



AVOIDING U.S. SECURITIES LITIGATION LIABILITY FOR DIRECTORS AND OFFICERS OF CHINESE COMPANIES

Over the last decade, many Chinese companies have made their way to the United States to access its capital markets and to bring home the prestige of a U.S. listing. While the U.S. markets offer many advantages to Chinese companies, they also bring substantial responsibilities and risks to the officers and directors who serve them. Securities class action lawsuits against Chinese companies and their officers and directors surged since the end of 2010. Where there were nine securities class actions filed in 2010 against Chinese companies, the number of cases increased to 33 in 2011.

By serving a U.S. public company, officers and directors subject themselves to various U.S. laws, including the federal securities laws, state law and criminal law. The Securities Act of 1933 (the "Securities Act") creates various express causes of action for claims in connection with the offering of securities. If a registration statement filed with the SEC contains a material misrepresentation or omission, a person who purchased securities offered pursuant to that statement may sue the directors and officers of the issuer at the time of the registration. Directors and officers may also face primary liability under the general antifraud prohibition established in the Securities Exchange Act of 1934 (the "Exchange Act"), which creates an implied cause of action for many forms of securities fraud. Advisors to the officers and directors of Chinese companies should make sure they understand these potential risks and are prepared to face them.

SEC Investigations and Enforcement Actions

The Securities and Exchange Commission (“SEC”) is an agency of the U.S. government. The commissioners who run the SEC are appointed by the President of the United States. One of the jobs of the SEC is to enforce the federal securities laws both in court and in administrative proceedings before the SEC itself. The lawyers who work for the SEC have the power to conduct wide-ranging investigations to determine whether there have been violations of the federal securities laws. These lawyers can require the production of documents and force people to testify under oath. At the end of the investigation, the SEC can go to court to get an order prohibiting violations of law; obtain fines and sanctions; bar people from being officers or directors of public companies; and ban the trading of securities on U.S. markets. The SEC can also obtain similar relief in administrative proceedings before SEC judges.

The Sarbanes-Oxley Act (“SOX”) has provided the Enforcement Division of the SEC with significant new enforcement tools, including new causes of action and new remedies. As a result, the SEC is opening more investigations, conducting them more quickly, and making more aggressive settlement demands, all of which results in more litigation. These changes have set a new tone in SEC investigations.

For example, SOX has established new causes of action for the SEC against senior executives of a public company. The principal executive officer and principal financial officer must certify under oath as to both the accuracy and the completeness of the issuer's financial results.

For these reasons, public companies, directors, officers, senior executives, special committees and audit committees must have defense counsel experienced in SEC enforcement matters and in litigating cases to trial. It is important to have attorneys who are experienced on both sides of the equation. Further, in an SEC enforcement proceeding and the resulting litigation matters, the interests of the company and the individuals are not necessarily aligned, and it is advisable that each party engages its own counsel to ensure undivided loyalty in legal representation.

Private Actions

In addition to actions by the SEC, private parties can bring actions against companies and their directors and officers. There are two primary types of private actions. First, there are class actions where a purchaser or seller of company stock brings suit on behalf of all purchasers or sellers during a set time period alleging violations of law. These claimed violations may be of either state or federal law. These actions often claim damages of tens of millions of dollars against both the company and directors and officers. The second type of private action is called the derivative action. In this type of action, a shareholder brings a claim on behalf of the company against its directors and officers (and others) claiming that the directors and officers violated their duties to the company and its shareholders. Once again, claimed damages can be in the tens of millions of dollars. Moreover, certain states, like Delaware, allow for state courts to have jurisdiction over a Chinese citizen, even if that person never enters the United States.

In private class actions, it may be necessary for directors and officers of a company being sued to consider retaining separate counsel if the plaintiff's complaint contains claims of impropriety by management or when approving transactions in which management may be interested. While in derivative actions, it is mostly certain that directors and officers being sued would need independent counsel, since their interest obviously contradicts the company's in that situation and the company's lawyers would only represent the company.

Internal Investigations

Often during the process of SEC investigations, the company's board of directors (or special committee) may order an internal investigation in order to respond to comments raised by the SEC and/or allegations made by third parties. An internal investigation is often a precursor to a securities class action or derivative action. In many situations, a director or executive will believe the company's lawyers also are representing them individually as well. Corporate counsel should be sensitive to and identify those situations where an individual should retain his/her own counsel.

For example, when attorneys hired by a special committee to conduct an internal investigation request to interview a board member or officer, those individuals need to know that the attorneys represent the special committee and do not represent them individually. Directors, officers and employees should also be advised that what they say to those attorneys may not be privileged, if the company chooses to disclose the information.

Criminal Proceedings

Violations of the federal securities laws and certain state laws can also constitute criminal offenses. These matters are investigated and prosecuted by United States Attorneys and state prosecuting authorities. Penalties can include lengthy terms in prison and large fines if there is a conviction.

Protecting the Company and its Directors and Officers

It is important to keep in mind that when a Chinese company participates in the U.S. capital markets, its directors and officers (including those who live in China) instantaneously assume certain responsibilities required by U.S. laws related to that participation, just like directors and officers of any U.S. public company. As a consequence, they face potential liability under U.S. laws for failure to fulfill those responsibilities, also just like their U.S. counterparts. There is no privilege at all for them to be "foreign."

It is also important to keep in mind that even if a Chinese national never enters the United States and his property in China cannot be reached to satisfy fines or judgments, there are consequences from a civil judgment or criminal conviction. Any property in the United States would be subject to seizure, entry into the United States may be impossible; and further business transactions in the United States may be unrealistic.

The first step in protecting your interests is to do things the right way. Follow applicable law and retain reputable advisors. Second, you should obtain Directors and Officers Liability Insurance. This type of insurance will help defray the costs of litigation in the United States. Policies can help pay the costs of defense and settlement of litigation. Getting the right kind of policy is key. FINALLY and of GREATEST IMPORTANCE is finding the right lawyers to defend you. Often when trouble arises there is the temptation to hire one lawyer to represent the company and all of its directors and officers. However, strong consideration should be given to separate representation for individual officers and directors in order to avoid any potential conflicts of interest.



In these situations, it is not uncommon for different lawyers to represent different groups of people. Often, directors who are not part of company management should have different lawyers than management. If a company does an internal investigation, subjects of that investigation will likely need separate counsel. When the question of separate counsel is not entirely clear, a behind-the-scenes representation of the individual — called "shadow counsel" — may be the best alternative. Every director and officer ought to consider his/her own situation when faced with an investigation or lawsuit and seek independent advice before making choice of counsel. Making the wrong choice can be a big mistake.

For example, Enron Corporation was an American energy, commodities and services company based in Houston, Texas. Before its bankruptcy on December 2, 2001, Enron employed approximately 20,000 staff and was one of the world's leading electricity, natural gas, communications and pulp and paper companies, with claimed revenues of nearly \$101 billion in 2000. At the end of 2001, it was revealed that Enron's financial condition was an accounting fraud. Enron has since become a popular symbol of willful corporate fraud and corruption. The scandal also brought into question the accounting practices and activities of many corporations throughout the United States and was a factor in the creation of the SOX. The scandal also affected the wider business world by causing the dissolution of the Arthur Andersen accounting firm.

A number of Enron employees, including its chief executive officer, president and chief financial officer, either pleaded guilty or were convicted of various crimes, including false statements, conspiracy, securities fraud and insider trading. Because alleged crimes and/or violations can be emotional and the facts and circumstances may vary from one person to another, representation by one counsel for a group may raise conflicts of interest and may not be in anyone's best interests. We cannot stress enough the importance of considering separate representation by separate counsel.

Retention of Separate Counsel for Directors and Officers

At Locke Lord, we advise clients at the onset that it is critical to confront these potential hazards at the beginning of any pending or anticipated lawsuit and decide if separate counsel is necessary. Locke Lord attorneys are experienced in evaluating the critical conflicts analysis and other components that make up these decisions.

Locke Lord attorneys have held senior positions at the SEC, have significant trial experience and have litigated cases against the SEC before the highest appellate courts. Locke Lord securities litigators have defended Fortune 500 public companies, financial institutions and their directors and officers in hundreds of securities class actions enabling us effectively to represent:

- Chief Executive Officers
- Founders
- Chief Financial Officers
- Accounting Executives
- Outside Directors
- Finance Executives
- Audit Committee Members
- Investor Relations Executives
- Sales Executives
- General Counsel



协助中国公司董事高管避免美国证券诉讼责任

在过去的十年中，许多中国公司已经成功进驻美国资本市场获得赴美上市的荣耀。美国市场在为这些中国公司提供了诸多优势的同时，也给他们的高管和董事带来了责任和风险。自2010年下旬起，美国境内针对中国公司及其高管董事发起的证券类集体诉讼案件呈激增之势。据统计，2010年全美共有9起针对中国公司的证券类集体诉讼。而2011年，该数据攀升到了33起。

作为美国上市公司的高管和董事，其将受制于诸多美国法律的管辖，包括联邦证券法，各州法律以及刑法。比如，美国1933证券法案针对股票发行设定了多种明确的诉因：如果公司递交给美国证监会的注册文件中含有重大失实陈述或遗漏，那么依据该些注册文件而购买了股票的投资者就可以对公司注册时的董事和高管进行起诉。再比如，美国1934证券法案中有关禁止欺诈的规定针对多种形式的证券诈骗行为设定了隐含的诉因，从而使相关董事和高管面对重大责任。作为中国公司高管和董事的顾问，理应确保当事人明白这些潜在的风险并做好应对的准备。

美国证监会调查和执法

美国证券交易委员会（以下简称“SEC”）是美国政府的分支机构。主持SEC工作的最高五人委员会成员均由美国总统亲自任命。SEC的职责之一，就是在法庭上和自身的行政诉讼程序中贯彻落实美国联邦证券法的要求。SEC的内部律师有权开展广泛的调查以确定是否有违反联邦证券法的情况发生。这些律师有权收集文件并强制当事人宣誓作证。在调查结束时，SEC可以从法院获取禁止违反法律的命令，罚款和实施制裁；禁止当事人继续担任上市公司高管或董事，以及禁止在美国市场上进行证券交易。同样，SEC也可以在自身的行政诉讼程序中从SEC法官那里获得上述类似的救济措施。

萨班斯-奥克斯利法案（以下简称“SOX”）的出台为SEC执法部门提供了新的强有力执法工具，包括新的诉因和新的救济措施。由此，SEC正在展开更多的调查，调查行动变得更为迅速，并会作出更具压迫性的庭外和解要求，所有这一切都将引发更多的诉讼。这些变化已经为SEC调查奠定了新基调。

例如，SOX已经为SEC建立起了一系列针对上市公司高级行政管理人员的新诉因。首席行政官和首席财务官必须就公司财务业绩的准确性和完整性作宣誓证明。

基于上述原因，各上市公司，董事，高管，特别委员会和审计委员会都必须拥有对SEC执法及诉讼有经验的辩护律师来为其保驾护航。聘用同时在上述两方面富有经验的律师至关重要。此外，SEC执法过程及伴随的后续诉讼中，公司和其董事高管个人的利益并非确定一致。因此各当事方非常有必要各自聘请律师以确保律师在代理的过程中对被代理人的绝对忠诚。

个人发起的诉讼

除了SEC调查和执法外，个人原告也可以针对公司及其董事高管发起诉讼。个人发起的诉讼主要有两种形式。第一，集体诉讼，公司股票的一位买家或卖家代表某时间段内公司股票的所有买家或卖家指控公司违反法律。这些指控或涉嫌违反州法律或涉嫌违反联邦法律。这些诉讼往往向公司及其高管董事索要数千万美金的赔偿。第二类个人诉讼形式被称作股东代位诉讼。在这类诉讼中，一名股东代表整个公司发起对其董事和高管（及其他人员）的诉讼，指控公司董事和高管违反了他们对公司和股东负有的职责。同样的，此处索要赔偿额可达数千万美元。此外，美国一些州，比如特拉华州，允许州法院对中国公民具有管辖权，即便此人从未进入过美国。

在个人集体诉讼案件中，一旦原告起诉书中包含了对公司管理层行为不当的控诉或是管理层过去批准的公司交易中掺杂有管理层自身的利益，作为被告的公司董事和高管就很有必要考虑单独聘用律师。而在股东代位诉讼中，几乎可以肯定地说，被诉的董事和高管需要另行聘请律师，因为在该种情况下董事高管的利益很明显地与公司利益相冲突。而公司的律师仅代表公司本身。

内部调查

往往在SEC调查的过程中，公司董事会（或特别委员会）可能会下令进行内部调查，以回应SEC提出的意见和/或第三方的指控。内部调查往往也是证券类集体诉讼或股东代位诉讼的前兆。董事或高管往往会认为该公司的律师同时也在代理他们个人。公司法律顾问应敏锐地洞悉到并指出此处个人需要单独另行聘请法律顾问。

例如，当受雇于某特别委员会来进行内部调查的律师要求采访董事会成员或管理人员时，这些董事高管个人需要明白，这些律师代表的是该特别委员会，而非他们个人。董事，高管和员工还应被告知，如果公司决定要披露信息，那么他们对这些律师所说的话并不一定享有保密特权。

刑事诉讼

违反联邦证券法和某些州法律也可以构成刑事犯罪。美国国家律师和各州检察机关负责调查这些问题及起诉。如有定罪，处罚包括长期监禁和巨额赔款。

对公司及其董事高管的保护

重要的是要记住，一旦中国公司进入美国资本市场以后，其董事和高管（包括那些生活在中国的管理层成员）便即刻受制于相关美国法律的约束，就如同任何传统美国上市公司的美国本土董事高管一样。同理，一旦赴美上市的中国公司董事高管们怠于履行其公司治理职责时，跟美国同行们一样，其将面临着相应的美国法律责任惩罚。此处不存在任何作为“外国人”的特权。

同时，重要的是要明白，即使一个中国籍公民从不进入美国，且他/她在中国的财产不会被触及到用来缴纳罚金或执行法院判决，美国法院的民事判决或刑事判决仍然会对他/她造成一系列后果。例如，此人在美国现在或将来的财产将被查封，从此可能无法进入美国；在美国境内继续进行商业交易也成为了泡影。

保护您利益的第一步是正确行事。遵守适用的法律，并聘用声誉高的顾问。其次，您应该握有董事高管责任保险。这种保险将会帮助支付在美国诉讼的费用。保险可以帮助支付辩护和诉讼和解的费用。要注意购买正确的保险种类。最后，最为重要的是聘请合适的律师来为您进行辩护。往往当问题出现时，有一种倾向是聘请一位律师来同时代表公司及所有的董事和高管。但是，为避免任何潜在的利益冲突，应重点考虑为董事和高管个人另行聘请的律师代表。在这些情况下，不同的

律师来代表不同的利益群体是常见的。通常，不从事公司管理的董事，应该雇用不同于公司管理层的律师。如果公司开展内部调查，该被调查的对象将很有可能需要另聘的律师。当是否需要另行聘请律师的问题不是彻底清晰的情况出现时，幕后个人代理 - 所谓的“影子律师” - 可能就成为了最好的选择。每一位董事和高管在面对调查或诉讼时都应该考虑自己的实际处境，并在作出选择律师的决定之前寻求独立的意见。做出错误的选择，可导致严重后果。

例如，过去安然公司是一家总部设在德克萨斯州休斯敦市的美国能源，商品和服务公司。在2001年12月2日破产前，安然公司聘用了约20,000名员工，是世界领先的电力，天然气，通信，纸浆和造纸公司。在2000年对外声称有近\$1010亿美金的收入。在2001年年底，有消息披露安然公司的财务状况是会计欺诈。从此，安然公司成为了公司故意欺诈和腐败行为的热门象征。该丑闻也带来了全美诸多公司会计业务和操作的质疑，SOX法案也是在这样的大背景下孕育而生的。该丑闻还造成了安达信会计师事务所的解体，对更广泛的商业世界造成了负面影响。

许多安然公司的员工，包括公司首席执行官，总裁和首席财务官，要么认了罪要么被判犯有各种罪行，包括虚假陈述，串谋，证券欺诈和内幕交易。因为指控的罪行和/或违法行为夹杂感性的因素，事实和情况可能会因人而异，由一个律师代表一群人可能会引起利益冲突，这显然不是任何人的最佳利益。因此，考虑到由不同律师代表不同群体的重要性不言而喻。

为董事和高管另行聘请律师

洛克律师事务所在雇佣关系建立之初就会建议我们的客户，在任何待决或预期的诉讼开始时就应直面这些潜在的危险情况并决定是否有必要另行聘请律师。洛克律师在对关键冲突分析和做出这些决定的其他因素进行评估方面富有经验。

洛克律师事务所的多位律师曾在SEC担任过高级职务，他们同时拥有丰富的庭审经验，并在多个最高层面的上诉法院成功代理过对抗SEC的诉讼案件。在数以百计的证券集体诉讼案中，洛克的诉讼律师团队为众多全球“财富”500强上市公司，金融机构及其董事和高管进行过辩护。这些宝贵经历使我们能够有效地代表：

- 首席执行官
- 公司创始人
- 首席财务官
- 会计主管
- 外部董事
- 财务主管
- 审计委员会成员
- 投资者关系主管
- 销售主管
- 总法律顾问



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