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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

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.

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

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](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.	

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.

VIE Structures³ <i>(if applicable)</i>	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 <i>(if applicable)</i>	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, <u>but if, after its secondary listing in Hong Kong</u> , 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 <u>even if</u> 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

Secondary listing in Singapore⁴

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

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.

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 depository receipts⁵

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

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 issuers⁶ 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. depository 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.

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.

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.

About Akin Gump Strauss Hauer & Feld

With 21 offices, 85 practice areas and over 900 lawyers and professionals, Akin Gump Strauss Hauer & Feld LLP is among the world's largest and the most prestige law firms, yet we strive to provide every client focused and consistent attention. Our Corporate team regularly represents investment banks, securities houses and venture capital and private equity firms in the full range of public and private debt and equity transactions, such as initial and secondary public offerings, Rule 144A/Regulation S offerings, traditional private placements and debt restructurings. Our lawyers also advise on venture capital and private equity transactions for emerging companies in the market.

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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，总部位于杭州的著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，“合格发行人”（即在“合格交易所”上市的发行人，“合格交易所”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](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。下表详细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日之前于合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/1/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，重点是确保新交所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，发展中国家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市场——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

艾金·岗波律师事务所是全球最大的律师事务所之一，设有21个办公室，有超过900名律师和高级专员，涉及85项业务领域。我们始终专注于对待客户交办的工作。我们的公司业务团队经常代表投资银行、证券公司、风险投资和私募股权投资公司处理各种公共和私人债务与股权交易，例如首次和二次公开发行、144A规则/S条例发行、传统私募以及债务重组等。我们的律师还为市场中新兴公司的风险资本和私募股权投资提供法律咨询。

联络人

Akin Gump
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