



# ADR-programmer i en dansk kontekst

Computershare Roundtable | 17. januar 2019

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## Hvem er vi?



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fuldmægtig, Gorrissen Federspiel

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+45 3341 4336 // +45 2780 4078

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# Dagens emner

- 1 Hvorfor overveje et ADR-program?
- 2 ADR 101 - The basics
- 3 Etablering af et ADR-program
- 4 ADRs og generalforsamlingen
- 5 Aktionærproblematikken
- 6 Lidt om US securities law
- 7 Ny retspraksis og risiko for amerikanske gruppesøgsmål
- 8 Reducering af risiko

*Disclaimer: This presentation has been prepared for educational purposes and does not purport to be a full account of legal requirements to be considered in connection with ADR programmes. The overview is limited to corporate law aspects under Danish law.*

# 1. Hvorfor overveje et ADR-program?

## Hvorfor overveje et ADR-program?

### Fordele

- Adgang til US kapitalmarked
- Udvidet investorbase i US
- Øget synlighed og likviditet
- Denomineret i USD
- Justering af aktie/ADR-forhold
- Tilpasning af handelspris til US præferencer
- Indtægt

### Ulemper

- Risiko for amerikanske gruppesøgsmål
- Udgifter ved etablering
- Udgifter til løbende drift
- Rapporterings- og oplysningsforpligtelser
- Valutarisiko
- Kildeskat
- Andre praktiske forhold

## De forskellige typer ADR-programmer

### Level 1 (usponsoreret)

- Oprettet af depotbanken selv
- Udsteder skal dog være registreret hos SEC *eller* undtaget fra registrering
- Handles OTC
- Ingen mulighed for kapitalrejsning (kun eksisterende aktier)
- ADR-indehaveren har typisk ikke stemmeret

### Level 1 (sponsoreret)

- Oprettet på baggrund af aftale mellem depotbank og udsteder
- Handles OTC
- Ingen mulighed for kapitalrejsning (kun eksisterende aktier)
- ADR-indehaverens stemmeret er aftalebaseret

### Level 2

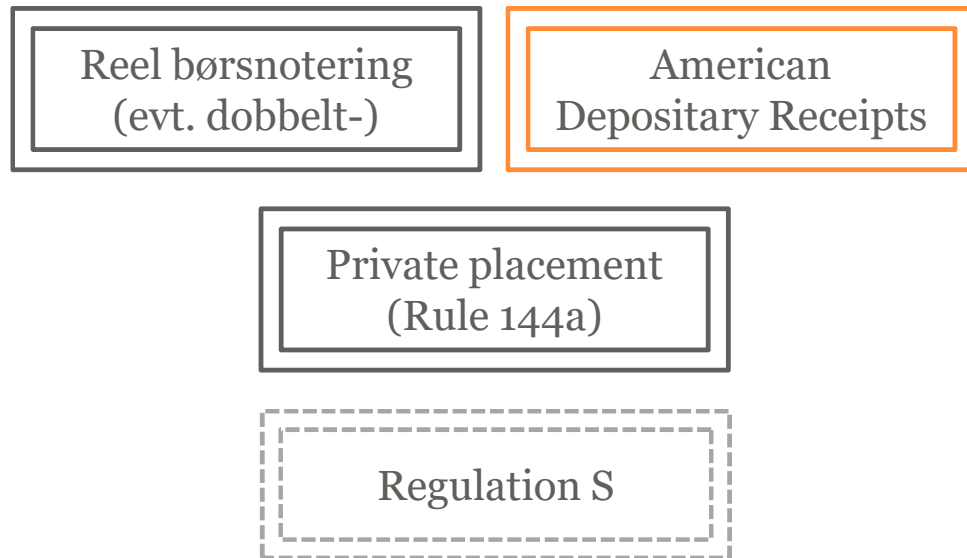
- Oprettet på baggrund af aftale mellem depotbank og udsteder
- Handles på børsen (NYSE/Nasdaq NY)
- Ingen mulighed for kapitalrejsning
- ADR-indehavere har typisk stemmeret (aftalebaseret)

### Level 3

- Oprettet på baggrund af aftale mellem depotbank og udsteder
- Handles på børsen (NYSE/Nasdaq NY)
- Mulighed for kapitalrejsning (nye aktier udstedes til ADR-brug)
- ADR-indehaveren har typisk stemmeret (aftalebaseret)

## 2. ADR 101 | The basics

## Adgang til US kapitalmarked | Muligheder



### Foreign Private Issuer (FPI) status

- (a) Mere end 50 % af aktiekapitalen ejes, direkte eller indirekte, af aktionærer uden for USA, og
- (b) Ingen af følgende betingelser gør sig gældende:
  - (i) Majoriteten af direktører, hhv. bestyrelsesmedlemmer er amerikanske borgere eller bosiddende i USA,
  - (ii) Mere end 50 % af udsteders aktiver er i USA, eller
  - (iii) Udsteders forretning administreres hovedsagligt fra USA.

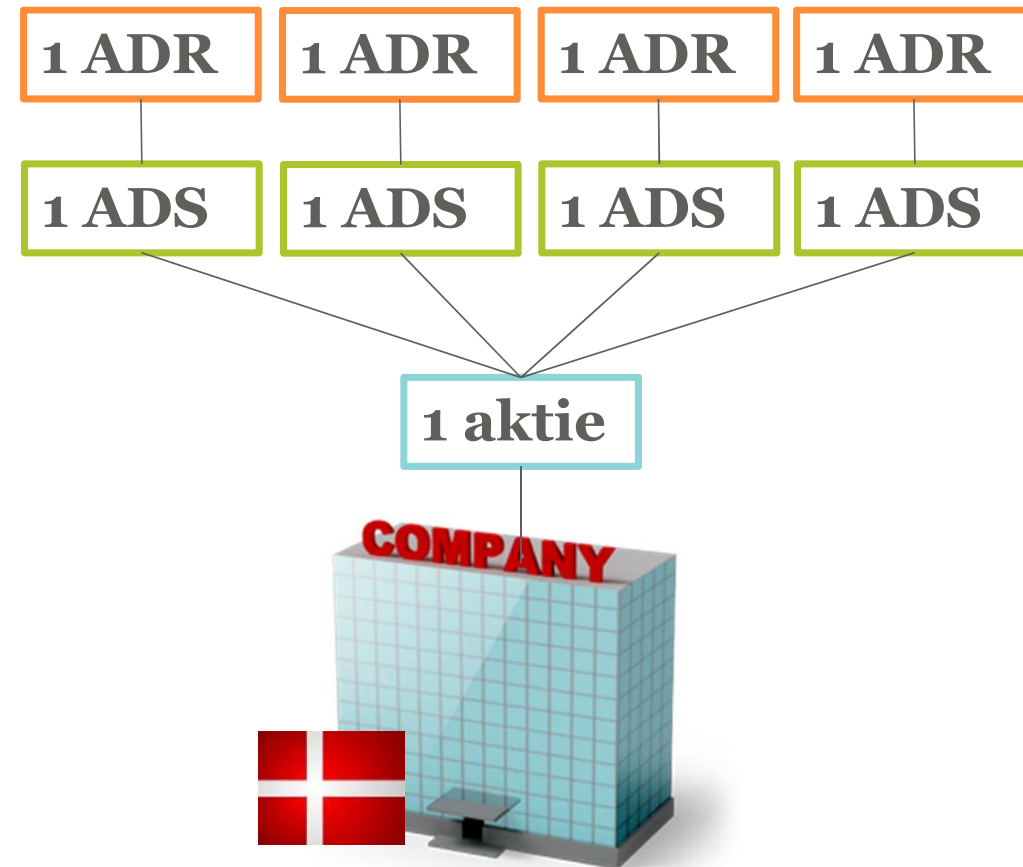


## Hvad er en ADR?

American **D**epositary **R**eceipts

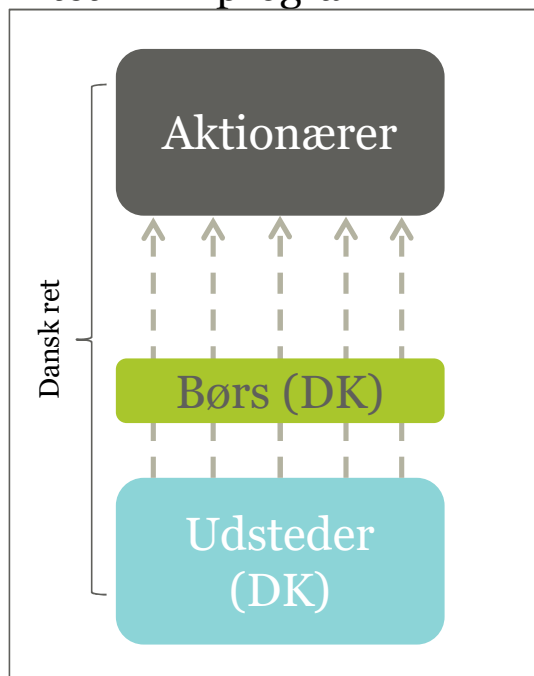
American **D**epositary **S**hares

Ordinary Shares

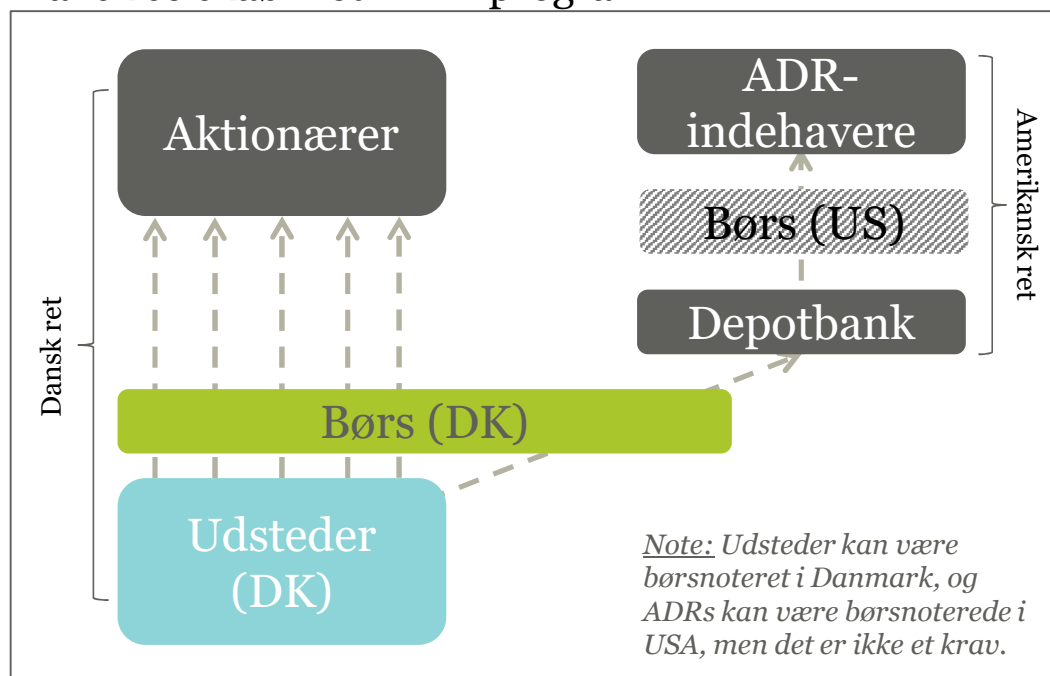


# Hvad er et ADR-program?

### Intet ADR-program

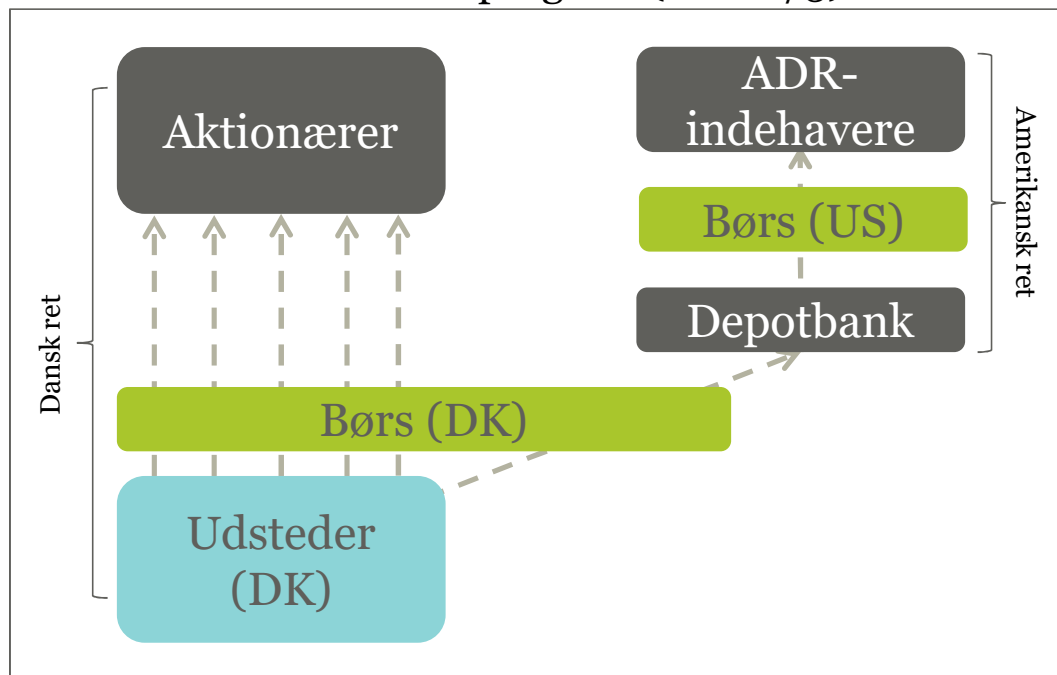


### Dansk selskab med ADR-program

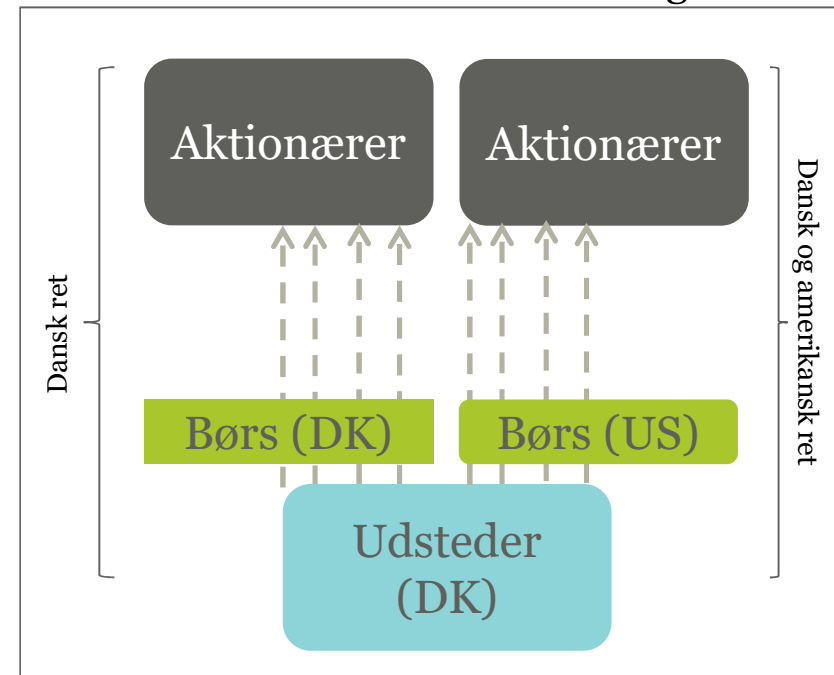


## Level 2 / 3 vs. dobbeltnotering?

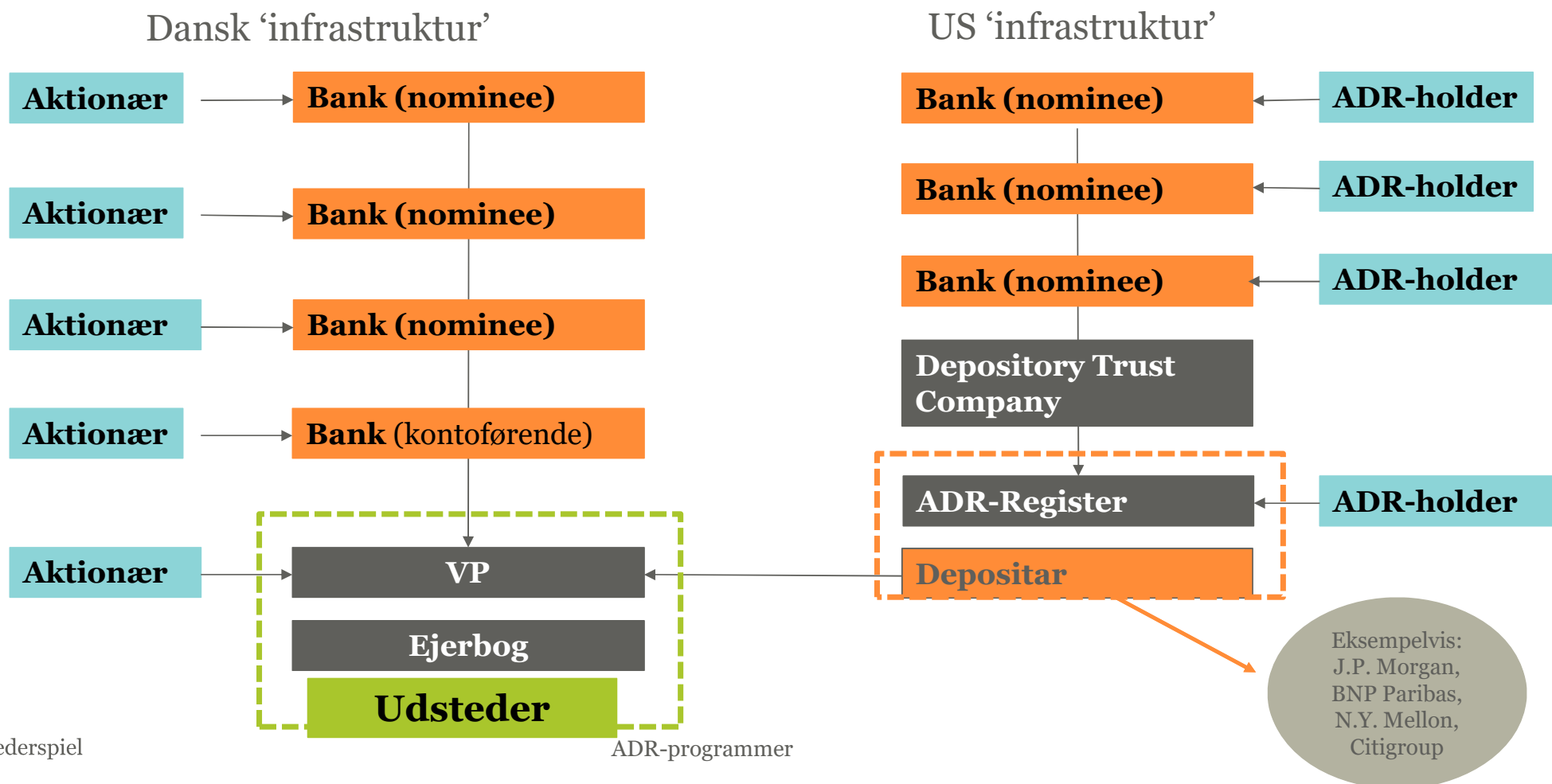
Dansk selskab med ADR-program (level 2/3)



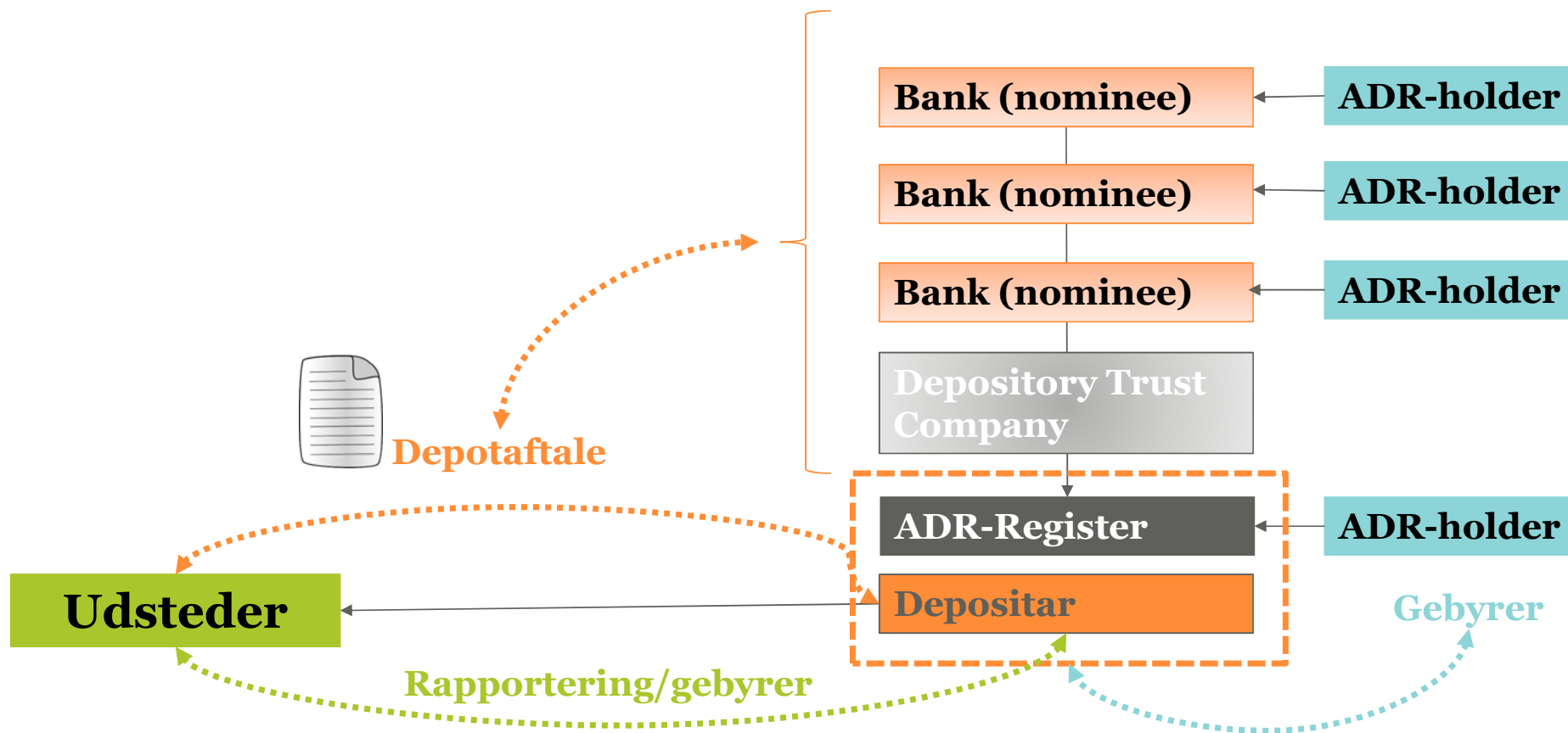
Dansk selskab med dobbeltnotering



# Parter i ADR-programmet



# US 'infrastruktur'



# 3. Etablering af et ADR-program

## Etablering | Proces og tjekliste

Før handlen påbegyndes, skal følgende foretages af udsteder og depositar		Level 1	Level 2	Level 3
1	Vælge depositar og rådgivere	✓	✓	✓
2	Få klarhed over krav til registreringsdokumentation	✓	✓	✓
3	Få klarhed over krav til løbende oplysningsforpligtelser mm.		✓	✓
4	Forhandle depositaraftale og færdiggøre ADR-bevis	✓	✓	✓
5	Udarbejde Form F-6	✓	✓	✓
6	Udarbejde påkrævet prospekt		✓	✓
7	Indsend registreringsdokumentation til SEC og afklar evt. kommentarer	✓	✓	✓
8	Sikre overholdelse af alle krav til OTC-handel via børsmæglere	✓		
9	Sikre overholdelse af alle krav til optagelse til handel via NYSE/Nasdaq NY		✓	✓
10	Opnå SECs godkendelse af prospekt		✓	✓
11	Optagelse til handel på NYSE/Nasdaq NY		✓	✓

## Etablering | FPI?

### Rule 12g3-2(b)

U.S. Securities Exchange Act 1934

Undtager 'foreign private issuers' (FPI'er) fra at skulle registrere aktier, hvis en række krav er opfyldt, herunder:

- Eksisterende notering på en handelsplads
- Ikke underlagt eksisterende Exchange Act rapporteringskrav
- Elektronisk offentliggørelse på engelsk

**OBS:** ikke længere krav om egentlig ansøgning – aktiveres automatisk, hvis krav er opfyldt



# Etablering | Registreringsdokumentation

Programtype	Form F-6 (ADR-registrering)	Form 20-F (noteringsprospekt)	Form F-1/3/4 (kapitalrejsningsprospekt)
Level 1 (usponsoreret)	✓		
Level 1 (sponsoreret)	✓		
Level 2	✓	✓	
Level 3	✓	✓	✓

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**  
Washington, D.C. 20549

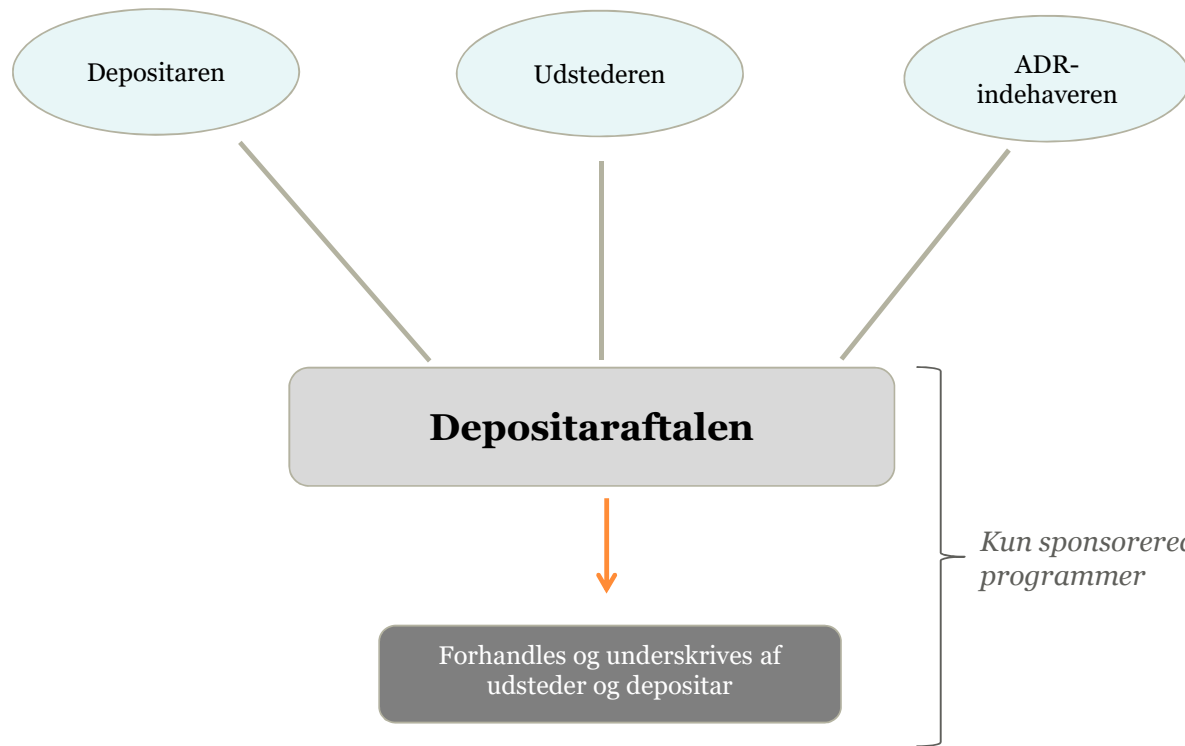
Amendment No. 3 to  
**FORM F-1**  
REGISTRATION STATEMENT  
UNDER  
THE SECURITIES ACT OF 1933

- REGISTRATION STATEMENT PURSUANT TO SECTION 12(b) OR (g) OF THE SECURITIES EXCHANGE ACT OF 1934
- ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934  
For the fiscal year ended December 31, 2017
- TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934  
For the transition period from to
- SHELL COMPANY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**  
WASHINGTON, D.C. 20549  
**FORM 20-F**

OR  
  
OR  
  
OR

# Etablering | Depositaraftalen



*Tiltræder automatisk depositaraftalen ved køb af en ADR*

BAIDU.COM, INC.  
AND  
THE BANK OF NEW YORK  
as Depository  
AND  
OWNERS AND BENEFICIAL OWNERS OF AMERICAN DEPOSITARY RECEIPTS  
Deposit Agreement  
Dated as of \_\_\_\_\_, 2005

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**DEPOSIT AGREEMENT**

DEPOSIT AGREEMENT dated as of \_\_\_\_\_, 2005 among BAIDU.COM, INC., incorporated under the laws of the Cayman Islands (herein called the Company), THE BANK OF NEW YORK, a New York banking corporation, and the Owners and Beneficial Owners of American Depositary Receipts issued hereunder:

W I T N E S S E T H :

WHEREAS, the Company desires to provide, as hereinafter set forth in this Deposit Agreement, for the deposit of Shares (as hereinafter defined) of the Company from time to time with the Depository or with the Custodian (as hereinafter defined) for the creation of American Depositary Shares representing the Shares so deposited and for the execution and delivery of American Depositary Receipts evidencing the American Depositary Shares; and

WHEREAS, the American Depositary Receipts are to be substantially in the form of Exhibit A annexed hereto, with appropriate insertions, modifications and omissions, as hereinafter provided in this Deposit Agreement;

NOW, THEREFORE, in consideration of the premises, it is agreed by and between the parties hereto as follows:

**ARTICLE I. DEFINITIONS.**

The following definitions shall for all purposes, unless otherwise clearly indicated, apply to the respective terms used in this Deposit Agreement:

**SECTION 1.1 American Depositary Shares.**  
The term "American Depositary Shares" shall mean the securities representing the interests in the Deposited Securities and evidenced by the Receipts issued hereunder. Each American Depositary Share shall represent the same number of Deposited Securities covered by Section 4.3 or a change in Deposited Securities covered by Section 4.8 with respect to which additional Receipts are not executed and delivered, and thereafter American Depositary Shares shall evidence the same.

**SECTION 1.2 Article Section.**  
Whenever references are made in this Deposit Agreement to an "Article" or "Articles" or to a "Section" or "Sections", such references shall mean an article or articles or a section or sections of this Deposit Agreement, unless otherwise indicated.

**SECTION 1.3 Beneficial Owner.**  
The term "Beneficial Owner" shall mean each person owning from time to time any beneficial interest in the American Depositary Shares evidenced by any Receipt.

**SECTION 1.4 Commission.**  
The term "Commission" shall mean the Securities and Exchange Commission of the United States or any successor governmental agency in the United States.

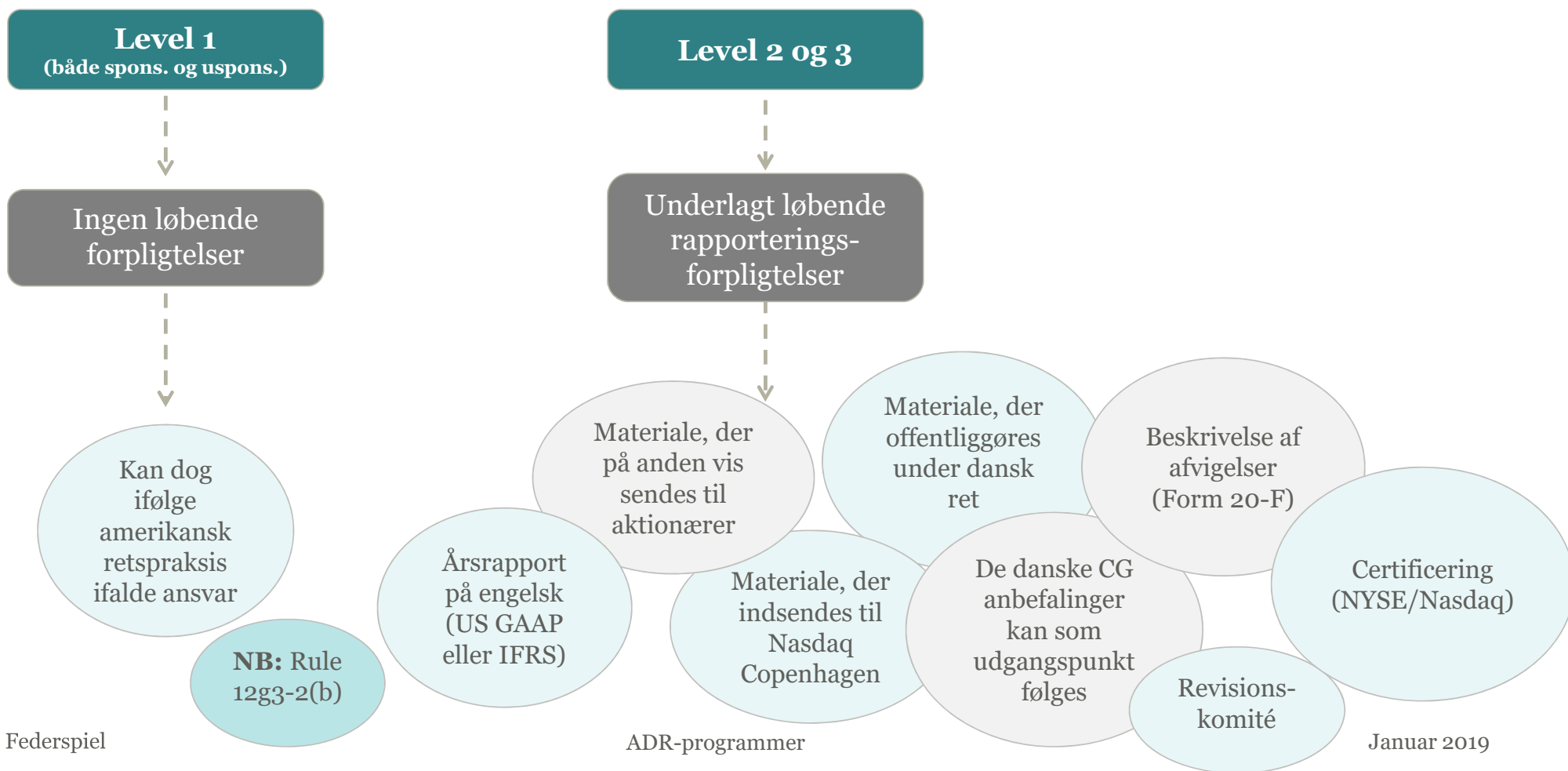
**SECTION 1.5 Company.**  
The term "Company" shall mean Baidu.com, Inc., incorporated under the laws of the Cayman Islands, and its successors.

**SECTION 1.6 Custodian.**  
The term "Custodian" shall mean the principal Hong Kong office of The Hongkong and Shanghai Banking Corporation Limited, as agent of the Depository for the purposes of this Deposit Agreement, and any other firm or corporation or additional custodian or custodians hereunder, as the context shall require and shall also mean all of them collectively.

# Efter etablering | EDGAR

Filings	Format	Description
SC 13D/A	<a href="#">Documents</a>	[Amend] General statement of acquisition of beneficial ownership Acc-no: 0001144204-19-001439 (34 Act) Size: 297 KB
6-K	<a href="#">Documents</a>	Report of foreign issuer [Rules 13a-16 and 15d-16] Acc-no: 0001193125-19-006186 (34 Act) Size: 273 KB
6-K	<a href="#">Documents</a>	Report of foreign issuer [Rules 13a-16 and 15d-16] Acc-no: 0001193125-19-003385 (34 Act) Size: 24 MB
6-K	<a href="#">Documents</a>	Report of foreign issuer [Rules 13a-16 and 15d-16] Acc-no: 0001193125-19-003292 (34 Act) Size: 19 KB
6-K	<a href="#">Documents</a>	Report of foreign issuer [Rules 13a-16 and 15d-16] Acc-no: 0001193125-19-002517 (34 Act) Size: 271 KB
6-K	<a href="#">Documents</a>	Report of foreign issuer [Rules 13a-16 and 15d-16] Acc-no: 0001193125-18-349908 (34 Act) Size: 272 KB
6-K	<a href="#">Documents</a>	Report of foreign issuer [Rules 13a-16 and 15d-16] Acc-no: 0001193125-18-345071 (34 Act) Size: 13 KB
S-8	<a href="#">Documents</a>	Securities to be offered to employees in employee benefit plans Acc-no: 0001193125-18-336583 (33 Act) Size: 87 KB
6-K	<a href="#">Documents</a> <a href="#">Interactive Data</a>	Report of foreign issuer [Rules 13a-16 and 15d-16] Acc-no: 0001193125-18-336571 (34 Act) Size: 1 MB
6-K	<a href="#">Documents</a>	Report of foreign issuer [Rules 13a-16 and 15d-16] Acc-no: 0001193125-18-329024 (34 Act) Size: 269 KB
6-K	<a href="#">Documents</a>	Report of foreign issuer [Rules 13a-16 and 15d-16] Acc-no: 0001193125-18-322552 (34 Act) Size: 18 KB
6-K	<a href="#">Documents</a>	Report of foreign issuer [Rules 13a-16 and 15d-16] Acc-no: 0001193125-18-317313 (34 Act) Size: 12 KB
6-K	<a href="#">Documents</a>	Report of foreign issuer [Rules 13a-16 and 15d-16] Acc-no: 0001193125-18-298360 (34 Act) Size: 266 KB
6-K	<a href="#">Documents</a>	Report of foreign issuer [Rules 13a-16 and 15d-16] Acc-no: 0001193125-18-294668 (34 Act) Size: 46 KB
6-K	<a href="#">Documents</a>	Report of foreign issuer [Rules 13a-16 and 15d-16] Acc-no: 0001193125-18-291882 (34 Act) Size: 264 KB
6-K	<a href="#">Documents</a>	Report of foreign issuer [Rules 13a-16 and 15d-16]

## Efter etablering | Løbende oplysnings- og rapporteringsforpligtelser



OMB APPROVAL	
OMB Number:	3235-0116
Expires:	August 31, 2020
Estimated average burden hours per response.....	8.7

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

**Form 6-K**

**REPORT OF FOREIGN PRIVATE ISSUER PURSUANT TO RULE 13a-16 OR 15d-16 UNDER THE  
SECURITIES EXCHANGE ACT OF 1934**

For the month of \_\_\_\_\_, 20\_\_.

Commission File Number \_\_\_\_\_

\_\_\_\_\_  
(Translation of registrant's name into English)

\_\_\_\_\_  
(Address of principal executive office)

Indicate by check mark whether the registrant files or will file annual reports under cover of Form 20-F or Form 40-F.  
Form 20-F  Form 40-F

Indicate by check mark if the registrant is submitting the Form 6-K in paper as permitted by Regulation S-T Rule 101(b)(1): \_\_\_\_

**Note:** Regulation S-T Rule 101(b)(1) only permits the submission in paper of a Form 6-K if submitted solely to provide an attached annual report to security holders.

Indicate by check mark if the registrant is submitting the Form 6-K in paper as permitted by Regulation S-T Rule 101(b)(7): \_\_\_\_

**Note:** Regulation S-T Rule 101(b)(7) only permits the submission in paper of a Form 6-K if submitted to furnish a report or other document that the registrant foreign private issuer must furnish and make public under the laws of the jurisdiction in which the registrant is incorporated, domiciled or legally organized (the registrant's "home country"), or under the rules of the home country exchange on which the registrant's securities are traded, as long as the report or other document is not a press release, is not required to be and has not been distributed to the registrant's security holders, and, if discussing a material event, has already been the subject of a Form 6-K submission or other Commission filing on EDGAR.

3. Etablering af et ADR-program

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

OMB APPROVAL  
OMB Number: 3235-0288  
Expires: July 31, 2021  
Estimated average burden  
hours per response..2649.52

**FORM 20-F**

(Mark One)

REGISTRATION STATEMENT PURSUANT TO SECTION 12(b) OR (g) OF THE SECURITIES EXCHANGE ACT OF 1934

OR

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934  
For the fiscal year ended \_\_\_\_\_

OR

TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

OR

SHELL COMPANY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934  
Date of event requiring this shell company report .....

For the transition period from \_\_\_\_\_ to \_\_\_\_\_

Commission file number \_\_\_\_\_

\_\_\_\_\_  
(Exact name of Registrant as specified in its charter)

\_\_\_\_\_  
(Translation of Registrant's name into English)

\_\_\_\_\_  
(Jurisdiction of incorporation or organization)

\_\_\_\_\_  
(Address of principal executive offices)

\_\_\_\_\_  
(Name, Telephone, E-mail and/or Facsimile number and Address of Company Contact Person)

**CERTIFICATIONS\***

I, [identify the certifying individual], certify that:

1. I have reviewed this annual report on Form 20-F of [identify company];

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the company as of, and for, the periods presented in this report;

4. The company's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as

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defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the company and have:

(a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the company, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

(b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

(c) Evaluated the effectiveness of the company's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

(d) Disclosed in this report any change in the company's internal control over financial reporting that occurred during the period covered by the annual report that has materially affected, or is reasonably likely to materially affect, the company's internal control over financial reporting; and

5. The company's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the company's auditors and the audit committee of the company's board of directors (or persons performing the equivalent functions):

(a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the company's ability to record, process, summarize and report financial information; and

(b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the company's internal control over financial reporting.

## 4. ADRs | Generalforsamlingen

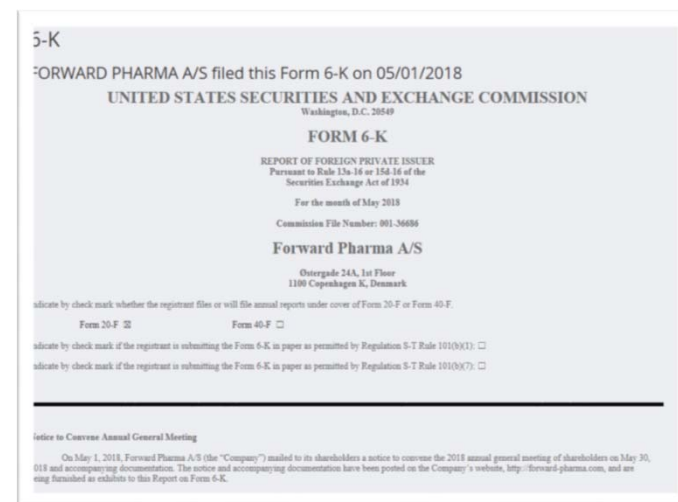
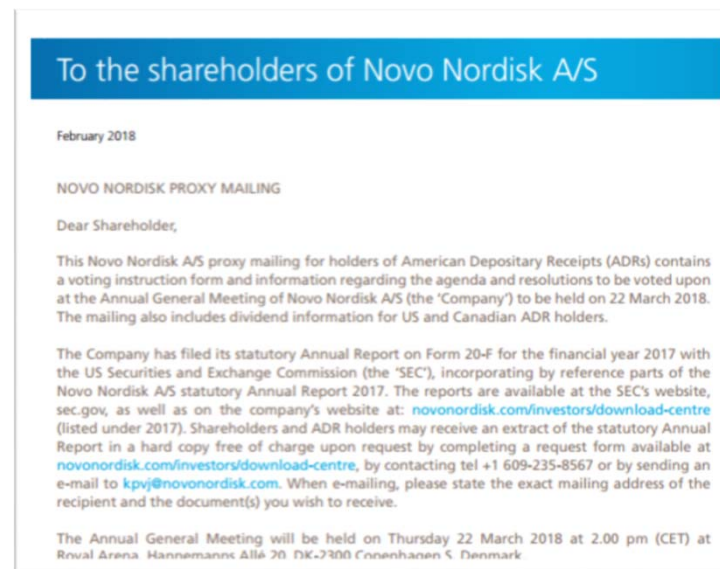


## Generalforsamling | Forberedelse

### Hvad skal udsteder være opmærksom på?

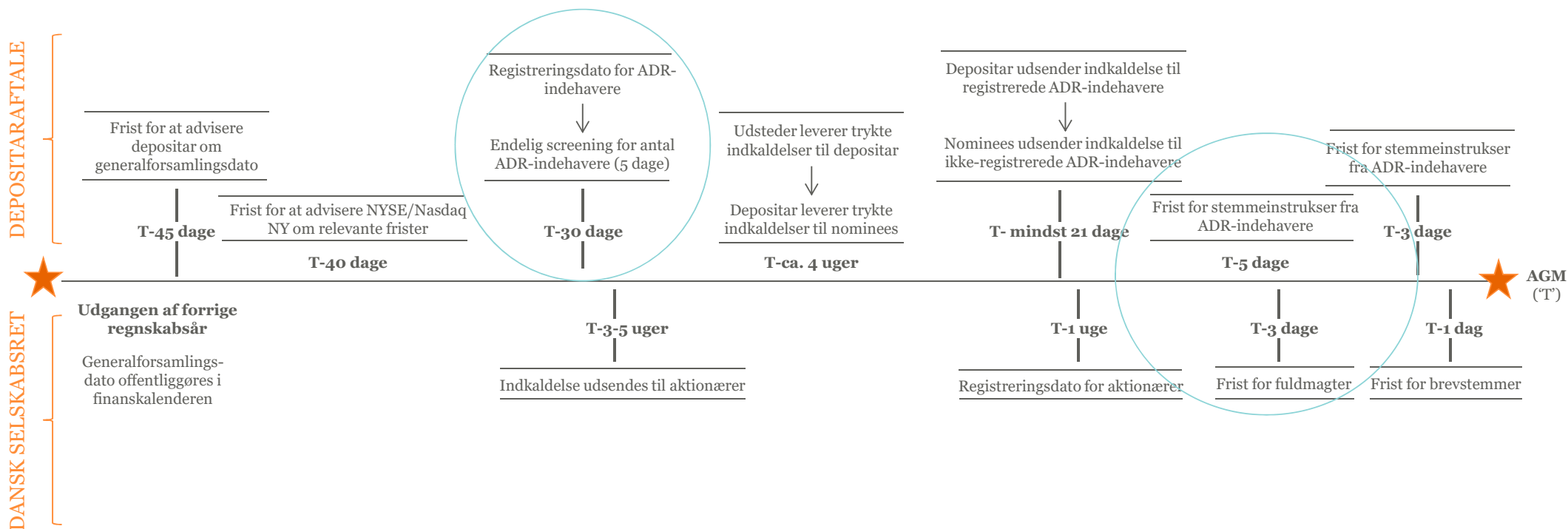
- Den amerikanske ADR-investorbase
- Amerikanske tidsfrister (reguleres i depositaraftalen)
- Dansk krav om hel fuldmagtskæde
- DK versus US registreringsdato
- Eventuelt legal opinion fra udsteders danske advokat

**NB:** Usponsorerede programmer vil typisk ikke give ADR-indehavere ret til at stemme eller deltage på AGM





# Forberedelsen | Tidslinje



# 5. Aktionærproblematikken

## Hvem er aktionær?

- Relevant for en række forhold, herunder
  - Ret til at deltage i generalforsamlingen
  - Ret til at udøve stemmeret
  - Ret til at kræve forslag optaget på dagsordenen
  - Ret til at udøve øvrige forvaltningsmæssige rettigheder
  - Ret til at modtage udbytte
  - Minoritetsbeskyttelsesregler
  - Storaktionærmeddelelse/flagning
  - Selskabets ret til identifikation af aktionærer
  - Osv.

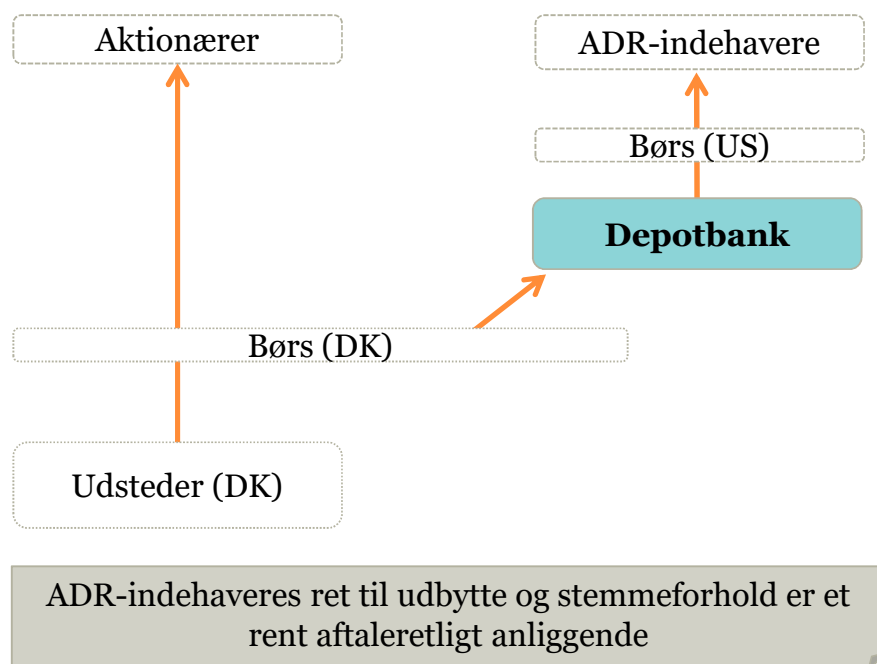
### 16) Kapitalejer:

Enhver ejer af en eller flere kapitalandele. 38

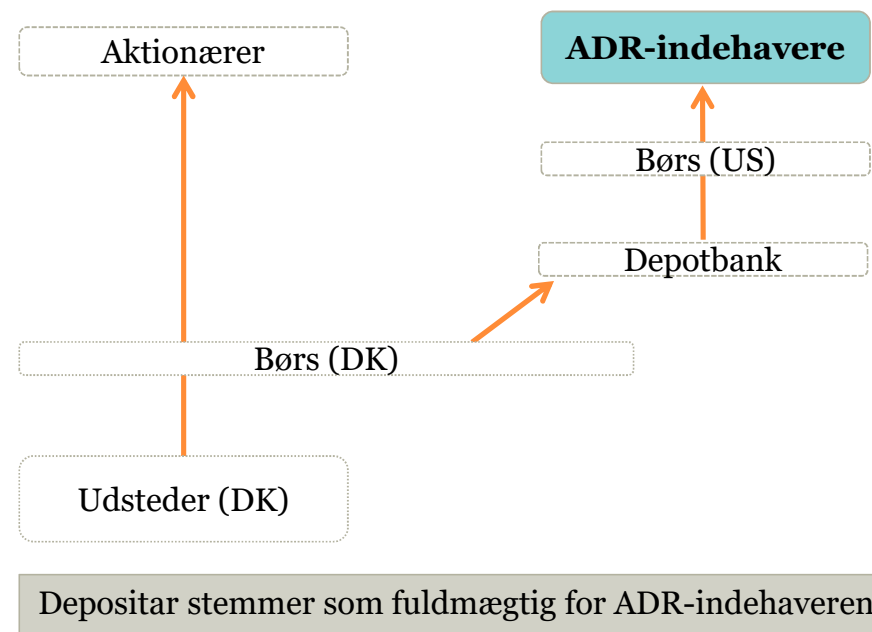


# ADR og generalforsamlingen

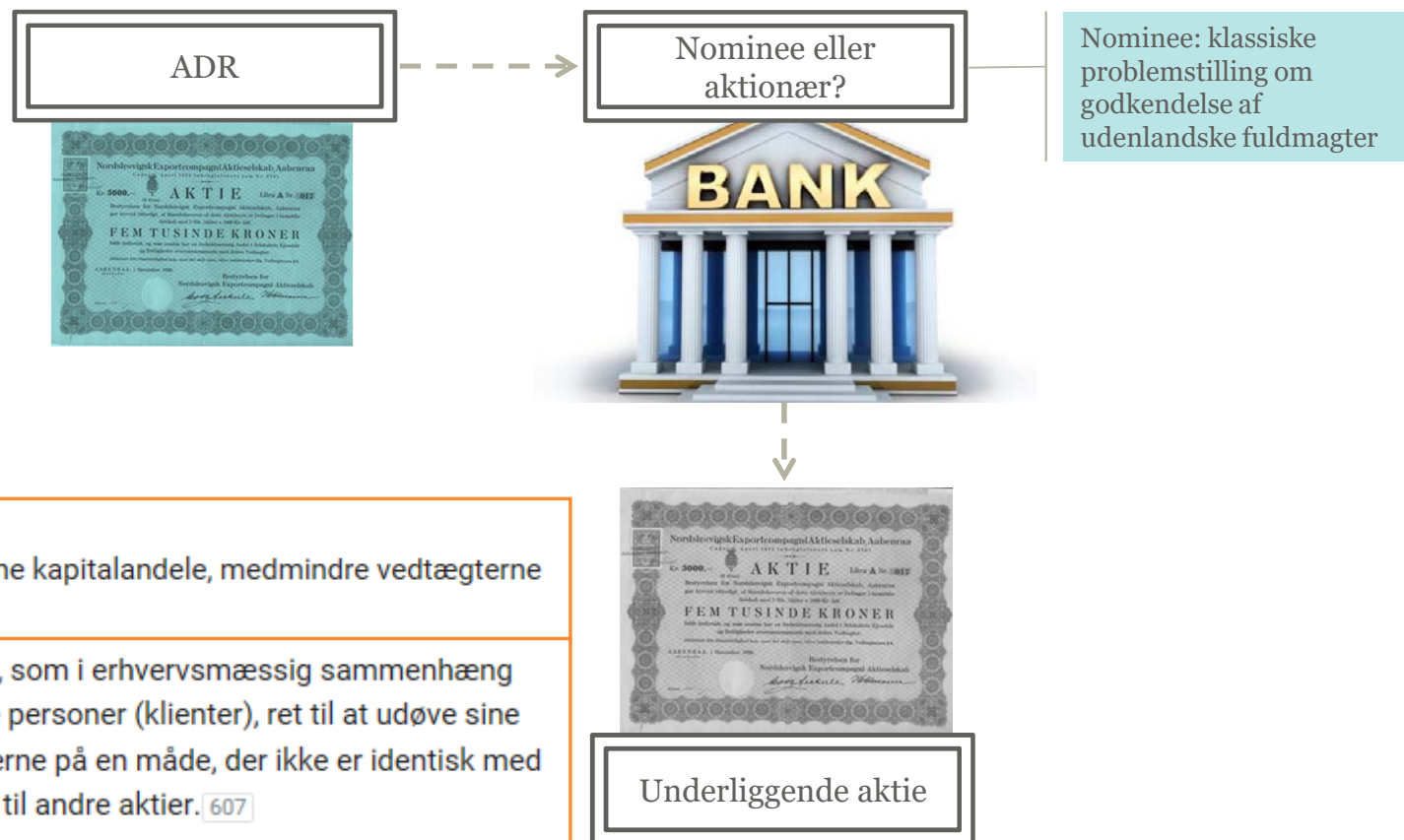
**Scenarie 1:  
Depositaren anses som  
aktionær**



**Scenarie 2:  
ADR-indehaveren anses  
som aktionær**



# Stemmeret | Skizofrenisk stemmeafgivning



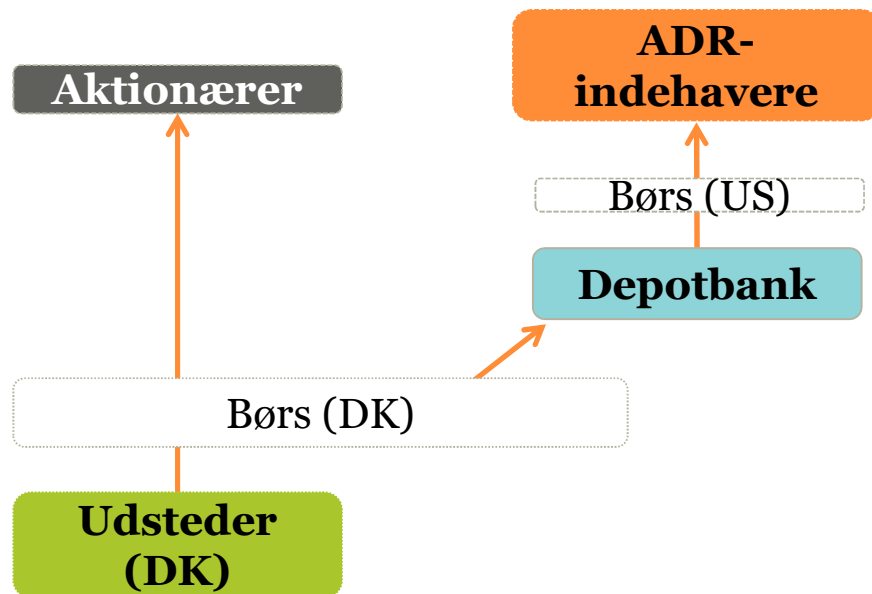
Lovbekendtgørelse 2015-09-14 nr. 1089 om aktie- og anpartsselskaber\* (selskabsloven) <sup>note 1</sup>

## § 104

600 En kapitalejer skal stemme samlet 601 på sine kapitalandele, medmindre vedtægterne bestemmer andet, jf. dog stk. 3.

Stk. 3. 605 I aktieselskaber 606 har en aktionær, som i erhvervsmæssig sammenhæng handler på vegne af andre fysiske eller juridiske personer (klienter), ret til at udøve sine stemmerettigheder i tilknytning til nogle af aktierne på en måde, der ikke er identisk med udøvelsen af stemmerettighederne i tilknytning til andre aktier. 607

# Flagningspligt



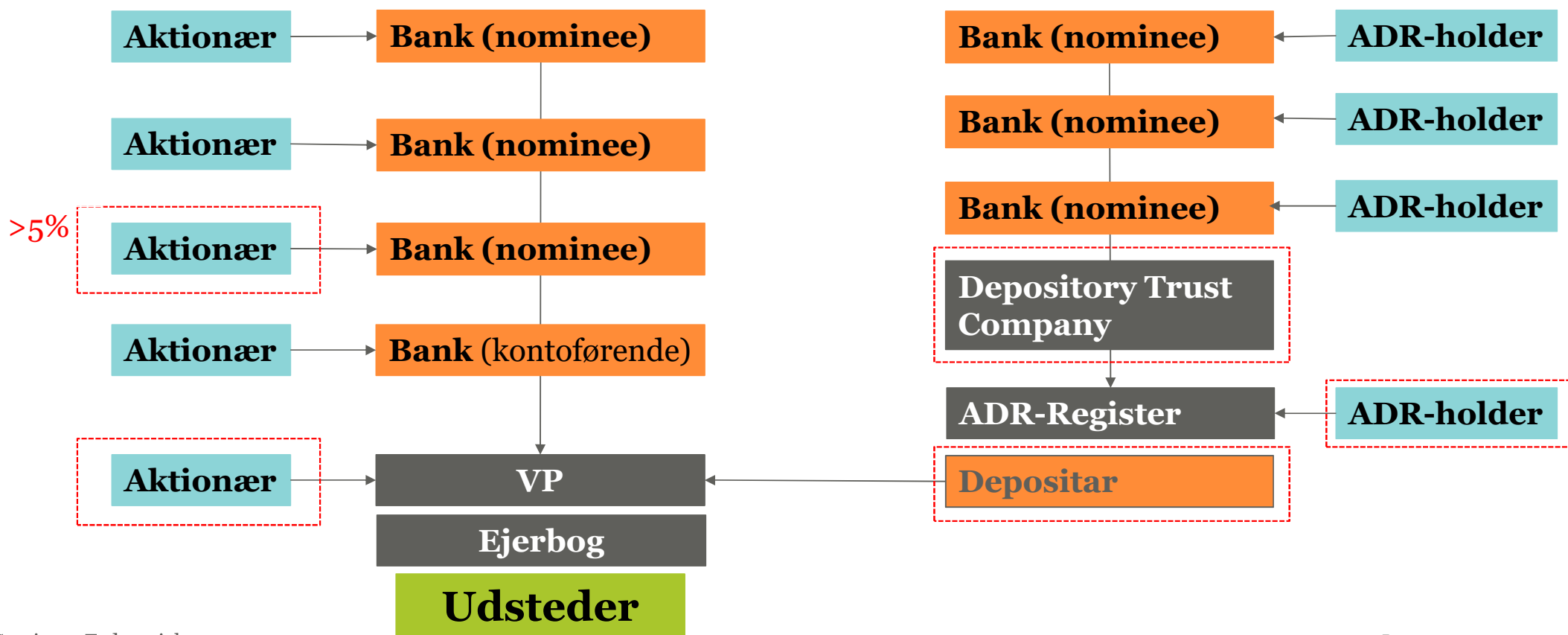
Aktionær?

Depositær?

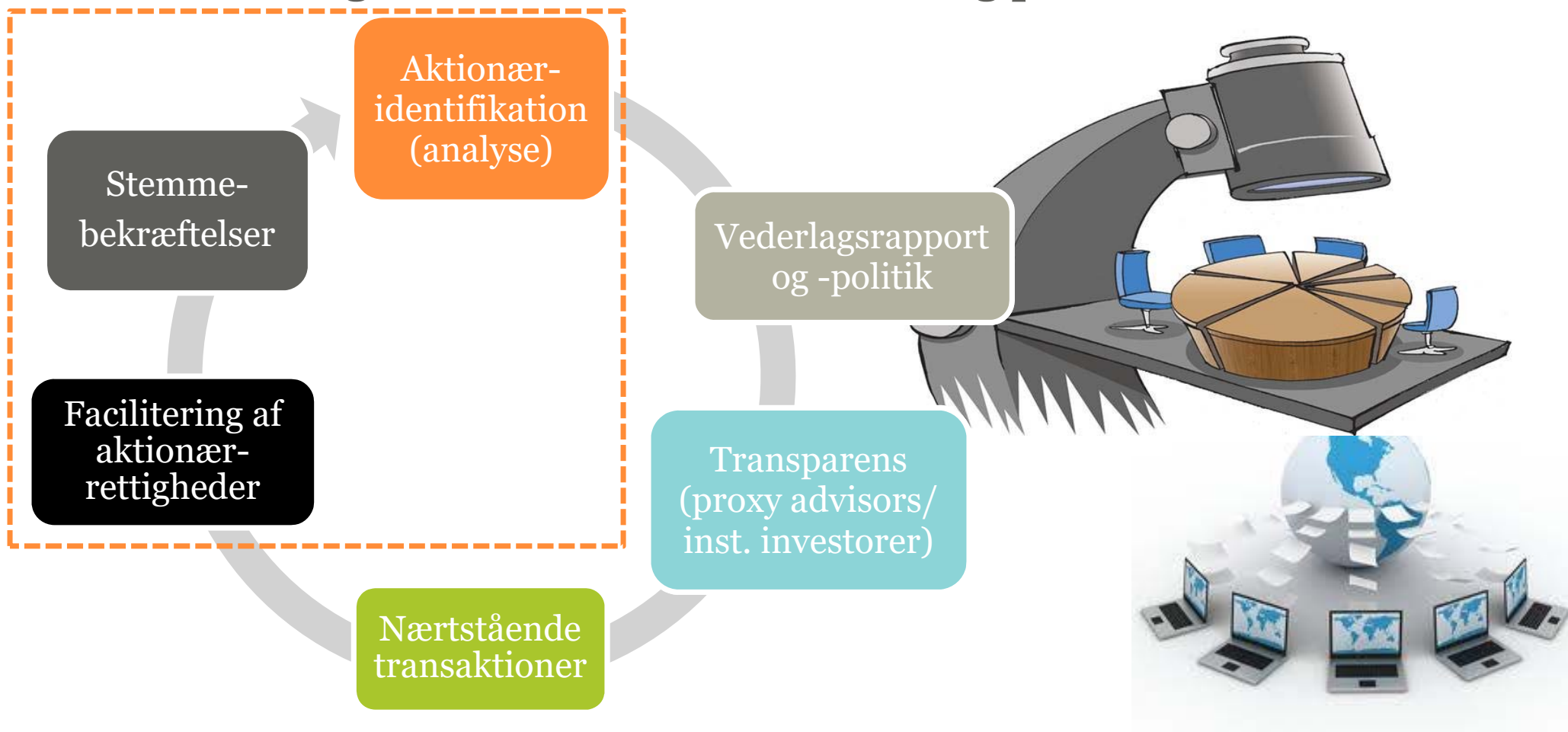
ADR-indehaver?



## Selskabets ret til information om aktionærer



## Aktionærrettighedsdirektivet – indvirkning på ADR-indehavere?





## 6. Lidt om US securities law

## Børsretlige faldgrupper | Hvornår klapper fælden?

Offentliggørelse af information	Udstedere med ADR-programmer skal sikre, at offentliggjort information gøres tilgængeligt for ADR-indehavere
Mangelfuld eller misvisende offentliggørelse	Rule 10b-5 gør udsteder (og de personer, der "kontrollerer" udsteder) ansvarlig for fejlinformation eller udeladelser i oplysningsdokumenter (level 1, 2 og 3)
For sen offentliggørelse	En udsteder med level 2- eller level 3-program skal sikre "prompt" offentliggørelse af enhver "væsentlig" information til SEC

### Rule 10b-5

*It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,*

- To employ any device, scheme, or artifice to defraud,*
- To **make any untrue statement of a material fact or to omit to state a material fact** necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or*
- To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, **in connection with the purchase or sale of any security.***

## 7. Ny retspraksis og risiko for amerikanske gruppesøgsmål

## Lovvalg og værneting

Vil typisk være reguleret i depositaraftalen – hvis en sådan findes.

*“The [Deposit] Agreement, the ADSs and the ADRs shall be governed by and construed in accordance with the laws of the State of New York [...].”*

*“... any legal suit, action or proceeding **against the Company** brought by the Depositary or any Holder, arising out of or **based upon** this [Deposit] Agreement, **the ADSs or the ADRs** or the transactions contemplated hereby or thereby, may be instituted in any state or federal court in New York, **New York**, [...].”*

## JURISDICTION AND VENUE

7. The claims asserted herein arise under and pursuant to §§10(b) and 20(a) of the 1934 Act [15 U.S.C. §§78j(b) and 78t(a)] and SEC Rule 10b-5 [17 C.F.R. §240.10b-5]. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331 and §27 of the 1934 Act. Defendants expressly **agreed to subject themselves** to this Court's personal jurisdiction in connection with registering ██████████ ADRs for sale in the United States.

8. Venue is proper in this District pursuant to §27 of the 1934 Act, because certain of the acts and practices complained of herein occurred in this District and because defendants expressly agreed to subject themselves to this Court's personal jurisdiction in connection with registering ██████████ ADRs for sale in the United States.

9. In connection with the acts and conduct alleged in this complaint, defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including, but not limited to, the mails and interstate wire and telephone communications.

## Men – hvad så med usponsorerede programmer?



### Denmark's Vestas reach settlement in U.S. lawsuit

2 MIN READ



COPENHAGEN (Reuters) - The world's biggest wind turbine maker, Vestas Wind Systems, has reached a conditional settlement with the lawyers representing shareholders in the U.S.

"The settlement consists of a cash payment of \$5 million to the plaintiffs and will

### Selskabsmeddelelse fra Vestas Wind Systems A/S

Aarhus, 26. juni 2014  
Selskabsmeddelelse nr. 25/2014  
Side 1 af 1

#### Betinget forlig af amerikansk søgsmål (class action)

Vestas offentliggjorde den 21. marts 2011, at der var blevet anlagt sag mod Vestas Wind Systems A/S, dets amerikanske datterselskab og visse medlemmer af bestyrelse og direktion ved en amerikansk domstol ([jf. selskabsmeddelelse nr. 8/2011 af 21. marts 2011](#)). Der er nu indgået betinget forlig med de advokater, der repræsenterer køberne af American Depositary Receipts (amerikanske depotbeviser) og almindelige aktier købt i amerikanske transaktioner i perioden fra 11. februar 2009 til 9. februar 2012 (transaktionsperioden). Kravene mod de enkelte medlemmer af bestyrelse og direktion er opgivet.

## Fra Morrison til Toshiba | Rækkevidden af de amerikanske regler

### US Supreme Court

#### Hvor og hvornår kan udenlandske udstedere sagsøges i USA?

*Morrison v. National Australia Bank (2010)*

- National Bank of Australia aktier blev handlet på US handelsplads med registrerings- og rapporteringsforpligtelser til SEC
- Sponsoreret ADR-program
- To trins test

Hvis der er tale om en transaktion:

- I. Foretaget via en amerikansk handelsplads (*domestic exchange*)
- II. Har fundet sted i USA (*domestic transaction*)

Sagen vedrørte sponsorerede programmer

### US 9th Circuit (Courts of Appeal)

*Automotive Industries Pension Trust Fund v. Toshiba Corp. (2018)*

- Aktier handles på Tokyo Stock Exchange
- Underlagt de japanske børsretlige regler
- Usponsoreret ADR-program handles OTC i USA
- Oprindelig sag i Japan: forhøjede regnskabstal afledte bøde på USD 60 millioner

### US Supreme Court

17. juli 2018 usponsorerede programmer kan være omfattet

NYT 14. januar 2019

Dec 21 2018	petitioner Toshiba Corporation filed.
	<a href="#">Main Document</a> <a href="#">Certificate of Word Count</a> <a href="#">Proof of Service</a>
Dec 26 2018	DISTRIBUTED for Conference of 1/11/2019.
Jan 14 2019	The Solicitor General is invited to file a brief in this case expressing the views of the United States.

ADR-programmer

Januar 2019

## Morrison og Toshiba | Key takeaways

Morrison afgrænsede gruppen af mulige sagsøgere betydeligt – Toshiba åbner op for en bredere kreds, men fortsat kun amerikanske investorer

- Skal ses i lyset af det konkrete selskabs eksponering i USA (oftest lille del)
- Fortsat større risiko for søgsmål ift. forretningen/product liability end ift. værdipapirhandel
- Fortsat usikkerhed om selve American Depositary Share er US eller DK reguleret



# The American way | En lidt anden proces...

## 56 Days Left To Seek Lead Plaintiff Status.

Company Name:	Danske Bank A/S
Stock Symbol:	OTC: DNKEY
Class Period Start:	01/09/2014
Class Period End (inclusive):	10/23/2018
Filing Deadline:	03/11/2019

**Court:**  
  
Danske and certain of its executive laws.

10-12-2018 21:45:00

### LEAD PLAINTIFF DEADLINE ALERT: Faruqi & Faruqi, LLP Encourages Investors Who Suffered Losses Exceeding \$100,000 In Marriott International, Inc. To Contact The Firm

NEW YORK, Dec. 10, 2018 (GLOBE NEWSWIRE) -- Faruqi & Faruqi, LLP, a leading national securities law firm, reminds investors in Marriott International, Inc. ("Marriott" or the "Company") (NASDAQ:MAR) of the January 30, 2019 deadline to seek the role of lead plaintiff in a federal securities class action that has been filed against the Company.

Relateret debat  
02 dec - Det bliver i det hele taget interessant at se hvor bøde..  
01 dec - Vi må håbe at dine ture til Pattaya forbliver en hemmel..  
30 nov - @AJ Uha, de staar med en daerlig sag paa haanden ift de..

Relateret indhold

15/01/2019 19:29:26 GlobeNewswire

### SHAREHOLDER ALERT: NSANY APHA CURO LOMA: The Law Offices of Vincent Wong Reminds Investors of Important Class Action Deadlines

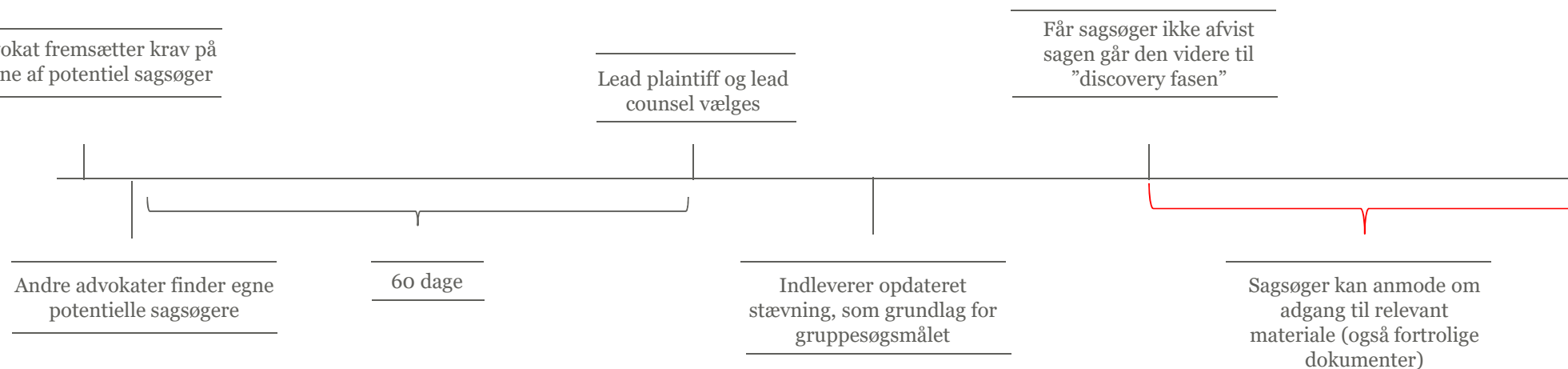
NEW YORK, Jan. 15, 2019 (GLOBE NEWSWIRE) -- The Law Offices of Vincent Wong announce that class actions have commenced on behalf of shareholders of the following companies. If you suffered a loss you have until the lead plaintiff deadline to request that the court appoint you as lead plaintiff.

**Nissan Motor Co., Ltd.** (OTCMKTS: NSANY)  
Lead Plaintiff Deadline: February 8, 2019  
Class Period: December 10, 2013 and November 16, 2018

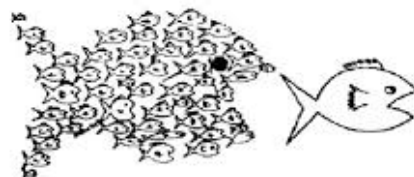
Get additional information about NSANY: <https://www.wongesq.com/pslra-1/nissan-motor-co-ltd-loss-submission-form?wire=3>

# The American Way

## Securities Class Action



## CLASS ACTION



## Class actions | Hvad er det?

- US class action | **Rule 23 (1936/66)**
  - Kollektivt søgsmål; (For alle berettigede medmindre frameldt (**Opt out**) – Eks alle US hjemmehørende købere af en ADR på Carlsberg-aktien i en periode.
- Dansk gruppesøgsmål | **Retsplejelov kap. 23a (2007)**
  - Kollektivt søgsmål for alle berettigede, der har tilmeldt sig (**Opt in**). Eks alle til søgsmålet navngivne tilmeldte DK bosiddende købere af Carlsberg aktien i en periode. Forbrugerombudsmanden kan føre opt-out.

Flere (100) kan sagsøge fælles i en almindelig sag mod samme part om et eller flere krav (**kumulation**), men så er de alle direkte parter og hæfter hver for sagsomkostninger.

**Hollandsk** class settlement – En unik retsgodkendt forligsaftale ml en forening af klagere og skadevolderen der bliver bindende for alle berettigede globalt – der ikke har frameldt sig (opt out)

**Opt out** – Alle potentielle krav indgår – dvs. megakrav  
**Ingen** ”loser pay” princip på **omkostninger**  
**Discovery** - Alt skal frem -  
Bøder/straf ved mangler – evt også advokater  
Næsten alle sager bliver forligt - Plaintiff lawyers og settlement objection lawyers scorer ”kassen”

## Afgørelser i USA kan normalt ikke håndhæves i Danmark

- Anerkendelse og fuldbyrdelse i DK?
  - PT ikke
- Ny Haagerkonvention
  - Kan træde i kraft ift. USA
  - Men kun for sager baseret på værnetingsaftaler



# Meget kreative sagstyper | Scams & Ripoffs

Scams & Ripoffs <https://www.classaction.org/list-of-lawsuits> MORE

Detail View List View

### Air Canada Refunds

Attorneys have reason to believe Air Canada is breaking their contracts when it comes to refunding canceled flights - and that, as a result, consumers are losing money that they shouldn't be.

> Share

### Baby Eczema Cream Lawsuits

Attorneys have reason to believe that the "baby" creams have the exact same ingredients as the adult versions - but are sold at a higher price point - meaning new parents are being duped into paying more for the same product.

> Share

### California Automatic Renewal Charges

Attorneys working with ClassAction.org would like to speak with any California resident who was charged automatically for an ongoing product or service. California has strict laws regarding what companies can and cannot do when it comes to recurring charges and a number of major companies.

> Share

### Deferred Interest Credit Card Lawsuits

Attorneys working with ClassAction.org are investigating whether lawsuits can be filed on behalf of people who paid interest charges on certain deferred interest store-branded debit cards serviced by TD Bank.

> Share

### Harris Jewelry Lawsuits

The lawsuit claims that Harris Jewelry engaged in "illegal, fraudulent, and deceptive" conduct when it entered into financing agreements with and sold jewelry to active duty servicemembers.

> Share

### Herff Jones Gold Rings Lawsuit

A class action lawsuit has been filed alleging that Herff Jones lied about the amount of gold in its class rings. Now, more people are needed to come forward to strengthen the litigation.

> Share

### Independent Energy Company Lawsuits

Class actions are being filed against independent energy companies to help people get their money back for excessive gas and electric bills. Learn more.

> Share

### Robocalls

Robocalls to cellphones and landlines are generally prohibited unless the consumer has provided their express consent to receive these automatic dialer, pre-recorded calls.

> Share

### Underpaid Gas Royalties

Several energy companies, including Chesapeake Energy, are facing allegations that they deliberately and fraudulently underpaid gas royalties to leaseholders - sometimes over a span of 10 years.

> Share

Drugs & Supplements

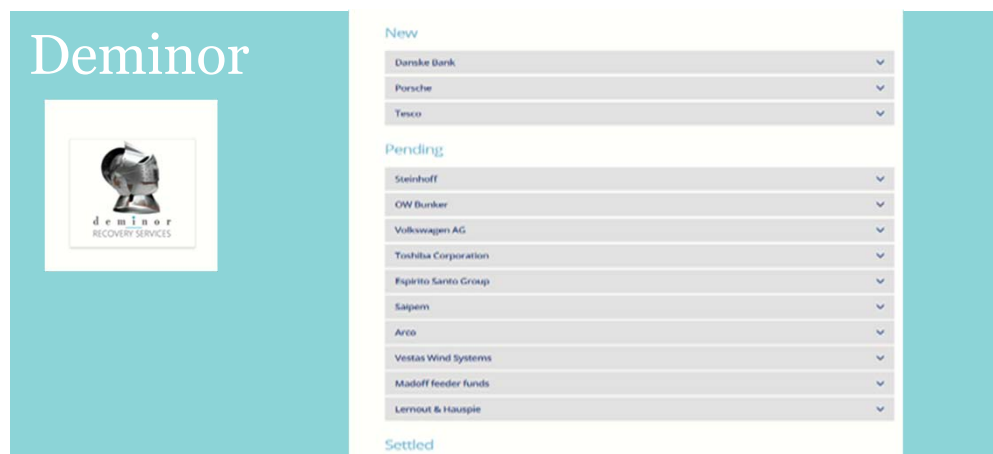
Detail View List View

### Costco Fish Oil

Attorneys working with ClassAction.org would like to speak with anyone who purchased Kirkland Signature's Wild Alaskan Fish Oil from Costco. They have reason to believe the supplement contains a substantially lower amount of omega fatty acids than its label advertises.

> Share

## I ”den gode sags tjeneste” | Litigation funding



**Deminor**

RECOVERY SERVICES

**New**

- Danske Bank
- Porsche
- Tesco

**Pending**

- Steinhoff
- OW Bunker
- Volkswagen AG
- Toshiba Corporation
- Espirito Santo Group
- Saipem
- Arco
- Vestas Wind Systems
- Madoff feeder funds
- Lemout & Hauspie

**Settled**

Litigation funding is not a loan; it is an investment. Should the claim not be successful there is nothing for the Claimant to repay. From the funder's perspective if the claim fails, the funder receives nothing but may face liability for the other side's costs. Litigation funding involves paying the legal bills and other costs of a claimant in exchange for an agreed share of the damages on success.

What this means for claimants:

- Securing litigation funding sends a powerful message to a defendant that an opponent's increasing cost bill will not scare the claimant into discontinuing their claim.
- Enables claimants with limited means to pursue claims they could not ordinarily pursue.
- Allows claimants to limit their litigation cost exposure, thus there is no downside to pursuing funded claims especially when it removes litigation as an accounting liability.
- Frees available capital to be directed to other business needs.
- Litigation-related insurance such as ATE may be obtained to reduce risk of adverse costs.



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Therium, [www.therium.com](http://www.therium.com)

Vivadum, [www.vivadum.com](http://www.vivadum.com)

Redress Solutions, [www.redressolutions.co.uk](http://www.redressolutions.co.uk)

Nivalion, [www.nivalion.ch](http://www.nivalion.ch)

# 8. Reducering af risiko

## Reducering af US risiko?



**Begrænset til US omsætning**

• **D&O/liability insurance**

**Kommunikation/presse dækning**

• **Discovery proces**

**Review af politikker**

• **Interne kontroller**





## Zealand Pharma | Dagsordenspunkt vedr. skadesløsholdelse

Company Announcement– No. 26/2017



### **Zealand Pharma A/S indkalder til ekstraordinær generalforsamling 2017** **Zealand Pharma A/S convenes an extraordinary general meeting 2017**

- |  |   |
|--|---|
| <p>(5) Forslag fra bestyrelsen om skadesløsholdelse af bestyrelsen for visse krav i forbindelse med og efter Selskabets notering i USA</p> | <p>(5) Proposal by the board of directors concerning the indemnification of the board of directors in relation to certain claims in connection with and after the listing of the Company in the United States</p> |
|--|---|



# Tak for i dag