



# “等待期”，不可忽略的重要一环



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在过去的几年中，很多中国公司已经成功地在美国证券交易所上市交易。大部分情况下，首次公开发行（IPO）的启动都很成功，主要归功于银行家和咨询顾问公司提供的优质服务。这是一件很让人了不起的成就，因为事实上这些中国公司的管理层完全是由中国企业家组成的，而且通常的情况是，他们缺乏关于美国IPO的必要知识。

中国公司，就如同其他外国发行人一样，需要接受有关IPO的教育。虽然中国公司的有些管理层有过在上海或深圳证券交易所上市的经验，但是美国IPO的规则是不同的，而“等待期”是其中的一个不同点。

在IPO的前期过程中，很多初始咨询机构会谈到的关键的问题，比如解决中国法规问题，公司海外结构以及避免变成“孤儿院”。虽然可能会提到“等待期”，但是它并不如那些重要事项一样受到关注。重要的是，公

司在“等待期”如果不能遵守限制，可能会导致美国证券交易委员会（SEC）延迟公司登记声明的有效性，阻止销售股票，直到SEC认为市场不再因为这些提前提交的声明而受到限制。这种延迟的结果可能会对公司的发行造成巨大影响，万一此种延迟持续到发行窗口关闭，那么公司实质上失去了上市的机会，浪费了宝贵的时间和资源。

“等待期”是指向SEC提交登记声明和登记声明生效之间的期限。在等待期中，公司和其承销商和交易商可以通过下列方式与其预期投资者进行沟通：口头销售报价；初始招股说明说，根据修订后的《1933年证券法》（《证券法》）第五章（c）的第430条；和证券发行公告，依据《证券法》的第134条。（更常用于生效后）

作为一般规则，任何其他类型的关于即将发行证券的书面沟通方式都将违反《证券法》的第五章（b）。此外，还有一些具体行

为，比如访问和广告，口头沟通，承销商内部备忘录，路线图等，在《证券法》下，在等待期中可能会构成非法发行。

## 访问和广告

作为一般规则，所有报纸和杂志的访问在做出上市的决定后一般都是禁止的。任何与此发行相关的广告或公开活动都可能违反证券法。公司应当避免做出与其产品或业务相关的超出事实信息以外的试图将其公司描绘为成功企业的任何公开声明，以免过早激起投资者的兴趣。不包含预测或其他财务信息的访问是允许的。

## 口头沟通

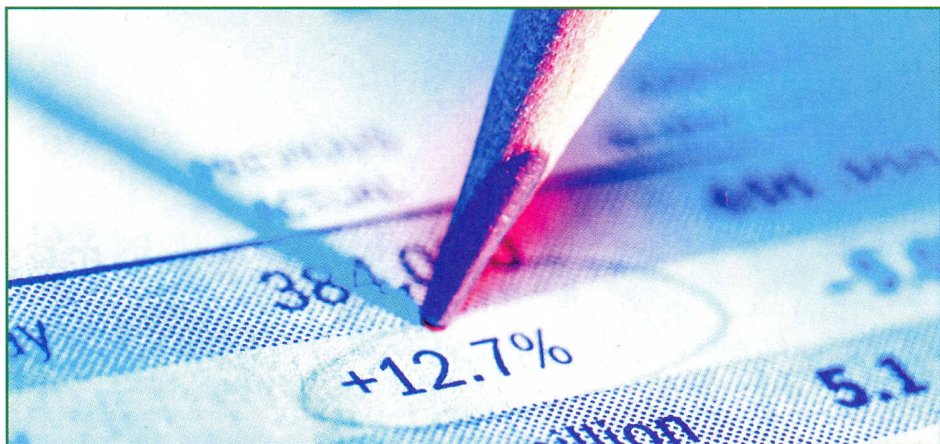
在下列条件下，关于此次发行的有限的口头沟通在等待期一般是允许的：（1）不提供估计或预测；（2）不作出与初始招股说明书中不一致或“超出”其声明的内容；和（3）不公布沟通的文件。作为一般规则，在没有咨询顾问之前，这些沟通都是禁止的。

## 承销商内部备忘录

承销商的内部备忘录是允许的（而且事实上也是习惯），但是这些备忘录不能被公布给一般大众或潜在投资者。

## 路线图

路线图本身是发行人借以与潜在投资者沟通的主要方式之一。书面材料，比如目录、文章、广告文化和其他关于发行人的书面材料，是禁止的。书面材料（而不是登记声明中的招股说明书）在路线图中是被禁止的。





## 其他材料

如果违反了证券法的反欺诈条款,录像录音带也可能构成违法。同样的,发布研究报告也可能被认为非法发行,并构成违法。

尽管在中国法律框架内没有诸如“等待期”这样的概念,但是,它也确实采用了相似的限制。

根据《首次公开发行股票并上市管理办法》,在IPO前6个月内,公司可以向公众公开部分信息,只要这些信息与招股说明书中的内容一致。这与上面提到的“等待期”中的沟通方式是一致的。

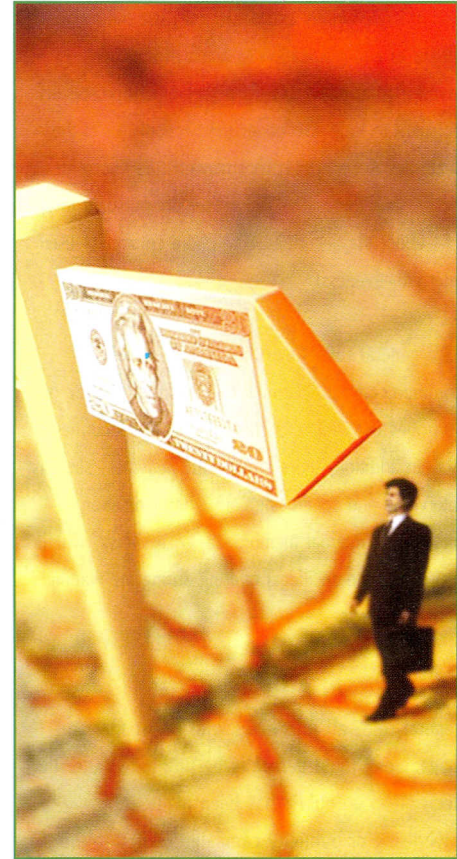
根据《中华人民共和国股票发行和交易管理暂行规定》第74条,如果公司在IPO前提供虚假信息,将会受到惩罚。与从向SEC提交登记声明开始的“等待期”不同,这一规定并没有提供一个时间框架。

认识此种不同很重要。一个对“等待期”一无所知的中国管理层可以做出一些声明,

这些生命必须是真实的,但是不包括在招股说明书之内。尽管中国法规允许这一行为的存在,但是如果它发生在“等待期”中,就可能导致SEC的调查。所以,在与中国客户打交道时,“等待期”应当被当作一个重要的问题。

目前,还没有引人注意的与中国相关的IPO受到公司未能遵守“等待期”限制而受到影响。事实上,最近受到“等待期”影响的IPO是Google。在此期间,《花花公子》的刊登的一篇对其创始人的采访文章被作为与SEC达成妥协的招股说明书的一部分。当然,公司不能假定它们会像Google一样幸运,必须完全遵守SEC关于IPO的规定。

了解美国法律与中国法律关于IPO的规定的不同将是分辨可能错棋的最好办法。甚至一些如同“等待期”限制这样普通的程序,在涉及到中国公司时,也可能会造成不同的结果和理解。●



# “Waiting Period” Too Important Not to Ignore

■ Tom Hopkins William Zheng

Over the past few years, many Chinese companies have enjoyed successful listing on the U.S. stock exchange. In most of those instances, the launching of the IPO was done very smoothly, largely due to the wonderful services provided by the bankers and advisors. This is quite amazing given the fact that the managements of those Chinese companies are made up of pure Chinese entrepreneurs, and often, lacking the necessary knowledge required for a U.S. initial public offering (“IPO”).

The Chinese company, just like any other foreign issuer, requires education relating to IPO. While some of the managements of the Chinese companies have

experience relating to listing on either the Shanghai or Shenzhen Stock exchange, the rules for a U.S. IPO are different, and the “Waiting Period” element is one of such differences.

During the pre-IPO process, many of the initial consultations will address critical issues such as solving the China regulatory issues, company offshore restructure, and avoidance of becoming an “orphanage”. While the “Waiting Period” might be mentioned, it will not be in a degree mirrors that of the critical issues. What is important is that the failure of the company to observe the restrictions during the “Waiting Period” may cause the Security Exchange

Commission (“SEC”) to delay the effectiveness of the Company’s Registration Statement and preclude the sale of securities until the SEC believes that the market is no longer conditioned as a result of such pre-offering statement. The consequences of such delay could have dramatic impact on the offering of the company, and in case it falls on a time when the window of offering is expired, the Company in essence loses its chance of being listed, and wasted valuable time and resources.

“Waiting Period” is a term referring to the period between the filing of the Registration Statement with SEC and the effectiveness of the Registration Statement. During the waiting period, the company



and its underwriters and dealer may use the following means of communication to reach prospective investors: oral offers to sell; a preliminary prospectus pursuant to Rule 430 under the Section 5(c) of the Securities Act of 1933, as amended (the "Securities Act"); and "tombstone" advertisement pursuant to Rule 134 under the Securities Act. (more commonly used after effectiveness)

As a general rule, any other type of written communication concerning the proposed offering of securities will violate Section 5(b) of the Securities Act. In addition, there are specific activities, such as interviews and advertising, oral communication, underwriter internal memoranda, road shows, which may constitute an illegal offering during the waiting period under the Securities Act.

**Interviews and Advertising** As a general rule, all interviews with newspaper and magazines should generally be prohibited after the decision to go public has been made. Any advertising or publicity campaign related to the offering will likely violate the securities laws. The company should avoid making public statement that go beyond factual information regarding its product and business and attempt to portray the Company as a success due to the risk of prematurely simulating investor interest. Interviews that do not contain forecasts or other financial information may be permissible.

**Oral Communication** Limited oral communications regarding the offering are generally

permitted during the waiting period provided that: (a) no projections or forecasts are given; (b) no statements are made that are inconsistent with or "go beyond" the statement made in the preliminary prospectus; and (c) copies of the communications are not distributed. As a general rule, no such communication should be made without prior consultation with counsel.

### **Underwriters Internal Memoranda**

Internal memoranda for underwriters are permitted (and in fact are customary) although such memoranda must not be distributed to the general public or potential investors.

**Road Shows** The road show itself is one of the primary means by which offers are made to potential investors. Written materials such as catalogues, articles, promotional literature and other written materials about the issuer are prohibited. The distribution of written materials (other than the prospectus contained in the Registration Statement) is prohibited during the road shows.

**Other materials** The distribution of video or audio tapes could also constitute a violation if they violate the antifraud provisions of the securities laws. Likewise, the distribution of a research report could be considered as illegal offer and constitute a violation.

While there is no such concept as "Waiting Period" under the Chinese law, it does, however, adopt similar restrictions.

Pursuant to the Measures for the Administration of Initial Public Offering and Listing of Stocks, during the 6 months prior to the IPO, a company may make available to the public certain information, so long as such information is the same as what is appeared in the prospectus. This is in line with the means of communication during "Waiting Period" mentioned above.

According to Article 74 of the Interim Provisions of the Management of the Issuing and Trading of Stocks of the People's Republic of China, a company could be punished if it makes false statement prior to the IPO. Unlike the "Waiting Period", which commences from filing of the Registration Statement with SEC, this provision does not provide a time frame.

The recognition of this difference is critical. A Chinese management not knowledge of the "Waiting Period" could make certain statement, which is true but not include in the prospectus. While such behavior could be permissible under the Chinese regulations, if it is made during the "Waiting Period", could result in investigation from SEC. Hence, the "Waiting Period" should be treated as a critical issue when dealing with Chinese clients.

At the present time, there has not been one notable China related IPO that is affected by the companies' failure in observing the restrictions of the "Waiting Period." In fact, the most recent "Waiting Period" affected IPO was Google, during which the Playboy article containing the interviews of its founders was included as part of the prospectus based upon compromise reached with SEC. Of course, all companies should not assume that they will all be as fortunate as Google, and must fully comply with the SEC regulations for an IPO.

Knowing the difference between the U.S laws relating to IPO and that of China would be the best method to identify possible missteps. Even something as common as restrictions of "Waiting Period" could have a different outcome and understanding when it comes to Chinese companies. ●

