具体上市事宜

规划、执行、管理首次公开招股是一项充满挑战的任务。筹备工作做得越充分，公司上市的过程就会更有效率，也会更节省开支。因此，拟发行人在首次公开招股的初始阶段提前了解有关上市事宜并加以应对，至关重要。

由于上市的具体情况、公司的性质以及所处行业的特点各不相同，尤其当香港证券市场或将进行改革时，不同的问题和挑战便随之产生。本章讨论拟进行的改革及拟发行人在上市时可能遇到的一些具体上市事宜。

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1. 监管机构联合就上市监管决策及管治架构发表谘询文件

谘询背景

香港股票市场在过去十年经历了大幅增长。由2005年至2015年，在香港联合交易所有限公司（「联交所」）上市的公司数目，由1,135家增加64%至1,866家，总市值则由8.18万亿港元上升三倍至24.684万亿港元。[1]多年以来，联交所既是营利性的交易所，同时在香港股票市场上扮演着监管的角色，引起市场质疑联交所有潜在的利益冲突。同时，联交所和证券及期货事务监察委员会（「证监会」）具有重叠的权力和职能，因为它们都对上市申请和招股章程的披露进行审查和反馈意见。证监会及联交所于二零一六年六月刊发《联合谘询文件 - 建议改善香港联合交易所有限公司的上市监管决策及管治架构》（「谘询文件」）向公众寻求对上市监管改革建议的看法。据说，改革建议是为了让联交所与证监会之间在重要上市事宜上更好地进行协调和达成共识，以及确保监管过程中的效率、透明度和问责机制。

现行制度

根据现行制度，联交所是规管首次公开招股的前线监管机构。联交所将与上市事宜有关的权力及职能下放给上市委员会，该上市委员会现时由 28 名成员组成，包括投资者、上市公司及市场从业员的代表，以及作为当然成员的香港交易及结算所有限公司（「港交所」）行政总裁。[2]上市委员会的组成让联交所能够在制订政策及作出监管决策时，借助市场使用者的商业及业务知识和经验。同时，由于上市委员会的成员通常会有其他全职专业职务在身，只能兼任委员，故上市委员会将一系列的上市权力和职能下放给一个全职负责上市规则日常管理工作的执行机构——上市部。

1.《联合谘询文件 - 建议改善香港联合交易所有限公司的上市监管决策及管治架构》第10页

2. 有关上市委员会各成员的简介，请参阅https://www.hkex.com.hk/chi/listing/listcomrpt/listcomrpt_bio/lc_member_bio_c.htm

另一方面，证监会亦在上市申请方面扮演着监管的角色。根据《证券及期货(在证券市场上市)规则》(香港法例第571V章）（《证券市场上市规则 》），上市申请人及上市发行人必须透过联交所向证监会提交申请及披露资料。目前，除了联交所的意见外，证监会通常也会就上市申请及招股章程披露的事宜另外提出意见。虽然证监会在上市委员会中没有任何正式代表，但上市委员会只会在两大监管机构的所有意见均获满意地回复后才举行上市聆讯，以考虑是否批准上市申请人的上市申请。证监会在上市规管方面的权力和职能也由（a）《证券及期货条例 》（香港法例第571章）赋予的调查及执行权力;及（b）《证券市场上市规则 》赋予的有权反对任何证券上市及暂停股份买卖或要求上市公司除牌的权力所补充。

谘询文件所载的主要建议

谘询文件提出以下主要建议：

1. 联交所将会保留上市职能，并继续作为上市事宜的前线监管机构。上市委员会联同上市部，将继续审批大部分上市申请及处理上市后事宜。
2. 两个新的联交所委员会将会成立，证监会及联交所在委员会中将拥有相同数目的代表：
    a. 由证监会及上市委员会的代表、港交所行政总裁以及收购及合并委员会主席组成的上市政策委员会将会提供一个平台，让相关的监管机构协调、合作及共同制订能够更迅速地应对现今监管需要的上市政策；及
    b. 由证监会及上市委员会的代表组成的上市监管委员会将会就涉及合适性问题或具更广泛的政策影响的个案作出决定。
3. 上市申请的审核及批准程序将会更精简，证监会将不再常规性地就上市申请人的法定存档另行发表意见。
4. 就联交所内的决策订立更清晰的问责安排。

市场反应

市场对谘询文件的反应呈现两极化。一方面，一些市场人士欢迎改革建议，认为改革有助提高在联交所上市的公司之质素和香港股市的声誉，以及简化不涉及合适性问题或具更广泛政策影响的首次公开招股申请的审批程序。另一方面，很多市场人士担忧，建议的改革会给证监会太多的权力，或遏止新股市场的发展。建议改革的必要性和合法性也受到争议。值得注意的是，上市委员会本身已经就谘询文件作出回应，代表上市委员会的多数意见，指出其对于建议的变动能否实现改革的目标存疑。市场正等待联交所和证监会公布这个影响着香港股票市场未来的谘询结果。

2. 红筹上市

何谓红筹和H股？

在联交所上市的中华人民共和国（「中国」）企业，包括「H股公司」和「红筹公司」。H股公司是指在中国境内注册成立的股份有限公司，并经中国证券监督管理委员会（「中国证监会」）批准在香港上市。而红筹公司则是指在中国境外（通常是香港、开曼群岛、百慕大）注册成立的公司，但大部分业务位于中国，并通常受中国实体控制。由于在公司重组和上市程序方面或需要取得中国相关机关审批，因此，中国企业在香港上市的程序通常较香港企业更为复杂。

10号文 - 红筹公司上市需要克服的难关

过去，中国有关红筹公司重组和上市的监管程序比H股公司简单。然而，在2006年8月《关于外国投资者并购境内企业的规定》（通称「10号文」或《并购规定》）出台后，红筹公司的上市程序变得越来越复杂。

10号文由中国商务部、国务院国有资产监督管理委员会、国家税务总局、国家工商行政管理总局（「国家工商总局」）、中国证监会以及国家外汇管理局（「外管局」）于2006年8月8日颁布，于2006年9月8日实施，并于2009年6月22日经中国商务部修订。根据10号文，红筹企业须在上市的几个阶段中取得中国商务部批准，包括：

- 中国境内企业在中国境外设立特殊目的公司，以作中国境内企业权益于境外上市的用途；[3]及
- 有关特殊目的公司收购中国境内企业的业务和资产。[4]

此外，10号文恢复红筹上市计划需经中国证监会批准的规定[5]（过往有关中国证监会须出具无异议函的规定曾于2003年被取消）。此外，根据10号文的框架，在境外成功上市的公司必须在预定期限内将所得款项调回中国。即使企业获得上市批准，如未能于获批准后12个月内完成境外上市，有关企业将恢复到原来的股权结构。[6]

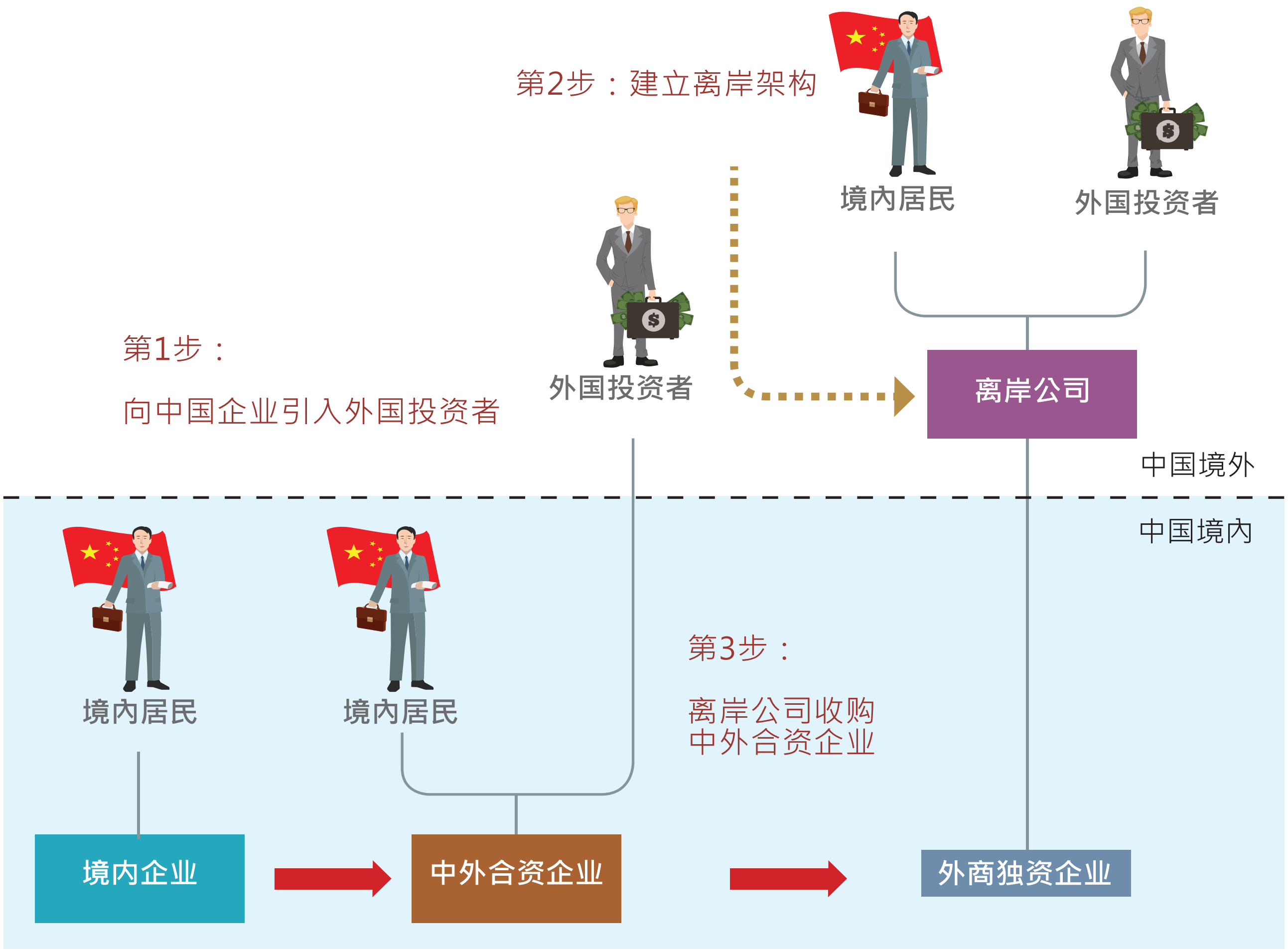
3. 10 号文第 42 条
4. 10 号文第 11 条
5. 10 号文第 40 条
6. 10 号文第 36 及 49 条

红筹上市的突破性进展

市场最初预期，10号文的严格规定和限制将会抑制在10号文实施日期（即2006年9月8日）前尚未完成红筹结构的中国企业在境外上市。然而，在过去十年中，我们已见证到不同中国企业通过多项巧妙的重组计划，避免10号文在香港上市中适用，例如建立可变利益实体、通过收购2006年9月8日以前建立的红筹结构，或通过中国企业拥有者获得外国公民身份等。这些重组计划都有自己的缺点和局限性。

在2012年，红筹上市出现创新的突破，带领红筹上市进入一个新的时代。当年，中国中盛资源控股有限公司（现名为爱德新能源投资控股集团有限公司）（股份代号：2623）上市，透过向有关中国境内企业引入外国投资者，从而将该境内企业转变成中外合资企业，随后再转为外商独资企业，以搭建其红筹架构。由于这家企业是在2010年（即在10号文的实施日期后）才开始搭建其红筹架构，其成功上市可谓已把10号文变成无牙老虎。[7]类似的方法亦在中国天瑞集团水泥有限公司(股份代号：1252)上市时采用。

下列图表概括了案例所涉及的关键重组步骤，以作说明：



7.《中盛资源控股“红筹”新路径》，《公司金融》2012年9月刊

中国中盛资源控股有限公司上市后，市场最初认为，相关外国投资者应持有中国相关企业至少25%的股权，以确保10号文对其不适用。但是，要找到有意收购其业务25%的投资者并不容易，也没有多少中国企业拥有者愿意在上市之前将其业务25%的股权出售予第三方。2014年，嘉士利集团有限公司（股份代号：1285)(「嘉士利」）的上市解答了这些问题。

在嘉士利的重组过程中，一名新加坡公民以外国投资者身份，通过特殊目的公司收购相关中国企业仅1%的股权（「1%收购」）。该中国企业转化为外商投资比例低于25%的中外合资企业，并随后转为外商独资企业。根据嘉士利的招股章程，当地商务部口头确认：

- 10号文第十一条（即境内公司、境内企业或境内自然人以其设立或控制的境外公司名义收购与其有关系的境内公司必须得到商务部审批）不适用于1%收购；及
- 1%收购完成后，该中国企业被转换成中外合资企业，进一步的股权收购不应受10号文规管。

集一家居国际控股有限公司（股份代号：1495)于2015年11月成功上市，其中涉及外国投资者收购相关中国企业3.43%的股权，是采用类似重组计划的另一个例子。

参考以上上市案例，中国境内企业可以更容易地实现海外上市。

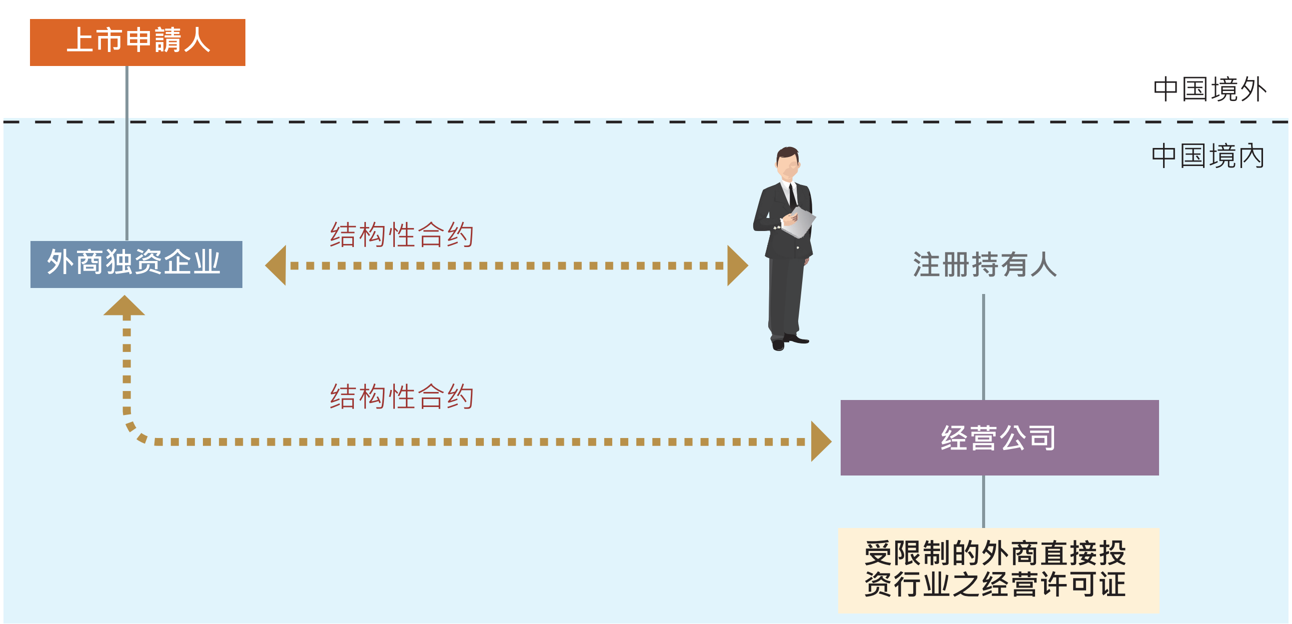
3. 深入研究可变利益实体结构的可行性

何谓可变利益实体结构？

可变利益实体结构一直是外资间接投资于中国限制外商直接投资的行业之方法。此外，可变利益实体结构一直被采纳，使得从事外商直接投资受限制的行业的中国企业能够在境外上市。2000年，新浪网通过采用可变利益实体结构，成功将其增值电信业务于纳斯达克上市，创造了「新浪结构」。此后，可变利益实体结构被推广到其他行业，如出版、广播、媒体、煤矿和互联网业务。

实质上，可变利益实体结构是指：在中国境内设立的全部或部分外资拥有实体，对持有在外国直接投资受到限制的行业运营的必需许可之中国境内企业有控制权的结构。通过各种合同安排，对中国境内企业的运营和管理的实际控制权以及经济利益转移到外资实体。在各种采用可变利益实体结构的红筹上市之过程中，因不涉及收购相关中国境内企业，10号文被相关发行人解释为不适用。

典型的可变利益实体 / 结构性合约安排



可变利益实体结构能否在香港上市？

由于可变利益实体结构没有得到中国当局的明确许可，可变利益实体结构的合法性存疑。在2010年和2011年，中国国际经济贸易仲裁委员会上海分会作出两项仲裁裁决，裁定若干可变利益实体协议无效，因其违反了中国法律明文禁止外国投资者控制和参与限制外商直接投资的业务的规定，并构成「以合法形式掩盖非法目的」。[8]此外，在2013年6月，中国最高人民法院在一宗涉及华懋金融服务有限公司的争议中，亦以类似理由裁定相关委托协议无效。[9]鉴于这些仲裁裁决和法院判决，可变利益实体结构能否在香港上市曾存在不明朗因素。

随着2012年至2016年间多个企业采取可变利益实体结构成功在香港上市，以上不明朗因素一扫而空。[10]联交所还发布了一份指引信和两项上市决策，澄清在充分考虑采用可变利益结构安排的原因后，可变利益实体结构的上市申请将按每一个别情况而获审批，而招股章程须披露可变利益实体结构的相关细节及涉及的风险。[11]联交所采纳的审查标准概述如下：

合约安排范围	合约安排的设计应严限于达致申请人的业务目标，以及把与中国相关法律法规发生冲突的可能性减至最低。[12]
合规保证	联交所将审查上市申请人的合法和守规纪录(如有)、管理机制和企业管治常规、其在维护股东权益方面的纪录、其财务资源，以确保其遵守适用的法律和法规。[13]
监管保证	如可以提供而又实际可行，申请人须向有关监管机构索取适当的监管确认。如没有此等监管确认，申请人的法律顾问须作出声明，表明根据其法律意见，其已采取所有能够采取的行动或步骤以达到其当时的法律意见。联交所咨询申请人及保荐人后，亦可考虑接受其他相关形式的保证。[14] 若有关法律法规明文禁止外国投资者使用任何协议或合约安排以获得限制外商投资企业的控制权或经营权的，中国法律顾问对结构性合约的法律意见必须包括一项正面确认，确定使用结构性合约并不构成违反该等法律法规，或结构性合约根据该等法律法规不会被视为无效，如不会在中国《合同法》下被视为「以合法形式掩盖非法意图」而属无效。[15] 如有可能，法律意见必须有适当的监管保障的支持，以证明结构化合同的合法性。[16]
外资拥有权限制以外的要求	若涉及限制业务，结构性合约的采用只限于解决外资拥有权规限，才会获批准（例如境外投资者只可通过合资形式营运限制业务，当中外资占投资总额及股权的比例低于50%)。至于外资拥有权规限以外的其他规定，申请人须令联交所信纳其已按法律顾问的意见，在上市前对所有适用规则下的规定作出合理评估，并采取一切合理步骤加以遵守。[17]

8. 《贸仲上海第一起VIE仲裁案》，《商法》2012年12月/2013年1月刊
9. 《最高院判决再触VIE敏感神经》，《商法》2013年7月/8月刊
10. 例子包括：于2016年1月上市的年年卡集团有限公司（股份代号： 3773），于2016年1月上市的成实外教育有限公司（股份代号：1565），于2016年11月上市的中国艺术金融控股有限公司（股份代号：1572）以及于2017年1月上市的睿见教育国际控股有限公司（股份代号：6068）
11. 港交所指引信GL77-14、港交所上市决策LD33-2012及港交所上市决策LD43-3
12. 港交所指引信GL77-14第16(a)段及港交所上市决策LD43-3第13(b)段
13. 港交所上市决策LD43-3第13(c)段
14. 港交所指引信GL77-14第16(a)(ii)段及港交所上市决策LD43-3第13(d)段
15. 港交所指引信GL77-14第16(a)(ii)段
16. 港交所指引信GL77-14第16(a)(ii)段及港交所上市决策LD43-3第18A段
17. 港交所指引信GL77-14第16(a)(i)段及港交所上市决策LD43-3第16A段

结构性合约要求	结构性合约应包括授权书和适当的争端解决条款，对仲裁以及有权要求作出支持仲裁庭未决仲裁或在适当的情况下要求作出临时补救措施作出规定，并涵盖处理经营公司资产的权力，以保护上市申请人和其继任人（包括清盘人）的权利。[18] 经营公司的股东向申请人的董事及其继任者（包括代替申请人董事的清盘人）授出的委托书应包括有权行使经营公司股东的所有权利（如在股东会议上投票、签署会议记录、向有关公司登记处提交文件）。经营公司的股东应当确保委托书不会导致任何潜在的利益冲突。若经营公司的股东是申请人的人员或董事，授权书应授予申请人的其他不存在关联关系的人员或董事。[19]
披露要求	港交所上市决策LD43-3列明申请人应在招股章程中披露的事宜。[20] 招股章程至少应包括以下与结构性合约相关的风险因素： (i)政府或裁定结构性合约不符合相关法规； (ii)结构性合约未必能提供与直接拥有权相同效力的控制权； (iii)国内股东或会与申请人有潜在利益冲突；及 (iv)结构性合约或会被税务机关裁定须缴付额外税项。[21]
其他	联交所规定，在法律允许无需结构性合约也可运营企业时，使用结构性合约的任何申请人及其保荐人应解除结构性合约。[22]

中国《外国投资法》草案对可变利益实体结构上市的影响

商务部于2015年1月19日发布了中国新《外国投资法》的草案征求意见稿，使可变利益实体结构的合法性及有效性引起了关注。根据中国《外国投资法》草案，「外国投资者」的定义包括由非中国国籍的自然人、于其他司法管辖区注册成立的企业、外国政府机构及国际组织实际控制的中国境内企业，而「外国投资」的定义扩大到涵盖外国个人或实体对中国境内实体的所有形式的控制，特别是没有股本所有权情况下的间接控制。[23] 因此，可变利益实体结构将受到中国新《外国投资法》管辖。中国《外国投资法》草案规定了通过可变利益实体结构从事在《外商投资产业指导目录》的「禁止类」范围内的业务之法律后果。[24]

商务部在中国《外国投资法》草案的解释性说明中谈到了现有可变利益实体结构的问题，并提出了三种方案：[25]

(1) 向商务部提供结构性合约的详情，确认实际控制人为中国投资者或一群中国投资者从而保留现有可变利益实体结构；

(2) 向商务部提交申请，经商务部确认实际控制人为中国投资者或一群中国投资者后获得其批准，从而保留现有可变利益实体结构；或

(3) 现有可变利益实体结构向商务部申请获得准入批准，商务部根据具体情况并考虑可变利益实体结构的最终控制人身份确定是否批准。

由于中国《外国投资法》草案出台，联交所鼓励现有的采用可变利益实体结构的发行人和拟使用可变利益实体结构拟发行人尽早寻求联交所的非正式及保密的指引。[26] 因此，采用可变利益实体结构并决定在相关中国法的例可能出现变化前完成上市计划的拟发行人应时刻关注监管的动向，并寻求适当的法律意见。

18. 港交所上市决策LD43-3第18(c)段
19. 港交所指引信GL77-14第16(b)段
20. 港交所上市决策LD43-3第19及20段
21. 港交所上市决策LD43-3第 20段
22. 港交所上市决策LD43-3第18(b)段
23. 中国《外国投资法》草案第11及15条
24. 中国《外国投资法》草案第144、147及148条
25. 中国《外国投资法》草案说明第3(3)段
26. 港交所指引信GL77-14第23段及港交所上市决策LD43-3第22段

4. 对在联交所创业板上市的特别关注

创业板上市的问题

近年来，于创业板上市的股份在上市后出现股价不寻常波动，证监会与联交所对此表示深切关注。根据由证监会于2017年3月13日发出的《有关近期创业板上市申请人的声明》，在2016年的45宗创业板上市中，有36宗为仅以配售方式上市。仅以配售方式进行的创业板首次公开招股于首日的平均股价（与配售价比较）的变动为上升656%，其中最高的升幅更达2005% 。在该36宗仅以配售方式进行的上市中，有30宗的股价于挂牌首日录得100%或以上的升幅。而截至2017年1月31日为止，当中有九宗上市的股价较其首日收市价下跌超过90%，另外十宗的股价则是于同日下跌50%至90%。

除此之外，监管机构亦对创业板股权呈现高度集中和股东基础狭窄的状况表示关注。证监会观察到在2016年仅以配售方式进行的创业板上市中，首25名承配人持有的股权占配售股份总数的70.0%至99.6%。

证监会与联交所发出的指引及联合声明

鉴于创业板股份出现大幅股价波动，证监会在2017年1月20日向参与创业板股份上市及配售的保荐人、包销商及配售代理发出了一份指引，并与联交所发表了一份联合声明。[27]

该联合声明提醒新上市申请人，应确保遵守《香港联合交易所有限公司创业板证券上市规则》（《创业板上市规则》）上所载有关配售安排的监管规定、确保符合有关寻求上市的证券必须有一个公开市场的规定，以及有关由不同方面的人士持股的规定和有关公众持股量的规定。尤其在确保寻求上市的证券必须有一个公开市场时，上市申请人应该：

1. 除其他事项外，经征询保荐人的意见后，小心谨慎地就下列事项作出决定 ：

   (a) 上市方式，特别是除配售部分外，新申请人应否采取发售以供公众人士认购或向公众人士发售现有证券的上市方式；

   (b) 目标投资者类别及承配人组合（例如，新申请人或会表明其属意配发予长期投资者而非短期投资者，或配发予机构投资者而非散户投资者的股份比例）；

   (c) 整体策略和配发基准，藉以营造一个公开的市场及使其证券由不同方面的人士持有，并确保由公众持有的股份百分比符合《创业板上市规则》的相关规定。这一般也包括在考虑包销商或配售代理的客户基础、胜任能力、资源、往绩和配发策略后，挑选适当数目的包销商或配售代理；及

   (d) 提供予承配人的任何优惠待遇（在财务或其他方面）及上市文件的相关披露；

2. 就上面所述的事项保留适当的文件；

3. 寻求包销商及配售代理的协助，以采纳一个适当的策略和配发基准， 藉以营造一个公开的市场及避免其股份出现股权过度集中；及

4. 在招股章程列出所有已获委任的包销商和配售代理以及其联络详情，以便向投资者提供关于可用的分销渠道的额外资料。[28]

近期就创业板上市所采取的监管行动

在证监会与联交所的联合声明出台后，监管机构向不同的创业板上市申请人，特别是仅以配售方式进行的上市申请人，采取监管行动。由于监管机构就是否符合公开市场之规定作出查询，三个上市计划因此被延后并最终失效。[29] 一个上市计划因股份价格明显高涨，被证监会质疑该等股份的交易是否存在一个公开市场，因此在开始交易后的第一个早上即被停牌。[30] 而另一个上市计划则因监管机构的查询而被延迟并最终失效。[31] 根据《证券市场上市规则》第6(2)(d)条，证监会被赋予在股份上市并不符合公众利益的理据下，反对该等股份上市的权力。

监管机构采取行动加强市场信心当然无可厚非，但欠缺明确指引的严厉监管措施对市场来说则是弊大于利的。香港股票市场的优势之一正是一套既明确且客观的上市资格。没有法律条文支持的潜规则是不应在上市监管中存在的。

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27. 由证监会与联交所在2017年1月20日发出的《有关创业板股份股价波动的联合声明 》
28. 由证监会与联交所发出的《有关创业板股份股价波动的联合声明》第18段
29. 详见心心芭迪贝伊集团有限公司(股份代号: 8297)分别于2017年2月3日及2017年2月27日发出的公告； 尚捷集团控股有限公司(股份代号: 8183)分别于2017年2月7日及2017年2月27日发出的公告；及浩柏国际（开曼）有限公司(股份代号: 8431)分别于2017年2月13日及2017年2月27日发出的公告
30. 详见骏杰集团控股有限公司(股份代号: 8188)于2017年2月22日发出的公告
31. 详见象兴国际控股有限公司(股份代号: 8157)分别于2017年2月27日及2017年3月30日发出的公告

5. 上市的合适性

「七宗罪」

联交所对有多家上市发行人在上市后监管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表示关注。此现象可能是由于该等发行人着眼于其上市地位所带来的利益而引发的。这或有可能导致市场上出现投机买卖、操控股价、内幕交易、不寻常波动及借壳上市等情况。在2016年6月，联交所发布了一份指引信 (HKEx-GL68-13A)，针对被质疑是否适合上市的申请人，列明其七个特点。联交所将会对这类申请人作出特别重点审查。这七个特点被行内称为「七宗罪」。

应对「七宗罪」

在大部分创业板上市中，联交所会预期上市申请人以指引信HKEx-GL68-13A为参考，对其是否适合上市提供分析。以下为上市申请人应注意的几个要点：

1. 低市值

创业板上市申请人应在上市时具备至少一亿港元市值。[32]就2016年1月至2017年2月期间于创业板上市的公司来说，在不考虑个别例外的情况下，[33]平均市值为大约2.79亿港元。[34]上市申请人应查核其计划上市的市值是否合乎市场惯例。

2. 仅勉强符合上市资格规定

创业板上市申请人必须具备足够至少两个财政年度的适当编制的营业纪录，及且从日常及正常业务经营过程中产生净现金流入（但未计入调整营运资金的变动及已付税项），其在刊发上市文件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2,000万港元。[35]上市申请人应考虑其营业现金流是否远高于上市的最低标准。特别应注意的是，联交所可能会忽视重大不合规事件所牵涉的收入。

3. 集资额与上市开支不合比例

在2016年1月至2017年2月期间于创业板上市的公司，其上市费用占总收益的比例由16.4%至67.2%不等，平均约为35.6%。上市申请人应考虑募集资金规模，上市费用占募集资金的比例是否恰好，及符合市场情况。

32.《创业板上市规则》第 11.23(6) 条

33. 因中国数字视频控股有限公司（股份代号：8280）及兴证国际金融集团有限公司（股份代号：8407）于上市时市值分别为大约11.78亿港元及53.2亿港元，故此被列为个别例外的情况

34. 创业板上市的资讯载列于www.hkgem.com

35.《创业板上市规则》第11.12A(1)条

4 . 仅有贸易业务且客户高度集中

上市申请人应注意，联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，联交所将考虑以下因素来确定依赖是否会对上市的适用性产生影响：

- 申请人可否随意改变业务模式來减少倚赖的程度，例如寻找替代客户的能力；
- 申请人是否有计划令其业务重点多元化以减少倚赖的程度；
- 整个行业是否由少数公司操控；
- 申请人能否证明有关的倚赖是双向而且相辅相成；及
- 在有所倚赖的情况下，申请人将來是否仍有能力保持收益。[36]

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资产比率是否符合其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：申请人的业务只是按地区、产品组合或不同开发阶段等刻意从母公司业务划分出来

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结构中排除。如果排除业务的划分过于表面，联交所可能会关注。特别是，上市申请人应注意，因为被排除的公司存在重大不合规事宜，或者因亏损交易而将其排除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

一般来说，联交所希望所有上市申请人能够透过其日常业务自行产生的资金及银行融资以支持他们的营运成本。上市申请人还应考虑引入首次公开招股前投资者是否有利。

其他合适性问题

上市规则规定，上市申请人及其业务必须属于联交所认为适合上市者。[37] 虽然在决定什么会使上市申请人及其业务不适合上市方面没有任何硬性准则，但联交所已发出若干指引信和上市决策，以在此方面提供指引。除上文所述的七宗罪外，以下情况较可能引起联交所对上市的合适性的关注：

- 对于董事及控股股东是否胜任存在怀疑，尤其是若其过往纪录或定罪令人严重质疑个别人士的诚信，而该人士很可能对上市后的申请人发挥重大影响力；[38]
- 申请人有计划地、存心及 / 或重复违反法例及规例，例如: 违规票据融资；[39]
- 营业纪录期后财务表现倒退，或鉴于溢利预测中的溢利大幅倒退，营业纪录业绩不反映业务前景；[40]
- 对母公司集团 / 关连人士 / 主要客户的依赖，在若干重要功能例如销售及采购功能上依赖母公司集团；或在财务及营运上依赖申请人的母公司；[41]
- 申请人存在与母公司的董事重叠、两者又属同一行业，且并无设立足够安排管理利益冲突及分隔业务等倚赖母公司的情况；[42]
- 申请人大部分营业额及纯利均源自密切关连方及关连人士的交易；[43]
- 过份依赖主要客户；[44]
- 受制的业务模式，即申请人主要原材料的采购及其主要客户渠道均涉及同一方；[45]
- 从事赌博业务而不符合联交所有关《涉及经营赌博业务的上市申请人及 / 或上市发行人》的公告及《2006 年上市委员会报告》所载的规定；[46]
- 合约安排不符合港交所上市决策LD43-3所载条件；[47]
- 依赖未变现公平值收益以满足盈利要求；[48]及
- 不可持续的业务模式。[49]

具有上述特点的上市申请人应尽早咨询专业顾问以规划其上市申请。

36. 港交所上市决策LD107-1
37. 《主板上市规则》第8.04条及《创业板上市规则》第11.06条
38. 港交所指引信GL68-13第3.2(1) 段 及港交所上市决策LD96-1
39. 港交所指引信GL68-13第3.2(2) 段，港交所上市决策LD50-5，港交所上市决策LD97-1 及港交所上市决策LD19-2011
40. 港交所指引信GL68-13第3.2(3) 段, 港交所上市决策LD73-2013及港交所拒纳信RL19-07
41. 港交所指引信GL68-13第3.2(4)(i) 段, 港交所上市决策LD46-1, 港交所上市决策LD46-2, 港交所上市决策LD51-1, 港交所上市决策LD69-1, 港交所上市决策LD30-2012 及港交所拒纳信RL12-06
42. 港交所指引信GL68-13第3.2(4)(ii) 段, 港交所上市决策LD51-3及港交所拒纳信RL21-07
43. 港交所指引信GL68-13第3.2(4)(iii)段, 港交所上市决策LD8-2及港交所上市决策LD92-1
44. 港交所指引信GL68-13 第 3.2(4)(iv)段及港交所上市决策 LD107-1
45. 港交所指引信GL68-13 第 3.2(4)(v) 段及港交所拒纳信 RL20-07
46. 港交所指引信GL68-13 第 3.2(5) 段及港交所拒纳信 RL25-09
47. 港交所指引信GL68-13 第 3.2(6) 段及港交所上市决策 LD43-3
48. 港交所指引信GL68-13 第 3.2(7) 段
49. 港交所指引信GL68-13 第 3.2(8) 段，港交所上市决策 LD37-2012 及港交所上市决策 LD92-2015

• 实用提示 •

在法律上及实践层面上，均有各种可行的解决方案以处理不同的上市问题。及时咨询专业的法律顾问可避免在上市过程中面对复杂的问题。

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有关以上主题的法律及程序十分专门和复杂。本文仅是对有关主题的一般概述，仅供参考，并不能用作个别个案的法律意见。如需要任何法律咨询或协助，请联络我们的律师。

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Specific Listing Issues

Planning, executing, and managing an initial public offering ("IPO") can be a challenging task. The better prepared a company is, the more efficient and less costly the process will be. It is therefore of paramount importance for potential issuers to identify issues in advance and resolve them at an early stage of an IPO.

There are many issues and challenges that may arise according to the specific circumstances of the listing, the nature of the company and its industry, in particular in the midst of potential reform to the Hong Kong stock market. This chapter discusses the potential reform and some of the specific listing issues that may be encountered by potential issuers.

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1. Consultation on the Decision-Making and Governance Structure for Listing Regulation

Background of the consultation

The Hong Kong stock market has experienced significant growth in the past decade. From 2005 to 2015, the number of companies listed on The Stock Exchange of Hong Kong Limited ("SEHK") has increased by 64% from 1,135 to 1,866, while the market capitalisation has multiplied threefold from HK$8,180 billion to HK$24,684 billion.[1] Over the years, SEHK has played both the commercial role as a for-profit stock exchange and the regulatory role in the Hong Kong stock market, leading to skepticism of its potential conflicts of interests. Meanwhile, SEHK and the Securities and Futures Commission (the "SFC") have overlapping powers and functions as they both review and raise comments on listing applications and prospectus disclosure. In June 2016, the SFC and SEHK published the "Joint Consultation Paper on Proposed Enhancements to SEHK's Decision-making and Governance Structure for Listing Regulation" (the "Consultation Paper") to seek the public's views on the proposed reform of listing regulation. The proposed reform is said to enable greater coordination and consensus-building on important listing matters between SEHK and the SFC, as well as to ensure greater efficiency, transparency and accountability in the regulatory process.

Current regime

Under the current regime, SEHK is the frontline regulator for IPO regulation. SEHK's powers and functions relating to listing matters are delegated to the Listing Committee, which currently comprises 28 members including representatives of investors, listed companies and market practitioners as well as the Chief Executive of Hong Kong Exchanges and Clearing Limited ("HKEx") as an ex officio member.[2] The composition of the Listing Committee enables SEHK to draw on the commercial and business knowledge and experience of market users for policy formulation and regulatory decision-making. At the same time, as members of the

1. Page 11 of the Consultation Paper

2. Listing Committee Members' Biographies, available at www.hkex.com.hk/eng/listing/listcomrpt/listcomrpt_bio/lc_member_bio.htm

Listing Committee usually have outside professional commitments and are only available on a part-time basis, the Listing Committee has delegated a range of listing powers and functions to the Listing Department, which is the full-time executive body responsible for administering the Listing Rules on a day-to-day basis.

On the other hand, the SFC also serves a regulatory role over listing applications. Under the Securities and Futures (Stock Market Listing) Rules (Chapter 571V of the Laws of Hong Kong) (the "Stock Market Listing Rules"), listing applicants and listed issuers must file applications and disclosure materials with the SFC via SEHK. Currently, the SFC usually issues separate set(s) of comments on the listing applications and prospectus disclosure alongside with SEHK's comments. While the SFC has no formal representation in the Listing Committee, the Listing Committee would only hold a listing hearing to decide whether to approve a listing application when all comments from both regulators have been addressed to their satisfaction. The SFC's powers and functions in listing regulation are also complemented by (a) its powers of investigation and enforcement provided under the Securities and Futures Ordinance (Chapter 571 of the Laws of Hong Kong); and (b) its powers to object to the listing of, and to suspend trading in or de-list, any securities under the Stock Market Listing Rules.

Key proposals under the Consultation Paper

The Consultation Paper sets out the following key proposals:

1. The listing function will remain within SEHK, which will continue to be the frontline regulator for listing matters. The Listing Committee, together with the Listing Department, will continue to decide a large majority of IPO applications and post-IPO matters.
2. Two new committees of SEHK, on which the SFC and SEHK are equally represented, will be established:
   a. the Listing Policy Committee (LPC), comprising representatives from the SFC and the Listing Committee as well as the Chief Executive of HKEx and the Chairperson of the Takeovers and Mergers Panel, creates a forum for the relevant regulatory bodies to co-ordinate, collaborate and jointly develop listing policy that is responsive to today's regulatory needs; and
   b. the Listing Regulatory Committee (LRC), comprising representatives from the SFC and the Listing Committee, will decide cases that involve suitability issues or have broader policy implications.
3. The vetting and approval process for IPO applications will be streamlined and the SFC will no longer routinely issue a separate set of comments on the statutory filings made by listing applicants.
4. Clearer accountability for decision-making within SEHK will be established.

Market responses

The market responses towards the Consultation Paper are diverse. On the one hand, some market players welcome the proposed reform for raising the quality of the companies listed on SEHK and the reputation of the Hong Kong stock market, as well as streamlining the vetting and approval process for IPO applications involving no suitability issues or broader policy implications. On the other hand, many market players fear that the proposed reform would give the SFC too much power and curb the development of the IPO market. The necessity and legality of the proposed reform are also controversial. Most notably, the Listing Committee itself has made a submission in response to the Consultation Paper, which represents the majority view of the Listing Committee, raising doubt on whether the proposed changes would achieve the objectives of the reform. The market now awaits SEHK and the SFC to publish their consultation conclusions, which will govern the future of the Hong Kong stock market.

2. Red Chip Listing

What is meant by "red chip" and "H-Share"?

People's Republic of China ("PRC") businesses listed on SEHK include "H-share companies" and "red chip companies". H-share companies are joint stock companies incorporated in the PRC which have received approval from the China Securities Regulatory Commission ("CSRC") to list in Hong Kong, whereas red chip companies refer to the companies which are incorporated outside the PRC (usually in Hong Kong, the Cayman Islands or Bermuda) but with most of their businesses in the PRC, and which are usually controlled by PRC entities. Listing a PRC business in Hong Kong is generally more complicated than listing a Hong Kong business as relevant PRC approvals may be required for the reorganisation and the listing process.

Circular 10 - A hurdle to overcome for red chip listings

Historically, the PRC regulatory process for the reorganisation and the listing of red chip companies was simpler than that for H-share issuers. Nevertheless, following the introduction of the "Regulations Concerning the Merger and Acquisition of Domestic Enterprises by Foreign Investors" (commonly known as "Circular 10" or the "M&A Rules") in August 2006, the listing process for red chip companies has become increasingly complicated.

Circular 10 was promulgated by the Ministry of Commerce ("MOFCOM"), the State-owned Assets Supervision and Administration Commission, the State Administration of Taxation, the State Administration for Industry and Commerce, CSRC and the State Administration of Foreign Exchange on 8 August 2006. It came into effect on 8 September 2006 and was amended by MOFCOM on 22 June 2009. By virtue of Circular 10, MOFCOM's approval is required at various stages of a red chip listing, including:

- the establishment of a special purpose vehicle ("SPV") outside the PRC by a PRC domestic enterprise for the purpose of an overseas listing of the interest in a PRC domestic enterprise;[3] and
- the acquisition of the businesses or assets of a PRC domestic enterprise by the SPV.[4]

In addition, Circular 10 reinstated the requirement to obtain CSRC approval for a proposed red chip listing,[5] which was previously removed when CSRC's practice of issuing a no-objection letter was phased out in 2003. Moreover, under the framework of Circular 10, companies which are successfully listed overseas must repatriate proceeds within a pre-determined

3. Article 42 of Circular 10

4. Article 11 of Circular 10

5. Article 40 of Circular 10

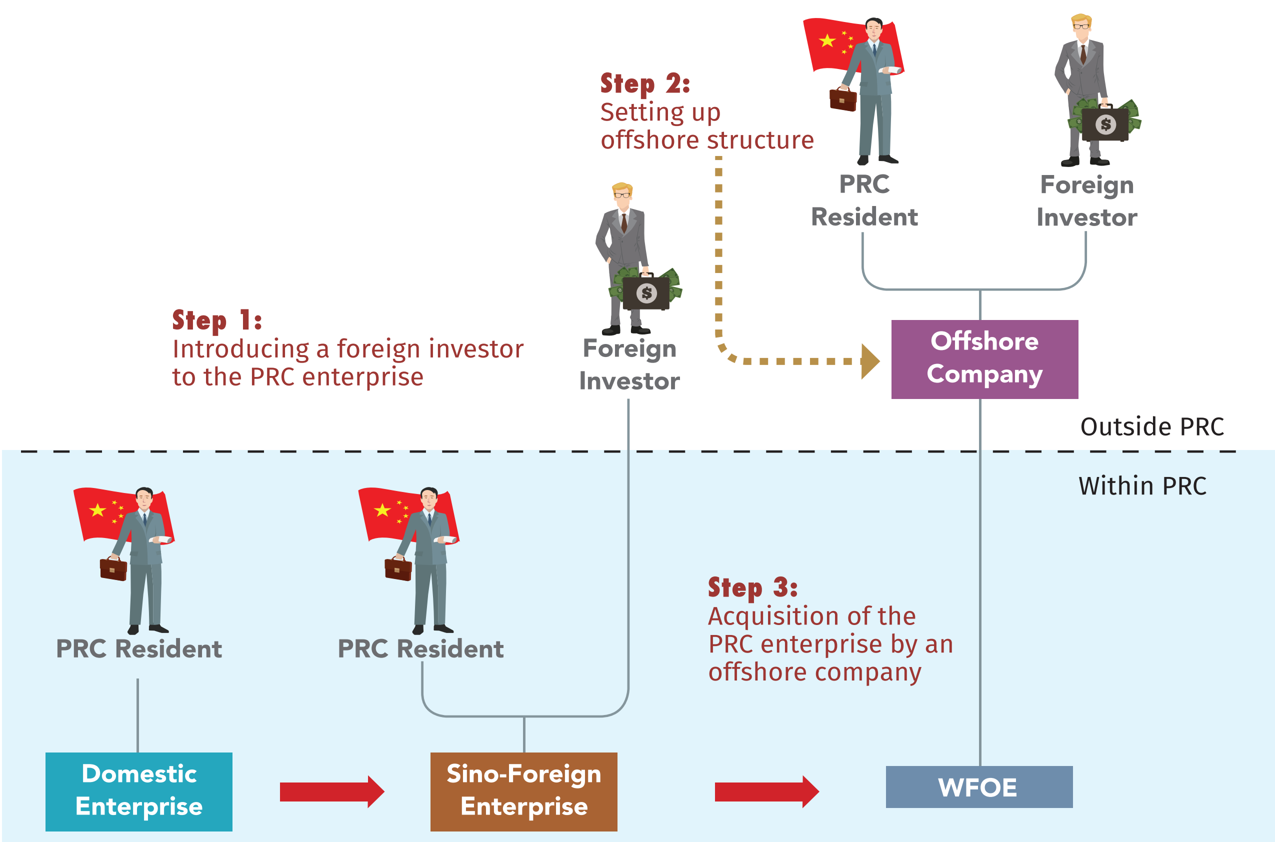
time frame to the PRC. Even if an enterprise has obtained a listing approval, failure to complete the overseas listing within 12 months of such approval would result in the enterprise reverting to its original shareholding structure.[6]

Breakthroughs in red chip listing

It was originally perceived that the stringent requirements and restrictions under Circular 10 would curb the overseas listing of those PRC enterprises of which red chip structures were not consummated before the implementation date of Circular 10 (that is, 8 September 2006). However, in the past decade, we have witnessed various ingenious reorganisation plans adopted by different PRC enterprises to oust the application of Circular 10 on their listings in Hong Kong, for example, by establishing a variable interest entity ("VIE") structure, through the acquisition of a red chip structure established prior to 8 September 2006, or through obtaining a foreign identity by the PRC business owner, etc. Each of these reorganisation plans has its own shortcomings and limitations.

In 2012, a breakthrough was achieved in the innovation of red chip listings, leading red chip listings into a new era. In the listing of China Zhongsheng Resources Holdings Limited (now known as Add New Energy Investment Holdings Group Limited) (Stock Code: 2623) in 2012, the red chip structure was developed by introducing a foreign investor to the relevant PRC domestic enterprise, thereby transforming the domestic enterprise into a Sino-foreign enterprise and subsequently a wholly foreign-owned enterprise ("WFOE"). As this enterprise only commenced the building of its red chip structure in 2010, that is, after the implementation date of Circular 10, its successful listing is said to have turned Circular 10 into a paper tiger.[7] A similar approach was adopted in the listing of China Tianrui Group Cement Company Limited (Stock Code: 1252).

A diagram summarising the key reorganisation steps involved in these cases is set out below for illustrative purposes:



6. Article 36 and Article 49 of Circular 10

7. "Zhongsheng Resources Holdings - New Route for Red Chip Listing" published in the September 2012 issue of Capital Finance

After the listing of China Zhongsheng Resources Holdings Limited, it was originally perceived that the foreign investor concerned should hold at least 25% of the equity interest of the relevant PRC enterprise so as to ensure that Circular 10 would not apply. However, it may not be easy to find foreign investors who are interested in acquiring 25% of the business, and not many PRC business owners are willing to sell 25% equity of their business to third parties before listing. In 2014, the listing of Jiashili Group Limited (Stock Code: 1285) ("Jiashili") provided a solution to these problems.

In the reorganisation of Jiashili, a foreign investor who is a Singapore citizen acquired, through a SPV, only 1% of the equity interest of the relevant PRC enterprise ("1% Acquisition"). The PRC enterprise was then transformed into a Sino-foreign joint venture with the ratio of foreign investment of less than 25%, and subsequently a WFOE. According to the prospectus of Jiashili, the local MOFCOM has verbally confirmed that:

- Article 11 of Circular 10 (that is, where a domestic company or enterprise, or a domestic natural person, through an overseas company established or controlled by him/her/it, acquires a domestic company which is related to or connected with him/her/it, approval from MOFCOM is required) shall not apply to the 1% Acquisition; and
- after the 1% Acquisition, the PRC enterprise would be converted into a Sino-foreign joint venture and further acquisition of its equity interest should not be subject to Circular 10.

The listing of Jiyi Household International Holdings Limited (Stock Code: 1495) in November 2015, which involves the acquisition of 3.43% of the equity interest of the relevant PRC enterprise by a foreign investor, is another example adopting a similar reorganisation plan.

In light of these cases, PRC domestic enterprises could achieve their offshore listings more easily.

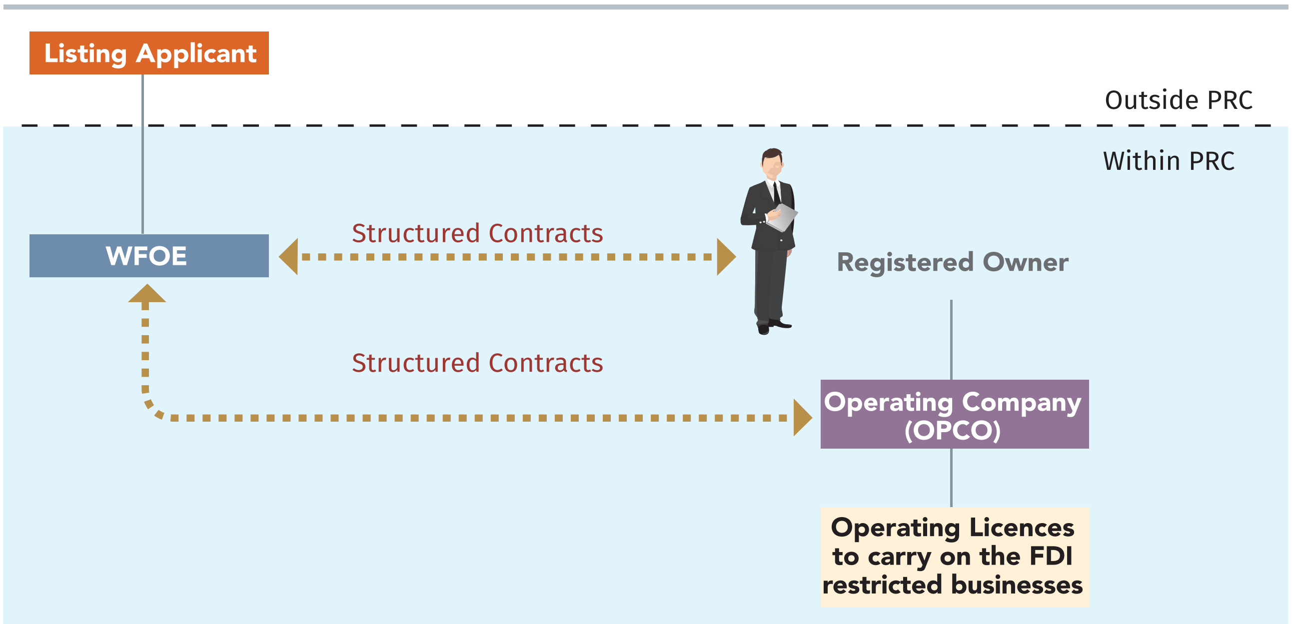
3. Feasibility of VIE Structures under Close Examination

What is a VIE structure?

VIE structures have long been used by foreign parties to indirectly invest in sectors in the PRC in which foreign direct investment ("FDI") is restricted. In addition, VIE structures have been adopted to enable PRC businesses in those FDI restricted sectors to list offshore. Coined as a "Sina structure" after Sina.com successfully listed its value-added telecom business on NASDAQ in 2000 by adopting a VIE structure, VIE structures have been replicated in other sectors such as publications, broadcasting, media, mining and internet-based businesses.

In essence, a VIE structure refers to a structure whereby a fully or partially foreign-owned entity established

Typical VIE/structured contract arrangement



in the PRC has control over a PRC domestic enterprise which holds the necessary licence(s) to operate in a FDI restricted sector. By virtue of various contractual arrangements, the de facto control over the operation and management as well as the economic benefits of the PRC domestic enterprise are shifted to the foreign-owned entity. In various red chip listings adopting VIE structures, Circular 10 was interpreted by the relevant issuers to be inapplicable as no acquisition of the relevant PRC domestic enterprises was involved.

Can a VIE structure be listed in Hong Kong?

Since there is no express endorsement of VIE structures by the PRC authorities, the legality of VIE structures is questionable. In 2010 and 2011, the Shanghai Sub-commission of the China International Economic and Trade Arbitration Commission ("CIETAC") granted two arbitral awards, in which the CIETAC invalidated some VIE agreements on the grounds that they violated express provisions of PRC laws that prohibit foreign investors from controlling and participating in the FDI restricted businesses and constituted "concealing illegal intentions with a lawful form".[8] Further, in June 2013, the PRC Supreme People's Court ruled in a dispute involving Chinachem Financial Services Limited that the relevant entrustment agreements were void on similar grounds.[9] In light of these arbitral awards and judgment, there was an uncertainty as to whether VIE structures could continue to be listed in Hong Kong.

The uncertainty has now been lifted as different enterprises adopting VIE structures successfully listed in Hong Kong from 2012 to 2016.[10] SEHK also published a guidance letter and two listing decisions to clarify that the listing of VIE structures would continue to be allowed on a case-by-case basis after full consideration of the reasons for adopting such arrangements, subject to certain disclosure requirements.[11] The standard of review adopted by SEHK is summarised as follows:

Scope of contractual arrangement	The contractual arrangements should be narrowly tailored to achieve the applicant's business purposes and minimise the potential for conflict with relevant PRC laws and regulations.[12]
Compliance assurance	SEHK would review the legal and compliance history(if any) of the listing applicant , its management systems and corporate governance practices, its records in protecting shareholder interests and its financial resources, to ensure compliance with the applicable laws and regulations.[13]
Regulatory assurance	Subject to availability and practicability, appropriate regulatory assurance should be obtained from the relevant regulatory authorities. In the absence of such regulatory assurance, the applicant's legal counsel is required to make a statement to the effect that in its legal opinion all possible actions or steps taken to enable it to reach its legal conclusions had been taken. In consultation with the applicant and the sponsor, other relevant forms of assurance could be considered.[14] Where the relevant laws and regulations specifically disallow foreign investors from using any agreements or contractual arrangements to gain control of or operate a foreign restricted business, the PRC legal advisers' opinion on the structured contracts must include a positive confirmation that the use of the structured contracts does not constitute a breach of those laws and regulations or that the structured contracts will not be deemed invalid or ineffective under those laws or regulations, e.g. not being deemed as "concealing illegal intentions with a lawful form" and void under the PRC contract law.[15] Where possible, the legal opinion must be supported by appropriate regulatory assurance to demonstrate the legality of the structured contracts.[16]

8. "Shanghai CIETAC's findings on VIE case raises plenty of questions", China Business Law Journal, December 2012/January 2013 issue
9. "Supreme court judgment again touches sensitive VIE nerve", China Business Law Journal, July/August 2013 issue
10. Examples include NNK Group Limited (Stock Code: 3773) listed in January 2016, Virscend Education Company Limited (Stock Code: 1565) listed in January 2016, China Art Financial Holdings Limited (Stock Code: 1572) listed in November 2016, and Wisdom Education International Holdings Company Limited (Stock Code: 6068) listed in January 2017
11. HKEx Guidance Letter GL77-14, HKEx Listing Decision LD33-2012 and HKEx Listing Decision LD43-3
12. Paragraph 16(a) of HKEx Guidance Letter GL77-14 and paragraph 13(b) of HKEx Listing Decision LD43-3
13. Paragraph 13(c) of HKEx Listing Decision LD43-3
14. Paragraph 16(a)(ii) of HKEx Guidance Letter GL77-14 and paragraph 13(d) of HKEx Listing Decision LD43-3
15. Paragraph 16(a)(ii) of HKEx Guidance Letter GL77-14
16. Paragraph 16(a)(ii) of HKEx Guidance Letter GL77-14 and paragraph 18A of HKEx Listing Decision LD43-3

Requirements other than foreign ownership restriction	Where restricted businesses are involved, the use of structured contracts is permitted only to address the foreign ownership restriction, for example, the restriction that foreign investors can only operate the restricted businesses under joint ventures with the foreign portion of the total investment and shareholding below 50%. For requirements other than the foreign ownership restriction, an applicant should demonstrate to the satisfaction of SEHK that it has, upon advice from its legal advisers, reasonably assessed the requirements under all applicable rules and have taken all reasonable steps to comply with them before listing.[17]
Requirements of structured contracts	The structured contracts should include a power of attorney and appropriate dispute resolution clauses which provide for arbitration and the courts of competent jurisdictions with power to grant interim remedies in support of the arbitration pending formation of the arbitral tribunal or in appropriate cases, and encompass dealing with the assets of the operating company so as to protect the rights of the listing applicant and its successors (including the liquidators).[18] The power of attorney granted by the operating company's shareholders to the applicant's directors and their successors (including a liquidator replacing the applicant's directors) should include the power to exercise all rights of the operating company's shareholders (e.g. the rights to vote in a shareholders' meeting, sign minutes, file documents with the relevant companies registry). The operating company's shareholders should ensure that the power of attorney does not give rise to any potential conflicts of interest. Where the operating company's shareholders are officers or directors of the applicant, the power of attorney should be granted in favour of other unrelated officers or directors of the applicant.[19]
Disclosure requirements	HKEx Listing Decision LD43-3 sets out a list of matters which should be disclosed in the prospectus.[20] The prospectus should include at least the following structured contracts-related risk factors: • the government may determine that the structured contracts do not comply with applicable regulations; • the structured contracts may not provide control as effective as direct ownership; • the domestic shareholders may have potential conflicts of interest with the applicant; and • structured contracts may be subject to scrutiny of the tax authorities and additional tax may be imposed.[21]
Others	SEHK requires any applicant using structured contracts and its sponsor to unwind the structured contracts as soon as the law allows the business to be operated without them.[22]

17. Paragraph 16(a)(i) of HKEx Guidance Letter GL77-14 and paragraph 16A of HKEx Listing Decision LD43-3
18. Paragraph 18(c) of HKEx Listing Decision LD43-3
19. Paragraph 16(b) of HKEx Guidance Letter GL77-14
20. Paragraphs 19 and 20 of HKEx Listing Decision LD43-3
21. Paragraph 20 of HKEx Listing Decision LD43-3
22. Paragraph 18(b) of HKEx Listing Decision LD43-3

Impact of the Draft PRC Foreign Investment Law on listings of VIE structure

MOFCOM published a consultation draft of the new PRC Foreign Investment Law on 19 January 2015 (the "Draft PRC Foreign Investment Law"), raising concerns over the legality and validity of VIE structures. Under the Draft PRC Foreign Investment Law, the definition of "foreign investor" includes PRC domestic entities that are actually controlled by non-Chinese individuals, enterprises incorporated in other jurisdictions, foreign government authorities and international organisations, and the definition of "foreign investment" is extended to cover all forms of control over a PRC domestic entity by foreign individuals or entities, particularly indirect control without equity ownership.[23] Therefore, VIE structures will be subject to the new PRC Foreign Investment Law. The draft PRC Foreign Investment Law sets out the legal consequences of engaging in a business within the "prohibited category" of the Foreign Investment Catalogue through a VIE structure.[24]

MOFCOM has addressed, in the explanatory notes to the draft PRC Foreign Investment Law, the issue of existing VIE structures and proposed three options:[25]

1. existing VIE structures to be preserved by filing the details of the structured contract with MOFCOM to confirm that the actual controller is a Chinese investor or a group of Chinese investors;
2. existing VIE structures to be preserved by filing an application to and obtaining approval from MOFCOM upon MOFCOM's confirmation that the actual controller is a Chinese investor or a group of Chinese investors; or
3. existing VIE structures to file an application to MOFCOM for market access approval and MOFCOM to decide whether to grant such approval on a case-by-case basis taking account of the identity of the ultimate controller of the VIE structure.

In view of the draft PRC Foreign Investment Law, SEHK encourages issuers with existing VIE structures and potential issuers which intend to list VIE structures to seek informal and confidential guidance from SEHK at the earliest possible opportunity.[26] Therefore, potential issuers with VIE structures who decide to press on with their listing plans ahead of the potential legislative change in the PRC should keep track of the regulatory development and seek competent legal advice.

4. Special Concern with Listings on the Growth Enterprise Market ("GEM") of SEHK

Problems with GEM listings

The SFC and SEHK have expressed grave concern over the price swings of GEM stocks after listing in recent years. According to the Statement on Recent GEM Listing Applicants published by the SFC on 13 March 2017, out of 45 GEM listings in 2016, 36 were listed by way of placing only. The average first day share price change (as against the offer price) for the placing-only GEM IPOs was an increase of 656%, with the highest one increasing by 2005%. Out of the 36 placing-only listings in 2016, 30 experienced a 100% or more increase in share price on their trading debut, nine of which saw their prices tumble by more than 90% from their first day closing price as at 31 January 2017, and another 10 saw their prices drop by between 50% and 90% as of the same date.

In addition, the regulators raised concern about the highly concentrated shareholdings and small shareholder bases of GEM stocks. The SFC noted the shareholdings of the top 25 placees for the placing-only GEM listings in 2016 ranged from 70.0% to 99.6% of the total number of placing shares.

23. Articles 11 and 15 of the Draft PRC Foreign Investment Law

24. Articles 144, 147 and 148 of the Draft PRC Foreign Investment Law

25. Paragraph 3(3) of the Explanatory Notes to the Draft PRC Foreign Investment Law

26. Paragraph 23 of HKEx Guidance Letter GL77-14 and paragraph 22 of HKEx Listing Decision LD43-3

Guideline and joint statement issued by the SFC and SEHK

On 20 January 2017, the SFC issued a guideline to sponsors, underwriters and placing agents involved in the listing and placing of GEM stocks and a joint statement[27] with SEHK regarding the price volatility of GEM stocks.

The joint statement reminds new listing applicants of the relevant regulatory requirements concerning placing arrangements and the requirements relating to open markets in the securities for which listing is sought, adequate spread of shareholders, and the minimum prescribed percentage of shares that must be in the public hands under the Rules Governing the Listing of Securities on GEM (the "GEM Listing Rules"). In particular, when ensuring that there is an open market in the securities for which listing is sought, a listing applicant should:

1. take due care to decide, in consultation with the sponsor, among other things:
   a. the method of listing, in particular, whether the new applicant should adopt an offer for subscription by or sale to the public in addition to a placing tranche;
   b. the target investor type and placee mix (for example, the new applicant may indicate its preference for a percentage of shares to be allocated to long term investors rather than short term investors or institutional investors rather than retail investors);
   c. the overall strategy and allocation basis with a view to achieving an open market and an adequate spread of shareholders and to ensure the percentage of shares in public hands meets the relevant requirements under the GEM Listing Rules. This will generally include selecting an appropriate number of underwriters or placing agents taking into account their client base, competence, resources and track record, as well as their allocation strategy;
   d. any preferential treatment (financial or otherwise) afforded to placees and the relevant disclosure in the listing document; and
2. retain proper documentation as to the above matters;
3. seek assistance from the underwriters and placing agents to adopt an appropriate strategy and allocation basis with a view to achieving an open market and avoiding any undue concentration in the holdings of its shares;
4. list all the underwriters and placing agents appointed and their contact details in the prospectus to provide additional information to investors about available distribution channels.[28]

Recent enforcement actions against GEM listings

Subsequent to the issue of the joint statement by the SFC and SEHK, the regulators have taken actions against different GEM listing applicants, in particular those placing-only GEM listings. Three IPOs were postponed and lapsed due to enquiries made by the regulators in relation to the open market requirements.[29] One was suspended after its first morning of trading as the SFC raised doubt as to whether there was an open market in the trading of the shares given the significant rise in price.[30] One was postponed and lapsed due to enquiries made by the regulators pursuant to section 6(2)(d) of the Stock Market Listing Rules,[31] which grants the SFC power to object to a listing on the ground that it would not be in the public interest for the securities to be listed.

While there is no objection to the regulators taking action to instil confidence in the market, severe regulatory measures without setting clear guidance to the market seems to do more harm than good. One of the strengths of the Hong Kong stock market is a clear set of objective listing qualifications. Grey law approach in listing regulation is not welcomed.

27. Joint Statement regarding the Price Volatility of GEM Stocks issued by the SFC and SEHK dated 20 January 2017
28. Paragraph 18 of the Joint Statement regarding the Price Volatility of GEM Stocks issued by the SFC and SEHK
29. Announcements of My Heart Bodibra Group Limited (Stock Code: 8297) dated 3 February 2017 and 27 February 2017, respectively; announcements of Speed Apparel Holdings Limited (Stock Code: 8183) dated 7 February 2017 and 27 February 2017, respectively; and announcements of Hao Bai International (Cayman) Limited (Stock Code: 8431) dated 13 February 2017 and 27 February 2017, respectively
30. Announcement of GME Group Holdings Limited (Stock Code: 8188) dated 22 February 2017
31. Announcements of XiangXing International Holding Limited (Stock Code: 8157) dated 27 February 2017 and 30 March 2017, respectively

5. Suitability for Listing

Seven Deadly Sins

SEHK has raised concerns that the controlling shareholders of a number of listed issuers either changed or have gradually sold down their interests shortly after the regulatory lock-up period following listing, probably due to the perceived premium attached to the listing status of the issuers. Such disposals may invite speculative trading activities, lead to opportunities for market manipulation, insider trading and unnecessary volatility in the market, and may enable backdoor listings. In June 2016, SEHK published a guidance letter (HKEx-GL68-13A) identifying seven characteristics of listing applicants which would raise concerns regarding the suitability for such listings and will be subject to a more focused review by SEHK. The seven characteristics have been dubbed the "Seven Deadly Sins".

Addressing the Seven Deadly Sins

In most GEM listings, SEHK would expect the listing applicants to provide an analysis on their suitability for listing with reference to the Guidance Letter HKEX-GL68-13A. Here are some points to note by the listing applicants:

1. Small market capitalisation

A GEM listing applicant should have a market capitalisation of at least HK$100 million at the time of the listing.[32] For GEM listings from January 2016 up to February 2017, the average market capitalisation, without taking into account of some outliers,[33] is approximately HK$279 million.[34] Listing applicants should compare the market capitalisation of their proposed listings with the market norm.

2. Only marginally meet the listing eligibility requirements

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

32. Rule 11.23(6) of the GEM Listing Rules

33. China Digital Video Holdings Limited (Stock Code: 8280) and China Industrial Securities International Financial Group Limited (Stock Code: 8407) are considered as outliers given their market capitalisation at the time of listing was approximately HK$1,178 million and HK$5,320 million, respectively

34. Statistics of GEM listings are available at www.hkgem.com

ordinary and usual course of business before changes in working capital and taxes paid of at least HK$20 million in aggregate for the two financial years immediately preceding the issue of the listing document.[35] Listing applicants should consider if their operating cash flow is well above the listing requirement. In particular, listing applicants should note that SEHK may disregard the income tainted by material non-compliance incidents.

3. **Involve fund raising disproportionate to listing expenses**

   For GEM listings from January 2016 up to February 2017, the proportion of listing expenses to gross proceeds ranged from 16.4% to 67.2%, with an average of approximately 35.6%. Listing applicants should consider if the size of the proposed fund raisings and the proportions of listing expenses to the fund to be raised are appropriate and in line with the market.

4. **Involve 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 SEHK as suitable for listing in Hong Kong. For businesses with high concentration of customers, SEHK will take into account the following factors in determining whether the reliance would have impacts on suitability for listing:

   a. whether the applicant's business model can be easily changed to reduce the level of reliance, e.g. by finding substitute customers;

   b. whether the applicant has plans to diversify its business focus to reduce its reliance;

   c. whether the whole industry landscape is dominated by a few players;

   d. whether the reliance is mutual and complementary; and

   e. whether the applicant is capable of maintaining its revenue in the future in light of the reliance.[36]

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 comparables.

6. **Involve a superficial delineation of business from the parent whereby the applicant's business is artificially delineated from the parent by geographical area, product mix or different stages of development**

   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. SEHK may have concern 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. **Have little or no external funding at the pre-listing stage**

   Generally speaking, SEHK expects all listing applicants to be able to finance their business activities through internally generated funds from its ordinary course of business and available banking facilities. Listing applicants should also consider whether it would be beneficial to introduce pre-IPO investors.

Other suitability issues

The Listing Rules provide that both the listing applicant and its business must, in the opinion of SEHK, be suitable for listing.[37] While there is no hard and fast rule in determining what would render a listing applicant and its business not suitable for listing, SEHK has issued a number of guidance letters and listing decisions to give guidance in this regard. Apart from the Seven Deadly Sins discussed above, SEHK would more likely raise concerns on suitability for listing in the following circumstances:

- suitability of director or controlling shareholders is in doubt, in particular in the case where the past record or conviction raises serious concern on an individual's integrity, and the individual is likely to exert substantial influence on the applicant after listing;[38]
- systemic, intentional and/or repeated breaches of laws and regulations by an applicant, e.g. non-compliant bill financing;[39]
- deteriorating financial performance subsequent to the track record period, or significant drop in forecast profit rendering the track record results not indicative of future performance;[40]

35. Rule 11.12A(1) of the GEM Listing Rules
36. HKEx Listing Decision LD107-1
37. Rule 8.04 of the Main Board Listing Rules and Rule 11.06 of the GEM Listing Rules
38. Paragraph 3.2(1) of HKEx Guidance Letter GL68-13 and HKEx Listing Decision LD96-1
39. Paragraph 3.2(2) of HKEx Guidance Letter GL68-13, HKEx Listing Decision LD50-5, HKEx Listing Decision LD97-1 and HKEx Listing Decision LD19-2011
40. Paragraph 3.2(3) of HKEx Guidance Letter GL68-13, HKEx Listing Decision LD73-2013 and HKEx Rejection Letter RL19-07

- heavy reliance on parent group for certain important functions such as sales and procurement functions, or financial and operational reliance on the applicant's parent;[41]
- dependence on the parent when there are overlapping directors, the applicant and its parent are in the same industry sector, and there are inadequate arrangements to manage conflicts of interest and delineation of businesses;[42]
- the applicant derives a significant portion of its turnover and net profit from transactions with closely related parties and connected persons;[43]
- heavy reliance on major customers;[44]
- a captive business model, i.e. the sourcing of the applicant's principal raw materials and its principal customer channel are dominated by the same party;[45]
- gambling business not satisfying the requirements in SEHK's announcement entitled "Gambling Activities Undertaken by Listing Applicants and/or Listed Issuers" and the Listing Committee Report 2006;[46]
- contractual arrangements not satisfying the conditions set out in the HKEx Listing Decision LD43-3;[47]
- reliance on unrealised fair value gains to meet profit requirements;[48] and
- unsustainable business model.[49]

Listing applicants with the above characteristics should consult professional advisers in advance in planning their listings.

• *Practical Tips* •

> There are legally and practicably acceptable solutions to different listing issues. Early consultation with good legal advisers would avoid complications in the listing process.

Disclaimer

41. Paragraph 3.2(4)(i) of HKEx Guidance Letter GL68-13, HKEx Listing Decision LD46-1, HKEx Listing Decision LD46-2, HKEx Listing Decision LD51-1, HKEx Listing Decision LD69-1, HKEx Listing Decision LD30-2012 and HKEx Rejection Letter RL12-06
42. Paragraph 3.2(4)(ii) of HKEx Guidance Letter GL68-13, HKEx Listing Decision LD51-3 and HKEx Rejection Letter RL21-07
43. Paragraph 3.2(4)(iii) of HKEx Guidance Letter GL68-13, HKEx Listing Decision LD8-2 and HKEx Listing Decision LD92-1
44. Paragraph 3.2(4)(iv) of HKEx Guidance Letter GL68-13 and HKEx Listing Decision LD107-1
45. Paragraph 3.2(4)(v) of HKEx Guidance Letter GL68-13 and HKEx Rejection Letter RL20-07
46. Paragraph 3.2(5) of HKEx Guidance Letter GL68-13 and HKEx Rejection Letter RL25-09
47. Paragraph 3.2(6) of HKEx Guidance Letter GL68-13 and HKEx Listing Decision LD43-3
48. Paragraph 3.2(7) of HKEx Guidance Letter GL68-13
49. Paragraph 3.2(8) of HKEx Guidance Letter GL68-13, HKEx Listing Decision LD37-2012 and HKEx Listing Decision LD92-2015

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