Asian Legal Business

Hong Kong IPO Handbook 2020

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ALB combines news and analysis from its team of professional legal journalists and the expert opinions of senior industry professionals with Reuters news and insights that power businesses across the globe.

Publisher's Note

1 Dec 2019

On behalf of the team here at Thomson Reuters, I am delighted to bring you the third edition of the popular ALB Hong Kong IPO Handbook. This book took a year to put together. We started discussions with law firms in December 2018 to create a new guide aimed at providing updates around listing reforms that HKEx introduced with the aim of attracting of new economy firms to list in the city. Over the next few months and following several more discussions, we started to receive interest from experts keen to share their knowhow on their specialist subjects, eventually making this handbook a must-read step-by-step manual for firms seeking to raise public capital.

The 2020 update builds on the work of our 2015 and 2017 editions – both of which were extremely well-received in the market. Additionally, this features a number of exciting new developments in the Hong Kong IPO scene. Among them are dual-class share structures, introduced by Hong Kong last year, which have resulted in Chinese technology companies listing on the HKEx as their primary market. We also look at the various Stock Connects that Hong Kong has established with cities in the mainland, which have made HKEx-listed companies even more alluring to investors, as well as the growing prevalence of secondary listings on the bourse.

Although the IPO market is traditionally quiet during the summer months, a combination of the U.S.-China trade war, the ongoing Brexit crisis and – closer to home - protests in Hong Kong badly affected the number of listings for the first nine months of 2019. However, the Hong Kong IPO market made a stirring comeback in the last quarter of this year. As I write this, one of those secondary listings – Chinese e-commerce giant Alibaba's mammoth $11.3 billion offering in Hong Kong – vaulted the city back to the top of the list of the world's IPO markets, with HKEx seeing $34.7 billion in IPO proceeds for the year as of the end of November. It is a testament to Hong Kong's resilience following a troubling few months, which saw the city sink into its first recession in a decade, and it is also a robust vote of confidence in Hong Kong's financial future. The strong return of the IPO market will no doubt inspire more companies to go public in Hong Kong, and we hope this guide will play an important part in their IPO journey.

Finally, ALB wishes to thank the individuals and supporting organisations that contributed their time and expertise to the publication.

The list includes Brian W. Tang, managing director, ACMI and founding executive director, LITE Lab@HKU, who provided the foreword to our IPO handbook 2020. Mr. Tang's foreword offers a useful timeline of events in the market since the introduction of HKEx changes in April 2018. The summary is a helpful overview to anyone reviewing listing applications for Hong Kong.

Our thanks also go to the following international and local professional associations in the region for their guidance and advice. In recognition of their support, the handbook will be immediately available to their members in both print and digital formats.

1. Inter-Pacific Bar Association (IPBA)
2. The Law Society of Hong Kong
3. Hong Kong Investor Relations Associations (HKIRA)
4. Hong Kong Corporate Counsel Associations (HKCCA)

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Thomson Reuters

Table of Contents

FOREWORD

Hong Kong IPO Market – Evolving with Technology Innovations and Global Competition

Brian W Tang
Managing director, ACMI; Founding executive director, LITE Lab@HKU

Hong Kong's initial public offering (IPO) market is going through an exciting new chapter while facing challenging and competitive times.

Listing rule innovations help make Hong Kong world's largest IPO venue in 2018

After many years of heated debate, Stock Exchange of Hong Kong (HKEx) sought to diversify from its traditional strength as a listing destination for Chinese state-owned enterprises (SOEs) to target more large Chinese private enterprises by changing its listing rules in April 2018 to admit companies with weighted-voting rights (WVR) or dual-class structures. The new rules enabled smartphone maker Xiaomi's US$4.72 billion IPO in July 2018 and food delivery and ticketing platform Meituan Dianping's US$4.2 billion IPO in September 2018 after Hong Kong's perceived loss of the world's largest-ever IPO, namely Alibaba's US$25 billion listing, to the New York Stock Exchange (NYSE) in September 2014.

HKEx's new biotech rules that became effective at the same time has also attracted many Chinese biotech companies by enabling IPOs of pre-revenue companies such as cancer drug developer Beigene (US$903 million), Innovent Biologics (US$485 million), Ascletis Pharma (US$400 milllion), Shanghai Junshi Biosciences (US$394 million), Cstone Pharmaceuticals (US$328 million), CanSino Biologics (US$173 million), Mabpharm (US$157 million) and Hua Medicine (US$117 million). The biotech emphasis also allowed HKEx to attract more established companies such as the second listing of Shanghai-listed medtech platform Wuxi AppTec (US$1.06 billion), and IPOs of Hansoh Pharma (US$1 billion), Frontage (US$205 million) and Viva Biotech (US$194 million), which helped make Hong Kong the world's second largest biotech funding hub.

Together, these new rules contributed to Hong Kong Kong being the largest IPO venue for 2018, raising US$33.3 billion from 195 IPOs.

Some listing trends and opportunities in 2019

2019 has seen more headwinds, with macro factors ranging from US-China trade war to the street protests in Hong Kong leading to downgrades in Hong Kong's credit rating and outlook.

In 1H 2019, Hong Kong was ranked third in amount of funds with HK$69.5 billion raised with 76 IPOs – the largest number of IPOs (although down from 101 IPOs during the same period the prior year) and in a year which saw top-ranked NYSE benefitting from Uber's US$8.1 billion IPO in May and second-ranked Nasdaq benefitting from Lyft's US$2.5 billion IPO in March.

Hong Kong is increasingly a venue for private-equity backed Chinese enterprise take-private exits, from Wuxi Biologics's US$410 million IPO in 2017 (the third largest privatisation of a US-listed company Wuxi PharmaTech and the first exit in Hong Kong) to Topsport's US$1.01 billion IPO in October 2019 (from formerly HKEx-listed Belle International).

Although Hong Kong has faced some challenges with international market listings, such as the 2018 delisting of Glencore after its 2011 US$11 billion dual HKEx-London Stock Exchange (LSE) IPO which remains the largest-ever IPO on LSE, the SAR remains the listing venue of choice for substantial Asian businesses, as demonstrated by Anheuser-Busch InBev's US$5 billion IPO as the world's second largest IPO in 2019 to date.

International competition heats up from China and London

Dealogic reported that in 1H2019, "China and Hong Kong are competing for the crown of Asian new listings, with China leading the race with US$9.1 billion in volume over Hong Kong's US$8.8 billion", but described it as a "new listings braking".

WVRs have not been permitted for companies listed in China, and in July 2018, the market was surprised when a special stability trading period (SSTP) for Chinese investors was announced to prevent Chinese investors from investing in HKEx listed WVR companies via the Southbound Trading of Stock Connect until better education of such investors. New rules were finally proposed after more than a year in August 2019, and greater certainty should attract more WVR companies.

In the meantime, in July 2019, Shanghai Stock Exchange's new STAR Board launched with 25 science and technology innovation companies listing for a first day average "IPO pop"of 140% . The STAR Board has reportedly been luring Chinese biotechs away from listing in Hong Kong, as well as larger technology companies, such as the US$640 milliion IPO of HKEx-listed Kingsoft's subsidiary Kingsoft Office, US$394 million IPO of mobile phone maker Transsion and even international companies such as the US$133 million IPO of Silicon Valley-based Hillstone Networks.

Notwithstanding Alibaba's record US$11.3 billion secondary listing in Hong Kong, the STAR Board's approval of the listing of WVR cloud storage provider UCloud in September 2019 is a milestone that heats up its competition with HKEx, NYSE and Nasdaq for such companies.

Separately, in August 2019, LSE agreed to buy data-provider Refinitiv from private equity firm Blackstone and Thomson Reuters for US$27 billion. One month later, HKEx made an unsolicited bid for LSE for US$36.6 billion (without Refinitiv), which was promptly and unanimously rejected by the LSE board. This bid had apparently been considered by HKEx's board more than a year ago. This is at a time when China Pacific Insurance is planning to be the second Chinese company to list its global depositary receipts (GDRs) on LSE

after Huatai Securities' US$1.63 billion GDR listing under the Shanghai-London Stock Connect set up in June – this could be the year's largest listing on LSE.

Attracting and sustaining IPOs of next-generation innovative companies in Hong Kong

IPO success is often measured not just in its initial listing size, but also in its after-trading (ie, if the stock price rises and investors make money). Yet, if the price rises too much and too quickly, CFOs often complain that they "left too much money on the table". Hence, successful IPOs can be more of an art rather than a science.

The disappointing IPOs of tech startups with valuations of more than US$1 billion this year (such as Uber and Lyft) has focussed the current differences between private valuation and public offerings of such unicorns. In the United States, direct listings have gained traction, but its appeal would be limited to cash-flow positive companies with brand recognition that do not need to raise capital, such as Slack and Spotify, with Airbnb also reportedly considering it.

As part of the Guangdong-Hong Kong-Macau Greater Bay Area development plan announced by the State Council in February 2019, Hong Kong is well positioned to play an integral role in this "globally influential international innovation and technology hub", including "[t]o leverage Hong Kong's leading position in the financial services sector, consolidate and enhance Hong Kong's status as an international financial centre, and establish a platform for investment and financing serving the Belt and Road Initiative."

The high levels of venture capital and private equity investment in Chinese companies in recent years means that IPO exits will continue to be sought. Hong Kong has a vibrant fintech community, and it has already attracted insuretech ZhongAn's IPO in September 2017, with facial recognition unicorn and WVR company Megvii's A-1 filing signalling what could be the first Chinese artificial intelligence (AI) listed company.

Blockchain or distributed ledgers are another innovative technology. While the A-1 filings of cryptocurrency hardware companies linked to bitcoin mining (namely, Bitmain, Canaan Creative and Ebang) have expired with the fall in bitcoin's price and in the popularity of proof-of-work consensus, owners of several blockchain companies have acquired HKEx listed companies. For example, 72% of Pentronics was acquired by chairman of Huobi Group in August 2018; 74.5% of Branding China was acquired by owners of ANX International and Octagon Strategy in August 2018; and 60.5% of LEAP Holdings was acquired by the founder of OK Coin in January 2019). While Branding China (now known as BC Group) currently conducts its main blockchain business under this entity with financial statements audited by PwC, Huobi is reportedly attempting to do a backdoor listing of its blockchain assets. It remains to be seen how the HKEx's new backdoor listing rules that came into effect in October 2019 to discourage backdoor listings, reverse takeovers and use of shell companies will impact such plans.

In the meantime, in June 2018, HKEx became the 74th stock exchange to join the United Nations Sustainable Stock Exchange Initiative and has sought to upgrade its environmental, social and governance (ESG) comply-or-explain regime with its public consultation paper ended in July 2019. This will help position Hong Kong well as a hub for green finance.

Hong Kong's rule of law, strong regulatory regime and market resilience remain some of its key competitive advantages, and its regulators are very focused on market participant discipline. In October 2018, the Securities and Future (SFC) head of enforcement Tom Atkinson announced that 28 sponsor firms in relation to 39 IPOs were under investigation for 30 cases of sponsor misconduct. Since then, record fines

amounting to more than US$100 million have been imposed on investment banks relating to shortcomings in the standards of sponsor IPO work between 2009 and 2014, including China Forestry (2009 – Standard Chartered, UBS)), Real Gold Mining (2009 – Citibank), China Metal Recycling (UBS, China Merchants), Tianhe Chemicals (2014 – Morgan Stanley, Merrill Lynch, UBS), and Fujian Dongya Aquatic Products (2014 – CCB International). UBS Securities had its IPO sponsor license suspended for 18 months.

Regulation of virtual asset trading platforms was also announced during Hong Kong Fintech Week by the SFC at a time when the US SEC in July 2019 approved Blockstack's US$28 million securities token offering and YouNow's Props Token loyalty program under Regulation A+.

We look forward to Hong Kong continuing to attract and sustain IPO fundraising by more quality innovative technology companies in the coming years in a manner that avoids a race to the bottom.

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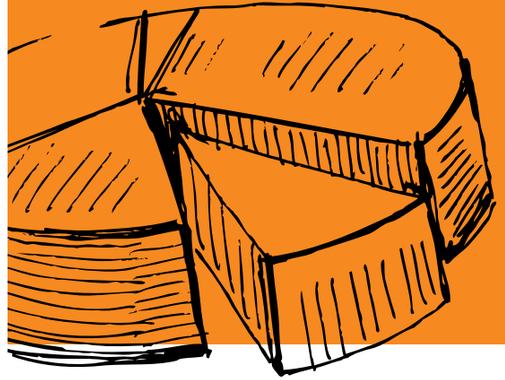

CHAPTER 1

Hong Kong Dual-Class Shares

I. Definition

'Dual-class share structure' is a kind of weighted voting rights structure', indicating that the specific shareholders holds weighted voting rights (hereinafter referred to as WVR). Generally, most of the companies issues same series of shares with equal rights, including voting rights (generally referred as 'single-class share structures'). WVR refers to certain shareholders enjoy disproportionate rights to their economic interest (per share) in the company, including disproportionate voting rights and other related rights, including non-voting right, preferential voting rights, enhanced or exclusive rights to elect directors and other forms.[1]

Companies adopting WVR structure issues dual classes or multiple classes of shares. Exemplified by the most commonly used two-class form, Class A shares held by ordinary shareholders with one vote per share and Class B shares held by the founder and senior management with multiple votes per share.

II. Background

1. Background of the Listing Regime Reform

In February 2018, after extensive discussions with several related parties, HKEX published the <Consultation Paper on a Listing Regime for Companies from Emerging and Innovative Sectors>, which contains a number of pertinent suggestions for the issuers with WVR structures. In April 2018, according to the public responds to the consultation paper, HKEX released the <Consultation Conclusions on a Listing Regime for Companies from Emerging and Innovative Sectors> and the Amendments to the Listing Rules (Update No.119) accordingly, which have been in effect since April 30, 2018 and officially revised to allow listing with WVR structures ("Listing Regime Reform"). The Listing Regime Reform improves the listing systems and mechanisms for the high growth innovative companies with dual-class share structure to list in Hong Kong.

1 See HKEX research report, "Listing Regime Reforms for Dual-Class Share Structure and Biotech Industry", published on the HKEX website, April 24, 2018.

2. History of the HK Listing Regime for Dual-class Share Structure

The Listing Regime Reform is not the first foray for HKEX on dual-class share structure. During 1972 to 1973, five listing subsidiaries of Wheelock Marden group, Local Property and Printing Company Limited and Swire Pacific Ltd. ("Swire Pacific") had issued B Class shares gradually. Followed by six of them had withdrawn their listings by privatizing or being brought up, Swire Pacific is currently the only listing company with B Class shares in issue in Hong Kong. At that time, the B shares entitled the holder to one vote per share as ordinary shares but lower denomination and dividend entitlement (either one-fifth or one-tenth of ordinary shares) and there was no specific HKEX listing rules towards dual-class share structure.[2]

In March 1987, a number of listed companies including Cheung Kong (Holdings) Ltd proposed to offer "B" shares, which led a slump in market reactions and strong opposition by Hong Kong and overseas brokers. The HKEX's securities regulator announced that neither the new dual-class listing application nor the listing "B" shares application of listed companies would be permitted any longer and subsequently codified the Listing Rules in December 1989.[3]

In consideration of the spotlights focused on the innovative companies in the market recently and innovative companies' founder and senior management's preference to adapting dual-class share structure for (1)innovative companies' characters for being strong capital demand, low initial revenue and high development potential, (2)the advantage of dual-class share structure on enhancing the stability of controlling, which lower the risk of hostile takeovers, high dependence on financial investors and so forth, and (3) the founder and senior management are able to put more effort in the fields of scientific innovation, technology research and so forth,[4] the influence of dual-class share structure upon innovative companies has gradually absorbed the market's attention and concern. In August 2014, HKEX published the <Concept Paper on Weighted Voting Rights>, consulting the public reaction on revising "one vote per share" listing regime and in June 2015 published the <Consultation Conclusions to Concept Paper on Weighted Voting Rights>. Although there is a considerable difference on adopting the WVR, the consultation conclusion laid a solid foundation for the Listing Regime Reform. In June 2017, HKEX released the <Concept Paper on New Board>, and the <Consultation Conclusions to New Board Concept Paper> in December 2017, stating that HKEX would proceed to modify its listing rules to broaden its listing system.

III. Specific Requirements on Dual-class Structure

On one hand, dual-class share structures can effectively alleviate innovative companies' financial pressure, motivate the founders and management and enhance the companies' long-term value; on the other hand, it may result in worsening asymmetric information, the agency problem and controlling shareholders' supervision difficulties. Therefore, it is crucial for adopting dual-class share structures to set a series of access requirements, improve the investors' protection mechanisms and enhance the internal governance and disclosure.

In order to balance the interest of investors and innovative issuers, HKEX has place a series of control mechanisms and requirements to the issuer with dual-class share structure and the beneficiaries of WVR shares as follows:

1. Qualifications for a new listing applicant

1) **Corporation Nature**: the applicant must be an innovative company deemed by HKEX.
2) **Business Success**: the applicant must demonstrate a track record of high business growth and its high growth trajectory is expected to continue.
3) **External Validation**: the applicant must have previously received investment from at least one Sophisticated Investor. Such investors will be required to retain an aggregate 50% of their investment at the time of listing and for a period of at least six months post-IPO.
4) **Market Capitalization**: the applicant must have a market capitalization of at least HK$40,000,000,000 at the time of listing, or a market capitalization of at least HK$10,000,000,000 at the time of listing and revenue of at least HK$1,000,000,000 for the most recent audited financial year.

2. Restrictions on WVR Beneficiaries

1) **Identity Requirements**: the beneficiaries must be individuals who are directors of the issuer at listing and remain directors afterwards.
2) **Material Contributions**: HKEX will reviewed the each beneficiaries' contributions to the issuer's growth in the past, which shall be comparable to his WVR.
3) **Minimum and Maximum Share Capital at Listing**: the beneficiaries should collectively own a minimum of at least 10% and a maximum of no more than 50% of the underlying economic interest in the applicant's total issued share capital at listing.

3. Limits on WVR shares

1) **Sunset Clause**: the beneficiary's WVR in a listed issuer must cease if, at any time after listing, the beneficiary is: (i) deceased, deemed to be incapacitated, no longer a member of the issuer's board of directors; (ii) no longer has the character and integrity commensurate with the position as a director; or the beneficiary transfer the shares with WVR to another person.
2) **Voting Right Cap**: the WVR shares in a listed issuer must not entitle the beneficiary to more than ten times the voting power of ordinary shares.

4. Disclosure

1) **Stock Marker**: the listed equity securities of an issuer with a WVR structure must have a stock name that ends with the marker "W".
2) **Warning Statements**: the WVR issuer must include the warning "A company controlled through WVR" on the front page of all announcement documents.
3) **Identification Notice**: the WVR issuer must identify the beneficiaries of WVR in its listing documents and in its interim and annual reports.

5. Corporate Governance

1) **Corporate Governance Committee**: an issuer with a WVR structure must establish a Corporate Governance Committee to review and monitor whether the listed issuer and its shareholders comply with listing rules on the regulation of dual-class share structure. Corporate Governance Committee must be comprised entirely of independent nonexecutive directors.
2) **Compliance Adviser**: an issuer with a WVR structure shall appoint a Compliance Adviser on a permanent basis to seek advice on matters related to the WVR structure and other issues.
3) **Training**: directors and senior management of a WVR applicant should undertake training on the rules and risks related to WVR before listing.

IV. Conclusion

This article mainly introduces the HXEX dual-class listing mechanism, including the definition of WVR, the background of the Listing Regime Reform and the specific requirements on dual-class listing structure. This article is mainly for the reference of the companies, agencies or other parties which intends to adopt or discuss such listing mechanism, and further combine the practice and theories to maximize related parties' value in the long run.

2 See HKEX consultation paper, "Concept Paper on Weighted Voting Rights", published on the HKEX website, August, 2014.
3 See HKEX consultation paper, "Concept Paper on Weighted Voting Rights", published on the HKEX website, August, 2014.
4 See HKEX research report, "Listing Regime Reforms for Dual-Class Share Structure and Biotech Industry", published on the HKEX website, April 24, 2018.

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The Securities Center, founded in 2000, is the earliest specialized business center of Beijing DHH Law Firm and is now comprised of over 100 partners and lawyers. All the team members have expertise and extensive experience in securities market services and many are certified public accountants, certified tax agents, independent directors of listed companies and licensed attorneys in foreign countries. The Securities Center has provided efficient legal services on stock and bond issuance, reform, reorganization, M&A and restructuring, and equity financing to hundreds of companies. The clients' listing locations include China main board, Sci-Tech innovation board, SME board, GEM, NEEQ, regional equity exchange centers, the Stock Exchange of Hong Kong, NASDAQ, the London Stock Exchange, the Australian Stock Exchange and Korea Exchange to name a few.

Guided by the strategy of Serving Listed Companies and Serving Companies Listing, the Securities Center provides high-quality legal services to clients with its elite teams and expertise. They face the changes in the market together with clients and accompany them in their operations and development.

CHAPTER 2

The Legal Issues Related to the Listing of Red Chips

There are two main methods for Chinese companies to list abroad, namely, Red Chips and H Shares. "Red Chips" means that domestic residents (the Mainland China residents, including natural persons and/or institutions) incorporate the offshore companies (generally in Cayman, Bermuda and BVI) as the listing company in compliance with the local laws and regulations as well as accounting standards. Through offshore company acquiring assets and/or shares of the domestic companies to make the latter become the former's subsidiaries company, or a series of agreements regarding de facto control entered into between the offshore company and the domestic companies, as a result, all of the de facto control, revenues and profits of the domestic companies are transferred to the offshore company.

I The Procedure in ODI by Domestic Institution Shareholders

A. The Procedure in NDRC

According to the ***Administrative Measures for the Outbound Investment by Enterprises*** (hereinafter referred as to "***Order No. 11***"), all types of prior supervisory procedure under the Outward Foreign Direct Investment (hereinafter referred to as "ODI") set forth as follows:

The Types of projects	The total amount of investments from Chinese investors	Direct investments with assets or equities or proving financing or guarantees	Investments via an overseas enterprise under the investor's control (not by way of investments with assets or equities or proving financing or guarantees)
Sensitive Projects	No matter the scale	Shall be approved by NDRC (National Development and Reform Commission)	Shall be approved by NDRC
Non-sensitive Projects	Including $300 million and above	Shall file before NDRC	Shall file the non-sensitive projects with large amount investment to NDRC
	Below $300 million	Central Enterprises: Shall file before NDRC, Local Enterprises: Shall file before the provincial development and reform authorities	No need for procedures in advance

According to the ***Notice of the National Development and Reform Commission on Issuing the Catalogue of Sensitive Industries for Outbound Investment (2018 Version)*** (hereinafter referred to as "***the Catalogue***"), "setting up equity investment funds or investment platforms abroad without specific industrial projects" is a sensitive project. According to the Q&A on the homepage of NDRC on May 15th, 2018, "setting up equity investment funds or investment platforms abroad without specific industrial projects" is mainly referred to the equity investment funds or investment platforms abroad (hereinafter referred to as the "***investment funds or platforms***") which has been invested assets, rights or provided financing, security, etc. without specific actual business, but not including two types of outbound investment activities as follows: (i) the equity investment funds or investment platforms that are totally raised abroad, not involving the domestic assets or rights investment, nor financing or guarantees within Mainland China; and (ii) the investment funds or platforms established by domestic financing enterprises, which have been already approved by the relevant domestic financial supervisory departments.

In conclusion, the domestic investors, who intends to invest the offshore company to be listed and its relevant SPV through offshore holding platform, shall perform ODI before NDRC. There is no requirement of filing before or informing NDRC when the total investment amount is under $300 million (not involving domestic investments with assets or equities or proving financing or guarantees).

B. The Subjects of Declaration in ODI

a. DRCD (Development and Reform Commission Department)

According to Article 16 under the **Order No.11**, where two or more investors jointly conduct a project, the investor with the comparatively larger amount of investment shall obtain the consent of other investors before submitting the application for approval or filing. If the amount of investment made by each investor is the same, one of the investors shall submit the application for approval or filing after reaching a consensus through negotiation.

According to our projects experience, the investor to submit the application for approval or filing herein is referred as the Chinese shareholder with a comparatively larger amount of this round of investment to the abroad SPV, rather than in successive.

b. Commerce Departments

According to the Article 11 under ***Administrative Measures on Overseas Investments (Ministry of Commerce Order [2014] No.3***), "Where two or more enterprises carry out an overseas investment jointly, the shareholder with the relatively larger shareholding shall, upon obtaining the written consent of the other investors, complete filing or application for approvals. Where the shareholding of each investor is the same, the investors shall negotiate to arrange one party to complete filing or application for approvals. Where the investors are not located in the same administrative region, the Ministry of Commerce or the provincial commerce authorities responsible for filing or approval shall notify the commerce authorities at the locality of the other investors of the results of filing or approvals.

According to our projects experience, the shareholder with the relatively larger shareholding to submit the application for approvals or filing herein is referred as the Chinese shareholder with comparatively larger amount of investment to the outbound SPV in successive, rather than this round.

Due to the divergent provisions on the subject of submission of overseas investment procedures stipulated by the DRCD and the commerce department, one ODI Project might be submitted in different locations for the approvals of or filing before the DRCD and the commerce department.

Commerce departments shall issue only one Certificate of Overseas Investment (no relevant requirement from DRCD), and the original copy shall be only issued to the Chinese submitter. Meanwhile, the submitter holds the login account and passwords for submission on the online system of commerce departments. The other Chinese investors may not submit application for the approval or filing in respect of capital increase or share transfer, without the assistance of the Chinese submitter. Accordingly, we suggest that the investment agreement shall be added relevant terms to clarify that all Chinese investors shall fulfill the obligations of full assistance and cooperation in the subsequent application for change and cancellation of approval/filing, in addition to strictly implementing the requirements of national laws and regulations.

II Foreign Exchange Registration under Notice No.37 by Domestic Nature Person

According to the Article 63 under ***Order No.11***, this regulation is not applicable to direct outbound investments by domestic natural persons. This regulation is not applicable to direct investments in Hong Kong, Macao or Taiwan by domestic natural persons." According to the Article 2 under ***Order No.3***, overseas investments referred to in this regulation shall mean the ownership of a non-financial enterprise through new establishment, merger and acquisition or any other method by an enterprise established in the People's Republic of China pursuant to the law (hereinafter referred to as the "enterprise") or obtaining ownership, controlling stake, business management right and other interests in an existing non-financial enterprise." Up to now, there are no specific supervisory regulations on outbound investments by domestic natural persons stipulated by DRCD or commerce departments.

Notice of the State Administration of Foreign Exchange on Issues Relating to Foreign Exchange Control for Overseas Investment and Financing and Round-tripping by Chinese Residents through Special Purpose Vehicles (Hui Fa [2014] 37) (hereinafter referred to as "***Notice No.37***") regulated that The State Administration of Foreign Exchange and its branches (hereinafter referred to as the "***Foreign Exchange Bureaux***") shall implement registration and administration of special purpose vehicles (hereinafter referred to as "***SPV***") established by Chinese residents.

Therefore, Chinese natural person shareholders (including the employee shareholders on shareholding platform) shall carry out foreign exchange registrations under Notice No. 37 for establishment or shares holding of SPVs.

The SPV under Notice No. 37 referred to in this Notice shall mean overseas enterprises established directly or controlled indirectly by Chinese residents (including domestic organisations and Chinese resident individuals) using assets or interests of domestic enterprises held by them legitimately or overseas assets or interests held by them legitimately, for the purposes of investment and financing. Therefore, when setting up the Red Chips structure, Chinese residents shall apply to the Foreign Exchange Bureaux for completion of foreign exchange registration formalities for overseas investments after the establishment of SPVs, and prior to the completion of round-tripping. Otherwise, cash income from profit and equity from SPVs might be hard to repatriate to Mainland China, and the capital transaction between WOFE and its overseas parent company is illegal, even that might cause obstacles to company to be listed.

Notice No.37 has regulated "retrospective registration formalities" also, "prior to implementation of this Notice, where a Chinese resident has made capital contribution to a special purpose vehicle using its legitimate assets or interests in China or overseas, but has not completed foreign exchange registration formalities for overseas investments pursuant to the provisions, the Chinese resident shall issue a statement stating the reason(s) to the foreign exchange bureau. The foreign exchange bureau shall process registration formalities retrospectively pursuant to the principle of legitimacy and reasonableness; persons who violate the foreign exchange administration provisions shall be subject to administrative punishment pursuant to the law".

III Deal with Related Party M&A

According to ***Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors*** (hereinafter referred to as the "***Order No.10***"), the Article11, "Merger and acquisition of a domestic company with a related party relationship by a domestic company, enterprise or natural person in the name of an overseas company legitimately incorporated or controlled by the domestic company, enterprise or natural person shall be subject to examination and approval by the Ministry of Commerce. The parties involved shall not use domestic investment by foreign investment enterprises or other methods to circumvent the aforesaid requirements." However, the Ministry of Commerce has never approved the aforementioned "Related Party M&A" in practice.

In response to the practicable obstacle on approval, during the construction of Red Chips structure, the model "change of nationality" or "two steps" are generally applied. The latter referred to: Step 1, the domestic operating entity is converted to a JV (Sino-foreign joint venture) through introducing independent third-party overseas investor; and Step 2, the domestic operating entity is converted to a WOFE (wholly-owned foreign enterprise) through the acquisition by the offshore company.

Nevertheless, in practice, some local commerce departments have gradually tightened approval standards, which trended to limit the model of "two steps". The main basis of the commercial department is as follows:

(i) Foreign ownership is less than or equal to 5% after the acquisition of the domestic operating company by the offshore company;
(ii) No commercial relevance between the domestic company and the foreign investor;
(iii) No commercial rationality while the acquisition by offshore HK SPV happened immediately after the completion of the Step1.

In response to the changes mentioned above, there are two solutions: (i) increasing the proportion of the foreigner ownership without changing the controlling stake; and (ii) extending the time interval between Step1 and Step 2, such

as 6 months or longer through adjusting the reorganization timetable.

However, due to the divergent identification standard on the issue mentioned above among local Commercial Departments, we recommend agency teams shall communicate with local Commercial Departments during the process of reorganization, to identify the feasibility of different plans.

IV The Influence of Cayman Economic Substance Test on the Construction of Red Chips

A Bill for A Law to Provide for An Economic Substance Test to be Satisfied by Certain Entities; and for Incidental and Connected Purposes (issued by Cayman Islands in December, 2018.) and ***Economic Substance for Geographically Mobile Activities*** (issued by Cayman Islands on Aril 30rd, 2019) (collectively hereinafter referred to as "***Cayman Economic Substance Test and Guidance***") jointly regulate that "Relevant Entity" shall satisfy the "Economic Substance Test" in relation to any "Relevant Activity" carried on by the relevant entity.

Shall the listing company enroll in Cayman or the SPV of investors under the structure of Red Chips be affected by the regulation of "economic substance test"? If yes, how will they be affected?

A. The Conception of "Relevant Entity" and "Relevant Activity"

"Relevant entity" means (a) a company, other than a domestic company, that is (i) incorporated under the Companies Law (2018 Revision); or (ii) a limited liability company registered under the Limited Liability Companies Law (2018 Revision), unless its business is centrally managed and controlled in a jurisdiction outside the Islands and the company is tax resident outside the Islands; (b) a limited liability partnership that is registered in accordance with the Limited Liability Partnership Law, 2017, unless its business is centrally managed and controlled in a jurisdiction outside the Islands and the limited liability partnership is tax resident outside the Islands; (c) a company that is incorporated outside of the Islands and registered under the Companies Law (2018 Revision) whose business is centrally managed and controlled in the Islands, unless the company is tax resident outside the Islands; but does not include an state-owned enterprise, investment fund, and an entity that is tax resident outside the Islands.

According to ***Cayman Economic Substance Test and Guidance***, "Relevant Activity" may be divided into nine business: (a) banking business; (b) distribution service business; (c) financing and leasing business; (d) fund management business; (e) headquarters business; (f) holding company business; (g) insurance business; (h) intellectual property business; or (i) shipping business; but not include investment fund business.

B. The Different Business Type under the Influence

a. If Cayman Company Satisfied "Holding Company Business"

According to ***Cayman Economic Substance Test and Guidance***, a relevant entity that is only carrying on a relevant activity that is the business of a pure equity holding company is subject to a reduced economic substance test which is satisfied if the relevant entity confirms that (a) it has complied with all applicable filing requirements under the Companies Law (2018 Revision); and (b) it has arranged adequate human resources and adequate premises in the Cayman Islands for holding and managing equity participations in other entities. The Schedule includes sector-specific guidance for "holding company business".

Based on our projects experience, Cayman companies within the structure of Red Chips (including ones as the shareholder and ones as the investment entity) generally do not carry out any business activities. The main purpose for establishment of Cayman companies is for holding stake and receipting investment profits, therefore, this kind of Cayman company is likely to be classified to "the business of a pure equity holding company". Furthermore, the registered agent will provide services on compliance and filling for meeting the test. Therefore, this kind of Cayman company may pass the test easily by "one station service" provided by the registered agent.

b. If Cayman Company unsatisfied "Holding Company Business"

Whether Cayman companies will be identified as the "holding company business" is uncertain because the company to be listed as the topside in the whole listing structure controls the corporate governance of the whole listing structure, which may make the company to be listed to be classified to "Headquarters Business"(namely, (i) the provision of senior management; (ii) the assumption or control of material risks for activities carried out by any of those entities in the same group; or (iii) the provision of substantive advices in connection with the assumption or control of risk referred to in the item(ii) above).

If the Cayman company is identified as "Headquarters Business", it shall meet a complicated economical substance test, which requires the core income-generating activities shall be held in Cayman, including: (i) taking relevant management decisions; (ii) incurring expenditures on behalf of other entities in the Group; (iii) co-ordinating activities of the Group. This regulation may require the relevant board of shareholders or board of directors shall be held in Cayman, relevant decisions activities shall be carried on in Cayman, or relevant directors have been resident in Cayman.

However, the measures mentioned above are not the only way to satisfy "economic substance test", because Cayman companies under the structure of Red Chips may evade the "economic substance test" by a customized tax scheme to be a qualified tax resident (e.g. tax resident in Mainland China, Hongkong, or in other foreign countries where the main business existed) in a nation or local that benefits to the listing structure.

Except issues mentioned in this article, there may be a number of individual issues raised in the construction of Red Chips for different projects, which also tests Chinese lawyers both the professional legal service ability and the ability to communicate and negotiate with competent authorities.

About Beijing DHH Law Firm

Beijing DHH Law Firm is a comprehensive legal service provider dedicated to international and high-quality services. With the global network and local wisdom, Beijing DHH Law Firm provides professional services in the full spectrum of legal areas and industries for clients at home and abroad.
The Securities Center is now comprised of over 100 partners and lawyers. All the team members have the expertise and a wealth of experience in securities market services. The Securities Center has provided efficient legal services on stock and bond issuance. reorganization, M&A and restructuring and equity financing to hundreds of companies.

contact

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CHAPTER 2

GUIDES

Two Tricky Issues in IPO Process – Non-Hong Kong Company Registration and IP Registration

Every company not incorporated in Hong Kong shall consider registering as a non-Hong Kong company before making an application for listing (Form A1 submission) to the Stock Exchange of Hong Kong. The registration will be complicated, with the registrability of the company name and/or the legality of the use of trademark, where the company name form a part or whole of the mark. For this reason, the listing applicant may need to adopt a new name to make it distinguished from Hong Kong incorporated companies' name(s) or the name(s) used and registered by other non-Hong Kong companies with the Companies Registry. The process may take a considerable amount of time, causing delays to Form A1 submission, greatly impacting the listing timetable. Every company seeking IPO in Hong Kong should be aware of these two tricky issues. This section seeks to provide some ways on how to tackle them.

Intellectual Property Risks and Avoidance Measures

Patents and trademarks of a company are not only related to its core competitiveness, operation and sustainable development, but also its valuable intangible assets. Companies should effectively protect them by means of registration. Intellectual property risks usually occur in the application stage, daily maintenance or infringement by others. The value of effectively protected intellectual property right is reflected as intangible assets of companies in Statement of Financial Position.

Trademark Right Risks and Countermeasures

A trademark is a sign that distinguishes the goods and services of one trader from those of others. A trademark can be inform or words, figurative elements or any combination thereof.

The characteristics of registered trademark right include exclusiveness, timeliness and regionality. The factors for registration to be considered include the distinctiveness of trademarks, conflicts with other trademarks, association with the trade name and class(es) that the company's goods and services falling into.

Trademark disputes encountered by a company mainly include infringement of similar trademarks, infringement of trademark right and interests, copyright, design patent right or opposition to the application for registration or revocation or invalidation of registered trademarks.

Therefore, the counter-measures in which a company shall take include:

1. Trademark Investigation

The scope of trademark investigation includes:

- Has the name of a company been registered as a trademark?
- Has the registered trademark been timely renewed?
- Is there any infringement of other well-known trademarks?
- Is there any change in ownership for the trademark right transferred or invested?

2. Trademark Registration at the earliest opportunities

A company should establish a system of control on trademark application and protection at the earliest opportunities, and carry out a plan for trademark management in advance for future business disciplines or categories. Trademark registration should be carried out in the initial stage of business establishment, so that the trademark can accompany the company's development.

3. Strengthening Trademark Management and Monitoring

A company should renew the registered trademark in a timely manner and retain the evidence of use so as to avoid application for revocation by any third party, and regularly monitor any change of the original ownership of the licensed trademark.

4. Actively enforcing Intellectual Property right

If there is a trademark squatters issue, the company should strongly oppose the trademark application or invalidate its application, or try to negotiate with the owner for an acquisition of the trademark.

Patent Risks and Counter-acting Strategies

Patent right means that the sovereignty state grants the patentee the right to exclusively use his invention and creation within a certain period of time according to the law. This includes:

- A Patent for invention: including product structure, construct, formulation, manufacturing or method of use.
- A Patent for utility model: protecting the shape, structure or combination of shape and structure of tangible products without protecting methods; and
- Design patent: protecting the appearance of products.

Besides the risk of rejection, there are also risks caused by major pending litigation over patent right, for example, the listing timetable of the applicant will be delayed substantially or indefinitely and/or material matter disclosure on contingent or legal risks in association of the affected product will also seriously affect the company's perception and/or value.

Therefore, the counter-acting strategies may include:

1. Patent investigation before Initial Public Offering

I. Is the technology fully patented? Whether the scope of protection is complete?

II. Has the patent for the product been applied in the market in which it is sold? Is there a risk of infringement?

III. Are patents valid? (For example, has the annual fee been paid on time? Is there any pledge, transfer, license, invalidity, termination discovered?)

IV. Is there a risk of infringement of others' products?

2. Product Research and Development Deployment

A comprehensive market research and study should be conducted before the commencement of the product development. Invented products shall be protected by a full-fledged patent application and/or cross-licensing agreements. This is to help to avoid a huge investment loss at the later stage of product research and development.

3. Patent Investment and Acquisition

Professional consultants are usually engaged to evaluate patents and conduct due diligence during patent investment and acquisition. Therefore, efforts should be made to apply for patents with the following qualities:

- quality (high technical content with reasonable scope of protection);
- stable right (not easily invalidated); and
- no ownership disputes (clear ownership).

4. Protection of Trade Secrets or Patents

When applying for a patent, the technical solution must be disclosed. After the expiration of the patent period, it belongs to public; therefore it is more suitable for fast-iterative products.

For formulation technology like the Coca-Cola formula, trade secret protection is more appropriate. Therefore, one can see that strict confidentiality measure is of paramount importance.

5. Independent Innovation

Research and development investment shall focus on active independent innovation and a comprehensive portfolio of patents with a view to realizing the independent intellectual property system, for example, Huawei's 5G technology.

6. In-house specialized department / external patent consultants

Unlike other intellectual property right, patent protection requires an extremely professional and rigorous system. Therefore, companies should set up a specialized department or employ external patent teams as consultants to effectively deal with various patent problems that may arise.

The above denotes the various intellectual property issues that companies may face, we hope this will raise the directors' and management's concerns, so as to strengthen their own intellectual property management, strive for an effective protection of intellectual property rights and help a proper valuation of intangible assets when companies are listed to be or merged.

Non-Hong Kong Company

The Stock Exchange of Hong Kong currently accepts more than 25 overseas jurisdictions as an issuer's proposed listing vehicle in Hong Kong ("HK"). Any overseas proposed listing vehicle must be registered with the HK Companies Registry ("CR") as a non-HK company for establishing place of business here under Part 16 of the HK Companies Ordinance ("CO").

Place of Business

"Place of business" includes a share transfer office and a share registration office but excludes a local representative office established or maintained with the approval of the HK Monetary Authority by a HK licensed bank.

Registration Procedure

1. Check company name or its translation[1] via the website of the CR to ensure their registrability[2] in HK. The company can use the registered name for listing application forms and listing documents purposes.
2. For avoidance of using a business name deceptively[3] similar to the name of another business, conduct a trademark search or apply for trademark registration via the HK Trade Marks Registry.
3. Submit the statutory forms and relevant supporting documents (please see "Registration documents" below) where applicable with the requisite fees to the CR either through the CR's electronic service portal "e-Registry" or in hard copy form for registration.
4. CR will normally issue a certificate of registration of non-HK company and a business registration certificate within 10 working days in either electronic or hard copy form (with same legal effect).

Registration Documents

The following documents must be provided by the overseas company to the CR for registration purpose:

Statutory Forms

1. Form NN1 (Application for Registration as Registered Non-HK Company)
2. Form IRBR2 (Notice to Business Registration Office)
3. Form NM1 (Statement of Particulars of Charge) together with a filing fee and a certified copy of the charge instrument on its property situated in HK, a ship or aircraft registered in HK (where applicable)

The aforesaid statutory forms can be downloaded from the CR's website.

Other Required Documents

4. Certified copy[4] of the certificate of incorporation or its equivalent issued by the relevant government authority in the place of incorporation
5. Certified copy of the constitutional documents
6. Certified copy of the latest published accounts as required by the law of its place of incorporation unless (with the reason given to the CR):
   (a) it is not required to publish its accounts or to deliver copies of its accounts to any person in whose office the accounts may be inspected as of right by members of the public; or
   (b) it has been incorporated for less than 18 months prior to the delivery date of the Form NN1 and its accounts that are required to be published have not been made up

If documents mentioned in items 4 to 6 above are not in English or Chinese, it requires a certified translation[5] in English or Chinese for registration purpose.

Alerts after Registration

1. With effect from 1 August 2019, a non-HK company must display continuously its name, place of incorporation and members' limited liability in legible characters at every business venue (or at its corporate service provider's venue) of its place of business in HK; in its communication and transaction documents and in liquidation, all relevant advertisements must bear the words "in liquidation" after its name[6].
2. The non-HK company is under the continuing statutory obligations to file with the CR the relevant matters using the relevant statutory forms downloaded from the CR's website within the prescribed filing deadlines. The following table[7] shows the relevant filing matters:

1 A certified translation in English and/or Chinese for company name
2 Not registrable if company name is identical or too similar to existing company name registered with the CR
3 Avoid infringement of "passing off" under the law of tort

4 Please refer to section 775 of the CO
5 Please refer to section 4 of the CO
6 Please refer to the "Non-HK Companies (Disclosure of Company Name, Place of Incorporation and Member's Limited Liability) Regulation (Chapter 622M)"
7 The use of greenshoe option (i.e. over-allotment option) by a "HK" company in the IPO process should file the Form NSC1 (Return of Allotment) with the CR within one month after an allotment of shares. A non-HK company is not subject to this statutory filling requirement.

Matters	Filing Deadline	Remark
Annual return	within 42 days after anniversary date of registration	Filing fee is required. Penalty will be imposed for late filing and the maximum of which is HKD4,800
Terminate authorized representative	within 1 month after the date the termination notice sent	No filing fee and penalty except for change of corporate name
Change of authorized representative, company secretary, director and their particulars	within 1 month after the date of change	
Change the constitutional document, corporate name and address		
Commencement of liquidation, appointment/cessation and change in particulars of liquidator/provisional liquidator	within 15 days after the later of the commencement date or the date the commencement notice was served	No filing fee and penalty
Notice of dissolution	within 15 days after dissolution date	
Revision of accounts	within 15 days after decision	
Cessation of place of business in HK	within 7 days after cessation	

3. Upon registration, directors of a listed company owe the duties, responsibilities and labilities at such standard as expected in the CO (both objective and subject tests apply) in addition to the Listing Rules, Securities and Futures Ordinance and any other applicable laws in HK as appropriate.

Contraventions

Failure to register a non-HK company within one month after the establishment of the place of business in HK, comply with Chapter 622M and statutory filings requirements may result in prosecution. The non-HK company, every responsible person (i.e. shadow director or officer includes director, manager or company secretary) and every agent of the non-HK company who authorizes or permits the contravention, commit an offence and each is liable to a statutory fine. Different level of fine apply subject to the nature of breach[8].

CR is very likely to issue a summon of prosecution to a listed company which committed an offence and the listed companies convicted would be announced by the CR via its website.

8 Please refer to sections 776(6), 778(10), 788(3)(4)(5), 790(5), 791(5)(6)(7), 792(6), 793(7), 794(4) and 795(4) of the CO for the relevant details

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CHAPTER 2

GUIDES

Considering Trust in Pre-IPO Planning

According to the HKEX, there are 2,413[1] companies listed in Hong Kong up to the end of October 2019. Many founders and major shareholders choose to settle their shares in a trust during Initial Public Offerings ("IPO") stage if not earlier at the pre-IPO stage for estate protection and succession planning with less tax burden. It saves hassles which may occur at an advanced stage of IPO or immediately prior to or after IPO. The striking case involving the founder of Longfor Group[2] who set up a trust before listing minimized the speculation of the stock market and therefore stabilized the share price of the group even though the divorce news was widely spread out.

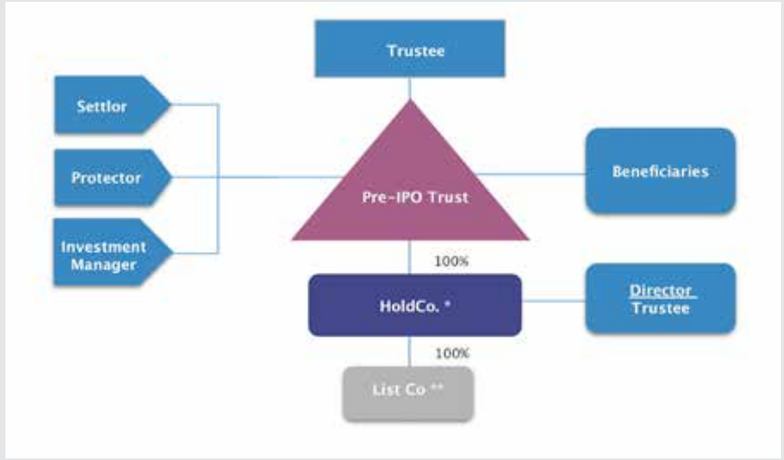
In addition, over 70% of the companies in the main board of HKEX have implemented Employee Stock Ownership Plan ("ESOP") either at their pre-IPO stage or post-IPO stage as an incentive to award, retain and motivate their employees. For example, Xiaomi[3], in addition to the family trust, established its ESOP at the pre-IPO stage to retain and benefit the core management team.

Pre-IPO Trust Structure

Trust can be set up at the pre-IPO stage offering effective wealth protection for the founder mainly as a discretionary trust and/or as an incentive for employees under an employee benefit trust. The founder (as the settlor) by having executed the trust deed with the trustee, can "effect" the trust structure by transferring his shares of the prospective listed company to the trust asset holding company ("HoldCo") prior to the company "going public". The trustee holds the shares indirectly via the HoldCo. This process shall be completed before the submission of Form A1 (Listing Application Form) to the HKEX. The public only knows the identity of the trustee but the beneficiaries' identities are not disclosed as this is generally a private discretionary trust except for substantial shareholders and/or directors/CEO of the listed company, who are obligated to disclose their interests under Securities and Futures Ordinance ("SFO").

1 HKEX Monthly Market Highlets – October 2019
2 Article: "CAI XINYI, DAUGHTER OF LONGFOR FOUNDER NOW CHINA'S YOUNGEST BILLIONNAIRE WITH $7.2B FORTUNE", by Emma Zhou, 25 November 2018
3 Xiaomi Corporation 2018 Annual Report and Xiaomi Corporation's HKEX Announcement on "GRANT OF AWARDS PURSUANT TO SHARE AWARD SCHEME" on 1 April, 2019

Below is a typical pre-IPO trust structure:



* Offshore Special Purchase Vehicle
** Listing vehicle

Key benefits of setting up trust at the pre-IPO stage:

No.	Advantages	Elaborate
1	Continuity of shareholding	• Prevent shares from being frozen due to incapacity/ death of the settlor/founder • Shares are reserved for the interest of beneficiaries; • Ensure smooth listing process not to be affected by unexpected changes or claims on the shareholding of controlling shareholders.
2	Prevent dilution of share rights	• Ensure that voting rights of the majority/ controlling shares within the family will not be dispersed with the founder passing away; • Beneficiaries can still enjoy substantive economic benefits with controlling share interests remain unchanged.
3	Protection from creditors' claims	• Shares are held by an independent trustee, instead of in the hands of the founder/settlor. • Prevent the potential claims from creditors of the settlor if the trust is properly constituted. • Protect the surviving spouse and children from potential creditors.
4	Avoid probate issues	• The transfer of the shares into a trust could prevent exposing the assets to subsequent probate process when founder has passed away. • Through the letter of wishes, the founder can indicate his preference in appointing the successor of his company and allocation of the assets.
5	Minimize marital disputes	• Prevent unwanted dispersion of shares due to divorce, resulted in asset protection.
6	Save cost of stamp duty in share transfer	• Transferring shares into a trust prior to the company 'going public' could save the extra cost of stamp duty.
7	Minimize the reporting obligation upon listing	• Transferring shares to a trust at pre-IPO stage does not require DI filing to the HKEX. • Avoid unnecessary publicity by media which may affect share price.
8	Maintain the confidentiality of the identity of beneficiaries	• Only the information of the founder and trustee is required to be disclosed as substantive shareholders according to Listing Rules. • The beneficiaries of the trust are not required to be disclosed to the public except for directors or chief executive.
9	Minimize volatility of share price	• During the lock-up period after listing, share price is less affected by any uncertainty of the major shareholders (e.g. health issues).

There are several factors which must be considered when setting up a Pre-IPO trust:

1) Degree of control – if the founder/settlor assumes excessive investment power and exercise tight control over the trust assets, there is a higher risk that the trust is treated as a sham trust.
2) Reporting obligation – under the trust structure, both the trustee (as a substantial shareholder who has 5% or more of the listed company's issued voting share capital) and the settlor (who is the Director and Beneficiary of the ListCo) have the obligation to file the DI (Disclosure of Interests) report to the Stock Exchange of Hong Kong and the ListCo concerned. Relevant information can be found under Part XV of the Securities and Futures Ordinance (Cap 571)[4] of the Laws of Hong Kong.
3) Governing law of the Trust – the validity, construction and effect of the trust deed vary from jurisdiction to jurisdiction. Some key factors such as the rule against perpetuity, asset protection for trust beneficiaries and the flexibility to modify trust deed should be considered.
4) Choice of the Trustee – a higher standard of the duty of care is expected from professional trustee who should demonstrate reasonable skill and care with the experience and knowledge claimed in trust administration and investment of trust assets. Trustee is required to administer the trust to comply with the law and the terms of the trust deed. An effective communication channel should be built with the settlor (annual review should be conducted), the protector (the power of the protector depends on the terms of the trust deed) and the beneficiaries (trustee should have an understanding of the founder's intention, as well as the needs of the beneficiaries). Different perspectives should be considered by the settlor in selecting the trustee such as the stability of the jurisdiction where the trustee is located, as well as the qualification, knowledge and experience of the trustee. In case the trust assets consist of listed shares, the trustees' knowledge in corporate governance and security regulations is important to ensure proper compliance.

An insight to ESOP – how it helps to retain talents

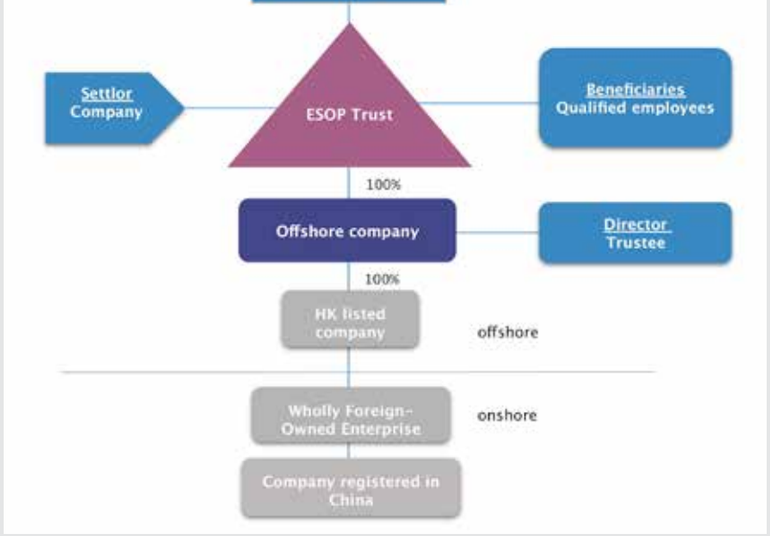
ESOP provides a long-term reward by offering share-based incentive awards to employees. The plan generally targets at executive ranks but it may be offered to employees at any level. From a management perspective, this is a useful tool for aligning the employees' interests with the company's goals. Since the new Listing Rules (on weighted voting rights and pre-revenue biotech companies) became effective in April 2018, Hong Kong IPO market has attracted many 'new economy' companies from the TMT (Technology, Media & Telecom) and the biotech sectors to go public. As significant number of these companies are based and operated in China, it is expected that they tend to use ESOP trust (namely using a trustee to hold shares for the grantees, i.e. their PRC employees) at the pre-IPO stage considering the flexibility in customizing the terms of the schemes.

4 Securities and Futures Ordinance Part XV – Disclosure of Interests
Substantial shareholders - individuals and corporations who are interested in 5% or more of any class of voting shares in a listed corporation, must disclose their interests, and short positions, in voting shares of the listed corporation; and
Directors and chief executives of a listed corporation must disclose their interests, and short positions, in any shares in a listed corporation (or any of its associated corporations) and their interests in any debentures of the listed corporation (or any of its associated corporations).

There are two common categories of ESOP: (1) Share Award Scheme and (2) Share Option Scheme:

	Share Award Scheme	Share Option Scheme
Basic Character	The company directly gives shares to employees or sell to them at a below-market price on the vesting date.	The company allows employees to purchase shares at an agreed exercise price. Employees will hold this right until the contract expiry date. The employees have the right (but not obligation) to buy shares on the vesting date. If the share market price is higher than the exercise price, the employees can benefit from selling the shares.
Voting right	The employees have the right to vote when the shares are given to them on the vesting date.	Employees have the right to vote after exercising their rights and converting them into shares.
Subscription price	No subscription price in general	The subscription price is set at a discount of the market share price by a certain percentage
Approval by Shareholders	Not required in general	Once the company is listed, a new scheme must be approved by shareholders of the listed company in general meeting[5]
Types of the Instruments	• Restricted Shares Award • Restricted Share Unit ("RSU")	Share Option

Below is a typical ESOP structure adopted by China-based (red-chip) companies:



Note: the above structure applies to other jurisdictions

5 A scheme ("Pre-IPO Scheme") adopted by the Company before listing does not need to be approved by its shareholders after listing. Options granted before lisiting may continue to be valid after listing but no further options may be granted under the Pre-IPO Scheme after listing. (HKEx Listing Rules Chapter 17, L.R. 17.02(1)(b))

From the tax perspective, PRC employees are required to register with the State Administration of Foreign Exchange for ESOP award. There is an upfront tax exposure to them for share option. They must pay salaries tax on benefits associated with share option once exercised, whereas, tax liability for RSU is incurred during the vesting period. There is an increase in shareholder base for share option (where the shares are allotted and issued to awardees once exercised) but not for RSU (where the share reward benefits can be settled by cash or transfer of shares).

Seeking professional advice to steer on the right track to pre-IPO trust

There are lots of complexities from the establishment, implementation to efficient operation of pre-IPO trusts and ESOP, which include, without limiting to, financing, trust structure, administration, compliance and regulatory obligations (e.g. CRS, FATCA reporting and economic substance requirement), fund remittance and taxation as well as changes in arrangements (e.g. alterations to trust deed and schemes) in accordance with the proposed IPO structure. Failure to consider and/or improperly administer either of these aspects may give rise to technical issues, and incur penalties and other adverse consequences to companies in IPO process (e.g. A1 submission). It is crucial for the founder and major shareholders to work closely with TCSP (Trust and Corporate Services Provider) as duly supported by other professionals (e.g. lawyers, accountants and tax advisors) in setting up appropriate pre-IPO trusts and administrating ESOP.

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CHAPTER 2

GUIDES

Strategic Investors and Pre-IPO Investment During Pre-IPO Preparation Stage

Pre-IPO investments are investments in companies made prior to the listing (pre-IPO) which can be in various forms, such as ordinary shares, preference shares or convertible notes. This kind of investments play an important role during pre-IPO preparation stage as they can provide capital to the company on its way to listing and/or to enhance the confidence of further institutional and public investors in investing in the company at listing.

In particular, pre-IPO investments have vital importance for companies with a weighted voting rights structure and biotech companies seeking for listing under Chapter 8A and Chapter 18A of the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (Listing Rules), respectively, as it is one of the listing requirements that such companies must have previously received meaningful third party investment from at least one "sophisticated investor" at least six months before the date of the proposed listing (which must remain at listing).

Regulatory Requirements

There are no specific provisions under the Listing Rules which deal with pre-IPO investments. The underlying principles governing the requirements relating to pre-IPO investments are the ones under Rule 2.03 of the Listing Rules that "the issue and marketing of securities must be conducted in a fair and orderly manner and all holders of securities must be treated fairly and equally" (Rule 2.03 Principles). The Stock Exchange of Hong Kong Limited (Stock Exchange) has issued three guidance letters (Guidance Letters): HKEx-GL29-12 (Interim Guidance on Pre-IPO Investments), HKEx-GL43-12 (Guidance on Pre-IPO Investments) and HKEx-GL44-12 (Guidance on Pre-IPO Investments in Convertible Instruments), which have consolidated the listing decisions on pre-IPO investments issued by the Stock Exchange in the past and set out the requirements for pre-IPO investments.

All acquisitions of shares from a company (Listing Applicant) or its shareholder(s) by a new or existing shareholder prior to the Listing Applicant's listing will be treated as "pre-IPO investments" and subject to the Guidance Letters, unless (i) the shares are acquired in an exchange of shares of a predecessor in interest company or an operating subsidiary of the Listing Applicant or otherwise as part of a corporate restructuring of the Listing Applicant in connection with the listing; or (ii) the shares are awarded to directors or employees of the Listing Applicant as part of a defined share award scheme.

Timing of pre-IPO investments

It will contravene the Rule 2.03 Principles if pre-IPO investments, with prices at a deep discount to the IPO price and much more favorable terms than investors at the IPO stage, are to be completed at a time close to the hearing of the listing application. Thus, according to the Stock Exchange guidance letter HKEx-GL29-12, pre-IPO investments must be "completed" at least 28 clear days before the date of the first submission of the first listing application form (First Filing). If the pre-IPO investment was completed (i) within 28 clear days before the date of the First Filing or (ii) on or after the date of First Filing, the Stock Exchange will delay the listing day of the Listing Applicant until 120 clear days after completion of the pre-IPO investment.

"Clear days" exclude the day of the pre-IPO investment completion, the day of the submission of the listing application form and the first day of trading of securities on the Stock Exchange. Pre-IPO investments are considered "completed" when the funds for the underlying shares are irrevocably settled and received by the Listing Applicant.

Divestment rights of pre-IPO investors

The only divestment right of pre-IPO investors which may exist on or after the First Filing is the one which is only exercisable if the listing does not take place and will terminate upon listing.

Any other divestment right (e.g., put options, redemption or repurchase rights) granted by the Listing Applicant or the controlling shareholder to the pre-IPO investor or right (e.g., call options) permitting the Listing Applicant or the controlling shareholder to repurchase shares of the pre-IPO investor must be terminated before the First Filing. Divestments on or after the First Filing will lead to a 120-day delay of the listing process regardless of when the pre-IPO investment was made or whether the divestment is pursuant to a contractual right.

For pre-IPO investors who divest prior to the First Filing, as they neither disrupt the listing process nor affect the equal treatment of shareholders post listing, regardless of when the pre-IPO investment was made or whether the divestment is pursuant to a contractual right, the Stock Exchange will not impose any delay to the listing timetable of the Listing Applicant.

Terms of pre-IPO investments

To attract investors to invest in a company prior to listing, special rights are usually offered by the company or its shareholders to pre-IPO investors. The range of these special rights varies and in general, special rights which do not extend to all other shareholders are not permitted to survive after listing to comply with the Rule 2.03 Principles.

Set out below are examples of some commonly seen special rights granted to pre-IPO investors:

i. **Price adjustments** – terms that provide a fixed rate of return to the pre-IPO investor and settled by a shareholder provided that they are not based on (a) a discount to the IPO price; or (b) a discount to market capitalisation of the shares at IPO, shall be allowed and can survive after listing.

ii. **Director nomination rights** – any right granted by the Listing Applicant to pre-IPO investor to nominate or appoint a director must terminate upon listing. Any director nominated or appointed by a pre-IPO investor need not resign at listing unless required under the Listing Applicant's articles of association. However, any agreement among the shareholders to nominate and/or vote for certain candidates as directors are generally not subject to the Guidance Letters and shall be allowed to survive after listing.

iii. **Veto rights** – any contractual right to veto the Listing Applicant's major corporate actions must be terminated upon listing.

iv. **Profit guarantee** – any financial compensation settled by a shareholder (and not by the Listing

Applicant) which is not linked to the market price or capitalisation of the shares may survive after listing.

v. **Right of first refusal and tag-along rights** – (a) any right of first refusal granted by the controlling shareholder to the pre-IPO investor; and (b) any right granted by the controlling shareholder to include the shares of a pre-IPO investor for sale together (i.e., tag-along) with the shares of the controlling shareholder, may survive after listing.

Convertible Securities

In some cases, pre-IPO investments will be made in the form of convertible securities as the investors will be able to enjoy a risk-return profile better than that of a shareholder. In view of the features of convertible securities, there are certain additional requirements as set out in the Stock Exchange guidance letter HKEx-GL44-12, some examples are set out below:

i. **Conversion price** – the conversion price for the convertible securities should be at a fixed dollar amount or at the IPO price. A guaranteed discount to the Listing Applicant's IPO price or market capitalisation of shares is not permitted.

ii. **Conversion price reset** – any conversion price reset mechanism of the convertible securities should be removed as it is considered to be contrary to the principle of the Listing Rules.

iii. **Partial conversion of the convertible securities** – it will only be allowed if all special rights are terminated after listing. This prevents the situation where a pre-IPO investor enjoys the special rights it held as holder of convertible securities by converting a significant portion of their convertible securities into shares and yet still be entitled to special rights by holding a small portion of the convertible securities.

iv. **Early redemptions** – the option enabling a holder to redeem early the outstanding convertible securities at a price which would enable it to receive a fixed internal rate of return (IRR) on the principal amount of the convertible securities being redeemed is allowed as such IRR is compensation for the investment and risk undertaken.

Lock-up and Public Float

Lock-up on the shares held by pre-IPO investors is not a mandatory regulatory requirement. However, the Listing Applicant or the underwriters will usually request the pre-IPO investors to be subject to a lock-up period of six months or more in order to avoid a significant drop in share price shortly after listing as a result of the disposal of a considerable amount of shares by the pre-IPO investors. These shares are counted as part of the public float so long as such shares are not financed directly or indirectly by a connected person of the Listing Applicant.

Disclosure requirements

Details of the pre-IPO investments have to be disclosed in the prospectus in accordance with the requirements set out in the Guidance Letters, which include but not limited to the date, amount and use of proceeds of the pre-IPO investments, the beneficial owners and background of the pre-IPO investors, the basis of determining the consideration and the material special rights granted to the pre-IPO investors. For convertible securities, given their complexity, certain additional information should also be disclosed in the "Financial Information" and "Risk Factors" sections of the prospectus to explain the impact of the convertible securities on the Listing Applicant.

About LC Lawyers LLP

LC Lawyers LLP is an independent law firm. It is a Hong Kong law firm member of the global EY network, in collaboration with other law firm members. It provides Hong Kong legal services to financial institutions, corporate clients and private enterprises doing business in and through Hong Kong. It advises on capital and debt markets, corporate finance, commercial transactions, regulatory compliance, dispute resolution, regulatory investigations and Chinese outbound investments.

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CHAPTER 3

IPO Application Process

Introduction

Deciding to go public is a significant decision for most of the companies. Among the many benefits of going public are enhancing corporate profile, image and visibility; raising capital for implementation of the company's business expansion plan; subsequent access to other fund-raising channels at lower costs than unlisted corporations; providing confidence for other stakeholders such as the company's financiers, suppliers and customers. Upon deciding to go public, the company has to choose the most appropriate listing venue taking into account its own circumstances and needs. This chapter sets out the listing application process when a company opts for Hong Kong as its listing venue.

From Preparation to Listing

A listing applicant will go through a few milestone stages starting from listing preparation before a successful launch of an IPO:

a) Internal preparation

A company contemplating a future flotation should conduct an assessment of its readiness to go public. The earlier a company begins to operate as a public company in advance of an IPO, the less hurdles that it will encounter at a later stage of the process. Companies considering going public should pay attention to the following aspects in order to prepare for a listing:

Listing criteria:

Listing applicants will only get listed in Hong Kong upon satisfaction of the listing eligibility requirements. For main board listing applicants, they are normally required to have a trading record of not less than three financial years. The Stock Exchange also expects that the listing applicants should satisfy the requirements for management continuity for at least the three preceding financial years and for ownership continuity and control for at least the most recent audited financial year. The listing applicants are additionally expected to satisfy one of the following financial performance tests:

1. Profit test: (i) profits[1] of HK$20 million for the most recent financial year and of HK$30 million in aggregate for the first two

financial years; and (ii) market capitalization of at least HK$500 million at the time of listing.

2. Market capitalization/ revenue/ cash flow test: (i) revenue of at least HK$500 million for the most recent audited financial year; (ii) positive cashflow from operating activities of at least HK$100 million in aggregate for the three preceding financial years; and (iii) market capitalization of at least HK$2 billion at the time of listing.
3. Market capitalization/ revenue test: (i) revenue of at least HK$500 million for the most recent audited financial year; (ii) market capitalization of at least HK$4 billion at the time of listing; and (iii) track record of less than three years may be accepted if certain criteria are satisfied.

The above eligibility requirements may not be entirely applicable to certain types of companies, such as mining companies, pre-revenue or pre-profit biotech companies or innovative company, which are subject to a specific set of listing eligibility requirements.

Listing applicants should appreciate that compliance with the bright-line eligibility tests set out in the Listing Rules may not by itself ensure its suitability for listing. The Stock Exchange has published various guidance in relation to listing suitability, among which, guidance letter HKEX-GL68-13 provides for non-exhaustive factors that the Stock Exchange would take into consideration when assessing certain factors would affect the listing applicant's suitability for listing under the Listing Rules. These factors include (i) historical non-compliance involving fraud, deceit or dishonesty; (ii) material non-compliances by the listing applicant, its directors and controlling shareholders; (iii) uncertainties regarding business sustainability; and (iv) the use of contractual arrangements. It is advisable that upon completion of the preliminary assessment of whether a company is able to meet the financial performance criteria, expert consultants may be engaged to provide more detailed analysis and share with the company their insight on any potential hurdles ahead of the company before proceeding to the next step.

Corporate governance and internal control:

Promoting a high level of corporate governance is one of the principal objectives of the Stock Exchange. Sound corporate governance helps to ensure the quality of the companies listed in Hong Kong and protect the minority shareholders' interest. Companies with an IPO as its corporate goal should appreciate the importance of good corporate governance and are advised to adopt the best practices within the corporation well in advance of the IPO.

Internal control is another area that a listing applicant should enhance well ahead of the kick-off of the IPO project. A listing applicant is required to have in place adequate procedures, systems and controls (including accounting and management systems) with regard to its scale of operations and business nature. The sponsor is required to provide its opinion on the overall sufficiency over these procedures, systems and controls to assist the listing applicant's directors with proper assessment of the financial position and prospects of the listed group, both before and after listing. Enhancement of internal control may avoid historical non-compliance, which may have adverse implications on a listing applicant's fulfilment of the listing suitability requirement.

Equity story:

A consistent, coherent and persuasive equity story is of paramount importance during the marketing and roadshow stage of an IPO. Not only will it substantiate the valuation and pricing of the listing applicant's shares, a convincing equity story will support the rationale behind the company's decision to seek for a listing. What has the company done and what will the company do in the future to achieve what it aims to achieve? What is the company's corporate and expansion plan in the upcoming five to six years down the road? What will be the plan for the use of proceeds to be raised in the offering? Answers to these questions should be substantiated by the company's historical financial and operating track record, in addition to the company's future financial projection. Setting achievable corporate strategy and operation goals which reflect the company's capability and align with the general environment of the industry will add credit to the management of the company.

The equity story will later appear in the listing document, analyst and roadshow presentation. For a corporation of smaller scale, providing persuasive and clear reasons for listing is one of the suitability requirements set forth by the Stock Exchange. Given the regulators' initiatives to clamp down on the creation and trading of shell companies, the Stock Exchange stipulates that listing applicants whose size and prospects appear not to justify the costs or purpose associated with the listing may give rise to suitability issues. Therefore, a well thought through equity story formulated by the company's management team well in advance of an IPO not only facilitates the marketing of the company's shares, but also serves as an essential consideration of the regulators during the vetting process.

Pre-IPO Reorganization

Often times, pre-IPO reorganization of the corporate structure of the listing applicant is necessary mainly because of the requirements of the Listing Rules and other applicable laws and regulations. For example, the Listing Rules only allow the listing vehicle to be incorporated in specific jurisdictions that are acceptable to the Stock Exchange, including Hong Kong, Bermuda, Cayman Islands and the PRC.[2] Re-organization is also driven by commercial decision, for example, which business segments or entities are to be included in the listing group and which are to be carved out. Other factors that will be considered before the implementation of the re-organization plan include tax implication, offering size and expected market capitalization upon listing, market position of the listing applicant, capital structure, expansion plan by way of acquisitions. If the controlling shareholder determines to retain certain businesses outside of the listing group, issues such as whether the listing applicant can demonstrate independent operation and the implication of potential competition with the parent group should also be assessed.

Forming a specialized IPO task force:

IPO preparation is an important corporate milestone stage. It demands a lot of resources and attention from the senior management of the company, including the directors and major shareholders. On top of the many significant decisions to be determined by the top level of a corporation, a lot of other matters require inputs of sufficient and additional attention and resources. In order not to disturb the normal operation of a company, it is advisable that a special task force focusing on the IPO project should be formed. A well prepared IPO in advance of the project guarantees a higher chance of a successful IPO launch.

b) Appointing a sponsor/ financial advisor, and other professional parties

A successful IPO hinges on the assistance and collaboration of various professional parties, including:

1 The profit should exclude any income or loss of the issuer, or its group, generated by activities outside the ordinary and usual course of its business.

2 A list of acceptable jurisdictions that the Listing Committee has formally ruled to be acceptable as an issuer's place of incorporation can be located on the website of the Stock Exchange. Other jurisdictions may be acceptable as long as the joint policy statement regarding the listing of overseas companies is followed.

Sponsors

The Listing Rules require the appointment of at least one sponsor to assist with a IPO project and prepare for the listing document. Indeed, sponsors play an instrumental role by leading the implementation of the project. Under the Listing Rules, a sponsor must be engaged 2 months before the submission of the listing application to the Stock Exchange, who shall undertake the following responsibilities:

(i) be closely involved in the preparation of the listing applicant's listing documents;
(ii) conduct reasonable due diligence inquiries to put itself in a position to be able to make the declaration set out in the Listing Rules;
(iii) ensure the documentation requirements set out in the Listing Rules are complied with;
(iv) use reasonable endeavours to address all matters raised by the Stock Exchange and the SFC in connection with the listing application; and
(v) accompany the listing applicant to any meetings with the Stock Exchange.

At least one of the sponsors of a listing applicant must be independent of the listing applicant. Sponsor can be any corporation or authorized financial institution which is licensed or registered under the SFO for type 6 regulated activities (i.e. advising on corporate finance). The sponsors are subject to the obligations and expectation set out in the Listing Rules and applicable rules and regulations issued by the SFC. Given the recent high profile cases involving IPO due diligence failures which resulted in the SFC's public reprimand and imposition of substantial penalties against a number of reputable financial institutions, sponsor firms nowadays are taking a very vigilant approach in delivering their duties and selecting cases that they will undertake to sponsor. For different reasons, it is not uncommon for sponsor firms to refuse taking up the sponsor role after preliminary due diligence or what we called "health check" on the company. Engaging dialogue with potential sponsor firms at an early stage is therefore highly recommended.

Reporting accountants

The financial information of the listing applicants during the track record period is required to be included in the listing documents in the form of an accountants' report prepared by a qualified reporting accountant. Apart from preparing for the accountants' report, the reporting accountants will also assist with the preparation of the proforma statement of net tangible assets and other proforma statement if necessary. For example, where the listing applicant determines to include a profit forecast in the listing document.

Preparation of the prescribed financial disclosure aside, the reporting accountants will be much involved in an IPO. For example, they may give financial or tax advice during the reorganization stage. They may also be deeply involved in addressing financial related questions raised by the regulators during the vetting process. In addition, the reporting accountants will usually be requested by the listing applicant and the sponsors to issue the so-called "comfort letter" which serves as an independent assurances provided by the reporting accountants in their professional capacity in areas such as the listing group's working capital sufficiency after listing and the listing group's indebtedness position.

Legal advisors

At least two teams of separate legal advisors will be engaged to represent the listing applicants and the sponsors and/or underwriters respectively. Given a majority of listing applicants seeking a listing on the Stock Exchange operates in the PRC, normally listing applicants and underwriters are represented by a team of Hong Kong legal advisors and a team of PRC legal advisors respectively. Depending on where the listing applicant and its subsidiaries are incorporated and operated, other overseas counsels, e.g. Cayman or BVI counsels, may as well be appointed to provide legal advice.

The principal responsibilities of Hong Kong legal advisors include, among others, (i) ensuring the compliance of applicable laws and regulations, such as the Listing Rules, the Companies Ordinance, and the SFO; (ii) advising on group restructuring and shareholding structure; (iii) drafting, reviewing and advising on legal documents in relation to the listing application, e.g. underwriting agreement; (iv) drafting the listing document and other listing application documents; (v) conducting due diligence on the listing applicant; and (vi) coordinating with other professional parties in the working group.

For PRC listing applicants or applicants with substantial shareholders or controlling shareholders with PRC nationality, PRC legal advisors' role will involve, among others, (i) obtaining necessary license or approvals from PRC governmental authorities; (ii) issuing PRC legal opinion which covers historical non-compliance (if any) and provides rectification proposal; (iii) providing guidance on PRC legal compliance.

For an offering with marketing plan or target investors outside Hong Kong, the listing applicant should be reminded to observe the securities laws of the relevant jurisdictions. Typically, for an offering with a scale not confined locally, shares may be marketed to institutional investors from the US under the Rule 144A and Regulation S pursuant to the US Securities Act. Both regimes allow offering be made to certain US investors without going through the registration process pursuant to the US legal regime. In such offering, US legal advisors will be engaged to provide US legal advice on the offering structure and compliance with US securities law.

Underwriters

Except in the case where listing is by way of introduction where no public offering is involved, the selling of shares to the public involve the engagement of an underwriter. For a larger scale of offering, a syndicate of additional underwriters is involved. Pursuant to the Listing Rules, an offer of securities to the public must be fully underwritten and in practice, the international tranche for the securities offer may also be underwritten. Therefore, the role of an underwriter is essential in an IPO. Separate underwriting agreements will usually be entered for the Hong Kong offering and international offering respectively. The underwriting agreement governs the rights and obligations of the parties involved, including the underwriter, the listing applicant and the selling shareholders (if any).

Other parties

Apart from the parties mentioned above, many other parties may also be involved in an IPO. For example, (i) a property valuer may be appointed for the preparation of a property valuation report; (ii) a share registrar is needed to administer the share register upon the listing of the issuers; (iii) a financial printer will be appointed for the services of professional typesetting of the listing document, conducting translation work and arranging for submissions on the website of the Stock Exchange; (iv) an industry consultant may usually be appointed to compile an industry report setting out the industry environment and competitive landscape that the issuer is principally engaged in. In addition, other parties that may be engaged include public relations firm, professional company secretarial firm, compliance advisor, internal control consultant, professional tax advisors, trustee firm (for setting up of a family trust before an IPO) and so on.

c) Due diligence to be conducted on the Company

Due diligence shall be conducted on listing applicants because of two principal reasons. First of all, disclosures in the listing documents should only be made after careful due diligence to ensure accurate, complete and non-misleading disclosure. Since investors subscribe for the shares of an issuer by relying on the description and representation provided in the listing documents, any misrepresentation and misleading information in the listing documents may potentially be a cause for litigation under Hong Kong laws and the common law principles of tort and contracts. Any director or other persons authorizing the publication of the listing documents may also be criminally liable if the listing document contains false, inaccurate or misleading information.

Secondly, due diligence obligation is imposed on the sponsor under the Listing Rules and Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission. Upon submission of a listing application on behalf of a listing applicant, a sponsor is expected to have performed all reasonable due diligence on the listing applicant, except for matters that by nature can only be dealt with at a later stage. Practice Note 21 (PN21) of the Listing Rules provides for the coverage of due diligence expected to be conducted by a sponsor so as to satisfy itself as to the validity of statements contained in the listing documents and whether the listing applicant is suitable for listing. Sponsors are encouraged to examine the information provided with professional skepticism, and must exercise their judgment as to what investigation or steps are appropriate in a particular situation.

Due diligence exercise is usually conducted from the legal, business and financial perspectives. Jointly with the listing applicant's legal advisors, the sponsor's legal advisor will typically take the lead in formulating and implementing the due diligence plan. In each case, due diligence plan varies with the nature and scale of the business of the listing applicant, but will normally involve (i) interviewing the senior managements in different departments of the listing applicant to understand the company's business and operations; (ii) interviewing stakeholders including major customers, suppliers, distributors, principal banks to ensure coherence in the information provided by the management of the company; (iii) physical inspection of the listing applicant's principal place of operation and factory (for a manufacturer); (iv) interviewing with relevant regulatory authority to ensure compliance of the listing applicant's operation with legal requirements; (v) reviewing material contracts, management accounts, board minutes, shareholders' resolutions and other corporate documents of the listing applicants. In some circumstances, a sponsor may appoint third party agents to conduct independent investigations on the listing applicant, its controlling shareholders, and its senior management.

d) Drafting of listing document and compiling of the listing application pack

The content requirements of a listing document are specifically set out in the Companies (Winding Up and Miscellaneous Provisions) Ordinance and the Listing Rules. As mentioned above, parties involved in producing or authorizing the listing documents may potentially be subject to civil or criminal liabilities if there is any misleading, inaccurate or fraudulent statement in the listing documents. At the time of submission of the listing application, a sponsor should be able to opine that the information contained in the application proof is substantially complete based on the due diligence performed. A main document for the regulator's vetting, a listing document is also the principal document for marketing of the securities of the listing applicant. Drafting of a listing document can be led by the issuer's counsel or the underwriter's counsel.

The contents of a listing document can broadly be categorized into four sections:

(i) Business-related sections – business, financial information, risk factors, history and development, management biographies, future plan and use of proceeds;
(ii) Offer-related sections – underwriting, structure of the global offering, how to apply for the offer shares;
(iii) Statutory- and compliance- related sections – regulations, corporate information, waivers, connected transactions, statutory and general information;
(iv) Expert sections – industry overview, accountants' report, property valuation report, competent person's report (for mining companies).

To prepare for the listing application submission, the working parties would usually work intensely for a few weeks before the target submission date to finalize all documents required to be submitted to the Stock Exchange. The Stock Exchange has issued various guidance for listing applicants to consider, among which, guidance letter HKEX-GL55-13 sets out the documentary requirements and administrative matters for new listing applications. It is advisable to check all relevant and applicable guidances published by the Stock Exchange before the submission as the Stock Exchange may consider an application not substantially complete if the relevant guidance is not followed. If the Stock Exchange decides that the information submitted in the listing application is not substantially complete, it may exercise its discretion not to continue the review of the listing application and return it to the sponsor. An application that was returned can only be re-submitted to the Stock Exchange not less than 8 weeks after the return decision.

e) Vetting, hearing, marketing and listing

The Listing Department of the Stock Exchange will start the vetting process upon receipt of the listing application. The review will be based on eligibility, suitability, sustainability, compliances and other applicable criteria. Depending on the complexity of the listing application and the capacity of the Listing Department, the first round of substantive comments from the Stock Exchange is usually available around two to three weeks from the receipt of the listing application. The Listing Department will determine when the listing application is ready for the review of the Listing Committee, which will depend very much on the turnaround time and the quality of the responses. Upon obtaining the approval from the Listing Committee, the listing applicant can proceed with the marketing process which involve investor education and IPO roadshow. After pricing and allocation of shares to institutional and retail investors, the listing applicant will be listed on the Stock Exchange.

Conclusion

From preparation for a listing to a successful launch of an IPO is a long journey not only for the company, but for all professional parties involved in the project. The above only provides an overview of certain key matters that a company needs to attend to prior to the submission of the listing application. It is advisable for a company to engage professional parties at the pre-IPO stage who can provide valuable and insightful advice and accompany the company through this challenging journey.

About Jingtian & Gongcheng

Founded in the early 1990s, Jingtian & Gongcheng is one of the first private and independent partnership law firms in China. Since its inception, the firm has been dedicated to providing clients with high-quality and efficient legal services and grown into one of the top full-service business law firms in China. The firm is active in a wide variety of practices and is recognized as an industry leader in Capital Market, Merger & Acquisition, Outbound Investment, Dispute Resolution, PE/VC Investments and etc. We advise our clients through our headquarters in Beijing and through our offices that are strategically situated across key economic centers, including Shanghai, Shenzhen, Chengdu, Tianjin, Nanjing, and Hong Kong, enabling us to collaborate with our clients where they need us.

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VIRTUAL DATA ROOM FOR IPO

WHY USE VIRTUAL DATA ROOM FOR IPO

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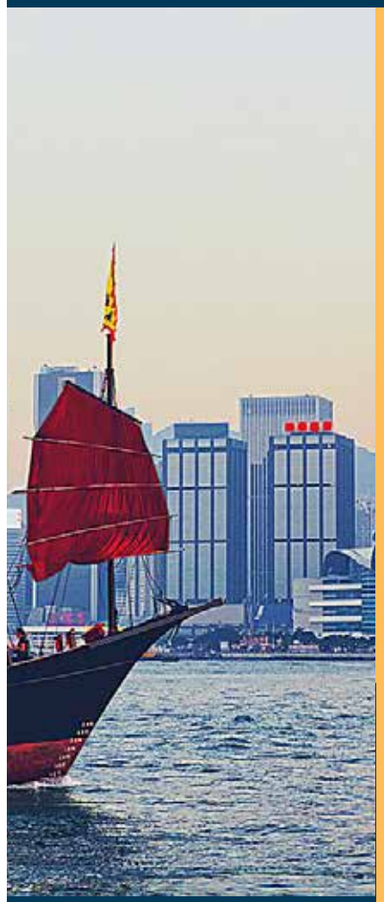
For any enterprise, the initial public offering (IPO) is one of the most important achievements, when the company is ready to receive a capital infusion and is examined with a strict financial scrutiny by investors, auditors, and regulators. The large volume of challenging financial preparations leaves many finance professionals unsure where to start. During this time, internal and external teams of lawyers, investment bankers, accountants and financiers will be sharing and collaborating on corporate information extensively.

Virtual Data Room provides a modern, secure and well-structured document repository system, which allows for the management team to focus on the actual planning the IPO instead of spending hours assembling and organizing the documents. The virtual data room technology allows for fast and accurate financial reporting, regulatory compliance, forecast accuracy, and data visibility. As a result, the company is better prepared for the IPO process in advance while all the documents are kept secure and protected.

There are several key participants involved in the IPO preparation process, such as investment bankers, attorneys, accountants, financial sponsors, underwriters, company executives, and board members. All of them will be able to take advantage of the IPO data room.

Key Values to IPO Project

- **Ensure the integrity of project document**
- **Ensure no leak of classified information**
- **Reduce the workload of documentation and management**
- **Extra behavioral insight of all participants**



HOW VDR FACILITATE KEY PARTICIPANTS IN IPO

There are several key participants involved in the IPO preparation process, such as investment bankers, attorneys, accountants, financial sponsors, underwriters, company executives, and board members. All of them will be able to take advantage of the IPO data room in order to complete the following:

- To create a secure document structure repository, which allows to organize and store essential information in one central location while allowing immediate access to key data as required.
- To upload new information instantly as soon as it becomes available. Any new acquired documentation can be added to a single centralized repository and the index will be updated automatically. The participants will be automatically alerted when the new documents become available.
- To access documents and work with them 24/7/365 from any locations by any devices. Team members can log in IPO data room and manage their materials from remote locations using devices running on any platform.
- To use the advanced online search tools to effortlessly locate required data.
- To initiate or join a Q&A session to get quick answers to questions and request additional information.
- To manage workgroup activities using tracking and audit tools provided by the online data room. State-of-the art reporting facilities make it easy to monitor the review process and to notify team members of any outstanding documents that require examination, which helps keep the project on schedule.
- To facilitate third-party audit and ensure regulatory compliance.
- To prepare memorandums and management presentations regardless of size in IPO data room secure environment.
- To respond to SEC comment letters and complete corresponding due diligence.
- To support road show queries in real-time.

CHAPTER 3

GUIDES

Virtual Data Room for IPO

Why Use Virtual Data Room for IPO

For any enterprise, the initial public offering (IPO) is one of the most important achievements, when the company is ready to receive a capital infusion and is examined with a strict financial scrutiny by investors, auditors, and regulators. The large volume of challenging financial preparations leaves many finance professionals unsure where to start. During this time, internal and external teams of lawyers, investment bankers, accountants and financiers will be sharing and collaborating on corporate information extensively.

Virtual Data Room provides a modern, secure and well-structured document repository system, which allows for the management team to focus on the actual planning the IPO instead of spending hours assembling and organizing the documents. The virtual data room technology allows for fast and accurate financial reporting, regulatory compliance, forecast accuracy, and data visibility. As a result, the company is better prepared for the IPO process in advance while all the documents are kept secure and protected.

There are several key participants involved in the IPO preparation process, such as investment bankers, attorneys, accountants, financial sponsors, underwriters, company executives, and board members. All of them will be able to take advantage of the IPO data room.

Key Values to IPO Project

- Ensure the integrity of project document
- Ensure no leak of classified information
- Reduce the workload of documentation and management
- Extra behavioral insight of all participants

How Vdr Facilitate Key Participants in IPO

There are several key participants involved in the IPO preparation process, such as investment bankers, attorneys, accountants, financial sponsors, underwriters, company executives, and board members. All of them will be able to take advantage of the IPO data room in order to complete the following:

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About iDeals Solutions Group Limited

iDeals Solutions is a provider of secure corporate data exchange services. The company was founded in 2008 on the principles of service excellence and technological innovation. We provide innovative solutions that simplify confidential document exchange and corporate deal management. 100% of the top 25 investment banks and thousands of enterprises have used iDeals™ Virtual Data Rooms, over 200 thousands users worldwide trust iDeals to safely store and distribute data.

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Or contact John Yuan at +86 158 2177 4726 or john.yuan@idealscorp.com

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John Yuan
Head of APAC

CHAPTER 4

The Role of Sponsors and Underwriters

Optimising your IPO by selecting credible long-term advisors

Hong Kong is one of the world's pre-eminent initial public offering ("IPO") markets. Regularly topping the annual global league table for total funds raised at IPO, it has provided capital to some of the most innovative and fastest growing companies from China and beyond. However, increasing geopolitical and economic uncertainty has tempered global investor confidence. Faced with heightened scrutiny and increasingly risk-averse investors, selecting the right sponsors, underwriters and advisory team, has never been so important for listing candidates as they embark on their IPO journeys.

Diminishing risk appetite

Buoyed by the rise of tech unicorns and the accompanying frenzy of investor excitement, global markets have achieved a record number of mega IPOs in recent years. Listing regime reforms in Hong Kong in 2018, which included the introduction of the dual-class share structure, also fuelled huge fundraisings from the likes of Xiaomi Corp, Meituan Dianping, and may entice companies with overseas dual-class listings to reconsider Hong Kong as an IPO destination.

However, subsequent chequered stock performances of a number of global unicorns, enhanced investor understanding of new economy businesses, and greater geopolitical and economic uncertainty, have seen investor risk-appetite start to wane. While Hong Kong currently stands as the world's leading IPO market, investors are becoming increasingly sensitive to pricing and selective about asset allocation.

Top-performing Global Stock Exchanges (2017-2019 YTD)

Rank	2019 YTD		2018		2017	
	Stock Exchange	IPO Proceeds (US$B)	Stock Exchange	IPO Proceeds (US$B)	Stock Exchange	IPO Proceeds (US$B)
1	HKEX	34.7	HKEX	36.9	NYSE	29.4
2	NASDAQ	33.5	NYSE	27.6	Shanghai Stock Exchange	21.3
3	NYSE	31.7	Tokyo Stock Exchange	26.7	London Stock Exchange	16.7
4	Shanghai Stock Exchange	14.0	NASDAQ	25.5	HKEX	16.5
5	Sci-Tech Innovation Board	11.3	Frankfurt Stock Exchange	13.8	Shen Zhen Stock Exchange	14.2

Source: Dealogic as of 28 Nov 2019

Heightened scrutiny

Intensifying scrutiny of listing candidates from regulators, investors and the general public at large, reinforces the importance of appointing experienced and reputable advisors.

Supported by a team comprised of underwriters, securities counsel and legal experts, accountants, investor relations teams, compensation experts and communications consultancies, lead sponsors are seen by investors as the "gatekeepers of market quality."[1]

Therefore, the Hong Kong Securities and Futures Commission's ("SFC") censure of a number of sponsoring banks in Hong Kong in recent years highlights the importance of hiring a sponsor that has an excellent track record.

The sponsor's brand is an essential endorsement, not only of the equity story, but also of the reputation of the company looking to list, as high-quality sponsors will impose more stringent due diligence on their clients prior to coming to market. The strength of the sponsor and underwriter's brand will influence pricing too: the better their reputation, the stronger the pricing power of the listing candidate.

Selecting the right sponsors and underwriters

Trusted long-term partners

Potential listed companies face a bewildering choice of more than 100 sponsors in Hong Kong. Like sponsors, which are mandated to carry out extensive due diligence of companies looking to IPO, listing candidates must conduct rigorous due diligence before appointing sponsors or underwriters.

When selecting, it is important to look beyond the IPO. Lead sponsors and underwriters should be viewed as trusted partners that can support a broad set of future business goals; this can encompass arranging private fund raisings and financings, bond issuances, block trade placements, wealth management solutions and business introductions. In short, the role of the sponsor will "grow with the company".

1 Security and Futures Commission (SFC) (2012), "Importance of sponsors", Consultation Paper on the regulation of sponsors, page 2, Online, Available at: https://www.sfc.hk/edistributionWeb/gateway/EN/consultation/openFile?refNo=12CP1

Independence

Turning specifically to an IPO, listing candidates must ensure that any potential conflicts of interests can be avoided or carefully navigated. In Hong Kong, one sponsor must be able to demonstrate to the Stock Exchange of Hong Kong ("SEHK") that it is independent from the listing candidate.

Experience and track record

As well as securing a sponsor with a stellar reputation, listing candidates should consider whether the experience and attributes of the potential sponsor are best suited to their requirements – for example country of jurisdiction, listing structure, shareholder background, industry knowledge etc.

Examining the past performance of a sponsor is a prerequisite. Hence, league tables are arguably the best indicator of a bank's ability to prepare and execute a successful offering in a market as competitive as Hong Kong.

2018 HK Main Board Sponsor League Table by Number of Deals

Rank	Sponsor	No.
1	Goldman Sachs	13
2	CLSA	12
3	Morgan Stanley	10
4	CICC	9
5	CMS	8
6	CCB	7
6	Citi	7
6	JPMorgan	7
6	China Merchants Bank Co Ltd	7
6	China Securities	7

Source: Dealogic

2018 HK Main Board Global Coordinator League Table by Number of Deals

Rank	Global Coordinator	No.
1	CLSA	17
1	CICC	17
3	Morgan Stanley	16
4	Goldman Sachs	12
4	UBS	12
6	Citi	11
6	CCB	11
6	CMS	11
9	JPMorgan	9
9	China Merchants Bank	9

Source: Dealogic

Drilling deeper, listing candidates should assess the bank's track record of executing offerings of a similar size and in the same industry. A small offering may not garner the strategic senior counsel it deserves from practitioners at a bulge bracket bank, whereas a smaller investment bank may not have the capacity needs or distribution network required to manage larger, more complex deals.

Landmark deals are also useful for evaluating the skills and capabilities of a potential sponsor or underwriter. For example, the listing of Xiaomi in 2018, not only raised an enormous US$5.4 billion, it was also the first dual-class listing in Hong Kong. Jinxin Fertility, an assisted reproductive services provider in China, raised US$400 million in June 2019. Both deals are testimony to well-crafted equity stories and smart targeting of global investors that understood the businesses and the industries in which they operate.

Market, industry and regulatory intelligence

Selecting a sponsor or underwriter that has its finger on the pulse of the market is crucial. Banks with strong global network and sales & research capabilities are arguably better placed to capture the attention of discerning investors.

The primary role of the sponsor is to ensure listing candidates are fully compliant with all established rules and procedures demanded of them by the market. The sponsor also acts as the main point of liaison with the regulator and the stock exchange. Therefore, listing candidates need to assess their sponsors' experience in dealing with the regulators and understanding of the fast evolving regulatory environment.

This is especially true in Hong Kong. Over the past two years the SEHK has amended the Listing Rules to permit listings of pre-revenue biotech issuers, and of companies with weighted voting right structures; as well as established a new concessionary secondary listing route for Greater China and international companies seeking a secondary listing in Hong Kong. These changes have dramatically reshaped the IPO market while also enhancing the importance of the sponsors and underwriters.

Scale and global reach

Another crucial question to consider before selecting a partner is whether the bank is able to generate investor demand on a global level.

The Hong Kong market has come to expect that new listings, especially larger offerings, arrive with a substantial number of pre-existing investment commitments. Known as cornerstone or anchor investors, these type of investments have traditionally signalled a green light for investors. The history of cornerstone investors in Hong Kong can be traced back more than 20 years, when investors had little or no idea how to value the bourgeoning influx of companies from north of the border.

While cornerstone commitments represent a seal of approval, striking the right balance in allocating shares is vital. Placing too many shares in lock-up has the potential to create illiquid and volatile stocks.

Nonetheless, cornerstone and anchor investors are essential ingredients for larger IPOs. In the first six months of 2019, 54% of IPOs in Hong Kong included investors of this kind.[2] Being able to secure these is based, to a large extent, on the influence and trust that banks and advisors wield with major investors, such as large corporates, sovereign wealth funds, and the increasingly important specialist investors such as ultra-high net worth individuals and family offices.

Banks that have extensive sales distribution networks and assets across China and the rest of the world, are invariably better positioned to drive awareness and generate demand among a larger pool of investors.

Stewardship of an IPO

The lead sponsor, which often acts as the main co-ordinator of the deal, is responsible for steering the applicant through the IPO process. Core responsibilities include forming a professional advisory team that best suits the needs of the listing candidate, undertaking a due diligence review, preparing listing documents, liaising with the exchange and the regulator and, more importantly, developing a compelling equity story.

The role of the sponsor in an IPO can be crystallised into two parts: using in-depth sector insights to establish a high-quality equity story, and executing the deal with the utmost efficiency.

Developing a compelling equity story

Against the backdrop of a more cautious investment climate, a sponsor plays a seminal role in helping shape the investment story. Identifying a listing candidate's unique selling points, and why it deserves a premium valuation to peers, derives from deep sector insights.

The rise of responsible investing and ESG globally in recent years is also gaining traction among investors and regulators in Hong Kong. The SEHK's publication of an ESG consultation paper in May 2019 has laid down a marker for companies to move away from compliance-based reporting to embedding ESG into their businesses as a genuine driver of value. In the years ahead, it is expected that ESG will become an increasingly important part of the equity story and the principal marketing document, the prospectus.

Executing with efficiency

In addition to the equity story, how sponsors and underwriters structure and optimise the deal process is paramount.

Key elements include timing, pitching a price range that satisfies the company and major initial investors, and leaving enough on the table for momentum to be sustained post-listing.

Underwriters play a lead role in this. Their in-depth understanding of the types of investors that will find the equity story attractive, knowing when the meetings should take place and where, and co-ordination of the analyst and management roadshows, are fundamental ingredients to a successful IPO.

Efficiency, dedication, leadership and problem-solving capabilities are some of the hallmarks of a professional advisory team.

Prospering in more cautious markets

Good companies will continue to have access to funds in bearish markets. However, listing candidates should not underestimate the importance of carrying out rigorous due diligence to find sponsors and underwriters that can become trusted advisors and partners for the long-term.

Even good companies can find their IPO bids derailed by poorly constructed equity stories, questionable timing, miscommunication and inadequate investor outreach.

2 Zhi Tong Cai Jing, "H1 2019 IPO performance", Online, Available at: https://www.zhitongcaijing.com/content/detail/217473.html

About CLSA

CLSA is Asia's leading capital markets and investment group, providing global investors with insights, liquidity and capital to drive their investment strategies.

Award-winning research, an extensive Asia footprint, direct links to China and highly experienced finance professionals differentiate our innovative products and services in alternative investments, asset management, corporate finance, capital and debt markets, securities and wealth management.

As the international platform of CITIC Securities (SSE: 600030, SEHK: 6030), China's leading investment bank, CLSA is uniquely positioned to facilitate cross-border capital flows and connect China with the world and the world to China.

Founded in 1986 and headquartered in Hong Kong, CLSA's global network spans 20 locations across Asia, Australia, Europe and the United States.

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Dickson Chan
COO of Corporate Finance and Capital Markets

CHAPTER 4

GUIDES

Marketing, Pricing and Stabilisation

Winning over increasingly discerning investors

An Initial Public Offering ("IPO") is a once in a lifetime marketing opportunity to drive brand awareness, attract potentially transformative financial resources and enhance corporate value. While the goals of an IPO have remained constant, recent regulatory change and greater scrutiny from diverse stakeholders is reshaping the IPO process. To compound matters, geopolitical and economic uncertainty, combined with a number of underwhelming major trading debuts, has cooled market sentiment. Navigating this environment requires deft handling of marketing and pricing strategies for companies looking to list.

Rise of the unicorns and cooling sentiment

The explosive growth of unicorns (start-ups with valuations in excess of US$1 billion) in recent years has been met with unbridled investor excitement. Fear of missing out on these investments has propelled valuations to unprecedented levels.

Underlining China's position as the growth engine of the world and a major innovation hub, it is estimated that the country has surpassed the United States in the number of unicorns that have developed within its borders.[1]

The Hong Kong stock market has been a primary beneficiary of China's success. Galvanised by the introduction of reforms, including the dual-class share structure, nearly US$10 billion was raised from the listings of Meituan Dianping and Xiaomi Corp alone in 2018. This represented 25 per cent of total funds raised that year.

However, a series of underwhelming market debuts and mixed post-listing stock performances globally, and in Hong Kong, has tamped investor appetite for risk and premium valuations. While markets ebb and flow, competition for funds is likely to be intense for the foreseeable future.

1 Hurun Report, "The Hurun Research Institute launched 'Hurun Greater China Unicorn Index 2019 Q1' & 'Hurun China Future Unicorns 2019 Q1'", 7th May 2019, http://www.hurun.net/CN/Article/Details?num=539EF0BAD055

Appointing advisors

Against a more bearish backdrop, selecting a team of professional sponsors, advisors and underwriters is one of the most important decisions for a listing candidate to make.

Sponsors oversee the entire IPO process and act as the point of liaison with regulators. Underwriters play a pivotal role in the marketing, pricing and positioning of the equity story.

While good companies are likely to be judged on their own merits, finding advisors that have an intimate understanding of the target IPO market, the industry that the listing candidate operates in, and which investors are likely to be most receptive to the offer, is critical.

Marketing process and pricing

Process and major steps of listing on HK Main Board

Planning	Preparation	Approvals	Marketing	Official Offering	Aftermarket
▪ Engage professional parties ▪ Confirm listing scheme ▪ Hold board / shareholder meeting	▪ Auditing ▪ Due diligence ▪ Create investment story, research fundraising project ▪ Prepare valuation models ▪ Prepare legal documents ▪ Draft prospectus	▪ Submit Form A1 to HKEx ▪ Reply to questions from HKEx and SFC, and conduct supplementary due diligence ▪ Submit supplementary financial audit report ▪ Submit "4-day document" ▪ Hearing	▪ Prepare cornerstone investors list, and contact them ▪ Hold analysts conference, and invite analysts to conduct on-site due diligence ▪ Analysts provide report and introduction to investors ▪ Propose price range	▪ Management roadshow ▪ Bookrunning ▪ Public offering ▪ Pricing and allotment ▪ Delivery ▪ Listing and trading	▪ Measures to stabilise share price ▪ Investors relation after IPO ▪ Aftermarket support
2~3 Months		2~3 Months		~1 Month	~1Month

The IPO process, from the day a listing candidate appoints a sponsor and underwriter to the first day of dealings, typically takes six to nine months. Businesses requiring major restructurings or complex regulatory approvals, can experience substantial delays.

In an age of intense scrutiny and regulatory oversight, the IPO process in Hong Kong has become ever more visible. In the past, listing candidates and sponsors submitted a confidential initial IPO application to the Stock Exchange of Hong Kong ("SEHK" or the "Exchange"). Nowadays, applications are made public on the Exchange's website. This has accelerated the marketing process, making it imperative for banks to move quickly to gauge and build interest in a potential IPO.

Establishing solid foundations: due diligence

While sponsor-investor trust has been somewhat eroded by the Hong Kong Securities and Futures Commission ("SFC") clampdown on a number of banks in recent years, due diligence remains the bedrock of any IPO process. Regulators and banks treat it with the utmost seriousness. Exemplifying this, any listing application must not be submitted by, or on behalf of, a new applicant less than two months from the date of the sponsor's formal appointment.

In addition to reassuring investors that a listing candidate is credible, enhanced due diligence provides sponsors and other advisors with a better understanding of the listing company's business. This is essential in distilling where the competitive edge of the company lies, and what areas of concern need to be addressed.

Prospectus

The insights gathered from the due diligence process inform the principal marketing document, the prospectus. This document contains information on the listing company's assets and liabilities, financial position, profits and losses, business prospects and the rights attached to the shares.

During the marketing process the prospectus undergoes several iterations. The initial A1 filing, which is accompanied by a draft prospectus (the "Application Proof" or "AP"), is submitted for approval to the regulator and is vetted over a two to three month period.

After vetting of the initial prospectus has been completed and comments from the regulator have been incorporated, a post-hearing information pack ("PHIP") is issued as an updated prospectus. Two further iterations are subsequently published; the 'red herring,' which contains details of the cornerstone investors and is used for the bookbuilding exercise; and the final prospectus, which contains the pricing range and is made public to retail investors.

Cornerstone and anchor investors

Arguably the most crucial aspect of an IPO is pricing. Together with the listing candidate, underwriters must assess whether cornerstone or anchor investors are required, how shares should be allocated across various investor parties, and what the optimal pricing should be.

These marquee investors – typically strategic corporate partners of the listing candidate or large pension or sovereign wealth funds – have become an expected part of any major listing in Hong Kong. Guaranteed sizeable allocations, cornerstones accept six month lock ups, or longer, and their names are disclosed in the prospectus.

Anchor investors have more flexibility in terms of pricing and commitment to investing. They place their orders on the first day when the book opens (usually called "anchor orders"). This creates pricing tension and fosters demand momentum.

Analyst research and management roadshow

Also informing the pricing process are the syndicate banks' equity research analysts. After meeting with the listing company's management, they prepare pre-deal research reports examining the industry context of the listing company, present valuation options, and set out comparable peers. Their views are independent from the bank's investment banking team and from the issuer's. Once the research is published, analysts meet with investors to share their insights.

The sponsors and underwriters, together with the listing candidate, embark on a one-to-two-week management roadshow around the globe, often travelling at night to gain a few hours, in order to secure quality orders from their desired investor base. In a Hong Kong IPO, a 3.5 day minimum offering period kicks in during the second half of the roadshow. Pricing and listing come into effect a week after the roadshow completes.

The art of pricing

Pricing is an art rather than a science. Underpricing can boost an IPO's appeal to risk-averse or bargain hunting investors. However, it also risks constraining an important capital raising exercise and demonstrates a lack of confidence in a company's fundamental value and future prospects. Overpricing can provoke accusations of a cash grab, potentially alienating influential investors that may think twice about investing in the future.

Setting a price range of between 15-25 per cent is ideal. Any more than that indicates a lack of confidence, or some uncertainty, in the true value of the business.

In Hong Kong, a listing company starts its roadshow having confirmed its pricing range. This is in contrast to the United States, where there is flexibility to downsize the offer by price and/or size, if macro conditions worsen. To help mitigate this, the SEHK introduced the 'Pricing Flexibility Mechanism' in early 2018. Under the new mechanism, applicants are allowed to price not lower than 10% below the indicative offer price, or not lower than 10% below the floor price of the indicative offer price range disclosed in the prospectus.

Another important factor in pricing is how the allocation is managed. Sizeable lock-ups can lead to illiquid stocks where small retail-led volumes can generate wild swings in the share price.

While every IPO differs, underwriters try to design shareholder registers that are fundamentally stable, but liquid enough to bring in new investors. To this end, putting aside the sizeable allocation to a cornerstone investor, 60/75 per cent of the remaining shares on offer are often given to long investors only, usually a top ten of major institutions. Forming a backbone of investors, they are complemented by 25-30 per cent of the stock being given over to hedge funds that can provide must needed liquidity. The balance is assigned to retail investors.

Setting the right tone for the future: pricing stabilisation

How a listed company's shares perform on the first day of dealings can entrench perceptions, either good or bad, of the issuer for some time to come. Therefore, share allocation and pricing play a leading role in determining post-listing performance. Macro or market conditions can also have a significant bearing. In Hong Kong this is especially acute as many retail investors prefer to file paper as opposed to online applications. This manual processing is one of the key reasons why the typical IPO takes five days to settle in Hong Kong, a system known as 'T+5.' As shares in the city can only start trading five days after the share subscription period ends, unexpected macro factors in that period can weigh heavily on the first day of dealings. Discussions between banks and the SEHK are ongoing to try to address this issue.

To ensure shares do not fall significantly below the listing price on the first day of trading, and to provide shares in the aftermarket, a risk control mechanism called stabilisation exists. Led by a stabilisation agent, usually the sponsor or global coordinator, stabilisation involves the agent receiving an over-allotment of up to 15 per cent additional shares at the IPO offer price, which can be exercised for up to 30 days. Often referred to as the 'greenshoe,' it can play an important role in supporting the shares on their trading debut and in the aftermarket.

Price stabilisation is never a guarantee of a risk free trading debut. However, a well thought-through marketing programme, a strong prospectus and a pricing strategy that strikes a delicate balance between accurately capturing the value of the business and leaving enough on the table for potential new investors, should enable the newly listed constituent to begin life as a listed company on a confident footing.

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CHAPTER 4

GUIDES

An Integrated Financial Services Provided by Receiving Bank

Helps Pave the Way for a Successful IPO

In every Initial Public Offering (IPO) listing process, a bank is an important partner of the listing candidate.

Roles of the Main Receiving Bank

In every IPO, the receiving bank is responsible for collecting and checking the IPO subscription application forms and handling the subscription monies. Throughout the listing process, the main receiving bank plays an important role: it has to fulfill the requirements of the listing applicant and its sponsor, such as account opening for the listing applicant including the account(s) which is/are opened with the main receiving bank or other sub-receiving bank(s); liaison with the share registrar for the refund cheque specimen and signing arrangement and provision of relevant instructions to the involved organizations in the capacity of a nominee, upon the instructions of the quasi-listed company or its sponsor.

Duties of a receiving bank:

a. Account Opening
b. Distributing IPO application forms and prospectuses;
c. Collecting and processing the completed application forms from applicants for new shares and the subscription monies;
d. Delivering the cheques and cashier orders for the payment of new shares to Hong Kong Interbank Clearing Limited (HKICL) for settlement;
e. Returning the subscription monies to the financial system through the interbank money market;
f. Arranging for the refund of subscription monies to those unsuccessful or partially successful applicants;
g. On the refund cheques dispatch date, depositing the funds raised into the main receiving bank account opened by the listing candidate.

Reasons for choosing CMB Wing Lung Bank as the Receiving Bank

1. Experiences and qualifications: From 2009 onwards, CMB Wing Lung Bank Limited ("CMB Wing Lung Bank" or "the Bank") acts as the receiving bank for more than 100 successful listed companies. In 2018, CMB Wing Lung Bank acted as the Receiving Bank for 19 most influential listed corporations which also ranked in the leading position in terms of fundraising amount of IPO in the Capital Market.
2. Efficiency: During the IPO period, CMB Wing Lung Bank will set up an on-site command operations centre in order to coordinate the related IPO works efficiently, like receiving funds, liaising and coordinating with sponsors, securities registration companies (the share registrars) and other receiving banks.
3. Cost and Return: With premium services provided, CMB Wing Lung Bank's service charges are reasonable and competitive interest rate is offered.
4. Lift-up IPO capital fundraising capability: CMB Wing Lung Bank has a prominent client base in mainland China and Hong Kong which helps the listing candidates attracting the potential investors. The Bank provides diversified IPO services including loan facility to cornerstone investors or anchor investors during international placing period, margin financing to securities brokers during public offering period. Meanwhile, CMB Wing Lung Bank deploys a client manager to facilitate sales promotion for the listing candidates and offers NET Banking Services and CMB Wing Lung Bank Wintech mobile banking services channels for personal customer to conduct EIPO subscription.
5. Capital Appreciation: Sustainable special cash management services like PRC cross-border guarantee and financing, global cash management and foreign exchange are provided to the successful listed companies, helping them to properly manage the funds raised from the IPO.
6. Dividend Payment Service: CMB Wing Lung Bank provides Dividend Payment Service to listed corporations. The Bank also offers Dividend Payment Financing to corporations for relieving their cash position.
7. Sustainable relationship: CMB Wing Lung Bank is eager to maintain a sustainable relationship with the corporation. The Bank offers comprehensive corporate banking products and services to corporations including payment and settlement, trade finance, bilateral loan, syndicated loan, employee share incentives schemes and bond issuance services.
8. Competitive edges: With the support of China Merchants Bank (CMB), CMB Wing Lung Bank offers a full range of banking and financial services to corporate clients and investors as well.

Risk Disclosure Statement

The above information is for reference only and does not constitute and should not be regarded as any offer to purchase or sell. Foreign exchange involves risks. Investment involves risks and the price of securities may fluctuate or even become worthless. Past record is not an indicator of future performance. Losses may be incurred rather than making a profit as a result of investment. You should carefully and independently consider whether the investment products are suitable for you in light of your investment experience, objectives, financial position and risk profile. Independent professional advice should be obtained if necessary. Please read the relevant terms and conditions together with the risk disclosure statements in the prospectus of the investment product before making any investment decisions. The above information has not been reviewed by the Securities and Futures Commission of Hong Kong.

Remarks: The above services are subject to the relevant terms and conditions, please contact us for details.

About CMB Wing Lung Bank Limited

CMB Wing Lung Bank (formerly known as Wing Lung Bank), founded in 1933, is among the oldest local Chinese banks in Hong Kong. Following its motto of "Progress with prudence, service with sincerity", the Bank provides comprehensive banking services, including deposits, loans, private Banking and wealth management, investment, securities, credit cards, NET Banking, CMB Wing Lung Bank Wintech mobile application, global cash management, syndicated loans, corporate financing, bills, hire-purchase and leasing, foreign exchange, insurance agency, Mandatory Provident Fund, etc. At present, the Bank has 40 banking business outlets in mainland China, Hong Kong, Macau and overseas, and a staff force of more than 1,900 people. As at 30th June 2019, its consolidated total assets stood at HK$325.4 billion. In 2008, CMB Wing Lung Bank was acquired by China Merchants Bank Co., Limited (China Merchants Bank). China Merchants Bank currently ranked 20th on the list of top 1,000 World Banks.

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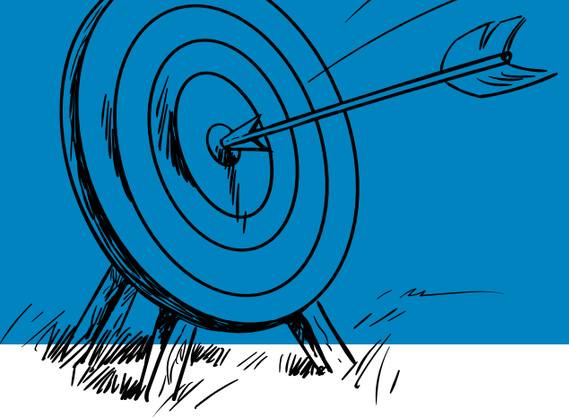

CHAPTER 5

Managing the IPO Marketing Process

Introduction

An IPO leads your company to the international stage of capital markets, it does not only give you access to global investors, but also raises your reputation to a new level. It is a great opportunity to establish a long-term trust between you and your investors. Effective communications and marketing effort are essential to establish a positive corporate image among the public and investors and mitigate potential crisis during the period, which is crucial to the subscription of shares and a successful listing.

Pre-marketing

Formulate your communications strategies

The first step of the IPO marketing process is to formulate your communications plan and strategies, this will determine your market response in the later stage. Work closely with your communications consultant for the best practice in media strategies and vehicles. You are also recommended to follow the communications guideline provided by your consultant strictly in order to comply with the regulations set by the HKEx. You should not disclose your intention to float prior to the A1 filing, as you will enter the "blackout period" after filing the A1.

It is also important to have a clear timetable to guide you through the actions to be carried out, step by step, during different stages of the process.

Build your equity story

You are now a story teller. Identify your communication objectives, know your target audience and establish your story based on your investment highlights. It is important to convey your competitive advantages, market potential and strategies in a straight forward manner to the investors. Make sure your key messages used in communications and roadshow materials are in line with your prospectus.

Communications guideline

The communication guideline helps you to get familiarized with the media landscape. During the IPO process, you will engage the international and local media, the guideline identifies different scenarios you will encounter, it gives you instructions on the do's and don'ts, what is eligible to tell the media and what is not, such as profit projection, information inconsistent with your prospectus and your intention to float prior to A1 filing etc.

Pre-roadshow market education

Pre-roadshow market education is particularly important when the market is not familiar with your business model or industry. Prior to the hearing, your communications consultant can brief the media on your industry and market trends and educate the market without mentioning too much about your company and violating any regulations of the stock exchange. This provides basic knowledge and a general picture of the industry and your company and paves the way to your deal roadshow meeting potential investors in the later stage.

Address key issues

Identify the potential concerns that could have an impact on your IPO such as political decisions, local culture, economy, stock market, industry trend, your company's business, new opportunities and employee engagement etc. Understand how these issues are relevant to your company and the IPO. For example, how the trade war between the US and China could affect your business. Prepare for your narratives in response to each issue, to avoid potential crisis which could impact your IPO.

Be prepared for crisis

A crisis can happen anytime through the process that could potentially bring severe damage to your business and the IPO. Once you filed the A1, your prospectus goes public and you will receive certain media exposure. There is the possibility that the media has negative or wrong interpretations regarding your financials, business and market prospect, which leads to misinformed reports on your deal. Therefore, media monitoring at all time is crucial to identify potential crisis and incorrect media reports, followed by quick reaction to resolve the crisis. Always work with your sponsors, lawyers and communications consultant regarding proactive crisis management, provide consistent responses to the media and investors through your communications consultant.

Prepare your roadshow infrastructure

During the roadshow in the later stage, you will present your equity story to your investors, which will be provided in your roadshow materials such as the investor presentation deck, corporate video and company website. The roadshow infrastructure does not only help to convey your investment highlights to investors, but it also enhances your corporate image among the public. Prior to the roadshow, discuss with your sponsors and communications consultant the preparation of materials, they will guide you on the best practice to emphasize your competitive advantages and deliver a strong and clear corporate message to your investors.

Roadshow

Establish communications with investors and media

When you kick off the roadshow, the spotlight is now on you. Work with your communications consultant to execute your communication strategy to highlight your competitive edges to the investors and media. The investor presentation luncheon and press conference are good occasions to interact with them directly and exchange ideas. Utilize this opportunity to deliver your equity story.

Get ready to face investors and media

Your management team will face the investors and media during the roadshow, a confident presentation will enhance your company image and investor confidence. It is recommended to receive media training, prepare a comprehensive QA and have a rehearsal before engaging the investors and media. Adequate preparation is crucial to avoid unexpected situations.

Select the right marketing vehicles

Besides face to face interaction with media and investors, pick the right channels to promote your deal and equity story. For Hong Kong IPOs, in addition to the traditional and online media reports that can provide regular features to the market, financial columnists and stock commentators are particularly influential among retail investors. They

are the financial key opinion leaders who are highly respected in the capital market, their opinions can be critical to the public perception towards your company. Maintaining a good relationship with the financial columnists and stock commentators will always be beneficial to your reputation in the market.

Aftermarket

A new journey in the capital market

The successful listing on the stock exchange only marks the beginning of the journey for your company in the capital market. Now, that you are a public company, you are responsible to the public and investors. Stakeholders hold high expectations for a public company in terms of corporate governance, disclosure of information and social responsibility. You will also need to announce your interim and annual results every six months, media and investors will continue to pay attention to your financials and strategies. On-going public relations and investor relations will be crucial to maintaining a quality reputation in the capital market.

About Porda Havas International Finance Communications Group

Porda Havas/AMO is a leading financial communications agency in Hong Kong and the greater China region, offering integrated services including financial and corporate communications, investor relations, crisis management, events management and branding. Founded in 1997, we have successfully assisted over 600 companies in their IPOs in Hong Kong. Our clients spread across various industries including technology, financial services, consumer, pharmaceutical, natural resources and energy, real estate, infrastructure, manufacturing etc. With our in-depth understanding of media landscape, we are dedicated to serve our clients with tailored communication campaigns in capital markets.

As a part of Havas Group, a leading global marketing and communications group, we are headquartered in Hong Kong and drives expansion in greater China with over 1,000 employees across Beijing, Shanghai and Shenzhen. Backed by Havas Group's strategic communications network, the AMO Network, we are united with our overseas teams across the world's financial hubs and dedicated to provide unparalleled professional PR services for our clients.

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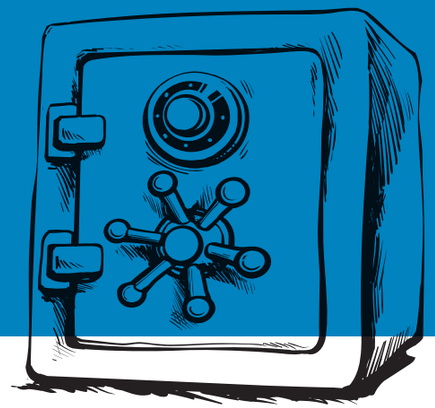

CHAPTER 6

Suitability for Listing

As the number of successful initial public offerings ("**IPO(s)**") increases every year, The Stock Exchange of Hong Kong Limited (the "**Stock Exchange**") has rejected more and more cases on the ground of unsuitability for listing in recent years. Listing applicants are advised to conduct in-depth pre-IPO diagnosis at an early stage of their IPO execution to identify issues which may cast doubt on their suitability for listing.

Suitability for listing as one of the listing qualifications

The Hong Kong stock market has prided itself on having very transparent and objective listing qualifications, which help provide certainty to the outcomes of listing applications. The market used to believe that as long as the listing qualifications, in particular the profits/cash flow requirements, management continuity and ownership continuity, are satisfied, the other issues involved in a listing can usually be dealt with by way of disclosure. This expectation is consistent with the general characteristics of the Hong Kong stock market as largely disclosure-based, which means the Stock Exchange will less likely pass judgement on the commercial viability of a business or company or the commercial aspects of a transaction to be undertaken by a listed issuer.

Rule 8.04 of the Rules Governing the Listing of Securities on the Stock Exchange (the "**Listing Rules**") and Rule 11.06(1) of the Rules Governing the Listing of Securities on GEM (the "**GEM Listing Rules**") provide that both the issuer and its business must, in the opinion of the Stock Exchange, be suitable for listing. It is stressed that suitability for listing depends on many factors, and a listing applicant's compliance with the Listing Rules / GEM Listing Rules may not of itself ensure its suitability for listing, and the Stock Exchange retains discretion to accept or reject applications for listing. Under the Listing Rules / GEM Listing Rules, the only example cited for being unsuitable for listing is where the assets of the proposed listing group consist wholly or substantially of cash and/or short-term investments. There was a time when it is generally believed that, save for the cited example or some other extreme circumstances, the Stock Exchange would unlikely invoke the "imperial sword" of the ground of unsuitability for listing to reject a listing application.

However, in recent years, the Stock Exchange has invoked the ground of unsuitability for listing more frequently and rejected more listing applications. In 2018, the Stock Exchange rejected 24 listing applications, as compared to 3 rejections in 2017.[1] Although there is no bright line test in determining what would render an issuer and its business unsuitable for listing, the Stock Exchange has published a number of listing decisions and guidance letters to illustrate the principles.

Avoiding creation of shells – the seven sins

In recent years, the Stock Exchange has noted that some listing applicants appeared to be listing their companies so that they could sell the listed entities as "listed shells" for another business. There has been a number of listed issuers where their controlling shareholders either changed or have gradually sold down their interests shortly after the one-year lockup period had expired. The Stock Exchange considers that these shell companies will invite speculative trading activities when identified by potential buyers, which can lead to opportunities for market manipulation, insider trading and unnecessary volatility in the market post-listing, and may enable backdoor listing circumventing regulatory scrutiny. In June 2016, the Stock Exchange published a guidance letter GL68-13A identifying seven characteristics of "listed shells", which would raise concerns regarding the suitability for such listings and will attract a more focused review by the Stock Exchange. The seven characteristics have been dubbed the "seven sins".

Seven characteristics	Points to note
1. **Small market capitalisation**	Listing applicants should compare the market capitalisation of their proposed listings with the market norm.
2. **Only marginally meeting the listing eligibility requirements**	Under the profits test in the Listing Rules, a Main Board listing applicant should have a profit attributable to shareholders of not less than HK$20 million in respect of the most recent financial year, and in aggregate not less than HK$30 million in respect of the two preceding financial years. In addition, since February 2018, Main Board listing applicants need to meet a market capitalisation at the time of the listing of HK$500 million.[2] A listing applicant with a net profits marginally over the listing eligibility requirements will unlikely satisfy the market capitalisation requirements because its price to earnings ratio (P/E ratio) is expected to be generally in line with its market comparable. A GEM listing applicant should have an adequate trading record of at least two financial years comprising a positive cash flow generated from operating activities in the ordinary and usual course of business before changes in working capital and taxes paid of at least HK$30 million in aggregate for the two financial years immediately preceding the issue of the prospectus.[3] It is expected to have a market capitalisation of HK$150 million at the time of the listing.[4] Listing applicants should note that any income or loss generated by activities outside the ordinary and usual course of its business or one-off windfall profits should be disregarded in determining listing eligibility. In addition, the Stock Exchange may disregard the income tainted by material non-compliance incidents.

1 The figures reflect listing applications that have exhausted all avenues of appeal with the Stock Exchange.
2 Rule 8.09(2) of the Listing Rules
3 Rule 11.12A(1) of the GEM Listing Rules
4 Rule 11.23(6) of the GEM Listing Rules

3. Involving fund raising disproportionate to listing expenses	Listing applicants should consider if the size of the proposed fund raisings and the proportions of listing expenses to the funds to be raised are appropriate and in line with the market. If a significant portion of the listing proceeds will be applied to listing expenses, the listing applicant should explain how the advantages of listing outweigh the cost of listing.
4. Involving a pure trading business with a high concentration of customers	Listing applicants should note that a pure trading business is unlikely to be regarded by the Stock Exchange as suitable for listing in Hong Kong. For businesses with a high concentration of customers, the Stock Exchange will take into account the following factors in determining whether the reliance would have impacts on suitability for listing: a. Whether the listing applicant has established relationship or long-term agreement with the customer;[5] b. whether the listing applicant's business model can be easily changed to reduce the level of reliance, e.g. by finding substitute customers; c. whether the listing applicant has plans to diversify its business focus to reduce its reliance; d. whether the whole industry landscape is dominated by a few players; e. whether the reliance is mutual and complementary; and f. whether the listing applicant is capable of maintaining its revenue in the future in light of the reliance.[6]
5. Asset-light businesses where a majority of the assets are liquid and/or current assets	Listing applicants should consider if the asset ratios of their businesses are in line with the nature of the industries in which they operate as well as their market comparable.
6. Involving a superficial delineation of business from the parent company	In pre-IPO reorganisation, it is common for a listing applicant to exclude the business which is not in line with the listing business from the listing group structure. The Stock Exchange may have concerns if there is a superficial delineation of business from the excluded business. In particular, listing applicants should note that excluding a business from the listing group on the grounds that the excluded company has material non-compliance issues or that it is trading at a loss would not be legitimate reasons in the eyes of the regulators.
7. Having little or no external funding at the pre-listing stage	To assess if the listing applicant has genuine funding needs, the Stock Exchange will consider if the listing applicant has a reasonable gearing ratio and any idle cash, the listing applicant's amount of utilised banking facilities and other borrowings and whether the listing applicant has exhausted cheaper financing options.

For a listing applicant which exhibits some of the above characteristics, such listing applicant and its sponsor(s) should provide a robust analysis to substantiate that such listing applicant is suitable for listing, including, among other things, in the following areas:

(i) **Use of proceeds** – The listing applicant should disclose specific uses for proceeds that commensurate with its past and future business strategy and observed industry trends and explain the commercial rationale for listing.

(ii) **Future objectives and strategies** – A comprehensive analysis should be provided to demonstrate that the listing applicant has a detailed strategic plan for its business operations and growth.

5 Paragraph 3.12(b) of HKEx Guidance Letter 68-13
6 HKEx Listing Decision LD107-1

(iii) **Profit and revenue growth** – Where a listing applicant (a) has experienced decreasing or low profit and revenue growth; and/or (b) is expected to record decreasing or low profit and revenue growth after listing, a comprehensive analysis is required to substantiate that the listing applicant's business is sustainable.

(iv) **Potential sunset industries** – If a listing applicant is in a potential sunset industry or in an industry that has declining market prospects, it must be able to demonstrate that its business is feasible and it has both the ability and resources to modify its business to respond to the changing demands of the market.[7]

The Stock Exchange emphasises that its focus is a qualitative review on the listing applicant's suitability such as whether the listing is consistent with the business strategies of the listing applicant, including the proposed use of proceeds and whether the listing applicant has genuine funding needs.[8] If the listing applicant is unable to demonstrate the commercial rationale for listing, the Stock Exchange may find that the listing applicant is not suitable for listing, irrespective of the nature and financial standing of the business operated by the listing applicant. In addition, if the Stock Exchange is aware of any specific facts and circumstances which give it a reasonable basis to believe that a listing applicant is likely to invite speculative trading upon listing or to be acquired for its listing status, it may find the listing applicant to be not suitable for listing.[9]

Sustainability of business model

The guidance letter GL68-13 published by the Stock Exchange last updated in March 2019 provides guidance on non-exhaustive factors the Stock Exchange will take into account when assessing whether a listing applicant's business is suitable for listing. One of these factors is sustainability of business model. A business model may be considered unsuitable due to a combination of factors, such as:

(a) Deteriorating financial performance

The Stock Exchange will consider, among other things, (a) how susceptible the listing applicant's financial performance is to changes beyond its control; (b) the underlying causes of the deteriorating financial performance and whether such downward trend is expected to continue, or whether it is the cyclical nature of the industry; and (c) whether the listing applicant had demonstrated that it is able to effectively mitigate its exposure to the relevant risks or to turn around the business.[10]

*(b) Material reliance on customer, supplier, limited number of distribution channels and/or controlling shareholder and its close associates (the "**Controlling Shareholder Group**")*

Material reliance on another party (a "**Relevant Counterparty**") may threaten a listing applicant's business sustainability if it is likely that the relationship with such party may materially adversely change or terminate.[11]

A listing applicant's material reliance on a Relevant Counterparty is a matter of disclosure if, absent red flags to indicate otherwise, (i) the relationship with the Relevant Counterparty is unlikely to materially adversely change or terminate; or (ii) the listing applicant is/ will be able to effectively mitigate its exposure to any material adverse changes to or termination of its relationship with the Relevant Counterparty. The disclosure in the prospectus should include:

(i) the background of the Relevant Counterparty;

(ii) the business relationship, the nature of reliance and details of the arrangements between the listing applicant and the Relevant Counterparty;

(iii) basis that the likelihood that the relationship with the Relevant Counterparty will materially adversely change/ terminate is low; or

7 Paragraph 3.2 of HKEx Guidance Letter GL68-13A
8 Paragraph 4.1 of HKEx Guidance Letter GL68-13A
9 Paragraph 4.2 of HKEx Guidance Letter GL68-13A
10 Paragraph 3.10 of HKEx Guidance Letter GL68-13
11 Paragraph 3.11 of HKEx Guidance Letter GL68-13

(iv) basis that the listing applicant is/ will be able to effectively mitigate its exposure to any material adverse changes to or termination of the relationship with the Relevant Counterparty.[12]

(c) Financial assistance from its Controlling Shareholder Group

A listing applicant may receive material financial assistance (e.g. loans from the Controlling Shareholder Group or personal guarantee or other forms of collateral or security given by the Controlling Shareholder securing the listing group's indebtedness) from the Controlling Shareholder Group. The Stock Exchange will presume such financial support will be withdrawn (absent evidence to the contrary) in assessing the sustainability of the listing applicant.[13]

The Stock Exchange will take into account the following non-exhaustive factors to assess whether the listing applicant's business will be sustainable without financial support:

(i) whether the listing applicant is able to obtain independent financing (e.g. without financial support) on comparable terms; or

(ii) whether the listing applicant has sufficient liquid assets on hand to meet its financial needs.[14]

(d) Material changes that may adversely affect the company's prospect

Concerns on a listing applicant's sustainability of business will also arise if it faces changes which imminently threatens its operations, such as:

(i) changes in regulatory requirements which may result in the listing applicant being unable to continue to operate its business in its current form or at its current profitability level; or

(ii) development of new technology which renders its business obsolete.[15]

To address these concerns, the Stock Exchange expects the listing applicant to affirmatively demonstrate that such changes are unlikely to materialise or will not affect the sustainability of the listing applicant's business.[16]

Whether non-compliance would affect a listing applicant's suitability for listing

Non-compliances that involved fraud, deceit or dishonesty (such as tax evasion or bribery) ("**Integrity Non-compliances**") and material non-compliances with laws and regulations by a listing applicant, its director(s) or controlling shareholder(s) ("**Material Non-compliances**") may render a business unsuitable for listing. With respect to the operational and financial impact of the non-compliances, the Stock Exchange may request the listing applicant to demonstrate that it could still meet the relevant eligibility requirements under the Listing Rules after adjusting its trading record results for the impact of the non-compliances, and that there would not have been any material adverse impact on its business and financial performance had it complied with the relevant rules or regulations and going forward.[17]

Category	Implications	Consideration
Integrity Non-compliances	Integrity Non-compliances will likely render the listing applicant, as well as the culpable director not suitable for listing or not suitable to be a director of a listed company, as the case may be. Integrity Non-compliances impugn a culpable director's character and integrity in contravention of the standards required under Main Board Rules 3.08 and 3.09 (GEM Rules 5.01 and 5.02). If a controlling shareholder is culpable for the Integrity Non-compliances, so long as such controlling shareholder has the ability to exert substantial influence over the listing applicant, the listing applicant will not be suitable for listing because it would be subject to substantial influence by such controlling shareholder.	The Stock Exchange will take into account all relevant facts and circumstances (including the underlying reasons for the Integrity Non-compliances and relevant mitigating factors, their operational and financial impact, the culpable person's influence on the listing applicant's operations, internal controls and trading record results, and whether any effective internal control measures have been implemented (and for how long) to avoid re-occurrence of similar Integrity Non-compliances) in determining whether such Integrity Non-compliances would render the listing applicant unsuitable for listing. The Stock Exchange expects the culpable director or controlling shareholder to cease being a director or controlling shareholder of the listing applicant, as the case may be, before listing.
Material Non-compliances	Material Non-compliances that raise concerns regarding the competency of any director who was involved in the Material Non-compliances or was on the board when such non-compliances occurred, leading to issues of his/ her suitability as a director which cannot be addressed by disclosure.	The Stock Exchange expects the listing applicant to have implemented enhanced internal control measures to prevent the recurrence of Material Non-compliances.[18] The Stock Exchange normally expects the Material Non-compliances to be fully rectified before listing.[19] Material Non-compliances that involve bill financing from banks and interest rate/loan arbitrage that are not criminal in nature may be addressable by disclosure. The listing applicant will be required to cease all non-compliant bill financing and for a period of at least 12 months before its listing application to demonstrate that its business is sustainable when it is in compliance.[20]

Rejection cases

Over the years, the Stock Exchange has published a number of listing decisions to disclose the reason for rejecting some listing applications. Here is a summary of some common grounds for rejection.

It should be noted the presence of a single issue may or may not by itself render a listing applicant unsuitable for listing and the Stock Exchange would look at the overall impacts of the issues on the listing applicant to evaluate if it is suitable for listing.

12 Paragraph 3.15 of HKEx Guidance Letter GL68-13
13 Paragraph 3.16 of HKEx Guidance Letter GL68-13
14 Paragraph 3.17 of HKEx Guidance Letter GL68-13
15 Paragraph 3.18 of HKEx Guidance Letter GL68-13
16 Paragraph 3.19 of HKEx Guidance Letter GL68-13
17 Paragraphs 3.6 and 3.8 of HKEx Guidance Letter GL68-13

18 Paragraph 3.4 of HKEx Guidance Letter 63-13
19 Paragraph 3.4(d) of HKEx Guidance Letter 63-13
20 Paragraph 3.7 of HKEx Guidance letter 63-13

Issues	Relevant listing decision(s)
Excessive transactions with closely related parties or connected persons	LD92-1 published in May 2010 (withdrawn in March 2019 and is superseded by GL 68-13 but the principles contained in this listing decision is still of relevance) Company B (rejection case in 2015) in LD100-2016 published in April 2016 Company A (rejection case in 2018) in LD121-2019 published in March 2019
Mining company failing to demonstrate that its principal assets had a clear path to commercial production	Company A (rejection case in 2013) and Company G (rejection case in 2014) in LD92-2015 published in June 2015 Company D (rejection case in 2015) in LD100-2016 published in April 2016
Failure to rectify non-compliance which may affect key licence renewal	Company B (rejection case in 2013) in LD92-2015 published in June 2015
Heavy reliance on controlling shareholders for financial assistance	Company B (rejection case in 2013) in LD92-2015 published in June 2015 Company B (rejection case in 2016) in LD107-2017 published in May 2017
Suitability of director(s), person of substantial interest or controlling shareholder in question	Company B, Company C and Company E (rejection cases in 2013), Company J and Company N (rejection cases in 2014) in LD92-2015 published in June 2015 Company C and Company F (rejection cases in 2015) in LD100-2016 published in April 2016 Company L (rejection case in 2016) in LD107-2017 published in May 2017 Company F, Company N and Company Q (rejection cases in 2018) in LD121-2019 published in March 2019
Failure to meet the financial requirements if (a) one-off income, waived directors' emoluments, waived rental and government grant, (b) income derived from material non-compliances, or (c) fair value gains from investment properties were excluded while notional interest expenses on shareholders' loan was imputed	Company D (rejection case in 2013) and Company N (rejection case in 2014) in LD92-2015 published in June 2015 Company C and Company E (rejection cases in 2015) in LD100-2016 published in April 2016 Company A, Company B, Company E and Company M (rejection cases in 2016) in LD107-2017 published in May 2017 Company I (rejection case in 2018) in LD121-2019 published in March 2019
Unsustainable business model and/or deteriorating financial performance with insufficient basis to believe situation will improve	Company D (rejection case in 2013), Company L, Company N, Company O and Company P (rejection cases in 2014) in LD92-2015 published in June 2015 Company A, Company E and Company G (rejection cases in 2015) in LD100-2016 published in April 2016 Company F, Company H and Company M (rejection cases in 2016) in LD107-2017 published in May 2017 Company B (rejection case in 2017) in LD119-2018 published in March 2018 Company E (rejection case in 2018) in LD121-2019 published in March 2019
Integrity non-compliance (e.g. tax evasion)	Company E (rejection case in 2013) in LD92-2015 published in June 2015
Departure of personnel or material acquisition leading to failure to meet the ownership continuity, management continuity and profit test requirements	Company E (rejection case in 2013) and Company H (rejection case in 2014) in LD92-2015 published in June 2015 Company D (rejection case in 2016) in LD107-2017 published in May 2017 Company C (rejection case in 2017) in LD119-2018 published in March 2018
Reliance on major customer(s), single project or product	Company F (rejection case in 2013) in LD92-2015 published in June 2015 Company I, Company J and Company K (rejection case in 2016) in LD107-2017 published in May 2017
Material or systemic non-compliances casting doubt on the listing applicant's ability to operate in a compliant manner or its business prospects	Company J and Company K (rejection cases in 2014) in LD92-2015 published in June 2015 Company C and Company F (rejection cases in 2015) in LD100-2016 published in April 2016 Company A and Company E (rejection cases in 2016) in LD107-2017 published in May 2017
Lack of title certificate or property ownership certificate to PRC property which is significant to the activities of the listing applicant	Company N and Company O (rejection cases in 2014) in LD92-2015 published in June 2015
Excessive competition with controlling shareholder	Company O (rejection case in 2014) in LD92-2015 published in June 2015
Lack of sponsor independence	Company M (rejection case in 2014) in LD92-2015 published in June 2015 Company V (rejection case in 2018) in LD121-2019 published in March 2019
Operation in high risk jurisdiction with extreme legal and political uncertainties	Company A (rejection case in 2015) in LD100-2016 published in April 2016

Material change of business model during or after the Track Record Period rendering the track record results not representative of future performance	Company B and Company E (rejection cases in 2015) in LD100-2016 published in April 2016 Company G (rejection case in 2016) in LD107-2017 published in May 2017
Significant advances to third parties casting doubt on integrity of director(s)	Company F (rejection case in 2015) in LD100-2016 published in April 2016
Unjustified P/E ratio	Company C (rejection case in 2016) in LD107-2017 published in May 2017 Company D, Company H and Company M (rejection cases in 2018) in LD121-2019 published in March 2019
Controlling shareholder and substantial shareholders previously involved in selling listed shells, casting doubt on whether the shareholders would be committed to nurture the listing applicant in the long run	Company A (rejection case in 2017) in LD119-2018 published in March 2018
Lack of commercial rationale for listing and/or no genuine funding need	Company A (rejection case in 2017) in LD119-2018 published in March 2018 Company B, Company C, Company G, Company H, Company J, Company K, Company L, Company M, Company O, Company P, Company R, Company S, Company W and Company X (rejection cases in 2018) in LD121-2019 published in March 2019
Packaging of different companies to meet the eligibility requirements	Company T (rejection case in 2018) in LD121-2019 published in March 2019

Heightened scrutiny of commercial rationale for listing

It is observed that the Stock Exchange has heightened the scrutiny of commercial rationale for listing in recent years, leading to a notable increase in rejected listing applications in 2018. The Stock Exchange stressed that the rejections were not sector specific. Instead, its primary focus when assessing suitability for listing was on whether the rationale for listing was supported by the listing applicant's expected growth and therefore needs for funding. As part of the Stock Exchange's commitment to maintain market quality, in assessing the suitability for listing for future cases, it is expected that the Stock Exchange will give more consideration to whether the proposed use of proceeds and funding needs are consistent with the business strategies and future plans of the listing applicants.

Disclaimer

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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CHAPTER 7

Specific Listing Issues

Chinese enterprises to be listed in Hong Kong capital market, in addition to the H-shares method (i.e. the main body in Mainland China as the listing entity, to issue shares and get listed in Hong Kong capital market), will also adopt the Red-Chip Structure approach. Red-Chip Structure refers to a structure, which is, through the establishment of an overseas shareholding platform as a listing entity, to inject the assets or interests of the Chinese enterprises into such overseas shareholding platform, and to raise funds in the Hong Kong capital market upon listing. The cross-border corporate structure established in a red chip approach as above-mentioned is usually referred to as the "Red-Chip Structure". Under the Red-Chip Structure, it is divided into "Grand Red-Chip Structure" and "Small Red-Chip Structure".

The Grand Red-Chip Structure refers to the structure that a domestic company or institution establishes an overseas shareholding platform (where such domestic company or institution controls the oversea shareholding platform or acts as its largest shareholder) as listing body, to inject the business entities or assets in China into such overseas shareholding platform, and to raise funds and get listed in the Hong Kong capital market through offshore subsidiaries. The core regulatory requirements for listing under the Grand Red-Chip Structure is Circular of the State Council on Further Strengthening Management of Issuance and Listing of Shares Overseas (Guo Fa [1997] No. 21, 97 Red Chip Guidelines), which stipulates that the above Grand Red-Chip Structure shall be subject to the approval of the China Securities Regulatory Commission (CSRC), the National Development and Reform Commission, the Ministry of Commerce, the State-owned Assets Supervision and Administration Commission and other governmental authorities. There are mainly three circumstances in terms of regulatory approval for companies to achieve IPO under Grand Red-Chip Structure: (1) under normal circumstances, approval of the CSRC is required, which is of great difficulty to obtain; (2) where there is no domestic asset involved or domestic assets having been exported for over three years, approval of the provincial government or the State-owned Assets Supervision and Administration Commission of the State Council and filing at record by CSRC afterwards is required; and (3) as for an overseas listed company spinning off, filing at record by CSRC afterwards is required. Besides the general advantages of an overseas listing

entity, the biggest advantage of listing under the Grand Red-Chip Structure is that the domestic group companies/headquarters in Mainland China could control over the oversea listing company and consolidate the financial statements with the oversea listing company, which is more catering to the business needs of major shareholders or domestic group companies/headquarters in Mainland China. However, in view of the long-standing strict requirements of the competent authorities for the approval under scenario (1) as above-mentioned (which applies to most cases), there are very few successful cases obtaining such approval in the market, and the above-mentioned scenario (2) and (3) (which applies to special cases) have emerged rapidly in the market recently. The above situation has led to the fact that, most of the Chinese state-owned enterprises can only adopt H-share method for their IPOs, while the private enterprises in Mainland China are mostly listed in Hong Kong by adopting the Small Red-Chip Structure described below.

The Small Red-Chip Structure refers to the structure that domestic natural persons establish a shareholding platform overseas (where such natural persons directly control the oversea shareholding platform or act as its largest shareholders) as a listing entity, to inject the equity interests or assets of the domestic operating entities into such overseas shareholding platform, or to adopt a Variable Interest Entities structure (VIE Structure), and to raise funds and get listed in the Hong Kong capital market through offshore subsidiaries. Since 2003, the CSRC has abolished the "No-Objection Letter" policy, and Small Red-Chip Structure is no longer subject to the approval of Chinese domestic securities authorities. In 2006, the Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors and its amendments, or the Provision No. 10, promulgated by the Ministry of Commerce of PRC, and the Circular of the State Administration of Foreign Exchange on Issues concerning Foreign Exchange Administration over the Overseas Investment and Financing and Round-trip Investment by Domestic Residents via Special Purpose Vehicles, or the Circular No. 37, promulgated by the State Administration of Foreign Exchange, have become the main regulatory provisions for restructuring and listing of companies under the Small Red-Chip Structure. At present, the main models to establish a Small Red-Chip Structure in the market include: (1) using the WFOE which has completed the round-trip investment by the domestic natural person shareholder(s) before Provision No.10 became effective; (2) change of the nationality of the actual controller; (3) two-step red chip restructuring; and (4) VIE Structure. The major advantages to adopt the Small Red-Chip Structure for listing are that: (1) the difficulty to obtain the relevant approvals is low; (2) the time required for the overall process is relatively short; (3) the listing entity is located overseas, the legal environment is relatively loose and the corresponding mechanisms are obviously flexible, such as dual class shares, and equity incentive methods; and (4) re-financing process is convenient, etc.

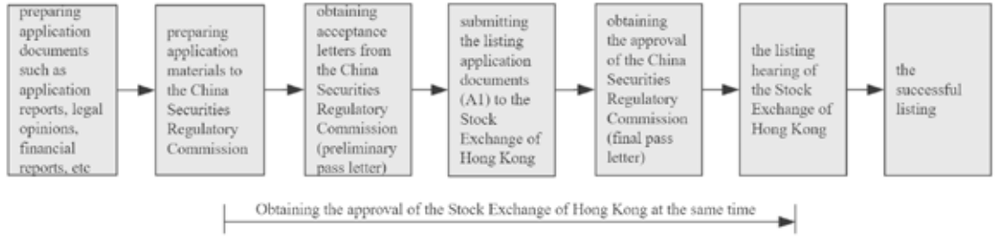
The VIE Structure is a relatively common type under the Small Red-Chip Structure. In general, under the VIE Structure, an applicant establishes a wholly-owned subsidiary in Mainland China (i.e. WFOE, whose business is mainly in Mainland China, with all intellectual property rights). Meanwhile, the applicant's controlling shareholders (i.e. domestic natural persons or enterprises in Mainland China) establish a domestic-funded operating enterprise in Mainland China (i.e. OPCO, with all the necessary operating licenses which are restricted and/or prohibited for foreign investors to obtain).The WFOE, the OPCO and the shareholders of the OPCO enters into a series of contractual agreements to realize the applicant's actual control over OPCO and consolidation of the financial statements of OPCO.

Adoption of VIE Structure requires to meet certain criteria of HKEx-LD43-3 promulgated by the Stock Exchange of Hong Kong, in particular to meet the "narrowly tailored" principle that applicants can only use contractual arrangements to avoid foreign investment restriction or prohibition when necessary. For example, if an applicant holds 50% equity interests in OPCO without restriction or prohibition, the remaining 50% of the equity interests can be held through contractual arrangements, and if the applicant needs to obtain approval or meet certain qualifications to holds the equity interests in the OPCO directly, the applicant should firstly seek to obtain such approval or satisfy qualification conditions. In addition, if the relevant laws and regulations stipulate that the VIE Structure is not allowed, the applicant's Chinese legal counsel should issue a positive legal opinion on that, and conduct an interview with the relevant competent authorities to confirm that there are foreign restrictions or prohibitions on such industry, and the adoption of the VIE Structure does not violate relevant PRC laws and regulations or affect the effectiveness of the VIE Structure.

At present, many new economic enterprises are listed in Hong Kong, and most of them adopt the VIE Structure. The Stock Exchange of Hong Kong also issued a consultation document to broaden the current listing system, attracting and accepting new economic enterprises with different voting rights structures. The new economic enterprises defined by the Stock Exchange of Hong Kong generally have the following characteristics: it can prove that the successful operation of the company depends on the application of new technologies, innovative ideas and/or business models in its core business, which also makes the company different from others. In new economic enterprises, Research and development (R&D) will contribute a large portion of the expected value to the company, with R&D as the main business and taking up most of the expenses; it can also prove that the company's successful operation depends on its patent or intellectual property and compared to tangible value of assets, the company's market value or the value of intangible assets is higher.

In addition to the red-chip method of listing, another way for Chinese companies to go public on the Stock Exchange of Hong Kong is to get listed by H-shares method. Listing by H-share ("H" is the abbreviation of the first letter of Hong Kong) refers to a joint stock company registered in China, issuing overseas-listed foreign shares and listing on the Stock Exchange of Hong Kong. The listing of domestic enterprises by H-shares requires the consent of the CSRC and the Stock Exchange of Hong Kong. The followings are key issues that CSRC focuses on: (1) whether the listing compliance with the regulations of state-owned equity management; (2) whether the listing compliance with foreign investment and macro-control policies; (3) whether the applicant's operation is compliance with relevant laws and regulations; (4) the applicant's shareholding structure and corporate governance; (5) the authorization and approval of the proposed listing; and (6) other applicable issues.

The main processes for listing by H-shares are: (1) preparing application documents such as application reports, legal opinions, financial reports, etc.; (2) preparing application materials to the CSRC; (3) obtaining acceptance letters from the CSRC (preliminary pass letter); (4) submitting the listing application documents (A1) to the Stock Exchange of Hong Kong; (5) obtaining the approval of the CSRC (final pass letter); (6) the listing hearing of the Stock Exchange of Hong Kong; (7) the successful listing.



In addition, the Stock Exchange of Hong Kong announced the new Listing Rules on April 30, 2018, adding the Chapter 18A--Biotechnology Section, to allow biotech companies which have not yet made a profit or have no income to apply for listing on the Main Board. The new Listing Rules stipulate that applicants should meet requirements in aspects of qualitative of the listing, expected market capitalization (at least HK$1.5 billion), performance records (at least two fiscal years in which the same management operates the existing business) and working capital (at least 125% of the Group's expenditure in the next 12 months). The cornerstone investors, disclosure responsibilities are also regulated under the new Listing Rules. The guidance letter of the Stock Exchange of Hong Kong clarifies that a qualified biotech company should have seven characteristics, including at least one core product that has passed the concept phase and possesses intellectual property rights related to the core product.

The new Listing Rules have greatly accelerated the listing process of biotech companies. As of the end of May this year, eight biotech companies, including Ascletis Inc, Innovent Biologics Inc and CanSino Biologics Inc, have issued new shares in accordance with the 18A chapter under the New Listing Rules, and more than ten biotech companies have submitted IPO applications.

About Commerce & Finance Law Offices

Commerce & Finance Law Offices (hereinafter referred to as "C&F") is one of the best commercial law firms in China. Faithfully adhering to the principles of professional integrity and excellence, C&F focuses on solving the clients' most demanding and important problems, and provides one-stop solutions and strive to provide clients with pragmatic and cost-effective legal solutions that meet their best interests. C&F has steadily built up its well-recognized practice and reputation in the fields of following: Capital Markets, Corporate M&A, Private Equity, New Economy (TMT/Education/Healthcare), Banking & Finance, Dispute Resolution, Insolvency & Restructuring, Investment Funds, Intellectual Property and Foreign Investment.

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CHAPTER 8

International Offerings

Secondary Listing in Hong Kong and Other Jurisdictions

1. Introduction

Dual listing refers to a situation where a company's shares are listed and traded on two different stock markets. A company seeking to raise funds from the capital markets may launch a primary listing of its shares on a stock market through an initial public offering (**"IPO"**). At the same time, or subsequent to the primary listing, such company may also seek to list its shares on another stock market as a secondary listing.

Dual listing offers benefits for both the company and its investors. From the company's perspective, dual listing broadens its shareholder base, raising its profile and increasing its visibility in the global market, which allows the company to seek financing from, and further expand its business into, other markets. From the investors' perspective, the dual listing of a foreign company in their home country brings foreign stocks closer to them and allows them to diversify their investments.

2. Secondary Listing in Hong Kong

An overseas issuer may apply for secondary listing in Hong Kong if it is able to satisfy the qualification requirements under the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Ltd (the **"Listing Rules"**), including the additional requirements set out in Chapter 19 of the Listing Rules.

The rules governing secondary listings in Hong Kong underwent a significant change in the past few years. Under the joint policy statement (the **"Statement"**) regarding the listing of overseas companies on The Stock Exchange of Hong Kong Ltd (**"HKEx"**) issued jointly by the Securities and Futures Commission of Hong Kong (**"SFC"**) and HKEx on 27 September 2013, a secondary listing applicant must have "a large market capitalization and a long track record of regulatory compliance on its primary market."[1] It is noteworthy that companies that have their "centre of gravity" in the Greater China region were regarded not suitable for secondary listings in Hong Kong pursuant to the Statement. These policies aim to prevent certain overseas issuers, which may come from an unrecognised stock exchange (as jointly determined by HKEx and the SFC), from evading the more stringent rules of primary listing in Hong Kong imposed by HKEx and the SFC by seeking secondary listing on HKEx instead.

Last year, however, HKEx promulgated a series of new rules to boost the prosperity of Hong Kong's capital markets, including easing the regulatory requirements for secondary listings and adding a new listing route for biotech companies, among other things. In April 2018, HKEx added a new Chapter 19C to the Listing Rules, providing "a new concessionary route" to secondary listing for large emerging and innovative companies with primary listings on major international exchanges.[2]

According to HKEx's report in May 2019, over US$90 billion has been raised via the new listing regime so far, strengthening Hong Kong's position as the listing market of choice for potential issuers. It was also reported that Alibaba, the famous Hangzhou-based technology company, is seeking its secondary listing on HKEx via this new concessionary route in the second-half of 2019, looking to raise US$10 to 20 billion.

3. Secondary Listing under the New Concessionary Route

Since 30 April 2018, HKEx has started to implement the newly added Chapter 19C of the Listing Rules which provides a "new concessionary route" to secondary listings in Hong Kong for large emerging and innovative companies which are primary listed on major international exchanges.

Under this new concessionary route, it becomes easier for a "Qualifying Issuer" (being an issuer primary listed on a "Qualifying Exchange," and "Qualifying Exchange" includes the New York Stock Exchange LLC, the Nasdaq Stock Market or the Main Market of the London Stock Exchange plc (and belonging to the UK Financial Conduct Authority's "Premium Listing" segment)) to conduct secondary listing in Hong Kong.

Notwithstanding the policy against secondary listing of Greater China companies in Hong Kong under the Statement mentioned above, this new concessionary route of secondary listings on HKEx under Chapter 19C is open to both "Greater China Issuers" (being Qualifying Issuers with their centre of gravity in the Greater China) as well as "Non-Greater China Issuers," with slightly different requirements as detailed below.

Type of applicant – large emerging and innovative company

A large emerging and innovative company, being a Qualifying Issuer, is normally considered as a suitable candidate for the purpose of secondary listing under the new Chapter 19C. According to Guidance Letter 94-18 issued by HKEx, HKEx normally assesses the suitability of a large emerging and innovative company by considering whether it has the following characteristics:

- The success of the company is demonstrated to be attributable to the application to the company's core business of: (i) new technologies; (ii) innovations; and/or (iii) a new business model, which also serve to differentiate the company from its peers.
- Research and development significantly contributes to the company's expected value and constitutes a major activity and expense of the company.
- The success of the company is demonstrated to be attributable to its unique features or intellectual property.
- Compared with the value of company's tangible asset, the company has an outsized market capitalisation or intangible asset value.

A large emerging and innovative company should possess more than one of the above characteristics to demonstrate its suitability for secondary listing under Chapter 19C. HKEx further emphasises that only adopting new technology to a conventional

1 For more details, please see https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Other-Resources/Listing-of-Overseas-Companies/Joint-Policy-Statement-20130927/new_jps_0927.pdf.

2 For more details, please see https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/February-2018-Emerging-and-Innovative-Sectors/Conclusions-(April-2018)/cp201802cc.pdf?la=en.

business is insufficient to qualify this company for secondary listing under Chapter 19C.

Other qualifications for secondary listing under Chapter 19C

A Qualifying Issuer must have a good track record of compliance for at least two full financial years on a Qualifying Exchange.

Other than a non-Greater China Issuer without a weighted voting rights (**"WVR"**) structure, all Qualifying Issuers must have a market capitalisation of at least HK$40 billion at the time of secondary listing, or a market capitalisation of at least HK$10 billion at the time of secondary listing with a revenue of at least HK$1 billion for the most recent audited financial year. For a non-Greater China Issuer without a WVR structure, it must have an expected market capitalisation at the time of its secondary listing of at least HK$10 billion.

Please also note that in order to secondary list under Chapter 19C, a large emerging and innovative company is expected to satisfy both the qualification requirements set out in Chapter 19C and the general suitability requirement under Rule 8.04 of the Listing Rules.

Shareholder protection measures and other requirements

Apart from the requirements mentioned above, the new Chapter 19C and Guidance Letter 94-18 introduce certain requirements regarding equivalent standards of shareholder protection, variable interest entity (**"VIE"**) structures, WVR structures and automatic waivers from full compliance with the Listing Rules. The following table sets out the different requirements on shareholder protection and other matters applicable to different types of overseas issuers:

	"Greater China Issuer"		"Non-Greater China Issuer"
	"Non-Grandfathered Greater China Issuer"	"Grandfathered Greater China Issuer"	
Definition	"Non-Grandfathered Greater China Issuer" means companies with centre of gravity in Greater China and listed on a Qualifying Exchange after 15 December 2017	"Grandfathered Greater China Issuer" means companies with centre of gravity in Greater China and listed on a Qualifying Exchange on or before 15 December 2017	"Non-Greater China Issuer" means companies listed on a Qualifying Exchange, whose centre of gravity is not in Greater China
Requirements on Equivalent Standards of Shareholder Protection	The company is required by the Listing Rules to amend its constitutional documents to ensure the standards of shareholder protection are comparable to those provided in Hong Kong.	The company is not required by the Listing Rules to amend its constitutional documents. However, it must demonstrate how the domestic laws, rules and regulations to which it is subject and its constitutional documents, in combination, provide the shareholder protection standards set out in Chapter 19C. The HKEx may require the company to amend its constitutional documents to provide such shareholder protection standards.	
VIE Structures[3] *(if applicable)*	The company is required to comply with all existing HKEx requirements regarding VIE structures.	The company may list with its existing VIE structure and will not be required to demonstrate that it is able to comply with the draft People's Republic of China (PRC) Foreign Investment Law. However, it must provide the HKEx with a PRC legal opinion confirming that the VIE structure complies with PRC laws, rules and regulations, and complies with the disclosure requirements under Listing Decision HKEx-LD43-3.	
WVR Structures *(if applicable)*	The company is required to meet the eligibility and suitability criteria for primary listing with a WVR structure. It must conform to all primary listing requirements, including ongoing WVR safeguards.	The company may list with its existing WVR structure, and is not required to comply with ongoing WVR safeguards, except for disclosure requirements.	
Automatic waivers from full compliance with the Listing Rules	The company will enjoy automatic waivers from full compliance with the Listing Rules, but if, after its secondary listing in Hong Kong, 55% or more of the total worldwide trading volume (by dollar value) of its shares migrates to Hong Kong in the most recent fiscal year, the company would be treated as having a dual-primary listing in Hong Kong and the automatic waivers will no longer apply. The company will have a grace period of 12 months to comply with the applicable requirements. Such grace period will commence from HKEx's written notice of its decision that majority of trading in the company's listed shares has migrated permanently to Hong Kong.	The company will be able to continue to enjoy automatic waivers from full compliance with the Listing Rules even if the bulk of trading in its shares migrated permanently to Hong Kong.	

4. Other Requirements for Secondary Listing on HKEx

In addition to complying with the general listing requirements for Hong Kong issuers, overseas issuers seeking secondary listing in Hong Kong (whether or not under the new concessionary route set out in Chapter 19C) are also required to comply with the additional requirements provided by Chapter 19 of the Listing Rules. Some requirements are highlighted below:

- HKEx reserves the right to refuse a secondary listing in its absolute discretion if it believes it is not in the public interests to list such an applicant, or it is not satisfied that the applicant's primary listing is, or is to be, on an exchange where the standards of shareholder protection are at least equivalent to those provided in Hong Kong.
- The applicant must appoint and maintain a person to accept service of process and notices on its behalf in Hong Kong.
- The listing by the applicant on its primary exchange must have been granted before the listing on HKEx can be granted.
- Only securities registered on the Hong Kong register can be traded on HKEx.

5. Secondary Listing in Singapore, Shanghai and the United States – A Brief Introduction

3 For more details, please refer to Listing Decision HKEx-LD43-3 at https://en-rules.Exchange.com.hk/sites/default/files/net_file_store/new_rulebooks/l/d/LD43-3.pdf.

Secondary listing in Singapore[4]

Based on our experiences in the Singapore market, the regulatory approach for secondary listings clearly differs from that for primary listing. When a company seeks a secondary listing on the Singapore Exchange Ltd (**"SGX"**), the place of the company's primary listing (**"home jurisdiction"**) will fully impose its listing rules on the company, and, as such, the SGX will generally rely on the stock exchange of the company's home jurisdiction (**"home exchange"**) to regulate the company. This approach recognises that for secondary listings, the primary regulatory role and oversight lie with the home jurisdiction, and, accordingly, the SGX customarily relies on the home exchange to administer its listing rules and maintain its standard of regulation. The SGX's role is to review and assess the application to see if the company satisfies the SGX's admission criteria and is suitable to list on the SGX.

Given the important role of home jurisdictions in secondary listings in Singapore, the SGX seeks to employ a "risk-calibrated approach" to assess secondary listing applications, with a focus on ensuring that the regulatory treatment applied by the SGX is commensurate with the regulatory risk posed by the applicant's home jurisdiction, which in turn depends on the classification ascribed to such home jurisdiction.

Based on the market classification developed by two international leading index providers, Morgan Stanley Capital International, Inc. (**"MSCI"**) and the Financial Times Stock Exchange 100 Index (**"FTSE"**), the SGX classifies international markets as "Developing Markets" or "Developed Markets." Companies with their primary listings on a Developed Market's exchange are viewed as posing less regulatory risk since their legal, regulatory and enforcement frameworks offer sufficient assurance on the levels of shareholder protection and corporate governance standards. In such cases, the SGX will not ordinarily impose additional continuing listing obligations on those applicants (except for Rules 217 and 751 of the SGX Listing Manual – see below) if they are able to meet the SGX's admission standards. In contrast, the legal and regulatory regimes in Developing Markets may not offer sufficient assurance on the levels of shareholder protection and corporate governance standards. In such cases, the SGX may require enhancements by imposing additional continuing listing obligations on such applicants to better safeguard the interest of investors.

In the case of Hong Kong listed companies seeking secondary listing in Singapore, companies with a primary listing on the Main Board of HKEx will be classified as having their place of primary listing in a Developed Market.

While the place of primary listing is the predominant factor in the classification of a company's home jurisdiction in view of the reliance placed by the SGX on the legal and regulatory regime of the company's home exchange, the SGX may review whether it remains appropriate for a company to be classified as being from a Developed Market based solely on its place of primary listing (i) if the company has presence in multiple jurisdictions; or (ii) if the company's place of primary listing is on the index providers' Watch List or Review List, such that it may be downgraded from a Developed Market.

In such cases, the SGX will conduct regulatory assessment to consider the following factors: (i) the current level of shareholder protection available; (ii) the enforceability of Singapore court orders in the company's place of dominant operations or place of incorporation; and (iii) the presence of extradition treaties or arrangements between Singapore and the company's place of predominant operation or place of incorporation.

In any case, foreign issuers seeking secondary listing on the SGX are subject to Rules 217 and 751 of the SGX Listing Manual. Under Rule 217, a secondary listing applicant must undertake with the SGX to: (i) release all information and documents to the SGX at the same time as they are released to its home exchange; (ii) inform the SGX of any issue of additional securities and the corresponding decision of its home exchange; and (iii) comply with all other listing rules that the SGX may apply from time to time. Under Rule 751, an issuer with a secondary listing on the SGX must (i) maintain its primary listing on its home exchange; (ii) be subject to all applicable listing rules of its home exchange (unless a waiver has been obtained for any noncompliance), and (iii) provide an annual certification that it has complied with the applicable continuing listing obligations under the SGX Listing Manual.

Secondary listing in Shanghai via issuance of Chinese depositary receipts[5]

Since 2018, red-chip companies which are primary listed overseas may apply to the China Securities Regulatory Commission (**"CSRC"**) for secondary listing on the Shanghai Stock Exchange via issuance of Chinese depository receipts (**"CDRs"**). Depository receipts refer to securities issued by depository parties and offered within the territory of mainland China based on the issuer's securities, representing the equities of the issuer's overseas underlying securities. The applicable laws and regulations of the issuance and trading of CDRs on the Shanghai Stock Exchange include the PRC Securities Law, the Administrative Measures for the Issuance and Trading of Depository Receipts (for Trial Implementation) (**"Measures"**) and the Circular on Issuing the Implementing Measures of the Shanghai Stock Exchange for the Listing and Trading of Stocks or Depository Receipts Offered by Pilot Innovative Enterprises.

Pursuant to the Measures, an issuer with overseas underlying securities which is seeking to publicly issue CDRs in China should meet the following requirements:

- The company shall have a sound corporate governance structure, sustainable profitability and healthy financial status, and shall not have provided any false statements in its financial and accounting reports over the latest three years, or have engaged in other serious illegal activity during the three preceding years.
- The company must have been duly incorporated and have been validly operating for over three years, and its major assets are not involved in any major ownership dispute.
- The company's actual controller has remained unchanged in the recent three years, and the shares held by the controlling shareholders and shareholders controlled by the company's actual controller are not involved in any major ownership dispute.
- The company and its controlling shareholders and actual controllers have not committed any serious violations of laws, harming investor's legitimate rights and interests and public interests over the last three years.
- The company has a normative accounting management and a sound internal control system.
- Directors, supervisors and senior executives of the company shall have good standing and meet the requirements prescribed by the laws of its place of incorporation and have no recent records of major violations or bad faith.
- The company shall meet the other requirements specified by the CSRC.

A red-chip company which is applying for the listing of its CDRs on the Shanghai Stock Exchange shall fulfill the following conditions:

- The number of publicly issued CDRs is not less than 100 million or the market value of publicly issued CDRs is not less than RMB¥5 billion at the time of listing;
- The company has not committed any materially illegal act during the recent three years, and there is no false statement in its financial and accounting reports; and

4 Akin Gump Strauss Hauer & Feld LLP operates as a foreign-registered law firm in Singapore and all commentary relating to secondary listings in Singapore is based on our experiences of working with clients and local counsel who are experienced/qualified in the Singapore market.

5 Akin Gump Strauss Hauer & Feld LLP Beijing Representative Office operates as a foreign law firm's representative office in China and all commentary relating to secondary listings in China is based on our experiences of working with clients and local counsel who are experienced/qualified in the Chinese market.

- The company shall also meet the other conditions required by the Shanghai Stock Exchange.

While the CSRC holds a positive attitude towards the launch of CDRs in China, the CSRC has not yet approved any CDR application thus far.

Secondary listing in the United States

The New York Stock Exchange (**"NYSE"**) and The Nasdaq Stock Market (**"Nasdaq"**) are popular venues for non-U.S. issuers seeking a secondary listing.

Foreign private issuers[6] looking to raise capital in the United States in connection with a secondary listing on a U.S. securities exchange are required to file with the U.S. Securities and Exchange Commission (the **"SEC"**) a registration statement under the U.S. Securities Act of 1933, as amended (the **"Securities Act"**). The registration statement must include a prospectus that incorporates the issuer's audited financial statements for the three most recent years,[7] as well as a description of the issuer's business, management, risks relating to the issuer's business and industry and related party transactions and a discussion of the issuer's financial performance from management's perspective.

Concurrently with the registration of its securities with the SEC, the issuer can apply to list its securities on the NYSE or Nasdaq. Completion of the offering and trading of the securities can commence only after the SEC has completed its review and comment process and declared the registration statement effective and after the applicable securities exchange has approved the securities for listing.

Once a foreign private issuer is registered under the Securities Act and/or listed on a U.S. national securities exchange, it becomes subject to certain periodic reporting requirements under the U.S. Securities Exchange Act of 1934, as amended (the **"Exchange Act"**), including a requirement to file an annual report containing audited financial statements.

The U.S. securities laws and U.S. securities exchange listing rules offer several benefits to foreign private issuers, as compared to U.S. domestic issuers, including the ability to:

- Present financial statements prepared in accordance with International Financial Reporting Standards (**"IFRS"**) (as issued by the International Accounting Standards Board) instead of United States Generally Accepted Accounting Principles (**"U.S. GAAP"**), without requiring a reconciliation to U.S. GAAP.
- Follow their home jurisdiction's corporate governance practices; numerous corporate governance requirements adhered to by U.S. domestic companies are not required for foreign private issuers.
- Either list American Depositary Receipts (**"ADRs"**) or directly list equity securities (as long as those securities are U.S. dollar-denominated).

ADRs are the most prevalent form through which foreign private issuers list and offer to the public equity securities in the United States. ADRs are issued by a U.S. depositary bank and represent ownership interests in a specified number of underlying securities of the issuer. For purposes of registration with the SEC, publicly traded ADR programs are divided into three "levels." Levels I and II are designed for securities already issued and outstanding, while Level III is designed for a capital raising offering of new securities. Level I ADR programs have the least burdensome registration and reporting requirements, but Level I is not available for NYSE or Nasdaq listings. Level II and III programs allow issuers to list ADRs on a U.S. securities exchange – these programs involve more extensive registration requirements, and issuers with Level II or III ADR programs also become subject to the ongoing periodic reporting requirements of a listed company under the Exchange Act.

6. Conclusion

The introduction of a new concessionary route for secondary listing in Hong Kong reflects HKEx's determination to attract large emerging and innovative companies primary listed in the U.S. or the U.K., in particular Chinese tech giants such as Alibaba, to have their secondary listing in Hong Kong.

For companies listed in Hong Kong, they may consider achieving dual listing status by seeking secondary listing in Singapore or the United States, both being very popular venues for secondary listing – for example, Hong Kong listed companies such as Alibaba Pictures Group Ltd, Courage Investment Ltd and Shangri-La Asia Ltd all have successful secondary listings on the SGX, and there are about 300 Chinese companies whose securities are traded in the United States, either as ADRs or as equity securities.

Notwithstanding a generally higher valuation for public offerings in the PRC, in view of the lack of approved CDR applications, whether Shanghai will become another popular venue for secondary listing remains to be seen.

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6 A "foreign private issuer" is any foreign company, *other than* a company with (a) more than 50% of its outstanding voting securities directly or indirectly held of record by residents of the United States; and (b) any of the following: (i) the majority of its executive officers or directors are U.S. citizens or residents; (ii) more than 50% of its assets are located in the United States; or (iii) its business is administered principally in the United States. This definition is found in Rule 405 under the Securities Act and Rule 3b-4(c) under the Exchange Act.

7 A foreign private issuer that had less than US$1.07 billion in revenue in its last fiscal year and meets certain other requirements set out in Section 2(a)(19) of the Securities Act qualifies as an "emerging growth company" and may be eligible to present only two years of audited financial statement information in connection with its listing in the U.S.

CHAPTER 9

Tax Considerations in an IPO

Tax is one of the key aspects that should be considered when planning to go for an initial public offering (IPO). To minimise tax costs and avoid prolonged enquiries from the Stock Exchange of Hong Kong (SEHK), careful tax planning should be conducted in the IPO planning process. In this Chapter, we will focus on discussing various Hong Kong (HK) and the People's Republic of China (PRC) tax and transfer pricing (TP) considerations during the following pre-IPO processes that may help you navigate through the various issues associated with the IPO:

- Pre-IPO group reorganisation; and
- Pre-IPO tax and TP review.

1. Pre-IPO Group Reorganisation

A typical IPO exercise would have to go through a pre-IPO group reorganisation where existing group entities to be included in the listing group will be put under a listing vehicle. Special attention should be given to the tax considerations in planning for a tax efficient and sustainable holding structure.

a) Holding Structure Planning

It is not uncommon for listed groups to use overseas companies (e.g. companies incorporated in the British Virgin Islands (BVI) or Cayman Islands) as the intermediate holding companies to hold the operating companies. The following areas should be considered in reviewing the holding structure:

- ***Profit repatriation***

  Profits are generally repatriated via dividend payouts. While HK does not tax foreign sourced dividend or impose withholding tax on dividend, many countries do impose taxes thereon. For multinational enterprises (MNEs), a tax efficient dividend repatriation flow could potentially be achieved by interposing an intermediate holding company in a jurisdiction having a favourable tax treaty which offers preferential dividend withholding tax rate with the jurisdiction in which the operating company operates.

  However, it is important to note that some countries such as the PRC has stringent beneficial ownership (BO) test such that

the reduced dividend withholding tax rate may not apply if the intermediate holding company is a mere conduit. Listed groups may be able to enjoy the safe harbor rule under the State Taxation Administration (STA) Public Notice [2018] No.9 whereby the immediate holding company of a PRC company can be directly recognised as BO without going through the BO test if it is directly or indirectly held by a listed company located in the same tax jurisdiction as the immediate holding company. Moreover, there are often practical conditions that need to be satisfied when applying for a certificate of tax resident or equivalent in each jurisdiction (e.g. HK) in order to enjoy the treaty benefit.

- ***Future divestment***

  It is very common that BVI companies are used as the listing vehicle and/or intermediate holding companies as this could be tax efficient in terms of future divestment. In particular, there is no stamp duty payable on the transfer of shares in BVI companies as long as their share registers are not maintained in HK. This is opposed to the transfer of shares in HK companies which will attract stamp duty. However, the use of BVI companies or other overseas companies set up in no or nominal tax jurisdictions should be carefully planned and considered in view of the possible substance requirements as explained below.

- ***Substance requirements***

  As one of the Base Erosion and Profits Shifting (BEPS) initiatives, the Organisation of Economic Co-operation and Development (OECD) has requested no or nominal tax jurisdictions to impose economic substance requirements in order not to be considered as harmful tax practices. Some jurisdictions, such as the BVI and Cayman Islands, have already introduced economic substance laws in their domestic legislation. While the economic substance law in different jurisdiction may vary, in general, an entity incorporated in such jurisdiction will need to meet certain substance requirements (e.g. having physical offices and hiring local directors/employees, etc.) if it is carrying on a relevant activity there, unless it is a tax resident of another jurisdiction. It is therefore important to evaluate the impact of the econominc substance requirements on the holding structure if it involves companies set up in the low or no tax jurisdictions.

b) Tax and TP Considerations

Usually, group reorganisation involves the transfer of entities from the existing group to the IPO structure and may trigger tax liabilities. The reorganisation step plan should be reviewed from a tax perspective with a view to mitigating any potential tax costs before implementation. In addition, cross-border related party transactions (RPTs) and value chain planning should be cautiously strategised at the same time.

- ***HK stamp duty***

  The transfer of shares of HK companies from the existing owner(s) to or away from the listing vehicle will attract stamp duty at 0.2% on the greater of the actual consideration or fair market value (FMV) of the shares transferred. The stamp duty is shared equally between the buyer and the seller at 0.1% each.

  Group stamp duty relief may be available for the transfer of shares from one associated body corporate to another if certain conditions are satisfied. "Associated" refers to: (i) one is the BO of at least 90% of the issued share capital of the other; or (ii) a third body corporate is the BO of at least 90% of the issued share capital of each. In addition, the transferor and transferee must not cease to be "associated" within two years after the transfer by reason of a change in the percentage of the issued share capital of the transferee in the BO of the transferor or a third body corporate. Otherwise, the exemption will be revoked. Since at least 25% of the shares in the listing company have to be offered to the public under the existing listing rules in HK, the group stamp duty relief may not apply for direct transfer of HK companies to the listing vehicle.

- ***Capital gains tax***

  There is no capital gains tax in HK. Where a HK company disposes of its shares in a company and it can be established that the shares were acquired and had been held for long-term investment purposes, the gain on disposal should not give rise to any HK tax liabilities. Moreover, HK adopts a territorial basis of taxation whereby only income that is arising in or derived from HK will be subject to profits tax. If it can be established that the disposal gain is offshore sourced, such gain should also not be subject to profits tax.

  In the PRC, direct transfer of equity interest of a PRC company by a non-resident company would trigger 10% capital gains tax under the Enterprise Income Tax (EIT) regulations. If the transferor is a foreign or PRC individual, the gain would be subject to Individual Income Tax (IIT) at 20%, unless capital gains tax exemption is available to the foreign individual under the relevant tax treaty.

  For determining the PRC tax liabilities, FMV of the entity being transferred should be used. The PRC tax authorities may require the taxpayer to provide a valuation report prepared by certified PRC valuation company to justify the transfer value of the PRC entity. If the equity transfer is effected at cost or net book value which is substantially lower than the FMV, it may be challenged by the PRC tax authorities in lieu of a reasonable explanation. It is therefore crucial to formulate the right strategy in the discussion and negotiation with the PRC tax authorities in order to minimise any potential EIT exposure to the extent possible.

- ***Indirect transfer tax***

  Under the STA Public Notice [2015] No.7 (Notice 7), if a transaction that involves indirect equity transfer of PRC entities is regarded as one without reasonable commercial purpose, the PRC tax authorities may invoke the general anti-avoidance rules and apply the "substance over form" principle to disregard the overseas target and intermediate holding companies and tax the transaction as if it was a direct transfer. If this is the case, the 10% capital gains tax may apply unless a preferential treatment under an applicable treaty applies.

  Under the new PRC IIT Law effective from 1 January 2019, the anti-avoidance rules are first introduced to enable the PRC tax authorities to tackle transactions undertaken by individuals involving indirect equity transfer of PRC entities. Going forward, the PRC tax authorities may impose IIT of 20% on the capital gains derived by non-PRC tax residents from indirect transfer of PRC entities by reference to the general anti-avoidance rules.

  If the reorganisation involves indirect transfer of shares in overseas companies, in particular those real estate rich companies, there might be tax implications in the overseas jurisdiction which should also be considered.

- ***Special tax treatment for corporate restructuring***

  Some direct equity transfer of PRC entities under internal group reorganisation can actually be structured in a more tax efficient manner by applying the special reorganisation rules under Caishui [2009] No.59 (Circular 59) and other relevant PRC tax regulations. Under Circular 59, the transferor is allowed to elect special tax treatment (STT) for corporate restructuring to defer the capital gains tax from the equity transfer provided the prescribed criteria are satisfied. Some of the requirements include meeting the minimum equity acquisition

percentage (i.e. not less than 50% of the total equity of the PRC entity acquired) and minimum equity consideration at not less than 85% of the total consideration.

The PRC tax authorities are generally supportive towards internal reorganisation amongst PRC entities by allowing the transferor to adopt STT for tax deferral. For cross-border corporate restructuring, the PRC tax authorities are more stringent and usually require the non-resident transferor to satisfy additional criteria in order to be qualified for STT.

It is worth noting that STT is not automatically granted. The transferor is required to file to the in-charge tax bureau of the PRC entity being transferred within 30 days upon conclusion of the sale and purchase agreement and completion of the change of shareholder application with the local Administration of Industry and Commerce for the direct equity transfer.

- ***Cross-border value-chain planning***

  The OECD's BEPS initiative prevents MNEs from using tax planning strategies to exploit gaps and mismatches for tax avoidance purposes. Different tax jurisdictions, including HK and the PRC, have joined the OECD/G20 BEPS Framework to further strengthen their TP legislations frameworks in response to the BEPS initiative. Such initiatives assure that TP outcomes on profits generated from intercompany transactions are in-line with value creation of MNEs, specifically, by adopting and applying proper TP methods within the context of the cross-border value chain. During the pre-IPO reorganisation process, cross-border value chain planning is an important step for MNEs as they restructure and re-strategise their business operations and transaction flows. Against the BEPS initiative and TP legislation, these MNEs should carefully identify the value created within the group so as to structure their cross-border transactions in accordance with the TP legislation.

  During the pre-IPO reorganisation exercise, MNEs are required to support their TP policies with a more granular review of functions, risks, and assets in their intercompany transactions. Such detailed TP analysis is necessary to substantiate that all RPTs within the value-chain follow the TP rules and arm's length principle. In the post-BEPS environment, it is of particular importance when the cross-border value-chain analysis involves the transfer or license of valuable intellectual properties. Thus, proper TP analysis should be performed before an IPO structure is put into place to avoid challenges from tax authorities.

2. Pre-IPO Tax and TP Review

SEHK often scrutinises if the listing group of companies have any potential tax exposures from non-compliance and requests for disclosure of the tax risk in the prospectus. In addition, the Reporting Accountant would need to consider the Hong Kong (IFRIC) Interpretation 23 – Uncertainty over Income Tax Treatments (HK(IFRIC)-Int 23) which becomes effective on 1 January 2019 when assessing the adequacy of tax provision. HK(IFRIC)-Int 23 requires an entity, in determining the amount of taxable profit or loss, to make an assessment on whether it is probable a taxation authority will accept an uncertain tax treatment and disclose the potential effect. As such, a tax and TP health check review for the track record period would need to be conducted pre-IPO. For any tax/TP issues identified in the review, thorough discussions should be made with tax advisors to come up with the appropriate remedial measures to ensure the IPO application goes smoothly without prolonged debates with the regulatory authorities. The following are the common issues that are identified during a pre-IPO tax review:

a) HK Tax Considerations

- ***Outstanding/Potential disputes with the Inland Revenue Department (IRD)***

  Under HK's territorial basis of taxation, one of the common disputes with the IRD would be the validity of offshore claims. If any company under the listing group has lodged an offshore non-taxable claim which is under the IRD review, it would be necessary to review whether there are technical grounds and sufficient documents to support the claim and the likelihood of success of the claim. Similarly, where there are controversial tax treatments adopted (e.g. capital gains claim) or prolonged tax disputes with or tax investigation undertaken by the IRD, a thorough review of the tax impact and possible remedial actions to be undertaken should be conducted.

- ***Prior year adjustments (PYAs)***

  During the IPO process, the Reporting Accountant may identify certain errors in the listing group's accounts for the track record period such that PYAs would need to be made to the statutory audited accounts of the relevant HK companies. In such a case, it is necessary to assess whether there are any profits tax implications arising from these PYAs and take corrective actions accordingly. If there are tax undercharged in prior years (and hence potential penalty) for the HK companies due to the PYAs, it is recommended to voluntary inform the IRD and file revised tax computations as soon as possible in order to mitigate any potential penalty exposure.

b) PRC Tax Considerations

MNEs with substantial operations in the PRC very often rely on local practices of the in-charge tax bureau in filing their PRC taxes. It is not uncommon for the local tax bureau and the STA to share different views and technical positions on some of the PRC tax issues, especially those which are not clearly specified or elaborated in the relevant PRC tax regulations, resulting in uncertain tax positions that applicants may find it difficult to address. Examples of such are as follows:

- ***Carving out of PRC assets***

  In some cases, the listing group may need to carve out some of the assets located in the PRC before going for IPO. If land property is to be disposed directly (or indirectly through disposing the shares of an overseas company which holds the land), this will trigger certain PRC taxes including EIT, land appreciation tax and value added tax giving rise to heavy tax burden. It may be necessary to explore with the local tax bureau if any preferential policy or financial subsidy is available to help alleviate the tax burden of the taxpayer from such land transfer. Otherwise, sufficient tax provision should be made in respect of the asset disposal.

- ***Preferential tax rate***

  In the PRC, preferential EIT rate of 15% is offered to companies certified as High and New Technology Enterprises (HNTEs) and those incorporated in the Western China region to carry out business operation of encouraged investment projects. Very often, the local management of the PRC entities would consider that so long as the entity is granted with the HNTE certificate, it should be able to enjoy the reduced EIT rate of 15% without any reasonable doubt. This may not be true as the HNTE status can be revoked if the entity concerned is eventually found not being able to satisfy the prescribed criteria for the HNTE status. For entities located in the Western China region which are enjoying the preferential EIT rate of 15%, if any of their profits are generated from operations carried out outside the region, such profits should be taxed at the normal EIT rate of 25%.

- ***Permanent establishment (PE)***

  HK companies with employees working in the PRC and substantial PRC operations may potentially have PE issues and PRC tax exposure. It could be challenging to settle the

PRC EIT and IIT liabilities arising from the PE with the PRC tax authorities prior to the IPO application and assistance from tax advisors would often be necessary in formulating the right strategy.

- ***Social insurance and IIT***

  The local management teams of the PRC entities generally rely on local practices in handling the social insurance contribution and IIT filing of the local staff. There would be potential tax risk if the local practices are not consistent with the underlying PRC tax regulations which may need to be accounted for in the tax provisions.

c) TP Considerations

During the pre-IPO stage, TP review usually focuses on pre-existing pricing policies for the RPTs, especially for cross border RPTs, to ensure that they are in accordance with TP rules and the arm's length principle. SEHK has been placing emphasis on TP compliance and requires IPO applicants to provide qualitative and quantitative analyses to support the claim of TP compliance. Therefore, proper TP documentation should be put in place to support the pre-existing intercompany pricing policies and to comply with the TP documentation requirements in the relevant tax jurisdictions.

The following are some examples of TP issues encountered during the pre-IPO TP review:

- ***Low profit margin for manufacturers***

  In some typical structure, a PRC company acts as a manufacturer and sells all finished products to an overseas trading principal. All distribution, sales and marketing activities are claimed to be carried out by the principal as end customers are located outside the PRC, but are in fact carried out by employees of the manufacturer in the PRC. It is not uncommon that the PRC manufacturer earns a very low-profit margin, is in a break-even position or even makes losses, where the majority of the group's profit is received by the overseas principal. The common TP issue challenged by the PRC tax authority is due to insufficient profit or losses associated with the manufacturing activities of the Chinese manufacturer.

- ***Non-arm's length intra-group service fee***

  It is often that intra-group service fees are charged between MNE group companies in different tax jurisdictions. Such service fees might not withstand TP scrutiny since the business activities and service functions rendered by the service provider simply do not comply with the TP legislation and the arm's length principle.

Where improper intercompany pricing arrangements among group companies are found, MNEs need to take action to rectify the non-compliant TP policies. The rectification process could be challenging because such rectification may have financial statement impact if PYAs were to be made to the statutory audited accounts. This is of particular importance when HK(IFRIC)-Int 23 takes effect in 2019 as MNEs must consider how to account for and disclose such uncertain TP positions.

Apart from the potential HK/PRC tax and TP considerations, MNEs having entities or operations in other overseas jurisdications should also consider the potential overseas tax implications. In view of the many complications involved, listing groups are highly recommended to consult with their tax advisors at the early stage of the IPO process so as to allow time for proper IPO tax and TP planning and reviews.

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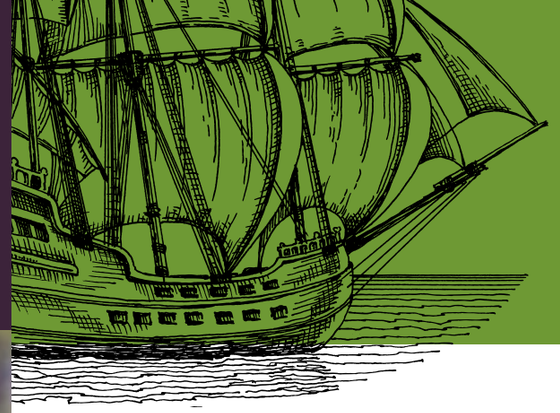

CHAPTER 10

Choosing Your Offshore Listing Vehicle – Key Factors to Consider

The offshore world is used extensively for corporate finance activities. In particular, companies in the Cayman Islands and Bermuda comprise more than 70% of all listed companies on the Hong Kong Stock Exchange ("HKSE"), almost all of which maintain a vast number of British Virgin Islands ("BVI") companies as part of the group. Since December 2009, the HKSE has allowed companies incorporated in the BVI to list on the HKSE. The HKSE's decision to accept BVI companies for listing in Hong Kong raises BVI's standing in the international investment community.

On other major international stock exchanges, Bermudan companies make up a majority of the listed offshore entities on the New York Stock Exchange, NASDAQ and the Singapore Stock Exchange. Overall, it has been observed that Cayman, BVI and Bermuda entities from Asia are increasingly appearing on New York Stock Exchange and NASDAQ. A significant proportion of Fortune 100 and FTSE 100 companies have also undertaken transactions in these offshore financial centres.

By far, Cayman, Bermuda and to a much lesser extent, BVI are the most popular listing vehicles in a Hong Kong listing. Certain salient features of Cayman, Bermuda and BVI companies could have an impact on a pre-IPO reorganisation and the listing process as well as post-IPO corporate finance transactions, such as securities offering and capital restructuring. This chapter will highlight such features in a Hong Kong listing context which would be key factors influencing the choice of domicile of an offshore listing vehicle.

1. Cayman Islands exempted companies

1.1 Prospectus filing

There is no prospectus filing requirement in the Cayman Islands for Cayman companies when making public offers unless the company constitutes a mutual fund under the Mutual Funds Law (as revised) of Cayman Islands, nor are there any Cayman governmental approval requirements for issuance and/or transfer of securities in Cayman companies. The Companies Law (as revised) of the Cayman Islands (the "Cayman Companies Law") provides that an exempted company that is not listed on the Cayman Islands Stock Exchange is prohibited from making any invitation to the public

in Cayman to subscribe for any of its securities, although this is unlikely to be applicable for a Hong Kong listing.

1.2 Taxation

At the time of writing, there is no taxation on profits, income or dividends, nor is there any capital gains tax, corporation tax, or taxes in the form of withholding, estate duty or inheritance tax under Cayman Islands law.

An exempted company may apply to the Governor of the Cayman Islands for a written undertaking that, should taxes ever be introduced into the Cayman Islands, the company will remain tax-free for a period of up to 30 years from the date of the undertaking. This undertaking is normally granted for up to 20 years, in the first instance, and may provide that in addition to the exemption from capital gains, profits and income taxes, no tax in the nature of estate duty or inheritance tax shall be payable on, or in respect of, shares, debentures or other obligations of the company.

1.3 Share Premium

Dividends may be paid out of the share premium account of a company, but may not be paid out of a company's capital. Where the intention is to provide the flexibility to pay dividends out of share premium, the articles should contain a provision which permits this. No dividend may be paid to the shareholders out of a company's share premium account unless the distributing company will be able to pay its debts as they fall due in the ordinary course of business immediately following the date on which the dividend is proposed to be paid.

1.4 Directors' interests

There are no Cayman statutory provisions regulating directors' interests. Directors will need to comply with their common law fiduciary duties and also any regulations in the articles of association.

1.5 Disposal of assets

There are no Cayman statutory provisions regulating disposal of assets. The articles of association may contain provisions regulating or restricting disposal of assets, for example requiring shareholders' approval.

1.6 Financial assistance

No Cayman statutory provisions exist prohibiting the grant of financial assistance to a person who acquires shares in a Cayman company. The common law rules will continue to apply, and a decision by the company's directors to provide such assistance must be made in good faith, for a proper purpose and in the interests of the company. The terms of such assistance should be on an arm's length basis.

1.7 Capital reduction

Unlike a Bermuda company where a capital reduction can be effected without a court process by a shareholder resolution passed at a general meeting subject to the passing of the relevant solvency test, the Cayman Companies Law requires all capital reductions of Cayman companies to be approved by the Cayman courts.

Subject to confirmation by order of the Grand Court of the Cayman Islands, a company may, if its articles so provide, reduce by special resolution its issued share capital in any way, including by extinguishing or reducing the liability on any of its partly-paid shares, cancelling any paid-up share capital which is lost or unrepresented by available assets, or paying off any paid-up share capital which is excess of the need of the company. The prescribed procedure for obtaining such an order of the Grand Court seeks to ensure that any creditors are not prejudiced by the capital reduction.

1.8 Economic substance requirements

The International Tax Co-operation (Economic Substance) Law, 2018 of the Cayman Islands ("ES Law") imposes certain economic substance requirements on a "relevant entity" as defined in the ES Law. Provided that a company's business is centrally managed and controlled in a jurisdiction outside the Cayman Islands and is tax resident outside the Cayman Islands, then such company would not be a "relevant entity" and will be outside the scope of ES Law. The Cayman Islands Monetary Authority will require any entity claiming to be tax resident outside the Islands to produce satisfactory evidence to substantiate the same, e.g. a Tax Identification Number, tax residence certificate together with an income tax return, assessment or evidence of payment of a corporate income tax liability.

2. Bermuda exempted companies

2.1 Prospectus filing

Before the amendment of the Companies Act of Bermuda (as amended) (the "Bermuda Companies Act") in 2013, HKSE listed Bermuda companies were required to file a copy of the prospectus with the Bermuda Registrar of Companies when making public offers (for example IPO, rights issue, warrant issue etc.). After the 2013 amendments, HKSE listed Bermuda companies are no longer required to file any prospectus in Bermuda provided that the HKSE has received or otherwise accepted the relevant prospectus, or if the rules of the HKSE do not require the company to publish and file a prospectus at such time or in such circumstances.

2.2 Taxation

There are no taxes on profits, income or dividends, nor is there any capital gains tax, estate duty or death duty in Bermuda. The Bermuda government has enacted legislation under which the Minister is authorised to give an assurance to an exempted company that, in the event of there being enacted in Bermuda any legislation imposing tax computed on profits or income or computed on any capital asset, gain or appreciation, then the imposition of any such tax shall not be applicable to such companies or any of their operations. In addition, there may be included an assurance that any such tax or any tax in the nature of estate duty or inheritance tax, shall not be applicable to the shares, debentures or other obligations of such companies. This assurance may be obtained by exempted companies for a period until 31 March 2035.

2.3 Consents of Bermuda Monetary Authority

A distinct feature of Bermuda companies is that all issuances and transfers of securities in a Bermuda company to non-Bermuda residents require prior approval of the Bermuda Monetary Authority with a few exceptions. Pursuant to Part I, paragraph 1 of the public notice issued by the Bermuda Monetary Authority on 1 June 2005 (the "BMA Notice"), where any equity securities of a Bermuda company are listed on an Appointed Stock Exchange (as defined in the BMA Notice to include the HKSE), general permission is given for the issue and subsequent transfer of any securities of the company from and/or to a non-resident of Bermuda, for as long as any equity securities of the company remain so listed.

2.4 Contributed surplus and share premium

Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to the share premium account. Share premium may be applied by a company, without going through capital reduction procedure, in paying up unissued shares of the company to be issued to shareholders of the company as fully paid bonus shares.

In the case of a share swap (including in the context of a pre-IPO reorganisation), the excess value of the shares acquired over the par value of the shares being issued may be credited to a contributed surplus account of the issuing company. A company may make a distribution out of contributed surplus, if there are no reasonable grounds for believing that: (a) the company is, or would after the payment be, unable to pay its liabilities as they become due; or (b) the realisable value of the company's assets would thereby be less than its liabilities.

2.5 Directors' interests

The Bermuda Companies Act requires directors to disclose at the first opportunity at a meeting of directors or in writing to the directors: (a) their interest in any material contract or proposed material contract with the company or any of its subsidiaries; and (b) their material interest in any person that is a party to a material contract or proposed material contract with the company or any of its subsidiaries. The Bermuda Companies Act also provides that an interest occurring by

reason of the ownership or direct or indirect control of not more than 10% of the capital of a person shall not be deemed material.

2.6 Disposal of assets

There are no Bermuda statutory provisions regulating disposal of assets. The bye-laws may contain provisions regulating or restricting disposal of assets, for example requiring shareholders' approval.

2.7 Financial assistance

The statutory regulations on financial assistance in the Bermuda Companies Act were repealed in 2011. Common law rules (as mentioned above) will continue to apply.

2.8 Capital Reduction

As mentioned above, Bermuda companies are more flexible than Cayman companies in that they are able to effect a capital reduction without court approval.

Depending on the provisions in the listing bye-laws, usually a special resolution will be required to approve a capital reduction. A legal notice in respect of the capital reduction is required to be published in an appointed newspaper in Bermuda at a date not more than 30 days and not less than 15 days before the effective date. The directors should ensure that the statutory solvency test for capital reduction can be satisfied. The company is also required to file a prescribed form of memorandum of reduction of share capital together with the above-mentioned legal notice and a certified true copy of the shareholders' resolution approving the reduction with the Registrar of Companies in Bermuda within 30 days from the effective date of the reduction.

2.9 Economic substance requirements

The Economic Substance Act 2018 (as amended by the Economic Substance Amendment Act 2019) and the Economic Substance Regulations 2018 of Bermuda (together the "ES Law") imposes certain economic substance requirements on a "registered entity" as defined in the ES Law. Provided that a company is resident for tax purposes in a jurisdiction outside of Bermuda which is not on Annex 1 to the EU list of non-cooperative jurisdictions for tax purposes, then such company would be a "non-resident entity" and will be outside the scope of ES Law. Based on the draft guidance notes, the Bermuda Registrar of Companies will require any entity claiming to be tax resident outside Bermuda to produce evidence to demonstrate such foreign tax residency, e.g.: (i) a letter or certificate from, or issued by, the competent authority for the jurisdiction in question stating that the entity is considered to be resident for tax purposes in that jurisdiction; or (ii) an assessment to tax on the entity, a confirmation of self-assessment to tax, a tax demand, evidence of payment of tax, or any other document, issued by the competent authority for the jurisdiction in question.

3. British Virgin Islands Business Companies

3.1 BVI company as a listing entity

BVI companies have been used extensively in private equity transactions and a HKSE listing is now a viable exit option for private equity investors.

The traditional pre-IPO restructuring steps would involve the incorporation of a Cayman/Bermuda listing vehicle ("Cayman/Bermuda Listco") and the reorganisation of the group structure (for example by a share swap) resulting in the Cayman/Bermuda Listco becoming the group holding company, which will then be listed. Where the BVI holding company is already in place, the pre-IPO restructuring and listing process of the BVI holding company can be simplified. Subject to the listing rules of the HKSE, the existing BVI holding company can directly act as the listing vehicle and be listed without going through the traditional pre-IPO restructuring steps. This will minimise any regulatory, bank or contractual approvals which would otherwise be required for a pre-IPO restructuring. However, as the existing BVI holding company may have undertaken various rounds of fund-raising exercises, guidance should be sought on its existing operations, constitutional documents, corporate records and any private equity arrangements. The BVI holding company will also need to amend its memorandum and articles of association to comply with the relevant HKSE listing rules.

3.2 Taxation

A BVI business company is exempt from all provisions of the BVI Income Tax Act (as amended) (including with respect to all dividends, interests, rents, royalties, compensations and other amounts payable by the company to persons who are not resident in the British Virgin Islands). Capital gains realised with respect to any shares, debt obligations or other securities of the company by persons who are not resident in the BVI are also exempt from all provisions of the BVI Income Tax Act (as amended).

3.3 BVI Business Companies and former International Business Companies

The BVI Business Companies Act (the "BC Act") abolished the concept of authorised share capital to accord with company legislation in Commonwealth jurisdictions such as Australia and Canada. Under the BC Act, no minimum share capital is prescribed for a company. A company may issue shares with par value, with no par value or a combination thereof. The company may also issue fractional shares.

Companies which were incorporated under the former International Business Companies Act ("IBCs") were all automatically re-registered under the BC Act on 1 January 2007 unless they had voluntarily re-registered under the BC Act prior to such date. The concept of authorised share capital continues to apply for those IBCs that were automatically re-registered on 1 January 2007, rather than voluntarily re-registering. There is a set of separate grandfathering provisions in the BC Act regulating IBCs' share capital, including surplus and capital reduction provisions. These provisions will continue to apply for these companies until they decide otherwise by adopting a new set of memorandum and articles of association to disapply the grandfathering provisions.

3.4 Share Premium

Without the concept of share capital or capital preservation rules, a company's ability to make distribution is no longer dependent on its level of share capital and/or share premium.

Subject to the memorandum and articles of association, the board of directors can authorise a distribution if they are satisfied, on reasonable grounds, that the company will, immediately after the distribution, satisfy the following solvency test:

(i) the value of the company's assets exceeds its liabilities; and
(ii) the company is able to pay its debts as they fall due.

Please note the position of IBCs on surplus as mentioned above.

3.5 Prospectus filing

There is no prospectus filing requirement in the BVI for BVI companies when making public offers unless the company is a BVI private, professional or public fund, nor are there any BVI governmental approval requirements for issuance and/or transfer of securities in BVI companies, provided that it does not make any offer of securities to the public in the BVI for purchase or subscription.

3.6 Directors' interests

The BC Act requires that a director of a company shall, forthwith after becoming aware of the fact that he is interested in a transaction entered into or to be entered into by the company, disclose the interest to the board of the company. The BC Act further provides that a transaction entered into by a company in respect of which a director is interested is voidable by the company unless the director's interest was: (a) disclosed to the board prior to the company entering into the transaction; or (b) the transaction or proposed transaction is between the director and the company; or (c) the transaction or proposed transaction is or is to be entered into in the ordinary course of the company's business and on usual terms and conditions. However, a transaction entered into by a company in respect of which a director is interested is not voidable by the company if: (a) the material facts of the interest

of the director in the transaction are known by the members entitled to vote at a meeting of members and the transaction is approved or ratified by a resolution of members; or (b) the company received fair value for the transaction.

3.7 Disposal of assets

The BC Act provides that subject to the memorandum or articles of a company, any sale, transfer, lease, exchange or other disposition, other than a mortgage, charge or other encumbrance or the enforcement thereof, of more than 50% in value of the assets of the company, if not made in the usual or regular course of the business carried on by the company, shall be first approved by the directors and then be submitted to the shareholders accompanied by an outline of the disposition for their approval. The articles of association may contain further provisions regulating or restricting disposal of assets.

3.8 Financial assistance

No BVI statutory provisions exist prohibiting the grant of financial assistance to a person who acquires shares in a BVI company. Common law rules (as mentioned above) will continue to apply.

3.9 Capital Reduction

With the abolishment of the concept of share capital, capital reduction becomes a relatively simple process in the BVI. Save as otherwise stated in its memorandum or articles of association, a company may reduce its authorised shares and must inform the Registrar of Corporate Affairs in writing of any such reduction and file an amendment to the memorandum. The reduction is effected by amending the memorandum of association to state the desired maximum number of authorised shares. Please note the position of IBCs on capital reduction as mentioned above.

3.10 Economic substance requirements

The Economic Substance (Companies and Limited Partnerships) Act, 2018 of the British Virgin Islands ("ES Law") imposes certain economic substance requirements on a "legal entity" as defined in the ES Law. Provided that a company is resident for tax purposes in a jurisdiction outside the British Virgin Islands which is not on Annex 1 to the EU list of non-cooperative jurisdictions for tax purposes, then such company would not be a "legal entity" and will be outside the scope of ES Law. Based on the draft Economic Substance Code, the BVI authorities will require any entity claiming to be tax resident outside the British Virgin Islands to produce evidence to demonstrate such foreign tax residency, e.g.: (i) a letter or certificate from, or issued by, the competent authority for the jurisdiction in question stating that the entity is considered to be resident for tax purposes in that jurisdiction; or (ii) an assessment to tax on the entity, a confirmation of self-assessment to tax, a tax demand, evidence of payment of tax, or any other document, issued by the competent authority for the jurisdiction in question.

About Appleby

Appleby is one of the most well-established offshore law firms in Asia with almost 30 years' experience operating in one of the world's most highly regarded, dynamic and vibrant economies.

Our Hong Kong office provides on the ground advice on the laws of Bermuda, Cayman Islands, British Virgin Islands and Jersey, in the areas of Corporate, Dispute Resolution and Private Client & Trusts. We can also facilitate the provision of legal advice in Guernsey, Isle of Man, Mauritius and the Seychelles.

Our Corporate practice advises on a wide range of corporate and commercial transactions, including the establishment of investment funds, equity capital markets and the full range of financing transactions, mergers and acquisitions, cross-border joint venture-arrangements, structured finance and debt capital markets products, banks and financing transactions and technology transactions across a broad range of emerging technologies.

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CHAPTER 11

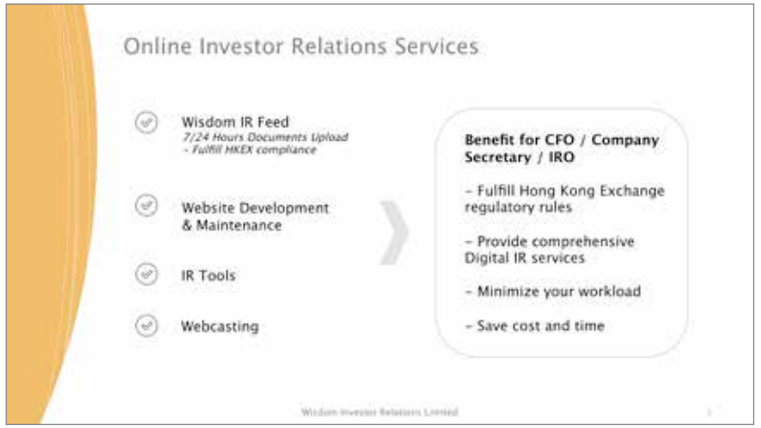
Best Use of an Effective Online Investor Relations Plan for IPO

An Initial public offering (IPO) is the initial point for a listed company to develop investor relations. Good investor relations management can help improve corporate transparency, establish strong corporate images and lay a solid foundation in the capital market for the company. Statistics show that between 2016 and 2018 Hong Kong mostly ranked No.1 in terms of capital raised through IPO. However due to market fluctuations and recent politic issues, it fell to the fourth position in 2019 (as of Jul 2019).

No. of IPOs for HKEx (2017 – 2019)		
2019 (as of Jul 2019)	2018	2017
100	218	174

Source: HKEx

Thanks to technological advancements, it is becoming easier to capture global information as investors around the world can access market information through the Internet. Digital Investor Relations service has become the prevalent trend in the market, especially when such service makes it convenient for more global financial institutions and individual investors to access first-hand corporate information in IPO processes.



To develop a database of investor targeting more effectively, here is a range of solutions which can help increase opportunities to access various types of investors, help the public understand the core business of the company and enhance the company's competitive advantages in the capital market.

Five effective ways to build an investor database

1. **Make good use of digital investor relations service, and extend the reach to global investors**

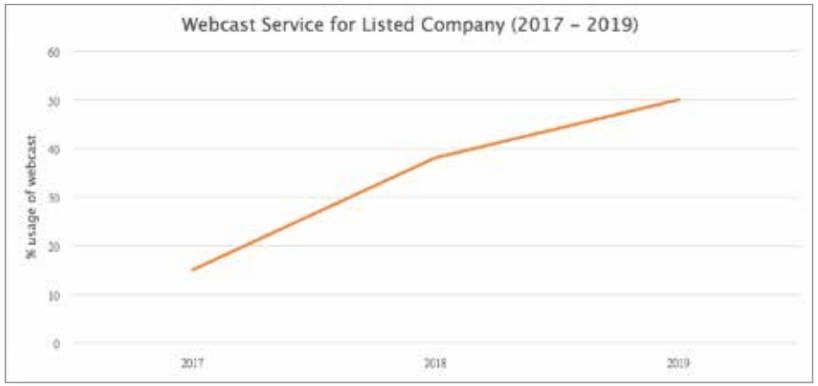
a. Reduce risks by complying with rules of local exchanges;
b. Gain Market exposure and enhance company's visibility and transparency by uploading latest announcements and news to the investor relations page of the company website; and
c. Enhance the corporate image and investors' confidence by publishing key messages about the company in an accurate and timely manner on well-known global media networks

2. Use exclusive webcasts to increase visibility

a. Increase media penetration and visibility through integrated webcast solutions (e.g. IPO Press conference events, online investors day, management interview, shareholders meeting, results announcements);

b. Provide investors with quicker access to first-hand information via live streaming webcasts; and

c. Support program replay and sharing to release key messages to the public, enhance investor confidence and polish the corporate image effectively.



Source: Wisdom IR

3. Create a customised and professional website for IPO

a. Help investors get all the information they need easily through comprehensive digital IR solutions (webpage designing, content management systems, webpage hosting, search engine marketing, e-mail promotion systems);

b. Apply the brand new cloud computing technology to store and retrieve data quickly and reliably;

c. Present the corporate image and convey the company's core business and value for investment by applying innovative design concepts; and

d. Communicate highlights of the company through a clear and concise layout

4. Develop responsive IR website to gain access to investors across geographic boundaries

a. Create a responsive IR website to facilitate the mobile users and deliver a very good user-experiences for investors

b. Update among desktop version, mobile version as well as tablet version of the website simultaneously to stay close to investors and market trends

c. Use fully-responsive solution for best displays on mobile devices

About Wisdom Investor Relations Limited

With over 10 years of rich experienced teammates in Digital Investor Relations, Wisdom Investor Relations Limited (called Wisdom IR) is a leading provider for digital investor relations in Asia, serving more than 150 clients in Hong Kong.

Wisdom IR offers integrated communication solutions all over Asia, which can be used individually or combined effectively in a modular system, as well as helping companies to fulfill mandatory news dissemination and disclosure requirements, develops Investor Relations and corporate websites as well as mobile solutions, produces online financial and as sustainability reports, and executes audio and video webcasts.

Our aim of maximum customer satisfaction is supported by the highest product quality standards as well as a high level of efficiency. The following factors are significant reasons to choose Wisdom IR:

- Rich local and global experience in Digital Investor Relations
- Help public companies attract and retain high net worth investors
- "One-Stop-Shop" integrated philosophy, providing all services for investor communication.
- Efficient project management processes and strict quality management
- We fulfill your mandatory stock exchange listing requirements

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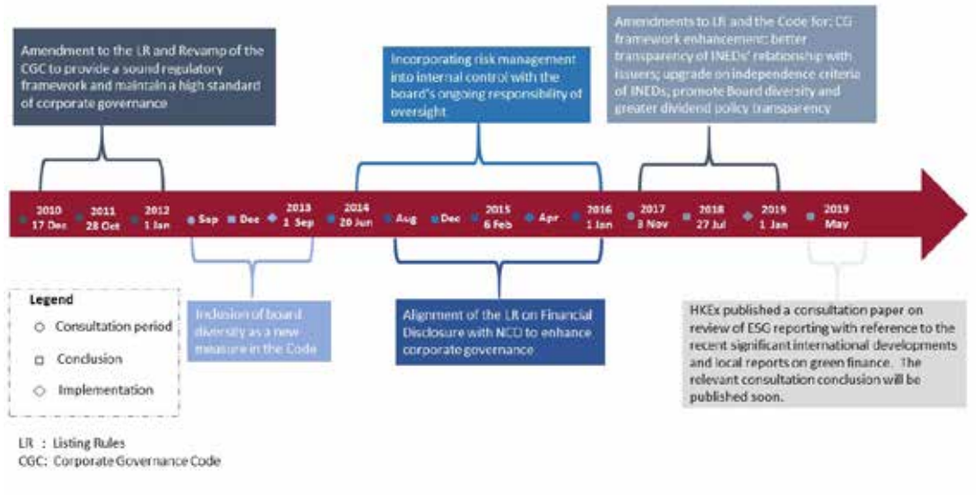
CHAPTER 12

Corporate Governance of a Listed Issuer

Corporate governance is an ongoing and evolving process, even in advanced and developed markets such as the USA, the UK, Australia, corporate governance structures shall be under periodic review and updates. Hong Kong Stock Exchange has been striving to enhance corporate governance standard through placing continued efforts on initiatives in raising the bar on directors' responsibilities, company secretaries' function and requirements, internal control and risk management together with extending disclosure on corporate governance and inside information.



Timeline of corporate governance initiatives by Hong Kong Stock Exchange from 2010 to end of 2019

At present, there is no set of internationally recognized corporate governance framework in the world. One of the famous definitions is from Cadbury Report in which it defines corporate governance as "the system by which companies are directed and controlled". "The boards of directors are responsible for the governance of their companies. The shareholders' role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place," the report stated. The board of directors is entrusted by the shareholders to have a responsibility to oversee the management of the company in day-to-day running of the Company, and is playing a pivotal role in ensuring a right governance structure of the company in place and operation. An effective Board is the center of good governance.

A good corporate governance framework would involve an interplay between: 1) a competent and accountable board; 2) robust internal control and risk management systems; 3) accountable audit systems; and 4) transparent and timely corporate reporting systems.

A Competent And Accountable Board

Board of Directors

The board of a listed issuer (the "Board") is principally responsible for leading, directing and monitoring the listed issuer's affairs to enable its long-term success and setting strategic directions with appropriate focus on value creation and risk management.

The Board in Hong Kong listed issuer comprises executive directors ("EDs"), non-executive directors ("NEDs") and independent non-executive directors ("INEDs"). Under the Listing Rules, a listed issuer is required to have 3 INEDs or INEDs representing at least one-third of the Board. At least one of the INED must have appropriate professional qualification or accounting or related financial management expertise. All INEDs must fulfil the independence requirements set out in the Listing Rules.

EDs, NEDs and INEDs, are subject to the same legal duty under the provisions of the constitution documents of the company, as well as the Companies Ordinance (Cap. 622) ("CO") and the Listing Rules. They own fiduciary duties as directors, act honestly and in good faith and in the interests of the listed issuer and shareholders as a whole and avoid actual and potential conflicts of interests. However, each of EDs, NEDs or INEDs have different roles and functions, and the duties to be discharged by them may potentially be different.

EDs should ensure that the management performs with the delegation of powers from the Board and executes the Board's decisions and is accountable to the Board for their performance, and also be responsible to the shareholders. EDs should listen to, and work closely with NEDs and INEDs, while NEDs and INEDs are required to take an active interest in the listed issuer's affairs and to have a general understanding of the listed issuer's businesses, and to follow up untoward any matter that comes to their attention. In addition, INEDs are expected to bring an independent judgement regarding issues of strategy, policy, performance, accountability, resources, key appointments and standards of conduct and take the lead where potential conflicts of interests arise. When connected transactions require shareholders' approval, INEDs have to form an independent Board committee to opine and make recommendations to the independent shareholders on the proposed transactions and to perform any review if the connected transactions are continuing nature namely continuing connected transactions. INEDs shall meet with independent auditors to have a private dialogue on audit performances and issues each year. They shall also have an executive session with the board chairman annually to express their views and concerns without management presence.

The collective and individual responsibilities of directors for compliance is a cornerstone of the corporate governance regime and is clearly set out in the Listing Rules. Directors are expected to fulfill fiduciary duties and duties of skill, care and diligence to such a standard at least commensurate with the objective and subjective standards defined by CO.

> ***Practical tips*:**
>
> *In 2017, Securities and Futures Commission ("SFC") issued a guidance note[1] on directors' duties on valuations on corporate transactions to remind the directors to ensure acquisition targets are properly considered and investigated so as to safeguard the company's assets. Directors should carry out proper investigating and independent due diligence regarding the assets or the target company. They should not accept blindly and unquestioningly any financial forecasts, assumptions or business plans provided to them, typically from the vendor or the management of the target company.*

Board Committees

In order to ensure the effective discharge of its functions and responsibilities, the Board may appoint and delegate certain areas for deliberation of Board committees, all of which operate within defined terms of reference. The Board committees may decide and report to the Board on delegated matters or make recommendations to the Board for final decision. Under the Listing Rules and Corporate Governance Code of the Listing Rules ("CG Code"), the Audit Committee, Nomination Committee and Remuneration Committee are required to be set up with the specific composition[2]. For listed issuers with weighted voting rights structure, they are also required to establish a corporate governance committee[3]. Listed issuers may establish other Board committees according to their business needs.

To enhance the corporate governance and to maintain an effective board, a listed issuer shall establish the following Board committees as under Listing Rules:

Audit committee

The duties and responsibilities of the Audit Committee include, among others:

- make recommendations to the Board on the appointment, re-appointment and removal of the external auditors and assess their independence, performance and fee levels;
- review the completeness, accuracy and fairness of the Company's interim and annual financial statements and reports;
- ensure compliance with the applicable accounting standards and legal and regulatory requirements on financial reporting and disclosures;
- review the arrangements for the Company's employees to raise concerns about financial reporting and any other improprieties; and
- ensure ongoing assessments of the group's risk management and the internal control systems over financial, operational, compliance and risk management processes.

Nomination Committee

The duties and responsibilities of the Nomination Committee include, among others:

- reviewing the structure, size, diversity and composition of the Board;
- assessing the independence of INEDs and reviewing the INEDs' annual confirmation on their independence having regard to relevant guidelines or the requirements of the Listing Rules in place from time to time and, if a proposed Director will be holding their seventh (or more) listed company directorship, his/her ability to devote sufficient time to Board matters;
- developing, reviewing and implementing, as appropriate, the nomination policy concerning

1 SFC Guidance note on directors' duties in the context of valuations in corporate transactions, 15 May 2017
2 HKEx Mainboard LR 3.21 Audit Committee, LR 3.25 Remuneration Committee, Appendix 14, A.5.1 Nomination Committee
3 HKEx Mainboard LR 8A.31

the selection criteria and procedures for the appointment and reappointment of Directors;

- identifying individuals suitably qualified to become Board members and making recommendations on any proposed changes to the Board and Board committees to complement the company's corporate strategy, and assisting in annual Board evaluation;
- reviewing annually the time commitment required of a Director to perform his/her responsibilities, and whether he/she is committed adequate time to discharge their responsibilities; and
- determining and reviewing the Board diversity policy of the company from time to time

Remuneration Committee

The duties and responsibilities of the Remuneration Committee include, among others:

- recommending on the establishment of a formal and transparent procedure for developing a remuneration policy;
- reviewing and recommending to the Board on the remuneration packages of individual directors and senior management;
- either:
  - (i) determining, with delegated responsibility, the remuneration packages of individual directors and senior management; or
  - (ii) recommending to the board on the remuneration packages of individual directors and senior management.

***Practical tips*:**

An issuer with WVR structures is to be prominently identified through a unique stock marker "W" at the end of their stock name.

An issuer with a WVR structure must have the proper set up of a governance structure which should consist of, in principle, a Corporate Governance Committee comprised entirely of INEDs (one of whom must act as chairman) to review, monitor and report on compliance issues. The Corporate Governance Report must include a summary of the work of the Corporate Governance Committee for the accounting period covered by both the half-yearly and annual reports and disclose any significant events for the period up to the date of publication of the reports. In addition, the issuer must establish a nomination committee chaired by INEDs who must be subject to retirement by rotation at least once every three years but eligible for re-appointment at the end of the three years term.

There are a number of governance issues highlighted by Hong Kong Stock Exchange in the Listing Rules and/or Corporate Governance Code:

Chairman and Chief Executive

To ensure a clear division of responsibilities between the Board and the management, the CG Code requires that the roles of each of Chairman and Chief Executive is separate and not performed by the same individual. The Chairman is responsible for, among others, providing leadership for and overseeing the running of the Board. He/ She should ensure that the Board works effectively and performs its responsibilities and that all key and appropriate issues are discussed by the Board in a timely manner. The role of the Chief Executive is to manage the day-to-day business operations of the listed issuer and to ensure to deliver the tasks according to the objectives, strategies and plans set by the Board within the scope of their delegated authority limit.

To promote good corporate governance, the Board should delegates its authority to the senior management of the company to implementing the policies and strategies set by the Board.

Rules of procedures of the Board and its Committees

The CG Code sets out that the Board should meet physically on a quarterly basis and appropriate quarterly board meetings as well as annual general meetings should be scheduled well in advance to enable the directors' participation. Notices of meetings should be sent to the directors at least 14 days prior to the meetings while all notices and meeting materials should be sent to the directors at least 3 days prior to the meetings so as to allow the directors to review the Board papers and to request for further explanation or clarification to facilitate the decision-making process and the meaningful discharge of their duties. Listed issuers should facilitate directors' participation of the Board meeting through telephone, video conference or any other form of communications. Unless otherwise specified, all Board Committees shall also adhere to the rules of procedures of the Board.

All important discussions and decisions of the Board and the Board committees must be recorded in the minutes of the meeting or in other appropriate format where no meeting is held.

***Practical tips*:**

Monthly management updates required under the CG Code[4] are important to the Board members, in particular to the NEDs and INEDs. The Chief Executive should ensure that the materials and information in the monthly management updates have included all significant changes and issues since the last report, in order to provide an overview of the current situation of the company to the Board members.

4 HKEx Mainboard Listing Rules Appendix 14, C.1.2

Board Diversity

A high performance Board is one that composes directors with the combination of competencies and diversity of perspectives aligning with the listed issuer's strategy and objectives. The diversity of the Board is also an important factor for the investors when making their decisions.

When nominating a new director, the Board should consider the skills, experience and diversity, and the potential contributions of the nominee as recommended by the nomination committee. The consideration and rationale of the Board should be explained clearly in the circular to shareholders accompanying the resolutions to elect the directors.

In assessing the current mix of competencies and diversity of the Board and to identify if there are any deficiencies, the listed issuer shall use a "Board skills matrix" which would typically including but not limited to the balance of skills, background, experience, knowledge, expertise, culture, independence, race, gender, and other qualities as appropriate to the requirements of the company's business, etc.

Board Evaluation

A regular performance evaluation of the Board to be conducted by the Nomination Committee would help to maintain and improve the effectiveness of the Board. The evaluation should include evaluations of (i) the effectiveness of the Board as a whole; (ii) the Board committees; and (iii) the contribution of each director. The evaluation may include the structure, diversity, balance mix of skills, contribution and performance, integrity and other qualities including core competencies, etc which the directors should bring to the Board.

Directors' trainings

All directors should attend trainings, both internal and external for their continuous professional development as required under the Listing Rules.

- for all newly appointed directors, induction training is essential to provide a proper

understanding of the company's operation and business at the outset and enable the director to be fully aware of their responsibilities under applicable law or regulation.

- all directors of the listed issuers should participate in professional training to develop and refresh their knowledge and skills throughout their term of office as a director of the company.

This is to ensure that the directors will have adequate knowledge to perform their duties and continue to contribute to the Board. The issuer should be responsible for arranging and funding of suitable training for their directors, site visits to front line operations should also be considered alongside training arrangements for the directors.

Company Secretaries

Hong Kong Stock Exchange recognizes that the Company Secretary plays an important and vital role in supporting the Board by ensuring good information flow between the Board members. The Company Secretary will advise and update the policy and procedures of the Board from time to time, and to advise the Chairman of the Board on governance matters and arrange for induction of the new directors as well as the continuing development for all directors. Company Secretaries report directly to the Board and their appointments shall be approved by the Board of Directors in a physical meeting. Every listed company in Hong Kong shall have a qualified company secretary with appropriate qualifications and participate in at least 15 hours of professional training every year.

Robust internal control and risk management systems

The CG Code recognises that risk identification and management is the Board's responsibilities. The Board should deal with internal control issues including the company's risk appetite, risk and return trade-offs, risk management and internal control systems, and to lead in shaping and developing risk culture.

In discharging the Board's duties, the Board may, through Audit Committee, review the adequacy and effectiveness of the listed group's risk management framework to ensure robust risk management and internal control systems are in place while management should provide confirmation on the effectiveness of the risk management and internal control systems to the Board/ Audit Committee. The CEO or senior management should maintain detailed risk registers which are reviewed and updated regularly. Reports on risk profiles of the listed group and the status of progress towards mitigating the key risks areas should be reviewed and deliberated by the Audit Committee at its regular meeting, before tabling to the Board for consideration.

Most listed issues adopt "Three Lines of Defense" model as its group's risk governance structure, with oversight and directions from the Board, Audit Committee and management. The management and individual divisions/departments are responsible for the day-to-day management of operational risks and implementation of mitigation measures. All division heads are required to confirm annually that the risk management and internal control systems adopted by the issuers are appropriate and effective.

Whistleblowing Policy

The listed issuer should operate a whistleblowing policy which enables employees to raise concerns about any malpractice, impropriety or fraud relating to internal controls and other matters confidentially, and anonymously to the designated officer(s) or if they so wish, directly to the chairman of the Audit Committee, without fear of reprisal or victimization, and encouraging reporting on serious concern about malpractice.

Under the whistleblowing policy, the Audit Committee are responsible for reviewing the effectiveness of the actions taken in response to the reports made under the policy by employees of the listed issuer and its subsidiaries. In addition to the internal reporting procedures available under the group whistleblowing policy, the listed issuer should also have in place arrangements for external parties, including investors, suppliers, vendors and other third parties, to raise their concerns in confidence via the designated channels.

> ***Practical tips*:**
>
> *Nowadays, IT applications are very important for the Company to have controls and reviews of business operations as well as financial information. It also provides the foundation for reliance on data, controls, business process and reports, in order to uphold the integrity, reliability, availability, security and stability of the group's financial information.*

Accountable audit systems

External Auditors

The function of an effective audit by an external auditor (the "Auditors") is to provide the Board and the shareholders of the listed issuer an objective assurance on whether the financial statements of the listed issuer give a true and fair view of the financial position and performance of the listed issuer in all material respects.

The Board, through the Audit Committee, considers the recommendations of the Auditors on the operational and financial risks identified during their annual audit of the listed issuer.

The Auditors also provides other non-audit services to the listed issuer for the purpose of other reporting requirements of Hong Kong Stock Exchange throughout the financial reporting year. The independence of Auditors is essential to the provision of an objective opinion on the truth and fairness of the financial statements. As such, the Audit Committee is mandated to ensure continuing objectivity and independence of the Auditors.

Auditors' Independence

The independence of the Auditors is of critical importance to the listed issuer and their shareholders. The Auditors shall confirm their independence annually to the Audit Committee and confirm that they are not aware of any matters which may reasonably affect their independence.

The Audit Committee assesses the independence of the Auditors by considering and discussing each matter of their concern (and having regard to the fees payable to the Auditors for audit and non-audit work and the nature of the non-audit work) at the meeting of the Audit Committee.

> ***Practical tips*:**
>
> *It should also be noted that a retiring auditor who had provided services to a listed issuer cannot be appointed as its INED within 2 years of retirement.*

Provision of Non-audit Services

In deciding whether the Auditors should provide non-audit services to the company, the following key principles are considered:

- the Auditors should not audit their own work;
- the Auditors should not make management decisions;
- the Auditors' independence should not be impaired; and
- quality of service.

In addition, any services which may be considered to be in conflict with the role of the Auditors should be submitted to the Audit Committee for approval prior to engagement, regardless of the amounts involved.

The role of Audit Committee and the Auditors

The Audit Committee acts as a point of contact, independent from management, with the Auditors. The Auditors of the listed issuer, should have direct access to the Chairman of the Audit Committee, who meets with them without the presence of management every year. In case of continuing connected transactions, the Auditors must provide an annual confirmation to the Board and to submit a confirmation letter from the Auditors to Hong Kong Stock Exchange at least 10 business days before the bulk printing of its annual report.

The Audit Committee is mandated to monitor the independence of the Auditors to ensure true

objectivity in the financial statements, to review its statutory audit scope and non-audit services, and to approve its fees. The fees paid to the Auditors for audit and non-audit services rendered are fully disclosed in the annual reports.

Transparent and timely corporate reporting systems

Mainboard listed companies are required to publish interim and annual results announcements and reports every year. Since the enactment on inside information under amended SFO in 2013, the listed companies shall timely disclose inside information (previously price sensitive information under the Listing Rules) by way of announcements. It was seen more often than before on the number of announcements of the companies' inside information throughout the year and of profit warning and/or positive alert prior to the publication of results announcements. Hong Kong Stock Exchange promotes a wider engagement with Shareholders and stakeholders by requiring the listed companies to disclose a shareholder's communication policy; asking the directors to appear at the shareholders' meetings (in particular the annual general meeting); and publishing ESG report alongside annual financial report or 3 months thereafter. It is found that shareholders can rely on relevant provisions under CO to guide their decision-making at shareholders' meetings.

Inside Information

Information disclosure is crucial to the company to ensure a level playing field in the capital market. It also serves a channel of communication to showcase investors, while sometimes being a tricky area for listed companies to comply with. Listed issuers should be committed to promoting consistent disclosure practices aiming at timely, evenly and fairly disseminating inside information in an accurate and complete manner to the market in accordance with applicable laws and regulatory requirements. With respect to procedures and internal controls for the handling and dissemination of inside information, the company should perform:

- conduct assessment of possible inside information in accordance with the Securities and Futures Ordinance, the Listing Rules and other applicable laws or regulations and "Guidelines on Disclosure of Inside Information" issued by the SFC;
- build up a list of relevant events and incidents of possible inside information to watch out;
- constantly review the effectiveness of internal reporting system to ensure timely escalation of possible inside information possessed by individuals, business units or departments to next level for further assessment; and
- ensure through the internal reporting system, the designated senior management or department for determining inside information disclosure to the board for consideration.

***Practical tips*:**

Conduct on share dealings

Directors of listed issuers are restricted in dealings in securities by the Listing Rules. This is to protect directors from insider dealing allegation that they have traded in the company's securities while in the possession of special knowledge by virtue of their position as directors in the companies. The company may follow the Model Code[5], or adopt a code of its own terms as long as that code is no less stringent than that the Model Code.

Under the Model Code, directors of every listed issuer must not deal in the company's securities when in possession of inside information and during the blackout periods of 60 days before the preliminary annual results announcement and 30 days of the interim results announcement.

Before any dealing, a director must follow a prescribed procedure and obtain clearance from the Chairman or any other director of the listed issuer designated for this purpose.

5 HKEx Mainboard Listing Rules Appendix 10

Communication with Shareholders

Shareholders are the owners of the company and are separated from its management. When certain proposed corporate changes or transactions are subject to the shareholders' approval, the company must take prompt action accordingly. Most often, if such matter contemplated attracts adverse comments or feedback from the institutional investors, they would sell out the company's shares in hands causing a drop in the share price. Nowadays, shareholders can obtain information via the internet, professional analysis reports or other means of media. To enable shareholders to have a better understanding on the company's business, listed issuers should actively and promptly disclose company information that directors consider to be effective and valuable to shareholders.

Further, the listed issuer is required to establish a shareholder communication policy by providing shareholders with communication channels to enable them to engage actively in the company's affairs by exercising their rights as shareholders in an informed manner. The listed issuer should review its shareholders' communications policy regularly to ensure the company has effective communication with its shareholders. The listed issuer is also required to disclose the relevant shareholders' right in their website.

In addition, to strengthen the relationship between the company and the shareholders, directors should provide ongoing dialogue with them and actively participate in all kinds of general meetings to interact with the shareholders and hence build up mutual trust with the shareholders. Communication and transparency lay down the foundation of good corporate governance.

The CO promotes shareholders' engagement in the decision-making process by:

- introducing a comprehensive set of rules for proposing resolutions and passing written resolutions;
- requiring a company to bear the expenses of circulating members statements relating to the business of, and proposed resolutions for, annual general meeting, if the requests are received in time for the company to send it together with the notice of the meeting; and
- the threshold requirement for members to demand a poll is 5% of the total voting rights.

Stakeholders' engagement

In order to deliver good corporate standards, listed issuers are required to balance the interests of various stakeholders, including customers, investors, employees, government, non-governmental organisations, and the general public etc. Listed issuers must be accountable for their actions and behaviors towards a diverse group of stakeholders and should consider within the company's business strategy. Stakeholders may exert influence on the company's business and management by raising questions, including market discussions, exercising their rights, dis-investing shares on hand, and refusing from doing business with the company, etc.; and regulators may upgrade or enforce new rules in order to be in line with international trends or ensure proper market order. Among others, Hong Kong Stock Exchange introduced the Environmental, Social and Governance ("ESG") Reporting Guide ("ESG Guide") in 2013. The Board has overall responsibility for its ESG strategy and reporting. Also in line with CG Code, the Board is responsible for evaluating and determining its ESG-related risks; and ensuring that appropriate and effective ESG risk management and internal control systems are in place. Directors should discuss those ESG issues and look into the company's current business and operations from an ESG perspective and disclose an ESG report in the Annual Report (or as a separate report published within 3 months after the publication of the Annual Report) appropriately.

In a Nutshell

Good corporate governance is the cornerstone of the healthy and sustainable development of a company. The long term success of the listed issuer is dependent on a competent and accountable board, on which the directors shall be competent, well-qualified, committed and have an independent mind and perspectives. All directors should think through and discuss matters that are

important to the company and its shareholders and stakeholders in an open and frank manner. The listed issuers should ensure a proper check and balance such as the appointment of a good proportion of INEDs within the Board and conduct review on the effectiveness of internal control and risk management systems of the company, which would help to detect the irregularities or abuses of powers and risks within a company. Robust internal controls and risk management mechanisms should be embedded within a listed issuer's operation processes management and governance structures. The board should be accountable to shareholders through regular reporting. Transparent, timely and effective shareholders' communication is an important aspect of good corporate governance and therefore, it requires without doubt for a company to implement a proper disclosure policy so that inside information can be disseminated to the market in a fair and efficient manner. Company secretary and independent auditors play a very important role of a facilitator and an assurer respectively in this context.

WATCH BOX

The following are 4 important areas emphasized by Hong Kong Stock Exchange.

1. ***Board' duties:*** *The collective and individual responsibility of directors for compliance is of critical importance. This obligation is refined and re-enforced by the personal undertaking given by the directors to Hong Kong Stock Exchange to use their best endeavours to procure Listing Rule compliance by listed issuers. This obligation encompasses a dual responsibility for ensuring substantive compliance with the Listing Rules and creating the conditions for compliance through appropriate internal controls measures.*
2. ***Rising expectation on INEDs:*** *Other than exercising independent judgement to bring about good corporate governance and being vigilant regarding potential misconduct, INEDs with financial and accounting expertise are expected to lead the Audit Committee and play a dominate role in financial reporting integrity and reviewing significant financial reporting judgements. INEDs also play important role in connected transactions and internal control (because of their role in Audit Committee).*
3. ***Company secretary:*** *Hong Kong Stock Exchange recognizes the importance of Company Secretary and regards company secretaries as key advisers on corporate governance and regulatory compliance matters as well as a crucial conduit of communications of the Board.*
4. ***Auditors:*** *After the commencement of the Financial Reporting Council (Amendment) Ordinance, the Auditors of listed issuers in Hong Kong are also regulated by the Financial Reporting Council.*

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CHAPTER 12

GUIDES

Role and Duties of Company Secretary

The essential of company secretary in listed issuer

Taking into consideration the increasing complexity of the regulatory framework and the awareness of the benefits of good corporate governance, the role and duties of the company secretary have become more significant in Hong Kong. Under the Companies Ordinance (Cap. 622) ("CO"), every company incorporated in Hong Kong must have a company secretary. In addition, a listed issuer must appoint a company secretary with specified academic or professional qualification or relevant experience as defined in the Listing Rules.

In Corporate Governance Code of the Listing Rules, Hong Kong Stock Exchange recognizes that the company secretary plays an important role in supporting the board by ensuring good information flow within the board and that board policies and procedures are followed. Company secretaries of listed issuers are part of senior management, directly reporting to Chief Executive Officer/ Chairman and advise the board through the Chairman and/or Chief Executive on governance matters.

Company secretaries have several dominant roles in corporate governance and compliance aspects of their companies. Their governance duties can be summarized as below.

Facilitating Board's decision-making

Company secretaries are normally responsible for setting agenda and gathering information for the Board for decision-making. They should ensure that the background information provided by management to the Board is sufficient, concise and easily understood by the directors and provide compliance advice to them. When the directors have questions or require further information, they should be their first point of call. This is particularly important for non-executive directors, who, unlike executive directors, may not be as familiar with day-to-day operation of the company and are not physically in the office every day. Once the Board has deliberated on the matter and make decisions, the company secretaries should conveys the board's decisions and monitor their execution and progress of their implementation, and keep an eye on major emerging issues that require further decisions by the board. Good effective communication should be maintained all the way by timely reporting back problems and difficulties faced by the management to the Board when carrying out the Board's decisions.

Directors' training

Moreover, company secretaries should keep constant review of all legal, regulatory and corporate governance developments. They should update the Board of any those major changes that may affect the company's operations and arrange formal training for directors. Induction training is pre-requisite for new directors to have proper understanding of the company's operations and businesses and be fully aware of their responsibilities under applicable law and regulation. For incumbent directors, refreshers can keep directors informed of the latest developments which would facilitate their decision-making. Company secretaries should work with management team for providing appropriate directors' induction training materials.

Dissemination of company information

Company secretaries serve as a channel of communication to shareholders, investors and regulators on behalf of listed issuers. They often take up the role of one of two authorised representatives, which, is responsible for answering the queries from the Hong Kong Stock Exchange on listed issuers' matters verbally or in writing. Company Secretaries normally handle the shareholders' enquiries and requests on corporate governance issues and procedural matters like notice of meetings and voting arrangements through telephones, emails or in general meetings.

Timely communications with shareholders

Company secretaries usually play an important role in maintaining an ongoing dialogue with shareholders. They are often the best persons to manage relations with institutional investors especially on corporate governance matters through the implementation of a holistic shareholder communications policy. Shareholders should be provided with up-to-date and relevant company information through general meetings and other corporate communications such as officially as announcements and circulars or informally as telephones or emails. Communication is a two-way process; other than ensuring good information flow, there must be a channel provided to stakeholders to give their feedbacks or raise enquiries. These enquires and feedbacks must be documented, followed up, and brought to the attention of the board where appropriate. Company secretaries should help to establish systems and procedures for monitoring and escalating potential price-sensitive information to the board, and provide timely advice to the board as to whether there is price-sensitive information. Once price-sensitive information has been identified, company secretaries should take reasonable precautions to preserve its confidentiality. Where a disclosure obligation has arisen, company secretaries may need to arrange a public announcement on inside information under Securities and Futures Ordinance ("SFO"). For example, after closing the accounting periods, when companies encountered substantial change in performance for the current period that is deviated from the last period and is unexpected by the market (usual investors of the company), company secretaries may need to publish positive price alert or profit warning announcements under SFO so that all investors are kept on the level playing field and can make their informed investing decisions. In cases of companies of dual or multiple listing such as a A+H shares company, company secretaries need to arrange for dissemination of information published in other exchanges by way of overseas regulatory announcements ("ORA") on Hong Kong Stock Exchange and shall further publish an inside information announcement if ORA contains some price sensitive information. Such announcement should be clear, comprehensible and in plain language and provide sufficient background information so that investors can make well-informed decisions.

Liaison with regulators

From regulators' perspective, company secretaries are responsible for monitoring listed issuers' compliance with the law and regulations and help putting in place a set of risk management and internal control systems to ensure compliance.

They help publishing the policies relating to listed issuers promulgated by regulators, and have the duty to explain laws, rules and regulations relevant to the operations of the company to the board and the management team, educating them on the legal and compliance basis of decisions. In this way, they will enhance the knowledge of the decision making and executing departments about relevant law, raise individuals' awareness of the need and their ability to conform to the norm and standards, and standardise individual actions in the company operations in compliant manner. Therefore, when the listed issuers receive enquiries from the regulators, company secretaries are able to deal with and respond to them timely. In respect of major undertakings and corporate changes of the listed issuer such as financing, share incentives, mergers, acquisitions and reorganisations and other changes such as change in articles and directors and secretaries, company secretaries should ensure good communication with the regulators and facilitate obtaining regulators' consent or approval on the company's proposed corporate actions and changes. Company secretaries are always the point of contact to regulators regarding routine listing matters such as listing fee payments, dividends entitlement confirmation and e-submission work and so on.

Dealing with investors

In relation to dealing with investors in particular institutional investors, the company secretaries have to uphold the basic principle to ensure that information is disclosed to the market as a whole and all users of the market have simultaneous access to the same information, while maintaining effective investor relations with an accurate account of the listed issuers affairs. It should be reminded that no undisclosed inside information shall be discussed in any meeting with the investors.

Listed issuer is required to prepare regular periodic financial reports, announcements, circulars and listing documents pursuant to the relevant laws and listing rules. When preparing the press release and company presentation for the investors and press conferences, the information should be consistent with the aforesaid documents of the listed issuer which have been published.

The listed issuer should also note that press release and company presentation for the investors and press conferences are used to provide the background to support the information that has been publicly disclosed, as well as to articulate the following:

- Long term strategy;
- Organisation history, vision and goals;
- Management philosophy and the strength and depth of management;
- Competitive advantages and risks;
- Industry trends and issues;
- Key profit drivers in the business.

The listed issuer should also be aware of the questions from analysts during the press release and company presentation for the investors and press conferences. When the listed issuer had received draft reports from analysts. The directors should resist pressure from analysts to provide or comment on data that may involve the dissemination of unpublished inside information. When information is wrongly interpreted by analysts and is materially incorrect, the listed issuer should ask the analysts to rectify it immediately. If the listed issuer is aware of any unpublished inside information that would cause a fundamental misconception in the report, it should consider to make an announcement of such inside information due to possible leakage and at the same time when rectifying the report.

Dealing with market rumours / negative analysis report

From time to time, media reports or market rumours or negative analysis report about the Company may circulate and carry false or untrue information. The listed issuer is not obliged to make further disclosure under the SFO and to respond to such media reports or market rumours, unless they appear to contain material information that will create a false market.

In general, the Company will take a proactive approach to addressing of media reports or market rumours or negative analysis report, so as to minimise uninformed speculation and promote an orderly market in its securities.

> ***Practical tips*:**
>
> *When there are allegations of fraud, serious accounting or mismanagement of the company's market commentary or analyst reports, or the relevant allegations have affected or may have an impact on the company's stock price, the listed issuer must promptly issue a clarification announcement. If a clarification announcement cannot be issued in a timely manner, the company must apply for suspension of trade. After the publication of the clarification announcement, the exchange may continue to follow up with the listed issuer on whether it needs to make further disclosures on issues arising from the allegations, review or investigation.*

Risk Management and Internal Control

Risk management and internal control are an important part of good corporate governance. The board is responsible for defining the risk appetite by reference to the listed issuer's strategy, ensuring appropriate internal controls are implemented to manage the risks and reviewing the effectiveness of internal control systems on a regular basis while audit committee is responsible for oversight of the risk management and internal control systems. Meanwhile, company secretaries can assist directors by:

- reminding the chairman to include risk management considerations on the board's and audit committee's agenda
- acting as a conduit between the management and the board to ensure that the board/ audit committee is kept informed of any changes to major risks faced by the listed issuer
- assisting the board in preparing corporate governance reports and environmental, social and governance reports on their performance in that regards on a "comply or explain" basis.

Supporting Transaction Compliance

Scalable transaction of listed issues are subject to size tests in determining categories of notifiable transactions they fall into. In case of connected transactions, more stringent compliance requirements are imposed on listed issuers such as requiring forming of independent board committee and independent shareholders' approval. Company secretaries who are familiar with the company business and operation as well as law, rules and regulations will be called upon to give assistance in transaction compliance work.

Connected transactions

Connected transactions are common compliance issues faced by family-controlled listed issuers and state-owned listed issuers from the Mainland. Under the Companies Ordinance, directors have an obligation to declare the nature and extent of their interests in any transaction, arrangement or contract to the board and/or abstain from voting at the board meetings. Thus, company secretaries should ensure the director to comply with following requirements:

- act honestly and in good faith in the interests of the company as a whole
- act for proper purpose
- be answerable to the issuer for the application or misapplication of its assets
- avoid actual and potential conflicts of interest and duty
- disclose fully and fairly their interests in contracts with the issuer
- apply such degree of skill, care and diligence as may reasonably be expected of a person of their knowledge and experience and holding their office within the issuer.

The Listing Rules also prescribes stringent disclosure, the set-up of independent board committee and shareholder approval requirements for connected transactions.

Very often, company secretaries involve in establishing policies and procedure for identification of notifiable and connected transactions for internal control purposes as well as arrange submission of transaction checklist

to Stock Exchange for compliant purposes. They also assist directors to disclose their interest in transactions and ensure that confidential and sensitive documents are not distributed to an interested director and that he or she refrains from taking part in the board discussion and voting on the conflicted issues.

Also, company secretaries assist in disclosure of directors' interest in the listed issuers on annual basis by requesting relevant directors to sign annual confirmation regarding their interest in the listed issuers' securities, competing business (if any), and independence of independent non-executive directors.

Above all, as the regulatory environment continues to consolidate and improve, requiring listed issuers to meet higher corporate governance standards, the role of company secretaries is becoming more complex and more professional. Their governance work becomes more important nowadays.

Appointment and dismissal of company secretary

The appointment or dismissal of company secretary of listed companies must be approved by the Board at a physical meeting. For any change in company secretary, a listed issuer must publish an announcement containing the reasons for the change as soon as practicable and file with the Hong Kong Stock Exchange and the Company Registry in prescribed form. These measures safeguard change in company secretaries due to the management's discretion.

Company secretaries should be employees of the listed issuers and have day-to-day knowledge of the listed issuers' affair. In general, blue-chip listed companies in Hong Kong tend to appoint senior management members to serve as their company secretaries. They generally have a company secretarial department comprising 6-8 professionals who are responsible for legal, finance or investor relations. On the other hand, as more companies with core business in PRC get listed in Hong Kong, these listed issuers may engage an external company secretarial service provider* to provide a qualified person to serve as their company secretaries and handle the duties of company secretary subsequent to the listing.

It is common for well-established External Service Providers which have professional terms comprising company secretaries, lawyers and accountants who work closely with, designated senior management members of those listed issuers which do not need to have a physical office, for supporting the governance and compliance matters. They may find that External Service Providers more advantages than hiring a qualified professional for they can enjoy the service of a team of professionals at the same time.

Under Corporate Governance Code, an listed issuer can engage external service provider as its company secretaries subject to the disclosure of a person with sufficient seniority (e.g. Chief Legal Counsel or Chief Financial Officers) at the listed issuer whom the external service provider can contact.

WATCH BOX

*** The trend of engaging external company secretarial service providers ("External Service Providers")**

In 2018, HKICS issued a guideline recommending an individual taking up not more than 6 appointments as named company secretary. However, the named company secretary provided by External Service Providers are supported by a team of professionals, as such, listed issuers should enquire the internal work arrangement and size of External Service Providers instead of taking the above numeric limit as a strict guide.

In 2019, the consultant paper issued by Hong Kong Stock Exchange which proposes to codify the general waiver of experience and qualification of company secretaries of listed issuers into the Listing Rules (ie the company secretary of a listed issuer needs not possess the experience and qualification required under the Listing Rules, if Hong Kong Stock Exchange thinks fit, after considering the principal business activities of the listed issuer, the suitability of the company secretary and whether that company secretary is to be assisted by a person who possesses the experience and qualification of company secretaries of listed issuers) receives some opposing view from the market. Some worry that the codification would lower the standard and requirement of a competent company secretary who plays an increasing significant role in board support and governance.

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CHAPTER 12

GUIDES

Environmental, Social and Governance Report

Introduction

The landscape for reporting on Environmental, Social and Governance ("ESG"), also known as Corporate Social Responsibility ("CSR") and Sustainability, becomes a global initiative. ESG is no longer merely a corporate social responsibility or a reputational issue. Investors are increasingly willing to allocate capital in sustainable investments via green financing with regards to climate change concerns, which is an important aspect that demands for more information on how the companies manage their ESG risks. The global regulatory landscape in this area is also changing rapidly, prompting the need for companies to undertake a comprehensive review of their ESG framework. In Hong Kong, the Stock Exchange of Hong Kong Limited (the "Exchange") takes the initiative from a risk management perspective by requiring listed issuers to disclose how they mitigate these risks in their ESG report, so that the stakeholders can better understand the company's goals and commitment in sustainability practices. It is also a driving force for the company to integrate sustainability into their businesses that could bring real value to the organisation.

In 2013, the ESG Reporting Guide ("ESG Guide") was introduced as a voluntary guide by the Exchange. Following a market consultation in 2015, the Listing Rules were amended to mandate issuers to report on ESG matters on an annual basis and regarding the same period covered in their annual reports, effective from the financial year starting 1 January 2016. The Guide contains 11 aspects ("Aspects") under two subject areas ("Subject Areas"): Environmental (three Aspects) and Social (eight Aspects). In order to promote the quality of ESG performance and reporting, and ensure the ESG framework is up to date with investors' and stakeholders' expectations and international best practice, the Exchange proposed to introduce disclosures of ESG governance structure and encourage independent assurance of the ESG reports and revise the Environmental and Social Aspects.

Latest ESG Development

In 2018, the Exchange released "Analysis of Environment, Social and Governance Practice Disclosure in 2016/2017" which analysed the disclosures made by 400 randomly selected listed issuers ("Sample Issuers") across the industries set out in the Hang Seng Industry Classification System. The analysis found that all listed issuers had published ESG reports for the financial year 2016/2017, however only 38% of Sample Issuers complied with all general disclosures ("General Disclosures") under 11 Aspects. It is important to note that it is a Listing Rule requirement to report on the "comply or explain" provisions under the 11 Aspects and departures without giving considered reasons amounts to a breach of the Listing Rule.

The above comparison chart depicts listed issuers generate better complied ESG reports with aid of professional consultants.

The Exchange is considering to extend the range of information companies must disclose as a part of this exercise. While there have been some improvements in ESG disclosure by listed companies, further progress is necessary. Aiming at ensuring the ESG framework remains fit for purpose, the Exchange continues to promote the quality of ESG performance and reporting, and published the consultation paper in 2019 to seek views and comments on proposed amendments to the ESG Guide and related Listing Rules. Subject to responses to this consultation, the Exchange intends to implement the revised Listing Rules and ESG Guide for financial years commencing on or after 1 January 2020.

Key Proposals

Topics	Current ESG Guide	Proposed amendments
Environmental	All Environmental General Disclosures and key performance indicators ("KPIs") are in "comply or explain" obligations, including the following Aspects: A1: Emissions A2: Use of Resources A3: The Environment and Natural Resources	New Environmental Aspect (subject to "comply or explain") requiring disclosure of climate change-related issues; Including disclosure of Environmental KPI description on targets set and steps to achieve

Social	The Social General Disclosures are in "comply or explain" obligations while KPIs are in "recommended disclosures" obligations, including the following Aspects: B1: Employment B2: Health and Safety B3: Development and Training B4: Labour Standards B5: Supply Chain Management B6: Product Responsibility B7: Anti-corruption B8: Community Investment	Upgrading all Social KPIs from "recommended disclosures" to "comply or explain"
Governance	- The board has overall responsibility for an issuer's ESG strategy and reporting - Management should provide a confirmation to the board on the effectiveness of these systems	Upgrading to mandatory disclosure requirements ("Mandatory Disclosure Requirements"), including: - Statement from the board setting out the board's consideration of ESG issues - The process used to identify, evaluate and manage material ESG-related issues and risks - How the board reviews progress made against ESG-related goals and targets
Timeframe for Publication of ESG Report	For both Main Board and GEM issuers, publishing the ESG report: - In the issuer's Annual Report: No later than four months after the financial year-end; or - A separate report: No later than three months after publishing the Annual Report	Shortened timeframe for publication. - Main Board issuers: within four months after the year-end date - GEM issuers: within three months after the year-end date
Reporting Principles and Boundary	The four reporting principles ("Reporting Principles") mentioned in the Guide are "Materiality", "Quantitative", "Balance" and "Consistency"	Upgrading to Mandatory Disclosure Requirements, including: - Explanation of application of the Reporting Principles and boundaries in the ESG report

Beginning your ESG journey

During the Pre-IPO stage, the company should:

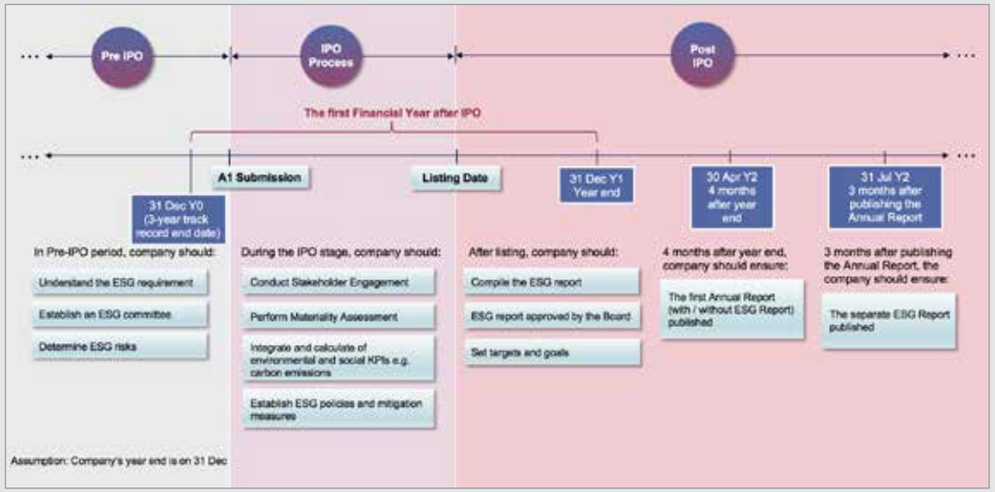
- **Establish an ESG committee** or ESG working group comprising senior management and staff who have sufficient knowledge in both ESG matters and the issuer's operation. The board is obligated to be involved in deliberating a company's ESG disclosures, formulating strategies and emission reduction targets and ensuring effective systems and processes to monitor performance.
- **Determine ESG risks.** Material risks vary depending on the industry and determining which ESG risks need to be treated as material.
- **Gather Information.** The company has to collect both Environmental and Social data and information.

During the IPO stage, the company should:

- **Conduct stakeholders' engagement.** Understanding stakeholders' expectations, interests and information needs is an essential step in creating an action plan to address the most important and relevant stakeholders' concerns.
- **Perform materiality assessment.** Materiality is the principle of defining the social and environmental topics that matter most to your business and your stakeholders. It helps the company identify certain material ESG issues whilst others are not.
- **Collect, integrate and calculate both Environmental and Social data and information** according to the ESG Guide.

After listing, the company should:

- **Tell the story.** More time and resources would be needed to compile data and meet compliance in the coming years. Compile the ESG report demonstrating the intensifying sustainability focus among stakeholders.
- **Reach your ESG goals.** Set targets and reduce the significant ESG impacts, effectively communicate your ESG risks and long-term business strategy. Companies will also have to start investing in systems and equipment that enable effective monitoring and measuring progress towards strategically set environmental goals and targets.



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CHAPTER 13

Special Consideration for Chinese Firms Listing on The Stock Exchange of Hong Kong Limited

INTRODUCTION

Throughout the years, Hong Kong, being a prominent international financial centre, has been one of the most sought-after venues for initial public offering ("**IPO**") fundraising activities, attracting companies around the globe, including companies incorporated or based in the People's Republic of China ("**PRC**"), which would like to boost their reputation and tap into the international capital markets. Such success could be attributed to a number of factors, including Hong Kong's attractive tax regime, its emphasis on free economy, its adherence on international standards and practices and its robust legal system.

Companies incorporated in the PRC, which is one of the four "Recognised Jurisdictions" along with Hong Kong, Cayman Islands and Bermuda, have been recognised to be eligible to get listed on The Stock Exchange of Hong Kong Limited (the "**Stock Exchange**").[1] PRC companies are able to list in Hong Kong by way of either H-Share structure or Red-Chip structure. H-Share companies are PRC-incorporated joint stock companies that have received the approval from the China Securities Regulatory Commission ("**CSRC**") to list in Hong Kong, whereas Red-Chip companies are companies incorporated outside the PRC (usually in Hong Kong, Cayman Islands or Bermuda) but controlled by PRC entities and/or individuals.

1 Joint policy statement regarding the listing of overseas companies, Securities and Futures Commission and The Stock Exchange of Hong Kong Limited (27 September 2013). Retrieved from: https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Other-Resources/Listing-of-Overseas-Companies/A-List-of-Acceptable-Overseas-Jurisdictions/jps_20180430.pdf?la=en

Over the past years, PRC companies remain the top participants in the Stock Exchange. Set out below is a table showing the number of listed companies and PRC companies listed in Hong Kong from 2016 to 2018:[2]

	2016	2017	2018
Total number of listed companies	1,973	2,118	2,315
Total number of PRC companies listed in Hong Kong	1,002	1,051	1,146
- H-Share companies	241	252	267
- Red-Chip companies	761	799	879

Table 1: Number of listed companies and PRC companies listed on the Stock Exchange

As shown in the table, of all 2,315 listed companies at the end of 2018, 1,146 (representing approximately 50%) were PRC companies, including 267 H-Share companies and 879 Red-Chip companies.[3] Moreover, the total market capitalisation of all PRC companies listed in Hong Kong accounted for approximately 68% of the total market capitalisation of all listed companies on the Stock Exchange as at the end of 2018.[4]

Most notably, in recent years, numerous high-profile PRC companies, such as Xiaomi Corporation (1810.HK), Haidilao International Holding Limited (6862.HK) and China Tower Corporation Ltd (0788.HK), have chosen Hong Kong as their destination for listing and fundraising.[5] Obviously, Hong Kong has become one of the most popular listing venues for PRC companies, and it is believed that the connection between PRC companies and the Stock Exchange will be even closer in the foreseeable future. In view of such trend, this chapter explores the special considerations for PRC companies seeking to get listed in Hong Kong.

H-SHARE COMPANIES

H-Share companies are joint stock companies incorporated in the PRC, which have issued both H-shares and domestic shares. H-shares are foreign shares which are listed on the Stock Exchange; whilst domestic shares are shares issued by the PRC issuers under the PRC law, denominated in Renminbi, and are subscribed for in Renminbi. Domestic shares can be listed in Shanghai Stock Exchange or Shenzhen Stock Exchange, or remain unlisted. H-shares and domestic shares are in general of the same class carrying the same voting rights, although each of them can be traded at different prices if listed in different stock markets. The diagram below illustrates a typical H-Share structure:

Diagram 1: a typical H-Share structure

2 HKEX Fact Book 2017, The Stock Exchange of Hong Kong Limited. Retrieved from: https://www.hkex.com.hk/-/media/HKEX-Market/Market-Data/Statistics/Consolidated-Reports/HKEX-Fact-Book/HKEX-Fact-Book-2017/FB_2017.pdf?la=en and HKEX Fact Book 2018, The Stock Exchange of Hong Kong Limited. Retrieved from: https://www.hkex.com.hk/-/media/HKEX-Market/Market-Data/Statistics/Consolidated-Reports/HKEX-Fact-Book/HKEX-Fact-Book-2018/FB_2018.pdf?la=en

3 *Ibid*

4 *Ibid.*

5 Market Statistics 2018, The Stock Exchange of Hong Kong Limited. Retrieved from: https://www.hkex.com.hk/-/media/HKEX-Market/Market-Data/Statistics/Consolidated-Reports/Annual-Market-Statistics/2018-market-statisitcs.pdf

As one of the participants in the Stock Exchange, it comes with no surprise that PRC issuers[6] are subject to the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (the "**Listing Rules**"), same as their peers incorporated in Hong Kong and/or overseas. However, the Stock Exchange has taken into account the civil law system in the PRC, the different companies law and the markets in which the shares of the PRC issuers may be traded and put forward Chapter 19A of the Listing Rules, which is a dedicated chapter containing various provisions tailor-made to PRC issuers in order for them to obtain and maintain a listing of their securities on the Stock Exchange. Chapter 19A modifies the existing Listing Rules, imposes additional obligations on and creates exceptions to PRC issuers. Set out below are some of the highlighted provisions of Chapter 19A:

(a) Initial requirements

The Stock Exchange will consider applications by PRC issuers for listing on the Stock Exchange only if:[7]

(i) they are duly incorporated in the PRC as joint stock limited companies ("**Requirement A**");

(ii) the Stock Exchange is satisfied that there are adequate communication and cooperation arrangements in place between the Stock Exchange and the relevant securities regulatory authorities in the PRC ("**Requirement B**");

(iii) the Stock Exchange is satisfied that applicable PRC laws and the articles of association of the PRC issuers provide a sufficient level of shareholder protection to holders of H-shares ("**Requirement C**"); and

(iv) in the case of PRC issuers having equity securities listed or to be listed on another stock exchange, the Stock Exchange is satisfied that there is adequate communication arrangement in place between the Stock Exchange and such other stock exchange authority.

In light of the aforementioned requirements, in particular Requirement A, as part of due diligence processes and application requirements to the Stock Exchange, PRC issuers should engage a law firm registered in the PRC which shall prepare a legal opinion on various aspects of PRC laws and regulations, including, amongst others:

(i) whether the PRC issuers and/ or their subsidiaries are duly incorporated in the PRC as legal persons having the legal capacity to enter into contracts, to sue, and to be sued;

(ii) whether approval by any PRC government or regulatory authority is required for the listing of the Company's shares on the Stock Exchange; and

(iii) details of all the requirements under applicable PRC laws and regulations relevant to the PRC issuers' business in the PRC, and whether the PRC issuers fully comply with the relevant requirements, including details of the licenses, permits or certificates obtained by the PRC issuers.

In addition, PRC issuers have to obtain confirming documentations from relevant competent authorities in the PRC, for example tax authorities and social security authorities, which certify that the PRC issuers concerned have not breached any relevant PRC rules and regulations and are in compliance with the PRC laws and regulations in all material respects. Such confirmations not only give assurance to sponsors, but also form a basis for the issuance of PRC legal opinion.

Furthermore, as requested in Form M104, one of the listing application documents required by the Stock Exchange, where the new applicants' principal operations are conducted through PRC incorporated entities, such applicants must submit a summary of the material findings of the sponsor

6 Unless otherwise specified, "PRC issuers" in this chapter refer to PRC companies seeking to get listed on the Main Board (the "Main Board") of the Stock Exchange and all rules referred to in this chapter apply to issuers listed on Main Board only.

7 LR19A.03

and the reporting accountants in assessing whether the underlying financial information of the applicants' PRC companies used for the preparation of the accountants' report is consistent with:-

(i) all the relevant regulatory filings or reports filed with the appropriate competent government authorities; and

(ii) where applicable, the information on related party transactions as shown in the financial statements of the related parties.

Such summary should set out all the relevant regulatory filings/reports reviewed, the method of retrieval of such filings/reports, the amount and nature of any material differences noted, the reasons for any such differences and whether the sponsor is satisfied that such differences have been properly dealt with by adjustments to the financial statements, disclosure or other follow-up action.

PRC issuers seeking to get listed by way of H-Share structure also have to obtain approval from CSRC, which conducts basic vetting on the PRC issuers. Accordingly, no application for listing could be made to the Stock Exchange unless an acknowledgment letter from the CSRC (commonly known as "**Xiao Lu Tiao** (小路条)") has been obtained. As requested in Form M104, the listing application documents should be accompanied with a copy of the PRC legal opinion when the PRC issuers submit the IPO application to the Stock Exchange. A certified copy of the letter issued by the CSRC expressly approving the issuance of equity securities in the manner contemplated by the PRC issuer's listing application (commonly known as "**Da Lu Tiao** (大路条)") has to be submitted to the Stock Exchange before the Listing Committee hearing.[8] Perhaps the above documentation requirement is to reflect the spirit of Requirement B.

In respect of Requirement C, it is expressly provided in Chapter 19A that the articles of association of the PRC issuers must contain provisions which will reflect the different nature of domestic share and overseas listed foreign shares (including H-shares) and the different rights of their respective holders.[9] In addition, Part D of Appendix 13 to the Listing Rules stipulates the articles of association of the PRC issuers whose primary listing is or is to be on the Stock Exchange must include certain provisions, which are sought to protect the interests of the holders of H-shares.

Also, it is worth mentioning that the Stock Exchange has expressly reserved the right, in its absolute discretion, to refuse a listing of securities of a PRC issuer if it believes that it is not in the public interest to list them.[10] It is to be noted that no such provision was found for other overseas issuers.

(b) Accountants' report and pro forma financial information

The accountants' report of PRC issuers may be drawn up in conformity with China Accounting Standards for Business Enterprises ("**CASBE**") in case the PRC issuers have adopted it in preparation of its financial statements, instead of Hong Kong Financial Reporting Standards ("**HKFRS**") and International Financial Reporting Standards ("**IFRS**"). On top of those qualified and independent firms specified under LR4.03, as an alternative, the Stock Exchange also accepts a firm of practicing accountants which has been approved by the China Ministry of Finance and the CSRC as being suitable to act as an auditor or a reporting accountant for PRC issuers. The Stock Exchange has maintained a list of such firms in its website.[11]

(c) Compliance adviser

The Listing Rules impose an obligation on newly listed issuers to appoint a compliance adviser. The periods for mandatory appointment of compliance advisers vary for Main Board listed issuers and GEM listed issuers. For instance, Main Board listed issuers are required to appoint a compliance adviser for the period starting from the date of initial listing to the date of publishing the financial results for the ***first*** full financial year upon listing[12] while GEM listed issuers are required to appoint compliance advisers until the date of publishing the financial results for the ***second*** full financial year upon listing.[13]

Apart from the responsibilities stipulated under Chapter 3A of the Listing Rules,[14] the compliance advisers of the PRC issuers are required to bear additional responsibilities under Chapter 19A of the Listing Rules. For example, the appointed compliance advisers are required to promptly inform the PRC issuers of any updates in the Listing Rules or other applicable Hong Kong laws and regulations.[15] As it is expected that the authorised representatives of the PRC issuers are frequently outside Hong Kong, the appointed compliance advisers shall serve as a principal channel of communication between the Stock Exchange and the PRC issuers and hence contact details of the compliance advisers including the names, business and residential telephone numbers and facsimile numbers have to be submitted to the Stock Exchange.[16] PRC issuers must ensure the appointed compliance advisers are able to reach their authorised representatives, directors and other officers at all time and shall procure the aforementioned persons to promptly provide the compliance advisers with the necessary information or assistance to discharge their duties.[17]

PRC issuers may appoint any intermediaries which are licensed or registered to advise on corporate matters to serve as their compliance advisers. However, PRC issuers may be requested by the Stock Exchange to terminate the appointment of a compliance adviser and to appoint a replacement as soon as possible if the Stock Exchange is of the view that the compliance adviser fails to adequately discharge its responsibilities.[18]

If there is any change in the appointment of compliance advisers, such as termination/ resignation of compliance advisers or appointment of new compliance advisers, both the PRC issuers and the compliance advisers have an obligation to immediately inform the Stock Exchange with regards of such change.[19] The PRC issuers shall not terminate the appointment of the existing compliance adviser until a new one has been appointed.[20]

(d) Management presence in Hong Kong

Rule 8.12 of the Listing Rules stipulates that listed issuers must have sufficient management presence in Hong Kong ("**Management Presence Requirement**"), which normally means at least two of the executive directors of the listing applicants must be ordinarily resident in Hong Kong. However, as the principal business and operation of the PRC issuers generally locate in the PRC, they may not be able to fulfil the Management Presence Requirement. With respect of this, the Stock Exchange reserves the discretion to grant waiver to listing applicants in connection with the management presence ("**Management Presence Waiver**") and each waiver application will be considered on a case-by-case basis, taking into account all the facts and circumstances. When exercising its discretion, the Stock Exchange shall evaluate whether sufficient arrangements will be put in place to ensure regular communication is maintained between the Stock Exchange and the prospective listed issuers. Generally, the following arrangements are considered as indispensable to obtain a waiver: -

8 LR19A.22A
9 LR19A.01(3)
10 LR19A.13(1)
11 List of Approved Mainland Accounting Firms Eligible for Acting as Reporting Accountants and/or Auditors of Mainland Incorporated Companies Listed in Hong Kong, The Stock Exchange of Hong Kong Limited (24 October 2013). Retrieved from: https://www.hkex.com.hk/Listing/Rules-and-Guidance/Other-Resources/List-of-Approved-Mainland-Accounting-Firms?sc_lang=en

12 LR3A.19
13 GEM LR6A.19
14 LR3A.21-3A.25
15 LR19A.06(3)
16 LR19A.06(4)
17 LR19A.05(2)
18 LR19A.05(4)
19 LR19A.05(3)(b) and (c)
20 LR19A.05(3)(a)

(i) the authorised representatives of the listing applicants shall serve as the principal channel of communication with the Stock Exchange and such authorised representatives shall be readily contactable by the Stock Exchange;

(ii) the authorised representatives are provided with the contact details of each director of the listing applicant, including the mobile phone number, office phone number and email address and hence have means to contact all the directors readily at all times as and when the Exchange wishes to contact the directors on any matters;

(iii) each director who is not ordinarily resident in Hong Kong possesses or can apply for valid travel documents to visit Hong Kong to meet with the Stock Exchange within a reasonable period of time when requested by the Stock Exchange;

(iv) the compliance advisers shall serve as an additional channel of communication with the Stock Exchange; and

(v) the Stock Exchange is provided with the contact details of each director of the listing applicant.[21]

(e) Company secretary

Listed issuers are required to appoint a company secretary. Company secretaries play vital role in the corporate governance of listed issuers and facilitate the compliance with Listing Rules and relevant companies law. This is particularly crucial for PRC issuers because PRC issuers generally do not conduct business in Hong Kong and their management normally resides in the PRC. The appointed company secretaries shall possess the requisite academic or professional qualifications or relevant experience to discharge their responsibilities.[22]

However, the company secretaries of the PRC issuers may not possess the requisite qualifications or relevant experiences. In order to safeguard the interests of the shareholders and to promote good corporate governance, PRC issuers may apply for a waiver from strict compliance with LR 3.28 and 8.17 in connection with the appointment of joint company secretaries ("**Joint Company Secretaries Waiver**") and appoint a suitably qualified person to assist the appointed company secretary to discharge his/ her responsibilities, whilst the appointed company secretary should acquire the "relevant experience" for a period of three years upon listing. Such person would have to possess the professional qualifications stipulated under note 1 of LR3.28, i.e. he or she shall be a member of The Hong Kong Institute of Chartered Secretaries, a solicitor or barrister as defined in the Legal Practitioners Ordinance or a professional accountant. Upon the end of the three-year period, the PRC issuers have to demonstrate that the appointed company secretary has already acquired the relevant experience and hence further assistance is no longer necessary.

(f) Independent non-executive directors

All listed issuers must appoint independent non-executive directors representing at least one-third of the board.[23] The independent non-executive directors of PRC issuers not only need to satisfy the Stock Exchange that they have the character, integrity, independence and experience to discharge their responsibilities under Chapter 3 of the Listing Rules, but also need to demonstrate sufficient commercial or professional experience to safeguard the interests of the shareholders.[24] Further, at least one of the independent non-executive directors of the PRC issuers must be ordinarily resident in Hong Kong.[25]

21 R19A.15 and HKEX GL9-09, The Stock Exchange of Hong Kong Limited (July 2009). Retrieved from: https://www.hkex.com.hk/-/media/hkex-market/listing/rules-and-guidance/interpretation-and-guidance-contingency/guidance-letters/guidance-letters-for-new-applicants/gl9-09
22 LR3.28 and 8.17
23 LR 3.10A
24 LR19A.18(1)
25 LR19A.18

(g) Authorised Person

Each PRC issuer is required to appoint an authorised person to accept service of process and notices on its behalf in Hong Kong throughout the period which its shares are listed on the Stock Exchange, and must notify the Stock Exchange of any appointment or termination of appointment of such authorised person as well as his contact details, including his addresses for service of process and notices, business and residential telephone numbers, email addresses and facsimile numbers, and any change in the aforementioned particulars.[26]

(h) Receiving Agent

Each PRC issuer must appoint at least one receiving agent in Hong Kong to receive and hold the declared dividends, pending payment and any monies owed to the shareholders in respect of the H-shares on trust for the holders of H-shares.[27]

(i) Share Register

With respect of the H-shares issued, PRC issuers are required to maintain a register for H-shares in Hong Kong to register the transfer of H-shares locally.[28] PRC issuers are not required to maintain register(s) in Hong Kong for domestic shares or other foreign shares (if any).

PRC issuers shall be deemed to have established a place of business in Hong Kong by maintaining a share register in Hong Kong and hence must apply for registration with the Companies Registry within one month upon establishment.[29]

(j) Supervisors

Under the PRC law, PRC issuers may appoint supervisors to perform supervisory function overseeing the board of directors, the managers and other officers of the PRC issuers. Supervisors must be able to demonstrate to the Stock Exchange that they have the character, experience and integrity to serve as supervisors as well as are competent to discharge their roles as supervisors.[30] As supervisors serve paramount function to oversee the performance of significant personnel of the PRC issuers and may be able to exert considerable influence, Chapter 14A of the Listing Rules regards supervisors as connected persons at the issuer level, reflecting the status that supervisors occupy in PRC issuers.[31]

(k) PRC governmental body

Listing Rules impose obligation on controlling shareholders of listed issuers to disclose interests in competing businesses.[32] However, as it is quite common for PRC governmental body to hold more than 30% shareholding in PRC issuers, the Stock Exchange normally will not regard a PRC governmental body as controlling shareholder for such disclosure obligation.[33] Similarly, PRC governmental body will not be classified as connected person under Chapter 14A of the Listing Rules.[34]

RED-CHIP COMPANIES

Red-Chip companies are companies listed in Hong Kong using a listing vehicle incorporated overseas as its holding company, for example the Cayman Islands and Bermuda, whilst such companies are controlled by PRC entities and/or individuals and conduct most of their business in the PRC.

26 LR19A.13(2)
27 LR19A.51
28 LR19A.13(3)(a)
29 Companies Ordinance (Cap. 622), s. 776(2)
30 LR19A.18(2)
31 LR14A.06(8)
32 LR8.10(1)
33 LR19A.14 (See definition of "PRC Governmental Body" in LR19A.04 and for clarity, entities under the PRC Government that are engaging in commercial business or operating another commercial entity will be excluded from the definition of "PRC Governmental Body")
34 LR14A.10

Set out below is a simple diagram showing a typical Red-Chip structure:

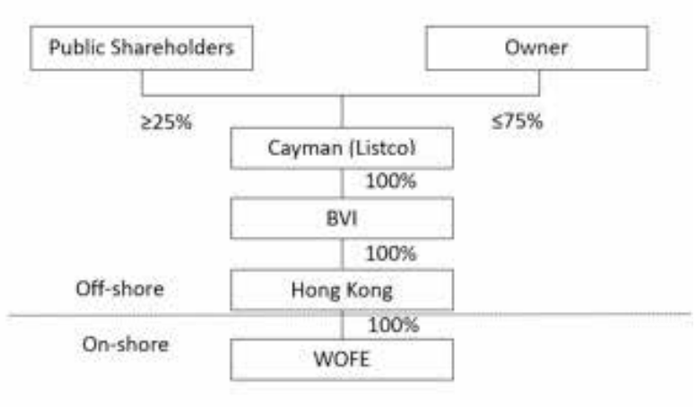

Diagram 2: a typical Red-Chip structure

Contrary to H-Share companies, Red-Chip companies are not subject to Chapter 19A of the Listing Rules. Instead they are regulated under Chapter 19 of the Listing Rules (in addition to other applicable Listing Rules). In this regard, Red-Chip listings are more straightforward than H-Share listings from the Listing Rules perspective given the companies laws in the Cayman Islands and Bermuda, both of which are common law jurisdictions, are largely similar to those in Hong Kong. In addition, Red-Chip listings are not required to obtain CSRC approvals, which is a compulsory requirement for H-Share listings. Apart from CSRC approvals, the general due diligence procedures of Red-Chip listings are basically the same with H-Share listings, and PRC legal opinion is also indispensable for Red-Chip issuers pursuant to Form M104. In addition, Red-Chip company may also need to obtain Management Presence Waiver as well as Joint Company Secretaries Waiver. Please see the section headed "Comparison between Red-Chip Listings and H-Share Listings" below for more detailed and comprehensive comparison between Red-Chip issuers and H-Share issuers.

Circular 10 – Barriers to Red-Chip Listings

Historically, the PRC regulatory processes for the reorganization and the listing of Red-Chip companies were simpler than those for H-Share issuers. However, Red-Chip listing has become less certain and straightforward as it used to be due to the implementation of "Rules on the Merger and Acquisition of Domestic Enterprises by Foreign Investors in the PRC" (hereinafter referred to as "**Circular 10**") on 8 September 2006, which were jointly promulgated by a number of PRC governmental departments on 8 August 2006 and amended by the Ministry of Commerce (hereinafter referred to as "**MOFCOM**") on 22 June 2009.

In a nutshell, Circular 10 prohibits the transfer of a PRC business to an off-shore entity (in the case of IPO, the future listed company) directly or indirectly owned by Chinese resident shareholder (so called 'round trip' investments) without the approval of MOFCOM. Under Circular 10, various stringent requirements and restrictions are imposed on Red-Chip listing, including:

(i) MOFCOM's approval is required for the acquisition of the businesses or assets of a PRC domestic enterprise by the special purpose vehicle ("**SPV**");[35]

(ii) MOFCOM's approval is required for the establishment of a SPV outside the PRC by a PRC domestic enterprise for the purpose of an overseas listing of the interest in a PRC domestic enterprise;[36]

(iii) CSRC approval is required for listing of a SPV holding PRC assets on an overseas stock exchange;[37]

(iv) proceeds of the offshore listing and dividends and proceeds of changes in the capital of Chinese shareholders must be repatriated to China within 180 days/ 6 months;[38] and

(v) failure to complete the overseas listing within 12 months upon obtaining a listing approval would result in the enterprise reverting to its original shareholding structure.[39]

It was originally perceived that the issuance and implementation of Circular 10 would seriously curtail, if not prohibit PRC enterprises from adopting the Red-Chip structure to get listed in Hong Kong due to the imposition of stringent requirements and restrictions on offshore restructurings of PRC issuers. However, more than a decade since its promulgation in 2006, it can be seen in practice that many PRC issuers have come up with various creative reorganization plans to materialise their listings in Hong Kong after the implementation of Circular 10 as discussed below: -

(a) Using Red-Chip structures established prior to the implementation of Circular 10

Considering the principle that law does not apply retroactively, technically speaking no MOFCOM approval is required if the Red-Chip structure was established prior to 8 September 2006, which is the effective date of Circular 10. As such, acquisition of a Red-Chip structure set up before 8 September 2006 will release domestic enterprises from being subject to Circular 10. Notable cases in this regard include Real Gold Mining Limited (0246.HK), China Zhongwang Holdings Limited (1333.HK) and Tiangong International Company Limited (0826.HK).

(b) Changing the nationality of actual PRC controllers

Changing the nationality of PRC business owners is also arguably a potential way adopted by some people who seek to avoid the application of Circular 10 as Circular 10 only applies to PRC individuals. However, in practice many PRC founders may have concerns of abandoning original nationality and obtaining nationality of an unfamiliar jurisdiction.

(c) Turning the PRC enterprises into JV or WOFE

As Circular 10 only restricts mergers and acquisitions between overseas companies and domestic companies, the rules cannot apply if the domestic companies have been transformed to a Sino-foreign joint venture ("**JV**") or a wholly foreign-owned enterprise ("**WOFE**"). The most common measure is to introduce a foreign investor to the PRC domestic enterprise, which then turns it into a Sino-foreign JV or WOFE, so as to get around the application of Circular 10. Relevant cases include China Tianrui Group Cement Company Limited (1252.HK) listed in December 2011 and China Zhongsheng Resources Holdings Limited (currently known as Add New Energy Investment Holdings Group Limited) (2623.HK) listed in April 2012.

It should be noted that this method is only directly available if the PRC businesses are within the foreign direct investment ("**FDI**") permissive

35 Article 11 of Circular 10
36 Article 42 of Circular 10
37 Article 40 of Circular 10
38 Article 48 of Circular 10
39 Article 49 of Circular 10

sectors as set out in the Foreign Investment Market Entry Special Administrative Measures ("**Negative List**") jointly promulgated by China's National Development and Reform Commission and MOFCOM. A shortened and simplified version of Negative List was released on 28 June 2018 and took effect on 28 July 2018, which opens more sectors to foreign investment.

(d) Listing through variable interest entity ("VIE") structures

In essence, a VIE structure refers to a structure established in the PRC which is fully or partially foreign owned and has control over a PRC operating company ("**OPCO**") which holds all necessary license(s) to operate in a FDI restricted sector. As the foreign investors are not allowed to directly invest in such FDI restricted businesses or have to obtain MOFCOM's approval, they adopt various contractual arrangements to obtain de facto control over the operation and management of the OPCO and to ensure its economic benefits be transferred back to the foreign-owned enterprises. The diagram below illustrates a typical VIE structure:

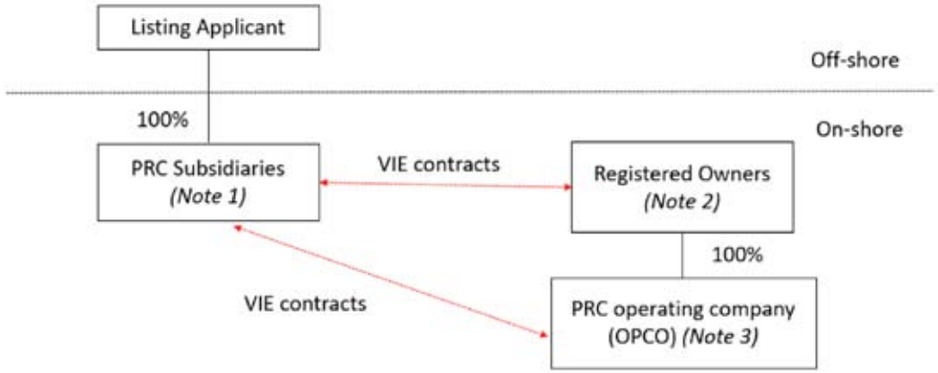

Diagram 3: a typical VIE structure

Notes:

1. PRC Subsidiaries are subsidiaries of the Listing Applicant (normally WOFE or Sino-foreign JV) and own all intellectual properties of the listed group.
2. Registered Owners are shareholders of OPCO, which are normally PRC national and controlling shareholders of the Listing Applicant.
3. The OPCO is incorporated in the PRC and own all operating licenses to perform the business of the listed group.

Whilst VIE structures have long been used by both domestic and foreign investors to "circumvent" the PRC approval requirements, its legality and validity remains uncertain and questionable from the PRC legal system perspective as there is neither clear prohibition nor express endorsement of VIE structures by the PRC regulatory bodies. In view of this, the Stock Exchange published one guidance letter and two listing decisions, i.e. HKEX Guidance Letter GL77-14, HKEX Listing Decision LD33-2012 and HKEX Listing Decision LD43-3, to specifically deal with VIE structures (so called "structured contracts" in Hong Kong). In particular, it is clarified that PRC issuers are not allowed to adopt VIE structure if there are no limits on foreign ownership under the PRC laws,[40] and the VIE structure is only permitted to the extent necessary to address the foreign ownership restriction.[41] The Stock Exchange has confirmed that VIE structures will be allowed on a case-by-case basis after full consideration of the reasons for adopting such arrangement and subject to certain conditions,[42] including but not limited to disclosing relevant details of the VIE arrangement and the risks involved in the prospectus.[43] For the purpose of protecting the interests of the listed companies and the investors, the VIE contractual arrangements must include a power of attorney, dispute resolution clauses and rights to deal with OPCO's assets.[44] Further, the listing applicant must unwind the VIE arrangements as soon as the law allows the business to be operated without them, and the registered owner of the OPCO must undertake to return to the listing applicant any consideration they receive in the event that the applicant acquires the shares of the OPCO when unwinding the VIE structure.[45] There are also certain requirements on the PRC legal opinion in the case of VIE structures, including:

(i) where the relevant laws and regulations specifically disallow foreign investors from gaining control of or operating a foreign restricted business through the use of a VIE structure (e.g. on-line game business in the PRC), the legal adviser's opinion on the VIE agreements must include a positive confirmation that the use of the VIE structure does not constitute breach of those laws or regulations and that the VIE agreements will not be deemed invalid or ineffective under those laws and regulations. The legal opinion must be supported by appropriate regulatory assurance, where possible, to demonstrate the legality of the VIE contracts;[46] and

(ii) if the VIE company operates in the PRC, a positive confirmation from the PRC legal advisers that the VIE agreements would not be deemed as "concealing illegal intentions with a lawful form" and void under the PRC contract law.[47]

In spite of guidance letter and listing decisions, the uncertainty of VIE structures reappeared after MOFCOM published a consultation draft of the new PRC Foreign Investment Law on 19 January 2015 which raised concerns over the legality of VIE structures. In light of this law, potential issuers which intend to list VIE structures are encouraged to seek informal and confidential guidance from the Stock Exchange at the earliest possible opportunity.[48]

Although VIE structures remain uncertain, it is observed that some PRC enterprises adopting VIE structures have been successfully listed in Hong Kong in recent years, such as Tianli Education International Holdings Limited (1773.HK) listed in June 2018, Boill Healthcare Holdings Limited (2001.HK) listed in April 2017, Wisdom Education International Holdings Company Limited (06068.HK) listed in January 2017 and China Art Financial Holdings Limited (1572.HK) listed in November 2016.

Comparison between Red-Chip Listings and H-Share Listings

Set out below is a comparison table showing major differences between Red-Chip and H-Share listings:

40 HKEX Listing Decision LD43-3, The Stock Exchange of Hong Kong Limited. Paragraph 17. Retrieved from: https://en-rules.hkex.com.hk/sites/default/files/net_file_store/new_rulebooks/l/d/LD43-3.pdf

41 Paragraph 16A of HKEX Listing Decision LD43-3
42 Paragraph 16 of HKEX Listing Decision LD43-3
43 Paragraphs 15 and 19 of HKEX Listing Decision LD43-3
44 Paragraph 18(c) of HKEX Listing Decision LD43-3
45 Paragraph 18(b) of HKEX Listing Decision LD43-3
46 Paragraph 18A of HKEX Listing Decision LD43-3
47 Paragraph 19(k) of HKEX Listing Decision LD43-3
48 HKEX Guidance Letter GL77-14, The Stock Exchange of Hong Kong Limited. Paragraph 23. Retrieved from: https://en-rules.hkex.com.hk/sites/default/files/net_file_store/new_rulebooks/g/l/gl7714.pdf and paragraph 22 of HKEX Listing Decision LD43-3

	Red-Chip	H-Share
Approval from PRC authorities	Approval from CSRC is not required but need to obtain MOFCOM approval if Circular 10 is applicable.	CSRC approval is required to get listed in Hong Kong.
Applicable laws and regulations	Laws and regulations of Hong Kong, place of incorporation of the Red-Chip issuers and the PRC (as the operation is mainly conducted in the PRC).	Laws and regulations of Hong Kong and the PRC.
Applicable Listing Rules	Subject to Listing Rules, excluding Chapter 19A of the Listing Rules.	Subject to Listing Rules, including Chapter 19A of the Listing Rules.
Listing requirements	Same, both listings are subject to financial tests, management continuity and ownership continuity as set out under Chapter 8 of the Listing Rules.	
Reorganisation	Offshore restructuring is necessary and need to consider the tax implications on reorganization.	Reorganisation is not necessary.
Waiver to be sought	(To the extent applicable) Management Presence Waiver and Joint Company Secretaries Waiver.	
Circulation	All securities (including founders' shares after listing) can be freely circulated subject to lock-up requirements.	Domestic shares held by founders cannot be circulated outside PRC without CSRC approval (the regulatory authorities are considering full circulation of H-shares).
Classes of shares	Only one class of shares if not adopt the weighted voting rights structure.	At least two class of shares (i.e. domestic shares and H-shares).
Post-listing finance	Listed companies cannot issue new shares within six months after listing under the Listing Rules.[49] Approval from PRC authorities is generally not required for issue of shares after listing and post-listing financing is more flexible.	Apart from restriction under the Listing Rules, H-Share issuers need to obtain CSRC approval for issue of new shares.

49 LR10.08

About DeHeng Law Offices

Founded in 1993, DeHeng Law Offices was formerly known as China Law Office and was renamed DeHeng in 1995. With 42 domestic and foreign branches, 160 cooperative agencies and over 2,500 legal service professionals, DeHeng has emerged as one of the largest domestic law firms, advising in a comprehensive number of practice areas. For over 27 years, DeHeng has been committed to providing quality and efficient legal services for clients at home and abroad, and has an active role in China's development and the globalization of Chinese enterprises.

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Judy has over 20 years of offshore and onshore experience in listings on the Hong Kong Stock Exchange and the Singapore Stock Exchange as well as mergers and acquisitions, private equity investments and other corporate finance transactions. Judy led the team in completing over 50 IPOs in 2018 and setting its highest record yet for deal value total on listing deals, approximately HKD15.5 billion, in the first half year of 2019. She also received several recognitions from legal journals. Clients commented on Judy with "a strong corporate finance, capital markets and investment funds practice" and described her as "very hands on; sound technical knowledge and attention to details". They noted Judy as one who "keeps her advice practical and focused, and is a pleasure to deal with" and "a very pragmatic, insightful and efficient lawyer" who offers "great commercial understanding and excellent client service".

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Paul has been recognised as a "Rising Star" by IFLR 1000 in 2018 and 2017 editions. Clients described Paul as "excellent...very technically knowledgeable and the advice he gives will be reliable and sound". Another client says he provides "detailed and professional advisory services".

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Agnes Cheung is a director and Head of Tax.

Agnes has extensive experiences in providing Hong Kong and international tax planning services to multinational companies as well as Chinese state-owned enterprises in different industries. In particular, Agnes is experienced in advising group restructuring, merger and acquisition and other cross border transactions involving Hong Kong.

Agnes also specialises in the asset management industry. She has advised numerous private equity, venture capital and hedge funds on their formation issues, top side and downstream structuring, field audit and tax investigation by the IRD. She is specialised in the Hong Kong Offshore Funds Law, Offshore Funds Law for Private Equity Funds and the newly enacted Unified Fund Exemption regime.

Agnes has acted as a technical reviewer in assisting Wolters Kluwer to review the Hong Kong Master Tax Guide from 2008 to 2016. She is a frequent contributor of articles on international tax journals, local magazines and newspapers.

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With nearly 20 years of industry experience, Mr Chan joined CLSA as part of its merger with CITIC Securities International in 2015, after four years at CITIC Securities International as Managing Director. He previously assumed investment banking roles, Deloitte & Touche Corporate Finance Limited, Core Pacific Yamaichi Capital Limited and Piper Jaffray Asia Limited, mostly in Hong Kong, with stints in Shanghai and Beijing.

Mr Chan graduated from the University of California with a Bachelor in Economics.

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Hang Li is CLSA's Global Head of ECM and Syndicate. At CLSA he has led the Hong Kong IPOs of Xiaomi Corporation, Fosun Tourism Group, Midea Real Estate and Hua Medicine among many others, as well multiple new and secondary share placements and block trades. Mr Li has also advised on IPOs in the US market, and has participated in many regional equity financing projects including the IPO of SoftBank's telecom business in Japan.

Prior to joining CLSA in 2013, Mr Li worked for Nomura International (HK) as an analyst in the oil, gas, metals & mining sectors for three years. He started his career in the Oil Gasification Department of Royal Dutch Shell.

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Steve Lam, Head of Equity Syndicate at CLSA, is responsible for the syndication of equity transactions across all markets CLSA operates in. Mr Lam has more than 15 years of equity capital market experience; he has executed a multitude of landmark transactions in Asia ex-Japan including IPOs, follow-ons and placements for Alibaba, AIA, China Construction Bank, China Railway, Samsung C&T and China Pacific Insurance, as well as secondary sell-downs for BoA in China Construction Bank and Vodafone in China Mobile.

Prior to joining CLSA in 2017, Mr Lam spent more than five years at Citigroup, working as part of its Asia ex-Japan Capital Markets Origination team. Before then, he worked for UBS's Equity Capital Markets team for four years.

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He was a member of Working Group on Professional Services under the Economic Development Commission of HKSAR (2013-2018), the President of the Hong Kong Institute of Chartered Secretaries (2014-2015), a General Committee member of The Chamber of Hong Kong Listed Companies(2014-now),, a member of Qualification and Examination Board of the Hong Kong

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Mr. Ringo has over 8 years in digital investor relations experience for IPO and Hong Kong listed companies. He was sales director of EQS Group AG (EQS:GR) and managed the Hong Kong region since 2011. In 2012. Mr. Ringo earned a master's degree in media management from Hong Kong Baptist University. Before 2011, he served as account manager in Alibaba Group Holding Ltd (BABA:US) and I-CABLE Communications Ltd (1097:HK) respectively. Having long been engaged in digital field and investor relations, he has gained a wealth of digital investor relations experiences at home and abroad.
At Wisdom IR, Mr. Ringo is responsible for day-to-day marketing operations and initiate measures to continuously enhance the efficiency of all related business development in digital investor relations sector.

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出版者的话

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在此，我谨代表汤森路透团队，为您献上这个广受欢迎的内容产品：第三版ALB香港首次公开上市手册。我们花费了一年时间，终于将这本手册编辑完成。记得是2018年12月，我们开始与诸家律所展开讨论，大家都希望能够围绕港交所近期的一系列改革，为寻求在这里上市的公司提供新的指导——这其中有许多是新经济领域企业。之后的几个月中，经过再三讨论，许多专家开始对这本手册产生兴趣，他们很想就自身专业的最新知识进行分享，最终，这本手册也成了寻求港交所上市的公司“必读”的一份“手把手”指南。

此次的2020版以我们在2015年和2017年出版的前两版为基础——在此不多赘言它们有受欢迎——此外还增加了不少关于香港IPO市场最新动态的专题文章。比如2018年才刚刚亮相香港的双重股权结构上市，这一制度使得中国内地的科技公司开始将港交所列为它们的主要交易市场。我们还探寻了一番将香港及内地证券交易所联系在一起的互联互通制度，它们使得在香港上市的公司对投资者更有吸引力了。此外，还有文章专门探讨了在香港越来越普遍的第二上市问题。

今年夏天，香港的上市市场还显得静悄悄的。当时，受到中美贸易摩擦、英国脱欧以及近在家门口的动荡因素影响，2019年前9个月的港交所上市可谓冷清。然而，在今年的最后一个季度，港交所经历了强势反弹。正当我写下这篇文章时，刚刚在香港进行的一场二次上市——中国电子商务巨头阿里巴巴募资金额高达113亿美元的上市——重新将港交所带回了2019年世界范围内IPO市场的顶峰。截止到2019年11月底，港交所在IPO方面的收益已经达到347亿美元。在经历了长达数月的动荡之后，港交所的表现无疑试炼着香港这座城市的坚韧，香港十数年来第一次陷入经济后退，但发行人和投资者也以实际举动为选票，支援着它作为金融中心的未来。 IPO市场的重振雄风无疑会吸引更多企业在港上市，我们希望这本小小的手册能在它们的IPO之路上提供指引。

最后，ALB希望对为这本手册的出版贡献出时间及专业知识的个人及机构表示感谢。

这份感谢名单中包括Brian W. Tang——他是ACMI的创始人和董事总经理，也是Lite Lab@HKU的创始执行董事，同时也是这本2020首次公开上市手册中前言的作者。Tang先生在引言中娓娓道来，为我们讲述了自2018年4月港交所启动改革以来的一系列市场变化时间线。他所做的这番总结对于任何寻求在港交所申请上市的人都颇有助益。

我们同样也要感谢为这本手册提出指导和建议的诸家国际及香港本地专业协会。以表鸣谢，这本手册的印刷及电子版本也会即刻提供给下述协会的会员们：

1. 环太平洋律师协会（IPBA）
2. 香港律师会
3. 香港投资者关系协会（HKIRA）
4. 香港公司律师协会（HKCCA）

谢京庭

亚洲法律杂志亚太区主管
汤森路透

目 录

前言

香港IPO市场指南 — 随技术创新和全球竞争逐步发展

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香港的首次公开发行（IPO）市场：面临挑战和竞争，同时翻开令人激动的新篇章。

2018年上市制度改革助力香港成为全球最大IPO市场

经过多年激烈争辩，香港联交所于2018年4月发布上市新规，接纳加权投票权或双重股权架构的公司上市，试图在作为国有企业上市地的传统优势之外拓宽上市制度，吸引更多中资大型私企。继联交所错失世界最大金额IPO交易（2014年阿里巴巴赴纽约股票交易所（纽交所）上市，筹资250亿美元）后，上市新规促使智能手机制造商小米在2018年7月上市，筹资47.2亿美元；美食外送及票务平台美团点评2018年9月上市，募集42亿美元。

联交所于同时生效、接纳尚未盈利或没有收入的生物科技公司上市的新规，也吸引了中国众多生物科技公司，其中包括抗癌药物研发企业百济神州（募集9.03亿美元）、信达生物制药（4.85亿美元）、歌礼生物科技（4亿美元）、上海君实生物医药科技（3.94亿美元）、基石药业（3.28亿美元）、康希诺生物（1.73亿美元）、迈博药业（1.57亿美元）及华领医药（1.17亿美元）。联交所重点支持生物科技，这点也吸引了更多老牌知名企业，在上交所上市的医药技术平台无锡药明康德新药开发股份有限公司二次上市（募集10.6亿美元），其他在港开展IPO的企业包括豪森药业（募集10亿美元）、方达医药（2.05亿美元）和维亚生物（1.94亿美元），助力香港成为全球第二大生物医药公司募资中心。

上述上市新规使得香港成为2018年度最大IPO场所，195次IPO共募集333亿美元资金。

2019年度上市走向与机会

2019年仍有众多不利因素，从中美贸易战到香港街头抗议等宏观因素，导致香港的信用等级下调，前景黯淡。

2019年上半年，香港IPO宗数共计76，募集资金总额695亿港元，排名第三，IPO宗数最多（但较去年同期101宗有所下滑）。同年5月，Uber在排名首位的纽交所上市，募集81亿美元，同年3月Lyft在排名第二的纳斯达克上市，募集25亿美元。

香港也日渐成为私募基金投资的中资企业私有化退出的场所，其中包括2017年度无锡药明生物4.1亿美元上市（系美股上市企业无锡药明康德一拆三私有化操作的第三部分，也是香港首单退出）以及滔博国际2019年10月10.1亿美元上市（此前在联交所上市的百丽国际）。

尽管香港面临国际市场上市的挑战，如2011年在伦交所和港交所双上市（至今仍为伦交所最大IPO）的嘉能可，于2018年撤回上市，但联交所仍为大部分亚洲企业的首选上市地，百威英博的50亿美元IPO，迄今为止2019年度全球第二大IPO，即为明证。

中国和伦敦国际竞争加剧

Dealogic公司报导称，2019年上半年，「中国和香港争夺亚洲新上市量的战斗日渐激烈，中国内地IPO规模达91亿美元，领先于香港的88亿美元」，但称之为「新上市量刹车」。

中国市场一直未能接纳不同投票权的公司上市，但是2018年7月，港交所公布将对中国投资者实行「稳定交易期」，待中国内地投资者熟悉相关规则后，方允许其在「港股通」下投资于联交所上市的双重股权架构企业，令市场震惊。直至一年多以后的2019年8月才最终提出新规，更大的确定性应能吸引更多不同投票权架构的企业。

同时，2019年7月，上交所推出科创板块，25家科技创新企业登录该板块，上市首日平均涨幅达140%。据报告称，科创板正诱使中国生物科技公司（其中包括大型技术公司）不在香港联交所上市，包括智能手机制造商传音控股3.94亿美元IPO，以及硅谷企业山石网科1.33亿美元上市。

阿里巴巴股东于2019年7月批准股份分拆，被解读为在香港二次上市的信号，而科创板于 2019年9月同意接纳不同投票权架构的云端存储服务商UCloud上市，则标志着加剧与联交所、纽交所和纳斯达克争夺该类公司的里程碑事件。

另外，2019年8月，伦交所同意270亿美元购买私募基金黑石和汤森路透持有的数据服务提供商Refinitiv。一个月后，联交所向伦交所发出主动收购要约，拟以366亿美元收购后者（不含Refinitiv），伦交所董事会即时回应并一致拒绝。很显然，联交所董事会一年多之前就曾经考虑本次要约收购。同时，继华泰证券在本年6月设立的沪伦通下首次发行16.3亿美元全球存股证（GDR）后，中国太保拟发行第二单GDR产品在伦交所上市，这可能是本年度伦交所最大规模的上市。

吸引新一代科创公司持续在香港上市

衡量IPO是否成功，除了考虑初始上市规模，还要考虑包括盘后交易（即股价是否上升，投资者是否赚钱）。但是，如果股价上升幅度过大过快，首席财务官会埋怨说「投资者赚取的金钱过多」。因此，成功的IPO不仅是一项科学，还是一门艺术。

今年估值超过10亿美元的科技初创企业（如Uber、Lyft）IPO成绩不尽如人意，主要在于这类独角兽企业的预估值和公开发行价之间的差值。在美国，直接上市已经步入正轨，但这种上市方式，对于正流金流量、品牌认同度高无须筹资的企业（如Slack和Spotify），吸引力有限。据称Airbnb也有意IPO。

作为2019年2月国务院发布的《粤港澳大湾区发展规划纲要》的一部分，香港将在建设这个「全球影响力国际科技创新中心」工作中起到不可或缺的作用，包括「发挥香港在金融服务行业的引领带动作用，巩固和提升香港国际金融中心的地位，打造服务「一带一路」建设的投融资平台」。

近年来中国企业迎来风投和私募投资盛宴，意味着将持续寻求IPO退出。香港的金融科技行业生机勃勃，已在2017年吸引保险科技公司众安保险上市，而双重股权架构的人脸识别独角兽企业旷视科技已递交上市申请，可能成为中国人工智能上市第一股。

区块链和分布式账本是另一种创新科技。虚拟货币挖矿相关的加密货币硬件公司（即：比特大陆、嘉楠科技和亿邦通信）提交的上市申请，已随着比特币价格下落和工作量证明等共识算法的兴起到期，几家区块链公司的所有方已收购了联交所上市企业的股权。其中，2018年8月，火币集团收购桐成控股72%股权；2018年8月品牌中国被ANXONE和OSL所有方收购74.5%股权；2019年1月OK集团收购前进控股集团60.5%股权。目前，品牌中国（现名BC集团）业下的区块链主营业务，其财务报表由普华永道负责审计，据报导称，火币正试图将区块链资产开展借壳上市。联交所2019年生效的遏止借壳上市、反向收购和壳公司使用相关的新规对这些计划将产生什么影响，我们将拭目以待。

同时，2018年6月，港交所成为联合国可持续发展证券交易所计划的第74家伙伴交易所，致力于进一步提升「环境、社会和管治」方面的「遵守或解释」规则，相关公众谘询报告已于2019年7月完稿。这将助力香港成为绿色金融中心。

香港奉行法治、其强有力的监管制度和市场韧性是主要竞争优势。香港的监管机构十分重视市场参与者的纪律奖惩。2018年10月，证券与期货事务监管委员会法规执行部执行董事魏建新（Tom Atkinson）宣布，已对39宗IPO上市所涉28名保荐机构开展30例保荐人行为不当调查。之后，以涉事投行在2009年至2014年间上市时未能尽到保荐人职责为由，处以创记录的超1亿美金罚单，其中包括中国森林（2009年上市，保荐机构为渣打和瑞银）、瑞金矿业（2009年上市，保荐人花旗）、中国金属再生资源（保荐人：瑞银，招商银行）、天合化工（2014年上市，保荐人：摩根士丹利、美林和瑞银）以及福建东亚水产（2014年，保荐人：建银国际）。瑞银证券暂被吊销IPO保荐牌照18个月。

2019年7月，美国证监会批准Blockstack发行2,800万美元代币，同时批准YouNow发行Regulation A+资格的代币，香港证监会也正在考虑成立虚拟资产交易平台。

我们期待未来几年内，香港能够以逐底竞争以外的方式，继续吸引更多优质创新科技公司上市并通过IPO募集资金。

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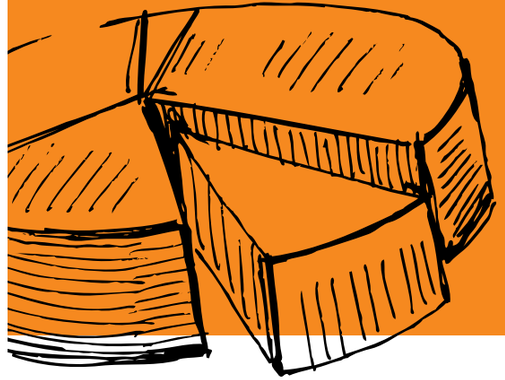

第1章

香港双重股权结构上市

一、 何为「双重股权结构」

「双重股权结构」是一种「不同投票权结构」，即某些特定股东所持有的公司股份「同股不同权」（Weighted Voting Rights (WVR)）。一般而言，大多数企业同种类的每一股份具有相同的权利，包括每一股股份享有同等的表决权（俗称「同股同权」）；然而，「同股不同权」是指某些股东享有与其在企业中所持有的经济利益（即每股股份）对应的权利不同，包括不成比例的投票权或其他相关权利，如无投票权股份、优先投票权股份及具有较大或独有的董事选任权的股份等多种形式[1]。

采用「不同投票权结构」的公司会发行两类或多类不同投票权的股份。以最为常见的「AB股结构」为例：A类股份由普通股东持有，每一股对应的投票权为一票，B类股份由公司的创始人或管理团队成员持有，每一股对应的投票权为多票。

二、「双重股权结构」出台的背景

（一）本次新政出台的情况

2018年2月，经与香港证监会和相关多方讨论后，香港联交所发布了《新兴创新产业公司上市制度咨询文件》，对于不同股票权架构的发行人提出了针对性的建议。2018年4月，香港联交所根据各方对咨询文件的反馈回复发布了《新兴及创新产业公司上市制度》咨询总结，并发布主板上市规则（第119次修订），于2018年4月30日生效，正式采纳了港股双重股权结构上市制度（「本次新政」），为采用双重股权结构的高增长创新产业公司赴港发行上市完善了制度建设。

（二）港股双重股权结构制度沿革

本次新政并非香港联交所对双重股权上市架构的首次尝试，早在1972年至1973年间，会德丰洋行旗下的5家公司、Local Property and Printing Company Limited以及太古股份有限公司（「太古集团」）已陆续发行「B股」上

1 香港联交所研究报告《双重股权架构与生物科技行业的上市制度改革》，2018年4月24日。

市，此后随着前述7家公司中的6家被收购/完成私有化而退市，太古集团成为港股市场唯一发行B股的上市公司；彼时，这些「B股」与普通股具有同等的投票权利，但股票面值及分红权利较低（如，为普通股的五分之一或十分之一），且香港上市规则并未对双重股权结构作出特殊规定[2]。

1987年3月，长江实业（集团）有限公司等多家企业均拟发行B股，但由于低迷的市场反响和香港及海外经纪的强烈反对，香港联交所当时的证券监管主管机构发布公告，禁止双重股权的上市申请，并禁止已上市公司发行「B股」，并于1989年12月相应修订《上市规则》[3]；

随着市场对科创型企业愈加关注，同时考虑到该类企业普遍存在的资金需求强、初期营收低、发展潜力高等特性，创始人及管理团队为进一步加强持股的稳定性，避免企业在成长中面临的包括恶意收购、企业决策掣肘于财务投资者等威胁，使得科创型企业的创始人及管理团队投入更多的精力在科研创新、技术开发等领域方面[4]，各方逐渐关注和重视「双重股权结构」对这类科创型企业的影响。2014年8月，香港联交所发布《不同投票权架构的概念文件》对修订「同股同权」上市制度进行征询，并于2015年6月发布《不同投票权架构的概念文件谘询总结》，虽然各界仍就采纳双重股权模式存在较大分歧，但该轮谘询总结奠定了联交所本次新政的基础。2017年6月，香港联交所发布《建议设立创新板框架谘询文件》并于同年12月刊发了《建议设立创新板的谘询总结》，明确了香港联交所将通过修订上市规则拓宽上市制度。

三、 申请「双重股权结构」的具体要求

双重股权结构一方面缓解了创新产业公司的资金需求压力，对创始人股东及管理层存在激励效应，有利于提升企业长远价值；但在另一方面，也可能存在信息不对称和代理问题以及对控股股东的有效监督等问题[5]，因此，对双重股权结构设定一定的限制、完善投资者保障措施、加强企业管治与信息披露显得尤为重要，本次新政，香港证监会为平衡投资者保护与发行人利益，对发行人及不同投票权受益人提出了一系列要求：

(一) 上市申请人的主要资格条件

1. **公司性质**：应为联交所认定的「创新产业公司」；
2. **业务成功**：申请人应证明其有高增长业务的记录以及存在较强盈利能力；
3. **外界认可**：申请人必须曾得到至少一名资深投资者的投资，该投资的至少50%应保留至上市后6个月；
4. **市值要求**：上市时市值最低为400亿港元，或申请人最近一年的收入超过10亿港元的，最低市值应超过100亿港元。

(二) 不同投票权受益人的主要资格条件

1. **身份要求**：受益人必须为自然人，且在申请人上市时和上市后担任/留任董事职务；
2. **受益人的贡献**：联交所需要对每一名受益人对申请人业务增长的贡献进行核实，以实现权利与贡献相匹配；
3. **上市时的最低及最高持股权益**：受益人应在上市时合计持有的已发行股本总额应不少于10%且不高于50%。

(三) 对不同投票权股份的限制

1. **日落条款**：当受益人因(i)身故、失去行为能力、不再担任董事等客观因素，(ii)因其品格及诚信因素不再符合董事资格，或(iii)将其持有的股份转让予第三方的情况下，受益人股份所附带的不同投票权将永久失效；
2. **表决权差额**：不同投票权股份所对应的表决权应不超过普通股的10倍。

(四) 加强披露要求

1. **股份标记**：采用双重股权架构的申请人应在股份代号结尾加上「W」以作标识；
2. **示警字句**：采用双重股权架构的申请人应在其公告文件醒目处标明示警字句「具不同投票权控制的公司」；
3. **身份提示**：在上市申请人的上市文件、年报、中期报告中应标明不同投票权受益人的身份。

(五) 加强企业管治

1. **设立企业管制委员会**：采用双重股权架构的申请人应设立企业管制委员会以对申请人及其股东符合《上市规则》关于双重股权架构的相关要求进行监管，企业管制委员会的全部成员应为独立非执行董事；
2. **合规顾问**：采用双重股权架构的申请人应委任常设的合规顾问，与双重股权架构相关的冲突或其他事宜应谘询合规顾问的意见；
3. **风险培训**：采用双重股权架构的申请人之董事及管理人员应接受关于不同投票权及相关风险的培训。

四、结语

笔者在本文中主要介绍了香港联交所「双重股权架构」制度下对「不同投票权」的含义、香港联交所出台该上市新政的沿革背景以及其对申请不同投票权架构的具体要求，供有意采纳、探讨该制度的企业、中介机构及其他各方参考，便于在后续实践中做到与相关理论的相互有效结合，实现企业价值的最大化。

2 香港联交所谘询文件，《不同投票权架构的概念文件》，2014年8月。
3 香港联交所谘询文件，《不同投票权架构的概念文件》，2014年8月。
4 香港联交所研究报告《双重股权架构与生物科技行业的上市制度改革》，2018年4月24日。
5 香港联交所研究报告《双重股权架构与生物科技行业的上市制度改革》，2018年4月24日。

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证券业务中心

证券业务中心成立于 2000 年，作为律所成立最早的专业化业务中心，现由百余名合伙人及专业律师组成。团队成员均具有专业的法律知识和丰富的证券市场服务经验，多名成员持有注册会计师资格、注册税务师资格、上市公司独立董事资格和其他国家律师执业资格。团队已经成功为数百家公司股票与债券的发行、改制、并购重组、股权融资提供卓有成效的法律服务，客户上市地点板块包括中国主板、科创板、中小板、创业板、全国中小企业股份转让系统、区域性股权交易中心、香港联合交易所、美国纳斯达克证券交易所、英国伦敦证券交易所、澳洲证券交易所、韩国证券交易所等。

在“为上市公司服务，为公司上市服务”战略的指引下，证券业务中心以专业的技能与优质的团队为客户提供高质量法律服务，与客户共同面对市场变化，谋定而后动，陪伴客户开拓与镇守。

第2章

红筹架构搭建过程中的法律问题

红筹模式和H股模式，是中国企业赴境外上市的两种途径。所谓「红筹模式」是指境内居民（包括境内自然人及/或境内机构）设立离岸公司（通常在开曼、百慕大或英属维尔京群岛等地），以离岸公司为境外上市主体，适用当地法律和会计制度。离岸公司收购境内公司的资产或股权，境内公司成为离岸公司的子公司；或者由离岸公司和境内公司签订以实际控制为核心的内容的一系列协议，将境内公司的控制权、收入、利润全部转移到离岸公司。

在红筹架构搭建的过程中，有一些典型的法律问题，本文稍作提示性整理。

一 境内机构股东的境外投资手续

(一) 发改部门的手续

根据《企业境外投资管理办法》（中华人民共和国国家发展和改革委员会令第11号）（下称「**11号令**」），各类境外投资项目应履行的事前监管程序：

项目类型	中方投资额	投资主体直接开展的境外投资项目（涉及境内投资主体直接投入资产、权益或提供融资、担保）	投资主体通过其控制的境外企业开展的境外投资项目（不涉及境内投资主体直接投入资产、权益或提供融资、担保）
敏感类项目	无论大小	中华人民共和国国家发展和改革委员会（下称「**国家发改委**」）核准	国家发改委核准
非敏感类项目	3亿美元及以上	国家发改委备案	国家发改委大额非敏感类项目情况报告
	3亿美元以下	中央企业：国家发改委备案；地方企业：省级发改委备案	无需履行核准、备案和报告事前程序

根据《国家发展改革委关于发布境外投资敏感行业目录（2018年版）的通知》（发改外资〔2018〕251号）（下称「**目录**」），「在境外设立无具体实业项目的股权投资基金或投资平台」属于敏感行业。根据国家发改委于2018年5月15日在其官方网站上的问题回答，《目录》所称「在境外设立无具体实业项目的股权投资基金或投资平台」，主要是指从境内投入资产、权益或提供融资、担保等，在境外设立无具体实业项目的股权投资基金或投资平台。《目录》所称「在境外设立无具体实业项目的股权投资基金或投资平台」，不包括以下两类境外投资活动：（1）既不涉及境内投入资产、权益，也不涉及境内提供融资、担保等，全部从境外募集资金的股权投资基金或投资平台；（2）境内金融企业已取得国内金融监管部门批准的情况下，在境外设立无具体实业项目的股权投资基金或投资平台。

综上，境内机构投资人通过其境外成立的持股平台公司投资境外拟上市主体及其下属一系列的特殊目的公司，成立境外持股公司须履行发改部门的境外投资手续，持股平台境外投资，只要投资额在3亿美元以下（不涉及境内出资或融资、担保），无需备案也无需告知。

（二） 境外投资手续申报主体

1. 发改部门

11号令第十六条规定，两个以上投资主体共同开展的项目，应当由投资额较大一方在征求其他投资方书面同意后提出核准、备案申请。如各方投资额相等，应当协商一致后由其中一方提出核准、备案申请。

根据项目经验，此处所指境外投资核准或备案申报主体是指本次对境外项目公司投资额较大的中方股东，而非历次对境外项目公司投资额较大的中方股东。

2. 商务部门

《境外投资管理办法》（商务部令2014年第3号）第十四条规定，两个以上企业共同开展境外投资的，应当由相对大股东在征求其他投资方书面同意后办理备案或申请核准。如果各方持股比例相等，应当协商后由一方办理备案或申请核准。如投资方不属同一行政区域，负责办理备案或核准的商务部或省级商务主管部门应当将备案或核准结果告知其他投资方所在地商务主管部门。

根据项目经验，此处所指境外投资核准或备案申报主体是指历次持有境外项目公司股权比例较大的中方股东，而非本次持有境外项目公司股权比例较大的中方股东。

基于以上发改和商务部门对境外投资手续申报主体的不同规定，一些境外投资核准或备案项目会出现发改和商务部门在不同地方申报的情况。

商务部门针对同一个项目只核发一张境外投资证书（发改部门暂无此类要求），且原件仅颁发给中方申报主体，且申报主体掌握着商务部门系统核准/备案申报所需的登录账号和密码。因此，中方申报主体若恶意不配合，可导致后来的其他中方投资者无法办理增资或股权转让等变更的核准/备案。为此，建议涉及多家境内企业共同境外投资同一最终目的地公司时，应在投资协议中增加相关约束性条款，明确各中方投资者在后续变更及注销核准/备案申请中，除严格执行国家法律法规规定的要求外，必须履行充分协助配合的义务。

二 境内个人的37号文登记手续

11号令第六十三条规定，「境内自然人直接对境外开展投资不适用本办法。境内自然人直接对香港、澳门、台湾地区开展投资不适用本办法。」《境外投资管理办法》第二条规定，「本办法所称境外投资，是指在中华人民共和国境内依法设立的企业通过新设、并购及其他方式在境外拥有非金融企业或取得既有非金融企业所有权、控制权、经营管理权及其他权益的行为」。截至目前，发改和商务部门对境内自然人境外投资均未出台具体的监管制度。

《国家外汇管理局关于境内居民通过特殊目的公司境外投融资及返程投资外汇管理有关问题的通知》（汇发[2014]37号）（下称「**37号文**」）规定，国家外汇管理局（下称「**外汇局**」）及其分支机构对境内居民设立特殊目的公司实行登记管理并详细规定了登记的流程和文件。

因此，境内自然人股东（包括持股平台的员工股东），均须就设立、持有境外持股平台的股权，办理37号文项下的外汇登记手续。

根据37号文的规定，「特殊目的公司」是指境内居民（含境内机构和境内居民个人）以投融资为目的，以其合法持有的境内企业资产或权益，或者以其合法持有的境外资产或权益，在境外直接设立或间接控制的境外企业。搭建红筹架构（包括VIE）时，境内居民个人在设立了特殊目的公司后、完成返程投资设立外商独资企业之前，应向外管局申请办理境外投资外汇登记手续。如果不办理登记，境内居民从特殊目的公司获得的利润和权益变现所得将难以调回境内使用，而且，会造成外商独资企业与境外母公司之间的资金往来（利润、出资等）均不合法，从而可能会对公司境外上市造成障碍。

37号文同时对「补登记」进行了规定。在37号文实施前，境内居民以境内外合法资产或权益已向特殊目的公司出资但未按规定办理境外投资外汇登记的，境内居民应向外汇局出具说明函说明理由。外汇局根据合法性、合理性等原则办理补登记，对涉嫌违反外汇管理规定的，依法进行行政处罚。

三 关联并购的处理

根据《商务部关于外国投资者并购境内企业的规定(2009修改)》（下称「**10号文**」）第十一条的规定，「境内公司、企业或自然人以其在境外合法设立或控制的公司名义并购与其有关联关系的境内的公司，应报商务部审批。当事人不得以外商投资企业境内投资或其他方式规避前述要求」。而实践中，商务部从未就前述「关联并购」情形给予过批准。

在红筹架构搭建过程中，为应对该审批困境，通常会采用「变更国籍」或者「两步走」模式。所谓的「两步走」模式是指：第一步，引入境外无关联第三方投资人使境内运营主体由内资企业变更为中外合资企业；第二步，由离岸公司收购境内运营主体使其变更为外商独资企业。

而实务中，部分地区的商务部门已经逐渐收紧审核尺度，对以「两步走」模式绕开10号文「关联并购」的操作方式审核趋严。商务部门的主要依据有：离岸公司并购内资境内运营主体后，外资的持股比例小于或等于5%的；外国投资者与内资公司业务在商业上没有关联性的；第二步外国投资者并购内资公司后即刻由境外香港公司收购为外商独资企业，缺乏商业合理性的。

为应对以上变化，可以采取两种应对方式：其一，增加外国投资者持股比例。即增加第一步中外国投资者的增资比例（但应保持控制权不变更）；其二，延长「两步走」的时间间隔。如调整重组时间表，将两步的时间间隔延长至6个月以上。

但是，因为各地商务部门对该问题的认定标准不一，所以建议各中介团队在具体操作时应及时与当地主管商务部门沟通，以确定不同方案的可行性。

四　开曼经济实质法对红筹架构的影响

开曼群岛（「**开曼**」）于2018年12月公布《2018年国际税务合作（经济实质）法》（「**开曼经济实质法**」），于2019年2月22日公布《地理移动活动的经济实质指引（第1版）》（「开曼经济实质法指引」，与开曼经济实质法合称为「**开曼经济实质法及指引**」）。总结开曼经济实质法及指引的主要内容，即「相关主体」从事「相关活动」应当符合特定的「经济实质要求」。

那么红筹架构下的开曼控股主体或者SPV投资主体，是否会受到开曼实质法的规管以及会受到何种影响？

(一)「相关主体」和「相关活动」的概念

「相关主体」是指根据开曼《公司法（2018年修订版）》（下称「**开曼公司法**」）《有限责任公司法（2018年修订版）》和《2017年有限合伙法》注册设立的开曼公司（包括在开曼注册的外国公司）、有限责任公司和有限合伙；但明确不包含以下三类主体：开曼国企企业；投资基金以及非开曼税收居民实体。

根据开曼经济实质法及指引，「相关活动」被划分为9项业务，包括控股业务、基金管理业务、总部业务、知识产权业务、融资及租赁业务、分销服务业务、运输业务、银行业务、保险业务；但明确不包含投资基金业务。

(二)　不同业务类型对开曼主体影响

1. 若开曼主体符合开曼经济实质法下的「纯控股业务主体」

根据开曼经济实质法及其指引，如果相关主体仅仅开展「控股业务」，即仅持有其他主体的股权，并仅收取股息及资本利得，没有进行其他业务活动（该等主体成为「纯控股业务主体」），则这类主体只需要满足简化的经济实质测试即可，即（i）满足开曼公司法规定的备案要求;（ii）在开曼配备足够的员工及办公场所以持有、管理其他主体的股权。开曼经济实质法及其指引亦明确表示纯控股业务主体可以通过其注册办公地址提供者（即注册代理人）来满足前述简化的经济实质测试。

根据我们的项目经验，红筹架构中的开曼主体（包括开曼持股主体以及投资者成立的开曼投资主体）一般不会开展任何业务活动，其设立目的主要为被动持股并收取投资收益，因此有可能被归属于开曼经济实质法下的纯控股业务主体；而且开曼注册代理人在公司设立及维护中均会提供公司法定的合规及备案服务，开曼经济实质法也明确规定其在未来可以直接提供经济实质的合规服务，因此这类开曼主体将非常容易通过其注册代理人提供的一站式服务满足开曼经济实质法下的合规要求。

2. 若开曼主体为非「纯控股业务主体」

红筹架构下的开曼上市主体能否被视为开曼经济实质法下的纯控股业务主体存在不确定性，因为拟上市主体作为整个上市架构里最上层结构，控制着整个上市架构的公司治理，这使得拟上市主体的实际运营活动很有可能会被归入「相关活动」下的「总部业务」范畴（即（i）提供高级管理人员；（ii）承担或控制该类实体所从事活动的重大风险；或（iii）就前述风险控制提供实质性建议）。

如果红筹架构下的开曼控股公司未被认定为纯控股业务主体而是被归属于「总部业务」的范畴，其需符合复杂的经济实质测试，其中要求「总部业务」下的核心创收活动必须在开曼发生，包括（i）管理决策行为；（ii）为集团内其他主体承担费用开销的行为；以及（iii）统筹协调集团的业务活动行为，这将可能导致要求该开曼控股公司的相关股东会或董事会在开曼召开，相关决策行为发生在开曼，或者相关董事常驻开曼。

但是，以上措施并不是红筹架构中的开曼控股公司满足开曼经济实质法合规要求的唯一途径，因为红筹架构下的开曼控股公司完全可以通过个性化的税务筹划，成为对上市架构整体税务最优的国家（地区）之税务居民身份（例如作为中国大陆税务居民、香港特别行政区税务居民或者其他有重大业务比重的海外其他国家的税务居民身份），从而完全规避在开曼上注入经济实质的需要。

当然，除了以上问题，在红筹架构的搭建过程中根据不同的项目，会产生其他很多个性问题，这也考验中国律师的专业能力以及与主管部门沟通协调的能力。

有关北京德和衡律师事务所

北京德和衡律师事务所是一家综合性法律服务机构，致力于追求“国际化”和“品质化”，贡献本土智慧，打造全球网络，为国内外客户提供全法律领域和行业领域的“一站” 式”法律需求解决方案。

证券业务中心现由百余名合伙人及专业律师组成，团队成员均具有专业的法律知识和丰富的证券市场服务经验。团队已经成功为多家公司的股票与债券的发行，改制，并购重组， 股权融资提供卓有成效的法律服务。

联 络 人

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周善良
联席合伙人

刘轩妤
律师助理

第2章

指 南

上市过程中的两个棘手问题 – 登记注册非香港公司和知识产权事宜

不在香港成立的公司在向香港联合交易所提交上市申请（递交A1表格）前，都应考虑登记注册为非香港公司。因申请人的公司名称及／或商号是否能注册，加上公司名称是其商标的一部分时，注册便会变得较复杂。因此，上市申请人可能需要采用新名称以使其与在公司注册处已注册的本地公司名称或其他非香港公司的名称作区分。该过程可能会花相当多的时间，导致延迟提交A1表格，从而对上市时间表产生极大影响。每个寻求香港上市的公司都应该留意这两个棘手的问题，本节旨在提供一些解决方法。

知识产权风险及规避措施

公司的专利和商标关系到公司的核心竞争力、经营及持续发展，亦是具价值的无形资产。公司应利用注册手段有效保护它们。知识产权风险通常在申请阶段、日常维护或被他人侵权时出现。有效保护的知识产权反映在公司财务状况表的无形资产项目中。

商标权风险及应对策略

商标是经营者在其商品或者服务上采用的，与他人商品或服务区别开的可视性标志，包括文字、图形及文字和图形组合等商标。

注册商标权的特征包括专有性、时间性及地域性，而需考虑的因素有商标的显着性、与其它商标冲突、公司字号关联及涵盖类别等。

公司遭遇的商标争议主要包括：商标近似侵权、侵犯商标权益、着作权、外观设计专利权等或申请注册商标遭遇异议或已注册商标遭遇撤销或无效。

因此，公司应采取的应对策略：

1、排查

商标排查范围包括：

- 公司名称是否已经注册成商标？
- 已注好的商标是否已及时续展？
- 是否存在侵害他人的驰名商标？
- 转让或出资商标权是否进行权属变更？

2、尽早全面加强商标注册。

公司应提前、及时建立完善的商标申请与保护的防控体系，对未来业务领域或类别提前进行商标管理的布局。在创立初期应进行商标注册，使商标伴随着公司发展。

3、加强商标管理与监控

对自有商标及时续展、保留商标的使用证据，以免商标被提出撤销申请；对被许可商标定期监控原始权属的变化。

4、主动维权

如商标遭他人抢注，可以进行异议或对其申请宣告无效，或者尝试谈判收购。

专利权风险及应对策略

专利权，即国家依法在一定时期内授予专利权所有人独占使用其发明创造的权利。其包括:

- 发明专利：包括产品结构、构造、配方，制造或使用方法等;
- 实用新型专利：其保护有形产品的形状、构造或者形状与构造的结合，不保护方法;
- 外观设计专利：其保护产品的外观。

除被驳回的风险，也有对专利权因重大未决诉讼等引起的风险。例如，公司上市时间表会严重延误或无限期推后，及/或法律及或然风险的重大披露事项，也会严重影响公司价值。

因此，相应的应对策略可以包括：

1） 上市前进行专利问题排查

I. 技术是否全面申请专利，保护范围是否完善？
II. 产品销售市场是否已申请专利，或存在侵权风险？
III. 专利权是否有效？（如已按时交纳年费、无存在质押、转移、许可、无效、终止等情况出现）
IV. 是否其产品出现侵权风险？

2） 产品战略研发部署

在产品研发前做好详细市场调查，并申请全面的专利申请，或达成交叉许可协议，避免在研发后期遭受巨大损失。

3） 专利出资和收购

专利出资和收购需要聘请专业机构对专利进行评估和尽职调查工作。所以应申请高质量（技术含量高，保护范围合理）、权利稳定（不容易被无效掉），权属没有纠纷（权属清晰）的专利。

4） 商业秘密保护或专利保护

申请专利必须公开技术方案，在专利期满后属于公众财产，更适宜替换快的产品。而对配方类的技术而言，则适合用商业秘密保护，例如，可口可乐配方，须有严格保密措施。

5） 自主创新

加大研发投入，积极进行自主创新，进行全面专利组合的布局，实现自主知识产权体系。例如，华为的5G技术就是典型例子。

6） 在内部专业部门／外部专利顾问

与其它知识产权不同，专利工作是一项极其专业而又严谨的系统工程。因此，公司应当建立专门部门或聘请外部专利团队作为顾问才能高效应对，以能够有效处理好可能遭遇的各种专利问题。

以上对公司的知识产权问题进行了详细的分析和解读，以期对公司上市或并购时提起董事和管理层的关注，并加强公司自身的知识产权管理，争取有效保护知识产权和有利于在公司申请上市或并购时体现无形资产价值。

非香港公司

香港联合交易所目前接受逾25个海外司法管辖区作为发行人在香港拟定上市工具。根据香港《公司条例》(「公司条例」)第16部的规定，任何海外拟定上市工具在香港设立营业地点必须在香港公司注册处（「公司注册处」）注册成为一间非香港公司。

营业地点

「营业地点」包括股份过户处和股份登记处，但不包括由香港持牌银行经香港金融管理局批准设立或维持经营的本地代表办事处。

注册程序

1. 透过公司注册处网站检查公司名称或其译名[1]，以确保它们可在香港注册[2]。公司可将注册名称用于上市申请表和上市文件。
2. 为避免以迷惑手段[3]使用与其他业务名称相似的业务名称，可透过香港商标注册处进行商标搜索或申请商标注册。
3. 透过公司注册处的电子服务「注册易」网站或以印本形式交付法定表格及相关证明文件（请见下文的「注册文件」）（如适用）连同所需费用至公司注册处。
4. 公司注册处一般会在10个工作日内以电子或印本形式（具有同等法律效力）出具非香港公司注册证明书及商业登记证。

注册文件

下列文件必须由海外公司提供给公司注册处以作注册之用：

法定表格

1. 表格NN1（注册非香港公司的注册申请书）
2. 表格IRBR2（致商业登记署通知书）
3. 表格NM1（押记详情的陈述）连同注册费用及在香港之财产、在香港注册之船舶或飞机（如适用）的经核证押记文书副本

上述法定表格可从公司注册处网站下载。

其他所需文件

4. 注册证书或注册地相关政府当局发行之同等文件的经核证副本[4]
5. 章程文件的经核证副本
6. 按注册当地法律要求需要发表的最新账目的经核证副本，除非（要向公司注册处提供理由）：
   (a) 无须发表其账目或将其账目文本交付予任何人士，而公众人士有权在该人士的办事处查阅该账目；或
   (b) 其在表格NN1交付日期前注册成立不足18个月，而需要发表的账目尚未拟备

如上述第4至6项所述文件并非英文或中文版本，注册时须提供经核证的英文或中文译本[5]。

注册后注意事项

1. 自2019年8月1日起，非香港公司必须持续地在香港营业地点的每个业务场所（或其服务提供商的业务场所）；在其通信和交易文件中清晰展示其名称、成立为法团所在地方及成员的有限法律责任及如正进行清盘，则所有相关广告必须在其名称后加入「正进行清盘」字样[6]。
2. 非香港公司有持续法定义务在规定申报截止日期前使用从公司注册处网站下载的相关法定表格向公司注册处申报相关事项。下表[7]显示了相关申报事项：

事项	申报日期	备注
周年申报表	在注册日期周年日后42天内	需要申报费用。延期申报将会被罚款，最高可达4,800港元
终止获授权代表职务	在发出终止通知后1个月内	除了法团名称变更，无申报费用和罚款
变更获授权代表、公司秘书、董事及彼等详情	在变更日期后1个月内	
变更章程文件、法团名称及地址		
开始清盘及清盘人/临时清盘人的委任/停任及变更彼详情	在开始日期或开始通知送达日期的较晚者后15天内	无申报费用和罚款
解散通知	在解散日期后15天内	
修改账目	在作出决定后15天内	
不再在香港设有营业地点	在不再设有营业地点后7天内	

3. 注册完成后，除了《上市规则》、《证券及期货条例》及香港的任何其他适用法律外，上市公司的董事还应按照《公司条例》的标准履行职责和责任（采纳客观和主观测试）。

违法

未能在香港设立营业地点后一个月内注册非香港公司、遵守第622M章及法定申报要求，可能会遭受检控。非香港公司、非香港公司的每名责任人（即幕后董事或高级人员，包括董事、经理或公司秘书）及每名代理人授权或允许违法行为，即属犯罪，须缴纳法定罚款。不同程度的罚款乃视乎违规的性质[8]而定。

公司注册处极有可能向违规的上市公司发出检控传票，而被定罪的上市公司将会在公司注册处网站公布。

1 公司名称的英文及/或中文经核证译名
2 如果公司名称与在公司注册处注册的现有公司名称相同或过于相似，则不能注册
3 避免侵权法下的「假冒」侵权
4 请参考《公司条例》第775条
5 请参考《公司条例》第4条
6 请参考《非香港公司(披露公司名称、成立为法团所在地方及成员的有限法律责任)规例（第622M章）》
7 「香港」公司在上市过程中运用绿鞋期权(即超额配售权)时须在股份配发后的1个月内向公司注册处提交表格NSC1(股份配发申报书)以作申报。非香港公司不需按该法定要求进行申报。
8 详情请参考《公司条例》第776(6)、778(10)、788(3)(4)(5)、790(5)、791(5)(6)(7)、792(6)、793(7)、794(4)和795(4)条。

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集团行政总裁

熊伟
副总监

第2章

指 南

上市前期信托规划

根据港交所数据，截至2019年10月尾，共有2,413[1]家公司在香港上市。在首次公开发行股票（「上市」）阶段或更早的上市前期，许多创始人和大股东选择通过信托持股份以较低税务负担进行财产保护和传承计划。这种做法为随后的上市前后或尾段省去不少麻烦。有一个很典型的案例，龙湖集团[2]创始人在上市前期就已成立信托，即使后来离婚的消息传出，也能够最大程度减小对股票市场的疑虑，并使公司股价保持稳定。

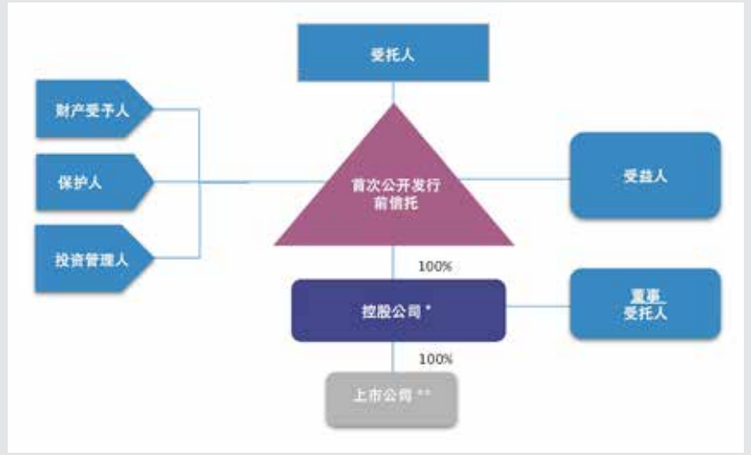
此外，在港交所主板上市的公司中，有70%以上的公司在上市前期/阶段或上市后推行员工持股计划（“ESOP”），以此作为奖励、挽留及激励员工。例如，除了家族信托外，小米[3]还在上市前期设立员工持股计划，以挽留和惠及核心管理团队。

上市前期信托结构

在上市前期成立之信托，可以是主要为创始人成立之全权信托而提供有效的财富保护，和/或为激励员工成立之员工持股计划信托。创始人（作为财产授予人）与受托人签订信托契约后，可以在公司“上市”前将其持有的预期上市公司股份转让予信托资产控股公司(“控股公司”)，完成有效信托架构。受托人通过控股公司间接持有股份。此流程必须于向联交所递交A1表格（上市申请表）之前完成。由于一般以全权信托持股，公众只知道受托人的身份，但受益人的身份则不会被披露，受益人为大股东及/或董事/最高行政人员按证券及期货条例作权益披露除外。

1 香港交易所每月市场概况 – 2019年10月
2 文章:「CAI XINYI, DAUGHTER OF LONGFOR FOUNDER NOW CHINA’S YOUNGEST BILLIONNAIRE WITH $7.2B FORTUNE」, by Emma Zhou, 25 November 2018
3 小米集团2018 年度报告及小米集团于2019年4月1日之香港交易所公告「根据股份奖励计划授出奖励

以下是典型的上市前期信托结构：



* 离岸成立之特殊项目公司
** 上市主体

在上市前期成立信托的主要好处：

序号	优势	说明
1	股权连续性	· 防止股份因财产授予人/创始人丧失工作能力/死亡而被冻结 · 股份预留给受益人 · 确保上市过程顺利，消除控股股东股权变动或主张带来的任何潜在威胁
2	防止股权被稀释	· 确保在创始人去世后，家族内的多数/控股股份投票权不会分散； · 受益人仍可以享受实质性的经济利益，其控股权益不会被稀释
3	免受债权人索赔	· 股份由独立受托人而非创始人/财产授予人持有 · 如果成立合适的信托，可以防止财产授予人之债权人提出的潜在索赔。 · 保护尚存配偶和子女免受潜在债权人的侵害
4	避免遗嘱认证问题	· 股份转让予信托，可以减免创始人去世后，资产须经过遗嘱认证的过程 · 创始人可以通过意愿书表明其对任命公司继任者及财产分配的意愿
5	减低婚姻纠纷	· 防止因离婚而导致非意愿的股份分散，从而保护资产
6	节省股份转让印花税	· 在公司「上市」前将股份转让予信托，可以节省额外的印花税
7	减低上市后的报告义务	· 在上市前期阶段将股份转让予信托，可以尽量减少向港交所提交权益申报 · 避免不必要媒体报导带来的负面舆论对股价产生影响
8	为受益人的身份保密	· 由于股份由信托持有，只需披露主要股东信息内的创始人和受托人的信息 · 除非信托的受益人同时也是董事会成员或高级管理人员，受益人的身份无需向公众披露。
9	尽量降低股价波动性	· 在上市后的锁定期内，不会因主要股东存在任何不确定性（如健康问题），而可能会对公司股价产生不利影响。

在成立上市前期信托时必须考虑以下几个因素：

1） 控制程度—如果创始人/财产授予人拥有过度的投资权力，并对信托资产严格控制，则该信托被视为虚假信托的风险较高。

2） 报告义务—在信托结构下，受托人（拥有上市公司5%或以上已发行有投票权股本的主要股东）与财产授予人（为上市公司的董事和受益人）有义务向港交所和相关上市公司提交权益披露（DI）报告。有关资料可参阅香港法例《证券及期货条例》（第571章）[4] 第XV部。

3） 信托所适用法律—信托契约的有效性、解释及效力因司法管辖区而异。应考虑某些关键因素，例如针对永续性、信托受益人资产保护以及修改信托契约之灵活性的规则。

4） 受托人选择—专业受托人应在信托管理和信托资产投资方面具有丰富的经验和知识，掌握合理的技能并足够谨慎，满足较高的注意义务标准。受托人须按照法律及信托契约的条款管理信托，并建立与财产授予人（应进行年度审查）、保护人（保护人的权力取决于信托契约的条款）和受益人（受托人应了解创始人的意图及受益人的需求）有效沟通的渠道。财产授予人在选择受托人时，应从不同角度进行考虑，如受托人所在司法辖区的稳定性，以及受托人的资格、知识和经验。如果信托资产由上市股份组成，受托人对公司治理和证券监管的了解对确保信托的合规性至关重要。

员工持股计划如何帮助挽留人才

员工持股计划指的是向员工提供股份激励来作为一种长期的奖励。该计划通常适用于管理层，但也可以向任何级别的员工授予。从管理的角度看，它是一个有用的方式，能够使员工的利益与公司的目标保持一致。自从新上市规则（同股不同权和未盈利的生物科技公司）于2018年4月生效，香港首次公开发行股票市场吸引了许多来自TMT（科技、媒体及电信）和生物科技行业的「新经济」公司上市，这些公司大部分在中国内地成立和运营。考虑到定制持股计划条款的灵活性，该类公司倾向于在上市前期设立员工持股计划（指由受托人为受益人持有股份，即奖励授予中国员工）。

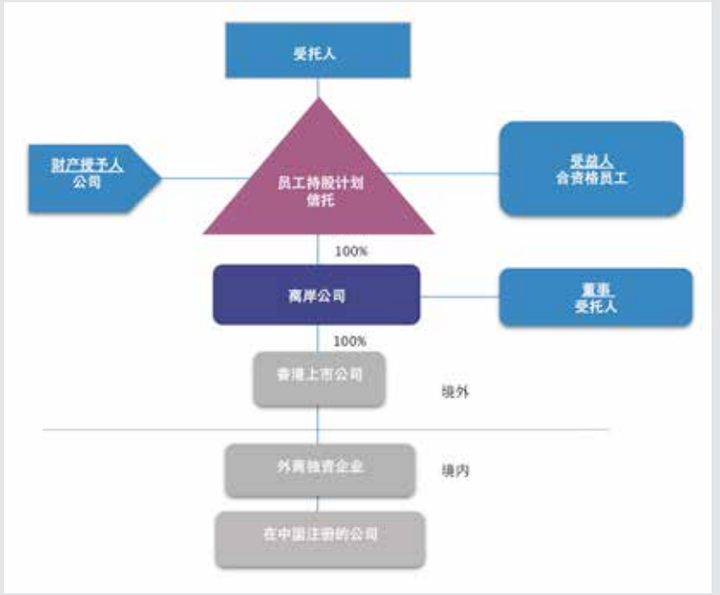
有两类常见的员工持股计划：一、股份奖励计划；二、股份认购权计划：

	股份奖励计划	股份认购权计划
基本性质	于归属日公司直接将股份授予员工，或以低于市场价的价格卖给员工。	公司允许员工以约定的执行价格购买股份。员工将拥有该权利直至履行合同失效日期。员工有权（但无义务）于归属日期买入或卖出股票。如果股份市场价高于执行价格，员工可以卖出股份赚取差价。
投票权	当股份于归属日给予员工后，员工有权投票。	员工有权在行使权利并转变为股票后有权投票。
认购价格	通常无认购价格	认购价格按市场股价的一定比例而折扣。

4 《证券及期货条例》第XV部－披露权益
主要股东——个人及公司如持有上市公司5%或以上任何类别有投票权股份，必须披露其持有该上市公司有投票权股份的权益及空头头寸；及
上市公司的董事和首席执行官必须披露其持有的任何上市公司（或其联营公司）股份的权益和空头头寸，以及上市公司（或其联营公司）的任何债权证的权益。

股东批准	通常不需要	一旦公司上市，新计划必须经上市公司股东在股东大会上批准[5]
工具类别	• 受限制股份奖励 • 受限制股份单位（「RSU」）	股份认购权

以下是总部位于中国内地的红筹公司的典型员工持股计划结构：



注：上述结构也适用于其他司法管辖区

从税收的角度看，中国员工必须在国家外汇管理局注册才能获得ESOP的授予，股份认购权会对他们造成前期税务负担。一旦行使股份认购权，他们必须就与股份认购权奖励有关的员工福利缴纳工资税。然而，在受限制股份单位的纳税义务于归属于员工的期间发生。由于股份奖励福利通过配发及发行股份，股东数量有增加，因此股份认购权计划会导致股东基数增加，但受限制股份单位以现金或转变股票结算，不会导致股东基数增加。

寻求专业建议，以适当的方式成立上市前期信托

成立、实施及高效运营上市前期信托及员工持股计划会有很多复杂性问题，包括（但不限于）融资、信托结构、管理、合规及监管义务（例如共同汇报准则、《外国账户税收遵从法》报告和经济实体要求）、汇款、税务，以及安排上变更（例如根据上市前架构修改信托契约及有关计划）。未能适当管理上述任何方

5 公司于上市前采纳的计划（「上市前计划」）无须在上市后经股东批准。上市前授出的期权在上市后继续有效，惟不可再根据上市前计划授出新期权（香港联合交易所上市规则第十七章，第17.02(1)(b)条）

面问题都可能引至上市阶段的技术问题及令公司招致罚款和不利后果。与信托公司服务提供商密切合作和连同其他专业人士（例如律师、会计师和税务管理顾问）的支持，以成立适合的上市前期信托和员工持股计划，对创始人和大股东至关重要。

联络人

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集团行政总裁

蔡慧思
副总监

第2章

指南

于首次公开招股前准备阶段的战略投资者与首次公开招股前投资

首次公开招股前投资是指在上市前（首次公开招股前）对公司所进行的投资。该等投资可以不同形式进行，如普通股、优先股或可转换债券。此类投资在首次公开招股前准备阶段发挥着重要作用，为公司进行上市工作准备时提供资金及／或增强机构投资者及公众投资者在上市时对公司进行投资的信心。

首次公开招股前投资对希望分别根据《香港联合交易所有限公司证券上市规则》（《上市规则》）第八A章及第十八A章上市，并采用不同投票权架构的公司及生物科技公司尤其重要，原因是该等公司的其中一项上市要求是在建议上市日期至少六个月前已获至少一名“资深投资者”提供相当数额的第三方投资（不只是象征式投资），且至上市时仍未撤回投资。

监管要求

《上市规则》并没有就首次公开招股前投资作出特别规定。《上市规则》第2.03条规定，有关于首次公开招股前投资的要求的基本原则是“证券的发行及销售是以公平及有序的形式进行”及“证券的所有持有人均受到公平及平等对待”（第2.03条的原则）。香港联合交易所有限公司（联交所）发出了三份指引信（指引信）：HKEx-GL29-12（有关首次公开招股前投资的临时指引）、HKEx-GL43-12（有关首次公开招股前投资的指引）及HKEx-GL44-12（有关首次公开招股前投资可换股工具的指引），整合了联交所过去所发出有关首次公开招股前投资的多份上市决策，并列出了对首次公开招股前投资的要求。

新股东或现有股东于公司（上市申请人）首次公开招股前从上市申请人或其股东购得的股份将被视为首次公开招股前投资，并受指引信的限制，除非该股份是（ｉ）转换前身公司或上市申请人的营运附属公司的股份时所获得的股份，又或就上市进行上市申请人的架构重组时所获得的股份；或（ｉｉ）上市申请人就制定的股份奖励计划授予其董事或雇员的奖励股份。

首次公开招股前投资的时间安排

首次公开招股前投资者一般按低于首次公开招股价的股价进行投资，且其投资条款通常优于首次公开招股时的投资者。因此，若进行首次公开招股前投资的时间很接近上市申请的聆讯，则会违反第2.03条的原则。

因此，根据指引信HKEx-GL29-12，首次公开招股前投资须在上市申请人首次呈交首次上市申请表格（首次呈交表格）日期的至少足28天前完成。倘首次公开招股前投资于（a）中首次呈交表格前足28天内，或（b）中首次呈交表格时或之后完成，联交所会将上市申请人证券交易首日押后至首次公开招股前投资完成后足120天。

上述日数不包括首次公开招股前投资完成之日、上市申请表呈交之日及证券交易首日。首次公开招股前投资需要于投资相关股份的资金已经不可撤回地交付至上市申请人，且上市申请人已经收到该资金，才会被视为已完成。

首次公开招股前投资者的撤回投资权利

首次公开招股前投资者的唯一撤回投资权利只可在上市不果的情况下行使，该权利可在首次呈交表格时或之后存在，直至在上市时终止。

由上市申请人或控股股东授予首次公开招股前投资者的任何其他可撤回投资权利（如认沽期权、赎回或回购权利），或容许上市申请人或控股股东回购首次公开招股前投资者的股份的权利（如认购期权）必须于首次呈交表格前终止。在首次呈交表格时或之后撤回投资会将整个上市流程顺延120天，不论首次公开招股前投资是何时所作或投资者是否根据合约权利撤回投资。

首次公开招股前投资者若在首次呈交表格前撤回投资，既不干扰上市流程，也不影响公司上市后对股东一视同仁的处理。因此，联交所不会就此撤资而处罚上市申请人，不论其首次公开招股前投资是何时所作或是否根据合约权利撤回投资。

首次公开招股前投资的条款

为吸引投资者在上市前投资公司，公司或其股东通常会向首次公开招股前投资者提供特别权利。这类特别权利没有特定范围，而普遍来说，不延伸至所有其他股东的特别权利在上市后都不得继续生效，以符合第2.03条的原则。

下列是一些常见授予首次公开招股前投资者的特别权利：

(i) **价格调整** - 向首次公开招股前投资者提供固定回报率及由股东履行的条款是允许的及可延续至上市之后，前提是该等条款不是根据：（a）首次公开招股价格的折让；或（b）股份在首次公开招股时市值的折让而定。

(ii) **董事提名权** - 由上市申请人给予首次公开招股前投资者的任何提名或委任董事的权利必须于上市时终止。除非上市申请人的组织章程细则另有规定，否则由首次公开招股前投资者所提名或委任的董事毋须于上市时辞任。然而，股东之间就提名及／或投票表决若干人选作为董事所订立的任何协议一般都不受指引信所规限，并可延续至上市之后。

(iii) **否决权** - 任何可否决上市申请人的重大公司行动的任何合约权利必须于上市时终止。

(iv) **盈利保证** - 由股东支付（而非上市申请人支付）及不是与股份市价或市值挂钩的任何财务补偿可延续至上市以后。

(v) **优先承购权及附带出售权** - （a）由控股股东给予首次公开招股前投资者的任何优先承购权；及（b）由控股股东给予首次公开招股前投资者的股份可以连同控股股东的股份一并出售（即附带出售）的权利都可延续至上市以后。

可转换证券

在某些情况下，由于投资者所享的风险回报水平会比股份持有人享有的更佳，首次公开招股前投资会以可转换证券的形式来进行。鉴于可转换证券的特点，指引信HKEx-GL44-12载列若干额外规定，部分例子列载如下：

(i) **换股价** - 可转换证券的换股价应订于某个固定金额或以招股价作定价。保证上市申请人首次公开招股价格的折让或股份市值的折让是不允许的。

(ii) **重设换股价** - 由于换股价重设机制被视为违反《上市规则》的原则，任何该等机制均应被删除。

(iii) **可转换证券的部分换股** - 只有在特别权利都在股份上市后全部终止的情况下，可转换证券方可作部分转换。这避免首次公开招股前投资者一方面使用作为可转换证券持有人所享的特别权利，将其所持有的大部分可转换证券转换为股份，但另一方面凭借其仍持有的小部分可转换证券，继续享有作为可转换证券持有人的特别权利。

(iv) **提早赎回** - 给予可转换证券持有人提早赎回尚未转换的可转换证券（其赎回价足以给予证券持有人一个按提早赎回的可转换证券的本金额计算相等于某个固定内部回报率的回报）的选择是可以容许的，因为该等以内部回报率表达的回报，乃对证券持有人的投资及承担风险的补偿。

禁售及公众持股

首次公开招股前投资者的禁售限制并非一项强制性监管要求。然而上市申请人或包销商一般要求首次公开招股前投资者受到六个月或以上的禁售限制，以避免股价因首次公开招股前投资者大量出售其股份而在上市不久以后大幅下降。只要不是由上市申请人的关连人士直接或间接资助购买的，该等股份将被视为公众持股量的一部分。

披露要求

首次公开招股前投资的详情必须根据指引信所载的规定于招股章程中披露，其中包括但不限于首次公开招股前投资的日期、所得款项及款项用途、首次公开招股前投资者的实益拥有人及背景、厘定所付代价的基准及给予首次公开招股前投资者的重大特别权利。对于可转换证券，由于该证券的复杂性，上市申请人应在招股章程的“财务资料”及“风险因素”两节中披露若干额外资料，阐释可转换证券对上市申请人的影响。

有关林朱律师事务所有限法律责任合伙

林朱律师事务所有限法律责任合伙是一家独立的律师事务所，也是全球安永网络的香港律师事务所成员，并与其他地区的律师事务所成员合作，为在香港经营或透过香港经商的金融机构、企业客户和私营企业提供香港的法律服务。我们提供有关资本及债务市场、公司融资、商业交易、监管合规、纠纷协调、监管调查和中国境外投资等的谘询服务。

林朱律师事务所有限法律责任合伙与全球安永网络内的其他律师事务所成员密切合作，凭借汇集来自世界各地的法律专业人员，能为客户提供广泛的服务。

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2016年	2017年	2018年	2019年上半年
联交所同类项目（仅含境内权益及H股项目）	联交所同类项目（仅含境内权益及H股项目）	联交所同类项目（仅含境内权益及H股项目）	联交所同类项目（仅含境内权益及H股项目）
75个	86个	138个	56个
本所承办香港上市项目（仅含境内权益及H股项目）	本所承办香港上市项目（仅含境内权益及H股项目）	本所承办香港上市项目（仅含境内权益及H股项目）	本所承办香港上市项目（仅含境内权益及H股项目）
30个	33个	36个	20个
40.00%	38.37%	26.09%	35.71%

连续多年

三分之一

港交所IPO市场份额

CHAMBERS AND PARTNERS

资本市场：香港地区及海外发行

全球及亚太法律指南第一等推荐

LEGALBAND

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IFLR1000

2018年值得关注律师事务所

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卓越综合实力律所海外资本市场

2019 卓越律所大奖

第3章

香港上市申请流程

简介

对于大多数公司而言，上市是一个重要的决定。上市的众多好处包括提升公司形象、市场认识和知名度，筹集资金以实现公司的业务扩展计划，以比非上市公司更低的成本获取其他后续融资渠道，为其他利益攸关方（例如公司的融资人、供应商和客户）提供信心。在决定公开上市时，公司必须根据自身情况和需求选择最合适的上市地点。本文将简述选择香港作为上市地点的上市申请程序。

从准备到上市

上市申请人在成功上市前的准备工作将经历数个里程碑阶段：

a) 内部准备

打算在未来上市的公司应对其上市准备情况进行评估。在上市前，公司越早开始以公众公司的标准进行运营，后期阶段遇到的障碍就越少。计划上市的公司，在为上市作准备时，应注意以下几个方面：

<u>上市条件:</u>

上市申请人只有在符合上市资格要求后才能在香港上市。对于主板上市申请人，通常要求他们拥有不少于三个财政年度的营业记录。联交所亦期望上市申请人最少应符合上市前三个财政年度的管理连续性要求，以及至少最近一个经审计的财政年度符合拥有权和控制权要求。此外，上市申请人还须符合以下三项中其一项财务表现的测试：

1. 盈利测试：（i）最近一个财政年度的盈利[1]为港币2,000万元，以及前两个财政年度的盈利总计为港币3,000万元；及（ii）上市时市值至少为港币5亿元。
2. 市值/收益/现金流量测试：（i）最近一个经审核财政年度的收益至少为港币5亿元；（ii）前三个财政年度来自经营活动的正现金流合计至少为港币1亿元；（iii）上市时市值至少达港币20亿元。
3. 市值/收益测试：（i）最近一个经审计财政年度的收入至少为港币5亿元；（ii）上市时市值至少达港币40亿元；及（iii）如果符合某些条件，或可以接受少于三年的业绩记录。

上述资格要求可能并不完全适用于某些类型的公司，例如矿业公司、收入前或盈利前的生物技术公司或创新型公司，这些公司还要遵守某些特定的上市资格要求。

上市申请人需理解，仅遵守《上市规则》所载列的明线资格测试并不能确保其适合上市。联交所已发表有关上市适格性的各项指引，其中指引信HKEX-GL68-13载列联交所在评估上市申请人上市规则下上市适格性时，可能会有影响的部分因素。这些因素包括：(i) 过往涉及欺诈、欺骗或不诚实的违规行为；(ii) 上市申请人、其董事及控股股东存在重大违规行为；(iii) 有关业务可持续性不明朗；及（iv）结构性合约的使用。我们建议在完成公司是否能够满足财务绩效标准的初步评估后，可以聘请专家顾问进行更详细的分析，并向公司提供他们对公司将可能会遇到障碍的看法，然后再继续推进下一步工作。

<u>企业管治和内部监控：</u>

促进高标准企业管治是联交所的重点目标之一。健全的企业管治有助于确保在香港上市的公司的质量，并保护少数股东的利益。以上市为企业目标的公司应理解良好企业管治的重要性，并建议在上市之前尽早于公司内部妥善实施最佳常规。

内部监控是上市申请人在上市项目启动之前应加强的另一个领域。上市申请人必须就其经营规模和业务性质制定适当的程序、系统和控制措施（包括会计和管理系统）。保荐人必须就这些程序、系统和控制措施的整体充分性发表意见，以协助上市申请人的董事在上市前后对上市集团的财务状况和前景进行适当的评估。加强内部监控或可以避免重蹈过往违规行为，从而可能对上市申请人符合上市适格性要求产生不利影响。

<u>资本故事:</u>

在上市的营销和路演阶段中，一致、连贯且具有说服力的资本故事至关重要。它不仅将支持上市申请人的股票估值和定价，一个有说服力的资本故事更将支持该公司上市决定背后的理念。公司过往做了什么工作？公司日后将如何达至目标？在未来的五到六年内，公司的企业和扩张计划是什么？这次资金募集的使用计划是什么？要解答以上问题，必须依赖公司未来的财务预测，以及以公司过往的财务和运营记录为依据。订立可实现的公司战略和运营目标，以反映公司的能力并与行业的总体环境保持一致，这将为公司的管理层带来认可。

资本故事将后续展现于上市文件、分析师和路演演示中。对于规模较小的公司，提供有说服力和明确的上市原因是联交所针对适格性的要求之一。鉴于监管机构积极采取措施防止制造和买卖空壳公司，联交所明确规模和前景似乎与上市相关的成本或目的不相符的上市申请人可能会引起适格性问题。因此，公司管理团队在上市前深思熟虑的资本故事，不仅有利于公司股票的市场营销，而且在审查过程中也是监管机构的重要考虑因素。

<u>上市前重组:</u>

一般而言，基于《上市规则》和其他适用法律和法规的要求，上市申请人需对上市前的公司结构进行重组。例如，《上市规则》只允许于联交所认可/ 可接受的特定司法管辖区设立上市主体，包括香港、百慕达、开曼群岛和中国[2]

1 盈利不包括发行人或其集团因日常业务活动以外的活动而产生的任何收入或损失。

2 上市委员会已正式裁定为发行人的注册成立地的可接受司法管辖区清单可在联交所网站上找到。遵守有关海外公司上市的联合政策声明的其他司法管辖区也是可被接纳的。

。重组亦受到商业决策的影响，例如，哪些业务部门或实体将被包括在上市范围中，哪些业务部门或实体将被剔除。在进行重组计划之前还需要考虑的其他因素包括税项影响、上市时的发行规模和预期市值、上市申请人的市场地位、资本结构及收购扩张计划等。如果控股股东决定将某些业务保留在上市集团之外，则还应评估上市申请人是否依然可独立运作以及与母公司潜在竞争的影响。

成立专门的上市工作组:

上市准备工作是公司重要的里程碑阶段。它要求公司高层管理人员，包括其董事和主要股东，投入大量资源和精力。除了由公司高层决定的许多重要决定外，许多其他事项还需要投入足够的额外注意力和资源。为了不干扰公司的正常运营，建议成立专门针对上市项目的特别工作小组。在项目前期的充分准备将确保能有更高的机会成功上市。

b) 委任保荐人/财务顾问以及其他专业团体

成功的上市取决于各个专业团体的协助与合作，包括:

保荐人

《上市规则》要求委任至少一名保荐人，以协助进行上市项目并准备上市文件。实际上，保荐人在主导项目的实施上扮演一个重要的角色。根据《上市规则》，上市申请人必须在向联交所提交上市申请两个月前聘用保荐人，以负责以下工作：

(i) 密切参与准备上市申请人的上市文件;

(ii) 进行合理的尽职调查，以使其能够作出《上市规则》所载的声明;

(iii) 确保符合《上市规则》项下的文件要求;

(iv) 尽合理努力解决联交所及证监会就上市申请提出的所有事宜; 和

(v) 陪同上市申请人出席与联交所举行的任何会议。

上市申请人的至少一名保荐人必须独立于上市申请人。保荐人需是根据《证券及期货条例》就第6类受规管活动（即就公司融资提供意见）而获牌照或注册的法团或授权金融机构。保荐人须遵守《上市规则》及证监会发布的适用规则及规例所载的责任及要求。鉴于近期多宗公众关注的案件中因上市尽职调查失职导致证监会对多家信誉良好的金融机构予以公开谴责并处以重罚，现时在履行职责及选择保荐的个案时，保荐人均采取审慎的态度。基于各种原因，保荐人机构在进行初步尽职调查或所谓的「健康检查」后，拒绝担任保荐人的角色并不罕见。因此，强烈建议及早与保荐人机构人选进行沟通。

申报会计师

业绩记录期间，上市申请人的财务资料必须以合资格申报会计师准备的会计师报告的形式列入上市文件。除准备会计师报告外，如有需要，申报会计师还将协助准备有形资产净值和其他备考财务报表，例如当上市申请人决定于上市文件中披露盈利预测时。

除了准备规定的财务披露文件外，申报会计师将深度参与上市的过程。例如，他们或会在重组阶段提供财务或税务建议，以及深度参与解答监管机构在审核过程中提出的与财务相关的问题。此外，上市申请人和保荐人通常会要求申报会计师出具所称的「告慰函」，作为其在上市集团上市后的资本充足情况和上市集团的负债状况等专业范畴提供的独立保证。

法律顾问

上市申请人最少需要委托两个独立的法律顾问团队，以分别代表上市申请人及保荐人及/或包销商。鉴于许多寻求在联交所上市的上市申请人在中国经营业务，因此上市申请人和包销商一般均分别有各自的香港法律顾问团队和中国法律顾问团队代表。根据上市申请人及其子公司的注册和营运地点，其他海外律师，例如开曼或英属维尔京群岛的律师，也可能被委托提供法律谘询。

香港法律顾问的主要职责包括 (i) 确保遵守适用的法律和法规，例如《上市规则》、《公司条例》和《证券及期货条例》；(ii) 就集团重组及股权架构提供意见；(iii)起草及审查与上市申请有关的法律文件，例如包销协议等，并提供相关意见； 及(iv) 起草上市文件及其他上市申请文件；(v) 对上市申请人进行尽职调查；(vi) 协调配合工作组中的其他专业机构。

对于中国的上市申请人或主要股东或控股股东为中国籍人士的上市申请人，中国法律顾问的职责将包括 (i) 从中国监管机构获得必要的许可或批准； (ii) 发表中国法律意见，包括针对以往的不合规情况（如有）并提供纠正建议；(iii) 提供有关中国法律合规性的指导。

对于在香港以外地区有市场推广计划或目标投资者的发行，上市申请人应注意遵守相关司法管辖权地区的证券法例。一般而言，对于非局限于本地的发行，可根据美国证券法的144A规则和S规则向美国的机构投资者营销股票。前述两种制度下可以向某些美国投资者作出要约，而无须按照美国法律制度进行注册。此类发行中，美国法律顾问将就发行结构和美国证券法的遵守提供美国法律意见。

包销商

除通过介绍方式上市不涉及公开发行的情况外，向公众出售股票均涉及包销商的参与。对于规模较大的发行，需要多名包销商的参与。根据《上市规则》，向公众提出的证券发行必须被完全包销，而实际上，股票发行的国际配售部分也或将被包销。因此，包销商的角色在上市中至关重要，通常将分别就香港发售和国际发售订立单独的包销协议。包销协议厘定有关各方，包括包销商、上市申请人和出售股东（如有）的权利和义务。

其他团队

除了上述各方外，许多其他中介也可能参与上市。例如，（i）可能需要委任物业估值师来准备物业估值报告；（ii）发行人上市后，需要股份过户登记处来管理股份登记册；（iii）将会委任财务印刷商，对上市文件进行专业排版，提供翻译服务并安排通过联交所网站提交文件；（iv）通常会委任行业顾问编写行业报告，列出上市申请人主要从事行业的环境和竞争形势。此外，其他各中介包括公共关系公司、专业公司秘书公司、合规顾问、内部监控顾问、专业税务顾问及受托人公司（用于在上市文件前建立家庭信托）等。

c) 对公司进行尽职调查

对上市申请人进行尽职调查基于两个主要的原因。首先，上市文件中的披露须经过认真的尽职调查，以确保披露资料准确、完整和非误导。由于投资者基于上市文件中的描述和陈述认购发行人的股票，因此，根据香港法律以及普通法下侵权法及合同法的原则，上市文件中的任何虚假陈述和误导性信息都可能引起诉讼。而上市文件中如果包含虚假、不准确或误导性的信息，则任何授权发行上市文件的董事或其他人员也可能承担刑事责任。

其次，根据《上市规则》和《证券及期货事务监察委员会授权或注册的人员的行为守则》，保荐人负有尽职调查责任。代表上市申请人提交上市申请后，除了根本必须后续处理的事项外，保荐人应已完成对上市申请人所有合理的尽职调查。上市规则第21项应用指引列明应由保荐人执行尽职调查范围，以确保载列于上市文件中的表述的有效性以及上市申请人上市适格性。建议保荐人应以专业怀疑态度验证资料，并必须对在特定情况下需要执行的相关调查或行动作出判断。

尽职调查通常是从法律、商业和财务角度进行的。保荐人的法律顾问通常会在上市申请人的法律顾问的协助下主导尽职调查计划的制订与实施。在各个项目中，尽职调查计划都会根据上市申请人的业务性质和规模而变化，但是通常将包括（i）会见上市申请人不同部门的高级管理人员，以了解公司的业务和运营；（ii）与利益攸关者 （包括主要客户、供应商、分销商

和主要银行） 进行访谈，以确保与公司管理层提供的信息的一致性；（iii）对上市申请人的主要营运地点和厂房（针对制造商）进行实地查核；（iv）会见相关监管机构，以确保上市申请人经营业务符合法律法规的规定;（v）审阅上市申请人的重要合约、管理账目、董事会记录、股东决议及其他公司文件。在某些情况下，保荐人可能会委任第三方代理人对上市申请人、其控股股东及其高级管理层进行独立调查。

d） 起草上市文件和编制上市申请文件集

上市文件的内容规定于《公司（清盘及杂项规定）条例》和《上市规则》详列。如上文所述，如果上市文件中含有任何具误导性、不准确或欺诈性的陈述，参与制作或批准上市文件的人员或可能要负上民事或刑事法律责任。在提交上市申请时，保荐人应能够根据所进行的尽职调查确认该申请版文件中包含的资料已大致完备。上市文件是监管机构进行审查的主要文件，也是上市申请人证券营销的主要文件。上市文件可以由发行人的律师或包销商的律师主导起草。

上市文件的内容大致可分为四个部分：

(i) 与业务有关的部分 – 业务、财务资料、风险因素、历史及发展、管理层履历、未来计划和募集资金用途；

(ii) 与发行相关的部分 – 包销、全球发行架构、如何申请发行股份；

(iii) 与法规和合规相关的部分 – 法规、公司资料、豁免、关连交易、法定及一般资料；及

(iv) 专家部分 – 行业概览、会计师报告、物业估值报告、合资格人士报告（针对矿业公司）。

为了准备提交上市申请，工作团队通常会在目标提交日期之前数星期进行紧密的工作，以完成所有需要提交给联交所的文件。联交所已发出各种指引供上市申请人考虑，其中指引信HKEX-GL55-13列出了新上市申请的文件要求和程序事项。建议在提交之前检查联交所发布的所有相关适用指引，如果未能遵循相关指引，联交所或会认为申请实质上并非大致完备。若联交所认为上市申请中提交的资料非大致完备，则可行使其酌情权，不继续审查上市申请并将其退回予保荐人。退回的申请只能在退回决定之日起计至少八星期后，方可重新呈交给联交所。

e） 审核、听证、营销和上市

联交所上市部将在收到上市申请后开始审查程序。审查将基于资格、适格性、可持续性、合规性和其他适用标准。视乎上市申请的复杂性和上市部的工作量，通常在收到上市申请后的二至三星期内，联交所的第一轮实质性意见将会发出。上市部将决定何时可以呈交上市申请予上市委员会审查，而这很大程度上取决于意见回复的速度和质量。获得上市委员会的批准后，上市申请人可以进行包括投资者教育和上市路演的营销流程。在定价以及向机构投资者和散户投资者分配股份后，上市申请人将在联交所上市。

结论

从准备上市到成功完成上市，对公司以及参与项目的所有专业中介都是漫长的旅程，以上仅概述了公司在提交上市申请之前需要留意的若干关键事宜。建议公司在上市前期聘请专业人士，他们将可以提供宝贵和实用的建议，并陪伴公司渡过这个充满挑战的旅程！

有关竞天公诚律师事务所

竞天公诚律师事务所于九十年代初设立，是中国第一批获准设立的合伙制律师事务所之一。发展至今，竞天公诚已成为中国最具规模和最具强劲实力的综合性律师事务所之一，在资本市场、兼并收购、海外投资、争议解决、私募股权投资等诸多专业领域处于国内领先地位。竞天公诚总部设于北京，并战略性地选择在上海、深圳、成都、天津、南京和香港设立分所，其中香港分所已于2019年4月30日变更为竞天公诚律师事务所有限法律责任合伙，是具有香港法律执业资格及独立提供香港法律服务能力的律所。这个发展的里程碑使本所更好地在境内外为我们的客户提供全方位的优质法律服务。

联络人

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虚拟数据室助力IPO

为什么在IPO中需要使用虚拟数据室

John Yuan 袁军
iDeals Solutions Group

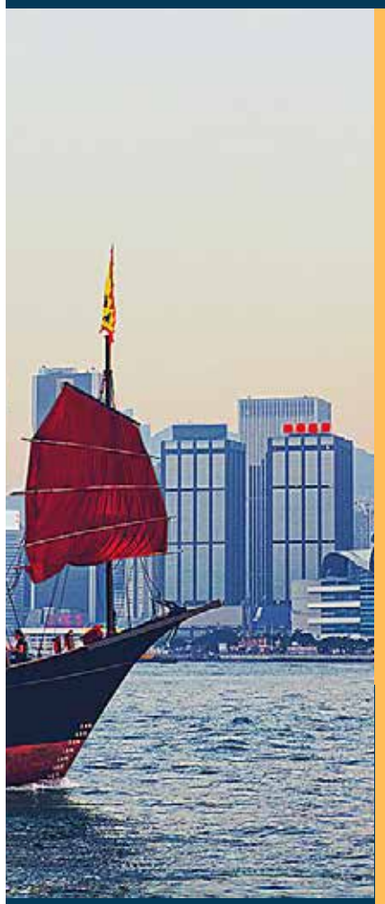
对于任何企业而言，首次公开募股（IPO）是最重要的里程碑事件之一。当公司准备IPO的过程中需要经过投资者，审计师和监管机构的严格财务审查。大量具有挑战性的财务准备工作使许多财务专业人士不确定从哪里开始。在此期间，律师，投资银行家，会计师和金融家的内部和外部团队将广泛分享和交换公司核心商业信息。

为了在数据安全和高效分享中取得一个平衡，虚拟数据室(VDR)是基于最先进的文件安全技术应运而生的一钟现代，安全且结构良好的文档存储和交换系统。这样管理团队可以专注于IPO的实际规划，而不是花费数小时来管理和组织文档。虚拟数据室技术可实现快速准确的财务报告，法律合规性，预测准确性和数据可见性。因此，公司可以提前为IPO流程做好准备，同时保证所有文件的安全和不被泄漏。

首次公开募股筹备过程涉及多个主要参与者，如投资银行家，律师，会计师，财务赞助商，承销商，公司高管和董事会成员。所有这些人都可以利用虚拟数据室参与IPO项目。

在*IPO*过程中起到的关键作用

- 确保项目文件的完整性
- 确保敏感信息不被轻易泄漏
- 减少文档管理和准备的工作量
- 密切跟踪和记录用户的所有动作并基于此提供用户行为洞察报告



虚拟数据室是怎样助力IPO中的各方参与者的

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- 创建安全的文档结构存储库，允许在一个中心位置组织和存储基本信息，同时允许根据需要立即访问关键数据。
- 一旦可用，立即上传新信息。可以将任何新获取的文档添加到单个集中式存储库中，并且索引将自动更新。当新文件可用时，参与者将自动收到通知。
- 访问文档并通过任何设备从任何位置24/7/365全天候使用它们。团队成员可以使用在任何平台上运行的设备登录IPO虚拟数据室并远程管理他们的材料。
- 使用高级在线搜索工具轻松找到所需数据。
- 发起或加入问答环节以快速回答问题并请求其他信息。
- 使用在线数据室提供的跟踪和审计工具管理工作组活动。最先进的报告功能使监控审核流程变得容易，并通知团队成员任何需要检查的未完成文档，这有助于使项目按计划进行。
- 促进第三方审核并确保合规性。
- 无论IPO数据室安全环境如何，准备备忘录和管理演示文稿。
- 回复美国证券交易委员会的评论函并完成相应的尽职调查。
- 实时支持路演查询。

虚拟数据室助力IPO

第3章

指南

为什么在IPO中需要使虚拟数据室

对于任何企业而言，首次公开募股（IPO）是最重要的里程碑事件之一。当公司准备IPO的过程中需要经过投资者，审计师和监管机构的严格财务审查。大量具有挑战性的财务准备工作使许多财务专业人士不确定从哪里开始。在此期间，律师，投资银行家，会计师和金融家的内部和外部团队将广泛分享和交换公司核心商业信息。

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John Yuan
亚太地区主管

第4章

保荐人和承销商的作用

选择可靠的长期顾问以完成最优化的IPO方案

香港是全球最活跃的首次公开发行（IPO）市场之一，不仅常年在IPO募集资金总额年度排行榜中名列前茅，而且向来自中国内地及全世界各地的一批最具创新性和成长性的公司提供了所需资金。但是，由于地缘政治和经济不确定性的增加，全球投资者信心受挫。面对更严格的审批标准和投资者逐渐提升的避险意识，选择最佳的保荐人、承销商和顾问团队，对于有意踏上IPO征途的企业而言，变得前所未有的重要。

趋于保守的风险偏好

随着科技独角兽企业的兴起和投资者随之而来的狂热情绪，近年来全球市场的超大规模IPO数量创下新高。2018年香港上市规则迎来改革，开始接纳双重股权架构公司的上市。这不仅推动了类似小米、美团点评等企业的巨额融资，同时还可能吸引已经在海外上市的双重股权架构企业重新考虑香港作为上市地点。

但是，由于全球各大独角兽企业的市场后续表现变换不定，投资者对于新经济产业理解的不断加深，再加上地缘政治和经济不确定性的增加，导致了投资者风险偏好趋于保守。2019年度，虽然香港目前是全球领先的上市地点，但投资者对于定价变得更为敏感，对于资金配置变得更为挑剔。

全球股票交易所表现排名表（2017年 - 2019年至今）

排名	2019（本年至今）		2018		2017	
	交易所	IPO募集资金（单位：10亿美元）	交易所	IPO募集资金（单位：10亿美元）	交易所	IPO募集资金（单位：10亿美元）
1	香港联交所	34.7	香港联交所	36.9	纽交所	29.4
2	纳斯达克	33.5	纽交所	27.6	上交所	21.3
3	纽交所	31.7	东京证交所	26.7	伦交所	16.7
4	上交所	14.0	纳斯达克	25.5	香港联交所	16.5
5	科创板	11.3	法兰克福证交所	13.8	深交所	14.2

数据来源：Dealogic, 2019年11月28日

审查趋严

由于监管机构、投资者和普通公众对拟上市企业的要求趋于严格，委任经验丰富的知名顾问团队尤为重要。

主保荐人会建立一个由承销商、法律顾问、申报会计师、投资者关系从业人员和公关顾问组成的团队。在整个团队的支持下，主保荐人被投资者视为「市场品质把关人」[1]。

近年来，香港证券及期货事务监察委员会（「香港证监会」）就此对香港多家失当保荐机构做过谴责，凸显了委任具有良好记录的保荐人的重要性。

保荐人的品牌为拟上市公司的企业故事和声誉提供了必要认可，因为优秀的保荐人必定会在客户启动上市之前，对客户开展更为严格的尽职调查。保荐人和承销商的品牌实力也会影响定价：声誉越好，拟上市企业的定价能力越强。

选择适当的保荐人和承销商

可信赖的长期伙伴

香港共有100多家保荐机构，如何选择让潜在上市企业备感困惑。正如保荐人依照协议要求，必须对拟上市企业开展详尽的尽职调查以充分了解其业务一样，拟上市企业也必须在委任保荐人和承销商之前开展彻底细致的尽职调查。

对于筛选标准，很重要的一点是需要潜在上市企业着眼于IPO之外的范畴，应将主保荐人和承销商视为可支持未来一系列业务目标的、可信赖的合作伙伴。这些目标可能包括私募资金募集、上市后的股权配售、债券发行、大宗交易安排、结构性产品、财富管理方案制定与业务引荐等。总之，保荐人的作用在于「伴随公司共同成长」。

独立性

就具体一单IPO而言，拟上市企业必须确保能够避免或谨慎处理利益冲突问题。同时，香港

1 见香港证券与期货事务监察管委员会2012年版《有关监管保荐人的谘询文件》第2页「保荐人的重要性」，内容详见以下网址 https://www.sfc.hk/edistributionWeb/gateway/EN/consultation/openFile?refNo=12CP1

的保荐人必须能够向香港联合交易所（「联交所」）证明其独立于拟上市企业。

经验与过往记录

除确保保荐人的声誉一流以外，拟上市企业还应考虑潜在保荐人的经验和资质（如：过往记录、行业知识、项目执行能力、其业务在该国的参与度等）是否最能切合自身要求。

核查保荐人的过往表现是一个先决条件。因此，排行榜可以说是衡量一家投行是否有能力在竞争激烈的香港市场筹备并组织成功上市的最佳指标。

2018年香港股市主板保荐人排行榜（按交易数）

排名	保荐人	宗数
1	高盛	13
2	中信里昂证券	12
3	摩根士丹利	10
4	中金	9
5	民生银行	8
6	建银国际	7
6	花旗	7
6	摩根大通	7
6	招商银行	7
6	中信建投证券	7

数据来源：Dealogic

2018年香港股市主板全球协调人排行榜（按交易数）

排名	保荐人	宗数
1	中信里昂证券	17
1	中金公司	17
3	摩根士丹利	16
4	高盛	12
4	瑞银	12
6	花旗	11
6	建设银行	11
6	民生银行	11
9	摩根大通	9
9	招商银行	9

数据来源：Dealogic

深入来看，拟上市企业应评估投行在同行业类似规模的IPO发行中的过往表现。小额发行的交易可能不会吸引太多高层的注意，而小型投行也可能并不具备管理大额复杂交易所需的能力要求和分销网络。

是否参与具重大里程碑意义的交易也是评估潜在保荐人或承销商专业素养和能力的重要因素。例如：2018年的小米上市，不仅募集了54亿美元的巨额资金，也是于香港上市的首家采用双重股权架构的公司。还有辅助生殖服务提供商锦欣生殖在2019年6月的上市，成功地募集了4亿美元资金。这两个项目均凸显了保荐人精心为上市公司打造企业故事的能力，并对全球熟悉相关行业和业务的投资者的精准把控能力。

市场、行业和监管信息

选择紧跟市场动向的保荐人和承销商至关重要。那些具备强大全球网络与研究能力的投行，无疑更受到挑剔的投资者的关注。

保荐人的主要作用在于确保拟上市企业完全遵守既有规定和程序要求，以帮助公司上市为最终目标的保荐人，同时还承担着联系监管机构和交易所的重要角色。因此，拟上市企业有必要对保荐人与监管机构打交道的能力，与掌握监管环境变化的经验进行评估。

在香港市场尤其如此。过去两年内，联交所新订了部分上市规则，接纳尚未盈利或没有收入的生物科技公司上市，并接纳采用不同投票权架构的公司上市。同时，还为有意赴港二次上市的中国内地企业和国际企业规划了更为便捷的二次上市路径。这些改变极大地重塑了IPO市场，同时也强化了保荐人和承销商的重要性。

规模和全球复盖

选择合作伙伴前考虑的另外一个关键问题在于，投行是否能够在全球范围内拉动投资者的需求。

香港市场期盼拟上市企业（尤其是大额度发行的企业）在上市前就获得大量预先承诺的投资。这类投资通常传达了所谓“基石投资者”或“锚定投资者”愿意投资的认可。

虽然基石投资者的投资承诺代表了对拟上市股票的认可，但在股权分配方面达成适度平衡至关重要。如果在受禁售限制的部分内分配过多股权，可能会造成股票流动性不足和异常波动。

但是，基石投资者是大规模IPO中至关重要的因素。2019年前6个月内，有相当一部分的香港IPO中存在该类投资者的参与。这在很大程度上是基于投行和顾问对主要投资者（如大型知名企业、主权财富基金、及包括超高净值个人投资者和家族理财室等影响力日益增强的专业投资者）的影响和信任。

毫无疑问，销售网络和资产遍布中国和世界各地的投行，更能够推动广大投资者的认知，并刺激需求。

IPO的组织管理

主保荐人也经常在交易中担任主要协调人的角色，负责引导拟上市企业完成整个IPO流程。其核心职责包括成立最能满足拟上市企业需求的专业顾问团队，开展尽职调查，准备上市文件，与监管机构联络，更重要的是打造一个引人入胜的企业故事。

保荐人在IPO中的作用可明确分为两大类：其一，运用深刻的行业见解打造一个引人入胜的企业故事；其二，以最高效率执行交易。

打造一个引人入胜的企业故事

在当前投资环境趋于审慎的背景下，保荐人在协助打造企业故事中的作用至关重要。找到拟上市企业的独特卖点，以及它为何能享有超越同业的估值溢价等，都源于对行业的深刻洞析。

近年来全球逐渐兴起的责任投资和环境社会与管治（ESG）投资，在香港也得到了投资者和监管机构的青睐。2019年5月联交所发布ESG征询文件，标志着公司应在合规报告中加入其业务的ESG影响，作为真正的价值驱动因素。

高执行效率

除企业故事外，保荐人和承销商如何构建并优化交易过程也至关重要。

关键因素包括选择时机、设定能够同时满足公司和主要初始投资者的价格区间、留下足够空间以维持上市后势头。

承销商在过程中发挥主导作用。他们深刻了解哪类投资者会被企业故事吸引，知道应该在何时何地召开会议，也会协调分析师和管理层开展路演活动，这些都是IPO成功的基本要素。

高效、专注、领导力和问题解决能力，都是专业顾问团队具备的特点。

在更为谨慎的市场中蓬勃发展

即使在熊市，足够优秀的公司也不乏资金来源。即便如此，拟上市企业也不能低估严格进行尽职调查的重要性。严格的尽职调查有助于筛选保荐人和承销商，最后成为公司可信赖的长期顾问和合作伙伴。

如果出现企业故事构思不当、时机选择不恰、沟通不畅或者投资者复盖不足，即使好公司的IPO也会偏离正轨。

有关中信里昂证券有限公司

中信里昂证券是亚洲首屈一指的资本市场及投资集团，为全球投资者提供独特见解，连系流动性资产及资本，帮助驱动客户的投资策略。

凭借屡获殊荣的研究、广泛的亚洲足迹，与中国直接的联系及资深的金融专业人士，中信里昂证券在资产管理、企业融资、资本及债务市场、证券与财富管理上的创新产品与服务使其在业界内脱颖而出。

作为中国领先投资银行中信证券(上交所600030, 港交所6030)的国际平台，中信里昂证券独特的定位能积极推动跨境资本流动，成为中国与世界相互接轨的重要桥梁。

自1986年公司成立以来，中信里昂证券以香港为总部并遍布在亚洲、澳洲、欧洲和美国的20个城市。

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第4章

指南

营销、定价与稳定机制

争取日渐挑剔的投资者

首次公开发行（IPO）对企业来讲，是一个独一无二的机会。IPO不仅能够推动品牌的认知，吸引具有变革潜力的重要资金，并且能提升公司价值。

虽然企业选择IPO的目的保持不变，但近期监管制度的改革以及来自各利益相关者更严格的监督，正在重塑IPO流程。令事态更复杂的是，地缘政治和经济的不确定性，加上近期一些大型上市交易表现平平，导致市场情绪有所冷却。要驾驭当前环境，要求拟上市企业在营销和定价策略方面具备高超的水平。

独角兽崛起，市场情绪冷却

独角兽企业（指估值超过10亿美元的初创企业）近年来高速增长，倍受投资者追捧。错失投资机会的顾虑将这些公司的估值推动到了前所未有的高位。

据估计，中国国内的独角兽企业数量上已经超越美国[1]，这凸显了中国作为全球经济增长的引擎和主要创新中心的地位。

香港股市从中国发展的成功中受益匪浅。在上市规则改革（包括接纳双重股权架构）的激励下，仅仅小米和美团点评两家公司的上市就在2018年融资近100亿美元，占该年度融资总额的25%。

但是，由于香港和全球股市的一系列新股表现平平，且上市后表现参差不齐，投资者的风险偏好和估值溢价有所下降。市场起伏不定的同时，资金的竞争在可预见的未来可能变得更为激烈。

1 胡润报告，胡润研究院2019年5月7日发布的《2019一季度胡润大中华区独角兽指数》与《2019一季度胡润中国潜力独角兽》，详见http://www.hurun.net/CN/Article/Details?num=539EF0BAD055

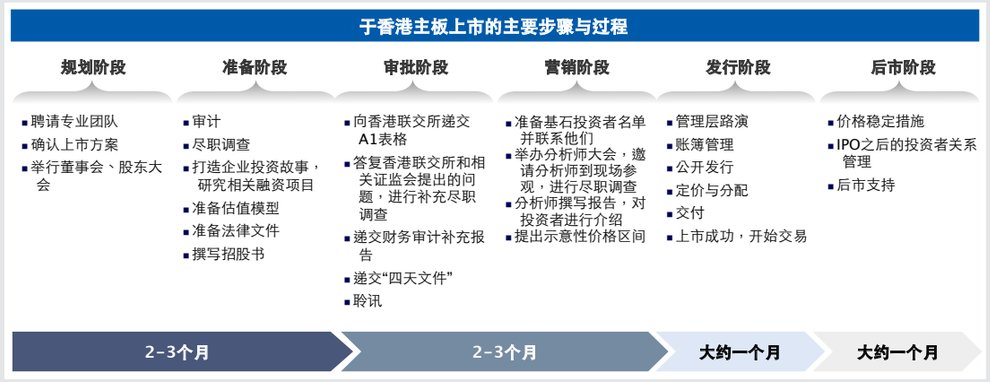
委任顾问

在较悲观的背景下，选择由专业保荐人、顾问和承销商组成的专业团队，是拟上市企业最重要的决定之一。

保荐人监督整个IPO流程，承担着联系监管机构的重要角色。承销商在营销、定价和股权故事的打造方面起到关键作用。

虽然好公司可能会基于自身的优点受到评判，但找到对目标IPO市场、拟上市企业所在行业、哪类投资者最倾向于接受报价有着深刻了解的顾问，是十分重要的。

营销流程与定价



IPO流程从拟上市企业委任保荐人和承销商之日起至交易首日止，一般为6至9个月。如企业将进行大规模重组或监管审批繁杂，时间可能严重推迟。

在如今严格的审查和监管下，香港的IPO流程变得更加透明。过去，拟上市企业和保荐人向香港联合交易所（「港交所」或「联交所」）提交机密IPO申请。如今，所有上市申请均公布在联交所网站。这一做法加速了营销过程，使得投行必须加快进度，考量和构建投资人对潜在IPO交易的意向。

奠定坚实基础：尽职调查

尽管近年来香港证券与期货事务监察委员会（「香港证监会」）对多个投行进行处罚，一定程度上削弱了保荐人与投资者之间的信任，但尽职调查仍然是IPO流程的坚实基础。监管机构和投行对尽职调查采取了极为严肃的态度。举例来说，任何新上市的申请人必须在提交上市申请前最少两个月，正式委任一名保荐人。

除了令投资者确信上市企业的可信度之外，加强尽职调查还能促使保荐人和其他顾问深入了解上市企业的业务。这一点对于了解公司的竞争优势是什么，以及需要解决的问题有那些是非常必要的。

招股说明书

尽职调查中获知的信息构成了主要营销文件——招股说明书。这份文件罗列了上市公司的资产负债、财务状况、利润与损失、业务前景、股份所包含的权利等相关信息。

营销过程中，招股说明书将经历好几轮修改。最初的A-1表格将同草拟的招股说明书（「申请版本」）一起提交给监管机构审批，审查过程为2至3个月。

在对草拟的招股说明书审查完成后，监管机构会先发出几轮修改意见，再给予初步批准。在此之后，拟上市公司会在营销阶段开始前发布一份「聆讯后资料集」，作为更新版招股说明书。后续将发布两轮修改：「红鲱鱼」包括了基石投资者详细信息，可用于簿记建档；香港公开发售招股说明书包括了发行价格区间的信息，将向散户投资者公布。

基石投资者与锚定投资者

可以说，IPO中最关键的部分就是定价。承销商必须与拟上市企业共同评估是否需要引入基石投资者或锚定投资者，股权在不同投资方之间如何分配，何为最优定价等。

这类最重要的投资者（往往是拟上市企业的战略性机构合作伙伴、大型养老基金或主权财富基金）构成香港市场大型上市交易预期的一部分。

基石投资者在获得有保证的重大股权分配的同时，接受六个月或更长时间的锁定期，而招股说明书中将披露基石投资者的名称。

锚定投资者在定价和投资承诺方面享有更大灵活性。他们通常在簿记后第一天开始下达订单（通常称为「锚定订单」）。这通常为定价与投资做出参考，并刺激需求。

分析师研究报告与管理层路演

同时，承销团的证券研究分析师也将为定价流程提供信息。与上市企业管理层会谈之后，他们将制作交易前研究报告，审查上市公司的行业环境、当前估值选择，并列明同类企业。他们的观点独立于承销团内的各投资银行团队，也独立于发行人团队。研究报告一经发布，分析师将与投资者会面，分享分析师的见解。

之后，保荐人与承销商将与拟上市企业共同开始为期一至两周的管理层全球路演，管理层通常在夜间启程，挤出几小时时间，以便更可能地从优秀投资者中获得高质量的订单。在香港IPO中，公开发行会在全球路演的后半段开始，并持续至少3.5天。最后，定价与上市会于路演结束一周后完成。

定价的艺术

与其说定价是一门科学，倒不如说是一门艺术。价格过低可以增强IPO对那些倾向趋避风险或精打细算的投资者的吸引力，但同时也有破坏重要的融资机会、显露出对公司基本价值和未来前景缺乏信心的风险。另一方面来讲，价格过高则会被指责趁机掠取现金，不仅可能令那些具有影响力的投资者退避三舍，还会在将来可能对该公司投资时一再犹豫。

理想的定价区间是15%至25%之间。高于该区间则说明企业对自己的真实价值缺乏信心或存在不确定性。

在香港，上市企业在开始路演之前已经确定了定价区间。这一点与美国不同；在美国可以采取弹性处理，如果宏观环境恶化，则可根据价格及规模缩减发行量。为缓解这种情况，联交所于2018年初出台了「灵活定价机制」。新机制允许上市申请人的最终发行价格低于招股说明书中的参考发行价格，最低可低于参考发行价格或参考发行价格区间之底价的10%。

定价中另外一个重要因素是如何管理股权分配。如大量股权被分配在受禁售限制的部分内，上市后将会导致股票缺乏流动性。与此同时，如果过多由散户投资者主导，股价可能产生剧烈波动。

由于IPO情况各有不同，承销商将设法构建稳定并且具有足够流动性的股权架构，以吸引新投资者。

为此，如果不计对基石投资者的大额分配，剩余发行股份中的60%至75%通常预留给长线投资者，他们通常是构成投资者中坚力量的前十大主要机构之一。然后其他25%至30%的股份分配给提供必要流动性的对冲基金。剩余股份配售给散户投资者。

为未来定下正确基调：稳定价格机制

上市公司的股份在交易首日的表现，可能会让投资者在未来一段时间内对该发行人留下或好或坏的深入印象。

因此，股份分配和定价在确定上市后表现中起到了主导作用。宏观环境和市场行情也可能产生重大影响，这种情况在香港尤其明显，因为许多散户投资者更倾向于提交纸质文件，而不是在线申请。这种人工处理方式也是导致香港新股结算周期为5天（也称为「T+5」机制）的关键原因之一。由于股份只可在申购期结束后5天开始交易，在此期间发生的意外宏观因素可能会对交易首日表现产生重大影响。目前，各投行及联交所正积极讨论应对方案。

为确保交易首日股份价格不至于在发行价格的基础上大幅下跌，并且在上市后仍能提供股票，存在一种称为「价格稳定」的风险控制机制。价格稳定机制由价格稳定经理人（通常为全球协调人）主导，价格稳定机制通过在市场上超额配售股票，并在上市时买回达15%的股票进行。这种权利可在簿记结束后30天内行权。这种机制也称为「绿鞋」机制，在支持新股上市和后市表现方面发挥了重要作用。

稳定价格机制并不保证上市首日交易不存在风险。但是，如果整体营销方案规划得当，招股说明书制备完善，定价策略能在为新上市企业精确捕捉企业价值和为潜在投资者预留足够空间方面达到微妙平衡，那么新上市企业将以充满自信的姿态书写全新的篇章。

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第4章

指南

首次公开发行（IPO）收款银行综合金融服务

助您顺利完成招股

在准上市公司首次公开发行(IPO)的过程中，银行是重要的合作伙伴。

主收款银行

在首次公开招股中负责收集认购申请表格及处理认购款项的银行，即称为收款银行。

在整个上市过程中，主收款银行是重要角色之一。主收款银行需要配合准上市公司及保荐人的要求，为准上市公司办理开立账户手续，包括开立一般公司账户及在主收款银行或其他副收款银行开立收款账户等；与过户处洽商退款支票的样式及签署安排；以及按准上市公司或保荐人指示，以代理人的名义发出相关指示予有关机构。

收款银行的具体职责：

A. 开立账户；
B. 派发IPO申请表格及招股书；
C. 收集并处理认购新股申请人已填妥的申请表格及认购新股款项；
D. 将新股款项的支票或银行本票送香港银行同业结算有限公司（HKICL）交收；
E. 透过银行同业资金市场让认购新股的款项回流至金融体系；
F. 安排向未能成功获分配新股或只能成功获分配部分新股的申请人退还有关款项；
G. 在退款日，将集资款项存入准上市公司在主收款银行开立的账户。

选择招商永隆银行做 IPO 主收款银行

1. 资历经验丰富：2009年至今，招商永隆银行有限公司（「招商永隆银行」）已为逾百家上市公司完成收款工作；仅2018年，先后为19家资本市场非常有影响力的、集资额名列前茅的IPO企业担任收款行；
2. 现场指挥高效：在新股上市期间，招商永隆银行设立现场指挥运作中心，有效统筹收款各项工作；
3. 低成本高收益：招商永隆银行以合理的收费提供优质的服务，提供富竞争力的优惠利率；

4. 扩大募资份额：招商永隆银行拥有坚实的中资与港资客户基础，帮助客户引入优质投资者；在国际配售阶段可提供基石／锚定投资者配资；在公开发售阶段可提供券商孖展融资服务等，同时，委派客户经理协助促销认购，并提供网上银行、「招商永隆银行一点通」手机App等EIPO线上新股认购渠道；
5. 资金增值：公司上市成功后，招商永隆银行提供持续的配套资金管理服务，为企业妥善管理募集所得资金，包括外保内贷、现金管理及外汇交易等；
6. 港股公司派息：招商永隆银行为上市公司提供派发股息服务，同时可提供派息融资，缓解公司资金流动性压力；
7. 长期合作伙伴：招商永隆银行为企业提供支付结算、贸易融资、双边贷款、银团贷款、员工股权激励，及企业债券发行等服务，致力于做企业的长期金融合作伙伴；
8. 综合金融优势：招商永隆银行可以在母行招商银行大力支持下，为企业和投资者提供专业的综合金融服务。

关于招商永隆银行有限公司

招商永隆银行（前称永隆银行）创立于1933年，是香港具悠久历史的华资银行之一，素持「进展不忘稳健、服务必尽忠诚」之旨，为客户提供全面银行服务，包括存款、贷款、私人银行及财富管理、投资理财、证券、信用卡、网上银行、「招商永隆银行一点通」手机App、全球现金管理、银团贷款、企业贷款、押汇、租购贷款、汇兑、保险代理、强制性公积金等。招商永隆银行现于中国内地、香港、澳门及海外共有机构网点40家，员工逾1,900人，截至2019年6月30日，综合资产总额为港币3,254亿元。2008年，招商银行股份有限公司（招商银行）成功并购招商永隆银行，招商银行现已跻身全球千家大银行20强。

联络资料

招商永隆银行 CMB WING LUNG BANK

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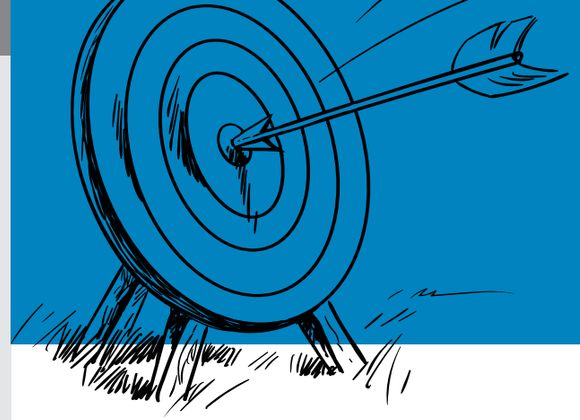

第5章

制定上市阶段性策略

前言

IPO能引领贵公司通往国际资本舞台。除了接触全球投资者之外，公司声誉也提升到一个全新高度。这是贵公司与投资者建立长期信任的绝佳时机。在此期间，有效的沟通和推介有助于在公众和投资者面前打造正面的企业形象，并缓解潜在危机，这对于股份认购和成功上市都至关重要。

预沟通

制定沟通策略

IPO推介流程的第一步是制定沟通方案与策略，这将影响后期的市场反应。贵公司应与公关顾问紧密合作，了解媒体策略和渠道的最佳实践。建议严格遵守公关顾问制定的沟通指引，以符合联交所相关规定。在递交A-1表格前不要披露贵公司的上市意向，因为在递交A-1表格后将经历「静默期」。

制定清晰的时间进度表同样重要，这将逐步指引贵公司在IPO流程各个阶段采取什么行动。

讲述自己的资本故事

您需要向市场传递您的资本故事。明确沟通目的，了解目标受众，并根据投资亮点讲述自己的故事。直接向投资者叙述贵公司的竞争优势、市场潜力和策略非常重要。确保沟通中讲述的关键信息和路演材料与招股说明书一致。

沟通指引

沟通指引将协助贵公司了解媒体生态。IPO过程中，贵公司将会与国际和本地媒体打交道，沟通指引会列明贵公司可能面临的不同场景，列出注意事项以及能够/不能够向媒体披露的内容，如利润预测、与招股说明书内容不符的信息或在递交A-1表格前公布上市意向等。

路演前市场教育活动

如市场不了解贵公司业务模式或所在行业，则路演前市场教育是非常重要的环节。贵公司的公关顾问可在聆讯前，在不过多提及贵公司且不违犯交易所任何规定的前提下，向市场简要介绍贵公司所在行业及市场趋势，以及对市场进行教育。这为市场提供贵公司及所从事行业

的基本信息和行业概览，为后期约见潜在投资者开展交易路演打下基础。

解决关键问题

识别可能影响贵公司IPO的潜在问题，如政治决策、本土文化、经济、股市、行业动向、贵公司业务、新机遇及员工雇用等。了解这些问题如何与贵公司和IPO相关，例如：中美贸易战对贵公司业务有何影响。准备回应各个问题的讲稿，以避免可能影响贵公司IPO的潜在危机。

做好充分准备应对危机

IPO过程中可能随时引发危机，对贵公司业务和IPO造成严重影响。贵公司递交A1表格，招股说明书将公开挂网，贵公司将受到一定媒体关注。媒体或许会对贵公司的财务数据、业务与市场前景进行错误或负面解读对公司上市造成不利影响。因此，贵公司必须进行媒体监测，这对于识别潜在危机及不实媒体报导，以及随后快速反应并解决危机，是十分关键的。务必与贵公司保荐人、律师和公关顾问协力主动开展危机管理，通过贵公司的公关顾问向媒体和投资者作出一致的反应。

准备路演材料

后期路演中，贵公司将向投资者讲述资本故事，将包括在涵盖投资者演示材料、公司宣传片和公司网站在内的路演材料中。路演材料不但助力贵公司向投资者传达投资要点，还能强化公司在公众心中的形象。在路演之前，请与贵公司保荐人和公关顾问探讨如何制作上述材料，他们将按照最佳实践指导贵公司强调自身竞争优势，向投资者传达清晰且强烈的信息。

路演

建立与投资者和媒体沟通

启动路演后，贵公司将成为关注焦点。与公关顾问合力执行沟通策略，向投资者和媒体强调贵公司竞争优势所在。投资者演示午餐会和新闻发布会是直接与他们见面并交流意见的重要场合。请充分利用机会，讲述贵公司的资本故事。

准备面对投资者和媒体

贵公司管理团队将在路演时与投资者和媒体见面，以自信的态度进行演示将增强贵公司的公司形象，增进投资者的信心。建议贵公司接受媒体培训，准备一份详尽的问答材料，在与投资者和媒体见面前进行预演。关键是做好充分准备，避免意外情况发生。

选择正确的推介渠道

除了与投资者和媒体进行面对面交流以外，也请选择适当的渠道，对贵公司交易和资本故事进行宣传。就香港IPO而言，除了通过传统和在线媒体报导向市场进行日常沟通以外，财经专栏作家和股市评论员对于散户投资者有着尤其深厚的影响力。他们是财经领域的主要意见领袖， 在资本市场倍受尊重，他们的意见可能左右公众对贵公司的看法。与财经专栏作家和股市评论员保持良好的关系始终有益于贵公司在市场上的声誉。

后市市场

资本市场新旅程

在股票市场上市只是贵公司在资本市场的起点。现在，贵公司已成为一家上市公司，需向公众和投资者负责。利益相关者对于上市公司的公司治理、信息披露和社会责任抱有很高的期望。贵公司还需要每隔6个月公布中期业绩和年度业绩，媒体和投资者将持续关注贵公司的财务状况和策略。持续的良好公共关系和投资者关系对于维护贵公司在资本市场的声誉至关重要。

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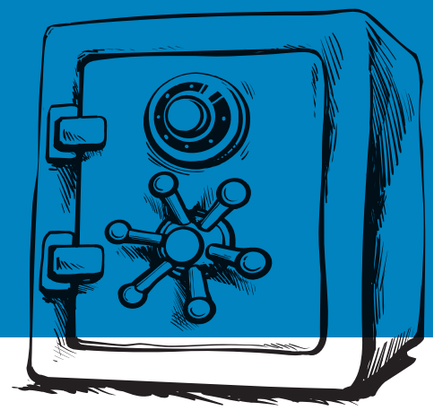

第6章

申请人是否适合上市

随着成功首次公开招股的公司数目按年上升，近年也有越来越多的上市申请被香港联合交易所有限公司（「港交所」）以上市申请人不适合上市为由否决。上市申请人最好在筹备上市初期便进行深入的上市前评估，从而识别出有可能令港交所质疑其是否适合上市的问题。

「是否适合上市」作为上市资格之一

香港证券市场素以透明度高及订有客观上市资格为荣，这有助申请人确切预计上市申请能否成功。过去，市场人士认为只要符合上市资格（特别是盈利／现金流量规定、管理层维持不变及拥有权维持不变的规定），其他牵涉上市的问题通常便可透过披露方式处理。此期望与香港证券市场主要以信息披露为基础的特点一致，意味着港交所很少对业务或公司的商业可行性或上市发行人将进行交易的商业元素作出判断。

《香港联合交易所有限公司证券上市规则》（《上市规则》）第8.04条及《GEM证券上市规则》（《GEM上市规则》）第11.06(1)　条订明，发行人及其业务必须属于港交所认为适合上市者。《上市规则》及《GEM上市规则》强调，上市申请人是否适合上市视乎多项因素而定，即使上市申请人遵守《上市规则》／《GEM上市规则》，亦未必确保其适合上市，港交所仍有批准或否决上市申请的酌情权。《上市规则》／《GEM上市规则》唯一列出不适合上市的例子，是拟上市集团的全部或大部分资产为现金及／或短期投资。市场人士曾经普遍认为，除了上述例子或某些极端情况外，港交所很少会用不适合上市这把「尚方宝剑」来否决上市申请。

然而，近年有越来越多的上市申请被港交所以不适合上市为由否决。于2018年，港交所拒绝了24宗上市申请，而2017年则为3宗。[1]　虽然目前并没有明确的测试方法可确定甚么因素使发行人及其业务不适合上市，但港交所已刊发多份上市决策及指引信来阐释有关原则。

1　数字反映已经尝试港交所所有上诉途径的上市申请。

防止「壳股」的出现 －七宗罪

近年，港交所留意到有些上市申请人看来是在将其公司上市，以便他们可以将上市后的实体售作另一项业务的「上市空壳公司」。不少上市发行人在一年禁售期结束不久即出现控股股东变动或逐渐减持其权益的情况。港交所认为，若有潜在买家发现此等情况，将对该等空壳公司展开投机买卖，这可能导致上市后市场上出现操控股价、内幕交易及不必要的波动，并可使借壳上市活动有机会规避监管审查。港交所于2016年6月刊发的指引信GL68-13A指出了「上市空壳公司」的七项特点，令市场关注此等公司是否适合上市，以及使港交所加强对此等公司的审核。这七项特点被业内称为「七宗罪」。

七项特点	注意事项
1. 低市值	上市申请人应查核其计划上市项目的市值是否合乎市场惯例。
2. 仅勉强符合上市资格规定	根据《上市规则》的盈利测试，主板上市申请人在刊发上市文件前一个财政年度的股东应占盈利应不少于港币2,000 万元，而前两个财政年度累计则不少于港币3,000 万元。此外，自2018年2月起，主板上市申请人在上市时的市值不得低于港币5亿元。[2] 若上市申请人的纯利仅勉强符合上市资格规定，该公司将不太可能符合上述市值规定，因为其市盈率预期与市场上可比较的公司大致相若。 GEM上市申请人应具备至少两个财政年度的适当编制的充分营业纪录，包括从日常及正常业务经营过程中产生净现金流入（但未计入营运资金的变动及已付税项）。申请人在紧接刊发招股章程前两个财政年度从经营业务所得的净现金流入总额必须最少达港币3,000万元[3]，而上市时的市值预期为港币1.5亿元。[4] 上市申请人应注意，港交所在判断其是否符合上市资格时，应不会考虑申请人在日常业务以外的业务所产生的任何收入或亏损或一次性盈利。此外，港交所亦可能会忽视重大不合规事件所产生的收入。
3. 集资额与上市开支不合比例	上市申请人应考虑募集资金规模及上市费用占募集资金的比例是否恰当和符合市场情况。若上市所得款项将大部分用于上市费用支出，上市申请人应解释为何上市所带来的好处值得耗用高昂的上市费用申请上市。
4. 仅有贸易业务且客户高度集中	上市申请人应注意，港交所不太可能认为仅有单一贸易业务的公司适合在香港上市。 对于客户高度集中的企业而言，港交所将考虑以下因素来确定这种依赖是否会对上市的适合性产生影响： a. 上市申请人与有关客户的关系是否由来已久，又或双方订有长期协议；[5] b. 上市申请人可否轻易改变业务模式来减少依赖程度，例如寻找替代客户； c. 上市申请人是否有计划令其业务重点多元化以减少依赖程度； d. 整个行业是否由少数公司操控； e. 有关的依赖是否为双向且相辅相成的；及 f. 在有所依赖的情况下，上市申请人将来是否仍有能力保持收益。[6]
5. 绝大部分资产为流动资产的「轻资产」模式	上市申请人应考虑其业务的资产比率是否符合其所经营行业的性质及与可比较的公司相若。
6. 与母公司的业务划分过于表面	在上市前重组中，上市申请人普遍会将与上市业务不一致的业务从上市集团架构中剥离，如果除外业务的划分过于表面，可能会引起港交所关注。特别是，上市申请人应注意，因为被剥离的公司存在重大不合规事宜，或者因亏损交易而将其剥离在上市集团业务之外，在监管机构看来并不是合理理由。
7. 在上市申请之前阶段几乎没有或无外来资金	为了评估上市申请人是否确实有融资需要，港交所将审视以下事项：上市申请人的资产负债比率是否合理及其闲置现金金额；上市申请人的已动用银行融资及其他借款金额；及上市申请人是否已尝试过所有较低廉的融资方法。

若上市申请人具备以上一项或多项特点，该上市申请人及其保荐人应提交详尽分析以证明申请人适合上市，分析的内容包括以下几方面：

(i) **所得款项用途** - 上市申请人应披露所得款项的具体用途，而有关用途应符合上市申请人过往及未来的业务策略及行业趋势，并解释上市的商业理据。

(ii) **未来目标及策略** - 上市申请人应提交全面的分析以证明其就业务营运及增长具有详细的策略计划。

(iii) **盈利及收益增长** - 若上市申请人 (a) 曾录得盈利及收益增长下跌或偏低；及 / 或 (b) 预期将于上市后录得盈利及收益增长下跌或偏低，便须提交全面的分析以证明其业务可持续发展。

(iv) **潜在夕阳行业** - 若上市申请人处于潜在夕阳行业或其行业市场前景下滑，便须能证明其业务的可行性，及其有能力和资源调整其业务以回应市场需求的转变。[7]

港交所强调其重点在于检视上市申请人是否适合上市，例如上市是否符合上市申请人的业务策略（包括所得款项的拟议用途）及申请人是否确实有融资需要。[8] 若申请人未能证明上市的商业理据，则不论其业务性质及财务状况如何，港交所可能都会认为该申请人不适合上市。此外，若有特定事实及情况使港交所可合理相信上市申请人在上市后很可能招致投机买卖或因其上市地位而被收购，港交所亦可能会认为申请人不适合上市。[9]

业务模型的可持续性

港交所公布的指引信GL68-13（最新于2019年3月更新）就港交所在评估上市申请人的业务是否适合上市时所考虑的部分因素提供指引，而其中一项因素是业务模型的可持续性。业务模型可因多项因素而被视为不适合上市，例如：

(a) 财务表现下滑

港交所会考虑（其中包括）：(a) 上市申请人的财务表现有多容易受到非其可控制的变动所影响；(b) 财务表现下滑的深层原因，以及倒退的趋势是否预期继续又或是否业内的周期性循环；及 (c) 上市申请人是否已证明其能够有效减低相关风险或扭亏为盈。[10]

(b) 过于依赖客户、供应商、有限的分销渠道及 / 或控股股东及其紧密联系人（「控股股东组群」）。

2 《上市规则》第8.09(2) 条
3 《GEM上市规则》第11.12A(1) 条
4 《GEM上市规则》第11.23(6) 条
5 港交所指引信GL68-13第3.12(b) 段
6 港交所上市决策LD107-1
7 港交所指引信GL68-13A第3.2段
8 港交所指引信GL68-13A第4.1段
9 港交所指引信GL68-13A第4.2段
10 港交所指引信GL68-13第3.10段

若上市申请人过于依赖其他人士（「相关对手方」），而上市申请人与该方的关系可能会重大不利地改变或终止，则可能会威胁到上市申请人的业务可持续性。[11]

在没有其他负面因素的情况下，若上市申请人(i) 与相关对手方的关系不太可能会有重大不利变动或终止；或 (ii) 可以或将可设法有效减低与相关对手方的关系出现重大不利变动甚或终止的风险，则只须对其过于依赖相关对手方的详情加以披露。上市文件应披露的资料应包括：

(i) 相关对手方的背景；

(ii) 上市申请人与相关对手方的业务关系、依赖性质及有关安排之详情；

(iii) 上市申请人与相关对手方的关系不太可能会有重大不利变动或终止的根据；及

(iv) 上市申请人可以或将可以设法有效减低与相关对手方的关系出现重大不利变动甚或终止的风险的根据。[12]

(c) 来自控股股东组群的财务支援

上市申请人可能会从控股股东组群获得重大财务资助（例如控股股东组群提供的贷款、个人担保或其他形式的抵押品或抵押，以确保上市集团偿还债务）。若无相反证据，港交所评估上市申请人的可持续性时会假设上市后有关财务支援将会撤销。[13]

港交所在评估上市申请人业务是否在没有财务支援的情况下仍可持续时所考虑的部分因素如下：

(i) 上市申请人能否取得条款相若的独立融资（例如没有财务支援下）；或

(ii) 上市申请人手头上是否有足够的速动资产应付其财务需要。[14]

(d) 可能对公司前景带来不利影响的重大变动

若上市申请人面临若干变动以致其业务受到迫切威胁，亦会令人质疑其业务的可持续性， 例如：

(i) 监管规定的变动，令上市申请人或未能以现有的形式或盈利水平继续经营；或

(ii) 新科技发展，令上市申请人的业务过时。[15]

针对这些问题，港交所预期上市申请人要确定地证明有关变动成真的机会不高又或不会影响上市申请人业务的可持续性。[16]

不合规事宜会否影响上市的合适性

若上市申请人、其董事或控股股东作出涉及欺诈、欺骗或不诚实（例如逃税或贿赂）的违规事件（「违反诚信事件」）及严重不遵守法律及法规（「重大不合规事件」），则可能导致其业务不适合上市。至于违反诚信事件对营运及财务的影响，港交所或会要求上市申请人证明其经调整违反诚信事件影响后的业绩纪录期的业绩仍符合《上市规则》的相关资格规定，且若其当时已遵守相关规定或规则，亦不会对其当时和往后的业务及财务表现造成任何重大不利影响。[17]

类别	影响	考虑因素
违反诚信事件	违反诚信事件很可能使上市申请人不适合上市或违责董事不适合担任上市公司董事。 违反诚信事件会令人质疑违责董事的品格及诚信不符合《主板规则》第3.08及3.09条（《GEM规则》第5.01及5.02条）的标准规定。 若控股股东须对违反诚信事件承担责任，则只要其有能力对上市申请人产生重大影响，上市申请人便会因其将大受此控股股东影响而不适合上市。	港交所在厘定违反诚信事件会否使上市申请人不适合上市时，会考虑所有有关事实及情况（包括违反诚信事件的底因及相关缓和因素、对营运及财务的影响、违责人士对上市申请人营运、内部监控及交易纪录业绩的影响力，及可有实施（及已实施多久）有效的内部监控措施避免同类违反诚信事件再次发生等等）。 港交所预期违责董事或控股股东在上市申请人上市前已不再为其董事或控股股东（视情况而定）。
重大不合规事件	重大不合规事件若令人担忧任何参与事件的董事或当时在任的任何董事的能力，继而质疑其是否适合担任董事一职，而问题又不能透过披露解决。	港交所预期上市申请人实施加强的内部监控措施，以避免重大不合规事件再次发生。[18] 港交所一般预期重大不合规事件在上市前已予以纠正。[19] 涉及银行票据融资及利率／贷款套利的重大不合规事件可予通过披露处理。上市申请人将需要终止一切违规票据融资交易，并至少在其上市申请前已维持12个月，以证明在合规情况下其业务仍可持续。[20]

否决个案

港交所历年来公布了许多上市决策，以说明一些上市申请被否决的原因。以下是一些常见否决理由的摘要。应注意的是，单是某一项问题的存在未必会令上市申请人不适合上市，港交所会审视上市申请人的各项问题的整体影响，以评估其是否适合上市。

问题	相关上市决策
过多与紧密关联方或关连人士进行的交易	2010年5月公布的LD92-1（于2019年3月撤销并被GL68-13取代，但此项上市决策所载的原则仍然相关） 2016年4月公布的LD100-2016中的公司B（2015年拒绝的个案） 2019年3月公布的LD121-2019中的公司A（2018年拒绝的个案）
矿业公司未能证明其主要资产具有清晰的商业生产计划	2015年6月公布的LD92-2015中的公司A（2013年拒绝的个案）及公司G（2014年拒绝的个案） 2016年4月公布的LD100-2016中的公司D（2015年拒绝的个案）

11 港交所指引信GL68-13第3.11段
12 港交所指引信GL68-13第3.15段
13 港交所指引信GL68-13第3.16段
14 港交所指引信GL68-13第3.17段
15 港交所指引信GL68-13第3.18段
16 港交所指引信GL68-13第3.19段
17 港交所指引信GL68-13第3.6及3.8段
18 港交所指引信GL63-13第3.4段
19 港交所指引信GL63-13第3.4(d) 段
20 港交所指引信GL63-13第3.7段

未能纠正不合规事宜从而可能影响重续重要牌照	2015年6月公布的LD92-2015中的公司B（2013年拒绝的个案）
高度倚赖控股股东的财务援助	2015年6月公布的LD92-2015中的公司B（2013年拒绝的个案） 2017年5月公布的LD107-2017中的公司B（2016年拒绝的个案）
董事、重大利益关系人士或控股股东适任与否	2015年6月公布的LD92-2015中的公司B、公司C及公司E（2013年拒绝的个案）、公司J及公司N（2014年拒绝的个案） 2016年4月公布的LD100-2016中的公司C及公司F（2015年拒绝的个案） 2017年5月公布的LD107-2017中的公司L（2016年拒绝的个案） 2019年3月公布的LD121-2019中的公司F、公司N及公司Q（2018年拒绝的个案）
如不计算 (a) 一次性收益、豁免的董事酬金及豁免的租金和政府补助，(b) 不合规事宜产生的收入，或 (c) 来自投资物业的公平值收益，但计入股东贷款要付出的利息支出，便无法符合财务要求	2015年6月公布的LD92-2015中的公司D（2013年拒绝的个案）及公司N（2014年拒绝的个案） 2016年4月公布的LD100-2016中的公司C及公司E（2015年拒绝的个案） 2017年5月公布的LD107-2017中的公司A、公司B、公司E及公司M（2016年拒绝的个案） 2019年3月公布的LD121-2019中的公司I（2018年拒绝的个案）
不可持续的业务模式及／或财务表现倒退，而没有充足理据相信情况会改善	2015年6月公布的LD92-2015中的公司D（2013年拒绝的个案）、公司L、公司N、公司O及公司P（2014年拒绝的个案） 2016年4月公布的LD100-2016中的公司A、公司E及公司G（2015年拒绝的个案） 2017年5月公布的LD107-2017中的公司F、公司H及公司M（2016年拒绝的个案） 2018年3月公布的LD119-2018中的公司B（2017年拒绝的个案） 2019年3月公布的LD121-2019中的公司E（2018年拒绝的个案）
违反诚信事件（例如逃税）	2015年6月公布的LD92-2015中的公司E（2013年拒绝的个案）
人员辞任或重大收购事宜，导致未能符合拥有权和管理层维持不变及盈利测试的规定	2015年6月公布的LD92-2015中的公司E（2013年拒绝的个案）及公司H（2014年拒绝的个案） 2017年5月公布的LD107-2017中的公司D（2016年拒绝的个案） 2018年3月公布的LD119-2018中的公司C（2017年拒绝的个案）

倚赖主要客户、单一项目或产品	2015年6月公布的LD92-2015中的公司F（2013年拒绝的个案） 2017年5月公布的LD107-2017中的公司I、公司J及公司K（2016年拒绝的个案）
重大或系统性不合规事宜，令人质疑上市申请人以合规方式经营的能力或其业务前景	2015年6月公布的LD92-2015中的公司J及公司K（2014年拒绝的个案） 2016年4月公布的LD100-2016中的公司C及公司F（2015年拒绝的个案） 2017年5月公布的LD107-2017中的公司A及公司E（2016年拒绝的个案）
欠缺中国物业的所有权证或物业所有权证明书，而有中国物业对其业务举足轻重	2015年6月公布的LD92-2015中的公司N及公司O（2014年拒绝的个案）
与控股股东的激烈竞争	2015年6月公布的LD92-2015中的公司O（2014年拒绝的个案）
保荐人缺乏独立性	2015年6月公布的LD92-2015中的公司M（2014年拒绝的个案） 2019年3月公布的LD121-2019中的公司V（2018年拒绝的个案）
于高危地区营运，有多项极其不确定的法律及政治因素	2016年4月公布的LD100-2016中的公司A（2015年拒绝的个案）
业绩纪录期内或之后的业务模型有重大变更，导致业绩纪录期业绩不代表日后表现	2016年4月公布的LD100-2016中的公司B及公司E（2015年拒绝的个案） 2017年5月公布的LD107-2017中的公司G（2016年拒绝的个案）
向第三方提供大额垫付款，令人质疑董事的诚信	2016年4月公布的LD100-2016中的公司F（2015年拒绝的个案）
市盈率没有合理解释	2017年5月公布的LD107-2017中的公司C（2016年拒绝的个案） 2019年3月公布的LD121-2019中的公司D、公司H及公司M（2018年拒绝的个案）
控股股东及主要股东过去曾参与出售上市空壳公司，令人质疑股东是否有心促进上市申请人的长远发展	2018年3月公布的LD119-2018中的公司A（2017年拒绝的个案）
欠缺上市的商业理据及／或真实的集资需要	2018年3月公布的LD119-2018中的公司A（2017年拒绝的个案） 2019年3月公布的LD121-2019中的公司B、公司C、公司G、公司H、公司J、公司K、公司L、公司M、公司O、公司P、公司R、公司S、公司W及公司X（2018年拒绝的个案）
将不同公司包装上市以符合资格规定	2019年3月公布的LD121-2019中的公司T（2018年拒绝的个案）

加强审查上市的商业理据

港交所近年加强了审查上市的商业理据，以致2018年被否决的上市申请个案明显增加。港交所强调，被否决的个案并无集中于特定行业；港交所在评估上市申请人是否适合上市时的主要考虑因素，是上市申请人的上市理由是否基于其预期增长，从而有集资的需要。维持市场质素是港交所的任务，预计港交所日后在评估上市申请人是否适合上市时，将更着重集资所得资金的拟议用途及集资需要，以及与上市申请人的业务策略及未来计划是否相符。

注意

以上内容涉及十分专门和复杂的法律知识及法律程序。本篇文章仅是对有关题目的一般概述，只供参考，不能构成任何个别个案的法律意见。如需进一步的法律谘询或协助，请联络我们的律师。

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第7章

具体上市问题

中国企业在香港上市除H股方式(即以中国境内主体作为上市主体，在香港市场发行股票并上市)之外，也多会采用红筹方式，即通过在海外设立持股平台作为上市主体，将中国境内企业的资产或权益注入该等海外持股平台，并进而在香港资本市场上市募集资金。红筹方式中搭建的上述跨境公司架构通常称为「红筹架构」。红筹架构项下具体分为大红筹架构与小红筹架构。

大红筹架构是指境内公司或机构在海外设立持股平台(由该等境内公司或机构控股或作为第一大股东)，将中国境内的经营性主体或资产注入海外持股平台，进而通过境外控股子公司进行上市融资。核心监管规定为97红筹指引(国发[1997]21号)，需取得证监会、发改委、商务部门、国资委等政府部门审批。大红筹架构下IPO在审批方面主要包括三种情况：(1)一般情况，需证监会审批，难度极大；(2)无境内资产或境内资产出境满三年的，由省政府或国务院国资委批准，并由证监会进行事后备案；(3)境外上市公司境外分拆上市，由证监会进行事后备案。大红筹架构上市除具备一般的境外上市主体的优势外，最大优势是境内集团公司/总公司可以控制及并表境外上市公司，更方便大股东或境内集团公司/总公司的业务需求。但鉴于长期以来主管部门对前述第(1)类一般情况IPO的审批要求非常严格，市场上通过的案例极少，而市场上近期较多出现上述(2)、(3)类特例情况。上述情况导致大部分国企一般IPO只能采用H股方式，而民营企业IPO则多采用下面介绍的小红筹架构在香港上市。

小红筹架构是指境内自然人在海外设立持股平台(由境内自然人直接控制海外持股平台或作为其第一大股东)，将中国境内的经营性主体的股权或资产注入海外持股平台或建立可变利益实体(VIE架构)，进而通过境外控股子公司进行上市融资。自2003年证监会取消「无异议函」制度，小红筹模式上市不再由境内证券主管部门审批。2006年商务部10号文(及其后续修订)及外汇37号文成为小红筹上市重组的主要监管规定。目前市场上搭建小红筹架构的主要方式有：(1)利用10号文生效之前已完成境内自然人股东返程投资的WFOE；(2)实际控制人变身份；(3)两步走红筹重组；及(4)VIE架构。

小红筹架构上市主要优势在于：(1)审批难度小；(2)整体流程所需时间相对短；(3)上市主体在境外，法律环境相对宽松，相应机制如同股不同权设置、股权激励方式都明显灵活；及(4)再融资方便等。

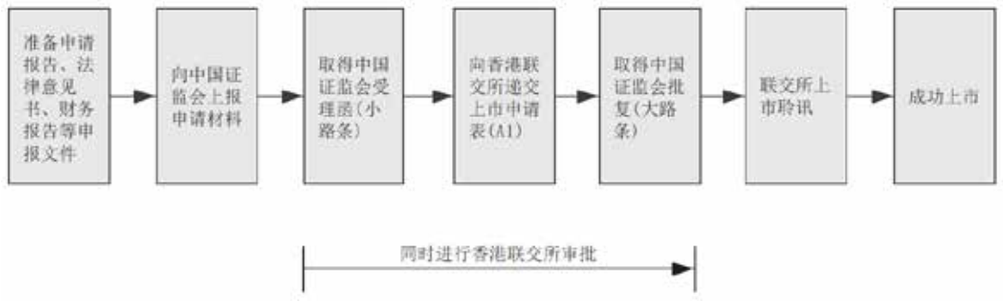
VIE架构是小红筹架构下较为常见的一种，通常在VIE架构下，申请人在中国境内设立一家全资子公司(即WFOE，其业务主要在中国境内，拥有全部知识产权)，同时申请人的控股股东(即中国境内居民自然人或企业)在中国境内设立一家纯内资企业(即OPCO，拥有外资限制和/或禁止取得的全部必要经营牌照)，WFOE、OPCO及其股东之间签署一系列结构性合约，实现申请人对OPCO的实际控制和财务并表。

采用VIE架构上市，需要符合香港交易所的上市决策文件HKEx-LD43-3规定的一系列条件，特别是要满足narrowly tailored的原则，即申请人只能在必要的情况下采用合约安排的方式解决外资限制问题。例如，若申请人可以持有OPCO 50%的股权而不受限制，剩余50%的股权方可通过合约安排持有。又如，若申请人直接持有OPCO的股权需要取得批准或者符合某些资格条件，则申请人应当首先寻求获得该等批准或资格条件。此外，如果相关法律法规规定不允许采用VIE架构，则申请人的中国法律顾问应当就此出具正面法律意见，并对有关主管部门进行访谈，确认该类业务存在外资限制或禁止，并确认该类业务采用VIE架构不违反相关法律法规或影响VIE架构的有效性。

目前，众多新经济企业赴港上市，而且多采用VIE架构。香港交易所也发布谘询文件拓宽现行的上市制度，吸引和接纳不同投票权架构的新经济企业。香港交易所定义的新经济企业一般具有以下几项或多项特征：能证明公司成功营运有赖其核心业务应用了新的科技，创新理念及/或业务模式，亦令该公司有别于现有上市公司，与众不同；研发将为公司贡献一大部分的预期价值，并以研发为主要业务及占去大部分开支；能证明公司成功营运有赖其专利业务特点或知识产权；及相对于有形资产总值，公司的市值或无形资产总值较高。

除上述红筹方式上市外，中国企业在香港联交所上市的另一方式则是H股上市，H股上市是指中国境内注册的股份有限公司，发行境外上市外资股并在香港联交所上市(「H」即Hong Kong首字母的简写)。境内企业H股上市需要同时取得中国证监会及香港联交所的同意，其中中国证监会的关注要点为：(1) 是否符合国有股权管理规定；(2) 是否符合外资准入及宏观调控政策；(3) 申请人的合规经营情况；(4) 申请人的股权结构与公司治理情况；(5)本次发行的授权、批准；(6)其他特定对象适用事项。

H股上市的主要流程为：(1)准备申请报告、法律意见书、财务报告等申报文件；(2)向中国证监会上报申请材料；(3)取得中国证监会受理函



(小路条)；(4)向香港联交所递交上市申请文件(A1)；(5)取得中国证监会批复(大路条)；(6)联交所上市聆讯；(7)成功上市。

另外，香港联交所2018年4月30日公布了新的《上市规则》，新增第18A章生物科技章节，允许尚未盈利或未有收入的生物科技公司申请香港主板上市。新规从上市适格性、预期市值(至少15亿港元)、业绩记录(由相同的管理层经营现有业务至少两个会计年度)和运营资金(集团未来12个月开支的至少125%)四方面对申请人提出要求，并对基石投资者、披露责任等进行了规定。联交所指引信明确了适格的生物科技公司应当具备七个特点，包括至少一项核心产品已通过概念阶段、拥有与核心产品相关的知识产权等。

新规大大加速了生物科技企业上市进程，截至今年5月底，已有歌礼制药、信达生物、康希诺生物等8家生物科技公司依据18A章节发行新股，另有10多家生物科技公司已经递交了IPO申请。

有关通商律师事务所

通商秉承专业，诚信和卓越的原则，致力于满足客户最迫切的需求，解决客户最关心的问题，为客户的通商律师事务所（以下简称为“通商”）是中国顶级商业律师事务所之一。通商能够提供一站式解决方案，善于为客户提供务实，经济的法律方案并在最大规模维护客户利益。通商在资本市场，并购，股权投资，TMT，教育，医疗，银行及金融，争议解决，破产重组，投资基金，知识产权，境外投资等领域拥有突出的业绩和良好的声誉。

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合伙人	合伙人	合伙人	合伙人

第8章

国际发售

在香港及其他地区进行第二上市

1. 序言

双重上市（dual listing）是指公司的股票在两个不同的股票市场上市交易。寻求从资本市场筹集资金的公司可以通过首次公开募股（**“IPO”**）的方式在某个股票市场上进行其股票的主要上市（primary listing）。与此同时或在主要上市之后，该公司还可以寻求将其股票在另一个股票市场上进行第二上市（secondary listing）。

双重上市能够同时为公司及其投资者带来好处。从公司的角度来看，双重上市扩大了其股东基础，提升了其在全球市场的知名度，从而使公司可以在其他市场上寻求融资，并进一步将业务扩展到其他市场。从投资者的角度来看，外国公司在其本国进行双重上市拉近了他们与外国股票的距离，并使他们能够实现投资多元化。

2. 在香港进行第二上市

如果海外发行人能够符合《香港联合交易所有限公司证券上市规则》（**“上市规则”**）的资格规定（包括《上市规则》第19章列载的附加规定），则可申请在香港进行第二上市。

过去几年里，香港对有关第二上市的规则作出了非常重大的调整。按照香港证券及期货事务监察委员会（**“证监会”**）及香港联合交易所有限公司（**“联交所”**）于2013年9月27日发出的关于海外公司在联交所上市的联合政策声明（**“政策声明”**）规定，寻求第二上市的申请人必须具有「很大的市值及在其主要上市的市场上有很长的合规记录。」[1] 值得注意的是，根据政策声明的规定，「业务重心」在大中华区内的公司被认为不适合在香港进行第二上市。该等政策旨在防止某些可能来自未经确认的证券交易所（由联交所和证监会共同认定）的海外发行人通过在香港交易所寻求第二上市，以规避联交所和证监会对在香港进行的主要上市执行的更为严格的规定。

1 更多详情，参阅 https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Other-Resources/Listing-of-Overseas-Companies/Joint-Policy-Statement-20130927/new_jps_0927.pdf.

但是，为了促进香港资本市场的繁荣，去年联交所颁布了一系列新规则，其中包括放宽第二上市的监管要求，以及为生物科技公司增加新的上市途径。2018年4月，联交所新增《上市规则》第19C 章，为已于主要国际交易所主要上市的大型新兴及创新产业公司设立第二上市新优待渠道。[2]

根据联交所2019年5月的报告，截至2019年5月，通过新的上市制度筹集了超过900亿美元资金，巩固了香港作为潜在发行人首选上市市场的地位。据报导，总部位于杭州的着名科技公司阿里巴巴正在寻求在2019年下半年通过这条新的优待渠道在联交所进行第二上市，预期募集资金100至200亿美元。

3. 第二上市的新优待渠道

自2018年4月30日起，联交所开始执行新增的《上市规则》第19C 章，为已于主要国际交易所主要上市的大型新兴及创新产业公司在香港进行第二上市设立新优待渠道。

在这条新优待渠道下，“合资格发行人”（即在“合资格交易所”上市的发行人，“合资格交易所”主要包括纽约证券交易所、纳斯达克证券市场或伦敦证券交易所主市场（并属于英国金融行为监管局“高级上市”分类））在香港进行第二上市变得更加容易。

尽管根据上文提到的政策声明不支持业务重心在大中华区内公司在香港进行第二上市，但《上市规则》第19C章下第二上市的新优待渠道同时面向“大中华区发行人”（即业务重心在大中华区内的合资格发行人）以及“非大中华区发行人”开放，只是在要求上略有不同，具体如下。

申请人类型——大型新兴及创新产业公司

根据《上市规则》新增的第19C章，大型新兴及创新产业公司如果是合资格发行人，通常被视为适合第二上市的候选人。 根据联交所发出的第94-18号指引信，判定一家公司是否为大型新兴及创新产业公司时，联交所通常会考虑其是否具备以下特征：

- 能证明公司成功运营有赖其核心业务应用了(i)新科技；(ii)创新理念；及/或(iii)新业务模式，亦以此令该公司有别于现有行业竞争者；
- 研究及开发为公司贡献一大部分的预期价值，亦是公司的主要活动及占去大部分开支；
- 能证明公司成功运营有赖于其独有业务特点或知识产权；
- 相对于有形资产总值，公司的市值/无形资产总值极高。

只有具备上述一个以上特征的大型新兴及创新产业公司，才适宜根据第19C章进行第二上市。联交所进一步强调，仅凭在传统业务中采用了新技术，并不足以证明该公司符合根据第19C章进行第二上市的资格。

第19C章有关第二上市资格的其他规定

合资格发行人应当在一家合资格交易所拥有至少两个完整财务年度的合规记录。

除没有采用不同投票权（**“WVR”**）架构的非大中华区发行人以外，所有合资格发行人在第二上市时的市值至少为400亿港元；或第二上市时的市值至少为100亿港元及经审计的最近一个会计年度收益至少为10亿港元。对于没有采用WVR架构的非大中华区发行人，其在第二上市时必须具有至少100亿港元的预期市值。

需要注意的是，为依据《上市规则》第19C章进行第二上市，大型新兴及创新产业公司须同

2 更多详情，参阅 https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/February-2018-Emerging-and-Innovative-Sectors/Conclusions-(April-2018)/cp201802cc.pdf?la=en.

时符合《上市规则》第19C章所载的资格要求及《上市规则》第8.04条的一般适合性规定。

股东保障措施及其他要求

除上述规定外，新增的第19C章及第94-18号指引信还提出了有关相当的股东保障水平（equivalent standards of shareholder protection）、可变利益实体架构（**“VIE”**）、不同投票权架构以及自动豁免全面遵从《上市规则》等方面的规定。下表详列出适用于不同类型的海外发行人的有关股东保障和其他事项的不同要求：

	“大中华发行人”		“非大中华发行人”
	“不获豁免的大中华发行人”	“获豁免的大中华发行人”	
定义	“不获豁免的大中华发行人”指业务以大中华为重心且于2017年12月15日后才在合资格交易所作主要上市的大中华发行人	“获豁免的大中华发行人”指业务以大中华为重心且于2017年12月15日或之前于合资格交易所作主要上市的大中华发行人	“非大中华发行人”指于合资格交易所上市但其业务非以大中华为重心的公司
相当的股东保障水平要求	《上市规则》要求公司必须修改组织章程以确保股东保障水平相当于香港公司之水平	《上市规则》并不要求公司修订其组织章程文件。但是，公司必须展述其所遵守的当地法律、规则及规例以及其组织章程文件综合起来可以达到相应第19C章规定的股东保障水平。联交所或会要求公司修订其组织章程文件以达到该等水平的股东保障。	
可变利益实体结构[3] *（如适用）*	公司必须遵守现有的联交所有关可变利益实体结构的要求	公司可按其既有的可变利益实体结构在香港第二上市，且不要求其展述能够遵守《中华人民共和国外商投资法》（草案）。但是，公司须向联交所提供中国法律意见，确认其可变利益实体结构符合中国法律、规则及规例。他们亦须符合联交所上市决策LD43-3中的披露规定 。	
不同投票权架构 *（如适用）*	公司必须符合以不同投票权架构主要上市的资格和适格要求 他们亦须遵守所有主要上市规定，包括不同投票权的所有持续保障措施	公司可利用现行不同投票权架构上市，且不需要遵守不同投票权的持续保障措施（披露规定除外）。	
自动豁免全面遵从上市规则之要求	公司可享有自动豁免权，但如二次上市后，公司最近一个财政年度的上市股份全球成交量总金额有55%或以上都转到联交所进行，公司将被作为在香港双重主要上市处理，不再适用上述自动豁免。 发行人将获得12个月宽限期，以遵守适用规定。该宽限期将自联交所发出书面通知厘定公司的上市股份交易已大部分永久转移到联交所市场的日期起开始。		发行人可继续享有自动豁免权，即使其大部分股份交易已永久转到香港市场

3 详情请参阅联交所上市决策(LD43-3): https://en-rules.Exchange.com.hk/sites/default/files/net_file_store/new_rulebooks/l/d/LD43-3.pdf.

4. 有关香港第二上市的其他规定

除遵守适用于香港发行人的一般上市规定外，在香港寻求第二上市的海外发行人（不论是否通过第19C章所列的新优待渠道）亦须符合《上市规则》第19章所载的附加规定。主要规定包括：

- 联交所保留权利，可在下述情况下全权决定拒绝海外发行人进行第二上市：(i)联交所认为申请人的证券上市不符合公众利益；或 (ii)联交所未能确信该申请人的主要上市地为股东提供的保障至少相当于香港提供的保障。
- 申请人应当委任并授权一名人士代其在香港接受向其送达的法律程序文件及通知书。
- 在联交所批准上市前，海外发行人必须先获其主要上市交易所批准上市。
- 在香港股东名册上登记的证券方可在联交所进行买卖。

5. 新加坡、上海和美国第二上市：简介

在新加坡第二上市[4]

根据我们在新加坡市场的经验，在新加坡，对第二上市的监管方法明显不同于主要上市。当一家公司寻求在新加坡交易所有限公司（**“新交所”**）进行第二上市时，公司应当完全受其主要上市地（**“所在辖区”**）的上市规则管辖，因此，新交所一般会依赖于该公司所在辖区的证券交易所（**“所在辖区交易所”**）对该公司进行监管。这种方法承认，对于第二上市而言，应当由所在辖区承担主要监管角色和监督责任，因此新交所通常依靠所在辖区交易所来执行其上市规则并维持其监管标准。新交所的职责是审查和评估上市申请，以确定公司是否符合新交所的准入标准，并且适合在新交所上市。

鉴于所在辖区在新加坡第二上市中发挥的重要作用，新交所寻求采用“风险校准方法”评估第二上市申请，重点是确保新交改采取的监管措施与申请人所在辖区存在的监管风险相称，而这种风险划分则体现在对其所在辖区的分类上。

根据两家国际领先指数提供商摩根士丹利资本国际有限公司（**“MSCI”**）和伦敦金融时报100指数（**“FTSE”**）推出的市场分类标准，新交所将国际市场划分为“发展中市场”或“发达市场”。 在发达市场交易所进行主要上市的公司被视为监管风险较小，因为这些市场的法律、监管和执法框架为股东保护和公司治理标准提供了足够的保证。在这种情况下，对于能够达到新交所的准入标准的公司，新交所通常不会对这些申请人提出附加的持续上市义务（《新加坡证券交易所上市手册》的规则217和规则751的规定除外 - 见下文）。 相反，发展中市场的法律和监管制度可能无法对股东保护和公司治理标准的水平提供充分的保证。在这种情况下，新交所可能需要通过对申请人增加额外的持续上市义务来强化保障力度，以更好地保护投资者的利益。

对于寻求在新加坡第二上市的香港上市公司，在联交所主板主要上市的公司将被划入在发达市场主要上市类别。

鉴于新交所对公司所在辖区交易所的法律和监管制度的依赖，主要上市地点是对公司所在辖区进行分类的主要考虑因素，如果（i）公司在多个司法辖区内存在，或（ii）公司的主要上市地点被指数提供商列入观察名单或评估名单故可能会从发达市场降级，新交所可能会评估仅凭公司的主要上市地点就将其分类为来自发达市场的做法是否得当。

4 艾金· 岗波律师事务所作为一家注册外国律师事务所在新加坡开展业务，本文有关新加坡第二上市的所有评论均基于我们与客户以及对新加坡市场具有经验/资质的当地律师共同办理业务的经验。

在这种情况下，新交所将进行监管评估，以考虑以下因素：（i）目前可为股东提供的保障水平，（ii）新加坡法院裁定在公司的主要营业地或注册地的可执行性，及（iii）新加坡与公司的主要营业地或注册地之间是否存在引渡条约或安排。

无论何种情况，在新加坡交易所寻求第二上市的外国发行人须遵守《新加坡证券交易所上市手册》的规则217及规则751。根据规则217，第二上市申请人必须向新交所承诺：（i）将披露给其所在辖区交易所的全部信息和文件同时披露给新交所，（ii）通知新交所其进行的任何额外的证券发行及其所在辖区交易所的相应决定，及（iii）遵守新交所可能不时适用的所有其他上市规则。根据规则751，在新交所第二上市的发行人必须（i）在其所在辖区交易所保持其主要上市地位，（ii）遵守其所在辖区交易所的所有适用上市规则（除非已获得任何违规行为的豁免），及（iii）提供年度证明，证明其已满足《新加坡证券交易所上市手册》中适用的持续上市义务。

通过发行中国存托凭证实现在上海交易所第二上市[5]

自2018年以来，在海外主要上市的红筹公司可以通过发行中国存托凭证（**“中国存托凭证”**）向中国证券监督管理委员会（**“中国证监会”**）申请在上海证券交易所进行第二上市。中国存托凭证是指由存托人签发，以境外证券为基础在中国境内发行、代表境外基础证券权益的证券。上海证券交易所发行和交易中国存托凭证的适用法律法规包括《中华人民共和国证券法》、《存托凭证发行与交易管理办法》（试行）（**“管理办法”**）和《上海证券交易所试点创新企业股票或存托凭证上市交易实施办法》。

根据管理办法规定，存在境外基础证券的发行人在中国境内发行中国存托凭证应当符合下列要求：

- 公司应具有良好的公司治理结构、可持续盈利能力和健康的财务状况，最近三年的财务报表无虚假记载，无其他重大违法行为；
- 为依法设立且持续经营三年以上的公司，公司的主要资产不存在重大权属纠纷；
- 最近三年内实际控制人未发生变更，且控股股东和受控股股东、实际控制人支配的股东持有的境外基础证券发行人股份不存在重大权属纠纷；
- 公司及其控股股东、实际控制人最近三年内不存在损害投资者合法权益和社会公共利益的重大违法行为；
- 会计基础工作规范、内部控制制度健全；
- 董事、监事和高级管理人员应当信誉良好，符合公司注册地法律规定的任职要求，近期无重大违法失信记录；
- 中国证监会规定的其他条件。

申请在上海证券交易所上市其中国存托凭证的红筹公司应满足以下条件：

- 本次公开发行的中国存托凭证不少于1亿份或者上市时本次公开发行的中国存托凭证市值不低于人民币50亿元；
- 公司最近3年无重大违法行为、财务会计报告无虚假记载；及
- 公司还应当满足上海证券交易所要求的其他条件。

尽管中国证监会对在中国推出中国存托凭证持积极态度，但至今尚未批准任何中国存托凭证申请。

5 艾金· 岗波律师事务所驻北京代表处是作为一家外国律师事务所设在中国的代表处在中国开展业务，本文有关在中国进行第二上市的所有评论均基于我们与客户以及对中国市场具有经验/资质的当地律师办理有关业务的经验。

在美国进行第二上市

纽约证券交易所（**“纽交所”**）和纳斯达克证券市场（**“纳斯达克”**）是非美国发行人寻求进行第二上市的热门场所。

寻求在美国证券市场进行第二上市以筹集资金的外国私人发行人[6]必须根据修订的《1933年美国证券法》（下称**“《证券法》”**）向美国证券交易委员会（**“SEC”**）提交登记声明。登记声明应当包括一份招股说明书，其中应当列载发行人最近三年的经审计财务报表[7]、有关发行人业务和管理层的介绍、发行人所从事业务及行业风险因素、关联方交易情况以及管理层有关发行人财务绩效的讨论。

在SEC办理证券登记的同时，发行人可以申请在纽交所或纳斯达克上市其证券。只有当SEC完成审核评估程序、宣布登记声明生效、且相关的证券交易机构批准证券上市之后，这些证券才算完成发售，方可开始交易。

当外国私人发行人根据《证券法》注册和/或在美国的一家证券交易所上市后，它应当按照《1934年美国证券交易法》（经修订，下称**“《证券交易法》”**）的规定提交定期报告，包括提交包含经审计的财务报表的年度报告。

与美国国内发行人相比，美国证券法律和美国证券交易所上市规则为外国私人发行人提供了若干优待措施，包括：

- 允许其按照《国际财务报告准则》（**“IFRS”**）（国际会计准则委员会发布）而不是《美国公认会计准则》（**“美国GAAP”**）提交其财务报告，无需按照美国GAAP调整。
- 遵循其所在辖区的公司治理要求。并不要求外国私人发行人遵守适用于美国国内公司的许多涉及公司治理的规定。
- 既可以以美国存托凭证（**“ADRs”**）方式上市，也可以直接以股票形式上市（只要这些股票以美元计价即可）。

ADRs是外国私人发行人在美国上市并向公众发售权益证券的最普遍形式。ADRs是由美国一家存托银行发行，代表发行人一定数量基础证券的所有权权益。出于向SEC注册的目的，公开交易的ADR计划分为三个「级别」。第一级和第二级是针对已发行的证券而设计的，而第三级是为发行新证券募集资金而设计的。第一级ADR计划下的注册和报告负担最轻，但第一级计划不适用于纽交所或纳斯达克上市。第二级和第三级计划允许发行人在美国的证券交易所上市ADRs，但这些计划对于注册的要求较为严格，采用第二级或第三级ADR计划的发行人还应遵守《证券交易法》有关上市公司持续定期报告方面的规定。

6. 结束语

在香港推出的第二上市新优待渠道反映了香港联交所决心吸引在美国或英国主要上市的大型新兴及创新产业公司，尤其是像阿里巴巴这样的中国科技巨头，在香港进行第二上市。

对于已在香港上市的公司，他们可以考虑通过在新加坡或美国寻求第二上市来实现双重上市地位，这两个地方都是非常受欢迎的第二上市场所 —— 例如，在香港上市的阿里巴巴影业集团有限公司、勇利投资集团有限公司和香格里拉亚洲有限公司都在新加坡证券交易所成功进行第二上市，而大约有300家中国公司的证

6 外国私人发行人是指除下列公司以外的任何外国公司：“(a)该公司超过50%的已发行有表决权股票直接或间接地由美国居民持有，及(b)下列任一情形：(i) 大多数高管或董事是美国公民或居民；或（ii）公司超过50%的资产位于美国；或（iii）公司的业务主要在美国进行管理。”上述定义见《证券法》下的规则405及《证券交易法》下的规则3b-4(c)。

7 如果一家外国私人发行人在上一财政年度的收入不到10.7亿美元，并且符合《证券法》第2（a）（19）条的其他若干规定的，可以作为“新兴成长型公司”，其在美国上市仅需提供近两年经审计的财务报表信息。

券在美国交易，包括通过发行ADRs和股票的方式。

尽管中国内地进行股票公开发售的估值普遍较高，但由于至今尚未有任何中国存托凭证申请获批，上海是否能成为另一个受欢迎的第二上市地点仍有待观察。

有关艾金・岗波律师事务所

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第9章

首次公开招股需要考虑的税务问题

税务是在筹划首次公开招股时其中一个需要考虑的关键环节。为了尽量减低税务成本及避免香港联合交易所（联交所）连番询问，在首次公开招股筹划过程中应小心考虑税务筹划问题。本章将重点探讨首次公开招股前，进行以下过程中需要考虑的各种香港及中国内地税务及转让定价问题，以助阁下应付与首次公开招股相关的事宜：

- 首次公开招股前的集团重组；及
- 首次公开招股前的税务及转让定价审视。

1. 首次公开招股前的集团重组

首次公开招股前一般都会进行集团重组，将拟纳入上市集团的现有集团实体放在上市主体控股公司下而整合为一个上市集团。与此同时，应特别留意为上市集团规划一个具有可持续税收优化效益的控股架构。

a) 控股架构规划

上市集团利用海外公司（例如英属维京群岛(BVI)公司或者开曼群岛公司）作为中介控股公司持有营运公司股权的做法并不鲜见。在审视控股架构时，应考虑以下几个方面的问题：

- ***利润返还***

  利润通常透过派发股息的方式返还。虽然香港不对源于境外股息收入征税，亦不对股息分派征收预提所得税，但许多国家却会征收这两种税项。对跨国企业而言，通过在具有优惠的税收协议缔约司法管辖区设立中介控股公司，便有可能享受优惠的股息预提所得税税率从而导致具有税务效益的股息返还。

  然而，必须注意的是，中国等一些国家有严格的受益所有人测试，若中介控股公司被视为导管公司，则无法享受较低的股息预提所得税率。上市集团可能符合国家税务总局公告[2018]第9号公告的安全港规则，如果中国子公司是由同一税收司法管辖区的上市公司直接或间接持有，在申请税收协议优惠时，中国子公司的直接控股公司可以直接被认定为受益所有人资格，无需通过受益所有人资格测试。此外，在每个司法管辖区（例如香港）申请税务居民证明或同等资格以享受条约优惠待遇时，通常需要根据实际情况判断。

- ***未来撤资***

  BVI公司普遍用来充当上市主体及／或中介控股公司，此举在日后撤资时可能带来税务效益。特别是，BVI公司的股东名册只要不是备存于香港，则其股份转让毋须缴纳香港印花税，相反香港公司的股份转让则须缴纳印花税。然而，在利用BVI公司或在免税或仅名义税务司法管辖区设立的其他海外公司时，应小心规划并考虑下文所述的实质性活动要求。

- ***实质性活动要求***

  作为税基侵蚀及利润转移(Base Erosion and Profit Shifting 「BEPS」)倡议的一部分，经济合作与发展组织（经合组织）要求不征税或仅名义征税的司法管辖区实施经济实质性法律要求，以免被视为有害税收实践。有些司法管辖区，例如BVI及开曼群岛，已在其国内立法中引入相关规定。虽然不同司法管辖区的经济实质法律规定可能不尽相同，但一般而言，在相关司法管辖区注册成立的实体若非另一司法管辖区的税务居民，则其在进行相关活动时，需要符合若干实质性活动要求（例如：有实体办公室以及雇用当地董事或者员工等）。因此，若控股架构涉及在低税或免税司法管辖区设立的公司，则应评估经济实质性活动要求对控股架构的影响。

b) 税务以及转让定价问题考虑

通常，集团重组涉及将有关实体由现有集团转移至上市架构，此举可能会产生税负。在实施重组前，应当从税务层面审视重组步骤及方案，以了解税务影响，并考虑选择可行的方案以降低潜在的税务成本。此外，跨境关联方交易及价值链规划在制订策略时应同时审慎考虑。

- **香港印花税**

  香港公司的股份由现行拥有人转让予或转出上市主体，将按实际出售代价或所转让股份的公平市值（以较高者为准）的0.2%缴纳印花税，由买方及卖方各自按0.1%的相同比例分担。

  在符合若干条件的情况下，相联法人团体之间转让股份，可获集团印花税宽免。「相联」是指(i)一家公司实益拥有另一家公司至少90%的已发行股本；或(ii)某第三方公司同时拥有该两家公司不少于90%的已发行股本的实益权益。此外，转让人和受让人不得在转让后两年内因转让人或第三法人团体在受让人已发行股权所占的实益拥有权比率变动而停止「关联」。否则，豁免资格将被撤销。根据香港的现行上市规则，上市公司至少25%的股份须予公开发售。因此，集团印花税宽免未必适用于股份由香港公司直接转让予上市主体。

- ***资本利得税***

  香港不征收资本利得税。如果一家香港公司出售旗下附属公司的股份，且能够证明有关股份乃为长期投资目的而购入及持有，则出售收益不会产生任何香港利得税税负。此外，香港采用地域来源征税原则，只有在香港产生或所得的收入才须缴税。如果能够证明出售收益来源于境外，则出售收益毋须缴付利得税。

内地与香港不同，根据内地企业所得税条例，非居民企业直接转让持有的中国居民企业的股权，将产生就资本收益征收的10%中国预提所得税。如果转让方属外国或中国居民个人，需就其资本收益缴纳20%个人所得税（个税），外国个人符合有关税收协议规定的条件时，可以申请免征资本利得税。

根据中国税例，转让价款应按公允价值评定，以计算相关的中国税负。中国税局可能要求纳税人提供已认证的中国评估公司出具的评估报告，以证明转让中国企业对价的合理性。如果股权转让的成本或账面净值远低于公允价值，中国税局可能提出质疑，除非能提供一个令他们满意的合理目的和解释。因此，与中国税务当局讨论及协商时，必须制定正确的策略，以尽量减轻任何潜在的企业所得税务负担。

- ***间接转让税***

  根据国家税务总局公告[2015]7号（7号公告），如果涉及间接转让中国居民企业的交易被视为缺乏合理商业目的，中国税务当局可能会引用一般反避税规定，按照「实质重于形式」的原则，直接穿透海外被转让的目标公司及其中间层公司，将有关交易重新定性为直接转让中国居民企业。如果是这种情况，除非条约规定的优惠待遇适用，否则可能征收10%的资本利得税。

  于2019年1月1日起生效的中国新个税法首次引入反避税规定，让中国税局能够有效处理涉及个人间接转让中国居民企业的交易个案。今后中国税局可以根据一般反避税规定，对非中国居民就间接转让中国居民企业的资本收益征收20%的个税。

  若重组涉及间接转让海外公司的股份，尤其是持有房地产为主的公司，还需要考虑相关海外司法管辖区的税务问题。

- ***特殊重组规定的税务待遇***

  于进行内部集团重组时，转让中国企业股权可以利用财税[2009]59号（59号文）的特殊重组规定和其他相关的中国税务条例，以提高其整体税务效益。根据59号文，在符合特定条件的情况下，转让方可就企业重组选择特殊性税务处理，以递延股权转让所产生的资本收益税。部分规定包括：达到最低股权收购比例（即不低于收购中国企业全部股权的50%）和最低股权支付金额不低于重组交易对价的85%。

  中国税局普遍支持中国企业的内部重组，允许转让方采用特殊性税务处理以延迟缴税。但是针对跨境企业重组，中国税局采用更为严谨的手法，一般要求非居民企业的转让方必须符合附加条件，方可符合资格享受特殊性税务处理。

  值得注意的是，特殊性税务处理并非自动授予转让方。转让方必须就直接股权转让达成买卖协议及向当地工商行政管理局完成股东变更申请后30天内，向被转让的中国企业所在地的主管税局办理税务备案。

- ***跨境价值链规划***

  经合组织的BEPS倡议禁止跨国企业运用税务筹划策略，利用税率差及税务错配以图避税。不同的税务司法管辖区（包括香港及中国内地）已加入经合组织／G20BEPS框架，以因应BEPS倡议而进一步强化转让定价的立法框架。该等倡议专门针对跨境价值链选择及运用合适的转让定价方法，确保关联交易的定价及利润水平，与跨国集团中所创造的价值相一致。在首次公开招股前进行重组的过程中，跨境价值链筹划是跨国企业重组及重新筹划业务营运及交易流程的重要环节。面对BEPS倡议和转让定价法规，该等跨国企业应仔细识别集团内创造的价值，以根据转让定价法规构造跨境交易架构。

  此外，在进行首次公开招股前的重组过程中，跨国企业须细致地审视有关关联方在交易中所履行的职能、承担的风险及拥有的资产，已支持其转让定价政策。为证实价值链中的所有关联方交易均遵循转让定价法规及符合独立交易原则，有必要对转让定价进行详尽分析。在BEPS倡议后的环境中，当跨境价值链分析涉及转让或授予重大知识产权时，这一点尤其重要。因此，在制订上市架构前，需要从转让定价角度适当分析集团架构，以避免引起税务当局的质询。

2. 首次公开招股前的税务及转让定价审视

在处理上市申请时，联交所经常会审查上市集团公司是否存在因不合规行为而可能产生的任何税务风险，并要求在招股章程中作出披露。此外，申报会计师在评估税项拨备是否充足时，需要考虑于2019年1月1日生效的香港（国际财务报告诠释委员会）诠释第23号 — 所得税之不确定性之处理（香港（国际财务报告诠释委员会）诠释第23号）。香港（国际财务报告诠释委员会）诠释第23号要求实体在厘定应课税盈亏额度时，评估税务当局会否接纳不确定的税务处理，并披露潜在影响。因此，在首次公开招股前，需要对往绩记录期间的税务及转让定价进行健康检查。对在税务审视中识别到的任何税务或者转让定价问题，应与税务顾问进行深入讨论，以作出适当的整改措施，确保首次公开招股申请过程能顺利推行，避免因监管机构提出冗长质询而付出高昂的代价。以下是在首次公开招股前进行税务审视过程中识别的常见问题：

a) 香港的税务考虑因素

- ***与税务局的待决／潜在纠纷***

  响应香港的地域来源征税原则，离岸利润免税申请的有效性是与税务局的常见纠纷之一。若上市集团旗下的任何公司在香港提出的离岸利润免税申请处于正在被税务局审查的阶段，则有必要审视该申请是否有技术依据及足够的文件支持，以及税务局有多大机会同意申请。同样，若在香港采用的税务处理（例如资本收益豁免利得税的申请）或长久存在争议或存在其他税务纠纷或税务调查，则应对税务影响及可能采取的补救措施进行全面审视。

- ***过往年度的调整***

  在首次公开招股过程中，申报会计师可能会发现上市集团往绩记录期间的账目存在若干纰漏，以致需要对相关香港公司的法定审计报告作出过往年度的调整。在此情况下，有必要评估过往年度的调整是否会产生任何利得税影响，并采取相应改正措施。若香港公司因过往年度的调整而引致在过往年度少缴税款（并因此可能面临处罚），建议应主动通知税务局，并尽快提交经修订的税务计算表，以减低潜在的罚款的风险。

b) 中国税务的考虑因素

在国内通过子公司经营主要业务的跨国集团，在申报企业所得税时往往依赖当地主管税局的惯例。针对某些中国税务问题，尤其是目前中国税例并无明确指引或解释的税务问题，当地税务机构与国家税务总局往往持不同的观点和技术立场，继而产生不明确的税务意见，导致申请人在首次公开招股过程中难以向联交所正确交待有争议性的税务问题。其中具体事项包括：

- ***分拆内地资产***

  某些情况下，上市集团在首次公开招股前可能需要分拆国内的部分资产。如果直接（或通过间接转让持有土地的海外公司的股权）转让土地，将产生若干中国税项，包括企业所得税、土地增值税及增值税，造成沉重的税务负担。因此有必要与当地政府商讨是否有任何优惠政策或财政补贴，以协助减轻土地转让所产生的税务负担。否则，出售资产需要计提充足的税项拨备。

- ***优惠税率***

  内地获认证为高新技术企业的公司，以及在中西部地区成立经营并从事政府鼓励投资项目的公司，可享受15%的企业所得税优惠税率。内地子公司的管理团队往往认为只要获发高新技术企业证书，便可理所当然地享受15%较低的企业所得税税率，但事实并非如此。公司一旦被发现无法符合高新技术企业的相关资格，其高新技术企业资格可能会被取消。对于中西部地区享受15%企业所得税优惠税率的公司来说，如果其部分利润来源于区外的业务，则相关利润应按一般的25%企业所得税税率征税。

- ***常设机构***

  在中国大陆拥有大量雇员或在中国大陆有大量业务的香港公司可能会有潜在的常设机构问题及中国税务风险。在首次公开招股申请前，向中国税务当局履行由中国常设机构产生的中国企业所得税及个税义务并非易事，一般需要税务顾问协助并制定正确的策略。

- ***社会保险及个税***

  内地子公司的当地管理团队在处理当地员工的社会保险缴费及个税申报工作时，往往依赖当地惯例。倘若当地惯例和中国有关税务条例有所抵触，会引起潜在的税务风险，这可能需要在税项拨备中加以考虑。

c) 转让定价的考虑因素

在首次公开招股前，转让定价审视通常重点针对关联方交易（特别是跨境关联方交易）已有的定价政策，旨在确保关联交易符合转让定价法规以及独立交易原则。联交所向来重视转让定价的合规问题，并要求首次公开招股申请人提供定性以及定量分析作为转让定价合规声明的佐证。因此，在首次公开招股前，企业应拟备适当的转让定价文件，作为已有的关联公司间定价政策的佐证，并遵守相关税务司法管辖区有关转让定价法规的规定。

下文举例说明首次公开招股前进行转让定价审视过程中可能出现的若干转让定价问题：

- ***中国制造商的利润率偏低***

  在某些典型的架构中，中国公司作为制造商，并将所有产成品出售予海外主体分销公司。因为终端客户在中国境外，所有分销、销售及营销活动均本应该由主体公司完成。但事实上，这些职能是由在中国的制造商负责完成的。中国制造商赚取微薄利润水平，勉强达到收支平衡，甚至是亏损，而集团的大部分利润则由海外主体公司赚取，这种现象并非不常见。中国税务局对转让定价提出的质疑，往往在于中国制造商从制造活动赚取的相关利润偏低或亏损，以及中国制造商的定位与实际的运营不匹配。

- ***不符合独立交易原则的集团间服务费***

  对于跨国集团而言，旗下位于不同税务司法管辖区的成员公司之间互相收取及支付的服务费的做法十分常见。然而，倘若服务提供方的业务活动及所提供的服务不符合转让定价相关法规及独立交易原则，则此类服务费可能难以通过转让定价审视。

一旦发现集团公司之间存在不当的关联定价安排，则跨国企业需采取措施纠正不合规的转让定价政策。如进行上述纠正需对法定审计报告作出往年度调整，则会对财务报表产生影响，从而令纠正过程充满挑战。随着香港（国际财务报告诠释委员会）诠释第23号于2019年开始生效，这一点显得更为重要，因为跨国企业必须考虑如何解释及披露转让定价合规情况存在的不确定性。

除潜在的香港税务，中国税务以及转让定价考虑因素外，于其他海外司法管辖区拥有实体或经营业务的跨国企业亦须考虑其业务在海外司法管辖区的潜在海外税务影响。考虑到潜在的税务风险存在的复杂性，建议上市集团在考虑进行首次公开招股前尽早咨询税务顾问，进行适当的公开招股前期的税务及转让定价筹划以及审查。

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第10章

选择离岸上市主体的关键考虑因素

离岸工具在企业融资活动中被广泛应用，尤其是开曼群岛及百慕达公司，它们共占香港联合交易所 （「香港交易所」）所有上市公司的70%以上，而且几乎所有上市公司都拥有大量的英属维京群岛的公司。自2009年12月，香港交易所容许于英属维京群岛注册的公司在香港交易所上市，这个决定提升了英属维京群岛在国际投资界的地位。

百慕达公司在包括纽约证券交易所、纳斯达克和新加坡证券交易所等的主要国际证券交易所上市的离岸公司当中占大多数。整体而言，有观察指，在纽约交易所和纳斯达克市场出现的亚洲区开曼、英属维京群岛和百慕达实体公司，愈益增多。财富100强及伦敦富时100指数的公司在这些离岸金融中心所进行的交易亦占颇重要的比例。

目前，开曼群岛和百慕达公司是于香港上市最受欢迎的上市主体，用英属维京群岛公司作为上市主体相对较少。开曼群岛、百慕达和英属维京群岛公司各自有其特点，对于上市前重组、公司上市过程及上市后的企业融资交易（例如发行证券和股本重组）都可能有影响。本章将重点讲述那些最影响如何选择在香港上市的离岸上市主体的关键因素。

1. 开曼群岛的获豁免公司

1.1 呈交招股章程

除非有关公司是开曼群岛互惠基金法（经修订）监管下的互惠基金，否则开曼群岛并没有规定要求开曼群岛获豁免公司把它的招股章程在开曼群岛存档。同时开曼群岛公司在发行新股或转让股份时并不需要开曼政府批准。开曼群岛公司法（经修订）（「开曼公司法」）规定，不是在开曼群岛证券交易所上市的获豁免公司并不可以向开曼群岛的公众人士提出任何认购股份的邀请，然而这个规定在一般情况下不适用于香港上市的公司。

1.2 税务

在编写本章时，根据开曼群岛的法律，开曼群岛公司现时毋须就溢利、收入或股息缴纳税

项，亦毋须缴纳任何以预提、遗产或继承税形式征收的资本收入税、公司税或其他税项。

获豁免公司可向开曼群岛总督提出申请，要求其书面承诺，假使将来开曼群岛征收税项，公司仍然享有由签署承诺书起计三十年的税务豁免优惠。首次书面承诺书的豁免年期上限普遍为二十年。除了豁免资本收入税、溢利税和收入税的承诺，有关承诺亦可包括公司毋须就股份、债券或其他公司的责任缴付遗产或继承税性质的税项。

1.3 股份溢价

公司可以从股份溢价账中分派股息，但却不可以从公司的股本派付。为了于日后公司可以在分派股息时享有灵活弹性，组织章程需要包含容许公司从股份溢价中分派股息的规定。除非于紧随建议派付日期后，公司可以偿还其日常业务中到期应付的债务，否则公司不得从股份溢价账中支付股息给股东。

1.4 董事利益

开曼群岛并无规管董事利益的成文法例。然而董事必须遵守普通法下所付予的受托责任和组织章程载列的任何规定。

1.5 出售资产

开曼群岛并无规管资产出售的成文法例，然而，组织章程或者含有规管或限制资产出售的条文，例如出售时须获得股东的批准。

1.6 财务资助

开曼群岛对开曼公司向他人提供财务资助以取得该公司的股份并无成文法例，但是普通法有关财务资助的原则将仍然适用。根据普通法，公司的董事须为公司的利益，以真诚和适当的理由来决定是否向取得开曼公司股份的人提供财务资助，而这类的资助条款应该建基在公平的基础上。

1.7 股本削减

百慕达公司的股本削减并不需要事先经过法庭程序，只是在股东大会上借股东决议的方式通过便能生效。但是开曼群岛公司有别于百慕达公司，开曼公司法规定所有开曼群岛公司的股本削减必须事先获得开曼群岛法庭批准。

若获组织章程授权，在开曼群岛大法院的确认命令下，公司可通过特别决议案以任何方法削减已发行股本，包括从未缴足股本的股份的债项消弭或减免，取消任何没有可用的资产代表或已损失的已缴足的股本，或抵销任何超出公司需要的已缴足股本。这些必须获得大法院确认的程序旨要是确保所有债权人的利益不会因为股本削减而有所损害。

1.8 经济实质规定

开曼群岛的《2018年国际税务合作（经济实质）法》（「《经济实质法》」）对该《经济实质法》界定的「相关实体」，施加若干的经济实质规定。只要某公司的业务在开曼群岛境外某司法管辖区进行中央形式管理或控制的话，并且属于开曼群岛境外税务居民的话，那么，该公司可能不会成为一个「相关实体」，并会被列在《经济实质法》范围之外。开曼群岛金融管理局将规定任何声称属为开曼群岛境外税务居民的实体，必须出示令人信纳的证据，以证明这一点，例如：纳税识别号码、税务居住证明书，连同所得税申报表、评税书或企业所得税债务的还款证据。

2. 百慕达的获豁免公司

2.1 呈交招股章程

于百慕达公司法（经修订）（「百慕达公司法」）在2013年修订之前， 在香港交易所上市的百慕达公司须在每次公开发售（例如首次公开招股、配股、发行认股权证等）时把招股章程送呈百慕达公司注册处存档。2013年百慕达公司法经修订后，只要香港交易所已经收到或以其他方式接纳相关的招股章程，又或香港交易所并无要求该公司在该情况下出版及提交招股章程，于香港交易所上市的百慕达公司就毋须再将任何招股章程送呈到百慕达存档。

2.2 税务

在百慕达，百慕达公司毋须就利润、收入或股息缴纳税项，亦无须缴纳任何资本收入税、遗产税或身故税。百慕达政府已制订法例，授权部长给予百慕达豁免公司保证，承诺倘若百慕达立法征收根据溢利或收入计算的税项，或根据任何资本资产、收入或增值计算的税项，则任何有关税项的征收将不会适用于该公司或其任何业务。此外，该保证亦承诺确保任何上述税项或属遗产税或继承税的任何税项不得适用于该公司的股份、债券或其他责任。百慕达豁免公司所获得的有关保证将维持有效直至2035年3月31日。

2.3 百慕达金融管理局的同意

百慕达公司有个明显的特点，就是除了少数例外情况外，百慕达公司所有对非百慕达居民的证券发行及转让均必须事先获得百慕达金融管理局的批准。根据百慕达金融管理局于2005年6月1日发出的公告（「百慕达金融管理局通告」）第I部分第1段，倘百慕达公司的任何股本证券在指定证券交易所（按百慕达金融管理局通告的界定，指定证券交易所包括香港联合交易所有限公司）上市，百慕达金融管理局已经批准该公司向非百慕达居民发行及转让任何证券（「一般许可」）。

2.4 实缴盈余及股份溢价

倘若公司按溢价发行股份以换取现金或其他代价，公司须将相当于这些股份溢价总额或总值的款项拨入股份溢价账内。公司毋须通过的股本削减程序便可以应用股份溢价，以缴足向公司股东分派的红股的股本。

在上市重组过程中，倘若有股份置换而所购得的股份价值超逾已发行股份的面值，有关的差额可拨入发行公司的实缴盈余账（Contributed surplus account）。倘若没有合理理由相信(a)公司当时或于付款后无力偿还其到期负债；或(b)公司资产的可变现价值会因此低于其负债，则公司可从实缴盈余账中作出分派。

2.5 董事的利益

百慕达公司法规定董事必须于第一时间在董事会会议上或以书面形式向董事会披露他的利益，包括：(a)他在公司或任何它的附属公司订立任何重大合约或拟订立合约时的利益；及(b)第三方与公司或公司的附属公司订立重大合约或拟订立重大合约，而他在第三方有重大利益。公司法还规定持有或能够直接或间接控制不超过股本10%人士的利益不应被视为重大利益。

2.6 资产出售

百慕达并无规管资产出售的成文法例，但是公司细则或者含有规管或限制资产出售的条文，例如出售时必须获得股东的批准。

2.7 财务资助

百慕达公司法中有关财务资助的条文已经于2011年被废除，但是上文所述的普通法原则将继续适用。

2.8 股本削减

如上述所言，百慕达公司较开曼公司有较高的弹性来处理股本削减，原因是股本削减的决定毋须经过法庭批准亦能生效。

视乎上市公司细则所订明的条文，一般而言股本削减必须通过股东特别决议案。公司必须在生效日期前的三十日至不少于十五日的期间内，在百慕达的指定报章上刊登有关股本削减的法律通告。董事必须确保达成公司在股本削减后可通过法定偿付能力测试。而且，公司还须在自股本削减生效日期起计三十日内把关于股本削减的指定表格连同上述提及的法律通告，以及批准有关削减的股东决议的经核证副本送交予百慕达公司注册处存档。

2.9 经济实质规定

百慕达的《2018年经济实质法案》（经《2019年经济实质修订法案》修订）及《2018年经济实质规例》（合称「《经济实质法》」），对《经济实质法》界定的「注册实体」施加若干经济实质规定。只要就税务目的而言某家公司属为百慕达境外某司法管辖区（并非列于就税务目的的不合作司法管辖区欧盟名单附件1）的税务居民，该公司或会属为「非居民实体」，并将列在《经济实质法》范围外。按照该指引附注草案，百慕达公司注册处处长将要求声称属为百慕达境外税务居民的任何实体出示证据，证明该外国税务居籍，例如：(i) 所涉司法管辖区的有权当局的或发出的证明书函件，表明在该司法管辖区就税务目的而言该实体被视为税务居民；或 (ii) 该实体的评税书、自行评税书的确认书、缴税通知书、缴交税款的证据，或由所涉司法管辖区有权当局出具的任何其他文件。

3. 英属维京群岛的商业公司

3.1 英属维京群岛的公司作为一上市实体

英属维京群岛的公司一向被广泛用于私募股权投资交易。如今在香港交易所上市亦是英属维京群岛公司的私募股权投资者可选择的出路。

为令开曼/百慕达的上市公司能够成为集团控股公司继而上市，传统上市前的重组计划结合成立开曼/百慕达上市公司（「开曼/百慕达的上市公司」）及集团结构重组（例如通过股份置换）。假若上市公司已是英属维京群岛控股公司，那将简化有关上市前重组及英属维京群岛公司上市的过程。在符合香港交易所的上市规则的情况下，现时的英属维京群岛控股公司可以直接作为上市个体，毋须经过传统上市前的重组步骤而进行上市。这将减少本应在上市重组前的任何监管规定、银行或合约下的批准。然而，由于现时的英属维京群岛控股公司或曾经进行数轮募资，因此英属维京群岛公司应在上市前， 就现有业务、章程、公司记录和任何私募股权投资安排寻求指引。英属维京群岛控股公司亦须修订其组织章程大纲及组织细则，以符合香港交易所的相关上市规则。

3.2 税务

英属维京群岛商业公司获豁免遵守《英属维京群岛所得税法》（经修订）的所有条文（包括有关公司支付非英属维京群岛居民的所有股息、利息、租金、特许权费、赔偿及其他款项）。任何非英属维京群岛居民就任何股份、债务责任或其他证券变现的资本收益亦获豁免遵守《英属维京群岛所得税法》（经修订）的所有条文。

3.3 英属维京群岛商业公司及前身为国际商业公司

《英属维京群岛商业公司法》（「商业公司法」）取消了法定股本的概念，与其他英联邦司法管辖区，如澳洲及加拿大的法例类同。根据商业公司法，英属维京群岛对公司并无最低股本规定。公司能够以面值及无面值组合形式发行股份，亦可发行碎股。

除非公司已于商业公司法的有关日期前自愿申请重新注册，否则所有按英属维京群岛《国际商业公司法》（「国际商业公司法」）注册的公司已根据2007年1月的商业公司法自动重新注册。有关法定股本的概念仍适用于根据2007年1月的商业公司法自动重新注册的公司，但有关概念并并不适用于那些自愿重新注册的公司。商业公司法载有若干追溯条文，使国际商业公司法关于股本的若干规定（包括盈余及股本削减）将继续适用于自动重新注册的公司，直至公司决定采纳新的组织章程大纲及组织细则，以放弃应用追溯条文。

3.4 股份溢价

英属维京群岛已经摒弃了股本或保留股本的概念，因此公司分派的能力再不是根据其股本及/或股份溢价的水平。

在符合公司的章程大纲及细则规定的情况下，若公司能符合并有合理理由相信在紧接作出分派日后公司仍能满足以下偿还能力测试的条件，董事会可授权作出分派：

(i) 公司的资产价值超过其债务，及

(ii) 公司能偿还其到期的债务。

请留意上述曾提及到按国际商业公司法注册的公司对于盈余的要求。

3.5 呈交招股章程

除非公司属英属维京群岛的私人、专业或公共基金，否则英属维京群岛并无规定要求英属维京群岛公司提交招股章程或就证券发行或转让而先获取政府批准，前提是公司不会在英属维京群岛作出任何证券的购买或认购邀约。

3.6 董事的利益

商业公司法规定公司的董事须在知悉他在与他担任董事的公司签订或将会签订的交易中有利益后向公司的董事会申明其利益。商业公司法进一步规定，在以下情况，交易有可能被视为无效：(a) 董事的利益并没有在与公司进行交易前披露；或(b)该交易或拟交易是董事与公司签订的；或(c)该交易或拟交易并非在公司日常业务进行及并非以惯常条款及条件所签订，有关董事与公司所订定与其利益相关的交易可视为无效。然而，倘若(a)拥有投票权的股东已知悉有关董事在交易中所拥有的重大利益，并且有关交易已经股东以决议案的方式批准或追认；或(b)公司能够在该交易中获得公平的价值，则有关董事与公司所订定与其利益相关的交易便不会被视为无效。

3.7 资产出售

根据商业公司法及在不违反组织章程大纲或组织章程细则的情况下，任何出售、转让、租赁、兑换或以其他方式处置（抵押、质押或其他留置权或执行以上项目除外）50%以上的公司资产而并非在公司日常或一般业务过程中进行，则须经股东批准。组织章程或进一步载有有关规管或限制资产出售的条文。

3.8 财务资助

英属维京群岛并无法规限制公司对他人提供财务资助以取得英属维京群岛公司的股份，而上文所述的普通法原则将继续适用。

3.9 股本削减

股本概念的取消令股本削减在英属维京群岛变得更为简单。除公司的公司章程大纲或公司章程细则另有规定，否则公司可透过更改章程来减少法定最高可发行股数，而且须向公司事务注册处就任何有关削减决定提交书面通知及组织章程大纲的修订本。请留意上述曾提及到按国际商业公司法注册的公司对于股本削减的要求。

3.10 经济实质规定

英属维京群岛的《2018年经济实质（公司及有限合伙企业）法案》（「《经济实质法》」）对根据《经济实质法》界定的「法定实体」，施加若干经济实质规定。只要就税务目的而言某家公司属为英属维京群岛境外某司法管辖区（并非列于就税务目的的不合作司法管辖区欧盟名单附件1）的税务居民，那么，该公司或会不属为「法定实体」，并将列在《经济实质法》范围外。按照《经济实质守则》草案，英属维京群岛当局将要求声称属为英属维京群岛境外税务居民的任何实体出示证据，证明该外国税务居籍，例如：(i) 所涉司法管辖区的有权当局的或发出的证明书函件，表明在该司法管辖区就税务目的而言该实体被视为税务居民；或 (ii) 该实体的评税书、自行评税书的确认书、缴税通知书、缴交税款的证据，或由所涉司法管辖区有权当局出具的任何其他文件。

有关毅柏律师事务所

Appleby毅柏律师事务所是亚洲区最具规模的离岸律师事务所之一，在全球备受高度关注、极具动力和充满活力的各经济体之一营运近30载，经验深厚丰富。

本所香港办事处提供百慕达、开曼群岛、英属维尔京群岛和泽西岛的法律谘询服务，涵盖企业、争议解决及私人客户和信托等事务。本所也能协助提供根西岛、马恩岛、毛里求斯及塞舌尔等的法律谘询意见。

本所企业事务部提供全方位的企业及商业交易事项法律谘询服务，包括设立投资基金、股权资本市场，以及各类融资交易事项、并购、跨境合资公司安排、结构型金融及债务资本市场产品、银行及融资交易事项以及复盖各类新兴科技的科技交易事项。

联 络 人

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卓文谦律师
合伙人（香港）

第11章

充分利用首次公开发行的有效在线投资者关系方案

首次公开发行（IPO）是上市公司开始构建投资者关系的起点。良好的投资者关系管理可助力提高公司透明度、创建强健的公司形象，为公司在资本市场打下坚实基础。统计结果表明，2016年-2018年间，香港的IPO募集资金规模名列榜首。但是，2019年（截至2019年7月），受市场波动和近期政治事件影响，香港跌居第四。

香港交易所的首次公开招股人数（2017-2019）		
2019（截至2019年7月）	2018	2017
100	218	174

资料来源：香港交易所

随着科技的进步，投资者可在全球范围内通过互联网获得市场信息，使得全球资讯的捕捉日趋简便。数字化投资者关系服务逐渐成为市场流行趋势，尤其是更多的全球金融机构和个人投资者可利用该类服务更加便捷地获取企业IPO过程中的一手信息。

为更有效地开发投资者识别数据库，下文解决方案可增加与各类投资者接触的机会，帮助公众了解公司的核心业务，并增强公司资本市场上的竞争优势。

有效建立投资者数据库的五种方法：

1. 充分利用数字化投资者关系服务，可接触全球投资者

a. 遵守本地交易所的合规要求，降低风险；

b. 在公司网站投资者关系页面上传近期公告及最新动态信息，提高市场曝光度，增加知名度和透明度；

c. 在全球知名媒体平台及时准确发布公司重要信息，提振公司形象和投资者信心

2. 使用专属网络直播提升知名度

a. 通过集成化网络直播方案（如IPO新闻公告事件、在线投资者日、管理人员访谈、股东大会、业绩公告等）提高媒体渗透率和知名度；

b. 通过流媒体网络直播使投资者可更快获取第一手信息；

c. 支持节目转播与分享，借此向公众传送重要信息，以有效提振投资者信心，提升公司形象

智富投资者关系有限公司

3. 为IPO创建定制化的专业网站

a. 向投资者提供综合性数字化投资者关系解决方案（网页设计、内容管理系统、网页托管、搜索引擎营销、电子邮件推送系统等），使投资者更加快捷地获得所需的全部信息；

b. 运用全新的云计算技术，快速可靠地进行数据存贮和检索；

c. 运用创新性投资理念，展示公司形象，传达公司的核心业务和价值观信息，吸引投资；

d. 以清晰简洁的方式展示公司的重大成就

4. 开发响应式投资者关系网站，吸引不同地域的投资者

a. 创建响应式投资者关系网站，方便移动用户，为投资者提供极佳的用户体验

b. 根据投资者需求和市场趋势，同时更新网站的台式电脑端、移动应用端和掌上电脑端；

c. 运用充分响应式解决方案，在移动设备端提供最佳显示体验

有关智富投资者关系有限公司

智富投资者关系有限公司（以下简称“智富”）拥有逾10年丰富工作经验的团队，是亚洲地区数字化投资者关系领导者，服务于香港地区150多名客户。

智富在全亚洲区域内提供一体化通讯解决方案，可单独使用，也可结合模块系统综合使用，以协助企业客户履行新闻传播和披露的强制性要求。公司还开发投资者关系与企业网站以及移动解决方案，制作在线财务报告与可持续性发展报告，开展音/视频网络直播。

公司能够高效生产超高品质的产品，以助力实现最大化客户满意度的目标。选择智富，您将可受益于：

- 在本地和全球市场丰富的数字化投资者关系工作经验；
- 助力公开上市公司吸引并维护高净值投资者；
- 提供“一站式”集成型投资者通讯服务；
- 高效的项目管理流程，严格质量管控；
- 满足贵司股票上市的强制性要求

联 络 人

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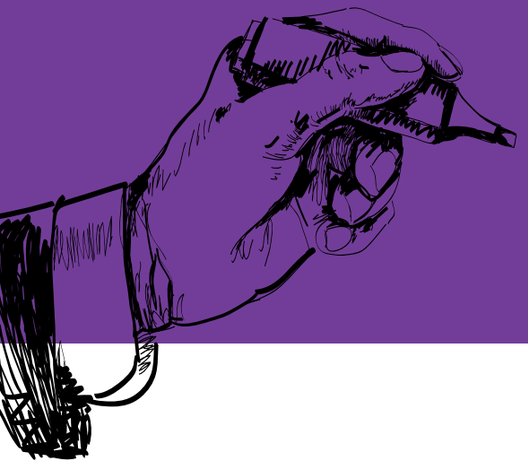
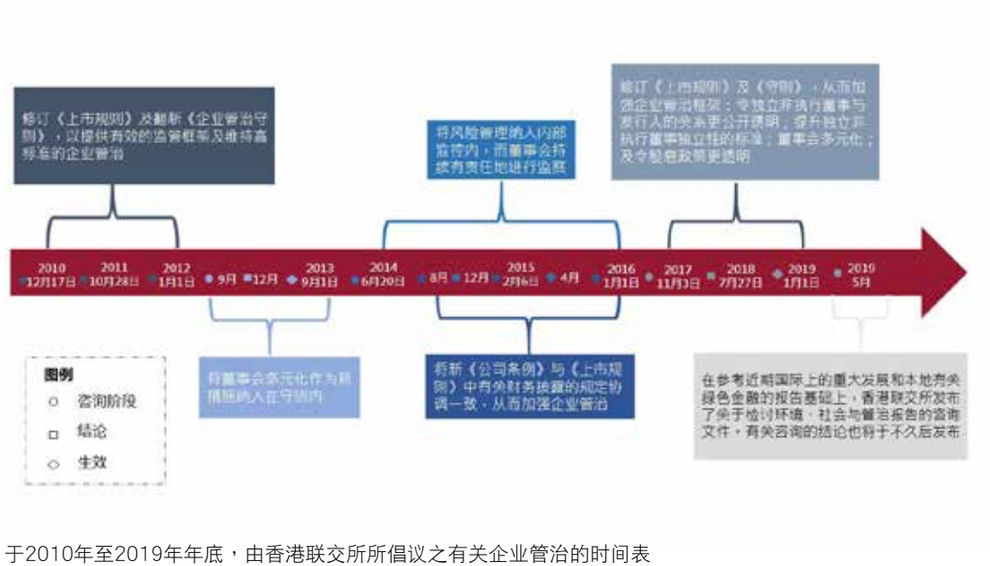


第12章

上市发行人的企业管治

企业管治是一个持续进行和不断演变的过程，即使在先进和发达市场如美国、英国和澳大利亚，企业管治结构应定期检讨及更新。香港联交所一直致力加强企业管治要求，不断努力倡议提高董事责任的标准、公司秘书的职能和要求、内部监控和风险管理，及有增加关于企业管治及内幕信息的披露。



于2010年至2019年年底，由香港联交所所倡议之有关企业管治的时间表

目前，世界上对于企业管治框架并没有一套国际公认的标准。其中一个着名的定义见于《卡德伯利报告》。该报告将企业管治界定为「管理和监控公司的制度」。该报告亦指出：「董事会须负责其公司的管治，而股东在管治中的角色是任命董事和核数师，以确保适当的管治结构满意到位。」董事会受股东委托并有责任监督公司在日常运营的管理，并对于确保公司的管治结构良好到位及持续有效，董事会的角色举足轻重。具有效率的董事会是良好管治的核心。

良好的企业管治框架涉及以下几方面的相互作用：1）能干及讲求问责的董事会；2）完善稳健的内部监控和风险管理系统；3）问责审核系统；及　4）具透明度及适时的企业汇报系统。

能干及讲求问责的董事会

董事会

上市发行人的董事会（「董事会」）主要负责领导、指挥及监察上市发行人的事务，使其长远成功，同时合适地以创造价值和风险管理为焦点而设定策略性的方针。

香港上市发行人的董事会由执行董事、非执行董事和独立非执行董事组成。根据《上市规则》，上市发行人必须拥有3名独立非执行董事或独立非执行董事的人数最少占董事会人数三分之一。其中至少一名独立非执行董事必须具有适当的专业资格或会计或相关财务管理专业知识。所有独立非执行董事必须符合《上市规则》中有关独立性的规定。

根据公司章程文件的条文、《公司条例》（第622章）和《上市规则》，执行董事、非执行董事和独立非执行董事须承担相同的法律责任。他们以董事身份履行其受信责任时，必须为上市发行人和股东的整体利益并诚实及真诚地行事，而且要避免实际和潜在的利益冲突。然而，每一名执行董事、非执行董事和独立非执行董事担当不同的角色和职能，且他们所履行的职责亦有可能不同。

执行董事应确保管理层按董事会转授的权力履行职责并执行董事会的决策，而且就他们的表现向董事会负责，同时也要对股东负责任。执行董事应听取非执行董事和独立非执行董事的意见并与其紧密合作，而非执行董事和独立非执行董事必须积极关心上市发行人的事务并大致了解上市发行人的业务，并且跟进任何引起他们注意的不利事宜。此外，独立非执行董事应就策略、政策、公司表现、问责性、资源、主要委任及操守准则等问题作出独立判断，并且在出现潜在的利益冲突时率先处理。当关连交易需要股东批准时，独立非执行董事必须成立独立的董事会委员会，审查该关连交易是否具有持续性质，即是否属于持续关连交易。每年独立非执行董事应与独立设计师会面，就审计事宜进行私下对话。他们还应在管理层无参与的情况下，每年与董事长举行一次常务会议，以表达其对公司的观点与看法。

董事的集体和个人合规责任是企业管治制度的基石，并且由《上市规则》明确规定。董事履行受信责任，以及技巧、谨慎和勤勉职责的标准不得低于《公司条例》所界定的客观和主观标准。

实用提示

2017年，证券及期货事务监察委员会（「证监会」）发布了《有关董事在企业交易估值方面的责任指引》[1]，以提醒董事要确保对收购对象目标进行适当的考虑和调查，以保护公司的资产。董事应对资产或目标公司进行适当的调查和独立的尽职调查。他们不应盲目和毫无疑问地接受提供给他们的任何财务预测、假设或业务计划，特别是由供应商或目标公司的管理层提供的信息。

董事会委员会

为了确保有效履行其职责，董事会可将某些领域指定和委托给董事会委员会审议，所有董事会委员会均在规定的职权范围内运作。董事会委员会可就委托事项作出决策并向董事会汇报，或向董事会提出建议由董事会作出最终决定。根据《上市规则》和《上市规则》及其《企业管治守则》（「企业管治守则」），须成立具有特定组成的审核委员会、提名委员会和薪酬委员会[2]。具有加权投票权结构的上市发行人还需要设立企业管治委员会[3]。上市发行人可以根据自身业务需要设立其他董事会委员会。

为加强企业管治及保持有效率的董事会，上市发行人应根据《上市规则》设立下列董事会委员会：

审核委员会

审核委员会的职责包括：

- 就委任、重聘和辞退外聘核数师以及评核他们的独立性、工作表现和费用向董事会提供建议；
- 审查公司的中期和年度财务报表和报告的完整性、正确性和公正性；
- 确保遵守有关财务汇报和披露的适用会计准则以及法律和监管要求；
- 审视关于提升公司雇员对财务汇报和任何其他不当行为的意识的安排；及
- 确保持续评估涉及财政、运营、合规和风险管理程序的集团风险管理和内部监控制度。

提名委员会

提名委员会的职责包括：

- 检讨董事会的架构、人数及组成；
- 检讨独立非执行董事就他们的独立性而发出的年度确认函，考虑到不时有效的《上市规则》相关指引和要求，以及如相关董事为七间（或以上）上市公司担任董事，他/她是否有能力投放足够时间处理董事会的事务；
- 在适当的情况下制定、检讨及执行与委任及重聘董事的筛选标准和程序有关的提名政策；
- 找寻具备合适资质的人士担任董事会成员，以及就有关任何拟议变更事项向董事会和董事会委员会提出建议，以补充公司的企业策略并为年度董事会评核提供协助；
- 每年检讨董事为履行他/她的职责所需付出的时间，以及他/她是否投入足够的时间履行他们的职责；及
- 不时订定及检讨公司董事会多元化政策。

薪酬委员会

薪酬委员会的职责包括：

- 确立制定正式和透明薪酬政策的程序向董事会提出建议；
- 就个人董事和高级管理层的薪酬待遇作出检讨及向董事会提出建议；
- 以下两者之一：
  - i) 获董事会转授责任，厘定个人董事及高级管理人员的薪酬待遇；或
  - ii) 向董事会建议个人董事及高级管理人员的薪酬待遇。

实用提示

具有同股不同权之上市公司应在其股票名称的末尾加上“ W”的标记以突出股票名称。

同股不同权之上市公司原则上需设立适当的管治架构，包括企业管治委员会，全部成员由独立董事组成（其中一位独立董事担任主席），负责检视、监察和报告管治事宜。企业管治报告需包括过去会计年度直至出版日之工作报告，透露重大事宜。再且，上市公司需设立提名委员会，由独立董事担任董事，而所有独立董事需最小三年轮休，但在三年任期届满后可以被提名及委任。

香港联交所在《上市规则》/《企业管治守则》中强调了许多治理方面的要素：

主席和行政总裁

为确保董事会与管理层之间有明确的职责分工，《企业管治守则》要求主席与行政总裁的角色必须分开，不能由同一个人担任。主席负责（尤其是）领导和监督董事会的运作，应确保董事会有效地开展工作和履行职责，并确保董事会及时讨论所有关键和适当的问题。行政总裁的职责是管理上市发行人的日常业务并确保在他们的授权范围内实现董事会设定的目标、策略和计划。

为了促进良好的企业管治，董事会应转授其权力予公司的高级管理层，以执行由董事会制定的政策和策略。

有关董事会及其委员会程序的规则

《企业管治守则》规定，董事会应按季度亲身会面，并且适当地出席季度董事会议和提前安排周年股东大会，以便董事能够参与。会议通知应在会议召开前至少14天发送给董事，而所有通知和会议资料应在会议召开前至少3天发送给董事，以便董事能够审查董事会文件并要求进一步的解释或澄清，从而促进决策过程和有意义地履行职责。上市发行人应允许通过电话、视频会议或任何其他通讯形式以便董事参加董事会议。除非另有规定，否则所有董事会委员会亦须遵守有关董事会程序的规则。

董事会和董事会委员会的一切重要讨论和决策均必须在会议记录或在没有举行会议的情况下以其他合适的格式记录。

实用提示

《企业管治守则》[4]要求的每月管理层更新资料对董事会成员是很重要的，尤其是非执行董事和独立非执行董事。行政总裁应确保每月最新管理更新资料中的材料和信息包含上月报告以来的所有重要变更和事项，以便公司董事会成员掌握现时的概况。

董事会多元化

高绩效的董事会是由具备与上市发行人的战略和目标一致的能力和多元化观点的董事组成。董事会多元化亦是投资者在决策时要考虑的重要因素之一。

1 证监会于2017年5月15日发布的《有关董事在企业交易估值方面的责任指引》
2 香港联交所主板《上市规则》3.21 审核委员会, 3.25 薪酬委员会, 附录十四A.5.1 提名委员会
3 香港联交所主板《上市规则》8A.31
4 香港联交所主板《上市规则》附录十四C.1.2
5 香港联交所主板《上市规则》附录10

在提名新董事时，董事会应考虑被提名人的技能、经验和多元化，以及提名委员会所推荐被提名人的潜在贡献。董事会的考虑和理由应在致股东的通函中明确说明。该通函应随附有关的选聘董事的决议。

在评估董事会当前的能力与多元化和找出不足状况时，上市发行人应使用「董事会技能矩阵」，其内容一般包括但不限于：技巧的平衡、背景、经验、知识、专业技术、文化、独立性、种族、性别和公司业务所需的其他合适品质等。

董事会评估

由提名委员会定期进行的董事会绩效评估有助于维持和提高董事会效率。评估应涵盖（i）董事会整体的效率；（ii）董事会委员会；及（iii）每位董事的贡献。评估领域可以包括董事会的结构、多元化、技能组合的平衡、贡献和绩效、诚信和其他品质，包括董事应带给董事会的核心能力等。

董事培训

所有董事都应按照《上市规则》的要求参加内部和外部培训，从而实现持续的专业发展。

- 对于所有新任董事而言，入职培训对于正确了解公司的运营和业务以及让董事充分了解其在适用法律法规下的职责至关重要。
- 上市发行人的所有董事都应参与专业培训，让他们在担任公司董事期间发展和更新他们的知识和技能。

这是为了确保董事具备充分的知识以履行他们的职责及持续为董事会作出贡献。发行人应负责为其董事安排并资助适当的培训，亦应考虑将考察前线工作列入董事培训安排当中。

公司秘书

香港联交所认为公司秘书在支持董事会方面担当重要而关键的角色，可以确保良好的信息在董事会成员之间流通。公司秘书会不时向董事会提供与政策和程序有关的建议和更新资料，并就管治事宜向董事会主席提供意见，并为新董事的入职以及为所有董事的持续发展作出安排。公司秘书直接向董事会汇报，其任命应在董事亲自出席的董事会议中批准。香港的每一家上市公司都应委任合资格的公司秘书。他们必须具备相应的资质以及每年参加不少于15小时的专业培训。

完善稳健的内部监控和风险管理系统

《企业管治守则》规定，辨认和管理风险是董事会的责任。董事会应处理内部监控事宜，包括：公司承担风险的意愿、风险和汇报之间的平衡、风险管理和内部监控制度，以及形成和发展风险文化。

在执行董事会职责时，董事会可通过审核委员会检讨上市集团的风险管理框架是否充分和有效，亦确保风险管理和内部监控制度坚实到位，而管理层应向董事会 / 审核委员会确认风险管理和内部监控制度的效用。行政总裁或高级管理层应保留详尽的风险表，并应定时审查和更新。与上市集团风险情况和降低主要风险范畴的进度状况有关的报告应在提交给董事会考虑之前由审核委员会在其定期会议中审核和详细讨论。

大部分的上市发行人都应采用「三线防御」模式作为其集团风险管治架构，并受董事会、审核委员会和集团管理层监督和指挥。管理层和个别部门负责日常运营风险管理并采取纾援措施。所有部门主管每年都应确认集团采用的风险管理和内部监控制度合适且有效。

举报政策

上市发行人应执行集团举报政策，以容许雇员能保密且匿名地向指定的经理或（倘他们希望的话）直接向审核委员会主席提出与内部监控和其他事宜有关的任何不良行为、不正当行为或欺诈等情况而无需担心遭到报复或伤害，也鼓励举报与不良行为有关的严重问题。

根据集团的举报政策，审核委员会负责检讨回应上市发行人及其子公司雇员按规定举报的行动是否有效。除了集团举报政策提供的内部举报程序外，上市发行人亦应安排外部人士（包括：投资者、产品供应商、服务供应商和其他第三方）通过指定的渠道保密地举报。

> ***实用提示***
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> *现今，资讯科技的应用对公司尤其重要，以监控和审视公司运作及财务资料。它亦对数据、监控、业务程序及汇报提供可靠的平台，令集团收集的财务信息保持诚信、可靠、安全和稳定。*

问责审核系统

外聘核数师

由外聘核数师（「核数师」）进行有效核数的意义，是对于上市发行人的财务报表是否在所有重要的方面都真实和公平地反映上市发行人的财务状况和表现，为上市发行人的董事会和股东提供客观的保证。

董事会通过审核委员会，考虑核数师就他们的上市发行人年度审核期间找出的营运风险和财务风险提出的建议。

核数师也会向上市发行人提供非核数服务，以符合香港联交所在财务汇报年度期间的其他汇报要求。对于就财务报表是否真实和公平提供客观意见，核数师的独立性是至关重要的。因此，审核委员会强制确保核数师能持续客观和独立。

核数师的独立性

核数师的独立性对上市发行人及其股东都是非常重要的。核数师应每年向审核委员会确认他们的独立性，并确认他们没有发现有可能合理地影响他们独立性的任何事宜。审核委员会在其会议中考虑和讨论每一个他们关注的事项（也考虑就核数和非核数工作向核数师支付的费用以及该等核数和非核数工作的性质），以评估核数师的独立性。

> ***实用提示***
>
> *曾经为上市发行人提供服务的已退任核数师在其退任后2年内不得被委任为其独立非执行董事。*

提供非核数服务

在决定核数师应否向有关公司提供非核数服务时，应考虑以下主要原则：

- 核数师不应审核他们自己的工作；
- 核数师不应作出管理决策；
- 核数师的独立性不应受削弱；及
- 服务质量。

另外，不论涉及多少金额，任何被认为与核数师角色有冲突的服务都应在提供有关服务前提交予审核委员会审批。

审核委员会和核数师的角色

审核委员会是核数师的联络点，独立于管理层。上市发行人的核数师应直接与审核委员会主席联系，审核委员会主席每年与核数师会面，管理人员不得在场。对于持续关连交易，核数师必须向董事会发出年度确认函，该核数师也必须在有关的年度报告付印前最少10个营业日向香港联交所提交确认函。

审核委员会必须监察核数师的独立性，以确保财务报表真实客观，审查其法定核数范围和非核数服务，以及审批其费用。为有关核数师提供的核数和非核数服务而向其支付的费用必须在年度报告中全面披露。

具透明度及适时的企业汇报系统

在主板上市的公司须每年发表中期和年度业绩公告和报告。自2013年起经修订的《证券及期货条例》对内幕消息作出规定。上市公司应适时发出公告，披露内幕消息（之前是《上市规则》规定的股价敏感资料），现时全年发出公司内幕消息公告和在发表业绩公告前发出盈利警告和/或正面盈利预告的数量比之前多。香港联交所要求上市公司披露股东沟通政策、董事出席股东大会（尤其是周年股东大会），及在发表年度财务报告同时或3个月前发表《环境、社会及管治报告》，以扩大股东和利益相关者的参与度。股东可依靠《公司条例》的相关条文在股东大会上作出决策。

内幕消息

要确保在资本市场内公平竞争，信息披露对公司而言尤其重要。这也是提供给投资者的沟通渠道，然则这使得上市公司恰当遵守有关规定时变得有点困难。上市发行人有责任促进持续的披露工作，以按照适用法律法规的要求适时、均衡及公平地向市场传播准确及完整的内幕消息。对于处理及传播内幕消息的程序和内部监控，公司应做到：

- 按照《证券及期货条例》、《上市规则》、证监会《内幕消息披露指引》，以及其他适用法律法规对可能的内幕消息进行评估；
- 建立与可能的内幕消息相关的清单用以防范；
- 不断审查内部汇报系统的有效性，以确保及时将个人、业务单位或部门的内幕消息向上反馈以作进一步评估；
- 通过他们的内部汇报程序确保高级管理层或为披露内幕消息而指定的人士或部门（如合适）有能力恰当地处理和传播内幕消息。

实用提示

股票交易行为

《上市规则》限制上市发行人的董事进行证券交易。这是为了保护董事不会被指控他们在拥有通过担任公司董事而获得的特殊知识的情况下买卖公司的证券。公司可以遵循《标准守则》5，也可以采用自己的守则，只要其守则的严格程度不低于《标准守则》。

根据《标准守则》，每个上市发行人的董事在拥有内幕消息时以及在初步年度业绩公告前60天的禁售期间和中期业绩公告的30天均不得买卖公司的证券。

在进行任何交易之前，董事必须遵循规定的程序并获得主席或为此目的指定的上市发行人另一名董事的批准。

与股东沟通

股东是公司的拥有者，并与公司管理层分离。当某些拟议的公司变更或交易需要股东批准时，公司必须相应地迅速采取行动。大多数情况下，倘此类预期的事项引起了机构投资者的负面评论或反馈，他们将会抛售所持有的公司股票，导致股份下跌。如今，股东可以通过互联网、专业分析报告或其他媒体获取信息。为了使股东能够更好地了解公司的业务，上市发行人应积极、迅速地披露董事认为对股东有效和有价值的公司信息。

此外，上市发行人需要制定股东沟通政策，向股东提供沟通渠道，使他们能够通过以知情的方式行使其股东权利来积极参与公司事务。上市发行人应定期审查其股东沟通政策，以确保公司与股东的有效沟通。上市发行人还需要在其网站上披露相关股东的权利。

此外，为加强公司与股东之间的关系，董事应与他们进行持续的沟通，并积极参加各种股东大会以便与股东互动，从而与股东建立相互信任。沟通和透明度是良好企业管治的基础。

《公司条例》通过以下方式促进股东参与决策过程：

- 为提出决议和通过书面决议引入一套全面的规则；
- 倘若有关要求成员陈述书的事宜与周年成员大会有关，并且公司及时收到该要求，以致在发出该成员大会的通知的同时能够递交该陈述书，公司须支付有关费用；及
- 要求投票表决的门槛是总投票权的5%的成员。

利益相关者的参与

为了实现良好的企业管治标准，上市发行人需要平衡各种利益相关者的利益，包括客户、投资者、雇员、政府、非政府组织、公众等。面对各种各样的利益相关者，上市发行人必须对自己的决策和行为负责，并应将利益相关者纳入其营运策略的考虑范围。利益相关者可通过提出问题（包括市场讨论）、行使他们的权利、放售手上的投资股份、减少与公司开展业务等，从而对公司的业务和管理产生影响；而监管机构可能会升级或执行新规则，以适应国际趋势或确保适当的市场秩序。除其他措施外，香港联交所于2013年推出了《环境、社会及管治报告指南》（“ESG指南”）。董事会全面负责其环境、社会及管治（“ESG”）策略和报告。同样按照企业管治守则，董事会负责评估和确定其ESG相关风险，并确保已经建立适当和有效的ESG风险管理和内部监控体系。董事应讨论这些ESG问题，并从ESG角度研究公司当前的业务和运营，并适当地在年度报告中（或在发表年度报告后3个月内单独发表）披露ESG报告。

概论

良好的企业管治是公司健康和可持续发展的基石。上市发行人的长远利益有赖于能干及讲求问责的董事会，其中董事应有足够的能力、具备相应的资格、有责任感，具有独立思想和观点。所有董事均应仔细考虑并以开放和坦率的方式讨论对公司及其股东和利益相关者非常重要的事项。上市发行人应确保适当的检讨和平衡，如任命合适比例的独立非执行董事并审视公司的内部监控和风险管理制度的效用，这有助于发现公司内部的违规行为、权力滥用和风险的情况。完善稳健的内部监控和风险管理制度应纳入上市发行人的管理和管治架构运作流程中。董事会应通过定期汇报向股东。透明、适时及有效股东沟通对于良好的企业管治是至关重要的。因此，毫无疑问，一家公司需要实施适当的披露政策，从而以公平和有效的方式在市场上传播内幕消息。公司秘书和独立核数师在其各自的岗位中担当很重要的协调和护航角色。

重要提示

以下是香港联交所强调的四个重要领域。

1. ***董事会职责：****董事在合规方面的集体和个人责任至关重要。此义务在董事向香港联交所作出的尽最大努力促使上市发行人遵守《上市规则》的个人承诺中得到完善和加强。此义务包括双重责任，即确保实质遵守《上市规则》和通过适当的内部监控措施为合规创造条件。*
2. ***对独立非执行董事的更高要求：****除了行使独立判断以实现良好的企业管治以及警惕潜在的不当行为以外，具有财务和会计专业知识的独立非执行董事应领导核数委员会，并在财务报告完整性和审查重要财务报告判断中发挥主导作用。独立非执行董事还在关联交易和内部监控方面发挥重要作用（由于其在核数委员会中的角色）。*
3. ***公司秘书：****香港联交所重视公司秘书的重要性，并视公司秘书为企业管治和监管合规事宜的主要顾问以及与董事会沟通的重要渠道。*
4. **核数师：**在《财务汇报局（修订）条例》实施后，香港上市发行人的核数师也受财务汇报局监管。

联络人

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魏伟峰博士

集团行政总裁

第12章

指南

公司秘书的角色及职责

上市发行人公司秘书的要素

鉴于监管框架日益复杂及良好企业管治所带来的好处，香港公司秘书的作用和职责变得更加重要。根据《公司条例》（第622章）规定，在香港注册成立的每家公司都必须任命一名公司秘书。此外，上市发行人任命的公司秘书必须具备《上市规则》所规定的学术、专业资格或相关经验。

在《上市规则》的《企业管治守则》中，香港联交所认同公司秘书在为董事会提供支持方面发挥着重要作用，以确保董事会内部有良好的信息流通，并使董事会的政策和程序得到遵守。上市发行人的公司秘书属于高级管理层的成员，直接向首席执行官/董事长汇报，并通过董事长/首席执行官向董事会就管治事宜提出建议。

公司秘书在公司的管治及合规方面发挥多个主导作用。他们的企业管治职责总结如下：

促进董事会的决策

公司秘书通常负责制定议程并为董事会收集信息以供董事会作出决策。公司秘书应确保管理层向董事会提供的背景信息充足、明确并易于董事理解，并向董事会提供合规意见。当董事有疑问或需要进一步的信息时，公司秘书应是他们的第一联系人。这一点对于非执行董事而言尤为重要，因为他们与执行董事不同，其可能对公司的日常运营并不熟悉，且并非每天都来办公室上班。一旦董事会对事项作出详细讨论并决议时，公司秘书应传达董事会的决策并监督董事会决策的执行情况和进度，并密切关注需要董事会作出进一步决定的新问题。公司秘书应及时向董事会报告管理层在执行董事会决策时所面临的问题和困难，以此来保持有效的沟通。

董事培训

此外，公司秘书应持续关注所有法律、监管和企业管治方面的发展动态，向董事会汇报任何前述可能影响公司运营的重大变化，并为董事安排正式培训。入职培训是新董事任职的先决

条件，能够使他们正确了解公司的运营和业务，并充分了解他们在适用法律法规下的责任。对于现任董事，培训可以使他们了解最新的发展动态，以便他们进行决策。公司秘书应与管理团队一起为新任董事提供适当的入职培训。

传播公司信息

公司秘书代表上市发行人向股东、投资者和监管机构传递信息。他们通常担当两名授权代表中的一名，负责以口头或书面的形式回答香港联交所的查询。公司秘书通常通过电话、电子邮件或在股东大会上，就股东对有关公司治理或程序查询进行处理，例如会议通知或者有关公司治理的投票事宜等。

与股东及时沟通

公司秘书通常在维持与股东的持续对话方面发挥重要作用。尤其在企业管治问题上，他们通常是公司透过实施全面股东沟通政策，来管理与机构投资者关系的最佳人选。公司秘书应通过股东大会和其他公司通讯形式向股东提供最新的公司相关信息，比如正式的公告或通函，或者非正式的电话或邮件。沟通是一个双向过程，除了确保良好的信息流以外，还必须向利益相关者提供一个可以作出反馈和提出询问的渠道。这些询问和反馈必须记录在案、持续跟踪并在适时提呈董事会注意。公司秘书应协助建立监控股价敏感资料并向董事会上报的程序，并及时向董事会提供有关是否存在股价敏感资料的资讯。一旦确定存在股价敏感资料，公司秘书应采取合理的预防措施来保护该信息的机密性。当有义务进行披露时，公司秘书可能需要根据《证券及期货条例》安排刊发公告。比如说，当会计期结束后，当公司在当期的业绩发生了重大变化而与上一期有所出入，并且超乎市场（公司的惯常投资者）意料时，公司秘书可能需要根据《证券及期货条例》发出正面盈利预告或利润警告，以便所有的投资者能够在公平的基础上作出深思熟虑的决定。在诸如A+H等两地或者多地上市的企业，公司秘书需要安排在香港联交所发布海外监管公告。当海外监管公告涉及股价敏感信息时，须同时发布内幕信息公告。此类公告应清晰明确、易于理解及使用简明语言，并提供充分的背景信息，以便投资者可以作出深思熟虑的决策。

与监管机构联络

从监管机构的角度来看，公司秘书负责监督上市发行人对法律及法规的遵守情况，并协助建立一套风险管理和内控系统以确保遵守相关的法律法规。公司秘书协助刊登监管机构颁布与上市发行人有关的政策，并有向董事会和管理团队解释与公司运营有关的法律、法规和条例的职责，向他们普及关于决策的法律和合规基础。借此，他们将加强决策和执行部门对相关法律的了解，提高个人对遵守规范必要性的意识和能力，并规范在公司运营中的个人行为的合规性。因此，当上市发行人收到监管机构的查询时，公司秘书能够及时处理并作出回应。对于公司的重大事项和变动，如融资、股权激励、合并、收购和重组及其他的诸如章程、董事或秘书的更换，公司秘书应确保与监管机构的良好沟通，并促使获得监管机构对企业行动和变动的同意或批准。公司秘书一直都是监管机构在日常上市事宜方面的联系人，如上市费支付、股息分配确认和电子提交工作等。

与投资者打交道

关于与投资者，特别是机构投资者，公司秘书必须坚持基本原则：确保资料是向整个市场披露，且市场的所有用户均同时获取相同的资料，同时保持有效的投资者关系，并准确反映公司事务。 应当提醒的是，在与投资者举行的任何会议均不得讨论未曾披露的内幕信息。

上市发行人必须根据有关法律和上市规则，编制定期财务报告，公告，通函和上市文件。 在为投资者和新闻发布会准备新闻稿和公司介绍时，资料应与上市发行人的已发布的上述文件一致。

上市发行人还应注意，为投资者和新闻发布会提供的新闻稿和公司介绍用于支持公开披露资料的背景，并可清晰表达以下内容：

- 长期战略；
- 组织历史，愿景和目标；
- 管理理念及管理的优势和深度；
- 竞争优势及风险；
- 行业趋势及存在的问题；
- 商业中的关键利润驱动因素。

上市发行人还应该注意到：了解分析员于投资者和新闻发布会的新闻稿和公司介绍提出的问题，以及当上市发行人收到分析师的报告初稿。董事应拒绝分析员的压力，当他们要求董事提供或评论可能涉及未公开内幕消息的资料。当分析员误解了任何数据，以致数据出现重大错误，上市发行人应要求分析员师立即纠正。倘上市发行人察觉到要改正报告内的错误概念涉及尚未发布的内幕消息资料时，考虑到可能出现泄露，在纠正该报告的同时公告这些内幕消息。

处理市场谣言/负面分析报告

有时，有关公司的媒体报导或市场谣言或负面分析报告可能会散布并含有虚假或不实的资料。根据《证券及期货条例》，上市发行人无须进一步披露资料或对这类媒体报导或市场谣言作出回应，除非它们似乎包含会造成虚假市场的实质内容。

总体而言，公司将采取积极主动的态度处理媒体报导或市场谣言或负面分析报告，以最大程度地减少不明智的投机活动并促进其证券的有序市场。

实用提示

当出现对公司涉及诈骗、严重会计或管理失当的市场评论或分析员报告的指控时，或者相关指控已经对或可能对公司股价造成影响，公司须及时刊发澄清公告。倘不能及时刊发澄清公告，公司须申请短暂停牌或暂停买卖。澄清公告发布后，香港联交所或会继续与上市发行人跟进是否需要就指控衍生的问题作其认为必要的进一步披露、复查或调查。

风险管理和内部控制

风险管理和内部控制是良好企业管治的重要组成部分。董事会负责就上市发行人的策略厘定风险偏好，确保实施适当的内部控制来管理风险，并定期检查内部控制体系的有效性。审计委员会负责监督风险管理和内部控制体系。同时，公司秘书可以通过以下方式协助董事们：

- 提醒董事长将风险管理考虑因素纳入董事会和审计委员会的议程
- 充当管理层与董事会之间的沟通渠道，以确保董事会/审计委员会随时获知上市发行人所面临重大风险的任何变化
- 在「遵守或解释」的基础上协助董事会根据风险情况等编制企业管治报告和环境、社会及管治报告

交易合规支持

上市发行人须按规模测试对大规模交易进行分类。当交易属于关联交易时，上市发行人要按更严格的合规标准，例如成立独立董事委员会和需要独立股东批准。公司秘书以其熟悉公司业务及运营，并了解法律法规的背景，将应邀协助处理工作。

关联交易

关联交易是家族控制的上市企业或香港上市的内地国有企业发行人面临的常见合规问题。根据《公司条例》，董事有义务向董事会声明其在任何交易、安排或合同中的利益的性质和范围，并/或在董事会会议上放弃投票权。因此，公司秘书应确保董事遵守以下要求：

- 真诚为公司整体利益行事
- 为正当目的行事
- 就发行人资产的使用或不当使用向发行人负责
- 避免实际和潜在的利益和职责冲突
- 充分、公正地披露其在与发行人的合同中的权益
- 应用与具有同样知识和经验并在发行人担任同样职位的个人应合理具有的同等技能、谨慎和勤勉

《上市规则》还为关联交易规定了严格的披露要求、设置独立的董事会委员会要求以及股东批准要求。

公司秘书经常会参与制定用于内部控制目的的须予公布的交易和关联交易识别政策和程序，并安排向香港联交所提交交易清单以符合合规要求。公司秘书协助董事披露其在交易中的权益，确保不会将机密和敏感文件分发给有利益关系的董事，避免其参与董事会就发生利益冲突的议程讨论和表决。

此外，公司秘书要求相关董事每年就其在上市发行人证券中的利益、其竞争性业务（如有）以及独立非执行董事的独立性签署确认书，以便协助披露董事在上市发行人中的权益。

最重要的是，由于监管环境不断整顿和完善，要求上市发行人达到更高的企业管治标准，因此公司秘书的角色正在变得更加复杂和专业。如今，他们的管治工作变得越来越重要。

公司秘书的任免

上市公司公司秘书的任命和免职必须经董事会实际开会批准。公司秘书如有任何变动，上市发行人必须在实际可行的范围内尽快发布包含更换原因在内的公告，并且按照规定的格式向香港联交所和公司注册处备案。这些措施保障了管理层任意决定权对公司秘书变更的影响。

公司秘书应为上市发行人的公司雇员，并对公司内部的日常事务有所了解。一般而言，香港的蓝筹上市公司倾向于任命高级管理人员担任公司秘书。它们通常设立公司秘书部，由6－8名专业人员组成，负责法律、财务或投资者关系。另一方面，随着越来越多在内地拥有核心业务的公司在香港上市，这些上市发行人可能会聘请外部公司秘书服务提供商*来提供合资人士担任公司秘书，并处理上市后的公司秘书事务。

外部服务提供商通常会成立由公司秘书、律师和会计师等组成的专业团队，以便与上市发行人的指定高级管理人员建立密切的沟通渠道，支持上市发行人的管治和和合规事宜。一些在香港没有营业办事处的上市发行人可能会发现，外部服务提供商比雇用一个合格且经验丰富的专业人员团队更为实惠，因为它们还可以享受整个专业团队服务。

根据《公司管治守则》，上市发行人可以聘请外部服务提供者为其公司秘书，但前提是上市发行人内部须具有足够资料的人士（如首席法律顾问或首席财务官）来作为外部公司秘书服务供应商的联系人。

＊重要提示＊

＊ 聘请外部公司秘书服务提供商（“外部服务提供商”）的趋势

2018年，香港特许秘书公会（HKICS）发布了一项指引，建议每个人最多接受6项公司秘书的具名职务任命。然而，外部服务提供商提供的公司秘书由专业团队支持，因此上市发行人应查询外部服务提供商的内部工作安排和规模，而不是将上述数字限制作为唯一的指引。

同时，香港联交所于2019年发布的谘询文件（该文件建议将一般豁免上市发行人公司秘书的经验和资格纳入《上市规则》，即在考虑上市发行人的主要业务营业地点、公司秘书的适合性以及该公司秘书是否应由具备上市发行人公司秘书经验和资格的人员来协助之后，倘香港联交所认为合适，上市发行人的公司秘书不需要具备《上市规则》要求的经验和资格）收到了一些来自市场的反对意见。一些人担心这样条文化会降低有素质的公司秘书的标准和要求，将对其在董事会支持和治理中扮演更重要的角色产生负面影响。

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第12章

环境，社会和管治报告

指 南

简介

环境、社会和管治（ESG）（也称为「企业社会责任」（CSR）和可持续发展）报告成为一项全球倡议。ESG不再仅仅是一项企业社会责任或一个声誉问题。投资者越来越愿意通过绿色融资将资金用于可持续发展投资，以应对气候变化问题，这些问题是重要的投资考虑因素，要求企业提供更多关于如何管理其ESG风险的信息。这一领域中的全球监管环境也在迅速变化，促使企业对其ESG框架进行全面审查。在香港，香港联合交易所有限公司（「联交所」）从风险管理方面主动采取行动，要求上市发行人在其ESG报告中披露其如何减轻这些风险，以便使利益相关者能够更好地了解公司在可持续发展实践方面的目标和承诺。这也是公司将可持续发展融入其业务的驱动力，而可持续发展能够为公司带来实际价值。

2013年，联交所以自愿遵守方式推行《ESG报告指引》（「《ESG指引》」）。在2015年的市场谘询之后，联交所修订了《上市规则》，强制发行人每年就其年度报告所涵盖期间的ESG事宜作出报告，该规定自2016年1月1日开始的财政年度开始生效。 《ESG指引》内列出合共11个方面，分为两个主要范畴：环境（三个层面）和社会（八个层面）。为了促进ESG表现和报告的质量，并确保ESG框架与投资者和利益相关者的期望以及国际最佳实践保持同步，联交所建议引入对ESG管治架构的披露，鼓励ESG报告的独立验证，以及修订环境和社会范畴。

ESG最新发展情况

2018年，联交所发布了《有关2016/2017年发行人披露环境、社会和管治常规情况的报告》，分析了从恒生行业分类系统中各行业随机挑选出来的400名发行人（「样本发行人」）所作的披露。该分析发现，所有发行人都发布了2016/2017财政年度的ESG报告，但只有38%的样本发行人遵守了11个方面的所有「一般披露」。值得注意的是，《上市规则》要求披露11个方面下的「不遵守就解释」条文的执行情况，而偏离条文且未给出合理理由即违反《上市规则》。

上图显示在专业顾问协助下，上市发行人编写更好的合规ESG报告

该做法的部分考虑为着联交所将考虑扩大公司必须披露的信息的范围而作准备。虽然上市公司的ESG披露情况有所改善，但还需要取得更大的进步。为了确保ESG框架适用性，联交所持续提升ESG表现和报告的质量，于2019年发布了谘询意见书，以征求关于对《ESG指引》和相关上市规则的拟议修订意见和评论。根据对谘询意见的回复，联交所计划于2020年1月1日或之后开始的财政年度实施修订的上市规则和《ESG指引》。

主要建议

主题	当前的《ESG指引》	建议的修订
环境	所有的环境一般披露和关键绩效指标（“KPIs”）均属于「不遵守就解释」责任，包括以下方面： A1：排放 A2：资源使用 A3：环境及自然资源	新增要求披露气候变化有关问题的环境范畴（受「不遵守就解释」汇报规定的约束）； 要求披露环境KPIs目标及为达到这些目标所采取的步骤
社会	“社会一般披露”属于「不遵守就解释」责任，而KPIs则属于「建议披露」汇报规定，包括以下层面： B1：雇佣 B2：健康与安全 B3：发展及培训 B4：劳工准则 B5：供应链管理 B6：产品责任 B7：反贪污 B8：社区投资	将所有社会KPIs从「建议披露」升级到「不遵守就解释」
管治	- 董事会对发行人的ESG策略和汇报承担全部责任 - 管理层应向董事会提供有关系统是否有效的确认	升级至强制性披露要求，包括： - 董事会声明，陈述董事会对ESG事宜所作的考虑 - 用于识别、评估和管理重要的ESG相关事宜和风险的流程 - 董事会如何按ESG相关目标检讨进度

发布ESG报告的时限	对于主板和创业板发行人，按以下方式发布ESG报告： - 在发行人的年度报告中：不迟于财政年度结束后四个月；或 - 单独报告：不迟于年度报告发布后三个月	缩短发布时限。 - 主板发行人：年结日后四个月内 - 创业板发行人：年结日后三个月内
汇报原则和范围	《ESG指引》中提到的四个汇报原则是「重要性」、「量化」、「平衡」和「一致性」	升级到强制性披露要求，包括： - 在ESG报告中解释如何应用汇报原则和汇报范围

开始您的ESG之旅

在IPO过程之前，公司应该：

- **成立ESG委员会**或ESG工作小组，成员应由充分了解ESG事务和发行人运营情况的高级管理人员和员工组成。董事会有责任参与讨论公司的ESG披露并制定策略和设定减排目标并确保有制度及流程以监督表现。
- **确定ESG风险：**重要风险因行业而异，需要确定哪些ESG风险应视为重要风险。
- **收集信息：**公司必须收集环境和社会数据及信息。

在IPO阶段，公司应该：

- **与利益相关者沟通：**了解利益相关者的期望、利益和信息需求是制定行动计划针对利益相关者关注最重要及相关议题的必要步骤。
- **进行重要性评估：**重要性是对您的业务和利益相关者最重要的社会和环境的议题的定义原则。它有助于公司识别哪些是重要的ESG事宜，哪些不是。
- **根据《ESG指引》收集、整合和计算环境及社会的数据及信息。**

上市后，公司应该：

- **告知实况：**未来，上市公司将需要更多的时间和资源来汇编数据和满足合规要求。在编制ESG报告时，展示利益相关者所聚焦的可持续发展议题。
- **达到ESG目标：**设定目标并减少重大的ESG影响，有效地传达ESG风险和长期业务策略。公司亦开始需要投资系统和设备，以便有效地监控和量度由战略制定的环境目标的进展情况。

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第13章

关于中国公司在香港联交所上市的特别考虑

简介

多年来，香港作为着名的国际金融中心一直是备受推崇的首次公开发行（“IPO”）募资活动场所之一，吸引着全球希望提高声誉并进入国际资本市场的各家公司（包括在中华人民共和国（“**中国**”）注册成立或位于中国的公司）。这种成功归因于多种因素，包括香港富有吸引力的税收制度、对自由经济的重视、遵守国际标准和惯例及其健全的法律体系。

中国与香港地区、开曼群岛及百慕大为四个“认可司法管辖区”，在中国注册成立的公司有资格在香港联合交易所（“**联交所**”）上市[1]。中国公司可通过H股架构或红筹股架构在香港上市。H股公司是在中国注册成立并经中国证券监督管理委员会（“**中国证监会**”）关于香港上市审批的股份有限公司；而红筹股公司是在中国境外（通常在香港地区、开曼群岛或百慕大）注册成立但受中国实体及/或个人控制的公司。

在过去几年里，中国公司一直是香港联交所的主要参与者。下表列出了2016年至2018年期间在香港上市的公司数量及中国公司数量[2]：

1《有关海外公司上市的联合政策声明》，香港证券及期货事务监察委员会与香港联合交易所（2013年9月27日）。资料来源：https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Other-Resources/Listing-of-Overseas-Companies/A-List-of-Acceptable-Overseas-Jurisdictions/jps_20180430.pdf?la=en

2《香港交易所市场资料2017》，香港联合交易所。资料来源：https://www.hkex.com.hk/-/media/HKEX-Market/Market-Data/Statistics/Consolidated-Reports/HKEX-Fact-Book/HKEX-Fact-Book-2017/FB_2017.pdf?la=en及《香港交易所市场资料2018》，香港联合交易所。资料来源：https://www.hkex.com.hk/-/media/HKEX-Market/Market-Data/Statistics/Consolidated-Reports/HKEX-Fact-Book/HKEX-Fact-Book-2018/FB_2018.pdf?la=en

	2016年	2017年	2018年
上市公司总数	1,973	2,118	2,315
在香港上市的中国公司总数	1,002	1,051	1,146
– H股公司	241	252	267
– 红筹股公司	761	799	879

表1：在香港联交所上市的公司及中国公司的数量

如表中所示，2018年年底，在所有2,315家上市公司中，1,146家为中国公司（约占50%），包括267家H股公司及879家红筹股公司[3]。此外，截至2018年年底，所有在香港上市的中国公司的市值总额约占香港联交所全部上市公司市值总额的68%[4]。

值得注意的是，近年来，小米公司（1810.HK）、海底捞国际控股有限公司（6862.HK）及中国铁塔公司（0788.HK）等众多高知名度的中国公司已选择香港作为上市募资地[5]。显然，香港已成为最受中国公司欢迎的上市地之一，相信在可预见的未来，中国公司与香港联交所之间的联系将更加紧密。鉴于这种趋势，本章将就中国公司在香港联交所上市的特别考虑进行探讨。

H股公司

H股公司是在中国注册成立的股份公司，这些公司同时发行了H股及境内股票。H股是在香港联交所上市的境外股票，而境内股票是中国发行人根据中国法律发行的股票，以人民币计价，并以人民币认购。境内股票可在上海或深圳证券交易所上市或一直不上市。总体而言，H股及境内股票类别相同，具有相同表决权，但若在不同的股票市场上市，可分别按不同的价格交易。下图列出了典型的H股架构：

图1：典型的H股架构

3 *同上*。
4 *同上*。
5 《2018年市场统计数据》，香港联合交易所。资料来源：https://www.hkex.com.hk/-/media/HKEX-Market/Market-Data/Statistics/Consolidated-Reports/Annual-Market-Statistics/2018-market-statisitcs.pdf

毫不意外，作为香港联交所的参与者之一，中国发行人[6] 与在香港及/或海外注册成立的发行人一样，应遵守《香港联合交易所有限公司证券上市规则》（“**上市规则**”）。但是，香港联交所考虑到中国的大陆法系、存在差异的公司法及可交易中国发行人股票的市场情况，出台了上市规则第19A章，专门包含针对中国发行人量身定制的各种条款，以方便他们在香港联交所进行证券上市，并维持上市地位。第19A章对既有的上市规则进行了修订，向中国发行人施加了额外义务，并设立了例外条款。下文列出了第19A章的重点条款：

(a) 基本要求

仅在下列情况下，香港联交所才会考虑中国发行人的香港联交所上市申请[7]：

(i) 发行人是在中国正式注册成立的股份有限公司（“**要求A**”）；

(ii) 香港联交所认为，香港联交所与中国的有关证券监管机构有足够的联系和合作安排（“**要求B**”）；

(iii) 香港联交所认为，适用的中国法律和中国发行人的公司章程为H股持有人提供有足够的股东保障（“**要求C**”）；及

(iv) 对于有股本证券已在或将在另一证券交易所上市的中国发行人，香港联交所认为，香港联交所与这些证券交易所当局有足够的联系安排。

考虑到上述要求（特别是要求A），作为尽职调查程序及香港联交所申请要求的一部分，中国发行人应聘请在中国注册的律师事务所，由其就中国法律法规的各个方面编制一份法律意见书，其中包括：

(i) 中国发行人及/或其子公司是否为在中国正式注册成立的法人，拥有缔结合同、起诉及被诉的法律能力；

(ii) 公司股票在香港联交所上市是否需要经中国政府或监管机关的审批；

(iii) 中国法律法规中与中国发行人的中国业务有关的所有详细要求，及中国发行人是否充分遵守了相关要求，包括中国发行人获得的许可、批文及证书的详细信息。

此外，中国发行人必须获得中国相关主管机关的确认文件，比如税务机关及社保机关，以证明相关的中国发行人未违反相关法律法规，且在所有重大方面符合法律法规。该确认书不仅向保荐人提供了保证，而且构成了出具中国法律意见书的基础。

此外，根据表格M104（香港联交所要求的上市申请文件之一）的要求，如果新申请人的主要业务活动是通过在中国注册成立的实体开展的，该申请人必须提交一份保荐人及申报会计师的重大发现摘要，以评估为编制会计师报告而使用的申请人中国公司相关财务信息是否与下列信息相一致：

(i) 向相应的主管政府机构提交的所有相关监管文件或报告；及

(ii) 关联方财务报表中所列的关联方交易的信息（若适用）。

这份摘要应列出经审阅的所有相关监管文件/报告、这些文件/报告的检索方法、所注意到的任何重大差异的金额及性质、产生这些差异的原因及保荐人是否认为这些差额已通过财务报表调整、披露或其他后续措施得到恰当处理。

6 除非另有明确说明，在本章中，「中国发行人」系指寻求在香港联交所主板（「主板」）上市的中国公司，且本章中所述及的所有规则均仅适用于在主板上市的发行人。
7 上市规则第19A.03条

寻求以H股架构上市的中国发行人也须获得中国证监会的批准，中国证监会对中国发行人进行基本审查。因此，除非已获得中国证监会的确认函（通常称为”**小路条**”），否则不得向香港联交所提交上市申请。根据表格M104的要求，在中国申请人向香港联交所提交IPO申请时，上市申请文件应随附一份中国法律意见书。在上市委员会聆讯之前，中国发行人必须向香港联交所提交一份由中国证监会出具的经核证的信函副本，该信函明确批准以中国发行人上市申请中所列方式发行权益证券（通常称为”**大路条**”）[8]。或许上述文件要求是为了体现要求B的精神。

对于要求C，第19A章明确规定中国发行人的章程必须包含反映内资股及境外上市外资股（包括H股）之差异性及各自持有人不同权利的条款[9]。此外，上市规则附录13的D部分规定，在香港联交所进行或将进行主要上市的中国发行人的章程必须包含寻求保护H股持有人权益的一些条款。

此外，值得一提的是，香港联交所明确保留在认为中国发行人的证券上市不符合公共利益的情况下自行酌情拒绝其证券上市的权利[10]。需要指出的是，这些条款不针对其他海外发行人。

(b) 会计师报告及备考财务资料

如果中国发行人在编制财务报表的过程中采用了《中国企业会计准则》（**“中国会计准则”**）而非《香港财务报告准则》（**“香港财务报告准则”**）及《国际财务报告准则》（**“国际财务报告准则”**），那么中国发行人会计师报告的编制必须符合中国会计准则。除上市规则第4.03条中规定的合格独立事务所外，香港联交所还接受经中国财政部及中国证监会审批的适于为中国发行人担任审计师或申报会计师的执业会计师事务所。香港联交所在其网站中列出了这些会计师事务所。[11]

(c) 合规顾问

上市规则要求新上市发行人任命一名合规顾问。主板上市发行人及创业板上市发行人的强制任命合规顾问的期间有所不同。比如，主板上市发行人的合规顾问任命期间自首次上市之日起，至上市后***首个***完整财务年度的财务业绩发布之日[12]，而创业板上市发行人应任命合规顾问至***第二个***完整财务年度的财务业绩发布之日[13]。

除上市规则第3A章规定的职责外[14]，中国发行人的合规顾问应根据上市规则第19A章规定承担额外的职责。比如，所任命的合规顾问应及时将上市规则或其他适用香港法律法规的更新内容告知中国发行人[15]。由于中国发行人的授权代表预期经常在香港境外，所任命的合规顾问应担任香港联交所与中国发行人之间的主要沟通管道，因此，合规顾问的姓名、办公电话及住宅电话及传真号码等联系方式须提供给香港联交所[16]。中国发行人须确保所任命的合规顾问可随时联系到其授权代表、董事及其他高管，并促使前述人士迅速向合规顾问提供必要的信息或协助，以便合规顾问履行其职责[17]。

8 上市规则第19A.22A条
9 上市规则第19A.01(3)条
10 上市规则第19A.13(1)条
11 经批准可为在大陆注册并在香港上市的公司担任申报会计师及/或审计师的大陆会计师事务所清单，香港联合交易所（2013年10月24日）。资料来源：https://www.hkex.com.hk/Listing/Rules-and-Guidance/Other-Resources/List-of-Approved-Mainland-Accounting-Firms?sc_lang=en
12 上市规则第3A.19条
13 创业板上市规则第6A.19条
14 上市规则第3A.21条-第3A.25条
15 上市规则第19A.06(3)条
16 上市规则第19A.06(4)条
17 上市规则第19A.05(2)条

中国发行人可任命任何经许可或登记并可就公司事务提供建议的中介担任合规顾问。但是，若香港联交所认为合规顾问未充分履行其职责，香港联交所可要求中国发行人终止任命合规顾问，并尽可能委任他人取而代之[18]。若合规顾问的委任发生变更，比如终止任命合规顾问/合规顾问辞职或委任新的合规顾问，中国发行人及合规顾问均有义务立即将这些变更告知香港联交所[19]。在委任新合规顾问之前，中国发行人不得终止任命现合规顾问[20]。

(d) 在香港的管理存在

上市规则第8.12条规定上市发行人必须有足够的管理层人员在香港（**“管理层存在要求”**），这一般意味着上市申请人至少须有两名执行董事通常居于香港。但是，由于中国发行人的主要业务及经营活动通常位于中国，他们可能无法满足管理层存在要求。对于这一点，香港联交所保留豁免上市申请人管理层存在要求（**“管理层存在豁免”**）的自由裁量权，且每项豁免申请均将考虑所有事实及情形，逐项加以评估。在行使其自由裁量权时，香港联交所应评估是否已做出充分的安排，以确保香港联交所与潜在上市发行人之间保持定期沟通。通常情况下，下列安排被认为是获得豁免的必要条件：

(i) 上市申请人的授权代表担任与香港联交所进行沟通的主要渠道，且香港联交所可随时联系到授权代表；

(ii) 上市申请人每个董事的详细联系方式均已提供给授权代表，包括手机号码、办公电话及电邮地址，因此当香港联交所希望就任何事项联系董事时，授权代表有办法随时联系到所有董事。

(iii) 非常住香港的董事拥有访问香港的证件或可申请访问香港的有效证件，以便一经香港联交所提出要求即可在合理期间内与香港联交所有关人员会面；

(iv) 合规顾问应担任与联合交易所进行沟通的额外渠道；及

(v) 已向香港联交所提供有关上市申请人每名董事的详细联系方式[21]。

(e) 公司秘书

上市发行人应任命一名公司秘书。公司秘书在上市发行人公司治理中起着关键作用，推动公司遵守上市规则及相关公司法律。由于中国发行人通常不在香港开展业务，且其管理层通常居住在中国，这一点对中国发行人尤为重要。所任命的公司秘书应拥有履行其职责所需专业资质或相关经验。[22]

但是，中国发行人的公司秘书可能不具备必要的资质或相关经验。为捍卫股东利益并推动完善的公司治理，中国发行人可申请免于严格遵守上市规则中与任命联席公司秘书有关的第3.28条及第8.17条（**“联席公司秘书豁免”**）规定，并任命一名合格的人选协助所任命的公司秘书履行职责，且所任命的公司秘书应在上市后三年期间内获取”相关经验”。合格人选应具备专业上市规则第3.28条附注1所规定的专业资质，即其应当为香港特许秘书公会的成员、《律师执业条例》中所定义的事务律师或出庭律师或专业会计师。在三年期间结束时，中国发行人必须证明所任命的公司秘书已获得相关经验，且因此无需进一步协助。

18 上市规则第19A.05(4)条
19 上市规则第19A.05(3)(b)条及第19A.05(3)(c)条
20 上市规则第19A.05(3)(a)条
21 上市规则第19A.15条及香港交易所第GL9-09号指引函指引函，香港联合交易所（2009年7月）。资料来源：https://www.hkex.com.hk/-/media/hkex-market/listing/rules-and-guidance/interpretation-and-guidance-contingency/guidance-letters/guidance-letters-for-new-applicants/gl9-09
22 上市规则第3.28条及第8.17条

(f) 独立非执行董事

所有上市发行人必须任命独立非执行董事，且人数至少应达到董事会的三分之一[23]。中国发行人的独立非执行董事不仅需要令香港联交所确信其具有履行上市规则第3章所需的品格、正直、独立性及经验，还需要证明其具备捍卫股东利益所需的充分商业或专业经验[24]。此外，中国发行人应至少有一名独立非执行董事常住香港[25]。

(g) 授权人士

每个中国发行人必须在其证券在香港联交所上市期间，委任一名授权人士代表其在香港接收法律程序文件及通知书，并须通知香港联交所任何有关该名授权人士的任命、终止任命及其联系方式详情，包括法律程序文件及通知的送达地址、办公电话及住宅电话、电邮及传真，以及前述资料的任何更改[26]。

(h) 接收代理

每个中国发行人必须至少在香港任命一名接收代理，以收取并持有因受托为H股持有人持有的H股而应向股东支付的宣派股利、待付款项及任何款项[27]。

(i) 股东名册

对于所发行的H股，中国发行人应为在香港的H股设置一份股东名册，以便在当地登记H股转让事宜[28]。中国发行人无需为内资股或其他外资股（如有）在香港设置股东名册。

通过在香港设置股东名册，中国发行人应视为已在香港设立了营业地点，并因此必须在设立后的一个月内向公司注册处申请登记[29]。

(j) 监事

根据中国法律，中国发行人可任命监事，对中国发行人的董事会、经理及其他高管进行监督。监事必须可向香港联交所证明其具备担任监事的品格、经验及诚信，并有能力履行监事职责[30]。由于监事在中国发行人重要人士的绩效监督上具有至高无上的地位并可施加相当的影响，上市规则第14A章将监事视为发行人层面的关联人士，这反映了监事在中国发行人中的地位[31]。

(k) 中国政府机构

上市规则规定上市发行人的控股股东有义务披露竞争业务中的利益[32]。但是，由于中国政府机构经常会在中国发行人中持有30%以上的股份，香港联交所通常不会将中国政府机构视作这种披露义务中的控股股东[33]。类似地，中国政府机构不会被归类为上市规则第14A章中的关联人士[34]。

红筹股公司

红筹股公司是将在开曼群岛或百慕大等境外地区注册成立的上市工具用作其控股公司并在香港上市的公司，但这些公司受中国实体及/或个人控制，且大多数业务在中国开展。

23 上市规则第3.10A条
24 上市规则第19A.18(1)条
25 上市规则第19A.18条
26 上市规则第19A.13(2)条
27 上市规则第19A.51条
28 第19A.13(3)(a)条
29 公司条例第622章第776(2)节
30 上市规则第19A.18(2)条
31 上市规则第14A.06(8)条
32 上市规则第8.10(1)条
33 上市则第19A.14条（参见第19A.04条中「中国政府机关」的定义，为澄清之目的，中国政府中参与商业活动或经营其他商业实体的实体将排除在「中国政府机关」之外）。
34 上市规则第14A.10条

下图简要说明了典型红筹股的架构：

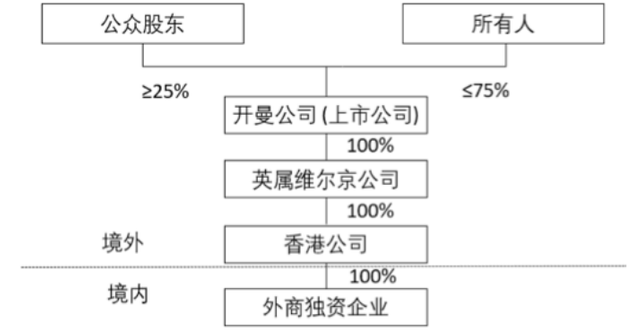

图2：典型的红筹股架构

与H股公司相反，红筹股公司不受上市规则第19A章的约束。相反，这些公司受上市规则第19章（除其他上市规则之外）的监管。就这一点而言，从上市规则的角度来看，由于开曼群岛及百慕大均为普通法域，其公司法与香港公司法在很大程度上类似，红筹股上市比H股上市更加简单。此外，红筹股上市无需获得中国证监会审批，而这是H股上市的强制性要求。除中国证监会审批外，红筹股上市的一般尽职调查程序基本与H股上市相同，且依据表格M104，对于红筹股发行人而言，中国法律意见书也必不可少。此外，红筹股公司可能也需获得管理层存在豁免及联席公司秘书豁免。关于红筹股发行人及H股发行人之间更详细和全面的比较，请参见下文「红筹股上市及H股上市的比较」一节。

10号文-红筹股上市的障碍

从历史上看，中国关于红筹股重组及上市的监管程序较H股发行人简单。但是，由于多个中国政府部门于2006年8月6日联合发布的《关于外国投资者并购境内企业的规定》（以下简称为”**10号文**”）自2006年9月8日实施（并由商务部于2009年6月22日修订），红筹股上市的确定性降低，难度变高。

简而言之，10号文禁止未经中国商务部批准，向中国居民股东直接或间接拥有的境外实体（在进行IPO时，即为未来上市的公司）转让中国企业（所谓的”返程投资”）。根据10号文，红筹股上市面临各种严格的要求及限制，包括：

(i) 通过特殊目的工具（“**特殊目的公司**”）收购中国境内企业的业务或资产，应经商务部审批[35]。

(ii) 中国境内企业为中国境内企业权益的境外上市而在中国境外设立特殊目的公司，应征得中国商务部的核准[36]。

(iii) 持有中国资产的特殊目的公司在境外上市交易应经中国证监会审批[37]。

35 10号文第11条
36 10号文第42条
37 10号文第40条

(iv) 境外上市的收入及红利和资本变动所得收入必须在180天/6个月内调回中国[38]；及

(v) 在通过上市审批后的12个月内未完成境外上市可能导致企业恢复到原持股架构[39]。

由于10号文对中国发行人的境外重组提出了严格的要求及限制，10号文的发布及实施最初被认为将严重缩减（如非禁止）中国企业采用红筹股架构在香港上市。但是，自2006年公布以来已超过十年，在实践中，众多中国发行人在10号文实施后创造性地设计出多种重组方案，实现在香港上市，具体如下：

(a) 利用10号文实施之前设立的红筹股架构

考虑到法不溯及既往的原则，从技术上讲，若红筹股架构设立时间在2006年9月8日（即10号文生效日期）之前设立，则无需中国商务部审批。因此，收购2006年9月8日之前设立的红筹股架构将会使国内企业不受10号文限制。这一方法的知名案例包括瑞金矿业有限公司（0246.HK）、中国忠旺控股有限公司（1333.HK）及天工国际有限公司（0826.HK）。

(b) 实际中国控制人变更国籍

由于10号文仅适用于中国个人，变更中国业务所有人的国籍无疑是一些寻求规避10号文的人士可能采用的方法。但是，在实践中，许多中国创始人可能对放弃原有国籍、获得陌生国家的国籍有所担忧。

(c) 将中国企业变更为合资公司或外资独资企业

10号文仅限制境外公司与境内公司之间的合并及收购，若境内公司转变为中外合资企业或外商独资企业，则这些规则不适用。最常见的方法是为中国境内企业引入外国投资者，境内企业随后变更为中外合资企业或外商独资企业，这就规避了10号文的约束。相关案例包括2011年12月上市的中国天瑞集团水泥有限公司（1252.HK）及2012年4月上市的中国中盛资源控股有限公司（2623.HK，现名为爱德新能源投资控股集团有限公司）。

应当注意的是，只有中国企业属于中国国家发展和改革委员会及商务部联合发布的《外商投资准入特别管理措施》（“**负面清单**”）中所列外商直接投资（“**外商直接投资**”）允许类行业时，这种方法方可直接使用。负面清单的简化版本于2018年6月28日发布，并于2018年7月28日生效，对外国投资开放了更多领域。

(d) 通过可变利益实体（「VIE」）架构进行上市

VIE架构实质上是一种在中国设立且全部或部分归外资所有的架构，这种架构控制着持有在外商直接投资受限行业开展业务所需一切必要许可的中国运营公司（“**中国运营公司**”）。由于外国投资者不得直接投资于这些外商直接投资受限行业或必须获得中国商务部的审批，他们采用了各种合同安排，实际控制着中国运营公司的运营及管理，并确保经济利益直接转回到外资企业。下图说明了典型的VIE架构：

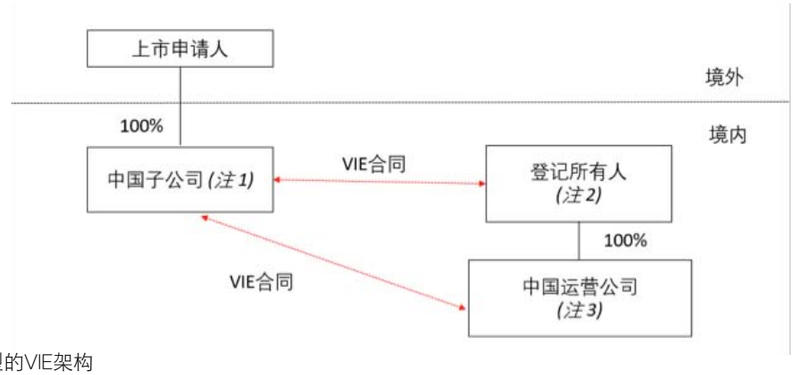

图3：典型的VIE架构

注：

1. 中国子公司为上市申请人的子公司（通常为外商独资企业或中外合资企业），并拥有上市集团的全部知识产权。
2. 登记所有人为中国运营公司的股东，通常为中国公民及上市申请人的控股股东。
3. 中国运营公司注册成立于中国，并拥有开展上市集团之业务的所有运营许可。

尽管境内及外国投资者很久以来一直使用VIE架构「规避」中国审批要求，但从中国法律体系的角度来看，由于中国监管机关未明确禁止，也未明确支持VIE架构，VIE架构的合法性及有效性一直不确定并受到质疑。考虑到这一点，为明确处理VIE架构问题，香港联交所发布了一份指引函及两份上市决策，即港交所第GL77-14号指引函、港交所第LD33-2012号上市决策及港交所第LD43-3号上市决策。特别是，明确了若中国法律未对外国所有权施加限制，中国发行人不得采用VIE架构[40]，且VIE架构仅适用于为应对外国所有权限制而必要的情况[41]。香港联交所已确认VIE架构将在充分评估采纳这种安排的原因后逐案准许，且应符合一些条件[42]，包括但不限于在招股说明书中披露VIE安排的具体细节及所面临的风险[43]。为保护上市公司及投资者的利益，VIE合同安排必须包括授权委托书、争议解决条款及处理中国运营公司资产的权利[44]。进一步地，在法律允许不采用VIE架构即可开展业务的情况下，上市申请人必须尽快解除VIE安排，且若在解除VIE架构的过程中，申请人收购了中国运营公司的股权，中国运营公司的登记所有人必须向上市申请人退还其收到的所有对价[45]。对于VIE架构，中国法律意见书也面临一些要求，包括：

(i) 在相关法律法规明确禁止外国投资者通过使用VIE架构控制或经营外资受限业务（比如中国的在线游戏业务）时，法律顾问关于VIE协议的意见书必须正面确认使用VIE架构不会违反这些法律法规，且根据这些法律法规，VIE协议不会被视为无效。在可行的情况下，法律意见书必须得到适当监管保证的支持，以证明VIE合同的合法性[46]；及

38 10号文第48条
39 10号文第49条

40 港交所第LD43-3号上市决策，香港联合交易所。第17款：资料来源：https://en-rules.hkex.com.hk/sites/default/files/net_file_store/new_rulebooks/l/d/LD43-3.pdf
41 港交所第LD43-3号上市决策第16A段
42 港交所第LD43-3号上市决策第16段
43 港交所第LD43-3号上市决策第15段及第19段
44 港交所第LD43-3号上市决策第18（c）段
45 港交所第LD43-3号上市决策第18（b）段
46 港交所第LD43-3号上市决策第18（A）段

(ii) 若VIE公司在中国开展经营活动，中国法律顾问应正面确认VIE协议不会被视为「以合法形式掩盖非法目的」，从而根据中国法律规定是无效的[47]。

尽管有指引函及上市决策，中国商务部2015年1月19日发布的新《外国投资法（草案征求意见稿）》引发了对VIE架构合法性的担忧，VIE架构的不确定性再次浮现。鉴于这部法律，有意通过VIE架构上市的潜在发行人应尽早寻求香港联交所非正式且保密的指引[48]。

尽管VIE架构仍有不确定性，但可以注意到近年来仍有一些采用VIE架构的中国企业在香港成功上市，比如2018年6月上市的天立教育国际控股有限公司（1773.HK）、2017年4月上市的保集健康控股有限公司（2001.HK）、2017年1月上市的睿见教育国际控股有限公司（06068.HK）及2016年11月上市的中国艺术金融控股有限公司（1572.HK）。

红筹股上市及H股上市的比较

下表列出了红筹股及H股上市之间的主要差异：

	红筹股	H股
中国机关的审批	无需中国证监会审批，但若10号文适用，需经中国商务部审批。	在香港上市需经中国证监会审批。
适用法律法规	香港、红筹股发行人注册成立地及中国（由于业务主要在中国开展）的法律法规。	香港及中国法律法规
适用上市规则	遵守上市规则，但排除上市规则第19A章。	遵守上市规则，包括上市规则第19A章。
上市要求	相同，两种上市方式均应遵守上市规则第8章中列出的财务测试、管理层连续性要求及所有权连续性要求。	
重组	有必要进行海外重组，且需考虑重组的税务影响。	无需进行重组。
待寻求的豁免	管理层存在豁免及联席公司秘书豁免（在适用的范围内）	
流通	在遵守锁定要求的前提下，所有证券均可自由流通（包括上市后创始人的股票）。	未经中国证监会审批，创始人持有的内资股不得在中国境外流通（监管机关正考虑H股全流通）。
股票类别	若未采用同股不同权（Weighted Voting Rights）架构，仅存在一类股票。	至少两类股票（即内资股及H股）。
上市后融资	根据上市规则规定，上市公司不得在上市后六个月内发行新股[49]。 上市之后的股份发行通常无需中国当局的批准，上市后融资更加灵活。	除上市规则的限制外，H股发行人的新股发行需经中国证监会审批。

47 港交所第LD43-3号上市决策第19（k）段
48 港交所第GL77-14号指引函，香港联合交易所。第23段。资料来源：https://en-rules.hkex.com.hk/sites/default/files/net_file_store/new_rulebooks/g/l/gl7714.pdf及港交所第LD43-3号上市决策第22段
49 上市规则第10.08条

有关德恒律师事务所

德恒律师事务所创建于1993年，原名中国律师事务中心，1995年更名为德恒。拥有42个国内外分支机构，160个合作机构和超过2500名法律服务专业人员，是中国规模最大的综合性律师事务所之一。二十七年来，德恒致力于为中外客户提供优质、高效的法律服务，为改革开放、经济建设、依法治国作出卓越贡献。

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李律师在港交所和新交所的上市工作，以及并购、私募股权投资和公司金融交易等范畴，拥有逾20年的丰富离岸和在岸执业经验。李律师于2018年领导团队完成了逾50宗首次公开发售项目；同时，于2019年上半年度，刷新上市交易的总交易价值最高纪录达155亿港元。李律师也荣获不同法律期刊的多项殊荣。客户赞颂李律师「在企业金融、资本市场及投资基金事务，拥有雄厚的执业实力」，并表扬李律师「经验资深；专业知识深厚，以及服务关顾仔细」。客户嘉许李律师为一位「提供既务实又切中重心的谘询意见和服务，为人随和」，以及「是位作风极为务实，具有远见，效率极高的律师」，能为客户提供「透彻了解商业环境，质素卓越的服务」。

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张瑛拥有为不同行业的跨国企业及中国国有企业提供香港及国际税务规划的丰富经验。张女士擅长处理企业重组、收购与兼并和其他涉及香港的跨境交易。

张瑛特别擅长资产管理行业的税务事宜，曾为不少私募股权、风险资本及对冲基金就成立及投资架构，绩效分成筹划以及香港税务局针对基金的税务调查提供专业咨询。张女士亦精通香港离岸基金法例、离岸私募股权基金税务条例、以及刚生效的基金税务条例。

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陈先生拥有近20年的行业经验。他于2015年正式加入中信里昂（该年为里昂证券与中信证券国际合并的一年）。此前，陈先生已经在中信证券国际有限公司担任董事总经理四年。陈先生曾任职于德勤企业财务有限公司、京华山一融资有限公司及派杰亚洲有限公司。陈先生在香港、上海和北京均有工作经验。

陈先生毕业于加州大学，并获得经济学学士学位。

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李航先生是中信里昂证券全球股票资本市场及承销部主管。在中信里昂，李航先生先后主导了多个香港IPO项目，如小米、复星遊文、美的置业和华领医药。除此之外，他还负责过多次二级市场配售项目、大宗交易项目、美国市场上市的财务顾问项目、及许多地区性股权融资项目，其中包括软银集团电信业务在日本的首次公开发行。

在于2013年加入中信里昂前，他曾于野村国际（香港）有限公司任石油天然气化工及金属矿产行业股票分析师3年。并于之前在壳牌石油气化部门开启自己的职业。李先生拥有香港中文大学工商管理硕士学位，以及南丹麦大学机械电子硕士学位。

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林国梁先生担任中信里昂证券董事总经理及股票承销部主管，负责中信里昂证券在各地区的股票资本市场交易的承销工作。林先生于2017年加入中信里昂证券，拥有逾15年的股票资本市场经验。在亚洲（日本除外）地区完成数百宗交易，包括多宗具有里程碑意义的IPO及配售，如阿里巴巴、友邦、中国建设银行、中国铁路总公司、三星物产、中国太平洋保险、中国建设银行与美林及中国移动与沃达丰的二次配售。

林先生在加入中信里昂证券之前任职于花旗，在亚洲（日本除外）资本市场业务发起团队任职5年。在任职花旗前，他曾在瑞银股票资本市场团队任职4年。

林先生毕业于伦敦大学国王学院，并获得数学与管理学士学位。

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孔鑫于2000年获得对外经济贸易大学国际经济法学学士学位，于2000年开始执业，2000年至2005年期间担任通商律师事务所执业律师，自2005年起担任通商律师事务所合伙人，自2017年年起担任通商律师事务所管理合伙人，是制造业，金融及商业，化工，工程，新媒体，消费品，房地产，教育和医疗等行业以及项目融资，并购，重组及上市，公司业务，金融，证券，银行，境外投资等领域最专业的律师之一。

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王波毕业于北京大学，在医疗健康领域有几十年的从业经验，完成了信达生物，康希诺生物，锦欣生殖等着名生命科学及医疗企业的上市，并为KKR，黑石集团及摩根士丹利等在多个并购项目中提供专业的法律服务。王波于2019年被LEGALBAND称为中国医疗健康和生命 科学领域的杰出律师，并于2016年和2017年被《商法》杂志评为百佳优秀律师。

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张新阳一直致力于TMT和互联网行业（“新经济产业”），在新经济产业的多个领域拥有丰富的经验，包括但不限于电子商务，人工智能，大数据，云计算，物联网，共享经济，互联网医疗，新零售，文化娱乐，智能硬件和知识经济。作为领先的中国律师，张新阳在新经济产业中得到广泛认可，并参与了许多具有重大意义的交易，这些交易对相关市场产生了深远的影响，并改变，塑造了相关产业结构。

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毕秀丽律师具有六年法官及十六年的律师工作经验，擅长资本市场的非诉和诉讼业务，包括内部外部上市，并购，重组，投资以及证券，金融，投资有关的诉讼，仲裁业务；是少有的实际境内外资本市场，能将非诉与诉讼经验融会转变于法律服务的律师。

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钟律师拥有香港及英国律师执业资格，从事公司法及商业法业务已有逾18年经验。钟律师就商业及公司事项提供法律建议的经验非常丰富，相关的法务工作包括于香港进行的首次公开发行，首次公开发行前投资，收购合并及上市公司遵从上市规则办法。在创立钟氏律师事务所前，钟律师曾于大型着名律所工作。钟律师更于2004年获得由香港证券专业学会（现称为香港证券及投资学会）提交的“香港证券专业学会高级从业员资格证书 - 机构融资”。

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纪律师经常为客户提供某种形式的企业及商务建议，包括公司上市，首次公开发行前投资及收购合并。纪律师亦擅长为在香港联合交易所有限公司主板及创业板上市的发行人及私营企业提供合规谘询。

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承婧芃，国浩上海办公室合伙人，英国华威大学法学硕士。从事法律工作10年，主要从事资本市场的法律服务，在企业发行上市、再融资、跨境投资、收购与兼并、资产重组等领域有丰富的经验。

张颖文
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张颖文，国浩上海办公室律师，英国伦敦国王学院法学硕士，主要从事企业发行上市、跨境投资、收购与兼并等法律服务。

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袁军作为iDeals亚太区的负责人，在VDR行业有多年从业经验。致力于提供最安全的环境，以便客户安心上传机密文件；提供最专业的支持，使项目能够高效的完成。

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杨明皓是竞天公诚律师事务所有限法律责任合伙的合伙人，她的专业领域包括资本市场交易、并购、证券、公司和合规事务。在加入本所前，杨女士在一家领先的国际律师事务所工作了超过七年，并在香港交易及结算所有限公司上市科工作了超过四年。她参与了许多宗香港的首次公开招股个案和完善政策。她还为香港联合交易所主板上市的多家公司提供了香港法律谘询服务。

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骆嘉昀是竞天公诚律师事务所有限法律责任合伙的合伙人，他专注于香港资本市场和证券交易。在加入本所前，他在一家领先的国际律师事务所工作。他的经验包括为首次公开招股、股份配售、供股、债券发行、上市公司的收购、私有化以及与香港联合交易所和香港证券及期货事务监察委员会有关的其他公司合规工作提供建议。他特别涉足于医疗保健、教育、科技、媒体和电信及房地产领域。

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容璟瑜
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容璟瑜律师是林朱律师事务所有限法律责任合伙的合伙人，于一般公司业务事宜及企业融资交易包括首次公开发行、兼并及收购、私募投资、公司重组及各种受香港上市规则及收购守则所监管的交易拥有丰富的经验，于IFLR1000法律顾问排行榜中获评选为2019年年度“备受注目”的香港执业律师。

王侠
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王侠律师是林朱律师事务所有限法律责任合伙的合伙人，他在首次公开发售股份、兼并及收购、私募投资、上市后集资活动、公司重组及各种受香港上市规则及收购守则所监管的交易拥有丰富的经验。

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张国明律师是本所的公司及商业部门主管，他在公司及商业法范畴拥有丰富经验，包括企业融资、合并及收购、证券、期货及基金、票据及债券以及银行及融资方面的法律事务。他拥有超过20年广泛而扎实的经验，为不同为客户提供法律意见，包括协助监管机构、金融机构及上市公司就处理跨国公司并购。张律师亦熟识企业融资事务，例如风险资本融资、首次公开招股前投资、首次公开招股、上市后集资、上市公司合规事宜，以及在香港、中国内地及其他不同司法管辖区进行收购。

张国明律师曾获评为Asialaw优秀律师（一般法团事务）。

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黄丽文律师是建立本所企业融资业务的成员之一。黄律师擅长处理上市事宜，曾在不少港交所主板和GEM的上市项目中代表上市申请人或保荐人。在短短几年间，黄律师已成功完成超过二十个上市项目，当中包括H股企业、红筹、香港本土企业，海外企业上市等。

黄律师在公司及商业事务方面拥有广泛经验，包括上市前重组及投资、首次公开招股、二次集资、海外上市、收购及合并、贷款及融资交易、《证券及期货条例》规定的牌照及注册事宜，以及上市公司及私人企业的企业管治以及一般合规事宜等。

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张律师亦会就涉及遵守香港《上市规则》及《公司收购、合并及股份购回守则》的商业交易为上市公司提供意见。

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李诺谦先生拥有8年企业及财经公关经验，服务的客户来自包括新经济、医疗、金融、消费、地产等行业，主要负责公司的国际项目管理、市场开拓及客户公关策略，对上市客户及政府机构需求有深入的了解和丰富的经验。

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赵宇彤小姐曾先后于传媒及公关界任职，对于媒体沟通和议题策划具有相当丰富的经验。赵小姐目前主要负责企业上市过程中的客户管理、公关媒体策略制定和执行、传媒的关系管理和危机处理等。尤其对于中国企业海外拓展中涉及到的媒体议题拥有丰富的经验。

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魏伟峰博士是方圆的始创人及集团总裁。他拥有逾三十年独特的企业及专业经验，曾在多个行业的上市公司出任要职，包括公司秘书，执行董事及首席财务执行官等。为 着名财务及公司治理专家，他经常被应邀在中，港两地就监管，公司治理，内控等方面演讲。

魏伟峰博士曾出任香港特别行政区经济发展委员会专业服务业工作小组非官首成员（2013-2018），香港特许秘书公会会长（2014-2015），香港上市公司商会常务委员会成员（2014年至今），香港会计师公会专业资格及考试评议局成员（2013-2018），香港树仁大学法律系兼任教授（2013-2017）及中国财政部会计谘询专家。

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余伟忠先生是方圆ESG项目的副总监，主要负责环境、社会及管治(ESG)谘询部门，专门提供有关设计和实施可持续发展项目和撰写可持续发展报等相关服务。他是国际可持续发展专家协会（ISSP）所认证的ISSP可持续发展协会会员，也是企业责任与可持续发展研究所（ICRS）的成员。

余先生在制定和执行公司的可持续发展策略和行动计划、持份者参与、供应链可持续发展和废物管理方面拥有丰富的经验。

他拥有多年的相关经验，曾为香港、中国大陆和亚太地区多种不同业务的企业提供低碳和可持续发展方面的专家支持和策略性指导，包括:

- 酒店
- 企业集团
- 制造业
- 物业及房地产发展
- 物流和供应链
- 贸易及零售

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