

## Corporate Finance

### The new Guidance Letter on qualification requirements for company secretaries of listed companies

#### Introduction

On 28 August 2020, the Stock Exchange of Hong Kong Limited (the “**Stock Exchange**”) published a new guidance letter HKEX-GL108-20 (the “**Guidance Letter**”) in relation to the qualification and experience requirements of the company secretary of issuers listed in Hong Kong. This Guidance Letter reiterates the important role played by a company secretary in supporting the board in achieving good corporate governance and provides guidance to issuers when appointing a company secretary whose qualifications and experience does not meet the qualification and experience requirements set out in the Rule 3.28 (“**Rule 3.28**”) of the Rules Governing the Listing of Securities on the Stock Exchange (the “**Listing Rules**”) (Rule 5.14 of the Rules Governing the Listing of Securities on GEM of the Stock Exchange (the “**GEM Listing Rules**”).

#### Relevant Listing Rules

Section F of the Corporate Governance Code and Corporate Governance Report under Appendix 14 to the Main Board Listing Rules (“**Appendix 14**”) (Appendix 15 to the GEM Rules) sets out the importance of the role of the company secretary, as an employee of the issuer with day-to-day knowledge of the issuer’s affairs, in ensuring good information flow within the board, compliance with board policies and procedures and advising the board on corporate governance matters.

Rule 3.28 (GEM Listing Rule 5.14) requires a company secretary of an issuer to possess:

1. certain academic or professional qualifications (“**Acceptable Qualification**”), or
2. relevant experience (“**Relevant Experience**”) to be considered capable of discharging the functions of company secretary.

The Acceptable Qualification includes: (i) a member of The Institute of Chartered Secretaries; (ii) a solicitor or barrister under the Legal Practitioners Ordinance (Chapter 159 of the Laws of Hong Kong); and (iii) a certified public accountant under the Professional Accountants Ordinance (Chapter 50 of the Laws of Hong Kong).

The Stock Exchange’s assessment criteria for Relevant Experience includes: (i) length of employment with the issuer and other issuers and the roles the company secretary has played; (ii) familiarity with the Listing Rules and other relevant laws and regulations including

the securities and companies laws of Hong Kong and the Takeovers Code; (iii) relevant training taken and/or to be taken in addition to the minimum requirement under Rule 3.29 of the Listing Rules (Rule 5.15 of the GEM Listing Rules) (i.e. 15 hours per financial year); and (iv) professional qualifications in other jurisdictions.

## **Background of the Guidance Letter**

Rule 3.28 intends to ensure issuers appointing individuals qualified to assist them in compliance with the Listing Rules, relevant laws and regulations in Hong Kong and to achieve a good corporate governance standard. However, issuers, especially those with principal business activities outside Hong Kong, tend to appoint candidates who may not possess the Acceptable Qualification or Relevant Experience but are familiar with issuers' business through serving related roles for a period of time or have special knowledge in local laws or industry-specific experience as company secretaries.

Therefore, the Stock Exchange has in the past granted waivers to issuers from strict compliance with Rule 3.28 in appointing a company secretary who does not possess the Acceptable Qualification or Relevant Experience (the "**Rule 3.28 Waiver**") for a specified period on the condition that the proposed company secretary must be assisted by a person whose qualification or experience can fulfil Rule 3.28 ("**Qualified Person**").

In August 2019, the Exchange issued a consultation paper proposing to codify the factors to be considered when granting the Rule 3.28 Waiver (the "**Proposal**"). Opposition was received from the market for reasons such as creating negative impact on corporate governance standards and investor protection in Hong Kong and the Rule 3.28 Waiver should only be granted in exceptional cases. As a result, the Stock Exchange did not proceed with the Proposal and issued the Guidance Letter to provide further guidance on Rule 3.28 Waiver.

## **Rule 3.28 Waiver**

The Guidance Letter provides that the Stock Exchange will consider the following factors in determining whether or not to grant the Rule 3.28 Waiver:

1. whether the issuer has principal business activities primarily outside Hong Kong;
2. whether the issuer was able to demonstrate the need to appoint a person who does not have the Acceptable Qualification nor Relevant Experience as a company secretary; and
3. why the directors consider the individual to be suitable to act as the issuer's company secretary.

A Rule 3.28 Waiver, if granted, will be for a fixed period of time (the “**Waiver Period**”) not more than three years and on the conditions that the proposed company secretary must be assisted by a Qualified Person and is appointed as a joint company secretary throughout the Waiver Period. Compared to the Rule 3.28 Waiver granted prior to the issuance of the Guidance Letter, the Stock Exchange has also tightened the condition attached to Rule 3.28 Waiver, as a Rule 3.28 Waiver can be revoked if there are subsequent material breaches of the Listing Rules by the issuer.

The length of the Waiver Period is determined on a case-by-case basis, after the following factors being taken into account: (i) the proposed company secretary's experience in handling company secretarial matters and his/her relevant professional qualifications and/ or academic background; (ii) the measures and systems in place to facilitate the proposed company secretary in discharging his/her duties as a company secretary; and (iii) the issuer's regulatory compliance and/or material deficiencies/weaknesses in internal controls. The proposed company secretary is expected to acquire the relevant qualification or experience required under Rule 3.28 within the Waiver Period.

Applicants for the Rule 3.28 Waiver are also required to disclose, in case of a new listing applicant, in the listing document and, in case of an issuer, the announcement (where applicable) the following information: (i) reasons for making the Rule 3.28 Waiver; (ii) details and conditions of the Rule 3.28 Waiver; and (iii) qualification and experience of both the proposed company secretary and the Qualified Person.

Prior to the lapse of the Waiver Period, the Stock Exchange will not automatically deem the proposed company secretary to be qualified under Rule 3.28. The issuer is expected to demonstrate to the Stock Exchange that the proposed company secretary, having had the benefit of the Qualified Person's assistance during the Waiver Period, would have acquired the Relevant Experience under Rule 3.28 so a further Rule 3.28 Waiver would not be necessary. The Stock Exchange will assess whether the proposed company secretary has attained the Relevant Experience and is capable of discharging the functions of company secretary by considering the following factors: (i) compliance history of the listed issuer during the Waiver Period; and (ii) the relevant training undertaken by the proposed company secretary during the Waiver Period.

## **Conclusion**

Although the Guidance Letter sets out clear criteria under which the Stock Exchange will consider whether or not to grant the 3.28 Waivers, since each application is determined on a case-by-case basis, issuers or companies seeking for a listing with the Stock Exchange are therefore advised to seek professional opinion before appointing any person as the company secretary who does not possess the Acceptable Qualifications and Relevant Experience.

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**Important:** The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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