



美国资本市场对中国发行人的接受程度有多大？在进入美国监管者视野前，中国公司需要考虑哪些重要的法律和合规问题？**Vanessa Ip**为您报道。

JUST HOW RECEPTIVE ARE US CAPITAL MARKETS TO CHINESE ISSUERS? AND WHAT MAJOR LEGAL AND COMPLIANCE ISSUES DO CHINESE COMPANIES NEED TO CONSIDER BEFORE EXPOSING THEMSELVES TO THE SCRUTINY OF US REGULATORS? **VANESSA IP** REPORTS

阿里巴巴在 2014 年上演了美国史上最大的首次公开发行 (IPO)，不过今年年初，这个全球最大的电子商务公司因为一些其他原因引起了媒体的关注。在对阿里巴巴的增长速度以及与关联公司的关系产生猜疑后，美国证券交易监督委员会 (Securities and Exchange Commission) 对阿里巴巴的会计操作展开了调查。

这肯定不是在美上市中国公司的可信度第一次受到密切关注了。几年前，一系列涉及利用壳公司进行反向并购造成市场混乱的会计欺诈丑闻使得投资者对中国上市公司的信心和兴趣变得空前低落，其造成的直接后果是，中国上市公司的价值大幅下跌，中国上市浪潮结束。受中央政府旨在降低国内上市标准的改革方案影响，如今有越来越多的中国企业选择从美国退市，私有化后再回到国内重新上市。（不过目前的改革和回归浪潮暂时有些停顿，因为中国监管机构自 2016 年起加大了对资本市场活动的监管力度。）

虽然中国公司在美国上市的热度已经不如 2010 年和 2011 年的巅峰时刻，但是这个市场“仍然是开放的”，瑞生

In 2014, Alibaba made headlines for being the largest US-listed initial public offering (IPO), but earlier this year, the world's largest e-commerce company caught the media's attention for an entirely different reason – the US Securities and Exchange Commission (SEC) launched an investigation into Alibaba's accounting practices following speculation about the company's growth rate and its relationship with affiliated companies.

It's certainly not the first time that the credibility of US-listed Chinese companies has come under scrutiny. A few years ago, a rash of repeated accounting fraud scandals involving the use of shell businesses to create reverse mergers rattled markets, leaving investor confidence and appetite for Chinese listings at an all-time low.

As a direct consequence, valuations have plummeted and the flood of Chinese listings has ended. Influenced by the central government's reform plans aimed at reducing domestic listing standards, the prevailing trend is that more and more Chinese companies are now choosing to de-list from US stock exchanges in order

律师事务所香港办公室合伙人杜以龙说。杜以龙经常就美国证券法为客户提供法律服务。他补充道：“在过去几年中，中国在美国上市的公司大约有十几家。美国市场对于信息技术领域的公司非常具有吸引力，特别是那些侧重点在美国的企业。”但是在早前的丑闻之后，美国市场对于中国企业的“开放”程度到底有多大呢？

事件余波

为中国企业就美国证券事务提供法律服务的高益茨律师事务所香港办公室合伙人谭敏亮表示同意，她认为美国资本市场对中国企业在美进行证券发行仍然接受。“不过，现在的情况与十年前的情况非常不同，”她表示。“首先，一定程度上由于2010年代初的财务丑闻，小企业发现在美国进行融资并上市更加困难。”

“其次，许多大型电信、媒体和技术企业 [TMT] 正在寻求从美国退市并在中国重新上市，因为在中国市场上类似的公司市盈率更高。”谭敏亮说。“第三，美国投资者对于中国企业的发展故事更加谨慎。对 TMT 和消费者服务领域的投资需求仍然很稳健，但是对于制造业、能源和资源以及基础设施领域的兴趣已经开始下降。”

为客户就美国司法部和证券交易委员会执法事务提供法律意见的瑞格律师事务所上海代表处合伙人杨咪咪表示，除了联想和百度等大型知名中国企业之外，美国市场仍然对希望在美国上市的中国企业非常谨慎。“部分原因是由于这些公司虽然在中国家喻户晓，但是在美国并没有名气，潜在的投资者担心这些公司的高增长率可能并不持久，”她说。

“投资者也很谨慎并且仍然记得几年前中国企业因为反向并购在美国上市涉及的丑闻，其中一些公司已经从美国

to go private, then re-list and trade at home. (At the moment, however, the reforms and the trend of returning have stalled temporarily because regulators have kept a tighter grip on capital-market activities since the start of 2016.)

Although the market for US listings of Chinese companies has cooled from its peak in 2010 and 2011, it “remains open”, says Du Yilong, a partner in the Hong Kong office of Latham and Watkins. Du, who advises regularly on US securities regulation, adds: “[In] each of the past few years, there were about a dozen US listings from China. The market is attractive for companies in the IT sector, particularly, that have a US angle.” But just how “open” are the US markets to Chinese companies following earlier scandals?

THE AFTERMATH

Virginia Tam, a partner in the Hong Kong office of K&L Gates who advises Chinese companies on US securities issues, agrees that US capital markets remain receptive to securities offerings of Chinese companies. “The situation, however, is very different from the markets we saw 10 years ago,” she says. “First, partly as a result of the financial scandals in the early 2010s, smaller companies are finding it much more difficult to raise funds and ‘up-list’ themselves in the US.

“Second, many large TMT companies are seeking to exit the US capital markets and relist in China, where the PE [private equity] ratios for comparable companies are higher,” Tam continues. “Third, US investors are more cautious towards the China growth story. The demand for investment opportunities in the TMT and consumer services sectors remains healthy, but the interest in manufacturing, energy and resources, and infrastructure sectors has declined.”

Other than the larger and more well-known Chinese companies such as Lenovo and Baidu, the US market is still wary of Chinese companies trying to go public in America, says Yang Mimi, a partner in the Shanghai office of Ropes & Gray who advises on US Department of Justice and SEC enforcement matters.

“Part of the reason is because these companies, while household names in China, are not well known in the US, and potential investors are worried that the high growth rate of these companies may not be sustainable,” she says.

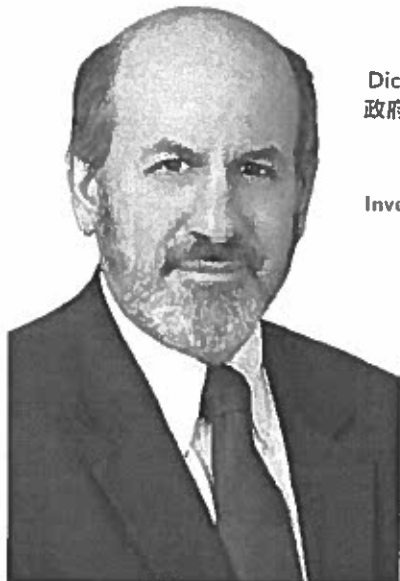
“Investors are also cautious and still remember the scandal involving Chinese companies that had listed by reverse merger from a few years ago, some of which were delisted from US stock exchanges. Many of these companies were targeted by short sellers, and short sellers often see Chinese companies as an easy mark. Moreover, with the current uncertainty in the political climate in the US, the overall market for new IPOs of foreign companies has been relatively soft.”

GOING TO AMERICA

Jacob Frenkel, chair of the government investigations and securities enforcement practice at Dickinson Wright in Washington, advises clients on compliance and risk management issues. With nearly 10 years of experience in the Enforcement Division of the SEC, he says the most significant legal and compliance consideration for any company based outside the US that wants to list in the US is “understanding that the US rules are strict and enforced”.

中国企业必须认识到披露 必须完整和真实

*Chinese companies must
recognize that disclosures
must be complete and truthful*



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美国市场对于信息技术领域的公司非常具有吸引力,特别是那些侧重点在美国的企业

The [US IPO] market is attractive for companies in the IT sector, particularly, that have a US angle



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证券交易所退市了。这些中国企业有许多成为了卖空者的目标,卖空者经常把中国企业视为容易的目标,此外,由于美国政治环境目前的不确定性,外国企业进行新股上市的整体市场都相对比较疲软。”

进军美国

Dickinson Wright 律师事务所华盛顿办公室政府调查和证券执法业务主席 Jacob Frenkel 为客户就合规和风险管理问题提供法律意见。Frenkel 拥有在美国证券交易委员会执法部门近十年的工作经验,他表示对于所有想在美国上市的境外企业来说,最大的法律和合规问题是“认识到美国的规则很严格并不会被严格执行。”

“美国市场对于上市来说有非常多的益处,并且是在世界上最透明、活跃和可信赖的资本市场进行交易,”Frenkel 表示。“对企业构成挑战的监管和执法制度同样会保护企业,中国企业必须认识到披露必须完整和真实,企业必须诚信经营。对于中国企业来说最大的一个挑战是遵守美国反贿赂法。”

瑞生律所的杜以龙认为,在美国上市的中国企业最主要的合规事宜包括美国证券交易委员会和证券交易所的报告要求,以及公司治理要求。“发行人必须熟悉这些要求并保证及时进行报告和备案,确保披露的信息符合美国法律法规的要求,”他表示。“从公司治理的角度说,发行人必须遵守针对审计委员会及其独立性的相关适用规则。”

杜以龙指出,一些合规要求可能会很费钱,比如就财务报告内控出具报告和证明。“此外,中国发行人需要意识到在美国上市涉及的诉讼风险,”他补充说。“美国证券法允许投资者通过私人救济途径要求发行人因披露文件中的虚假陈述或遗漏赔偿损失。就投资者诉讼而言,美国的

“There is a tremendous benefit to listing, and that is being traded in the most liquid, active and trustworthy capital market in the world,” says Frenkel. “The same regulatory and enforcement regime that challenges companies also protects companies. Chinese companies must recognize that disclosures must be complete and truthful, and the company must do business with integrity. One of the greatest challenges for Chinese companies is complying with the American anti-bribery laws.”

Du, from Latham and Watkins, thinks the primary compliance requirements of US-listed Chinese companies consist of the SEC and stock exchange reporting requirements, and corporate governance requirements. “The issuers must get familiarized with these requirements and ensure reports and filings are made in a timely manner, and information disclosed meets requirements of US laws and regulations,” he says. “From the corporate governance perspective, the issuers shall comply with applicable rules for audit committee and its independence.”

Du points out that some of the compliance requirements can be costly – for example, the report and attestation as to internal control over financial reporting. “In addition, the Chinese issuers need to be aware of the litigation risks by listing in the US,” he adds. “The US securities laws give investors a private course of action for losses suffered due to misstatement or omission in the issuer’s disclosure documents. The US has a judicial system that is more facilitative for investor litigation than other jurisdictions. Further, Chinese issuers will be subject to regulatory jurisdictions of the US government agencies, such as the SEC.”

Yang, from Ropes & Gray, believes the SEC is a relatively strong regulator compared to other countries, and US-listed Chinese companies are at risk of being targeted by short sellers for accounting irregularities. She notes that while nothing can absolutely prevent the SEC, short sellers or shareholders from going after a company, Chinese companies should consider taking steps to prevent impropriety.

Yang’s recommendations include: “Establishing a robust system of corporate governance and making sure the company’s internal controls are effective; educating the board of directors on their fiduciary duties and the US legal regime, or appointing independent directors and board subcommittees if they do not yet exist within the organization; promoting transparency within the organization and establishing a strong, experienced investor relations team for communications with investors; thoroughly understanding financial reporting requirements, accounting standards such as US GAAP [generally accepted accounting principles], and disclosure requirements, which often involves putting together a finance team that is well versed in those issues; and establishing reporting systems and a risk management framework.”

Despite the complex US regulatory landscape, there is still an appetite from some Chinese companies for listing in America. “From a technical perspective, it is much easier to become a publicly traded company in the US compared to Hong Kong and mainland China,” says Tam, from K&L Gates, for reasons including: (1) the initial listing requirements are lower; (2) there is no IPO queue, and (3) except in more extreme cases, regulators do not make a subjective judgment on whether a candidate is suitable for listing.

司法制度比其他法域更加便利。此外，中国发行人会受到美国证券交易委员会等美国政府机构的监管。”

瑞格律所的杨咪咪认为，与其他国家相比，美国的证券交易委员会是比较强力的监管机构，由于会计违规，美国上市的中国企业有被卖空者看中的风险。她指出，虽然没有什么可以完全阻挡美国证券交易委员会、卖空者或股东紧追中国企业不放，但中国公司应当考虑采取措施阻止不正当行为。

杨咪咪提出的建议包括：“建立健全的公司治理制度，确保公司的内控制度有效；对董事会成员就其诚信义务和美国法律制度提供培训，或者如果公司尚未任命独立董事和董事会专业委员会，则尽快任命；提高公司的透明度，建立强有力并经验丰富的投资者关系团队，负责与投资者沟通；充分理解财务报告要求、美国公认会计原则（GAAP）等会计准则以及披露要求，通常需要组建一支精通这些问题的财务团队；建立报告制度和风险管理框架。”

虽然美国的监管环境很复杂，但是一些中国企业对于在美国上市仍然很有兴趣。“从技术角度来说，在美国上市比在香港和中国大陆来说要容易许多。”高盖茨律所的谭敏亮表示。原因包括：（1）首次上市的要求更低；（2）没有IPO排队；以及（3）除了极个别案件，监管机构不会对申请者是否适合上市进行主观判断。

“但是中国企业不应该仅仅基于这些原因就选择在美国上市而不考虑香港和中国大陆。”谭敏亮表示。“中国企业选择在美国上市之前应当考虑三个主要因素。首先，由于Sarbanes Oxley法案的各项要求、董事高管责任保险和审计费用，美国上市公司的维护费用很高。其次，诉讼和监管调查更加频繁，如果诉讼和调查发生，对这些问题的处理会更加繁重。最后，美国机构投资者希望公司管理更加透明和积极，公司需要一个可以与这些投资者更有效沟通的管理团队。”

有意义的怀疑

虽然杜以龙认为已经在美国上市或准备赴美上市的中国企业面对的监管力度与过去相比没有太大差别，但是杨咪咪与Frenkel认为在先前的丑闻发生后，监管力度有所加强。

“虽然自本世纪初开始，在美国上市的中国企业越来越多，但是由于反向并购公司浪潮以及随后爆出的财务违规现象，投资者对中国企业的信心在2010年至2013年期间受到了严重的打击。”杨咪咪说道。

“But these are the wrong reasons for Chinese companies to choose the US over Hong Kong and mainland China,” says Tam. “A Chinese company should consider three main factors before choosing to list in America. First, the maintenance costs for a US listing status are high, due to various Sarbanes Oxley requirements, as well as higher D&O [directors and officers liability] insurance, and audit fees. Second, litigation and regulatory investigations are more frequent and, if they emerge, will be more burdensome to handle. Third, US institutional investors expect management to be more transparent and proactive, and the company would need a management team who can communicate effectively with these investors.”

MEANINGFUL SKEPTICISM

While Du argues that the level of scrutiny placed on US-listed Chinese companies, and those looking to list in America, have stayed the same, the sentiment of Yang and Frenkel is that it has intensified following earlier scandals.

“While Chinese companies have increasingly listed on the US stock markets since the early 2000s, investor confidence was badly shaken during the period 2010-2013, with the wave of reverse merger companies and the subsequent exposure of financial irregularities,” says Yang.

“Chinese companies have renewed their focus on listing on the US stock exchanges, but since that time, the SEC has established an internal taskforce specifically dedicated to investigating overseas companies, and has become more proactive in launching formal investigations and informal inquiries with respect to these companies. While this programme is geared towards all public company issues, it may result in closer scrutiny of Chinese companies as a matter of course.”

Frenkel describes the SEC's attitude towards US-listed Chinese companies as “meaningful skepticism”, an attitude that is improving for two reasons: “One is there is a better understanding of the market. The other is that many of what the SEC viewed as the bad or fraudulent companies are pretty much out of business and off the markets. And the SEC is seeing Chinese companies viewing US regulation and expectations more seriously. All companies that are public in North American markets are subject to much greater scrutiny than ever before.”

美国证券交易委员会由于虚假陈述或未披露重大事项而调查中国公司的次数最为频繁

The SEC most frequently investigates Chinese companies for misrepresenting or failing to disclose material facts

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美国投资者对于中国企业的发展故事更加谨慎

US investors are more cautious towards the China growth story

“中国企业又开始关注在美国上市, 但是自从那时起, 美国证券交易委员会建立了一个内部小组专门负责调查海外公司, 并且在对这些公司开展正式调查和非正式询问方面变得更加积极主动。虽然这项行动针对所有上市公司, 但是自然也有可能也会导致对中国企业的监管更加密切。”

Frenkel 认为美国证券交易委员会对在美国上市的中国企业的态度属于“有意义的怀疑”, 这种态度在两个方面具有正面的作用: “一是增进对市场的认识, 二是许多美国证券交易委员会认为不良或存在欺诈的公司中, 有很多都几乎破产或不在了。美国证券交易委员会注意到了中国企业比以往更认真地对待美国的监管和要求。在北美市场上市的所有公司都比以前受到了更多的审查。”

中国企业合规

高盖茨律师事务所华盛顿办公室合伙人 Jonathan Eisenberg 的职业生涯自美国证券交易委员会法律顾问办公室开始, 他经常就执法问题为金融机构和个人提供法律意见。他认为: “显然, 美国证券交易委员会由于虚假陈述或未披露重大事项而调查中国公司的次数最为频繁。”

“在一些案件中, 证券交易委员会认为中国公司参与了欺骗投资者的计划,” Eisenberg 说。 “调查还涉及违反《反海外贿赂法》禁止向政府官员贿赂的规定, 以及违反美国内幕交易法禁止在拥有非公开信息时进行交易或向其他交易者透露该等信息的规定。”

不过 Frenkel 表示, 中国企业在合规方面的表现越来越好了。 “在美国上市的中国企业, 特别是大型企业, 非常努力地根据美国证券法规改善其合规行为,” 他说。 “但文化差异总会存在, 美国监管者应该耐心让中国企业有机会转变其文化思维以遵守特定法律法规, 这点仍然很重要。”

虽然在美上市中国企业过去几年在监管和法律合规方面有了改善, 杨咪咪认为这些企业仍然落后于美国公司。

CHINESE COMPLIANCE

Jonathan Eisenberg, a partner in the Washington office of K&L Gates, began his career in the SEC's Office of General Counsel. Having spent most of his career representing financial institutions and individuals in enforcement matters, he has observed that “far and away, the SEC most frequently investigates Chinese companies for misrepresenting or failing to disclose material facts”.

“Unfortunately, in a number of cases, the SEC concluded that Chinese companies had engaged in schemes to defraud investors,” says Eisenberg. “Investigations also involve violations of the Foreign Corrupt Practices Act (FCPA), which prohibits payments to government officials, and violations of US insider trading laws, which generally prohibit trading while in possession of material non-public information or tipping that information to others who trade.”

According to Frenkel, though, compliance by Chinese companies is getting better. “US-listed Chinese companies, particularly the large companies, have worked very hard to improve their compliance with US securities laws,” he says. “There always will be cultural differences, and it remains important that US regulators be patient for companies to shift their cultural thinking in order to comply with specific regulations.”

Although there have been improvements with respect to regulatory and legal compliance over the years, Yang contends that US-listed companies still lag behind their US counterparts. “Part of the reason is because US public companies ‘grew up’ in the robust US legal environment, and so get their legal departments, outside counsel and board of directors involved at very early stages of any situation involving compliance issues,” she says. “US-listed Chinese companies often still lack the robust corporate governance struc-



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投资者对中国企业的信心在 2010 年至 2013 年期间受到了严重的打击

Investor confidence [in Chinese companies] was badly shaken during the period 2010-2013

“这一定程度上是因为美国上市公司在健全的美国法律环境中成长，因此他们的法律部门、外部律师和董事会在任何涉及合规问题的情况产生之初就会介入，”她说。

“在美国上市的中国公司通常仍然缺少健全的公司治理结构，并且在遭遇积极起诉时不太愿意让律师介入。不过，随着越来越多中国企业渐渐熟悉美国的法律和监管环境，上述情况也有所改变。”

阿里巴巴和其他企业

美国证券交易委员会近期对阿里巴巴展开的调查可能会勾起关于过去那些丑闻的不好回忆，但是 Frenkel 不认为这会对中国企业赴美国发行上市的机会有什么影响。他说这是因为“调查专门针对的是阿里巴巴具体涉及的披露和关联交易问题”。

在 Eisenberg 看来，针对阿里巴巴的调查是“投资者会考虑的因素之一，但不是唯一的因素”，“美国证券交易委员会的调查以及阿里巴巴股价上市以后出现下滑的实际情况，可能会对投资者未来投资中国企业股票的意愿有负面影响，”他说。“另一方面，投资者应当根据每个企业的自身特点判断其价值，一家企业正受到调查并不意味着调查结果会是该企业存在违规行为。许多调查完成后都没有执法的必要，或导致的执法行为都可以由企业轻松解决。” ▲

ture, and are hesitant to involve lawyers when it's not an active litigation. However, I do see this starting to change slowly as more and more Chinese companies become familiar with the US legal and regulatory environment.”

ALIBABA AND BEYOND

The SEC's recent investigation into Alibaba may have dredged up memories of earlier scandals, but Frenkel does not see it having any impact on new listing opportunities for Chinese companies on US markets. He says the reason is that “the issues are very specific to Alibaba about its disclosures and related-party transactions”.

In Eisenberg's opinion, the Alibaba investigation is “one among many factors that investors will consider, but it's not the only factor”. “The fact that the SEC is investigating, and that Alibaba's stock price has fallen since it began trading in the US, may have a negative impact on investors' willingness to invest in future offerings of Chinese companies,” he notes.

“On the other hand, each company is judged on its own merits and the mere fact that a company is being investigated does not mean that the investigation will lead to a conclusion that the company has done anything wrong. Many investigations do not result in enforcement actions, or result in enforcement actions that are easily resolved by the company.” ▲



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