



By email (response@hkex.com.hk) and by hand

23 September 2019

Our Ref.: C/CFAP/PAIBC, BH46412

Hong Kong Exchanges and Clearing Limited
8th Floor, Two Exchange Square
8 Connaught Place, Central
Hong Kong

Dear Sirs,

**Re: Consultation Paper on Codification of General Waivers and Principles
Relating to IPOs and Listed Issuers and Minor Rule Amendments**

Please find attached a submission from the Hong Kong Institute of Certified Public Accountants on the above consultation paper.

While we not have any concern in principle with the most of the Exchange's proposals to codify the general waivers and principles relating to IPOs and listed issuers, we have comments on the details in some cases.

In addition, we have serious concerns about the proposal to codify the waiver relating to the qualifications and experience of the company secretary.

For the reasons explained in our response to question 11 in the consultation paper, we cannot support this particular proposal. We believe that it sends out the wrong message and that it may encourage issuers whose principal business activities are primarily outside Hong Kong to appoint as their company secretary persons who may not have the necessary qualifications or experience, and who may be unfamiliar with the corporate governance and regulatory environments in Hong Kong. If this becomes prevalent, it could in turn have a negative impact on standards of governance and regulatory compliance and, ultimately, compromise investor safeguards and confidence in Hong Kong's market.

----- Please refer to the attached the questionnaire and the supplementary information contained in the Appendix for the Institute's views in more detail.

Should you have any questions on the Institute's submission, please do not hesitate to contact me at [REDACTED] or [REDACTED]

Yours faithfully,

Peter Tisman
Director, Advocacy and Practice Development

PMT/NCL/pk
Encls.

Part B Consultation Questions

Please indicate your preference by checking the appropriate boxes. Please reply to the questions below on the proposed change discussed in the Consultation Paper downloadable from the HKEX website at:

<http://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/August-2019-Codification-of-General-Waivers/Consultation-Paper/cp201908.pdf>

Where there is insufficient space provided for your comments, please attach additional pages.

Capitalised terms have the same meaning as defined in the Consultation Paper unless otherwise stated.

1. Do you agree with our proposal to codify the existing General Waiver such that bonus or capitalisation issues by a PRC incorporated issuer are exempted from shareholders' approvals in general meetings and separate class meetings?

Yes

No

You may provide reasons for your views.

We do not have any issue on the basis that the exemption conditions for PRC incorporated issuers are generally consistent with other non-PRC incorporated issuers under Main Board Rule 13.36(1).

2. Do you agree with our proposal to codify the existing General Waiver to modify the calculation of consideration ratio for a PRC incorporated issuer whose domestic shares are listed on a PRC exchange?

Yes

No

You may provide reasons for your views.

Listing Decision HKEX-LD83-1 referred to a situation in which the consideration ratio produced an anomalous result, according to the company concerned (para. 2 of the decision). It should be considered, therefore, whether this General Waiver should be codified, given that not all companies would necessarily need to apply for a waiver. Moreover, the justification for this proposal, that modifying the calculation of the market capitalisation of a PRC incorporated company's A or B shares by referencing the market price of the A or B shares listed on a PRC exchange (and not the H shares listed in Hong Kong) would better reflect the market value of the PRC incorporated company (para. 26 of the consultation paper), must also be questionable, given the much more limited access of international investors to the PRC market.

3. Do you agree with our proposal to codify the existing General Waiver to allow the listed issuer's stock code to be displayed prominently in the corporate or shareholder information section of financial reports as described in paragraph 30 of the Consultation Paper?

Yes

No

You may provide reasons for your views.

In principle, this is reasonable. However the interpretation of "displayed prominently" may need to be elaborated, given that the current requirement under Rule 13.51A is to display the stock code on the front cover or on a specific page, whereas the waiver will allow it to be displayed anywhere in a larger section.

4. Do you agree with our proposal to codify the R4.04(2)&(4) Conditions as an exception to Main Board Rules 4.04(2) and 4.04(4) regarding the disclosure of financial information of subsidiaries or businesses acquired or to be acquired after trading record period?

Yes

No

You may provide reasons for your views.

While we are in general agreement this proposal, greater clarity needs to be provided as to the meaning of "unduly burdensome for the new applicant to obtain or prepare such financial information" and how this criterion is to be assessed. There may be a concern that applicants will seek to use this waiver for administrative convenience without making genuine efforts to obtain the relevant information.

5. Do you agree with our proposal to codify the R4.10 Waiver as an exception to Main Board Rule 4.10 regarding the disclosure of financial information of the overseas banking companies?

Yes

No

You may provide reasons for your views.

In putting forward this proposal, paragraph 43 of the consultation paper contains a proviso which states the following, among other things: "... provided that they [new applicants] can demonstrate to the Exchange's satisfaction that the foreign regulator provides adequate supervision to the new applicant". This wording does not appear in the proposed Note to Rule 4.10, which instead states: "If a new applicant is a banking company organised outside Hong Kong and primarily regulated by a regulator which has functions similar to the Hong Kong Monetary Authority and provides adequate supervision to the applicant...". It is not clear from this wording who is to make that judgment. Even if the intention is that it should be the Exchange, which is not clear, we would question the appropriateness of that. In our view, it would be more appropriate that the Hong Kong Monetary Authority should need to be satisfied that the requisite standard has been met.

6. Do you agree with our proposal to codify the R8.21(1) Conditions as an exception to Main Board Rule 8.21(1) regarding the change of financial year period?

Yes

No

You may provide reasons for your views.

We have no specific comment on this.

7. Do you agree with our proposal to (i) codify the modification provided by the General Waivers into Main Board Rules 13.46 and 13.49(1) subject to the new applicant meeting the Annual Results and Reports Waivers Conditions; (ii) codify similar exception to Main Board Rule 13.48(1) as well as GEM Rules 18.66 and 18.79; (iii) align the conditions for Interim Results Exemption with the Annual Results and Reports Waivers Conditions; and (iv) repeal PN 10 and consolidate the guidance with the relevant Main Board Rules?

Yes

No

You may provide reasons for your views.

While we are in general agreement this proposal, for waivers with regard to the distribution of annual reports and accounts, the conditions include that "the new applicant has disclosed in its listing document a statement as to whether it complies with the Corporate Governance Code in Appendix 14 to the Main Board Rules and, if not, the reason for deviation" (para.54(ii) of the consultation paper). This may need to be supplemented. Where the annual report includes a sustainability/ environment social and governance ("ESG") report, there should also be a statement that the applicant complies with the requirements of the ESG Reporting Guide in Appendix 27 to the Main Board Rules and, if not, the reason for any deviation.

8. Do you agree with the proposal to codify the waiver from disclosure of actual consideration of aircrafts to be acquired by listed airline operators, as described in paragraph 58 of the Consultation Paper?

Yes

No

You may provide reasons for your views.

HKEX would need to be satisfied that there are genuine contractual confidentiality restrictions on disclosing the consideration. It should also be clarified whether this proposal refers only to aircraft purchases or also, potentially, to leasing arrangements.

9. Do you agree with the proposal to allow listed issuers to determine SpinCo's Scheme Limit with reference to SpinCo's shares in issue as at the date of SpinCo's listing?

Yes

No

You may provide reasons for your views.

10. Do you agree with the proposal to codify the waiver of the exercise price requirement for issuers dually listed on the Exchange and a PRC exchange as described in paragraph 65 of the Consultation Paper?

Yes

No

You may provide reasons for your views.

11. Do you agree with our proposal to codify the waiver described in paragraph 71 of the Consultation Paper in respect of the experience and qualification of company secretary into the Rules?

Yes

No

You may provide reasons for your views.

We do not support this proposal. It is widely acknowledged that the company secretary of a listed issuer has a very important role and responsibilities, including in relation to:

- supporting the board
- ensuring good information flow within the board
- advising the board on governance matters
- facilitating induction and directors' professional development.

When Rule 3.28 of Listing Rules and the Provisions on the company secretary in the then Code on Corporate Governance Practices were introduced in January 2012, following a consultation in 2010-2011 (see: Consultation Paper on Review of the Code on Corporate Governance Practices and Associated Listing Rules, December 2010 ("2010 Consultation")) the significance of this role was emphasised. It was stated:

"Company secretaries can play an important role in enhancing corporate governance standards. These standards, which can be complex, change frequently and should be tailored to an issuer's circumstances." (para. 340.) It was proposed, therefore, that the company secretary should report directly to the chairman of the board or the chief executive officer and, furthermore, that decisions on the appointment and dismissal of the company secretary required discussion and approval in a board meeting. The Consultation Conclusions (published in October 2011) stated: "Directors should carefully consider the qualifications and experience of a company secretary and the reasons for dismissal at a physical board meeting. We have therefore revised the Note [to a proposed Code Provision] to state that the appointment and dismissal of the company secretary should be dealt with by a physical board meeting rather than a written resolution."

Given the responsibilities of the position, ideally, the company secretary of an issuer should be qualified professional who has passed a fit and proper test, is bound by an ethical code and is subject to a disciplinary framework. He/ she should also be familiar with the regulatory compliance and governance environment and culture in Hong Kong. However, where the person appointed is not an appropriately qualified professional he/ she should, as a minimum, be able to meet the "relevant experience" requirements of the Rule 3.28. One of the relevant considerations in the 2010 Consultation, as this related to company secretaries, was balancing the specific needs of PRC issuers, given the increasing number of such listings on the Exchange, against the importance of having a Hong Kong qualified and/or experienced person at the right level in the company to ensure effective compliance and good governance. To this end, further flexibility was introduced in the proposed new Rule 3.28 to take account of, inter alia, professional qualifications and experience in other jurisdictions, as well as relevant training in addition to the proposed minimum requirement of 15 hour per year. The proposal to introduce the new Rule 3.28 "received overwhelming support" according to the Consultation Conclusions.

Against this background, and notwithstanding that a limited number of waivers from the requirement have been granted, we cannot see that there are grounds for codification, or to depart from the carefully-thought-out approach reflected in the Listing Rules and Corporate Governance Code. Any future waivers, should be considered only in exceptional circumstances and justified strictly on a case-by-case basis.

We believe that, if implemented, this proposal will send out the wrong signal and will serve to discourage overseas companies from looking to appoint a suitably qualified and/ or experienced person to serve as company secretary. We consider that the proposed arrangements for an unqualified person, who does not meet the necessary experience requirements of Rule 3.28, to be assisted by a person who possesses the requisite qualification or experience, for the period of the waiver (up to three years), would not be effective and would, potentially, have an adverse impact on corporate governance and regulatory compliance in Hong Kong. Please refer to the Appendix for further details of our position and why we cannot support to this proposal.

12. Do you agree with the proposals (a) to provide an exemption for Main Board listed issuers that are banking companies or insurance companies from including a working capital statement, subject to appropriate alternative disclosures in their listing documents and transaction circulars if they are able to meet the same conditions as those set out in Main Board Rule 8.21A(2), and (b) to limit Main Board Rule 8.21A(2) so that the exemption applies only to banking companies or insurance companies, subject to alternative disclosures in their listing documents and the conditions as described in paragraph 73 of the Consultation Paper?

Yes

No

You may provide reasons for your views.

13. Do you agree with our proposal to codify the guidance in Guidance Letter HKEX-GL7-09 into the Rules for new applicants' easy reference?

Yes

No

You may provide reasons for your views.

14. Do you agree with our proposal to codify the guidance in Listing Decision HKEX-LD15-3 into the Rules for new applicants' easy reference?

Yes

No

You may provide reasons for your views.

We have no particular view on the matter.

15. Do you agree to amend Main Board Rule 17.05 to state clearly that the restricted period for grant of share options would cover the trading day after the announcement is made with respect to the inside information?

Yes

No

You may provide reasons for your views.

16. Do you agree with our proposal to codify the guidance in Guidance Letter HKEX-GL16-09 into the Rules for completeness?

Yes

No

You may provide reasons for your views.

17. Do you agree with our proposal to codify the guidance in Guidance Letter HKEX-GL31-12 into a new practice note to the Rules for completeness?

Yes

No

You may provide reasons for your views.

18. Do you agree with our proposal to codify the guidance in Guidance Letter HKEX-GL58-13 into the Rules for new applicants' easy reference?

Yes

No

You may provide reasons for your views.

19. Do you agree with our proposal to codify the guidance in Guidance Letter HKEX-GL60-13 into the Rules for new applicants' easy reference?

Yes

No

You may provide reasons for your views.

- End -

Hong Kong Institute of CPA's comments on HKEX Consultation Paper on Codification of General Waivers and Principles Relating to IPOs and Listed Issuers and Minor Rule Amendments

Supplementary information regarding Question 11.

Do you agree with our proposal to codify the waiver described in paragraph 71 in respect of the experience and qualification of company secretary into the Rules?

It is acknowledged that company secretaries (“compsecs”) of listed companies in Hong Kong often play a key role in advising the board on regulatory compliance and corporate governance (“CG”). For this reason, when the Exchange introduced Rule 3.28 following the 2010 consultation exercise, “Review of the Code on Corporate Governance Practices and Associated Listing Rules”(“2010 Consultation”) they emphasised two requirements that enabled a person to carry out the functions of a compsec. These were:

- (a) academic or professional qualifications; and
- (b) relevant experience.

The three academic or professional qualifications that the Exchange currently considers acceptable are:

- (a) a member of the Hong Kong Institute of Chartered Secretaries; or
- (b) a solicitor or barrister (as defined in the Legal Practitioners Ordinance); and
- (c) a certified public accountant (as defined in the Professional Accountants Ordinance).

In assessing an individual’s “relevant experience”, the Exchange will consider the:

- (a) length of employment with the issuer and other issuers and the roles he/ she played;
- (b) familiarity with the Exchange Listing Rules and other relevant laws and regulations, including the Securities and Futures Ordinance, Companies Ordinance, Companies (Winding Up and Miscellaneous Provisions) Ordinance, and Takeovers Code;
- (c) relevant training taken and/or to be taken in addition to the minimum requirement under Rule 3.29; and
- (d) professional qualifications in other jurisdictions.

In introducing the above rule, the Exchange intended to modify the previous rules (Rules

8.17 and 19A.16) to make it clear that qualifications and experience outside Hong Kong could be acceptable. At the same time, the requirement for the compsec to be ordinarily resident in Hong Kong, which did not apply to issuers incorporated in the Mainland under Rule 19A.16, was removed generally. However, familiarity with the relevant laws and regulations remained at that time, and still remains, an important consideration as to whether a person, who is not a Hong Kong qualified compsec, accountant or lawyer, has the requisite experience to be appointed compsec. This is clearly a reasonable and logical requirement, and, in practice, an essential investor protection safeguard, particularly given that the Hong Kong market is increasingly dominated by overseas-incorporated listed companies. Moreover, it has become ever more important as the extent of regulation, including CG and, now also, environmental, social and governance (“ESG”) regulation, as well as recommended practices and disclosures, have continued to develop and expand. New statutory and regulatory requirements that have been introduced since the 2010 Consultation include statutory backing for price sensitive information disclosure, the Companies Ordinance Rewrite, a new sponsor regime, new provisions on independent non-executive directors and board diversity, changes to the connected transaction rules, changes to the delisting and backdoor listing regimes, a completely new Competition Ordinance, and rules on weighted voting rights.

We are well aware of the role the compsecs play in CG in advising boards and management on and helping to implement the CG framework in companies through our own experience with our Best Corporate Governance Awards. It is frequently the case that the qualified person in the compsec role is helping to support a good CG culture and to drive best practices with the company. They cannot do this effectively if they are not familiar with requirements and market expectations, or given sufficient stature and responsibility within the organisation and do not have direct access to the highest levels of the board and management.

The 2010 Consultation set out in some detail the need for the reporting lines and appointment and dismissal of the compsec to be such as to reinforce the importance of the role and functions. Some of the changes proposed were specifically designed to make sure that, from an organisational point of view, appropriate arrangements would be put in place. Quoting from the 2010 Consultation:

“Selection, appointment, dismissal and reporting line

There are concerns that, despite the importance of the role, issuer’s company secretaries tend to be regarded by the board as junior members of staff and may not even be asked

to attend board meetings. Some issuers may deliberately employ junior staff as their company secretary so that they do not question the authority of the board on policy and procedures or governance matters.

The Rules and Code do not state who can select, appoint and dismiss a company secretary. To raise awareness of the importance of the role, the board could be given this responsibility. To elevate the role of company secretary, it may also be preferable for the company secretary to report directly to the board chairman or CEO.

Requirements in other jurisdictions

It is one of the UK Code's supporting principles that: 'Under the direction of the chairman, the company secretary's responsibilities include ensuring good information flows within the board and its committees and between senior management and non-executive directors, as well as facilitating induction and assisting with professional development as required. The company secretary should be responsible for advising the board through the chairman on all governance matters.' It is a UK code provision that 'all directors should have access to the advice and services of the company secretary, who is responsible to the board for ensuring that board procedures are complied with.' The Singapore Code contains similar provisions as the UK. The Australian code states that a company secretary is responsible for "governance matters".

The UK, Singapore and Australian codes state that the appointment and removal of a company secretary should be a board decision." (paras. 356-360)

To address these concerns, in addition to changing the rules, as explained above, the Exchange's response was to propose a new section F of the CG Code on the compsec which included specific Provisions on reporting lines and the appointment and dismissal of the compsec dealing. The Code Principle states:

"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".

In practice, the compsec works not only with the directors, management and shareholders companies he/ she also needs to liaise with various government and

regulatory agencies regulating the activities of the company, such as the Companies Registry, the Inland Revenue Department, the Securities and Futures Commission and the Exchange.

Day-to-day duties are generally wide and, on the regulatory side, often include:

- (i) Monitoring and ensuring compliance of listing rules and codes
- (ii) Advising and updating directors regarding the above.
- (iii) Releasing of information to the market
- (iv) Maintaining relationships with regulators

The compsec must have the knowledge and standing to perform this role, which is why it is important for a suitably qualified professional, or at the very least someone with a high degree of knowledge, familiarity with the legal, regulatory and CG requirements, and experience to serve as an effective compsec.

The current consultation states (at para. 68), as the rationale for codifying this particular waiver:

“Issuers usually appoint a senior management member, or other employees that had served related roles in the new applicant for a period of time and are familiar with the affairs of the new applicant as its company secretary, given the individual’s familiarity with the issuer’s business and affairs. However, these individuals may not possess the academic or professional qualifications under note 1 to Main Board Rule 3.28 or the relevant experience under note 2 to Main Board Rule 3.28. In addition, issuers with principal business activities outside Hong Kong may find it suitable to appoint a candidate who fits their specific needs (e.g. someone who has special knowledge or skills in the local laws and regulations or industry-specific experience or expertise) but who lacks familiarisation with securities regulation in Hong Kong to fulfil the Main Board Rule 3.28 requirement.”

While we understand that issuers with principal business activities outside Hong Kong may also want to appoint people who are familiar with, or have knowledge of local laws and regulations or industry-specific experience or expertise. However, it is vital that Hong Kong investors can be confident the person advising the board is familiar with the Hong Kong CG and regulatory requirements, environments and culture. These are not the same across different markets and, as the Asian Corporate Governance Association’s regular comparative study, “CG Watch”, indicates, Hong Kong has among the highest standards of CG in the region. Confidence in the integrity and trustworthiness of the

market is an integral part of Hong Kong's success and not something that we can afford to put at risk. Therefore, in our view, whether or not a company with principal business activities primarily outside Hong Kong also engages someone who is familiar with the local laws and regulations in that jurisdiction, it is, nevertheless, essential that the compsec for the purposes of the listing on the Hong Kong Stock Exchange be someone who meets the current requirements of rule 3.28. Only in very exceptional cases should waivers be considered, and there are no clear principles established, or which could be laid down, that would justify codifying this type of waiver.

The proposal put forward in the current consultation that a waiver may be granted where a person occupying the position of compsec does not meet the requirements of Rule 3.28, provided he/ she is assisted by a person who possesses the necessary qualifications or experience under Rule 3.28, throughout the waiver period is not appropriate, in our view, for reasons that should be clear from the above, and we do not believe that it will serve the purpose that the Exchange may intend it to serve. In practice, it is likely to result in the situation akin to that described in the 2010 Consultation, and referred to above, where the person eligible to be compsec, i.e., here the assistant, will often be too junior to have any to influence with the board or the management, including the person occupying the position of compsec. Meanwhile, the latter may have little knowledge of the relevant Hong Kong laws and regulations specified in Rule 3.28 or of the regulatory and governance environment and culture here. If the outcome is that the assistant's voice will carry little weight and the compsec is unqualified and unfamiliar with the Hong Kong situation then the impact will be felt by investors in the Hong Kong market. It could well have an adverse effect on investor protection and standards of CG in Hong Kong and, if it were to become a normal course of events, it could result in long-term damage to Hong Kong's reputation as an international financial centre.

For all the above reasons, we reiterate that we cannot support this proposal.