

Specific listing issues

CHAPTER

08



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1. SPECIFIC ELIGIBILITY QUALIFICATIONS FOR SPECIAL TYPES OF ISSUERS

1.1 Background

In general, a listing applicant seeking to list on the Main Board of The Stock Exchange of Hong Kong Limited (the “Stock Exchange”) is required to satisfy one of the 3 financial eligibility tests under Rule 8.05 of the Rules Governing the Listing of Securities on the Stock Exchange (the “Listing Rules”), namely (1) the profit test, (2) the market capitalisation/revenue/cash flow test and (3) the market capitalisation/revenue test. To attract different types of listing applicants, the Stock Exchange has refined the listing qualifications imposed on mineral companies, biotech companies, companies with weighted voting rights (WVR) structures, as well as companies seeking secondary listing in Hong Kong.

1.2 Mineral companies

Mineral companies seeking to list on the Main Board of the Stock Exchange are required to meet the basic eligibility criteria for listing set out in Chapter 8 of

the Listing Rules, as well as additional requirements for mineral companies set out in Chapter 18 of the Listing Rules. The following table summarises the listing qualifications applicable to mineral companies:

Qualifying business	<p>“Mineral Company” is defined as an issuer and/or its subsidiaries whose major activity, which represents $\geq 25\%$ of the total assets, revenue or operating expenses of the issuer and its subsidiaries, is the exploration for and/or extraction of natural resources.</p> <p>A Mineral Company must (1) establish that it has the right to participate actively in the exploration for and/or extraction of natural resources; and (2) establish that it has at least a portfolio of indicated resources (in the case of minerals) or contingent resources (in the case of petroleum) that are identifiable under one of the accepted reporting standards and substantiated in a competent person’s report.</p>
Track record	3 financial years (subject to waiver if its directors and senior management, taken together, have a minimum of 5 years’ experience relevant to the exploration and/or extraction activity that the Mineral Company is pursuing)
Financial requirements	A Mineral Company that cannot satisfy any of the 3 financial eligibility tests under Rule 8.05 of the Listing Rules may be accepted if its directors and senior management, taken together, have a minimum of 5 years’ experience relevant to the exploration and/or extraction activity that the Mineral Company is pursuing. A pre-production stage company seeking such will need to show a clear path to commercial production.
Management continuity	At least the 3 preceding financial years (subject to waiver if its directors and senior management, taken together, have a minimum of 5 years’ experience relevant to the exploration and/or extraction activity that the Mineral Company is pursuing)
Ownership continuity and control	At least the most recent audited financial year

1.3 Biotech companies

To attract listings of China’s new generation of biotech companies amid growing competition from the US and Chinese stock exchanges, the Stock Exchange permits biotech companies which cannot

meet any of the 3 financial eligibility tests under Rule 8.05 of the Listing Rules to list on the Main Board of the Stock Exchange pursuant to Chapter 18A of the Listing Rules. The following table summarises the listing qualifications of pre-revenue biotech companies:

Qualifying business	<p>“Biotech Companies” are defined as companies primarily engaged in the research and development (R&D), application and commercialisation of biotech products, processes or technologies. “Biotech” is defined as the application of science and technology to produce commercial products with a medical or other biological application.</p> <p>Biotech companies must meet the following requirements set out in the Guidance Letter HKEx-GL92-18, which provides:</p> <ol style="list-style-type: none"> 1. In general, it must have developed beyond the concept stage (detailed rules on what means by concept stage for different types of product is set out in the guidance letter): <ol style="list-style-type: none"> (a) at least one core product in the categories of pharmaceutical, biologics or medical devices (including diagnostics); and (b) such product is recognised by a competent authority such as EMA, FDA, NMPA and CFDA. 2. It must have been primarily engaged in R&D for developing its core product(s) for at least 12 months before IPO (and in case of a product which is in-licensed or acquired from third parties, the listing applicant must demonstrate R&D progress since the in-licensing/acquisition). 3. It must have as its primary reason for listing the raising of finance for R&D to bring its core product(s) to commercialisation. 4. It must have registered patent(s), patent application(s) and/or IP relating to such core product(s). 5. If the listing applicant is engaged in the R&D of pharmaceutical (small molecule drugs) products or biologic products, it must demonstrate that it has a pipeline of those potential products.
Track record	The listing applicant must operate in its current line of business for at least 2 financial years prior to listing under substantially the same management.
Financial requirements	NIL. Pre-revenue companies are eligible for listing.
Market capitalisation at the time of the listing	\geq HK\$1.5 billion
Management continuity	At least the 2 preceding financial years
Ownership continuity and control	The Stock Exchange will review any change in ownership of the listing applicant in the 12 months prior to the date of the listing application in assessing the suitability of the listing applicant for listing.
Pre-IPO investor	It must have previously received meaningful third party investment from at least one sophisticated investor at least 6 months before the date of the proposed listing (which must remain at IPO).

1.4 Companies with WVR structures

Chapter 8A of the Listing Rules sets out the qualifications for listing of companies with

WVR structures on the Main Board of the Stock Exchange. The listing qualifications of companies with WVR structures are summarised below:

Qualifying business	<p>The listing applicant must be an innovative company, which normally be expected to possess more than one of the following characteristics:</p> <ul style="list-style-type: none"> (a) its success is demonstrated to be attributable to the application, to the company's core business, of (1) new technologies; (2) innovations; and/or (3) a new business model, which also serves to differentiate the company from existing players; (b) R&D is a significant contributor of its expected value and constitutes a major activity and expense; (c) its success is demonstrated to be attributable to its unique features or intellectual property; and/or (d) it has an outsized market capitalisation/intangible asset value relative to its tangible asset value.
Track record	<p>The listing applicant must demonstrate a track record of high business growth, as can be objectively measured by operational metrics such as business operations, users, customers, unit sales, revenue, profits and/or market value (as appropriate) and its high growth trajectory is expected to continue.</p>
Financial requirements	<p>The listing applicant should meet one of the 3 financial eligibility tests under Rule 8.05 of the Listing Rules.</p>
Market capitalisation at the time of the listing	<ul style="list-style-type: none"> (1) \geq HK\$40 billion; or (2) \geq HK\$10 billion if revenue for the most recent audited financial year \geq HK\$1 billion
Management continuity	<p>At least the 3 preceding financial years (subject to waiver if it applies the market capitalisation/revenue test)</p>
Ownership continuity and control	<p>At least the most recent audited financial year. The listing applicant may be able to rebut a presumption that there has been a change in ownership continuity and control, by demonstrating that there was no material change in influence on management notwithstanding the technical change in controlling shareholder(s) resulting from an increase in voting power conferred by the WVR structure.</p>

Pre-IPO investor	<p>The listing applicant must have previously received meaningful third party investment (being more than just a token investment) from at least one sophisticated investor (which must remain at IPO). An investor will be assessed with reference to factors such as net assets or assets under management, relevant investment experience, and the investor's knowledge and expertise in the relevant field.</p>
Permissible WVR structures	<p>WVR structures will be limited to share-based structures only. A company which has a board-based WVR structure, which gives certain persons control of the board which is disproportionate to their equity stake in the company, is not currently eligible for listing in Hong Kong.</p>
Restriction on voting power attached to WVR shares	<p>The voting power attached to WVR shares must not be more than ten times the voting power of ordinary shares on any resolution tabled at the company's general meetings.</p>
Voting power of non-WVR shareholders	<p>Non-WVR shareholders must be entitled to cast at least 10% of the votes that are eligible to be cast on resolutions at the company's general meetings.</p>
Minimum economic interest of WVR beneficiaries at listing	<p>WVR beneficiaries must beneficially own collectively at least 10% of the underlying economic interest in the applicant's total issued share capital at the time of listing.</p>

In October 2020, the Stock Exchange published the consultation conclusions on the proposal to allow corporate WVR beneficiaries, in which it is concluded that more time is needed for the market to develop a better understanding of Hong Kong's regulatory approach to listed companies with WVR structures and to monitor the operation of Chapter 8A of the Listing Rules. The Stock Exchange has however decided to treat Greater China Issuers that are (1) controlled by corporate WVR beneficiaries as at 30

October 2020; and (2) primary listed on a Qualifying Exchange on or before 30 October 2020, in the same manner as Grandfathered Greater China Issuers for the purposes of Chapter 19C of the Listing Rules.

1.5 Companies seeking secondary listing

The following table summarises the listing qualifications applicable to secondary listings of Qualifying Issuers under Chapter 19C of the Listing Rules:

	Non-Greater China Issuer	Grandfathered Greater China Issuer	Non-Grandfathered Greater China Issuer
Centre of Gravity	A Qualifying Issuer with a primary listing on a Qualifying Exchange and its centre of gravity out of Greater China.	A Qualifying Issuer with its centre of gravity in Greater China and was listed on a Qualifying Exchange on or before 15 December 2017 (i.e. the date on which the New Board Concept Paper Consultation Conclusions were published). The purpose of the distinction between Grandfathered Greater China Issuer and Non-Grandfathered Greater China Issuer was to prevent companies from circumventing Hong Kong's primary listing requirements.	A Qualifying Issuer with a primary listing on a Qualifying Exchange and its centre of gravity out of Greater China.
Qualifying Issuer	<p>"Qualifying Issuer" is defined as an issuer primary listed on a Qualifying Exchange.</p> <p>"Qualifying Exchange" is defined to include The New York Stock Exchange LLC, 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).</p> <p>The Stock Exchange would normally regard a Qualifying Issuer as suitable for secondary listing where it is an innovative company. The "innovative company" requirements are the same as those for issuers with a WVR structure.</p>		
Track record	<p>3 financial years</p> <p>The Qualifying Issuer is required to have a record of good regulatory compliance of at least 2 full financial years on a Qualifying Exchange.</p>		
Financial requirements	One of the three financial eligibility tests under Rule 8.05 of the Listing Rules.		

	Non-Greater China Issuer	Grandfathered Greater China Issuer	Non-Grandfathered Greater China Issuer
Market capitalisation at the time of the listing	<p>>= HK\$10 billion for Qualifying Issuer with no WVR structure</p> <p>For Qualifying Issuer with WVR structure,</p> <p>(1) >= HK\$40 billion; or</p> <p>(2) >= HK\$10 billion if revenue for the most recent audited financial year >= HK\$1 billion</p>	<p>(1) >= HK\$40 billion; or</p> <p>(2) >= HK\$10 billion if revenue for the most recent audited financial year >= HK\$1 billion</p>	
Management continuity	At least the 3 preceding financial years (subject to waiver if it applies the market capitalisation/revenue test)		
Ownership continuity and control	At least the most recent audited financial year.		
Equivalence requirement	<p>The Qualifying Issuer must demonstrate, to the Stock Exchange's satisfaction, how applicable domestic laws, rules and regulations and their constitutional documents, in combination, satisfy key shareholder protection standards set out in Chapter 19C of the Listing Rules. It may be required to amend its constitutional documents.</p> <p>Any provisions in a Qualifying Issuer's constitutional documents relating to its governance that are unusual compared with normal practices in Hong Kong and are specific to the issuer (rather than a consequence of the laws and regulations to which it is subject), and how such provisions affect its members' rights, must be prominently disclosed in listing documents.</p>		<p>The Qualifying Issuer must vary its constitutional documents to satisfy the key shareholder protection standards set out in Chapter 19C of the Listing Rules.</p>
Contractual Arrangements	<p>The Qualifying Issuer may secondary list with its existing contractual arrangements in place and will not be required to demonstrate that it is able to comply with the draft PRC Foreign Investment Law. It is required to comply with the disclosure requirements specified in the Listing Decision HKEx-LD43-3, and to provide the Stock Exchange with a PRC legal opinion that its contractual arrangements comply with PRC laws, rules and regulations.</p>		<p>The Qualifying Issuer needs to comply with the Listing Decision HKEx-LD43-3. If the PRC Foreign Investment Law comes into effect, it may also be required, on a case by case basis, to demonstrate that it is able to comply with the legislation.</p>

	Non-Greater China Issuer	Grandfathered Greater China Issuer	Non-Grandfathered Greater China Issuer
WVR companies	<p>Qualifying Issuers with a WVR structure seeking a Chapter 19C secondary listing must satisfy the Chapter 19C (rather than Chapter 8A) eligibility and suitability criteria.</p> <p>The Qualifying Issuer is not required to comply with the ongoing WVR safeguards under Chapter 8A of the Listing Rules, excluding the disclosure requirements.</p>		<p>The Qualifying Issuer needs to ensure that its WVR structure complies with the primary listing requirements under Chapter 8A, including ongoing WVR safeguards and disclosure requirements.</p>

2. RED CHIP LISTING V.S. H-SHARE LISTING

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

People's Republic of China ("PRC") businesses listed on the Stock Exchange 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.

2.1 Red chip or H-share?

	Red chip	H-share
Listing vehicle	Any recognised jurisdiction or acceptable jurisdiction which can meet the key shareholder protection standards can serve as the place of incorporation of the listing vehicle. The most common listing vehicles are Cayman Islands and Bermuda companies.	Must be a PRC joint stock company.
Key legal obstacle	The listing group needs to undergo restructuring to inject domestic assets/ business into an offshore structure, which may be restricted by Circular 10 (as defined below) and the Circular on Relevant Issues concerning Foreign Exchange Administration of Offshore Financing and Round-Trip Investment by Domestic Residents Through SPVs ("Circular 37") issued by SAFE (as defined below).	Approval from the CSRC is required.

	Red chip	H-share
Financial tests	The listing applicant must satisfy one of the 3 financial eligibility tests under Rule 8.05 of the Listing Rules.	<p>The listing applicant must satisfy one of the 3 financial eligibility tests under Rule 8.05 of the Listing Rules.</p> <p>Pursuant to the CSRC's rule issued in July 1999, enterprises must have RMB400 million of net assets, raise US\$50 million of funds, and have an after-tax profit of not less than RMB60 million before they can apply for listing on overseas main boards, including Hong Kong's. These are commonly referred to as the "4-5-6 requirements". In 2012, the CSRC lifted the "4-5-6 requirements".</p>
Restriction on circulation	Subject to lock-up requirements, all securities can be freely circulated.	Domestic shares held by founders cannot be circulated outside PRC without CSRC approval. There has been several successful applications for full circulation of the domestic unlisted shares of H-Share companies.
Lock-up period	Pursuant to the Listing Rules, controlling shareholders cannot dispose any of their shares within 6 months from the date of listing; and within the 6 months thereafter, controlling shareholders cannot dispose their shares to the extent of losing the controlling status.	Apart from the requirements under the Listing Rules, according to PRC Company Law, shares issued before listing cannot be transferred within one year from the date of listing.
Issue after listing	Pursuant to the Listing Rules, a listed company cannot issue new shares within six months after listing. Generally speaking, approval from PRC authorities is not required for issue of shares after listing. Future financing is more flexible.	Apart from the requirements under the Listing Rules, an H-share listed company needs to comply with the regulations and filing procedures imposed by the CSRC every time when it issues new shares.
Ease of Future Financing	Subject to the lock-up restrictions, controlling shareholders generally can charge or pledge their shares for their own borrowings.	The shares held by controlling shareholders are domestic shares, which are not freely tradeable on the stock exchange. Lenders are less likely to accept domestic shares as security for lending.

2.3 Circular 10 - A hurdle to overcome for red chip listings

"Regulations Concerning the Merger and Acquisition of Domestic Enterprises by Foreign Investors" (commonly known as **"Circular 10"** or the **"M&A Rules"**) 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 (**"SAFE"**) on 8 August 2006. By virtue of Circular 10, MOFCOM's approval is required at various stages of a red chip listing, including:

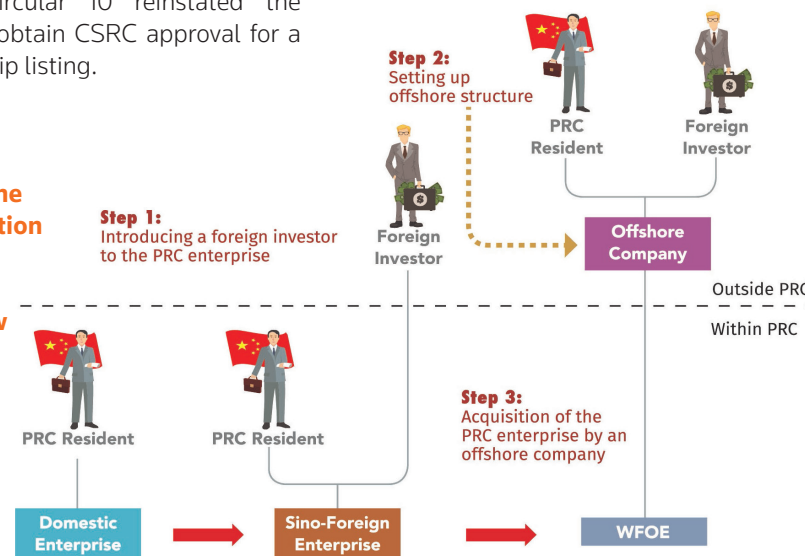
- the establishment of a special purpose vehicle (**"SPV"**) outside the PRC by a PRC domestic enterprise for the purpose of an overseas listing of the interest in a PRC domestic enterprise;¹ and
- the acquisition of the businesses or assets of a PRC domestic enterprise by the SPV.²

¹Article 42 of Circular 10

²Article 11 of Circular 10

In addition, Circular 10 reinstated the requirement to obtain CSRC approval for a proposed red chip listing.

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



2.4 Red chip restructuring

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 recent years, the most commonly adopted restructuring plan is to introduce 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"**).

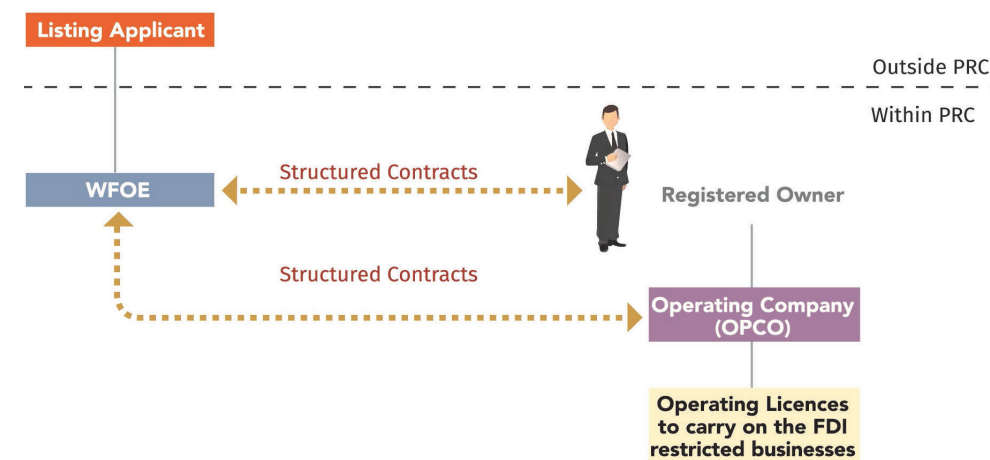
3. FEASIBILITY OF VIE STRUCTURES UNDER CLOSE EXAMINATION

3.1 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.

Typical VIE/structured contract arrangement



3.2 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 subject to legal challenges. Notwithstanding the challenges, there has been quite a number of enterprises adopting VIE structures successfully listed in Hong Kong in the

past years. The Stock Exchange 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.³ The standard of review adopted by the Stock Exchange is summarised as follows:

³HKEX Guidance Letter GL77-14, HKEX Listing Decision LD33-2012 and HKEX Listing Decision LD43-3

Scope of contractual arrangement

The contractual arrangements should be narrowly tailored to achieve the listing applicant's business purposes and minimise the potential for conflict with relevant PRC laws and regulations.

Compliance Assurance	The Stock Exchange 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.
Regulatory Assurance	<p>Subject to availability and practicability, appropriate regulatory assurance should be obtained from the relevant regulatory authorities. In the absence of such regulatory assurance, the listing 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 listing applicant and the sponsor, other relevant forms of assurance could be considered.</p> <p>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. Where possible, the legal opinion must be supported by appropriate regulatory assurance to demonstrate the legality of the structured contracts.</p>
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%.
Requirements of structured contracts	<p>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).</p> <p>The power of attorney granted by the operating company's shareholders to the listing applicant's directors and their successors (including a liquidator replacing the listing 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 listing applicant, the power of attorney should be granted in favour of other unrelated officers or directors of the listing applicant.</p>

3.2 Potential tightening of oversight of VIEs by PRC securities regulator

In July 2021, the PRC securities regulators have announced inquiries into the data-security policies of Didi Global Inc (DIDI.N) after it pushed ahead with its IPO despite a request to delay its listing. Following such

incident, the PRC securities regulator has been reportedly exploring the possibility of greater oversight of how mainland firms have used VIE structures to go public. Companies which plan to list by way of VIE structures are recommended to plan ahead and look out for regulatory changes.

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

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Angel also leads a team to provide legal services for listed companies under annual retainers.



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David also advises listed companies on corporate governance and general compliance of the Hong Kong Listing Rules.