

## HKEX GUIDANCE LETTER HKEX-GL93-18

(April 2018)-)(Updated in January 2022)

Subject	<u>Suitability for an applicant (other than Grandfathered Greater China Issuers or Non-Greater China Issuers with a weighted voting rights (“WVR”) structure applying for (i) a dual primary listing under Chapter 19 that meet the conditions set out in Rule 8A.46; or (ii) a secondary listing under Chapter 19C) to Listinglist with a WVR Structure-structure in compliance with Chapter 8A</u>
Listing Rules and Regulations	Main Board Listing Rules 8.04, 8A.04-, <u>19C.02</u> HKEX-LD43-3

**Important note:** *This letter does not override the Listing Rules and is not a substitute for advice from qualified professional advisers. If there is any conflict or inconsistency between this letter and the Listing Rules, the Listing Rules prevail. You may consult the Listing ~~Department~~Division on a confidential basis for an interpretation of the Listing Rules, or this letter. Unless otherwise specified, defined terms in the Listing Rules shall have the same meanings in this letter.-*

### 1. Purpose (Updated in January 2022)

1.1 This letter provides guidance to an applicant<sup>1</sup> on the factors that the Exchange will take into account when considering whether an applicant is suitable for listing with a weighted voting rights (“WVR”) structure under Main Board Listing Rule that is required to comply with the safeguards of Chapter 8A.04<sup>2</sup>.

1.1A For Grandfathered Greater China Issuers or Non-Greater China Issuers with a WVR structure applying for (i) a dual primary listing under Chapter 19 that meet the conditions set out in Rule 8A.46; or (ii) a secondary listing under Chapter 19C, please refer to HKEX-GL94-18 for guidance on the factors that the Exchange will take into account when considering whether it is suitable for listing.

<sup>1</sup> For the avoidance of doubt, this guidance letter also applies to Non-Grandfathered Greater China Issuers with a WVR structure applying for a secondary listing under Chapter 19C (or a dual primary listing under Chapter 19) because they are required to comply with the WVR safeguards of Chapter 8A.

<sup>2</sup> Main Board Listing Rules 8A.07 to 8A.36, 8A.43 and 8A.44.

- 1.2 This letter also sets out the Exchange’s approach in relation to an issuer relying on its WVR structure to demonstrate compliance with the ~~draft~~ PRC Foreign Investment Law.

## 2. Application of this Guidance Letter

- 2.1 The concept of proportionality between the voting power and equity interest of shareholders, commonly known as the “one-share, one-vote” principle, is an important aspect of investor protection as it helps align controlling shareholders’ interests with those of other shareholders and makes it possible for incumbent management to be removed, if they underperform, by those with the greatest equity interest in an issuer.–
- 2.2 The Exchange believes that the “one-share, one vote” principle continues to be the optimum method of empowering shareholders and aligning their interests in a company. Consequently, the Exchange will exercise its discretion to find an applicant suitable to list with a WVR structure sparingly. Demonstration of the characteristics in this guidance letter may not of itself satisfy the Exchange of an applicant’s suitability to list with a WVR structure. The Exchange retains discretion to reject an application for listing with a WVR structure even if the applicant meets the requirements in this guidance letter.

## 3. Relevant Listing Rules

3.1 Main Board Listing Rule 8.04 provides that in the opinion of the Exchange both the issuer and its business must be suitable for listing. (Updated in January 2022)

3.43.2 Main Board Listing Rule 8A.04 states that a new applicant seeking a listing with a WVR structure must demonstrate that it is both eligible and suitable for listing with a WVR structure.–

~~Main Board Listing Rule 8.04 provides that in the opinion of the Exchange both the issuer and its business must be suitable for listing.–~~

3.3 Main Board Listing Rule 19C.02 provides that an overseas issuer seeking a secondary listing under Chapter 19C must demonstrate to the Exchange that it is both eligible and suitable for listing. (Added in January 2022)

## 4. Guidance

## **Suitability to list with a WVR structure**

4.1 An applicant must demonstrate that, in addition to the other requirements for listing as set out in the Main Board Listing Rules, it has met the following characteristics for the purpose of demonstrating to the Exchange that it is suitable for listing in Hong Kong with a WVR structure.

### 4.2 Innovative company

The applicant must be an innovative company. The Exchange considers an innovative company for the purpose of the Main Board Listing Rules would normally be expected to possess more than one of the following characteristics:

- (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) research and development 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.

The Exchange recognises that what is considered "innovative" depends on the state of the industry(ies) and market(s) in which an applicant operates, and will change over time as technology, markets and industries develop and change. For example, a new and "innovative" business model may cease to be so if it is adopted by numerous industry players over time. Conversely, a company may develop an "innovative" way of deploying existing technologies that qualifies it for listing with a WVR structure. Accordingly, the fact that a particular company has qualified for listing with a WVR structure does not necessarily mean that another applicant with a similar technology, innovation or business model will also qualify for listing with a WVR structure.

The Exchange will review the facts and circumstances of each case to determine if an applicant has demonstrated that it is an innovative company

for the purpose of this paragraph. The superficial application of new technology to an otherwise conventional business will not be sufficient to demonstrate the characteristics set out in this paragraph. So, for example, the Exchange may consider that an applicant that operates a retail business with an online sales platform may not be suitable to list with a WVR structure if it does not exhibit other distinctive features or characteristics.

#### 4.3 Success of the company

The 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.

#### 4.4 Contribution of WVR holders

Each WVR beneficiary must have been materially responsible for the growth of the business, by way of his skills, knowledge and/or strategic direction in circumstances where the value of the company is largely attributable or attached to intangible human capital.

#### 4.5 Role of WVR holders

- (a) Each WVR beneficiary must be an individual who has an active executive role within the business, and has contributed to a material extent to the ongoing growth of the business; and
- (b) each WVR beneficiary must be a director of the issuer at the time of listing.

#### 4.6 External validation

The applicant must have previously received meaningful third party investment (being more than just a token investment) from at least one sophisticated investor<sup>3</sup> (which must remain at IPO). Such investors will be required to retain an aggregate 50% of their investment at the time of listing for a period of at least six months post-IPO<sup>4</sup> (subject to exceptions for de

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<sup>3</sup> ~~An investor that the~~The Exchange considers an investor to be sophisticated by 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.

<sup>4</sup> Where the applicant is a Non-Grandfathered Greater China Issuer seeking a dual primary listing

minimis investments by specific investors provided that the main investors are in compliance). The Exchange would not normally require an applicant to demonstrate that it has received meaningful third party investment if the applicant is a spin-off from a parent company<sup>5</sup>.

- 4.7 The Exchange reserves the right to reject an applicant on suitability grounds if its WVR structure is an extreme case of non-conformance with governance norms (for example if the ordinary shares would carry no voting rights at all).
- 4.8 Applicants should note that the factors set out in this section 4 are neither exhaustive nor binding and the Exchange will take into account all relevant circumstances in its assessment of the applicant.

## 5. PRC Foreign Investment Law

- 5.1 Under existing PRC laws, certain industry sectors are subject to foreign investment restrictions. ~~A “foreign investor” is defined according to the form of the investment made i.e. whether investments are made by way of wholly foreign-owned entities, foreign-invested equity joint ventures or contractual joint ventures. Under the Foreign Investment Law, foreign investment refers to the investment activity directly or indirectly conducted by a foreign natural person, enterprise or other organisation. (Updated in January 2022)~~

### 5.2 (Deleted in January 2022)

- 5.3 The Exchange’s current approach in relation to issuers operating in restricted industries is set out in HKEX-LD43-3. ~~Since the PRC Foreign Investment Law is still in draft form with no proposed date for implementation, the~~ The Exchange will continue to examine each case on its individual merits to determine whether the arrangements an issuer proposes will provide

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or a secondary listing, references to “IPO” in paragraph 4.6 are to the applicant’s listing on the Qualifying Exchange provided that save for the adoption of the WVR safeguards under Chapter 8A of the Listing Rules, there is no substantial change in the WVR structure between the date of the applicant’s listing on the Qualifying Exchange and the date of the applicant’s listing in Hong Kong. For other applicants which have a primary listing elsewhere, they should consult the Exchange at an early stage if there are difficulties in complying with the requirement. We may only consider references to “IPO” herein to mean the applicant’s listing on the overseas stock exchange in exceptional circumstances. (Added in January 2022)

<sup>5</sup> ~~For the purpose of assessing the eligibility and suitability of an applicant to list with a WVR structure, a spin-off applicant will be assessed on a stand-alone basis separate from the characteristics and track record of the parent (irrespective of whether the parent is listed on the Exchange or an overseas)– exchange).~~

appropriate investor protection. Under this approach, an issuer ~~may be~~will be required ~~, on a case by case basis,~~ to demonstrate that it is able to comply with ~~, amongst other things,~~ the requirements of the ~~draft~~ PRC Foreign Investment Law ~~in the event that the legislation is promulgated.~~ ~~The Exchange has in the past accepted disclosure of the relevant risks without requiring the issuer to specify how compliance with the draft PRC Foreign Investment Law will be achieved if it is promulgated and will continue this approach.~~ , which was promulgated in March 2019 and became effective on 1 January 2020. (Updated in January 2022)

5.4 ~~If~~With the ~~draft~~ Foreign Investment Law ~~were to~~having come into effect, ~~an issuer with a WVR structure could potentially use weighted voting rights to demonstrate compliance with the draft PRC Foreign Investment Law in that they had de facto control of an issuer that is in an industry subject to foreign ownership restrictions, if the WVR holders are PRC citizens. In this connection the Exchange believes that WVRs and foreign ownership restrictions are separate issues. Since the publication of the draft PRC Foreign Investment Law, a number of issuers have listed on the Exchange with a range of mechanisms to comply with foreign ownership restrictions that do not involve WVRs. it is possible that an issuer with a WVR structure operating in an industry subject to foreign ownership restrictions may potentially use weighted voting rights with a view to demonstrating that it is under de facto control of PRC citizens if the WVR holders are PRC citizens. (Updated in January 2022)~~

5.5 In the event that an applicant seeks to demonstrate compliance with the ~~draft~~ PRC Foreign Investment Law through ~~WVRs,~~ given that WVRs could ~~WVR after obtaining favourable legal advice and/or regulatory assurance from the relevant PRC government authorities, and the WVR in question will~~ not exist indefinitely ~~as a result of the required safeguards in Chapter 8A, (for example, they are personal to the holder and incapable of being transferred, or are subject to sunset),~~ the applicant must clearly explain and disclose the risk that its ~~WVRs~~WVR may fall away and it may not be able to comply with the PRC Foreign Investment Law as a result. (Updated in January 2022)

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