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在美国上市指南

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本文介绍了中国公司如何到美国这个全球最大资本市场的上市之道

中国公司通常通过反向收购一家美国壳公司进入美国资本市场，这就是所谓买壳上市的融资型反向收购（APO）。成为美国上市公司后，中国公司会遇到监管上的新问题。

监管难关

空壳公司的原有债务

大多数用于APO的美国壳公司都是曾经的上市公司，之前或因经营不善，之后不再有任何业务存在。因此，中国公司在APO之前，必须确认不会因该壳公司的前期业务而遭受任何索赔。

会计制度差异

美国的会计准则不同于中国。APO之后，中国公司必须遵守美国的规定，其财务报表应接受美国证券交易委员会（SEC）和美国投资者的审核和裁决。如果会计人员熟悉美国的会计规则，则有益于在并购前做出必要的财务重述。倘若并购后再进行重大财务重述，则有可能导致投资者失去对公司的兴趣；假如陈述失实，情况将会更糟，甚至可能招致起诉。

缺乏投资者活动

尽管壳公司已在SEC备案，但它的股票在此前是不会正式上市交易的。因此对于中国公司来说，非常重要的前期工作是要开拓市场，提高公众对公司和股票的关注度。新闻稿、投资者关系公司、在投

资银行会议上进行陈述（“路演”）以及向SEC提交所需报告等，都会提高公司的知名度。

若要检验一家投资者关系公司，可向他们提出如下问题：他们将如何向投资者推广一家公司？他们将如何说服经纪商撰写有关该公司的报告？他们将如何帮助公司准备路演、等等。新闻稿的用途则是：联络现有投资者、调动旁观者的兴趣。

中国公司的最终目标是在纳斯达克（NASDAQ）、纽约证券交易所（NYSE）或美国证券交易所（AMEX）上市。首次上市一般是在美国证券交易所或纳斯达克上市，原因是这里的上市门槛较低。

报告制度

每一家美国上市公司都必须每季度报告一次财务业绩及所有业务变更。年度报告为10-K报表，这是一份长表，要求公司提供详细资料（包括经审计的财务报表）。其他三个季度的报表为10-Q报表，某些事件（如董事变动或签订重要合同）必须以Form 8-K表上报。SEC至少每三年审核一次10-K表和10-Q表，以核实报告中的信息和财务披露是否真实。

最难报告当属财务报表。SEC有可能出具反对意见函，公司必须对迅速回复此函：或做出解释、或拟定修正。一定要彻底、迅速地处理任何出现的问题，通常可指派熟悉SEC及其做法的公司法律顾问

去完成。

如不及时解决SEC认定的问题，有可能导致公司股票暂停交易；如果不按时提交报告，公司的股票符号有可能会改变。公司必须持有连续12个月按时提交报告的记录，方有资格使用更快的融资方式。

主要文件翻译成英文

公司的主要文件必须作为附件提交给SEC，其中包括：组织文件（章程和规章制度）、APO文件、收购文件、重要合同、高管雇用合同、期权和其它福利计划。所有这些文件必须准确译成英文，不得有异于中文版本。

公司治理要求

在证券交易所上市的公司必须满足特定的公司治理要求。绝大多数董事必须是独立的，公司必须有审计委员会、薪酬委员会和管理委员会。审计和薪酬委员会的成员仅限于独立董事，参与管理的董事不得加入。

上市公司必须经由年度股东大会选举董事、批准审计人员的委任、批准股票期权计划。有关收购等其他一些问题，比如收购计划也须由股东批准同意。无论是经过会议投票批准还是一致同意通过，上市公司必须向股东发出声明，告知即将采取的行动、公司的股权状况以及高管的薪酬。

有关调查要求的法律

美国上市公司必须接受以下两方面调查：《反海外腐败法》（FCPA）调查和“10A”调查。

《反海外腐败法》禁止美国公司向政府官员行贿，不论以前与政府机构有何关系，只要这些关系违反了该规定，均就必须重新修正以符合规定。如有违反，将受到严厉惩罚。

“10A”调查主要涉及财务报表中的失实。此项调查由律师事务所进行，之后将须对此采取必要的补救措施。此项调查耗资巨大。

募集资金

私募基金投资公股（PIPE）

许多中国上市公司首次募资是通过私募基金投资公股的方式。在这一方式下，投资者首先以私购的方式购入公司股份，然后，公司将这些股份登记为公开转让股票，通常与某一股票上市相关联。因登记声明可能是公司的首份大范围披露文件，所以SEC对这一文件的审查可能需要很长时间。公司应该考虑到这一时间，以配合SEC，确保满足登记时限要求。未能在截止日期前进行股份登记的，将受到处罚。

普通股首次公开发行（IPO）

公开发行是募集资金的另一种方式。公司的首次上市发行称作IPO，如果一家公司已通过APO的方式上市，则登记过程与私募投资的方式相似。上市文件应与投资银行/承销商联合准备，文件类似于10-K报表（除非要求详细讨论业务和战略）。登记声明应包括招股说明书，招股说明书必须准确、完整地披露公司的所有重要信息。

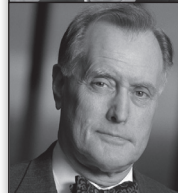
通常情况下，登记流程需要120—180天，公司应根据此时限进行安排。招股说明书是10-K报表的基础。

结论

尽管美国的上市过程比较复杂，满足SEC和市场要求的过程也较繁琐，但美国仍不失为全球最大、最容易进入的资本市场。这一市场能为拟上市的中国企业提供最重要的东西：实现资金筹集、带来流动性。



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Going public in the US

By Jeffrey Li, Of Counsel, and Tom Wardell, Partner, McKenna Long & Aldridge LLP

Jeffrey Li and Tom Wardell explain how to break into the world's largest capital markets

People's Republic of China (PRC) companies commonly access US capital markets through a reverse merger with a US shell public company. This is known as an alternative public offering (APO). As a US public company, the PRC company will encounter new regulatory hurdles.

Regulatory Hurdles

Existing liability of the shell

Most shell companies that are used for APOs were once public but no longer operate. The shell company's previous business may have failed. Before the APO, the PRC company must ensure that it will not be subject to any claims arising from the shell company's previous business.

Accounting differences

US accounting rules differ from those in China. After the APO, the PRC company will have to follow the US rules and its financial statements will be subject to the review and decisions of the Securities and Exchange Commission (SEC) and investors. Accountants familiar with US rules can help to produce any necessary financial restatements before the merger. Significant restatements after the merger can lead to loss of interest in the company or, worse, lawsuits for misrepresentation.

Lack of investor activity

Even though it files SEC reports, the shell company's shares will not previously have been traded on a regular exchange. It is important to develop market interest in the company and its shares. Press releases, investor relations firms, and presentations at investment banking conferences ('road shows'), as well as submitting the required reports to the SEC, will all enhance the company's profile.

To test an investor relations firm, ask them how they promote a company to investors, how they persuade broker-dealers to write reports on companies and how they help a company to prepare for road shows. Press releases can be used to communicate with existing investors and to encourage the interest of others. The ultimate goal will be to list the stock on NASDAQ,

the New York Stock Exchange or NYSE/AMEX. Usually, the first listing occurs on AMEX or NASDAQ because their listing requirements have lower thresholds

Reporting

Every US public company must report its financial results and any changes in its business every three months. The annual report is the 10-K. It is lengthy and requires the company to provide much detail, including audited financial statements. The other three quarterly reports are 10-Qs. Certain events (like a change in directors or signing a major contract) must be reported quickly on Form 8-K. The SEC reviews the 10-K and 10-Qs at least once every three years to verify the information and financial disclosure that the reports contain.

The most difficult reporting requirements concern financial statements. The SEC may issue a comment letter with objections to which the company must respond promptly, providing either an explanation or proposed amendments. It is important to deal thoroughly and quickly with any issues, usually by instructing counsel who are familiar with the SEC and its practices.

Failure to resolve any differences identified by the SEC can result in a suspension of trading in the company's stock, while late filing of a report will be reflected in a change to the company's stock symbol. The company must have a 12-month record of punctual filing before qualifying to use quicker methods of raising capital.

Translation of principal documents into English

The company's principal documents must be on file with the SEC as exhibits. These include its organisational documents (charter and bylaws), APO documents, acquisition documents, major contracts, employment contracts with executives, and option and other benefit plans. These documents must be accurately translated into English and must not operate differently from the Chinese versions.

Governance requirements

Companies listed on an exchange must meet specific

governance requirements. The majority of its directors must be independent, and companies must have audit, compensation and governance committees. Membership of the audit and compensation committees is restricted to independent directors only; management directors may not participate.

Exchange listed companies must have annual shareholders meetings to elect directors, approve the appointment of auditors and approve stock option plans. Certain other matters, such as acquisitions, are also subject to shareholder approval. Whether approval is to be given by meeting or by consent, companies must furnish shareholders with an information statement describing the action to be taken, the status of the company's share ownership, and compensation of its executive team.

Laws requiring investigations

US public companies are subject to investigations in two areas: the Foreign Corrupt Practices Act (FCPA) and 10A.

FCPA prohibits US companies from bribing government officials. Any pre-existing relationships with government agencies that violate these provisions must be redesigned to comply. Violation carries significant penalties.

A 10A investigation will address a possible misrepresentation in the financial statements. This investigation will be conducted by a law firm, which will then implement any necessary remedy. The process can be very expensive.

Raising capital

The PIPE

Many Chinese public companies' first capital raise will be by way of a Private Investment in Public Equity (PIPE). In a PIPE, investors first buy the company's stock privately. Then, the company registers the shares for public re-sale, often in connection with an exchange listing. This registration statement may be the company's first extensive disclosure document and the SEC review may take a long time. Companies should

take into account this time-scale and work with the SEC to ensure that they meet the registration deadline. There are penalties for failing to register shares by the deadline.

The IPO (Initial Public Offering)

A public offering is another method of raising capital. A company's first offering is an IPO. If a company became public by APO, the registration process is like that for the PIPE. The document should be prepared in collaboration with an investment banker/underwriter and is similar to the 10-K, except that it requires expanded discussion of business and strategies. The registration statement will include the prospectus, which must accurately and completely disclose all material information about the company.

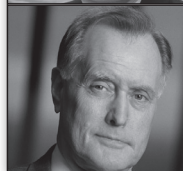
Usually the registration process takes 120 to 180 days, and a company should plan accordingly. The prospectus will then become the basis for future 10-Ks.

Conclusion

Although the process of going public in the US and satisfying SEC and market requirements is complicated, the US capital markets remain the world's largest and most accessible. They offer Chinese businesses the main benefits of being public: raising capital and providing liquidity.



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