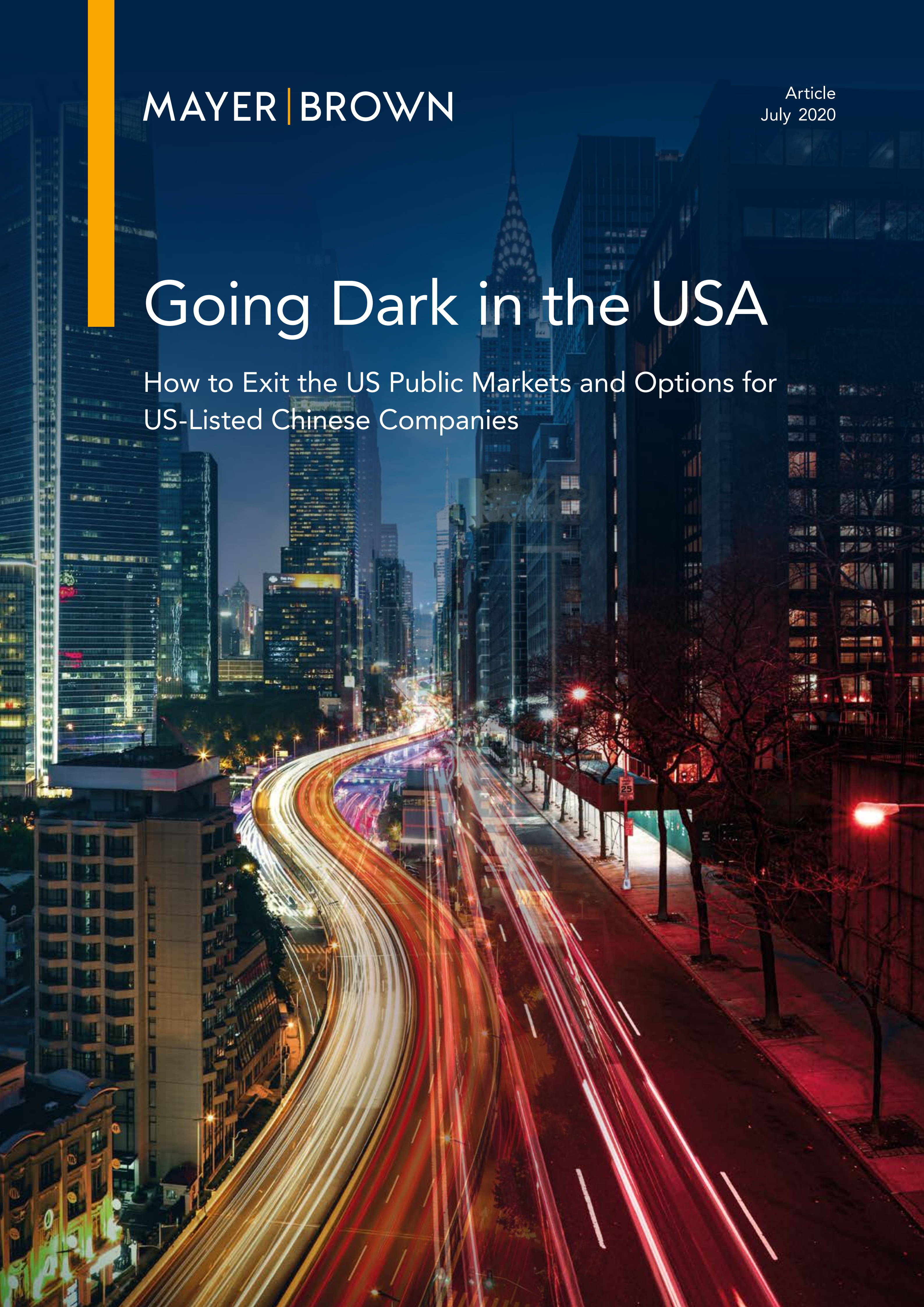

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Going Dark in the USA

How to Exit the US Public Markets and Options for US-Listed Chinese Companies

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Overview

Recently proposed legislation in the United States, S. 945 the Holding Foreign Companies Accountable Act (the Act), along with rising tension between the United States and China present significant challenges for US-listed Chinese companies. This article explains the details of the Act and how it impacts US-listed Chinese companies and provides options for US-listed Chinese companies to exit the US public markets, including: (1) going private transactions, such as negotiated share acquisitions, open-market share purchases and public tender offers for shares; (2) delisting from US securities exchanges, such as the New York Stock Exchange (NYSE) and National Association of Securities Dealers Automated Quotations exchange (Nasdaq); (3) deregistering securities registered with the US Securities and Exchange Commission (SEC); and (4) secondary (to primary) listings in Hong Kong.

Background

On 20 May 2020, the US Senate unanimously passed the Act. The Act, an amendment to the Sarbanes-Oxley Act of 2002 (the Sarbanes-Oxley Act), would prohibit foreign issuers from listing and trading their securities on any US securities exchange or through any other method regulated by the SEC if authorities in the foreign issuer's home jurisdictions prohibit the Public Company Accounting Oversight Board (the PCAOB) from inspecting the issuer's registered public accounting firm. Statements made by the Act's sponsors and the text of the Act itself indicate that the Act was aimed at US-listed Chinese companies.

Why This is Important for US-Listed Chinese Companies

The Act puts US-listed Chinese companies in a difficult position and compliance may be impossible, especially because various Chinese regulations effectively prohibit the inspection of public accounting firms based in China by foreign regulators, including the PCAOB. Various options such as "going private", delisting and deregistering and secondary listings in a jurisdiction outside of the United States, such as Hong Kong, should be considered by US-listed Chinese companies sooner rather than later as they require significant lead time to execute.

While most Chinese firms that list on US exchanges do so through Cayman Islands or other offshore entities due to Chinese foreign investment and other regulations, the financial statements included in these initial public offering (IPO) registration statements are audited by PRC-based auditors. Accordingly, Cayman Islands/Chinese companies that list on the New York Stock Exchange NYSE or Nasdaq – an exchange that includes many high-profile Chinese internet and technology companies – as well as Chinese companies from other growth sectors are directly impacted by the Act.

Disclosure Requirement and PCAOB Inspection Requirements

The Act would require the SEC, through a disclosure obligation by issuers, to identify issuers of securities on US securities exchanges that retain a registered public accounting firm that has a branch or office that (i) is located in a foreign jurisdiction and (ii) the PCAOB is unable to inspect or investigate completely because of a position taken by an authority in the foreign jurisdiction. This is especially troubling for US-listed Chinese companies because various Chinese regulations effectively prohibit the inspection of public accounting firms based in China by foreign regulators, including the PCAOB. The Act also requires issuers to submit to the SEC documentation that establishes that the issuer is not owned or controlled by a governmental entity in the foreign jurisdiction where the issuer's accounting firm has a foreign office.

Issuers identified by the SEC must allow the PCAOB to inspect or investigate the issuer's registered public accounting firm. If the issuer fails to allow the PCAOB to conduct an inspection for three consecutive years, the SEC shall prohibit the issuer from being traded on a US securities exchange or through any other method regulated by the SEC, including over-the-counter trading of securities. The SEC may remove the trading prohibition if the issuer certifies it has retained a registered public accounting firm that the PCAOB has inspected to the satisfaction of the SEC. If the issuer fails to comply again, trading will be suspended for a minimum of five years.

Additional Disclosure Requirements

The Act also requires that in any year when an identified issuer uses a non-PCAOB-inspected accounting firm to prepare its audit report, the issuer must disclose in its annual report:

- that a non-PCAOB inspected accounting firm prepared its audit report;
- the percentage of shares of the issuer owned by governmental entities in the foreign jurisdiction in which the issuer is incorporated or otherwise is organized;
- whether governmental entities in the foreign jurisdiction of the accounting firm have a controlling financial interest in the issuer;
- the name of each official of the Chinese Communist Party who is a member of the board of directors of the issuer or the operating entity with respect to the issuer; and
- whether the constitutive documents of the issuer contains any charter of the Chinese Communist Party, including the text of any such charter.

Timing of Potential Effectiveness of Legislation and SEC Rulemaking

The timing of the potential effectiveness of the proposed legislation is unclear as of the date of this briefing. A bill with the same language (which could ultimately be amended) was introduced in the US House of Representatives on 20 May 2020 and it is yet to be scheduled for a House vote. The US House of Representatives would need to pass the bill before it is presented to the President to veto or sign into law. On 4 June 2020, President Trump requested the Secretary of the Treasury along with select Presidential working groups to prepare a report on the PCAOB access issue as well as investor protections more broadly. The report is expected to be issued by 3 August 2020. If the legislation is enacted, the SEC would have 90 days to issue rules regarding the disclosure and documentation requirements.

Options for US-Listed Chinese Companies

In the current draft of the legislation, a US-listed Chinese issuer effectively would have up to three years before non-compliance would compel a delisting. However, it is important to determine a course of action now to ensure enough time to execute a plan with respect to an issuer's US public equity and ongoing US regulatory and compliance obligations. Various options available to a US-listed Chinese issuer include going private, voluntarily delisting and deregistering, and a secondary listing outside of the United States.

One major difference with a going private transaction compared to other alternatives is that it generally involves cashing out public shareholders so that the issuer becomes eligible to delist and deregister its shares under the Securities and Exchange Act of 1934, as amended (the Exchange Act). As these transactions require significant capital and time commitments as well as compliance with tender offer rules and regulations, many companies will prefer to deregister and delist under the Exchange Act without a tender offer or other going private transaction given that these alternatives are all typically available to issuers.

GOING PRIVATE TRANSACTIONS

The term "going private" refers to transactions (or a series of transactions) whereby a controlling shareholder, significant shareholder or other affiliated persons decreases the number of shareholders of a public company, generally by cashing out its public shareholders, allowing the issuer to terminate its public company status and related reporting and

compliance obligations under the Exchange Act and the Sarbanes-Oxley Act. The amendments to the Sarbanes-Oxley Act proposed by the Act and the compliance challenges it presents, as discussed above, make going private a very real possibility for US-listed Chinese companies, particularly for companies with the capital and resources to do so.

Going private transactions commonly take the form of a negotiated share acquisition by a controlling shareholder, significant shareholder or other affiliated persons or a repurchase or public tender offer for shares.

Negotiated Share Acquisition

In a negotiated share acquisition, a controlling shareholder, significant shareholder or other affiliated persons acquires the outstanding public shares of the issuer through a negotiated sale. The process of acquiring a public company may trigger obligations under US federal securities law, and it is important to be aware of these obligations at the outset to avoid any unintended consequences. For example, the acquirer may have disclosure obligations soon after any offer is made under Section 13D of the Exchange Act which requires beneficial shareholders of more than 5% of the issuer to disclose its or their intentions with respect to a share acquisition and Rule 13e-3 of the Exchange Act imposes significant disclosure requirements with respect to the transaction. In addition, the jurisdiction of incorporation of the issuer along with US common law may also impose special obligations on the board of directors in considering and negotiating the offer to purchase and these must be carefully examined. Litigation is not uncommon in going private transactions.

Repurchases Through Open-Market Purchases and Public Tender Offers

An issuer may also elect to conduct repurchases through open-market purchases or a public tender offer process.

Open-Market Purchases

A market-oriented repurchase of public equity can be done in a number of ways. For example, the issuer may engage a financial intermediary to negotiate and effectuate open-market repurchases or agree with a financial intermediary to repurchase shares that the financial intermediary purchases on a principal basis.

An open-market repurchase of shares is effective if the issuer is seeking to repurchase only a small percentage of shares or if the shares are not widely held. An issuer repurchasing any US-registered securities runs the risk of inadvertently triggering the US federal tender offer rules so it is important that the trades are structured properly. These rules were adopted to ensure that an issuer and others conducting a tender offer would not engage in manipulative practices. In order to avoid triggering an inadvertent tender offer under the US federal tender offer rules while conducting an open-market repurchase, the trades should be structured (i) for a limited amount of shares; (ii) to a limited number of holders; (iii) over an extended period of time (with no pressure on holders to sell); (iv) at prices privately and individually negotiated; and (v) with offers and acceptances independent of others. All major financial intermediaries should be aware of these issues and would be expected to appropriately structure the transactions to include these features.

Public Tender Offer

A tender offer is an offer to purchase from holders all or a portion of an issuer's shares for cash. The advantages of a tender offer include allowing an issuer to capture a large part of the outstanding US public equity, relatively straightforward documentation and a short timeframe for execution (usually within 30 days from kick-off). Typically, an issuer will engage an investment bank to act as a dealer manager to manage the overall process. Under the US federal tender offer rules, tender offers must be held open for a specified time period (typically 20 days absent any interim modification of terms) and be in compliance with certain other conditions. Tendering holders must be paid promptly, which has been interpreted to be no later than three business days after the conclusion of the tender offer.

Once shares are repurchased the issuer will need to go through the delisting and deregistration process with the relevant exchange on which the American Depositary Receipts (ADRs) were listed and the SEC.

DELISTING AND DEREGISTRATION

Delisting and deregistration, referred to as "going dark", are related but separate processes, and both need to be undertaken in order for an issuer to suspend and terminate its reporting and compliance obligations as a US-listed issuer.

Delisting is withdrawing or striking a class of securities from listing on a US national securities exchange, such as the NYSE or Nasdaq. Deregistration is withdrawing a class of securities from registration under the US Securities Act of 1933, as amended (the Securities Act) and terminating and/or suspending reporting obligations under the Exchange Act.

An issuer becomes subject to Exchange Act reporting requirements if it has a class of securities registered under Section 12 or 15(d) of the Exchange Act. This can occur in several different ways, including: (i) by listing a class of securities on a national securities exchange (Section 12(b)) which captures companies that have conducted IPOs in the US on the NYSE or Nasdaq; (ii) by meeting certain statutory thresholds with respect to total assets and the number of shareholders (Section 12(g)); or (iii) by having an effective registration statement under the Securities Act (Section 15(d)).

The process of voluntarily delisting an issuer's securities from a US securities exchange as well as the process of deregistering these securities under the Exchange Act must be done in a way that terminates and/or suspends the issuer's public-reporting obligations under the Exchange Act. Both the delisting and deregistration processes can be completed without a shareholder vote, fairness opinion or cashing out the public company shareholders, in contrast to going private transactions, open-market purchases, and public tender offers discussed above.

An issuer is not subject to Exchange Act reporting obligations under more than one section at a time. For example, an issuer's reporting obligations under Section 12(b) by virtue of being listed on the NYSE or Nasdaq suspend any other reporting obligations under another provision of the Exchange Act, such as Section 12(g) or Section 15(d). However, if the Section 12(b) registration is terminated, any other previously suspended reporting obligations under the Exchange Act (i.e., under Section 12(g) or Section 15(d)) are revived. As such, an issuer will need to ensure that it terminates or suspends its reporting obligations under these provisions as well.

Delisting and Deregistration – Section 12(b)

To delist from NYSE, Rule 806.02 of the NYSE Listed Company Manual requires:

- Written notice to the NYSE of intent to withdraw a class of securities from listing and/or registration;
- Publication of a press release providing notice of the delisting and the intention and reasons for withdrawal. The notice must also be posted on the company's website until the completion of the delisting process. The press release with notification must be made at least 10 days before filing a Form 25 with the SEC;
- Providing the NYSE with board resolutions authorizing delisting;
- Filing a Form 8-K (or 6-K if the issuer is a foreign private issuer (FPI)) announcing the delisting; and
- Filing Form 25 with the SEC.

To delist from Nasdaq, Rule 5840(j) of the Nasdaq Manual requires:

- Written notice to Nasdaq of intent to withdraw a class of securities from listing and/or registration at least 10 days before filing a Form 25 with the SEC;
- Publication of a press release providing notice of the delisting and the intention and reasons for withdrawal. The notice must also be posted on the company's website until the completion of the delisting process. The press release with notification must be made at least 10 days before filing a Form 25 with the SEC;
- Filing a Form 8-K (or 6-K if the issuer is a foreign private issuer ("FPI")) announcing the delisting; and
- Filing Form 25 with the SEC.

Once the Form 25 is filed with the SEC, the delisting occurs automatically after 10 days, and in most cases, the issuer's securities will stop trading on the related securities exchange. At this point, the issuer's Section 13(a) reporting obligations will be suspended, however, Section 14(a), Section 16 and Section 13(d) still apply to the issuer and beneficial owners during the suspension period, which continues for another 80 days (a total of 90 days from the date the Form 25 was filed). This process operates automatically through the passage of time and the SEC rarely intervenes during this time period. However, an issuer may still be required to file periodic reports during this 90 day period if it is required to register under Section 12(g) of the Exchange Act or report under Section 15(d) of the Exchange Act (both outlined below). The Form 25 filing also serves to withdraw the class of securities from registration, which becomes effective 90 days after its filing. Once effective, the issuer's reporting obligations under Section 12(b) of the Exchange Act are terminated.

Deregistration – Section 12(g)

The termination of an issuer's Exchange Act reporting obligations under Section 12(b) may revive the issuer's Section 12(g) reporting obligations if (i) the class of securities to be deregistered was listed on Nasdaq prior to August 2006 or (ii) there are more than 300 shareholders of record of the class of securities to be deregistered. If there are fewer than 300 shareholders of record, Section 12(g) registration is effective by operation of law. Otherwise, to terminate any revived reporting obligations under Section 12(b), the issuer must file a Form 15 with the SEC. The Form 15 can only be filed after the Form 25 is effective, therefore the earliest the Form 15 can be filed is 10 days after the Form 25 is filed. The Form 15 is effective 90 days after filing unless the SEC allows for earlier effectiveness. In contrast to the Form 25, the filing of the Form 15 immediately suspends the issuer's periodic and other reporting obligations under Section 13(a) of the Exchange Act.

Deregistration – Section 15(d)

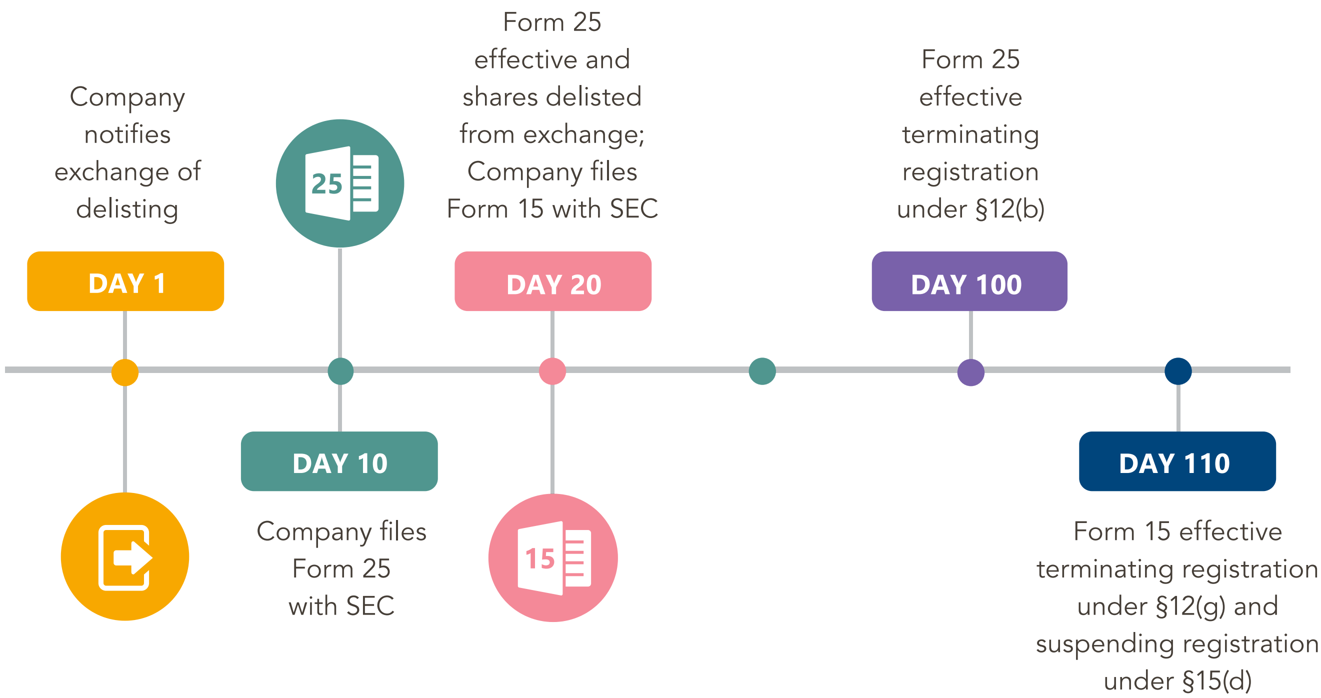
The termination of an issuer's Exchange Act reporting obligations under Section 12(b) also may revive the issuer's Section 15(d)) reporting obligations if the issuer has an effective registration statement on file with the SEC. Once an issuer is registered pursuant to Section 15(d), the issuer's reporting requirement can never be terminated but its obligations can be suspended for eligible classes of securities.

Section 15(d) reporting obligations are suspended automatically if (i) an issuer has a class of securities registered under Section 12 or (ii) there are fewer than 300 shareholders of record of the class of securities subject to registration on the first day of any fiscal year (other than the year in which the subject registration statement became effective). If an issuer's Section 15(d) reporting obligations are suspended, but the issuer later does not meet the record holder and asset eligibility thresholds for suspension on the first day of a subsequent fiscal year, the issuer's reporting obligations under Section 15(d) will be revived. Therefore, issuers need to monitor the number of record holders on an annual basis to ensure they meet the suspension requirements of Section 15(d) unless the issuer is an FPI that meets the requirements to file a Form 15F outlined below, in which case the Form 15F operates to terminate rather than suspend these reporting obligations.

Rule 12h-3 of the Exchange Act permits an issuer to suspend its Section 15(d) reporting obligations voluntarily if it files a Form 15 and meets the following conditions: (i) it is current in its Exchange Act reporting requirements for the last three fiscal years and the portion of the current prior to filing of the Form 15 and (ii) the registered class has (a) fewer than 300 shareholders of record or (b) as of the end of the company's last fiscal year, fewer than 500 shareholders of record and assets less than US$10 million. Even if an issuer has thousands of beneficial owners of a class of securities, it may have less than 300 shareholders of record of that class of securities since the issuer only needs to count the number of registered holders on its shareholder list and if depositaries are listed, the number of holders for whom the depositary holds securities which is typically a more limited number than the actual number of beneficial owners. Accordingly, many companies may meet the shareholders of record threshold to delist.

Rule 12h-3 of the Exchange Act is not available to an issuer if it has had a registration statement relating to the shares become effective in the fiscal year for which the issuer seeks to suspend reporting, or has had a registration statement updated by Section 10(a)(3) of the Securities Act during the fiscal year for which the issuer seeks to suspend reporting. Furthermore, an issuer may not rely on the fewer than 500 record holders and US$10 million in assets rule if a Securities Act registration statement went effective or required a Section 10(a)(3) update during the two succeeding fiscal years. Issuers with outstanding F-3s are considered to have had a registration statement "updated" during the year because the annual report filing is a Section 10(a)(3) update to those registration statements, because the annual report is automatically incorporated by reference.

Below is a typical timeline for the delisting and deregistration process.



Special Deregistration Rules for Foreign Private Issuers – Rule 12h-6

In March 2007, the SEC adopted Rule 12h-6, which allowed FPIs to terminate their reporting obligations under Section 15(d) of the Exchange Act or deregister a class of securities under Section 12(g) thereunder if they satisfy the following three conditions: (i) the FPI must have had reporting obligations under the Exchange Act for 12 months and filed or furnished all reports during this period including the filing of at least one annual report; (ii) the class of securities of the FPI sought to be deregistered, must not have been sold, subject to certain exceptions, through a registered public offering in the 12 months leading up to the sought deregistration; and (iii) the FPI must have maintained a listing of the class of securities sought to be deregistered on an exchange in the FPI's primary trading market for at least the 12 months preceding the deregistration filing. In the period leading up to the adoption of Rule 12h-6, there were many dual-listed FPIs that had accessed the US capital markets through a listing of ADRs on the NYSE or Nasdaq, and after its passage, this rule helped many issuers delist and deregister. At the moment, dual or multiple listings, particularly in certain sectors like technology, life sciences and other growth sectors, are not as common and the ability of issuers listed solely on the NYSE or Nasdaq to take advantage of Rule 12h-6 is more limited, however, as implementation of the Act may take time and enforcement of delisting may run up to three years based on the current drafting of the Act. There can be planning opportunities to list on other exchanges around the world including Hong Kong as described below which could lead to situations where Rule 12h-6 would be helpful.

If the above three conditions are met, Rule 12h-6 provides two avenues for a FPI to terminate its reporting obligations under the Exchange Act: the average daily trading volume (ADTV) Threshold Method and the Record Holder Threshold Method, which allows an FPI to terminate its reporting obligations in relation to the FPI's securities if, on a date within 120 days before filing for deregistration, the FPI has either (i) less than 300 record holders on a worldwide basis, or (ii) less than 300 record holders who reside in the United States. To judge whether it meets the Record Holder Threshold Method, an FPI can look through the amount of securities represented by accounts of customers who reside in the United States to brokers, dealers, banks and other nominees located in (i) the United States, (ii) the FPI's jurisdiction of incorporation, legal organisation or establishment, and (iii) the FPI's primary trading market if different than the market listed in the preceding item (ii). Furthermore, if an issuer aggregates the trading volume in two foreign jurisdictions for the purpose of determining its primary trading market, it will have to look through both of the foreign jurisdictions when looking through accounts to meet the threshold of 300 record holders.

The ADTV Threshold Method sets out an ADTV test that an FPI must meet in order to deregister its equity securities pursuant to which the ADTV of an issuer's class of securities must be five percent or less of that class of securities ADTV on a worldwide basis for the same period. There are two constraints on issuers limiting their use of the ADTV test method to deregister securities. An issuer cannot terminate its reporting obligations using Rule 12h-6, if (i) an issuer has terminated an ADR facility in a class of securities in the past 12 months and (ii) the ADTV of that class of securities in the United States is greater than 5 percent of the ADTV on a worldwide basis. Secondly, an issuer cannot terminate its reporting obligations using Rule 12h-6, if, within the past 12 months, the issuer delisted a class of securities from a US national securities exchange or inter-dealer quotation system and the ADTV of that class of securities in the US was greater than 5 percent of the issuer's worldwide ADTV at the time of such delisting.

Under Rule 12h-6, the FPI must file a Form 15F to deregister a class of securities under the Exchange Act. If the issuer meets all the conditions in Rule 12h-6 outlined above to terminate registration of a class of securities under the Exchange Act and the FPI has no classes of securities with reporting obligations aside from the class for which deregistration is sought, the FPI is eligible to file the Form 15F. Once the Form 15F has been filed, the FPI's reporting obligations under the Exchange Act are immediately terminated.

Registration Rights, Shareholder Agreements and Debt Instruments – Special Considerations

A company should review any registration rights or shareholder agreements and terms of its debt instruments prior to undertaking a delisting and deregistration exercise. Following delisting and deregistration, a company may no longer be able to comply with any existing obligations to register privately-placed shares. Also, certain debt instruments may have covenants requiring maintenance of a listing and any failure to do so may cause an event of default under the terms of the debt instrument and potentially lead to acceleration.

SECONDARY LISTINGS – HONG KONG

The status of the Act is currently unsettled and no final rules have been adopted. Prior to undertaking a going private transaction and/or a delisting and deregistration exercise, a prudent and proactive first step for a US-listed Chinese issuer would be to consider a secondary listing in another jurisdiction closer to home, such as Hong Kong. A mechanism for exchanging ADRs listed in the United States with ordinary shares listed in Hong Kong should also be considered and likely favoured by shareholders. At a minimum, this would give the US public equity a "second home" and optionality for shareholders to "move exchanges". It also would provide a clear liquidity framework for the public equity in the event of a US delisting and could lower the risk and cost of any potential going private transaction with respect to the US-listed equity.

Primary Listing vs. Secondary Listing

If an issuer chooses Hong Kong as its only listing venue, it is a primary listing. The Stock Exchange of Hong Kong Limited (HKEx), as opposed to any other overseas stock exchange, is its primary listing regulator.

In a dual listing, the Hong Kong listing may be either primary or secondary. To qualify for a secondary listing in Hong Kong, the issuer must maintain a primary listing on a recognized overseas stock exchange which the HKEx recognizes as providing equivalent standards of shareholder protection. However, if the majority of trading in an issuer's securities is likely to be on the HKEx, it is generally expected that the Hong Kong listing should be primary. The Hong Kong Listing Rules (HKLR) give greater latitude in a secondary listing in respect of listing requirements and ongoing obligations such as the contents and accounting standards of an issuer's financial reports.

Secondary Listing with an Offering vs Secondary Listing by Introduction

An issuer may seek a secondary listing in Hong Kong with an offering of new shares, or its shareholders may sell existing shares, or a combination of both, by way of an offering to achieve a broad shareholder base in Hong Kong. A secondary listing can also be achieved by way of introduction by migrating a certain number of shares traded on the primary listing venue to the secondary listing venue. In essence, the vetting process is the same in both cases but in a secondary listing by way of introduction, no offering or other marketing arrangements are required.

Concessionary Secondary Listing Route

In April 2019, the HKEx adopted Chapter 19C to the HKLR which provides a new route to a secondary listing for large emerging and innovative companies which are primarily listed on a major international exchange . An issuer seeking a secondary listing on HKEx by way of the concessionary secondary listing route under Chapter 19C of the HKLR must possess the following characteristics:

- Be an "innovative company" (as further described below);
- Have its primary listing on the NYSE, Nasdaq or the Main Market of the London Stock Exchange Premium Listing, each being a "Qualifying Exchange", with a good record of compliance for at least two full financial years; and
- Have a market capitalisation of at least HK$10 billion at the time of secondary listing in Hong Kong.

The HKEx considers an "innovative company" for the purpose of a secondary listing in Hong Kong would normally be expected to possess more than one of the following characteristics:

- Its success is demonstrated to be attributable to the application, to the issuer's core business, of new technologies, innovations and/or a new business model, which also serves to differentiate the company from existing players;
- Research and development is a significant contributor of its expected value and constitutes a major activity and expense;

- Its success is demonstrated to be attributable to its unique features or intellectual property; and/or
- It has an outsized market capitalisation / intangible asset value relative to its tangible asset value.

The HKEx will review the facts and circumstances of each case to determine if an applicant has demonstrated that it is an "innovative company". The superficial application of new technology to an otherwise conventional business will not be sufficient to demonstrate the characteristics above. For example, the HKEx may consider that an applicant that operates a retail business with an online sales platform may not be suitable to list by the concessionary secondary listing route under Chapter 19C of the HKLR, if it does not exhibit other distinctive features or characteristics.

A US-listed Chinese issuer and/or an issuer with a Weighted Voting Rights (WVR) structure will be required to have a minimum revenue of HK$1 billion in its most recent audited financial year if its market capitalisation is less than HK$40 billion. This is important to a US-listed Chinese issuer with a "centre of gravity" in Greater China as they were not eligible for a secondary listing before this new concessionary secondary listing route under Chapter 19C of the HKLR.

Only those US-listed Chinese issuers listed before December 15, 2017, will enjoy the concessions in connection with the following:

- Equivalence requirement: the requirements in respect of the issuer's constitutional document under the HKLR will not apply. In other words, it is not mandatory for US-listed Chinese issuers to amend constitutional documents to meet Hong Kong's key shareholder protection standards; they may adopt the methods specified in HKEx's jurisdictional guidance.
- VIE structures: The US-listed Chinese issuers will be able to obtain a secondary listing with their existing variable interest entity (VIE) structures in place subject to the provision of a PRC legal opinion that their VIE structures comply with the relevant PRC laws, rules and regulations and additional disclosure. A VIE structure refers to a structure whereby an entity established in the PRC that is wholly or partially foreign-owned

exercises de facto control over a PRC domestic operating company, which holds the necessary license(s) to operate in a restricted sector. The US-listed Chinese issuers in the Internet-related, education related and other restricted business sectors usually have a VIE structure in their group structure.

- WVR safeguards: US-listed Chinese issuers will be able to obtain a secondary listing with their existing WVR structures and would not have to comply with the ongoing WVR safeguards under Chapter 8A of the HKLR (such as the restriction not to increase the proportion of shares with WVR after listing; or the requirement for certain resolutions to be subject to voting on a one vote per share basis) except for those that are subject to disclosure requirements.

US-listed Chinese issuers that listed on or after December 15, 2017 will have to comply with existing HKLR requirements in relation to key shareholder protection standards, VIE structures and WVR safeguards.

A US-listed Chinese issuer applying for a secondary listing under the concessionary secondary listing route under Chapter 19C of the HKLR would be entitled to make a confidential filing of its application.

The HKEx will regard the majority of trading in an issuer's shares to have been moved to Hong Kong on a permanent basis if 55% or more of the total worldwide trading volume (by dollar value) of those shares (including the trading volume in depositary receipts issued on those shares) over the issuer's most recent financial year, takes place on the HKEx. When the bulk of trading is considered migrated to Hong Kong on a permanent basis, the codified waivers granted to US-listed Chinese issuers above would cease to apply. These issuers would, on a case-by-case basis, be granted only waivers that are commonly granted to dual-primary listed companies, such as those relating to reporting accountants' independence/qualifications and company secretary qualifications/experience.

Effects of US-delisting on Concessionary Secondary Listing in Hong Kong

If a US-listed Chinese issuer fails to meet its obligations under the US regulations and listing rules (e.g., fails to meet the requirements of the Act, if passed), it would be a non-compliance event on its primary listing venue and the HKEx would likely review this non-compliance event on a case-by-case basis as to whether it would affect the secondary listing status. If the primary listing status of such US-listed Chinese issuers is impacted by the PCAOB inspection requirements under the Act, the US-listed Chinese issuer may shift not less than 55% (or all) of its trading volume to Hong Kong. In such event, the HKEx will regard the issuer as having a primary listing in Hong Kong and it will no longer enjoy the concessions granted under Chapter 19C of HKLR (being certain exemptions and waivers from Hong Kong securities laws and HKLR), which could result in incurring of incremental compliance cost and burden.