



Going Public in the U.S.

Seminar

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Summary of Presentation

Part I

- IPO Process

Part II

- Post-IPO Reporting Obligations



Part I – IPO Process Background

- Non-U.S. issuers can access the U.S. capital markets mainly through a U.S. SEC-registered public offering (e.g., Air Media, CNInsure, Baidu, Ctrip, Home Inns, New Oriental Education, Perfect World, Trina Solar, Longtop and Melco PBL) or an exempt private placement.



Part I – IPO Process

U.S. Statutory Framework

- There are two principal U.S. federal statutes which govern securities transactions in the U.S.
 - Securities Act of 1933, as amended (the “1933 Act”)
 - Securities Exchange Act of 1934, as amended (the “1934 Act”)
- The 1933 Act requires that a registration statement be filed with the SEC before any offer of securities is made, and be declared effective by the SEC before any sale is made.
- Prospectus used to offer and sell securities must meet the requirements of the 1933 Act.



Part I – IPO Process

U.S. Statutory Framework

- Three Critical Periods During an IPO Process
 - **Pre-Filing.** *No offers to sell and buy.* May not “offer” any security unless registration statement has been filed with the SEC. This means no “gun-jumping.” The term “offer” is very broadly construed to include many activities in connection with the promotion of a sale of the securities.
 - **Waiting Period (Post-Filing but Pre-Effective).** *Certain kinds of offers but no sales.* Prospectus used to make offers must meet the requirements of the SEC. The term “prospectus” is very broadly construed to include any promotional writing or broadcast referring to a security for sale.
 - **Post-Effective.** *Sales.* Unlawful to sell a security by means of a prospectus or otherwise unless registration statement is effective.



Part I – IPO Process

Key Players

- **Issuer** – The company whose securities are to be registered and listed on Nasdaq or NYSE
- **Selling shareholders** – The pre-IPO shareholders which sell shares in the IPO
- **Underwriters** – The investment banks which will purchase securities from the issuer and offer and sell these securities to the public in connection with the IPO
- **Counsel** – The company’s US, PRC and home jurisdiction counsel, as well as the underwriters’ US and other local jurisdiction counsel, if necessary
- **Independent auditors** – The Company’s independent auditors, which are normally one of the big 4 accounting firms registered with PCAOB
- **Others** – The company’s depository bank (if ADSs will be issued) and its counsel, financial printers, insurance broker for D&O insurance policy, independent appraiser (if necessary), and IR/PR agent (if necessary)



Part I – IPO Process

Key Documents

- Issuer's registration statement on Form S-1 or F-1 containing the prospectus
- Issuer's Nasdaq or NYSE listing application
- Issuer's board and shareholder resolutions approving the IPO and IPO-related matters
- Issuer's post-IPO articles of association
- Underwriting agreement among the issuer, the selling shareholders, if any and the underwriters
- Issuer's road show presentation slides
- Deposit agreement among the issuer, the depositary bank and beneficial owners of ADSs from time to time
- Other ancillary documents (e.g., employment agreements, new share incentive plan, indemnification agreement, selling shareholder documents including power of attorney, custody agreement, etc.)



Part I – IPO Process

A Sample Time Table For an IPO

Dates

Action

Up to 12 months before
Effective Date

- Issuer and its auditors begin planning to prepare the required financial statements in accordance with U.S. GAAP or IFRS
- Issuer considers adopting a stock option plan (if it does not already have one), and granting stock options at a price at or above the then fair market value of the underlying shares
- Issuer begins corporate restructuring, if necessary
- Issuer hires a CFO and other personnel with experience in U.S. GAAP or IFRS financial reporting and the US listing process



Part I – IPO Process

A Sample Time Table For an IPO

Dates

Action

Up to 6 months before
Effective Date

- Organizational meeting
- Issuer discusses accounting and disclosure issues with accountants, U.S. legal advisors and managing underwriter
- Issuer's counsel begins preparation of prospectus
- Audited US GAAP financial statements completed
- Commence preparation of additional documents, including Underwriting Agreement and Deposit Agreement
- Prepare and distribute directors' and officers' questionnaire
- Begin preparation of presentation to be made to institutional investors (the "Road Show")
- Due diligence and drafting sessions as new drafts of the Registration Statement become available
- Select and notify printer
- Choose depository for ADS facility
- Submit applications for any necessary home country governmental approvals
- Complete any restructuring of the issuer



Part I – IPO Process

A Sample Time Table For an IPO

Dates

Action

Up to 6 months before
Effective Date (cont.)

- Take any necessary corporate action (*e.g.*, shareholder vote) ¹
- Pre-filing conference with the SEC to discuss particular accounting or disclosure problems, if necessary ²
- Accountants and managing underwriters commence discussions on form of comfort letter

- ¹ Any requirement to obtain shareholders' approval can raise U.S. legal issue if there are U.S. shareholders. Any such requirement should be discussed at any early date with U.S. legal advisors.
- ² Particularly difficult problems may require an earlier conference.

Part I – IPO Process

A Sample Time Table For an IPO

Dates

Action

14-16 weeks before Effective Date – First Confidential Submission

- Confidentially submit Form F-1 Registration Statement
- Issuer wires NASD fee

7-9 weeks before Effective Date – Second Confidential Submission

- Confidentially submit Form F-1 Registration Statement for the second time after receiving SEC comments



Part I – IPO Process

A Sample Time Table For an IPO

Dates

Action

3 weeks before Public Filing Date

- Meeting to make final revisions to prospectus
- Issuer wires SEC registration fee and other miscellaneous fees
- Assemble exhibits for filing
- Accountants and managing underwriter agree on form of comfort letter to be delivered when final prospectus issued
- Publicly file Form F-1 Registration Statement (including preliminary prospectus, forms of agreements and other exhibits with the SEC)
- Commence formation of underwriting group
- Managing underwriter submits Registration Statement, underwriting documents and check with the FINRA for review of the underwriting arrangements (if applicable)
- File Form F-6 with SEC to register ADSs
- File preliminary application with Nasdaq or NYSE



Part I – IPO Process

A Sample Time Table For an IPO

Dates

Action

During Registration Period
(After Public Filing)

- Print Red herring
- Road show
- Finalize underwriting group
- Continue to build “book” of institutional interest
- Accountants distribute draft of final comfort letter to be delivered at closing
- Issuer files acceleration request with the SEC
- Managing Underwriter files letter with the SEC combining acceleration request (pursuant to Rule 461) and distribution of preliminary prospectus (pursuant to Rule 460)



Part I – IPO Process

A Sample Time Table For an IPO

Dates

Action

Effective Date

- Registration Statement, as amended, declared effective by the SEC
- Determine price and other terms of the offering
- Signing of Underwriting Agreement
- Commence public offering
- Accountants deliver first comfort letter

1-15 business days after Effective Date

- If Rule 430A offering, file final prospectus containing information omitted from Rule 430A prospectus with the SEC



Part I – IPO Process

A Sample Time Table For an IPO

Dates

Action

Day before Closing

- Preliminary closing

3-4 business days after
Pricing Date, unless
otherwise agreed and
disclosed in the prospectus

- Closing
- Issuer receives proceeds of offering
- ADS facility goes into effect



Part I – IPO Process

Pre-IPO Private Placement

- Definitive agreements relating to the pre-IPO private placement should generally be executed prior to the public filing of the registration statement as soon as possible, generally in any event
- To avoid any charge to the company, price per share in the private placement should be at or above the fair market value of the issuer's shares as of the date the price was determined (an appraisal may be needed)

Practical tips:

- Share transfer from a major shareholder to management in recognition of their services would result in a share-based compensation charge to the company
- If the investor has a put right and the exercise price is linked to the value of the company, it may be deemed to be a financial derivative and would constitute a charge against net income
- If the investor has a put right and the exercise price is not linked to the value of the company, preferred shares might be deemed mezzanine debt of the company



Part I – IPO Process

Pre-IPO Restructuring

- Should ideally be completed prior to the initial confidential submission of the registration statement with the SEC
- The holding company before and after the restructuring should ideally be under common control by the same shareholders and/or their affiliates to avoid “purchase accounting” treatment, which could result in unanticipated accounting charges and messy predecessor/successor financial presentation
- Applicable PRC governmental approval of a PRC company’s restructuring is required
- SAFE registration by PRC resident shareholders of the company is required
- CSRC approval of the listing of an offshore SPV formed through share exchange after September 8, 2006 is generally required
- Query: how do we get around Regulation No. 10 – stories from the frontline



Part I – IPO Process

Due Diligence

- As a matter of risk management, underwriters will typically conduct the following “due diligence” investigation:
 - Management due diligence conducted by the underwriters and their U.S. legal advisors with senior management.
 - Documentary due diligence conducted by underwriters’ legal advisors.
 - External verification, including interviews with key customers and/or suppliers and sometimes regulators.
 - A “comfort letter” provided by the issuer’s independent auditors to the underwriters covering the issuer’s financial statements and most of the numbers in the offering document.
 - Based on the overall due diligence, U.S. legal advisors for the issuer and the underwriters will each issue “10b-5 negative assurance” on the registration statement.



Part I – IPO Process

Liability for Material Misstatements or Omissions

- General Principle – The U.S. securities laws are based on the premise that potential investors are best protected by accurate and complete disclosure of all material information necessary for them to make an informed investment decision. A material misstatement or an omission of a material fact can result in potential liability to the issuer, its directors and controlling persons and the underwriters.
- The issuer is liable for all material misstatements and omissions.
- The selling shareholders are contractually liable to the underwriters for all material misstatements and omissions relating to the selling shareholders unless they contractually agree to more.
- The underwriters, the issuer’s directors and executive officers and persons who “control” the issuer are entitled to a “due diligence” defense against liability.



Summary of Presentation

Part I

- IPO Process

Part II

- Post-IPO Reporting Obligations



Part II – Post-IPO Reporting Obligations Under the 1934 Act

Securities Exchange Act Periodic Reporting

- A foreign company that lists its securities on Nasdaq or NYSE is required to file annual and other periodic reports under the Securities Exchange Act. Failure to comply may result in civil liability or criminal sanctions or in the withdrawal of the securities from the NYSE.
- Material misstatements or omissions in periodic reports may also result in civil liability, criminal sanctions and/or withdrawal from stock exchanges.



Part II – Post-IPO Reporting Obligations Under the 1934 Act

Annual Reports on Form 20-F

- An annual report on Form 20-F must be filed within six months after the end of each fiscal year by any foreign company which has a class of securities registered under the Securities Exchange Act.
- For fiscal years ending on or after December 15, 2011, the Form 20-F must be filed within four months after the end of each fiscal year. Therefore, for a foreign company using calendar year as its fiscal year, the Form 20-F for fiscal year 2011 must be filed with the SEC by April 30, 2012.
- The Form 20-F is relied upon by investors as an ongoing source of information regarding the company and is often useful as part of an annual results roadshow involving private meetings with investors. It is also widely used by analysts who follow the company.
- The information (including financial information) required to be included in Form 20-F is very similar to that required by Form F-1.



Part II – Post-IPO Reporting Obligations Under the 1934 Act

Annual Reports on Form 20-F

The annual report on Form 20-F requires comprehensive information about the Company, including:

Audited Financial Statements

- Audited balance sheets as of the end of each of the two most recent fiscal years,
- Audited statements of income and cash flows for each of the three most recent fiscal years, and
- Summary financial data for each of the previous five fiscal years (or from inception).



Part II – Post-IPO Reporting Obligations Under the 1934 Act

Annual Reports on Form 20-F

Description of the Company

- Description of the Company's business, including an update of significant business risks affecting the Company,
- Description of the Company's organizational structure, material property and employees,
- Existing and pending legal proceedings involving the Company,
- Information about the Company's directors and senior management and their aggregate annual compensation,
- Information about major shareholders and related party transactions,
- All material off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the Company with unconsolidated entities or other persons,
- Description of material contractual obligations of the Company, and
- Information regarding the Company's equity compensation plans.



Part II – Post-IPO Reporting Obligations Under the 1934 Act

Annual Reports on Form 20-F

Miscellaneous

- Disclosure as to whether or not the Company has adopted a code of ethics for its officers, directors and other key employees, and if not, why it has not
- Disclosure as to whether or not the Company's audit committee includes at least one audit committee financial expert
- An internal control report that states the responsibility of management for establishing and maintaining internal control over financial reporting and contains an assessment, as of the end of the most recent fiscal year, of the effectiveness of internal control over financial reporting
- Sarbanes-Oxley contains two overlapping certifications that must be separately provided by an issuer's CEO and CFO and filed as exhibits to Form 20-F: the Section 302 certification and the Section 906 certification.



Part II – Post-IPO Reporting Obligations Under the 1934 Act

Current Reports on Form 6-K

- Interim Reports on Form 6-K
 - Form 6-K requires the furnishing of information which is material with respect to the foreign company and which:
 - Has been filed with a stock exchange and has been made public by that exchange;
 - Has been made or is required to be made public pursuant to the law of the company's home country; or
 - Has been distributed or is required to be distributed to its securities holders.



Part II – Post-IPO Reporting Obligations Under the 1934 Act

- Typical information reported on Form 6-K includes:
 - Change in business;
 - Change in management or control;
 - Material acquisitions or dispositions of assets;
 - Changes in certifying accountants;
 - Financial results;
 - Material legal proceedings;
 - Changes in securities;
 - Material increases or decreases in the amount of securities or indebtedness;
 - The results of the submission of matters to a vote of securities holders;
 - Transactions with directors, officers, or principal securities holders;
 - The granting of options or payment of other compensation to directors or officers; and
 - Any other information which the company deems of material importance to securities holders.



Part II – Post-IPO Reporting Obligations Under the 1934 Act

Quarterly Reports on Form 6-K

- Foreign private issuers are not required to file quarterly reports. However, if an issuer chooses to file quarterly reports, it should consider filing the quarterly report on Form 6-K with the SEC after the end of each of the first three fiscal quarters of each fiscal year.
- The quarterly report on Form 6-K may include:
 - An unaudited income statement for the most recent fiscal quarter, for the period between the end of the preceding fiscal quarter and the end of the most recent fiscal quarter and for the corresponding period of the preceding fiscal year;
 - A balance sheet as of the end of the most recent fiscal quarter; and
 - A statement of cash flows for the period between the end of the preceding fiscal quarter and the end of the most recent fiscal quarter and for the corresponding period of the preceding fiscal year.
 - Reconciliation of non-GAAP measures to the most comparable GAAP measures if necessary.
 - Known trends and uncertainties not apparent on the face of the financial statements should be discussed.



Part II – Post-IPO Reporting Obligations Under the 1934 Act

Obligations of Major Shareholders to File Schedule 13D or 13G Reports

- Any person who acquires the beneficial ownership of more than 5% of the total outstanding voting securities of an issuer must, within 10 days after such acquisition, send to the issuer and file with the SEC, a statement on Schedule 13D. A person is deemed to be the beneficial owner of the Shares if he or she, directly or indirectly, has or shares the power to vote or the power to dispose of such Shares.
- Any person who acquired beneficial ownership of more than 5% of the total outstanding voting securities of an issuer before the IPO must file a statement on Schedule 13G within 45 days after the end of each calendar year (*i.e.*, by February 14th).
- Reports on Schedule 13D and Schedule 13G must be amended if any material change in the facts set forth therein have changed.



Part II – Post-IPO Reporting Obligations Under the 1934 Act

Reports to NYSE and Nasdaq

- NYSE and Nasdaq requires a listed company to disclose to the public any news or information which might reasonably be expected to materially affect the value of its securities. Copies of any release of a financial nature, such as interim reports, dividend releases and other important developments material to the value of the company's securities, should be sent directly to NYSE and Nasdaq.



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