

# Capital markets Insight

## 资本市场观察

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Yang Chen's practice focuses on mergers and acquisitions, capital markets transactions, venture capital and private equity, foreign direct investment and outbound investments and covers a wide range of industries such as internet, information technology, real estate development and brokerage, media and entertainment, education, energy, etc. Ms. Chen joined Han Kun in April 2005. Before that, she had been working with Guo Fang Law Firm for about three years, where she specialized in securities offerings on the A-share market and merger and reorganization of listed companies.



陈漾律师主要从事兼并收购、境内外上市、风险投资和私募、外商投资、企业海外投资等业务，并专注于互联网、计算机信息技术、房地产开发与经纪、传媒娱乐、教育、医药与能源等行业和领域。陈律师于2005年4月加入汉坤。在此之前，陈律师在北京市国方律师事务所任职近三年，主要负责A股市场的首次公开发行并上市、增发、配股、发行可转换公司债券及上市公司收购重组等业务。

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### 1. What were the key legislative updates affecting the capital markets in China over the past 12 months?

Over the past year, China's legislative organs have not issued any major legislation on capital markets, but the relevant state authorities have promulgated certain documents on the issuance of new shares, regulation of listed companies, and merger and acquisition (M&A) and restructuring, such as:

- i. In the area of offering of new shares, the China Securities Regulatory Commission (CSRC) promulgated the *Decision on Amending the <Measures for the Administration of the Offering and Underwriting of Securities>* and the *Guiding Opinion on Intensifying Reform of the System for Offering of New Shares* to make the pricing of new shares more reasonable and enhance the efficiency of the offering of new shares;
- ii. In terms of regulation of listed companies, the two stock exchanges issued documents such as the *Guidelines for the Standardised Operation of Companies Listed on the Main Board* and *Guidelines on the Discipline of the Controlling Shareholders and De Facto Controlling Persons of Listed*

### 1. 过去一年中，有哪些影响资本市场的新的法律法规出台？

在过去的一年中，从法律层面而言，中国的立法机关并未颁布针对资本市场的重大立法，但在新股发行、上市公司监管和并购重组方面国家相关机构还是出台了一些文件，比如：

1. 在新股发行方面中国证监会发布了《关于修改〈证券发行与承销管理办法〉的决定》和《关于深化新股发行体制改革的指导意见》，旨在使新股发行定价更为合理，提高新股发行的效率；
2. 在上市公司监管层面，两大交易所发布了诸如《主板上市公司规范运作指引》、《上市公司控股股东、实际控制人行为指引》等文件，加强对上市公司及其股东行为的管理；
3. 在并购重组领域，中国证监会也发布了多项《证券期货法律适用意见》，对上市公司收购或重大资产重组中的部分问题给出了明确的适用意见，并且中国证监会还发布了《关于修改上市公司重大资产重组与配套融资相关规定的决定》，借壳上市行为将受到更严格的监管。

*Companies* to strengthen the administration of activities of listed companies and their shareholders;

- iii. In the area of M&A and restructuring, the CSRC also promulgated several *Opinions Applicable to Securities and Futures Laws* to provide clear, applicable opinions on certain issues arising from the acquisition and material asset reorganization of listed companies. The CSRC also promulgated the *Decision on Amending the Relevant Provisions on Material Asset Reorganization and Ancillary Financing of Listed Companies*. In light of these new rules, backdoor listing will be subject to more stringent regulation.

## 2. What developments can be expected in the coming 12 months?

We expect the following developments in China's capital markets over the next 12 months:

- i. The long-simmering "international board", ie the board for overseas incorporated enterprises to offer and list their shares on China's A-share market, may be launched at a suitable time. Once the international board is formally launched, many listed red-chip enterprises will directly return to the A-share market as an overseas incorporated enterprise. Many large multinational corporations will also seek to list on China's A-share market.
- ii. The CSRC will accelerate the development of the over-the-counter market, and actively drive the expansion of the "New Third Board".
- iii. China's regulatory authorities will further expand the regulation of sponsor organizations and representatives.

## 3. CSRC has carried out a series of pricing reform last year. (eg. Underwriters are subject to closer scrutiny of their rights and responsibilities in the price-inquiry process, and need to take into account interest of issuers and investors, and the scope of the book –building participants are likely to be broadened, etc ) What do you think is the impact on the role of underwriters? How would you advise institutional investors?

The CSRC promulgated the *Guiding Opinion on Intensifying Reform of the System for Offering of New Shares* (the "Guiding Opinion") in Oct 2010, which started a new wave of reform on the system for offering of new shares. We believe its impact on underwriters mainly includes the following areas:

- i. the expansion of the rights of lead underwriters: the *Guiding*

## 2. 估计来年，资本市场的法律法规方面将有哪些新发展？

我们预计在未来的12个月，中国资本市场将主要会有以下方面的发展：

1. 可能会择机推出酝酿已久的“国际板”，即境外注册企业在中国A股市场发行上市的板块。国际板一旦正式推出，很多红筹架构的上市企业将直接以境外注册公司的身份回归A股市场，一些大型跨国公司也有望在中国A股市场上市；
2. 证监会将加快推动场外交易市场建设，积极推动“新三板”扩容；
3. 中国监管层将进一步加大对保荐机构、保荐代表人的监管。

## 3. 证监会实行了一系列有关新股定价方面的制度改革，比如承销商在定价过程中的责任和义务将受到更严格的监管，也要求其考虑发行人和投资者的利益等，您认为这对承销商产生了哪些影响？对机构投资者您有哪些建议？

中国证监会在2010年10月出台《关于深化新股发行体制改革的指导意见》（《指导意见》），从而启动了新一轮的新股发行体制改革。我们认为对于承销商的影响主要体现在以下方面：

1. 主承销商的权利范围得到扩大。《指导意见》明确，主承销商可自主推荐一定数量具有较高定价能力和长期投资取向的机构投资者，参与网下询价配售；
2. 加大了承销商的自主发行责任；
3. 因询价过程的透明度提高，承销商的信息披露义务也增强。此外，回拨和中止发行机制，也可能促使部分主承销商从追求高价发行转变为更注重投资者的利益。

针对上述改革，我们对于机构投资者提出如下建议：

1. 符合条件的私募机构有权参与报价过程，在适当的时候可以积极参与；
2. 改革后中小型公司新股发行中单个机构获配股份的数量提高，机构投资者需对报价更加审慎，避免以较高价格购买大量股份；
3. 建议机构投资者不要将赌注都押在新股发行上，而可以更多地关注二级市场，研究和发现价值。

## 4. 对于承销商的保荐权未能得到充分监管，导致新股发行的估值偏高等现象，您认为哪些方面需要更进一步改革？

对于A股新股发行过程中的估值偏离市场化的问题，建议从以下方面着手改革：

1. 加强对中介机构尤其是承销商、保荐人的监管；

*Opinion* stipulates that lead underwriters may recommend a certain number of institutional investors with relatively higher pricing capability and intention for long-term investment to participate in offline private placement through price inquiry;

- ii. the expansion of the underwriters' issuance responsibility; and
- iii. the increase in information disclosure obligations of underwriters as a result of the higher transparency of the price inquiry process. Also the clawback and offering suspension mechanisms may also urge certain lead underwriters to change from seeking to offer shares at a high price to focusing on investors' interests.

In relation to the aforementioned reform, we have the following recommendations for institutional investors:

- i. Qualified private equity institutions have the right to participate in the quoting process and may actively participate at the appropriate time.
- ii. After the reform, single institution shall be allocated a larger quantity of shares in the offering of new shares by small- and medium-sized enterprises (SMEs). Institutional investors need to be more prudent in providing quotes and avoid purchasing a large quantity of shares at a relatively high price.
- iii. Institutional investors should not place all their bets on the newly issued shares. They can focus more on the secondary market and look for valuable shares on the market.

**4. Some said that the recommendation rights of underwriters were not sufficiently supervised, which is one of the reason that caused the IPO price of new shares became unreasonably high, but soon falls below their IPO price. – What other reforms do you think would be necessary to deal with the over-valuation?**

In regards to the issue of the unreasonably high IPO price in the A-share offering process, we recommend reform in the following areas:

- i. strengthen the regulation of intermediaries, especially underwriters and sponsors;
- ii. introduce penalty mechanism to include key shareholders, lead underwriters and sponsors in the compensation system. Public shareholders shall be granted compensation if there is a significant discrepancy between the share price and the IPO price; and
- iii. rigorously implement the delisting system and strengthen the administration of material asset reorganization and backdoor listing.



### 5. What is your outlook for the launch of Shanghai International Board? How would you advise a client (both issuers and investors) who are considering listing on the new international board?

Although the overall plan and ancillary rules for the launch of international board are yet to be announced, the opinions expressed publicly by the senior officials of the CSRC and the Shanghai government over the recent months have attracted strong market anticipation of the international board. We think the launch of international board to permit or even encourage outstanding overseas enterprises to list in China is an inevitable trend. However the time of launch needs to take into consideration of a number of factors, and the launch requires a series of market conditions and support of the legal system.

We suggest issuers that consider to have their shares listed on the international board to pay attention to the following:

- i. learn more about the laws and regulations, and rules on the offering and trading of shares in China's capital market as early as possible;
- ii. decide on the intermediaries, especially the lead underwriter, as early as possible; find out the latest developments and policies before the issue of the official documents on the international board; and concurrently start the preparation of the relevant system and documents internally; and
- iii. have a thorough understanding of the issues involved in cross-border listing such as the management of raised funds and foreign exchange control.

Investors need to pay special attention to the following:

- i. pay attention, as early as possible, to the official news on the international board and all laws, regulations and rules promulgated from now on;
- ii. due to information inequality, the risks involved in investing in the international board could be relatively higher. Investors should have risk awareness, in particular, institutional investors should strengthen the design of their risk system; and
- iii. develop language capability to learn more about the issuer from more channels such as foreign websites.

### 6. Prior to the launch of Shanghai International board, a number of global investment banks are looking to join the market by setting up JV securities firms. What would be the potential opportunities and risks in this partnership?

2. 引入惩罚机制，将主要股东、主承销商和保荐人等纳入补偿体系，如上市后与定价出现重大偏差，应给予公共股东一定补偿；
3. 执行严格的退市制度及加强对重大资产重组、借壳上市的管理。

### 5. 您如何看待上海国际板的发展前景？您对考虑参与国际板的客户（包括发行人和投资者）有哪些建议？

尽管国际板推出的整体方案及配套规则尚未公布，但最近几个月从证监会到上海市政府高层官员的几次表态引发了市场对于国际板推出的强烈预期，我们认为允许甚至鼓励国外优秀企业来中国上市的国际板的推出是一个必然的趋势，但何时推出则是一个需要多方因素综合考量和把握的问题，并且需要具备一系列的市场条件和法律制度基础。对于考虑在国际板发行上市的发行人而言，建议注意以下问题：

1. 尽早加强对中国资本市场相关发行、交易的法规、规则和政策的学习和了解；
2. 尽早确定中介机构，尤其是主承销商，在国际板正式规范文件出台前了解相关动向和政策，同时内部开始有关制度和文件的准备工作；
3. 充分了解跨境上市可能涉及的募集资金管理、外汇管制等问题。

投资人应特别注意以下几点：

1. 尽早关注关于国际板的官方消息和今后将公布的各项法规和规则；
2. 鉴于信息的不对称，投资国际板可能有比较大的风险，因而投资人要有风险意识，特别是机构投资者要加强风险制度的设计；
3. 过好语言关，可以从外国网站等多渠道了解发行人的情况。

### 6. 在上海国际板正式启动前，不少国际性投资银行为加入市场，正着手建立合资证券公司，这样的合资证券公司模式有哪些潜在机遇和风险？

合资证券公司潜在的机会包括：

1. 通过合资，外国证券公司可以进入中国市场，分享中国经济增长带来的机会，并且在今后中国政策放开后，可以优先获得在中国设立独资公司的资格；
2. 针对国际板上市，合资券商可以获得更多的海外客户资源。财富500强企业被普遍认为是最有可能上国际板的对象，而500强企业很可能也会偏向于选择有该等国外券商参股、并且具有中方国内操作经验和政府关系的合

The potential opportunities include:

- i. Foreign securities companies can enter the China market through joint venture and capitalize on the opportunities from China's economic growth, and may obtain the qualification for establishing wholly foreign-owned company in China in priority when China opens up the market in future.
- ii. In regards to listing on the international board, JV securities firms can have access to more overseas clients. The Fortune 500 enterprises are generally regarded as the companies most likely to be listed on the international board. They may be inclined to select a JV securities firm that has equity participation of a securities firm from its home country, as well as business operation experience in China and relationship with the Chinese government. This will give JV securities firms an advantage in the competition on IPOs on the international board.
- iii. In the recent establishment of many JV securities firms, the driving force from relevant departments such as the Shanghai financial office has played an important role. JV securities firms (especially companies and securities firms in Shanghai) are likely to have better policy and government support that will benefit their business development.

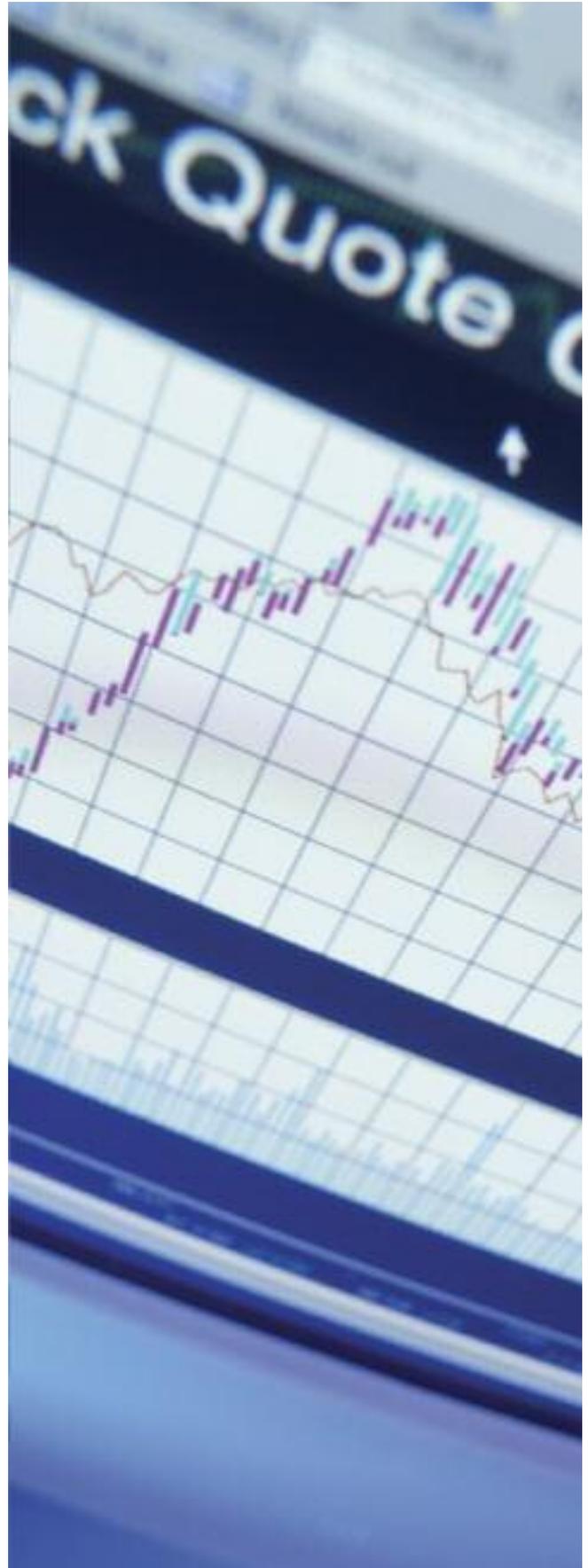
The major risks faced by JV securities companies include:

- i. The policy restrictions and the uncertainty concerning the legal environment: securities firms are still a sector where foreign investment is restricted. There are still restrictions on the shareholding ratio and business scope for foreign investors.
- ii. The adjustment of the Chinese and foreign shareholders and their fight for controlling power may affect the stable operation and efficiency of JV securities firms.
- iii. There is still no concrete schedule for the launch of the international board, which may affect the operation and business performance of JV securities firms. Without the support of business from the international board, JV securities firms may be unable to compete with stronger Chinese securities firms merely on domestic business, or to achieve good economic benefits.

#### **7. Listings on the SME Board and ChiNext have picked up quickly, what do you think are the driving force?**

The driving force includes the following:

- i. The financing needs of SMEs – the majority of companies that are listed on the SME board and ChiNext are enterprises of a relatively small scale or in the development stage. These types



- of enterprises account for the majority of companies in the current economic environment in China. Their financing channels are relatively few, and therefore have a relatively stronger financing need and desire for listing;
- ii. The capital market and system – in recent years, the development of the Chinese capital market has been relatively fast, the framework for a multi-layered capital market system has basically been established, and the various ancillary systems and rules are improving. The CSRC and the Shenzhen Stock Exchange are also strongly encouraging SMEs to list on the SME board and ChiNext;
  - iii. The support of state policies and local governments, and investment institutions – state policies (as well as local governments under the guidance of state policies) encourage the development of innovative and hi-tech companies, and such companies have received fund support from domestic and overseas investment institutions that have been growing rapidly over the last few years;
  - iv. Advantages such as the relatively high valuation and price-to-earnings ratio on the A-share market, the relatively low cost for IPO and low cost subsequent to listing, and close proximity to target market and investors.

Despite the above, there are still many issues with listing on the SME board and ChiNext. Recently the price-to-earnings ratio on the SME board and ChiNext have begun to show a downward trend, and how long will the listing activities on these boards continue to be dynamic remains to be seen.

#### **8. Please share your experiences and strategies, and describe the challenges problems or issues generally arise for IPOs deals you are representing recently.**

This year, we represented many companies and underwriters in IPO transactions. Although the overseas IPO market (the US in particular) has been a bit weak this year, especially Chinese listed companies that are affected by the negative news reports on the authenticity of their financial data and have become targets of short selling, the number of IPO transactions that we are currently handling and that will soon commence are not affected. In regards to the overseas IPOs of Chinese companies in which we currently participate, here are some experiences and thoughts to share:

- i. Companies should sort out the audit of the relevant account books prior to the commencement of IPO procedure, and carry out an evaluation of tax compliance as these issues always impede the progress of IPO;

资券商，这将使合资券商在国际板IPO竞争中处于优势地位。

3. 在近期诸多合资证券公司成立的过程中，据悉上海金融办等相关部门的积极推动起了很重要的作用。合资券商（特别是在上海的机构和券商）应该会有比较好的政策环境和政府支持，将有利于业务的开展。

而合资证券公司面临的主要风险包括：

1. 政策限制和法律环境的不确定，券商领域仍是外资限制投资的领域，对于外资持股比例、业务领域均有限制；
2. 中外股东的磨合及对控制权的争夺可能都会影响合资券商的稳定经营和效率。
3. 国际板何时推出尚无确切时间表，可能会影响合资券商的经营和业绩表现。如果没有国际板业务的支撑，合资券商仅就中国国内业务可能无法与中国传统的实力比较强的券商竞争，无法获得好的经济效益。

#### **7. 中小板和创业板上市近年来越来越活跃，您认为背后的驱动力是什么？**

驱动力：

1. 中小企业融资需求。在中小板和创业板上市的公司多数都属于规模比较小或处于成长期的企业，该等企业在目前中国经济模式中占绝大多数，但融资渠道比较少，因而有比较强的融资需求和上市愿望；
2. 资本市场和制度推动。近几年中国资本市场发展比较快，多层次的资本市场体系框架已基本确立，各种配套制度和规则也在完善当中，证监会和深圳交易所也在大力鼓励中小企业在中小板和创业板上市；
3. 国家政策和地方政府的支持以及投资机构的推动。国家政策（而地方政府在国家政策驱动下）支持创新型、高科技公司的发展，并且许多这类的公司获得了近几年蓬勃发展的国内外投资机构的资金支持；
4. A股市场的估值和市盈率都比较高，首次发行上市成本较低，上市后维持成本较低，接近目标市场和投资者等优势。

尽管如此，在中小板和创业板上市也存在很多问题，近期中小板和创业板的市盈率已经呈现下降趋势，中小板和创业板上市的活跃能持续多久，可能还有待进一步观察。

#### **8. 能否分享您最近做上市项目的经验、策略、或者遇到的问题或挑战？**

我们今年代表多家公司和承销商在处理IPO交易。尽管今年海外的IPO市场（尤其是美国）表现似乎不甚突出，尤

- ii. Companies should at their earliest convenience appoint Chinese lawyers to familiarize with and sort out all legal documents to drive due diligence once the IPO commences;
- iii. Most of the legal issues faced by Chinese companies in the course of overseas IPO involve the regulation and explanation of domestic laws in China. Common issues for each project include the lawfulness of the company's roundtrip investment and the level of disclosure, registration according to Document No. 75, tax disclosure, and Variable Equity Interest (VIE) structure. Also depending on the industry of the listed company, there may be special regulatory issues. The more challenging issue is how to handle certain ambiguous applicable Chinese laws, regulations and departmental rules, and the uncertainty in the implementation thereof. Nonetheless, most of the aforementioned issues, with the exception of the basic corporate structure, can be categorized as issues on how to handle disclosure effectively. Provided that the disclosure is consistent with the applicable laws, regulations and departmental rules, it should comply with the requirements of the general disclosure standards and level as much as possible. As for provisions that are ambiguous and that are uncertain in their implementation, we will provide disclosure recommendations that comply with the law provisions and that are acceptable to all parties, in light of our understanding of the relevant industry regulatory system.
- iv. In regards to the IPOs of Chinese companies in the US, in general we feel that the examination by the US Securities and Exchange Commission (SEC) seems to be more stringent compared to last few years. For instance, in the past SEC examiners in general would not ask questions about the VIE structure, but this issue has come up a number of times in the examination of several projects this year. Our experience is that as long as we fully understand the reasons for the examiners to raise the questions with our knowledge of the industry background, we can generally submit a reply that is satisfactory to SEC examiners.

**9. a) What are some of the major issues or concerns issuers might have with both the onshore and offshore listings? b) How would you address these?**

The major challenge for issuers for A-share listing in China is the share offer review system. As the listing of A-shares in China is subject to a review system, the preparation period for issuers is longer, and the scope of review by the CSRC is wider. The issuer

其中国上市公司群体性受到财务数据真实性方面负面新闻的影响，成为一些机构做空的目标，但是目前我们正在进行和即将启动的IPO交易数量却未受影响。就我们目前参与的中国公司海外IPO交易而言，有几点经验和想法可以分享：

1. 公司在正式启动IPO程序之前最好充分梳理好有关会计账目的审计工作，并进行税务合规性方面的评估，这方面的问题往往会成为牵制IPO进程的障碍；
2. 公司最好第一时间请其中国律师熟悉和帮助公司梳理其各项法律文件，以便IPO项目启动后尽快推动尽职调查；
3. 中国公司海外IPO面临的大部分法律问题都涉及中国境内的法规监管和解释。各个项目普遍遇到的问题包括公司返程投资结构的合法性和披露尺度的把握、75号文登记、税务披露、VIE结构等问题。此外，视拟上市公司所从事的行业类型不同，可能会出现一些特殊的涉及具体行业的监管问题。比较具有挑战性的是如何处理一些中国适用法律、法规或部门规章规定含混且在实践中的实施又具有不确定性的问题。但无论何种情况，前述除了基本架构之外的大部分问题最终往往归结为如何进行有效披露的问题，披露在与适用法律、法规或部门规章一致的前提下，应尽量符合普遍遵循的披露标准和尺度，对于规定含混且在实践中的实施具有不确定性的法条，我们尽量结合对有关行业监管体制的理解提供既如实描述法律规定又令各方可以接受的披露建议。
4. 此外，就中国公司在美国的IPO项目而言，我们普遍感觉美国证券交易委员会（SEC）的审查似乎比前几年更严格一些，比如以前SEC审查员一般不会问及的Variable Interest Entities（VIE）结构的相关问题在今年多个项目的审查中被多次问及。但我们的经验是，只要充分了解有关问题的由来和演变，以及在熟悉业界背景的情况下了解审查员提出问题的大概动机，一般都可以提交令SEC审查员接受的答复。

**9. a) 对于国内及国外上市，发行人可能面临的主要问题有哪些？ b) 对此您有何建议？**

对于境内A股上市而言，发行人遭遇的最重要的难题是发行审核体制。由于国内A股上市实行审核制，使得发行人的准备周期较长，证监会的审核范围较广，发行人需要面对审核不予通过的风险，发行速度也较难把握。

除了上述问题外，发行人在境内和海外上市过程中，可能还会面临以下问题和顾虑：发行人业务经营及资产的独立性、发行人的核心资产尤其是知识产权的保护、信息披露的完整及准确、发行人的合规性、发行人的行业监管及外

needs to bear the risks of not passing the review, and it is more difficult to manage the offering progress.

Apart from the aforementioned problems, an issuer may also encounter the following issues and concerns in the course of domestic and overseas listing: the independence of the issuer's business operation and assets; the protection of the issuer's core assets, especially intellectual property; the completeness and accuracy of information disclosure; the compliance of the issuer; the industry regulation and foreign investment restriction on the issuer; the financial status and accounting standards of the issuer; the lawful disposal of state-owned assets; and the application of overseas laws, etc.

We mainly provide comprehensive due diligence and pre-listing guidance to ensure that the issuers fulfil the listing criteria, and to assist them to safeguard against the potential risks as much as possible.

**10. On the whole, what is your outlook for the market as a whole in the upcoming year? What would be the major trend moving forward?**

We expect the Chinese stock market to be in a volatile transition period in the coming year. As the economic growth slows down and inflation accelerates, there may be "N-shape" fluctuations in the stock market.

We believe the key trends to note regarding the Chinese stock market in the coming year are development and compliance. The international board is a major step towards the establishment of China's capital market, and its launch is becoming more certain. Also, at present there are a large number of requests for equity transfer and trading from companies that fail to meet the listing criteria of the stock exchanges, leading to more and more demands for an over-the-counter market. Therefore we understand that the expansion of the "New Third Board" will soon be launched, or a registration system will be implemented.

In the coming year, the Chinese government will further improve the government-led market regulatory system that integrates central regulation and industry self-discipline, combat insider trading, and continue to drive the reform for offering of new shares and the delisting system, and launch refinancing on ChiNext.



资限制、发行人的财务状况及会计准则、国有资产的合法处置、国外法律适用等方面的问题。

我们主要通过对发行人进行全面的尽职调查以及施行全面的上市前辅导，确保发行人符合发行上市的条件要求，并尽可能的协助发行人防范潜在的风险。

**10. 总的来说，您如何看待来年的市场发展前景？有哪些主要的趋势？**

预期未来一年中国证券市场将以震荡过渡为主，在经济增速回落，通胀加剧的情况下，市场趋势或呈现“N”型波动。

我们认为未来一年中国证券市场的趋势是发展与规范并举。国际板作为中国资本市场制度建设布局的重要一步，推出的预期正在明朗化。另外，当前中国有大量不符合交易所上市标准的公司有着较强的股权转让和交易需求，国内建立场外交易市场的呼声日渐提高。因此我们理解“新三板”扩容在即，或将实行注册制。未来一年中国政府将会进一步完善以政府为主导，集中监管和市场自律相结合的市场监管体系，打击内幕交易、继续推进新股发行体制改革、改革退市制度、启动创业板再融资。