported codification, Note 3, and the future grant of any waiver from strict compliance to Rule 3.28 of the Listing Rules (and equivalent GEM Board rules).

We know the practice is to take our strong objection as one view. The reality is that we speak as a professional body and we believe our view is cogent and backed by almost all of our members surveyed. We therefore ask – whatever the rationale of the practice – to give heavy weight to our view supported by professionals most directly impacted by the proposal. Quite simply put, the proposal is unacceptable, and flies in the face of why people have to be professionals. There is also no justification as to why the waiver is granted in the first place, as the assumption that someone who is hand-held could pick up the role of the company secretary is untenable and serves no useful purpose. Further by what code of conduct and discipline would such persons be subject to should they become company secretaries? The matter could simply be resolved by having a joint appointment as company secretary with the qualified professional (i.e. the Qualified Person) being responsible for complying with the relevant corporate laws and regulations in Hong Kong. This is how the proposal should be framed and not a waiver from strict compliance with Listing Rules 3.28. This proposal does long term damage to professionalism in Hong Kong and impacts on Hong Kong being a leading international financial centre.

Other Proposals

In respect of the other proposals under the Consultation Paper, we support the direction to codify the existing waivers and/or general principles as it is in good governance to have a centralised document for applicable rules and regulations, instead of a number of documents for guidance.

Should you have any questions, please feel free to contact Samantha Suen FCIS FCS(PE), Chief Executive, HKICS or Mohan Datwani FCIS FCS(PE), Senior Director; and Head of Technical and Research, HKICS at [REDACTED] or [REDACTED]

Yours sincerely

For and on behalf of
The Hong Kong Institute of Chartered Secretaries

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President