

# CONSULTATION ON CODIFICATION OF GENERAL WAIVERS AND PRINCIPLES RELATING TO IPOS AND LISTED ISSUERS AND MINOR RULE AMENDMENTS - AUGUST 2019

## Introduction

1. This is a submission made in response to the Proposal set out in paragraph 71 of the above-referenced Consultation Paper ( the “Proposal” ) regarding the codification of a waiver from an issuer’s obligation under Main Board Rule 3.28 in respect of the appointment of a duly capable company secretary. I object to the Proposal for the reasons given below.

## Background

2. I am a Fellow of the Hong Kong Institute of Chartered Secretaries ( the “Institute” ). I was previously Company Secretary and Executive Director with CLP Holdings before retirement in 2013. I was a member of the Standing Committee on Company Law Reform and also served on the Listing Committee. Since 2013 I have continued to chair the Institute’s biennial Corporate Governance Conference. I presently serve as one of the Institute’s two representatives on the Council of the Institute of Chartered Secretaries and Administrators.
3. I have read and wholly support the Institute’s submission in response to the Proposal. However, I wished to take the opportunity to express my own views, in my own words, on the Proposal. These views are, of course, entirely my own. I have copied my submission to the Institute.
4. Before setting out those views, I should recognise that there can be a leaning in a response to any such proposals towards protecting one’s profession and professional self-interest. This is not the case here - I have no axe to grind in that respect. In any case, Rule 3.28 does not require a company secretary to be a member of the Institute, or even a chartered secretary by profession. The motivation behind this submission is the maintenance and safeguarding of corporate governance standards of listed companies.

## The Company Secretary

5. The Company Secretary is at the heart of good corporate governance of companies listed on the Main Board of the Hong Kong Stock Exchange. Good governance is everyone’s responsibility, including that of all directors and senior management. However, it is only the company secretary who will possess the necessary skill, knowledge and experience to bring professional, informed and specialist corporate governance expertise to the service of his or her colleagues, the company and its shareholders.
6. It is in this context that Main Board Rule 3.28 exists and should be applied. The unique standing and responsibility of the company secretary is further acknowledged by HKEX in the recently introduced Code Principle F, referenced in the Consultation. It would also be appropriate to take note of the Exchange’s own “ *Guidance for Boards and Directors* “ of July 2018. This describes the company secretary as a “key advisor on corporate governance and other regulatory compliance matters’. In paragraph 6.2, the Guidance sets out the company secretary’s duties as being to :-
  - “ help the issuer construct and maintain a sound and effective corporate governance framework and in particular, a set of risk management and internal control systems to ensure regulatory compliance
  - be aware of developments in laws, rules and regulations that may affect the issuers’ business and operation;
  - be pro-active and think about issues that may arise and provide advice to the Board in accordance with the laws, rules and regulations;

- ensure that the board receive continuous training on regulatory developments that are relevant to their business developments and needs; and

- provide compliance advice to the board and senior management in the decision-making process.”

7. Through the Listing Rules, the Corporate Governance Code and its Guidance for Boards and Directors, the Exchange has set down its requirements and expectations of the importance of the role of company secretary in considerable, measured and unambiguous terms. It would be inconsistent, unwelcome and unhelpful to good governance for the Exchange to dilute or diminish this clear message by the proposed amendment to Rule 3.28. Further reasoning in this sense is set out in the following paragraphs.

### The Proposal

8. The following separate, albeit related, reasons argue against the Proposal.

a) Because of the central role of the company secretary in the corporate governance regime of any issuer, the Proposal does not just weaken the terms of Rule 3.28. It weakens compliance with the Rules and the Code as a whole.

b) The legal and regulatory compliance obligations attached to a Hong Kong listing have grown steadily and substantially in recent years. It would be inconsistent and self-contradictory if compliance obligations increase, whilst a key capability to meet those obligations is reduced.

c) The location of the “principal activities” of the issuer is immaterial:

i) The company secretary is not responsible for managing the issuer’s business. That is not his or her job.

ii) Contrary to the argument advanced in the Proposal, the “specific needs” of the job are not “skills in local laws and regulations” (that is the speciality of the company’s internal and external lawyers). Still less are they “industry-specific experience or expertise”. The company secretary’s job is to promote corporate governance and regulatory compliance. All five of his or her duties described in the Exchange’s own Guidance for Boards and Directors refer to this role. None prescribes “familiarity with the issuer’s business and affairs” (as mentioned in the Consultation).

iii) The requirements for compliance and the expectations for corporate governance are set in the place of listing, not the location of “principal business activities”. They do not vary or soften according to the location of the business.

d) As currently formulated, Rule 3.28 is not unduly prescriptive. It is, in fact, both generous and flexible. The issuer is given a range of options regarding the sourcing of its company secretary and an adequate pool of resources to choose from. The issuer has chosen to be listed in Hong Kong. In that wider context, securing the services of a properly capable company secretary is a relatively minor and straightforward matter.

e) In similar vein, the Proposal would operate solely to the minor added convenience of the issuer. It would not operate in any way to the benefit of the actual or potential shareholders or other stakeholders. The only consequence to them can be the weakening of the contribution of a duly capable company secretary.

f) The qualifications of a company secretary under Rule 3.28 as currently formulated are a matter which lend themselves to objective assessment and judgment. They are also a matter of past and present fact. The efficacy of the “handholding” role contemplated by the Proposal does not lend itself to such assessment and judgment. Nor is it a matter of fact - only an unverifiable expression of future intentions.

g) With respect to the qualifications attaching to the length of the “ handholding’ Period referred to in paragraph 70 of the Consultation ( and adopting the corresponding numbering ) :-

i) There is no strong reason why an issuer should not find a capable company secretary to start with, rather than finding a “ Qualified Person” in addition to an individual whom he represents as capable of learning the job within three years ;

ii) In reality, the issuer is hardly likely to understate the scale and quality of the “measures and systems in place to facilitate the Proposed Company Secretary in discharging his or her duties” which it promises to implement. And it is even less likely that the issuer would report against itself on any subsequent shortcomings in those measures and systems.

iii) The issuer’s regulatory compliance and quality of internal controls may say something about the standard of the issuer’s other staff, responsible for such matters ( and of the Qualified Person). They do not necessarily say anything about the Proposed Company Secretary.

### Conclusion

9. Against the background of, and for the reasons set out in, this submission, I do not agree with the proposal to codify the waiver described in paragraph 71 of the Consultation. Rule 3.28 should be maintained in its current form, with the occasional grant of waivers in specific cases at the Exchange’s discretion, carefully and extremely sparingly exercised. In terms of the capability and role of the company secretary the Proposal does not constitute “the thin end of the wedge” - it is a wedge. Nor, in the case of externally-based issuers would it be an exception to the Rule : it would be the exception which is the Rule.

P.W. Greenwood

28 August 2019

Greenwood, Peter William