

# APERCU



## BDO HONG KONG ANNOUNCES BDO INTERNATIONAL AND BDO CHINA INVESTMENT IN THE FIRM

**B**DO Hong Kong announced on 16 October 2014 that BDO International Limited and BDO China Shu Lun Pan Certified Public Accountants LLP (BDO China) have made an investment in a shareholding in the firm. This investment was cemented in a signing ceremony held at the BDO network's Biennial Conference in Shanghai, China.

The agreement will come into effect on 1 January 2015 and is a first step towards the integration of BDO Hong Kong and BDO China. This three-party collaboration will further strengthen the BDO network's international expertise by combining the best available business and advisory services locally in Hong Kong and China, enabling the provision of seamless service to clients operating in both territories.

**Albert Au, Chairman of BDO Hong Kong**, says: "This agreement comes at the right time. More and more businesses are demanding seamless, outstanding professional service to help them grasp the vast market opportunities engendered by the increasingly closer economic integration of China and Hong Kong. I am confident that this closer cooperation will further demonstrate our professionalism and commitment to quality and to serving the best interests of all our clients."

"We are also very excited to have developed this collaboration with BDO China, which has established itself as the most prominent CPA firm in China, driven by its strong heritage and reputation of delivering the highest quality of services with integrity, independence and objectivity," adds Albert.

**Zhu Jiandi, Managing Partner of BDO China**, is equally delighted with this new development. "BDO China takes pride in our local market knowledge, industry expertise and technical skills, the combination of which delivers top quality services to our clients. The integration of our strengths with BDO Hong Kong's world class services, and the expertise of BDO's robust and extensive network, will ensure the delivery of extraordinary service to all our clients."

**Martin van Roekel, CEO of BDO International Limited**, says: "I am extremely pleased to see that the recent discussions have come to successful fruition. BDO's participation at global level in this investment demonstrates our commitment to the further growth of BDO in Hong Kong and China. This is an excellent example of how providing truly customised services to multinational corporations and local enterprises alike embodies BDO's guiding principle of delivering exceptional client service through talented people."

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# VALUATION OF INTEREST RATE SWAPS

## Introduction

An interest rate swap is a contractual agreement between two parties to exchange a range of interest rate payment, but without exchanging the underlying debt instrument.

In light of the increasing demand of interest rate swap (IRS) being utilized by companies in recent years for cash flow management, risk management, portfolio management and speculation, many industry commentators have expressed alarm over the rapid growth and size of the IRS market, arguing that IRS and other derivative instruments may threaten the stability of global financial markets. In light of the renewed interest in IRS, we provide below an overview of the valuation of this financial instrument.

## Introduction to IRS

In an ordinary IRS, one party agrees to pay the counterparty a fixed or floating interest rate denominated in a particular currency.

## Purpose

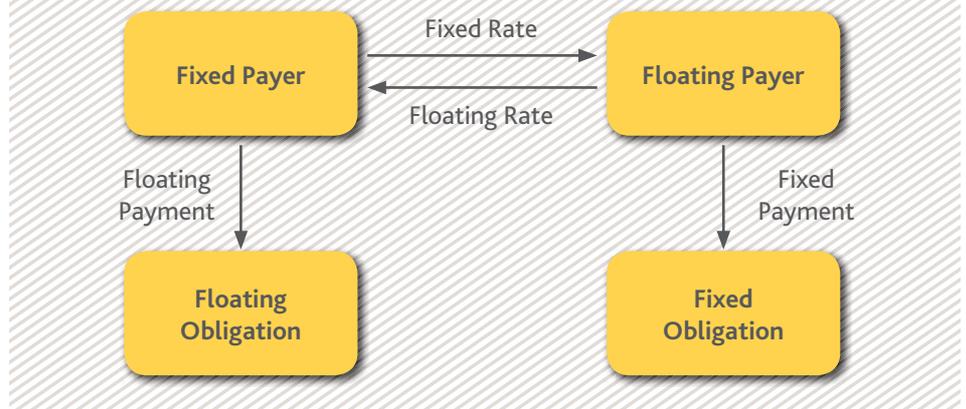
- Hedge:** financial market participant holding financial assets or liabilities with interest rate exposure can use an IRS to hedge against its exposure and risk, ie a non-redeemable float-bond issuer may wish to enter into an IRS as a fixed payer to hedge its interest risk exposure in an expected rising interest rate cycle.
- Speculation:** risk-taking investors may wish to profit from speculation of interest rate movements using IRS, ie a speculator expecting interest rates to rise may gain interest rate exposure by entering an IRS as a fixed rate payer.

## Type

The principal types of IRS are as follows:

- Float-for-fixed:** One party pays floating interest indexed to reference index A to receive a swap rate on a given notional amount at an initial exchange rate for a given number of years. This is one of the most commonly seen IRS in the market, used by market participants to alter its exposure according to their expectation of floating interest rate movements. Arbitrage opportunities may exist due to varying level of credit-worthiness and the existence of the quality-spread differential between companies. (Graph 1)
- Float-for-float:** One party pays floating interest indexed to reference index A to receive floating rate interest indexed to reference index B, on a given notional amount, for a given number of years. Likewise, float-for-float swaps with the same index, but for differing maturities are also common swaps available. Float-for-float

Graph 1



rate swaps, also known as basis swaps, are normally used to hedge against or speculate on the spread between the two indexes widening or narrowing.

- Cross-currency feature:** The above float-for-float and fixed-for-float swaps can also be created using different currencies. With the cross-currency feature embedded, an additional complexity of exchange rate fluctuation is introduced because the initial exchange rate is likely to change at each reset date. Therefore, extra care is needed in valuing cross-currency swaps.

## Valuation of swaps

Although a number of interest rate resets and cash flow exchanges between parties may occur before the expiration date of the instrument, the valuation of an IRS is not as complex as one imagines. A plain vanilla IRS can actually be seen as a combination of bonds (ie a fixed-rate bond vs a float-rate bond): a fixed interest rate payer can gain equivalent exposure by investing in a floating-rate bond while issuing a fixed-coupon bond with the same expiration and payment dates, and vice versa.

In general, the values recognized by the fixed rate payer and the floating rate payer are both zero at inception; otherwise, an arbitrage opportunity would arise. Therefore, the interest rate paid by the fixed rate payer, which is known as the swap rate, will be set based on the market yield curve to equalize the value to both parties in the IRS.

## Zero-sum game

The value of the IRS could deviate from zero based on any shift or twist of the yield curve or floating rate changes over the life of the IRS. The parties to the instrument could then recognize a positive or negative value prior to maturity of the IRS. However the IRS arrangement, at any time, between the two parties is a zero-sum game, ie one party's gain is the other party's loss. Therefore, the IRS can be valued on either side, as follows:

$$V_{fixed} = -V_{float}$$

Where

$V_{fixed}$  = IRS value to the fixed rate payer

$V_{float}$  = IRS value to the float rate payer

## Pricing of swap at inception

At inception of the instrument, the present value of the fixed interest rate payments is set to be equal to the floating rate payments in order to calculate the swap rate. Assuming there are T periods of payments in the IRS, and maturity of the IRS is at time T ( $t = T$ ), then:

At inception  $t = 0$ ,

$$V_{fixed} = PV_{floating} - PV_{fixed} \\ \& \\ V_{fixed} = 0$$

Therefore,

$$PV_{fixed}(0) = PV_{floating}(0)$$

Where

$V_{fixed}$  = the value of the IRS to the fixed rate payer

$PV_{fixed}(0)$  = the present value of the fixed rate payment at inception,  $t=0$

$PV_{float}(0)$  = the present value of the floating rate payment at inception,  $t=0$

Presented as individual cash flows, the equation above can be represented as:

$$\sum_{i=1}^T \frac{C}{(1+r_i)} + \frac{N}{(1+r_T)} = \sum_{i=1}^T \frac{F_i}{(1+r_i)} + \frac{N}{(1+r_T)}$$

Where

$C$  = fixed rate payment in each period, ie swap rate

$F_i$  = floating rate payment in the respective period  $i$ , for  $i = 1, 2, 3, \dots, T$

$r_i$  = spot rate in the respective period  $i$ , for  $i = 1, 2, 3, \dots, T$

$N$  = Notional Amount of the IRS

Simplifying the above formula, the swap rate, C, can be represented as a series of discount factors, as follows:

$$C = \frac{1 - \frac{1}{(1+r_T)^T}}{\sum_{i=1}^T \frac{1}{(1+r_i)^i}}$$

**Subsequent valuation of swap**

As mentioned above, the subsequent valuation at any time beyond the inception can be performed by treating the IRS as a bond portfolio. Under this method, the fixed rate bond and the floating rate bond are valued individually and the value of the IRS is the net value of the two bonds.

From the fixed rate payer’s perspective, the value of the IRS at time k (t = k) can be presented in the following equations:

$$V_{fixed}(k) = PV_{floating}(k) - PV_{fixed}(k)$$

$$= \sum_{i=k+1}^T \left( \frac{F_i}{1+r_i} + \frac{N}{1+r_T} \right) - \sum_{i=k+1}^T \left( \frac{C}{1+r_i} + \frac{N}{1+r_T} \right)$$

The above method provides a quick and convenient way for the market participant to estimate the fair value of the IRS through two simple bond valuations, which are performed using a conventional discounted cash flow method. This common methodology can be readily applied in the market for general valuation practice.

**Valuation complexity**

Beyond the basic IRS valuation steps detailed above, other complexities may need to be reflected in any IRS valuations, as follows:

- 1. Financial intermediary:** For large swap arrangements, a financial intermediary may be used to match counterparties on a given instrument. When a financial intermediary is involved, a spread will be earned by the financial intermediary, which will need to be incorporated in the valuation. The financial intermediary earns the spread by party-sourcing-&-matching, anonymous identity keeping, valuation, swap administration, and sometimes by offering a payment guarantee.
- 2. Credit risk:** Credit risk exists in a swap instrument through default/counterparty risk. It is the risk reflecting how likely the counterparty will default on the given payments. Depending on the arrangement, the risk usually is the highest at the middle of the term as credit deteriorates when significant level of payments remaining. For currency swap, since principal is exchanged at maturity, the highest level of credit risk is shifted later towards between the middle and the end of the swap term. It is also worthwhile to note that payment guarantee may not be part of the contractual service even when a financial intermediary is involved. Counterparty credit risk may also be further aggravated when combining with unfavorable exchange rates expected for the counterparty. Therefore, the credit risk may fluctuate over the life of an IRS prior to maturity. This risk is unfortunately subjective and difficult to incorporate within the valuation model.

Credit default swaps can be incorporated if credit default protection is desired, especially if there is no financial intermediary and deemed counterparty credit risk.

- 3. Duration:** Duration of a fixed income portfolio can be managed via an IRS instrument to modify the duration to a desirable target level (ie lowering a long-term bond’s duration by using a float-for-fixed IRS; or matching the duration of the asset and long-term liability). IRS is one of the frequently used financial derivatives to adjust the portfolio’s duration flexibly at a reasonable cost. Flexibility and cost effectiveness can be achieved due to the fact that an IRS can be set up with customised terms such as a reference index, reset date frequency and basis spread agreed without excessive upfront cost.

**Conclusion**

Interest rate swaps are a widely used instrument in global financial markets. For non-complex swap arrangements, this can be valued relatively simply using discounted cash flow techniques. However, for a given portfolio to satisfy the overall hedging or speculation purpose, more complex features can be incorporated in a swap arrangement, which will require additional valuation considerations. These areas will be further reviewed in a subsequent publication.

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**Summary of swap instrument and complexity**

Swap Instrument	Short description	Complexity
Float-for-float	Floating rate payments for floating rate payments	★
Float-for-fixed	Floating rate payments for fixed rate payments	★
Fixed-for-fixed	Fixed rate payments for fixed rate payments	★
Cross-currency	Exchange of payments between two currencies	★★
Equity	Exchange of payments with which at least one side is based on an equity index	★★
Commodity	Fixed payments for floating payment based on the underlying commodity price level	★★
Credit default swap	Periodical payments in exchange for protection of counterparty’s default	★★★★
Option-embedded	Option features embedded such as Bermudan or European within any kinds of swap	★★★★
Mixed	Any combination of the above features can create an exotic swap arrangement	★★★★★

**Summary of sample swap payoff pattern**

Perspective	Option equivalence	Payoff pattern
Fixed-rate payer	Long call + short put	Gain when interest rate rises
Fixed-rate receiver	Short call + long put	Gain when interest rate falls
Callable swap by fixed-rate receiver	Long call + short put + early termination right	Gain when interest rate rises with loss cap at strike rate when interest rate rises

# CYBER CRIME: IT'S YOUR PROBLEM TOO!

We now live in the cyber age.

Smartphones linked to the internet have become a must in our daily lives. Regardless of the industry, businesses have one thing in common: the fact that they are all equipped with cyber devices.

Most of us are in awe of today's technologies. But for every upside, there is a downside. In the cyber era, it is cyber crime.

You may immediately associate cyber crime with the problems created by individual "hackers". You are right, but they are only a part of the problem. Large-scale cyber-attacks are now perpetrated among countries, for political, security and military purposes. Edward Snowden's leaks of what the NSA were doing confirmed what was previously thought only happened in films: life imitates art!

More recently, the iCloud scandal involving the leak of private pictures of film stars demonstrated how easy it is to steal personal data. Cyber criminals are becoming more and more sophisticated. Phishing emails are just the tip of the iceberg. Cyber crime can happen anywhere and anytime. It is probably happening as I write this!

You may not have been a victim of cyber criminals yet (or you have been, but did not realise it). Either way, we can guarantee you they are not very far away from you and me. Below is a case study (inspired by real events):

## Case Study

A professional consulting firm (the "Firm") in Hong Kong discovered one morning there had been a conference call made from their IP phone system the night before. The call was between their office and participants in Monaco and Latvia. The Firm has no business clients or offices in Monaco or Latvia. In Hong Kong, all the employees and the boss had left the office at the time of the call. The footage from their surveillance cameras and their office access systems did not show anyone entering or leaving the office during the time of the call.

The Firm checked their telephone bill with their service provider (the "Telco"), and was informed that the conference call's duration was six hours at a cost of over HK\$35,000.

The staff at the Firm was working with eight Windows-based PC consoles which were all connected to the internet. Telecom LAN and office LAN were provided and maintained by the Telco. In theory, they were independent networks in their initial configurations. However, the Firm's internal investigation revealed that two of the LAN ports were cross plugged. This meant the voice and data networks were bridged and merged as one network. This then provided a window for someone to hack into the network

and make the conference call using its IP phone system.

The next questions were "Who did the hacking and is the security breach the fault of the Firm or the Telco?"

The Firm reported the breach to the police. They were informed that in cyber crime investigations, all the computers and electronic equipment involved have to be taken out of operation. This is because the police have to perform digital acquisitions to obtain the relevant evidence.

If the equipment was used, the evidence might be compromised/overwritten and rendered unusable.

The police also advised that their computer forensic officers were all occupied on other cases at the time. The Firm would therefore have to wait for a while before the police could commence the investigation. In the meantime, all the Firm's computers had to be put out of service and its business suspended immediately.

The Firm contacted the relevant government authority to seek help, but the authority could only advise that there were no legal regulations or policies concerning this situation. They instead informed the Firm to follow police instructions.

What was initially a manageable financial loss of HK\$35,000 had now evolved into something far worse. The business had to shut down and the consequential impact included the following:

- Business loss;
- Reputational damage;
- Uncertainty about business resumption; and
- Costs to be incurred to review and enhance the security and controls of their network and systems.

The alternative approach was to ignore the police and continue with their business but any useful evidence could be lost. Also, the Firm would never know who had hacked its systems and would have no evidence to refute the Telco's claim for the conference call.

Further, it was possible that the hacker may have stolen the personal data of clients and leaked such data to others. If so, the firm could be prosecuted for breaching the Personal Data (Privacy) Ordinance.

If any data leaked were used for tax evasion or money laundering or even terrorism financing, the consequences for the Firm would be dire.

So, what to do!??

The Firm decided to continue with their operations whilst waiting for the police to

complete their investigation.

Five months later, the police finished their investigation and informed the Firm that no evidence of a cyber crime had been detected. This was not unexpected as the Firm had not suspended operations and any evidence could have been compromised as such. The police said the Firm was the sixth victim that week of similar hacking crimes. The case was closed by the police accordingly. The Firm could not file a claim against their insurers for any losses as no evidence of a theft or crime had been established.

The Telco charged the Firm for the cost of the conference call. The Firm denied all liability and the matter will likely end up in legal proceedings.

Fortunately, no leak of personal/business data was detected.

At BDO, our digital forensics team can provide immediate and practical recommendations concerning your IT systems so that your business is not unduly disrupted in the event of a cyber attack. This includes:

- ring fencing the crime scene to preserve physical evidence eg backing up all the relevant files and details of the network and systems configuration and folders and obtaining a copy of the CCTV footage plus door access records.
- setting up a temporary network on computers and equipment that are not impacted by any enforced shutdown to allow the victim to continue its operations pending the completion of the police investigation.
- facilitating the police investigation and computer forensic review of systems.

But more importantly, such breaches could have been prevented with a periodic review of digital systems and controls. We can carry out such reviews of your cyber security defences and recommend the required improvements or changes if necessary.

As Benjamin Franklin once said, "An ounce of prevention is worth a pound of cure."

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Photo: Timothy Chan

## RISKS AND REGULATIONS OF VIE STRUCTURE IN PRC

The VIE (Variable Interest Entity) structure - also known as SINA when it first went public on the US Stock Exchange - was created by investment banks and is a group procedure used by the PRC companies which plan to be listed overseas in order to avoid some of the industry restrictions made on foreign investment by the PRC government.

### Regulations and market solution

In 2006, the Ministry of Commerce and six other ministries of the PRC government published the Acquisition of Domestic Enterprises by Foreign Investors Provisions - normally referred to as the No. 10 Regulation Article - that set out a series of strict rules to limit foreign investment in certain industries in PRC.

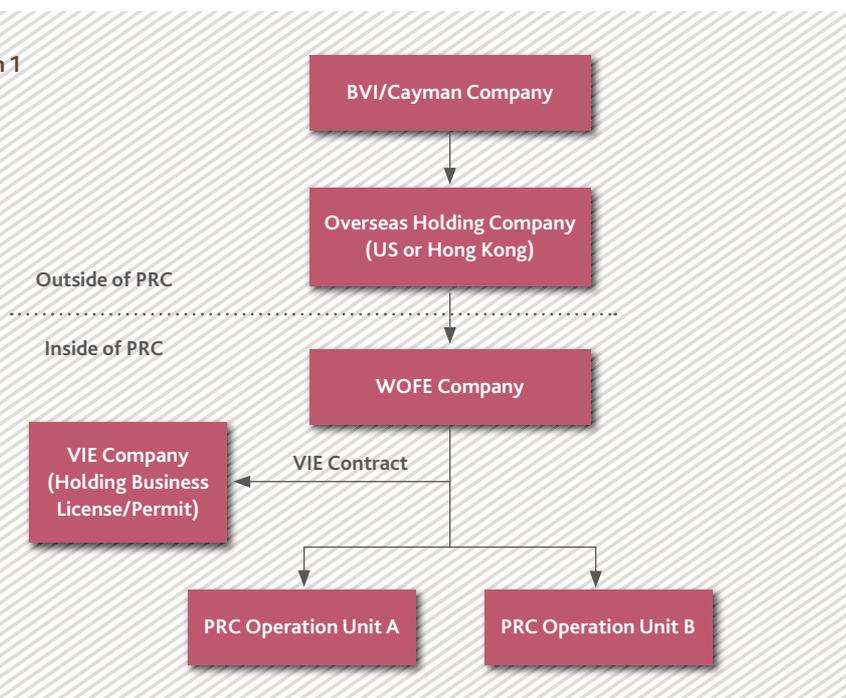
In addition to the No. 10 Regulation Article, the Foreign Investment Industrial Guidance Register published by the National Development and Reform Commission and Ministry of Commerce and recently amended in July 2013, sets out the industry restrictions for foreign investment. The Guidance Catalogue detailed foreign investment which are restricted or prohibited in certain industries. Among those industries, technology, media and telecom (TMT industries) have become examples in recent years due to the conflict between their active performance in the market and the limited financing options in PRC. As it's difficult to obtain financing from banks or PRC IPO market, some of the companies of TMT industries in PRC are seeking financing opportunities from overseas IPO market.

The VIE structure - or Protocol Controlled Entity - then comes from TMT industries to allow the companies to avoid the restrictions of the industry register. VIE structured businesses generally consist of three levels: (i) the overseas listed company; (ii) the foreign wholly-owned subsidiary (WFOE) or foreign-invested companies (FIE); and (iii) the licensed companies (business license holders) within the foreign investment restricted industries. Effective management is achieved by signing a series of

general VIE agreements between the WFOE and licensed company, which usually states that the WFOE substantially controls the VIE company's assets and operations, and the profits of the VIE company are required to be transferred to the WFOE as management fees or royalties (**Graph 1**).

In the VIE structure, the business invested has actual or potential economic benefits but the enterprise itself has no complete control over

Graph 1



the economic interest. The primary earner, which in fact controls beneficiaries, must consolidate the VIE company into the listed group. The US GAAP approved the VIE structure and established the accounting standards for VIE companies. Hong Kong Exchange (HKEx) recently amended the Listing Decision HKEx-LD43-3 in April 2014 and stated that the contractual arrangements should not make the company unsuitable for listing; but the VIE structure information must, nevertheless, be disclosed in detail.

### Listed companies using VIE structure

Upon examination of the listed VIE structured companies in US, Hong Kong and UK - the three main markets where Chinese companies seek financing opportunities - it has been noted that, as of September 2011, over 85% of the VIE companies were listed in the US, 13.5% were listed in Hong Kong, while a very small number were listed in the UK. Most of these listed companies were from the TMT and education sectors (**Graph 2**). Again, examination of annual reports of VIE structured companies in the US revealed that 78.35% of companies stated that the Chinese Government's restrictions on foreign investment are the primary reason why VIE was used.

### Risks in VIE structure and its regulation

From a legal perspective, there are many issues in relation to the VIE structure. It is effective in overseas capital financial markets but its legality has not been clearly defined or adequately noted by PRC regulatory bodies, and that creates uncertainty with VIE structures. In assessing the risk that is associated with the VIE, most companies referred to legal opinion that says that there are no unlawful issues for VIE agreements under Chinese law. To describe the

risks, however, over 70% companies who sought legal opinion reported that there is considerable uncertainty about Chinese regulatory bodies' view of VIE structure.

Other than the legality risks, VIE structure has its own weakness since it is based completely on a series of contracts. As an effective way to deal with foreign investment restrictions so far, VIE seems to be more like a mutual agreement, with no problems until the VIE structure fails. There have been several instances of breaking or cancellation of VIE contracts in recent years and the opportunities for the foreign investors to successfully apply for Chinese court enforcement are considered as low. Questions have been frequently raised on how to ensure that VIE partners completely and accurately report and transfer profit to the WOFE in accordance with that VIE contracts, and that overseas investors will maintain the VIE contract effective.

It is realised that authority should be present, from the initial VIE structure, and should pass from the listed body and the "private" WOFE to the licensed VIE company. In the VIE structure, the licensed company is controlled by the listed corporation through a series of agreements with a "private" company, ie the WOFE, but without equity shares. Although the licensed company is consolidated into the listed group, the structure itself may not be able to ensure that the profit of the licensed company can be transferred into the "private" one to safeguard the interest of foreign investors. The shareholders of the listed corporation and the founders of the licensed Chinese company or other agency shareholders should have common objectives, this being one of the important criteria to be listed in the major markets. In the VIE structure, however, common interests are only reflected at the listed

corporation but not at licensed company level. Once interests cease to be the same, there is an increasing risk of infringement of the founders' rights and also of damage to other shareholders' interests. Therefore, the compositions of shareholders and the Board of Directors are the keys to regulate particular risks.

### Authority over the nominal shareholders of the VIE company

It would not be advisable to choose the legal representative as the nominal shareholder of the VIE company due to lack of independence. It is generally considered a wise choice to appoint a neutral person who is a resident of PRC.

Any single shareholder can be a risk as this nominal shareholder can make decisions without the consent of any other shareholders. Also, the VIE company may not set up a Board of Directors if there is only one shareholder and, in such an event, the executive director's power may not be effectively regulated. From this control point of view, it is an advisable practice to appoint at least two, or better three to four nominal shareholders with pledge of share rights of the VIE company.

### Authority over the Board of Directors of the VIE company

VIE board members are appointed by the nominal shareholders and so investors should have an agreement with these nominal shareholders to regulate the board member's appointment. Due to the restriction of the PRC government, members of the Board should not be solely foreigners or else the Board will be seen as being controlled by overseas investors.

Additionally, the legal representative of the VIE company should be appointed with caution. It is considered a reliable control that the legal representative and the Chairman of the Board are two separate individuals.

Graph 2

Industry	Listed in the US	Listed in Hong Kong	Listed in the UK	Total
Internet business services	19	3	-	22
E-commerce	7	1	1	9
Online games	8	1	-	9
Software services	11	1	-	12
Education and training	10	-	-	10
Publication and media	9	4	-	13
Agricultural production	3	-	-	3
Energy	3	1	-	4
Hardware and semiconductor equipment	5	-	-	5
Biotechnology and medicine	6	-	-	6
Real estate agency	3	-	-	3
Financial services	2	2	-	4
Retail	7	2	-	9
Commercial and technology services	2	-	-	2
<b>Total</b>	<b>95</b>	<b>15</b>	<b>1</b>	<b>111</b>
%	85.59%	13.51%	0.90%	100%

For further enquiries about corporate governance over VIE structured companies, please contact Patrick Rozario, Director and Head of Risk Advisory Services, at (852) 2218 3118 or [patrickrozario@bdo.com.hk](mailto:patrickrozario@bdo.com.hk)

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# 中國內地可變利益實體(VIE)結構的風險及其法規

**可**變利益實體(VIE)模式,是由投資銀行為中國大陸公司在境外上市而創造的特殊結構模式,主要是為了使中國政府禁止外商投資的行業能夠通過VIE模式繞開法律法規所設置的限制。由於新浪首先使用這種結構成功在美國上市,故VIE也被市場稱為新浪模式。

## 相關法規和市場的應對舉措

2006年,中國政府的商務部及其它六部委共同頒布了《關於外國投資者併購境內企業的規定》,即通常所說的10號文,提出了一系列嚴格的規則來限制外國投資者對中國境內某些特定行業進行投資的行為。

除了10號文的規定之外,由國家發展和改革委員會及商務部發布並曾於2013年7月作出修訂的《外商投資產業指導目錄》,列出了限制或禁止外商投資的中國境內產業。在此指導目錄中,已列明某些行業的外商投資被明確設限或完全禁止。然而,這些外商投資被禁止的行業在市場上的活躍表現往往與中國境內融資渠道狹窄存在著矛盾和衝突,其中尤以科技、傳媒和電信(即TMT行業)為近年來的代表。由於通過銀行貸款的形式進行融資難度增加,大量的如TMT行業的各類公司迫切希望能夠通過上市渠道融資從而得到進一步發展。但是另一方面,在中國境內上市的難度被普遍

認為很高,不少企業希望選擇到中國境外市場上市。

VIE結構,即可變利益實體,也可以被稱為協議控制實體。協議控制實體最初是在TMT行業中率先使用,使得擬在境外上市的公司繞行外商投資產業的限制。VIE結構的企業一般包括三個層面:(i)中國境外掛牌上市公司;(ii)外資全資子公司(WOFE),有時可能是非全資外商投資企業(FIE);和(iii)持有中國境內外商投資受限行業經營許可的公司(持牌公司)。在這樣的結構框架中,控制關係是通過WOFE與持牌公司之間簽訂一系列VIE協議來實現。這些協議中通常規定控制關係是通過WOFE實際控制持牌公司的資產和運營。另外,持牌公司的盈利按照規定應以管理費或特許權費等形式轉移給WOFE(圖一)。

在VIE結構中,被投資企業擁有實際或潛在的經濟利益,但是該企業本身對此經濟利益卻沒有完全的控制權。主要受益人(primary beneficiary)則需要將持牌公司體現於合併報表中以反映對該經濟利益的實質或潛在控制。美國公認會計準則承認了VIE結構並針對VIE公司建立專門的會計準則。香港交易所(港交所)最近於2014年4月修訂的上市決定(HKEx-LD43-3)中表明,VIE協議的安排不會導致公司不適宜上市,但同時也要要求VIE結構的信息需要詳細披露。

## 使用VIE結構的上市公司

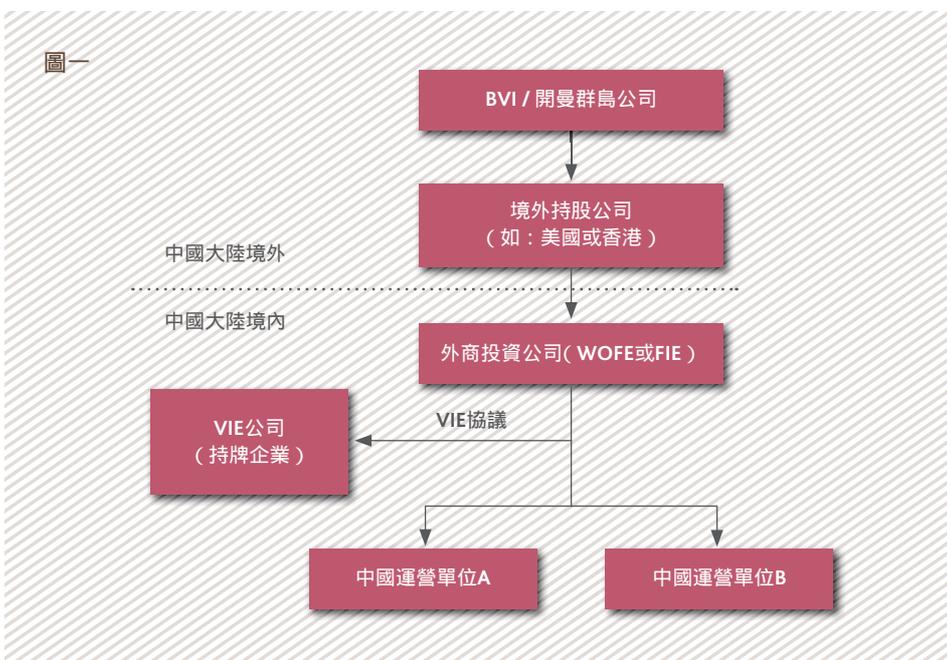
通過對上市公司中使用VIE結構的研究,人們已經注意到在美國、香港和英國這三個中國企業尋求融資機會的主要市場中,截至2011年9月份,超過85%的VIE公司在美國上市,香港上市的VIE公司佔13.5%左右,而英國市場數量則非常有限;行業主要集中在TMT產業及教育產業(圖二)。在分析美國上市公司年報披露採用VIE結構的原因,78.35%的公司表示主要是為了規避中國政府對部分行業外國投資的設限。

## VIE結構的風險及其法規

從法律有效性的角度,VIE模式早已備受爭議。在境外資本市場融資的有效性目前仍然是公認的,然而其合法性尚未被中國大陸政府、任何政府部門或立法機構正式認可。有趣的是,中國監管機構既不承認也沒有禁止,這使得VIE結構處於一個灰色地帶。當披露與VIE結構有關的風險時,大多數企業採取引用法律意見的形式,表明VIE結構在現行中國法律法規下並不存在違規問題。然而,在這些披露相關風險的企業中,超過70%的公司同時也披露承認中國監管機構對VIE模式的觀點存在不確定性。

除了合法性風險,VIE結構因完全依賴對一系列契約為基礎而擁有自身的弱點。作為目前最有效規避外商投資限制的變通工具,VIE模式從小兵看來,它更像是一種君子協定,如和平則相安無事;但問題一旦發生則可能導致異常嚴重的影響,甚至可能導致完全毀滅性的崩潰。由於最近幾年時不時露出檯面的一些事件中,VIE契約中的持牌公司違約或取消協議,現在市場上愈來愈多關於VIE結構在保護投資人利益方面的爭論頻現。實際上,外國投資者成功申請中國法院執行的可能性普遍被認為很低。近來被不斷提出的問題就包括如何保證VIE結構中的持牌公司按照公司的VIE合同全面準確的向WOFE報告並轉移利潤,以及境外投資者如何保障VIE協議持續有效。

已經被普遍認識到的是,治理應從VIE結構初步階段開始,而且不但要包含境外上市公司和作為“殼”的WOFE層面,更要涵蓋持牌公司。在VIE結構中,境外上市公



行業	美國上市	香港上市	英國上市	合計
互聯網服務	19	3	-	22
電子商務	7	1	1	9
網絡遊戲運營	8	1	-	9
軟件服務	11	1	-	12
教育及培訓	10	-	-	10
媒體出版業	9	4	-	13
農產品	3	-	-	3
能源開發及銷售	3	1	-	4
硬件及半導體設備	5	-	-	5
生物製藥	6	-	-	6
房地產中介	3	-	-	3
財務融資服務	2	2	-	4
零售業	7	2	-	9
商務及科技服務	2	-	-	2
總計	95	15	1	111
%	85.59%	13.51%	0.90%	100%

司是通過其設立的“殼”公司與持牌公司之間的一系列協議從而控制持牌公司，而不是通過股權進行控制。儘管持牌公司合併進上市集團，結構本身可能無法確保持牌公司的利潤可以順利轉移到“殼”公司以保護外國投資者的利益。境外上市公司的股東和中國企業創始人或其他機構股東應該擁有共同利益，這也是在多個主要市場上市的重要標準之一。但在VIE結構中，共同利益僅僅體現在上市公司層面，並沒有在持牌公司層面得以公平的體現。一旦利益失衡，創始人濫用權利的風險增大並可能損害其他股東利益。因此，股東及董事會的構成為防範風險的主要治理手段。

#### 持牌公司名義股東的管控

由於缺乏獨立決策，選擇境內公司法人作為名義股東並不可取。普遍認為較為合適的選擇是任命中國大陸境內居民自然人為名義股東。

單獨一名名義股東也存在風險，這位名義股東有可能在未有獲得其他股東認可的情況下進行重大決策，給境外股東造成風險或損失。同時，當公司僅有一名名義股東時，可能並不會建立董事會。在此情況之下，執行董事缺乏制衡監督，其權利也沒有董事會有效進行控制。從管控的角度，

比較合理的安排是任命至少2名，最好3-4名名義股東；並且，也建議對名義股東在持牌公司的股權進行質押。

#### 持牌公司董事會的管控

持牌公司董事會成員按照法律規定由名義股東任命。境外投資人應與名義股東有所約定，從而實質掌控持牌公司董事會成員的任命。處於規避中國政府機構的審查考慮，董事會成員不應全部為非中國國籍人士，否則存在境外投資人明顯控制的成分而難以通過審查。

除此以外，任命持牌公司的法人代表需要格外謹慎。法人代表和董事會主席最好任命不同人士擔任較為妥當。

如需瞭解或諮詢更多關於VIE結構企業的公司治理，敬請與我們的董事兼風險諮詢服務總監羅柏達(Patrick Rozario)聯絡。電話：(852) 2218 3118；電郵：

[patrickrozario@bdo.com.hk](mailto:patrickrozario@bdo.com.hk)

#### 夏湘

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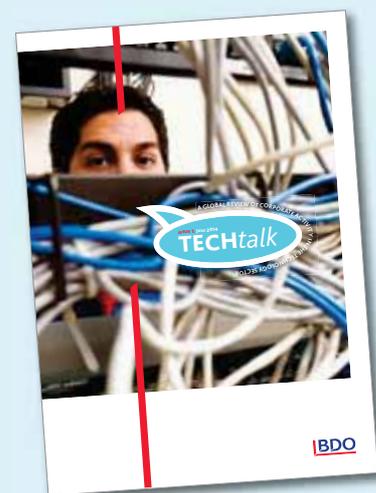


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