及监管文化，不能以未上市前的角度和思维方式思考问题。”他同时指出，同一个问题“在不同的国家及地区，代表的意义及产生的后果可能会完全不一样”。

陈巍律师强调应头脑冷静。“保持冷静，切勿冲动行事。国外监管机构调查的原因及内容是多方面的，在最终确定应对方案之前，一定要冷静处理，”他建议道。

有的律师强调在应对调查时需要积极沟通。天元律师事务所合伙人曾曦分析说：“最重要的是维持与审计师、律师持续的沟通和协调，确保以一致的口径配合和应对调查。另外，非常重要

Hu Shenglin, a partner at Guantao Law Firm, places a premium on openness. “A Chinese company facing investigation should conduct its own internal examination and actively address any issues that exist,” he says. “Problems that exist should not be purposefully hidden.”

When faced with allegations of fraud or regulatory misstatements, lawyers are united in recommending immediate recourse to counsel. Chau at Herbert Smith urges “truthful, complete and accurate information disclosure and truthful, complete and accurate investor relations and regulatory communications. “Listen to your lawyer,” he advises.

Practitioner's perspective

# To go dark or to go private? Delisting from the US

US regulators have expressed grave concerns about financial fraud involving a small number of Chinese companies listed in the US. These companies have been investigated, and some punished, since the problem came to light last year. The environment has become even harsher for smaller Chinese listed companies and those Chinese companies listed on the Over the Counter Bulletin Board. Given the increasingly stringent regulatory controls and high cost of compliance, a number of US-listed Chinese companies have begun to consider the possibility of delisting from the country. Simply speaking, a company can be delisted in the following three ways according to US securities laws.

## Delisting

A Chinese company listed in the US as a foreign issuer can delist according to Rule 12h-6 of the US Securities Exchange Act. However, the act requires that before a foreign issuer seeks to delist from the US, its shares must be simultaneously listed and traded openly on another stock exchange outside the US. Since almost all Chinese private enterprises listed in the US do not meet this requirement, they cannot delist under this rule.

## Cease reporting

To cease reporting is a relatively low-cost way of delisting. It takes less time and is procedurally simple, but it must satisfy Rules 12g-4 and 12h-3 of the US Securities Exchange Act. One key point is that the number of of-record shareholders of a company concerned (including but not limited to shareholders in the US) must be less than 300.

**Calculation of the number of of-record shareholders**

In calculating the number of of-record shareholders, it is only necessary to include named shareholders using the name of a securities brokerage firm, and not necessary to include actual shareholders (dormant shareholders). In other words, the number of actual shareholders of a company may be tens of thousands, while the number of of-record shareholders may be less than 300. However, after the company announces its plan to cease reporting, any securities brokerage firm is likely to change the nominal shareholders into actual shareholders so that the number of of-record shareholders will increase to more than 300. If at this time the relevant reporting forms (see below) are not yet effective, the company will have to resume its reporting obligations, and its plan to cease reporting will not be able to proceed. Even if the relevant reporting forms have been submitted and are already effective (i.e. its application to cease reporting is successful), if the company is not able promptly to take relevant measures (including the buyback or consolidation of shares) to ensure that the number of shareholders is less than 300, the company may be forced to resume its reporting obligations towards the US Securities and Exchange Commission. Therefore, the company must continually monitor changes to its shareholders after it ceases reporting.

**Procedures and timetable**

If it chooses to cease reporting, a company must complete Form 15. If it is listed on the New York Stock Exchange or Nasdaq (excluding the Over the Counter Bulletin Board), it should also fill in Form 25 in advance. The timetable is as follows:

| | |
|---|---|
| 1st day | Submit Form 25, publish news of the company's preparation to delist and make a report to the public using Form 8-K or Form 6-K. |
| 10th day | Report the delisting to the public using Form 25. |
| 20th day | Make a report to the public using Form 15. |
| 100th day | When Form 25 takes effect, the reporting obligations of the company under section 12(b) of the US Securities Exchange Act cease. |
| 110th day | When Form 15 takes effect, the reporting obligations of the company under sections 12(g) and 15(d) of the US Securities Exchange Act cease. |

的一点就是要非常及时和恰当地向市场和投资人说明情况。在这方面，关键在于聘请有经验的公关公司。”

观韬律师事务所合伙人胡胜林强调应当诚实坦率:“面对调查，中国企业首先进行自查，对于存在的问题应当积极整改和采取补救措施。”他指出：“不要故意隐瞒存在的问题。”

对于欺诈或假账指控，律师们不约而同地指出应立即寻求法律顾问的帮助。英国史密夫律师事务所的邹兆麟律师认为：“应真实、完整、准确地披露信息，并向投资者和监管机构提供真实、完整、准确的资料。”他建议说：“应倾听法律顾问的意见。”

## Listing will be trickier

For Chinese companies – especially those attracted to growth markets where the barriers to listing are lower like Nasdaq, the London Stock Exchange's second-tier Alternative Investment Market (AIM) or third-tier Plus Market or Toronto's Venture Exchange – listing overseas is likely to become more difficult. "The regulatory and stakeholder environments in Western and emerging markets are likely to become more complex and difficult to navigate as regulatory requirements become more complex," says Esther Leung, co-head of capital markets in

It appears simple for a company to cease reporting but the practical procedures contain a number of pitfalls (such as the calculation of the number of of-record shareholders and details of the reporting by a company during a current year). Any minor oversight may lead to the company breaking applicable securities regulations.

## Privatization

In practice, many companies have far more than 300 of-record shareholders. A company will be subject to Rule 13e-3 of the US Securities Exchange Act if it attempts to end its reporting obligations by means of stock buybacks, mergers, asset sales or stock consolidation. Compared with the procedure to cease reporting, privatization is more costly, takes more time and is procedurally more complex.

**Full disclosure**

Rule 13e-3 requires comprehensive, accurate and detailed disclosure of the process of a privatization transaction. Since the other parties to a privatization deal are often substantial shareholders, the management or their connected parties, the rule requires full verification and disclosure in relation to the fairness of the transaction, including whether the prices and the procedures are fair (such as whether an independent committee is established to evaluate and negotiate the transaction, and whether an evaluation report is available from a third party). A disclosure cannot be merely a formal or general statement of the particulars disclosed. It must be as specific and quantified as possible.

**Special committee**

To demonstrate that a privatization deal takes place at arm's length, a special committee will normally be formed, usually comprising more than three independent directors. Their experience and professional competencies must be disclosed to the public in detail. More essentially, the special committee must have independent powers and adequate funding support as well as the right to engage its own advisers and lawyers. In deciding whether to conduct a privatization transaction, a special committee must consider whether the timing of the transaction is appropriate for the shareholders, and whether options (such as the issue of new shares to raise funds or the sale of the whole company at a


Duan Min


Lucas Chang

public auction) other than delisting are available to improve shareholders' returns.

**Fairness opinion**

To avoid questions from regulatory bodies and lawsuits brought by shareholders, the special committee will often engage a reputable third-party appraisal institution to evaluate whether the transaction price is fair, and then present a fairness opinion. The fairness opinion as well as the qualifications, experience and specific charges of the appraisal institution must be disclosed to the public. If the appraisal institution is not well experienced or has any connection with substantial shareholders or with the management, the opinions it presents will be questioned. If the fees charged by the appraisal institution to any extent depend on whether the transaction is completed successfully, the credibility of its fairness opinion will be undermined.

In short, no matter which delisting method is adopted, minority shareholders are exposed to certain legal risks associated with lawsuits, regulatory controls and other aspects. Given that US legislation regarding delisting is complex, it is recommended that a company seek professional legal advice in advance when considering delisting before making a decision based on its particular circumstances.

---

*Duan Min is of counsel in the Beijing office of Morgan Lewis & Bockius. Lucas Chang is the managing partner of the Beijing office and senior partner of the firm's Greater China practice. Lucas Chang may be contacted on +86 10 5876 3688 or by email at lchang@morganlewis.com.*