

Regulating Corporate America – Myths and Realities

監管美國公司— 神話與現實

“What does not kill me makes me stronger” – Twilight of the Idols (1888) by Frederick Nietzsche

Introduction

Corporate America refers to public companies listed on New York Stock Exchange or Nasdaq, Wall Street, New York; accordingly regulating Corporate America is sometimes interchangeable with regulating Wall Street. This article will give readers a bird-eye’s view as to how Corporate America is regulated (*A reading list for those who are interested to explore this interesting area of US securities regulation is available upon request to the Chamber Secretariat and on the Chamber’s website.*)

「那些沒能殺死我的，使我變得更堅強」—《偶像的黃昏》（1888年），弗雷德里克·尼采（Frederick Nietzsche）

簡介

美國公司是指在紐約華爾街紐約證券交易所或納斯達克上市的上市公司；因此，監管美國公司有時亦相當於監管華爾街。本文將有助讀者對美國公司的監管方式有一個概括了解（有興趣探討美國證券監管這一有趣領域的讀者可向商會秘書處或網站索取一份書單）。

From Gilded Age to Great Depression

After the civil war in 1865, US entered into the reconstruction period extending to the wild west benefitting from the second industrial revolution and marking the beginning of Corporate America. The Gilded Age was coined by Mark Twain to represent a thin surface of gold over underlying metal base, a metaphor for a small number of fabulously wealthy people growing rich by exploiting vast numbers living in poverty, as contrasted with a Golden Age where life is good for everyone. The Gilded Age was represented by robber barons Andrew Carnegie in steel industry, John Rockefeller in oil industry and JP Morgan in banking industry and was ended by the collapse of the stock market in 1929 leading to the great depression that was only recovered until 1939.

Regulating Corporate America

After the US independence war, George Washington became the first US president on 30 April 1789 with Alexander Hamilton as the first Treasury Secretary and Thomas Jefferson the first Secretary of the State. The political ideologies of Hamilton and Jefferson and their differences had determined how US was to be administered and how Corporate America was to be regulated. In a nutshell, Hamilton was in favour of strong central government whilst Jefferson was in favour of strong state governments and weak central government. Hamilton was for self-regulation by market in regulating Corporate America in Wall Street, New York and Jefferson was for regulation by government. Since the capital of US was moved out of Wall Street, New York into Washington DC in 1801, regulating Corporate America was a constant tension between Wall Street or New York and Washington, the first of which was the bank panic in 1907. The panic was resolved not by President Roosevelt in Washington but by JP Morgan and the bankers in Wall Street, New York. Jefferson was the legendary figure for the democratic party as evidenced by President Clinton in his inaugural address making reference to Jefferson on 20 January 1993 whilst Hamilton was the legendary figure for the republican party as evidenced by President Bush making reference to Hamilton in his appointment of Henry Paulson as Treasury Secretary on 30 May 2006.

Securities Act 1933 and Securities Exchange Act 1934

Prior to 1933, there was no federal securities law, and Wall Street was mostly self-regulated. In individual states, the offering of securities and related matters were then regulated by the state blue sky law, the first of which was enacted in Kansas in 1911. Blue sky law was named after Hall v Geiger-Jones Co in 1917 as referring to those 'speculative schemes which have no more basis than so many feet of blue sky'. In the midst of and in response to the Great Depression, the Securities Act and Securities Exchange Act were enacted by the Roosevelt administration in 1933 and 1934 respectively as the first two federal securities regulations. The Securities Act 1933 was enacted to require mandatory disclosure of information for all public offering of securities and to prohibit securities fraud in the sale of securities. Securities Exchange Act 1934 was enacted to create the Securities and Exchange Commission (SEC) and to empower the SEC to regulate the securities industry including regulation of stock exchanges and intermediaries and requiring periodic reporting of information by all listed companies.

從《鍍金時代》(Gilded Age)到《大蕭條》(Great Depression)

1865年南北戰爭結束後，受惠於第二次工業革命，美國進入重建期，這股浪潮一直延伸到荒野西部，標誌著美國公司的開始。《鍍金時代》出自馬克·吐溫 (Mark Twain) 筆下，是指用一層金覆蓋著下面的金屬層，暗喻少數極富裕人士透過剝削廣大的貧苦民衆來發財致富，與人人獲得美好生活的黃金時代形成對比。《鍍金時代》塑造了一眾斂財役民的大亨，包括鋼鐵業的安德魯·卡內基 (Andrew Carnegie)、石油業的約翰·洛克菲勒 (John Rockefeller) 及銀行業的約翰·皮爾龐特·摩根 (JP Morgan)，直至1929年股災後終結，股災並導致大蕭條，直到1939年經濟才得以復甦。

《監管美國公司》(Regulating Corporate America)

在美國獨立戰爭之後，喬治·華盛頓 (George Washington) 於1789年4月30日成為第一任美國總統，亞歷山大·漢密爾頓 (Alexander Hamilton) 為第一任財政部長，托馬斯·傑斐遜 (Thomas Jefferson) 為第一任國務卿。漢密爾頓及傑斐遜的政治意識形態及其分歧決定了美國的管理方式以及美國公司的監管方式。簡而言之，漢密爾頓支持建立強而有力的中央政府，而傑斐遜則支持州政府強、中央政府弱。漢密爾頓主張對於華爾街的美國公司採用市場自我監管方式，而傑斐遜則主張由政府監管。自1801年美國的首都由紐約華爾街遷至華盛頓以來，對美國公司的監管一直令華爾街，或紐約與華盛頓之間的關係長期處於一個緊張狀態，其中第一宗事件便是1907年的銀行恐慌。這場恐慌並非由羅斯福 (Roosevelt) 總統在華盛頓解決，而是由約翰·皮爾龐特·摩根及紐約華爾街的銀行家出手了結。傑斐遜是民主黨的偶像人物，曾被克林頓 (Clinton) 總統在1993年1月20日就職演說中提及；而漢密爾頓是共和黨的偶像人物，布殊 (Bush) 總統於2006年5月30日任命亨利·保爾森 (Henry Paulson) 擔任財政部長時亦曾有談及。

1933年《證券法》及1934年《證券交易法》

在1933年之前並無聯邦證券法，華爾街基本上是透過自我規管。各個州份的證券發售及相關事宜均受州政府的藍天法監管，第一部藍天法於1911年在堪薩斯州頒佈。藍天法於1917年以Hall 訴 Geiger-Jones Co 一案而得名，專指那些「沒有比頭頂的藍天有多高更有根據的投機性投資計劃 (形容虛無飄渺)」。在大蕭條期間，為了應對當時的情況，羅斯福政府於1933年及1934年先後頒佈《證券法》及《證券交易法》，成為最初的兩部聯邦證券法規。1933年《證券法》要求所有公開發售證券必須強制披露資料，並禁止銷售證券時的證券欺詐。1934年《證券交易法》要求成立證券交易委員會 (證交會)，並授權證交會監管證券行業，包括監管證券交易所及中介機構，並要求所有上市公司定期匯報資料。

The Go Go Years after World War II

After World War II, US took over from UK to lead the world and entered into the go go years of great prosperity economic growth and optimism. Through a series of mergers and acquisitions (M&As), Corporate America grew from strength to strength. With the creation of junk bonds (high yield but low grade bonds) by Michael Milken in 1980s to finance M&As, companies with poor performance were taken over by corporate raiders and sometimes by management (termed management buy-out (MBO)) through leverage buy-outs (LBO) that only the fittest would survive market.

Barbarians at the Gate – the LBO of RJR Nabisco

The go go years were represented by the classic hostile takeover of RJR Nabisco (RJR) by Kohlberg Kravis Roberts & Co (KKR) through LBO with the issue of junk bonds using other people's monies in 1988. KKR and other drawn corporate raiders were barbarians at the gate and were featured not only in books but in the movie "Wall Street" by Michael Douglas. Greed and monies were the engine of growth for Corporate America into the roaring nineties.

The Roaring Nineties

1990s was a period of unprecedented growth and Corporate America seemed triumphant. Globalisation was in full swing. Internet and powerful computers made their way into the consumer and business marketplace. The new economy was a shift from a manufacturing and commodity-based economy to one that used technology to create new products and services at a rate that the traditional old economy could not match. The roaring nineties were reverberated by the classic phase 'irrational exuberance' by Alan Greenspan, then chairman of the Federal Reserve in 1996 during the dot-com bubble.

When Genius Failed – the Collapse of Long Term Capital Management

Long Term Capital Management (LCTM) was the leading hedge fund founded by Wall Street genius John Meriwether in 1993 and advised by noble prize laureates in economics Robert Merton and Myron Scholes. Between 1994 and 1998, LCTM was engaged and leveraged heavily in arbitrage trading with an average return of 40% per annum and trading volume in excess of US\$ one trillion. In the midst of Asian Financial Crisis and on 17 August 1998, the Russian government defaulted on its sovereign debts and devalued its currency initiating a mass exodus from the world's markets. Within days, LCTM lost 45% of its capital and was eventually bailed out by a consortium of 14 banks arranged by the Federal Reserve in September 1998. LCTM was wound up in early 2000.

二戰後的《沸騰歲月》(The Go Go Years)

在第二次世界大戰結束後，美國從英國手中奪走全球領袖寶座，並邁向經濟發展、欣欣向榮的「沸騰歲月」。透過一系列併購活動，美國公司日益壯大。上世紀八十年代，邁克爾·米爾根 (Michael Milken) 開創垃圾債券 (高收益但低評級的債券) 為併購活動提供資金，業績欠佳的公司被企業狙擊手、有時甚至被管理層 (稱為管理層收購 (MBO)) 透過槓桿收購 (LBO) 接管，上演一場適者生存的淘汰賽。

《門口的野蠻人》(Barbarians at the Gate) – RJR Nabisco槓桿收購案

「沸騰歲月」最具代表性的事件要數Kohlberg Kravis Roberts & Co (KKR) 於1988年挪用他人資金發行垃圾債券，透過槓桿收購對RJR Nabisco (RJR) 進行經典的敵意收購。KKR及其他參與的企業狙擊手都是門口的野蠻人，不僅見於多本書籍，更被邁克爾·道格拉斯 (Michael Douglas) 拍成電影《華爾街》。貪婪與錢財是美國公司邁向「喧囂的九十年代」的增長推動因素。

《喧囂的九十年代》(The Roaring Nineties)

上世紀九十年代是經濟空前增長的時期，美國公司似乎高奏凱歌。全球化如火如荼。互聯網及功能強大的電腦進入消費與企業市場。新經濟由一個以製造業和商品交易為基礎的經濟，變成透過利用科技以傳統舊經濟無法趕及的速度，創造新的產品與服務。1996年科網泡沫期間，時任聯儲局主席艾倫·格林斯潘 (Alan Greenspan) 卻對喧囂的九十年代作出「非理性亢奮」的評價。



The Smartest Guys in the Room – the Fall of Enron

Enron was founded by Kenneth Lay in 1985 as a traditional energy company and was diversified into water plans and broadband services across the globe in early 1990. Since 1990, its share price increased by 311% by 1998. During the period, its profits were inflated by the mark-to-market accounting treatment and its liabilities were hidden by special purpose vehicles making those liabilities not recorded in the balance sheets (off balance sheet). Enron's financial statements were audited by Arthur Anderson (AA) and all transactions were advised and opined by Vinson & Elkins (VE). The downfall of Enron was triggered by an article titled "Is Enron Overpriced" by Bethany McLean published by Fortune on 5 March 2001. On 15 August 2001, the accounting irregularities were discovered by the whistleblower Sherron Walkins. On 15 October 2001, VE announced that Enron had done nothing wrong and that the accounting practices were approved by AA. Enron share price however decreased from US\$97.75 on 23 August 2000 to US\$0.12 on 11 January 2002. Enron filed for bankruptcy on 2 December 2001, the then largest bankruptcy in US history. Kenneth Lay, its founder and Jeffrey Skilling, its former CEO were charged and convicted with securities fraud in 2006. AA was charged and convicted in June 2002 and had surrendered its CPA licence in August 2002. Enron was managed by the smartest guys in the board room and was advised by the smartest professionals as gate-keepers. Unfortunately, Enron went from peak to bankruptcy within 16 months exposing the corporate governance failure in Corporate America.

Sarbanes – Oxley Act (SOX) 2002

After the bankruptcy of Enron, SOX was enacted on 30 July 2002 to revamp the accuracy and reliability of corporate disclosures including, amongst others, the creation of Public Company Accounting Oversight Board, improving auditor independence and corporate responsibility, enhancing financial disclosures, and targeting corporate and criminal fraud and white-collar crime.

Too Big To Fail – the Bankruptcy of Lehman Brothers

Bear Stearns (BS) was founded as an equity trading house by Joseph Bear and Robert Stearns on 1 May 1923. By November 2006, BS was heavily exposed to subprime mortgages - mortgages that were granted to subprime mortgagors and securities that are backed by or derived from those mortgages. With the decline in US housing prices leading to a rapid deterioration of subprime mortgages and securities derived therefrom, BS recorded a loss for the first time since 1923 in 2007. With further collapse of the subprime market, BS plummeted and was sold to JP Morgan Chase for US\$2 per share on 16 March 2008 with a loan of US\$30B from Federal Reserve.

Lehman Brothers (LB) was formed by Henry Lehman (and his brothers) back in 1844 and was the fourth-largest investment bank in US by 2008 (after Goldman Sachs, Morgan Stanley and Merrill Lynch). By then, LB was heavily invested in subprime mortgages which were financed by short term repurchase arrangements. With the collapse of the subprime mortgage market, LB filed its bankruptcy on 15 September 2008 after US government failing to bail it out, making it the largest company to fail in US history. This led directly to the great recession in US and the subsequent occupy Wall Street movement in

《天才隕落》(When Genius Failed) — 長期資本管理公司的倒下

長期資本管理公司 (Long Term Capital Management, LCTM) 是華爾街奇才約翰·梅利韋瑟 (John Meriwether) 於1993年創立的領先對沖基金，由諾貝爾經濟學獎得主羅伯特·默頓 (Robert Merton) 及麥倫·斯科爾斯 (Myron Scholes) 擔任顧問。1994年至1998年間，LCTM 利用高槓桿從事套戩交易，錄得年均回報 40%，成交量超過一萬億美元。亞洲金融風暴期間，俄羅斯政府於1998年8月17日宣佈主權債務違約，貨幣貶值，引發全球市場大量資金外流。數天內，LCTM 虧損 45% 的資本，最終於1998年9月獲聯儲局安排由14家銀行組成的財團提出救助。LCTM 於2000年初倒閉。

《董事局內聰明人》(The Smartest Guys in the Room) — 安然的陷落

安然公司 (Enron) 由肯尼斯·萊伊 (Kenneth Lay) 於1985年創立，是一家傳統能源公司，於1990年初拓展多元化業務，涉足全球各地的水利計劃及寬頻服務。從1990年到1998年，公司股價上漲了311%。期間，公司利潤因按市值計算的會計處理方式而膨脹，公司負債被特別項目的投資工具所隱藏，令這些負債並未記入資產負債表內 (賬外)。安然的財務報表由安達信會計師事務所 (Arthur Anderson, AA) 審核，所有交易項目則由 Vinson & Elkins (VE) 提供法律建議及意見。2001年3月5日，《財富》雜誌刊登了一篇由 Bethany McLean 撰文題為「安然是否定價過高」 (Is Enron Overpriced) 的文章，由此引發安然的倒閉。2001年8月15日，告密人 Sherron Walkins 發現了會計違規行為。2001年10月15日，VE 宣稱安然公司並無任何不當行為，而會計慣例亦經過 AA 審核。然而，安然的股價由2000年8月23日的 97.75 美元跌至2002年1月11日的 0.12 美元。安然於2001年12月2日申請破產，成為當時美國史上最重大的一宗破產案。創辦人肯尼斯·萊伊及前行政總裁傑弗里·史基林 (Jeffrey Skilling) 於2006年被控及裁定證券欺詐罪。AA 於2002年6月遭起訴並定罪，於2002年8月交出執業會計師牌照。安然雖則由董事會最聰明的人管理，由最聰明的專業人士擔任顧問及把關，不幸的是，安然從高位到破產僅用了16個月時間，揭露了美國公司在企業管治方面的失敗。

2002年《薩班斯—奧克斯利法案》(Sarbanes – Oxley Act, SOX)

繼安然破產之後，SOX 於2002年7月30日頒佈，旨在提高公司披露資料的準確性及可靠程度，其中包括成立上市公司會計監督委員會、提高核數師的獨立性和企業責任、加強財務披露以及打擊企業及刑事欺詐及白領罪行。

《大至不能倒》(Too Big To Fail) — 雷曼兄弟破產

貝爾斯登 (Bear Stearns, BS) 是一家由約瑟夫·貝爾 (Joseph Bear) 及羅伯特·斯登斯 (Robert Stearns) 於1923年5月1日創立的股票交易公司。2006年11月，貝爾斯登投資大量的次級按揭 (即授予次級按揭人的按揭) 及由這些按揭衍生的證券。由於美國住宅價格下跌，導致次級按揭及其衍生的證券急轉直下，2007年貝

2011 with the slogan – ‘we are the 99%’, going back to square one of the Gilded Age as regards income and wealth inequalities.

Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (Dodd-Frank Act)

After the bankruptcy of LB, the Dodd-Frank Act was enacted on 21 July 2010 to promote the financial stability of the US by improving accountability and transparency of the financial system, to end “too big to fail”, to protect US taxpayers by ending bailouts, and to protect consumers from abusive financial services and practices.

After Dodd-Frank Act

After the enactment of Dodd-Frank Act, further Corporate America weaknesses are observed. For example, the operation model of a leading unicorn Theranos was found to be fake with its CEO Elizabeth Holmes and its COO Ramesh Balwani being charged with fraud in 2018; IPO of WeWork valued at US\$47 billion was suddenly withdrawn after the filing of its IPO documents with the SEC in August 2019 exposing massive losses; trading of Luckin Coffee shares was suspended on 30 June 2020 after fraud was discovered. All of these corporations are subject to US securities regulation.

Myths and Realities

Myths are that Corporate America is regulated by the best securities regulation, is traded in the best stock exchanges and is regulated by the best securities regulator in the world. In realities, over the years, Corporate America is subject to ups, downs, and collapses. For each collapse, it has affected not only US market but has spilled over to the world. Is it a myth that US securities regulation is the best in the world?

Conclusion

Hong Kong is one of the top three international financial centres in the world and has topped the world in fund raisings for many years. Hong Kong is regulated by the Securities and Futures Ordinance and by the non-statutory Listing Rules and Takeovers Code. Thus far, Hong Kong has not experienced any market collapse nor any bailout nor any major bankruptcy. Is it a reality that Hong Kong securities regulation is not only the best in Asia but deserves more? **M**

— Vincent P C Kwan

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爾斯登錄得自1923年以來的首次虧損。隨著次按市場的進一步崩壞，貝爾斯登的股價暴跌，並於2008年3月16日以每股2美元的價格出售給摩根大通，其中聯儲局提供了300億美元貸款。

雷曼兄弟 (Lehman Brothers, LB) 由亨利·雷曼 (Henry Lehman) 及其兄弟於1844年創立，至2008年已躋身為美國第四大投資銀行 (僅次於高盛、摩根士丹利及美林)。當時雷曼兄弟投資大量的次級按揭，這些次級按揭是透過短期回購安排進行融資。隨著次按市場崩壞，加上美國政府未能提供救助，雷曼兄弟於2008年9月15日申請破產，成為美國史上規模最大的破產公司。這直接造成美國經濟出現嚴重衰退，以及其後於2011年的佔領華爾街運動，當時運動的口號是「我們是99%」，重現鍍金時代的收入與財富不均的現象。

2010年《多德—弗蘭克華爾街金融改革與消費者保護法》(《多德—弗蘭克法案》，Dodd-Frank Wall Street Reform and Consumer Protection Act 2010)

經雷曼兄弟破產後，《多德—弗蘭克法案》於2010年7月21日頒佈，旨在透過改善金融系統的問責制及透明度來促進美國的金融穩定性，結束「大至不能倒」的局面，透過結束救助措施來保障美國的納稅人，以及保護消費者免受濫用金融服務和行為的侵害。

《多德—弗蘭克法案》(Dodd-Frank Act)之後

在《多德—弗蘭克法案》頒佈後，美國公司暴露出更多的缺點。例如，領先獨角獸公司Theranos的營運模式被揭發是偽造的，行政總裁Elizabeth Holmes及營運總監Ramesh Balwani於2018年被指控欺詐；WeWork首次公開發售作價470億美元，但在2019年8月向證交會提交的招股文件揭露巨額虧損後突然撤回；瑞幸咖啡因被發現欺詐而於2020年6月30日遭到停牌。上述公司均受美國證券當局監管。

神話與現實

被人們奉為神話的是美國公司受到最完善的證券法規監管，在最好的證券交易所交易，並由全球最佳的證券監管機構監管。然而現實是，美國公司近年經歷起伏跌宕，甚至有企業倒閉情況。每次有企業倒閉，影響的不僅是美國市場，更會波及全球各地。美國證券監管全球第一是否只是一個神話？

結語

香港躋身全球三大國際金融中心之一，多年來的集資能力無人能及。香港受《證券及期貨條例》及非法定的《上市規則》和《收購守則》所規管。至今，香港尚未曾出現任何大型跌市、企業救助措施或嚴重的企業破產。香港證券監管不僅是亞洲一流，而且值得備受更多讚賞，這是否亦屬現實？ **M**

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