

Listing of Chinese Companies on the Toronto Stock Exchange or TSX Venture Exchange

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THE TORONTO STOCK EXCHANGE (TSX) AND THE TSX Venture Exchange (TSX-V), which are part of the TMX Group in Canada, are receptive to new successful listings of Chinese companies. With the new TMX Group office opening in Beijing on November 14, 2011, Chinese companies now have greater exposure to the Canadian capital markets. From 2006 to 2011, an increasing number of Chinese companies were listed on the TSX or the TSX-V and the number of Chinese-based companies listed on the TSX and TSX-V grew from 35 to 56. The total market capitalization of these companies grew from \$3.9 billion to \$4.6 billion at the end of 2011.

Chinese companies currently listed on the TSX or TSX-V belong to a variety of industries, with 36% in Diversified Industries, 16% in Mining and the remaining companies involved in other sectors such as Technology, Life Sciences, Harvest Products, Financial Services, Clean Technology and Oil and Gas.

While the European debt crisis is roiling the global financial markets, going-public activities have slowed but never stopped. The TSX and TSX-V welcomed 270 new listings as of September 30, 2012. This number consists of 152 companies, 65 Capital Pool Companies (CPCs), 36 exchange traded funds and 17 structured products. Of these new listings, 27 were international companies – 16 were from the United States, four from Australia, three from Latin America, one from Africa and three from Asia.

Listing Vehicles

The three main listing vehicles that are used by foreign companies in Canada are an Initial Public Offering (IPO), a Reverse Takeover (RTO) and a Capital Pool Company (CPC).

An IPO is the traditional way for an issuer to raise money and offer stock or shares to the general public for the first time. This method requires a high level of disclosure through a prospectus, a formal legal document that provides details about the securities offered for sale to the public. The prospectus is required to be filed with the securities commission in the jurisdictions where the issuer's securities are being offered and sold. The prospectus contains all

relevant facts an investor would want to know in order to make an informed investment decision.

A private company that wishes to become publicly traded but does not have a current need for raising capital through an IPO uses an RTO. The private company merges with a smaller company that is already listed on the TSX or TSX-V. A management information circular is filed by the public company and the company's shareholders are asked to approve the transaction.

A CPC involves a type of RTO. Investors set up a shell company, or CPC, on the TSX-V solely to acquire an unlisted company or business. The listed CPC must identify an appropriate business as its "qualifying transaction" and announce its intention to complete the transaction within 24 months of listing. The TSX-V reviews the qualifying transactions. A filing statement or management information circular provides prospectus-level disclosure on the company or business that is going to be acquired by the CPC.

Reverse Mergers in the U.S.

Many foreign companies have obtained public listings on U.S. stock exchanges or have gone public on the over-the-counter market (OTC) in the U.S. by way of reverse merger. In substance, a reverse merger is similar to an RTO or a CPC in Canada, where a private company is merged with a U.S. public company. However, as the U.S. public company shares trade on the OTC, there can be significantly less disclosure with a reverse merger in the U.S. compared to an RTO or CPC in Canada. The U.S. Securities and Exchange Commission (SEC) has pursued regulatory proceedings against a number of public companies that resulted from reverse mergers, with the SEC alleging that there was improper financial disclosure to investors and improper due diligence by the underwriters. In the case of an RTO and a CPC, the higher level of prospectus-level disclosure required for RTOs in a management information circular and the filing statement for a CPC undertaking a "qualifying transaction" is designed to avoid the regulatory issues encountered in the U.S. with reverse mergers.

Recent Regulatory Issues

North American securities regulatory authorities are increasingly scrutinizing foreign-based public issuers to improve investor protection and strengthen the capital markets. The SEC and the Ontario Securities Commission (OSC), Canada's largest securities regulatory authority, have recently issued Staff Notices related to public companies from or with operations in emerging markets. Chinese companies are referenced in both the SEC and OSC staff notices. In Canada, there have been recent regulatory proceedings by the OSC related to alleged accounting and audit irregularities of Sino-Forest, which has forest plantation operations in China, and Zungui Haixi, a casual clothing manufacturer from China.

When emerging market issuers decide to publicly list, they should not only consider general market conditions, but should also consider recent reports and recommendations by securities regulatory authorities.

On June 9, 2011, the SEC released a Staff Notice entitled "Reverse Mergers," which warns investors about the risks of companies that have gone public via reverse mergers. The notice identifies several Chinese companies, including Heli Electronics Corp., RINO International Corporation and HiEnergy Technologies Inc., whose public trading was recently suspended due to auditing and accounting irregularities.

In October 2011, the Public Company Accounting Oversight Board released a Staff Audit Practice Alert warning auditors to be aware of certain fraud risks in companies with operations in emerging market jurisdictions.

Similarly, in February 2012, the Canadian Public Accountability Board released a special report that found the auditing of public companies in foreign jurisdictions did not meet acceptable Canadian standards and that a wide gap in auditing standards existed between Canada and China. The report said that many Canadian audit firms do not adequately account for the business environments in foreign jurisdictions and do not address risks from different business customs and practices.

On March 20, 2012, the OSC released Staff Notice 51-719 entitled "Emerging Markets Issuer Review," identifying problems in auditing, disclosure, internal controls and due diligence for foreign companies, including Chinese companies. The OSC Staff Notice is based upon a "targeted review" of 24 issuers listed on Canadian exchanges with business operations in emerging markets, such as Asia, Africa, South America and Eastern Europe. The goal of the review is to examine the disclosure and corporate governance practices of issuers and the roles of auditors, underwriters and the exchanges in protecting capital markets and investors.

Four main areas of concern are highlighted in the OSC Staff Notice:

- * the level of governance and disclosure for emerging market issuers;
- * the adequacy of the audit function for emerging market issuers' annual financial statements;

- * the adequacy of the due diligence process conducted by underwriters in offering securities of emerging market issuers; and
- * the stock exchange listing approval process.

OSC Recommendations

The OSC Staff Notice provides a list of preliminary recommendations summarized as follows:

Issuers

- * Improve issuer corporate governance practices and focus on the board of director's responsibility to understand the business, foreign operations and risks of issuers in foreign jurisdictions
- * Ensure CEOs and CFOs of issuer conduct reasonable due diligence and clarify expectations
- * Require issuers to disclose complex corporate structures and their purpose to investors
- * Require issuers to raise awareness of risk factors associated with foreign jurisdictions
- * Require issuers to maintain books and records in Canada
- * Consider minimum Canadian director residency requirements
- * Consider language competency requirement for Canadian-resident board members in the appropriate local language given issuer's business operations

Auditors

- * Allow OSC access to the audit working papers of issuers
- * Address and disclose if regulators cannot access foreign audit files relating to issuers
- * Consider if auditors should be required to publicly disclose resignation and reasons for resignation

Underwriters

- * Establish a set of requirements for due diligence that addresses the following issues for issuers: operational structure; the internal controls and risk management; government relationships; translation and foreign language use; asset ownership and review of key documents; key members of management, customers, suppliers and other relevant parties

Stock Exchanges

- * Determine if additional listing requirements or exchange review procedures are required to address specific risks of foreign issuers
- * Provide greater transparency in the event of waivers of any listing requirements
- * Determine the extent to which reliance on third party due diligence is appropriate

The report also references lawyers, experts, consultants and other professionals and emphasizes the important roles they must play to ensure full disclosure of the risks associated with foreign issuers.

Issuers should be aware of all recommendations in the OSC Staff Notice so that they can anticipate potential areas of concern when listing on the TSX or TSX-V.

Concluding Remarks

On November 9, 2012, the OSC published an Issuer Guide, which outlines eight key areas that should be considered by companies operating in emerging markets. A follow-up article will be written summarizing this Industry Guide. This Industry Guide should assist foreign issuers in understanding the expectations of securities regulatory authorities in relation to the protection of investors and will allow foreign issuers to prosper in Canadian capital markets. 

中國公司在多倫多證券交易所或TSX創業交易所上市

中國企業的實用指南和建議

多伦多证券交易所 (TSX) 和TSX创业板 (TSX-V) 都属于加拿大TMX集团, 中国公司可以在此成功上市。2011年11月14日TMX集团在北京设立新的办事处, 促使更多中国公司得以接触加拿大资本市场。从2006-2011年, 在TSX或TSX-V上市的中国公司数量已经从35增加至56。这些公司的总市值从30亿美元增至2011年底的46亿美元。

目前在TSX或TSX-V上市的中国公司来自多种行业, 36%属于多元产业, 16%来自采矿业, 其余公司涉及的行业包括技术、生命科学、收获类产品、金融服务、清洁技术以及石油和天然气。

欧洲债务危机搅动全球金融市场, 上市活动放缓但从未停止。截至2012年9月30日, TSX和TSX-V新增了270家上市机构, 包括152家公司、65家资本库公司 (CPC)、36支交易型开放式指数基金和17种结构性产品。在这些新上市机构中, 有27家国际企业, 其中16家来自美国, 4家来自澳大利亚, 3家来自拉丁美洲, 1家来自非洲, 3家来自亚洲。

上市工具

外国公司在加拿大上市使用的3种主要的上市工具是首次公开发售 (IPO)、反向收购 (RTO) 以及通过资本库公司 (CPC) 进行的合格交易 (QT)。

IPO是发行人首次向大众募集资金并发行股份或股票的传统方式。这种方式要求通过招股说明书进行详尽的信息披露, 招股说明书是一份向公众说明所出售证券的详细情况的正式法律文件。招股说明书需提交给发行人发行和出售股份所在的司法管辖区的证券委员会。招股说明书应包含投资者做出明智投资决定所需要的所有相关信息。

私营企业想要公开上市交易但目前不需要通过IPO募资, 这种情况可以使用反向收购 (RTO)。私营公司与一家已经在TSX或TSX-V上市的更小的公司合并。由这家上市公司提交公布管理层信息文件, 要求公司的股东批准该交易。

资本库公司也是一种反向收购。投资者在TSX-V上设立一个空壳公司或CPC, 只是为了收购一家未上市的公司或一项业务。上市CPC必须确定一家合适的公司作为其“合格交易”并宣布在上市后24个月内完成交易。由TSX-V审查合格交易。提交的声明或管理层信息文件需提供关于CPC将要收购的公司或业务的信息披露, 信息披露程度类似于IPO需达到招股说明书的级别。

在美国的反向并购

许多外国企业在美国证券交易所公开上市或通过反向并购在美国的场外交易市场 (OTC) 上市。反向并购本质上与加拿大的RTO或CPC类似, 是一家私营企业与一家美国上市公司合并。但是, 因为美国上市公司的股票在场外进行交易, 美国反向并购的信息披露程度远远低于加拿大的RTO或CPC。美国证券交易委员会 (SEC) 对通过反向并购上市的公司实行监管程序, 指控其向投资者进行了不当的财务信息披露而且承销商进行了不当的尽职调查。就RTO和CPC而言, RTO的管理层信息文件以及进行“合格交易”的CPC提交声明中的信息披露水平要高于招股说明书, 这是为了避免遇到像美国反向并购中的监管问题。

最近的监管问题

北美证券监管机构对外国发行人实施越来越严格的审查, 以加强对投资者的保护并规范资本市场。美国证券交易委员会和加拿大最大的证券监管机构安大略证券交易委员会 (OSC) 最近发布了关于来自新兴市场或在新兴市场有业务运营的上市公司的《工作人员公告》。SEC和OSC的《工作人员公告》中都提到中国公司。在加拿大, OSC最近对嘉汉林业 (在中国有种植园业务) 以及中国休闲服制造商尊贵海西的会计和审计违规行为启动了监管程序。

当新兴市场发行人决定公开上市时, 不仅要考虑一般市场条件, 也要关注证券监管机构最近发布的报告和建议。

2011年6月9日, SEC发布了题为“反向并购”的《工作人员公告》, 提醒投资者警惕通过反向并购上市的公司风险。该通知列出几个中国公司, 包括浙江合力电子有限公司、绿诺环境工程和科技有限公司以及HiEnergy Technologies Inc., 由于审计和会计违规行为为这几家公司最近已被停牌。

2011年10月, 上市公司会计监管委员会发布《全员审计实务警示公告》, 提醒审计员注意在新兴市场司法管辖区有业务运营的公司可能存在某些欺诈风险。

在2012年2月, 加拿大公众责任委员会也发布一份特殊报告, 报告指出来自外国司法管辖区的上市公司的审计未能满足可接受的加拿大标准, 而且中国和加拿大之间的审计标准存在巨大差距。报告表示许多加拿大审计公司没有充分地说明外国司法管辖区的商业环境, 也没有解决不同商业惯例和做法带来的风险。

2012年3月20日, OSC发布《工作人员公告》51-719号文件, 题为“新兴市场发行人审查”, 确定了外国公司 (包括中国公司) 在审计、信息披露、内部控制和尽职调查方面的问题。OSC《工作人员公告》基于对24家上市公司的“针对性审查”而得出, 这些公司在加拿大交易所上市且在亚洲、非洲、南美和东欧等新兴市场有业务运营。审查目的是审查发行人的信息披露和企业管理做法、审计员和承销商的角色以及在保护资本市场和投资者方面的交流。

OSC工作人员公告中强调了四个主要问题:

- 1 新兴市场发行人的管理和信息披露水平
- 2 对新兴市场发行人年度财务报表的审计的充分性
- 3 承销商在新兴市场发行人发行证券过程中展开尽职调查过程的充分性
- 4 股票交易所的上市批准流程

OSC的建议

OSC《工作人员公告》提供的初步建议总结如下：

发行人

- 改善发行人的企业管理做法，注重董事会的责任，即了解外国司法管辖区发行人的业务、外国业务运营和风险
- 确保发行人的首席执行官和首席财务官执行合理的尽职调查并说明预期
- 要求发行人向投资者披露复杂的企业机构及其目的
- 要求发行人提高对外国司法管辖区风险因素的认识
- 要求发行人在加拿大保持簿册和记录
- 考虑加拿大董事居住地的最低要求
- 鉴于发行人的业务运营，考虑居住在加拿大的董事会成员的本地语言水平

审计员

- 允许OSC获得发行人的审计工作底稿
- 如果监管人员无法获得与发行人相关的外国审计文件，审计人员要解决该问题并披露信息
- 考虑审计员是否应该将辞职及其原因公开披露

承销商

- 设立一系列尽职调查的要求，为发行人解决以下问题：运营结构、内部控制和风险管理、政府关系、翻译和外语使用、资产所有权和关键文件审查、管理层主要成员、客户、供应商和其他相关方。

证券交易所

- 确定是否需要额外上市要求或交换审查程序来应对外国发行人的具体风险

- 在豁免任何上市要求时提供更大的透明度
- 确定对第三方尽职调查的依赖程度是恰当的

该报告也提到律师、专家、顾问和其他专业人士，并强调他们应当扮演重要角色以确保对外国发行人的相关风险进行全面披露。

发行人应了解OSC《工作人员公告》上的所有建议，才能预料在TSX或TSX-V上市过程的潜在问题。

结语

在2012年11月9日，OSC发布了一篇《发行人指南》。指南概述了在新兴市场进行业务运营的公司所需要关注的八大关键点。不久之后将会出一篇后续文章对这个指南进行进一步总结。OSC发表这个指南是为了帮助外国发行人了解证券监管机构在保护投资者方面的期望，也将使外国发行人在加拿大资本市场蓬勃发展。📄

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