

# 中国法律透视

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P07 阎兰——举重若轻走人生的完美女律师

P24 **The Trimone Case: The First Ever Win for a Chinese Company in an ITC-Related U.S. Customs Proceeding**

P32 **Reducing Risks of Foul Play in a Bad Economy**



# 美国上市：中国公司该如何准备（一）

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目前为止，已有400多家中国公司直接或间接地在美国证券交易所上市。



上市能够拓宽公司的融资渠道、增强公司的品牌声誉、创造更多的并购机会，同时加强资本的流动性。包括纽约证券交易所以及纳斯达克证券交易所在内的大型美国证券交易所是全球证券交易所的“黄金标准”。这些证券交易所为证券买卖提供了高效的市场环境，吸引了全世界投资者及媒体的广泛关注，同时在全球交易所的交易活动中占据了大量的份额。

目前为止，已有400多家中国公司直接或间接地在美国证券交易所上市。然而，仅有一小部分在纽约证券交易所或纳斯达克证券交易所进行交易，其余几百家中国公司的股票则零散地在场外交易系统或粉纸市场进行交易。这些公司只有少量的投资者，股价及日交易量都比较低。对于这些公司而言，在美国上市无异于增加额外的运营费用，股东也可能承担更多潜在的诉讼责任。

有一些方法可以增加中国运营公司在美国成功上市的机率，包括进行合理的规划和建立精炼的团队。

## 规划

并不是每一家公司或管理团队都做好准备迎接成为上市交易公司的详细审查与挑战。成功上市的关键以诚实地评估运营公司的业务及人员是否具备了成功管理上市交易过程的能力为起点。公司上市的目的在于拓宽融资渠道并进行股票交易，但对于成为上市公司并保留上市公司地位的成本费用，则需要进行评估。

上市的直接费用包括准备美国证券交易委员会申请材料的内部人工费用、投资人公关费用、审计费用、律师费以及证券交易所的上市交易费。这些费用一年总共50万美元或以上。

上市还包括间接支出。公开交易的公司必须披露其财务状况以及影响其业务经营的负面事件。而该公司的竞争者便可以利用所披露的毛利、成本结构、收益能力及融资来源等信息扰乱该公司

的交易，以此获得更强的竞争力。

最后，美国证券法规规定上市公司应当定期提交所有关于其业务与经营的重大信息报告。因此，如果公司认为其内部控制系统无法及时准确地报告这些重大信息，或公司不希望披露包括负面信息在内的重大信息，则公司应当重新考量其上市战略。

公司在上市规划时应当认识到，证券交易所的首次上市交易是其发展道路上的起点而非终点。上市交易并不能保证公司实现商业发展或获得高额市值，也不能保证股东的资本流动性。不论股价还是公司的整体市值，都是反映股票供需情况的。为使股票的需求量增加，投资人必须了解公司，并掌握充分的信息来作出投资决策。满足市场需求、与投资人保持沟通、披露合格的财务信息是上市公司必须完成的商业行为。

如果投资人对上市公司的股票丧失兴趣，那么该上市公司的股票单价就会下跌。随之导致公司的股价低于实值，同时令公司难以抵挡恶意收购行为。过低的股价还会增加资本成本，使资本募集变得更加困难。

投资人可以通过股价的涨跌赚取差价，同时通过“庄家控股”影响股价的浮动来创造盈利的机会，而不顾影响上市公司经营的基本商业原则。大型上市公司的股票买卖量相对较大，降低了这种人为操作的可能性，但上述情况确实应当引起中小企业的警惕。因此，公司的运营计划及预算应当包含投资人关系及公共关系因素，籍此来吸引投资人的兴趣。

## 团队

要想成功在美国上市，团队内部必须有几名关键成员。公司应当有一名首席执行官负责做出有效的商业决策，一名首席财务官负责会计和控制事项以便及时准备并报告财务信息。除了上述两名关键成员外，公司还需要既精通英语又具有



资本市场经验的人同美国媒体、分析人员以及未来投资者一起探讨公司的商业成效和计划。

除了团队内部成员外，公司还需要三大外部顾问：审计员、律师和财务顾问。

### 审计员

为了成功在美国上市，公司的财务报表必须符合美国或国际财务会计标准并且满足审计要求。所以，审计员应当尽早介入。如果公司的财务记录不足以进行审计，便无法满足SEC关于上市申请的要求。另外，一些国际通用的财务会计准则往往需要公司改变过去的会计习惯，其影响将非常重大，还可能关系到公司能否满足在证交所挂牌交易的标准。



SEC要求上市公司的审计师必须是美国会计监督管理委员会(“PCAOB”)下的注册会计师。因此，中国经营企业应当选择一家经PCAOB注册的会计师事务所或附属会计事务所。除了要在PCAOB注册外，选择会计师事务所的另一个标准便是其工作质量，以及服务质量。企业希望聘请反应积极并能按时在预算内完成工作的事务所，但最关键的还是审计工作的准确性。审计不当可能会拖延上市注册的进程，增加上市成本。会计方面的错误也可能严重影响一家企

业的净收入，以及该企业是否能够符合特定证券交易所的上市规定。企业上市后发现或出现的报表与实际数据的差异可能会迫使该企业对过往的财务数据进行重新申报以更正错误。股价通常会因此严重下跌，投资人也会状告企业证券欺诈。

### 律师

律师的主要作用是确保公司向证券交易委员会提交的上市申请及其他向投资人公开的材料满足委员会的披露要求。另外，律师还负责公司业务、重大合同及部分经营事务的尽职调查，以确定公司的上市申请没有违反美国证券法律的规定，虚报或瞒报重大信息。同时，律师还

在SEC申报与沟通的材料准备中发挥主导作用。

与审计员不同的是，对办理向SEC上市申请业务的律师没有特别的注册要求。中国企业应聘请经验丰富，熟悉SEC申请要求并且能够帮助企业制定成功上市计划的律师。另外，IPO承销商通常会要求企业提供一份法律意见书作为成交过程中的一部分，还可能坚持要求企业聘请一家具有资质的律师事务所来出具该意见书。同时，律师还是向证券交易委员会做上市申报准


备和沟通谈判的领导人物。好律师能够加快审批进程，减少申报信息误解的几率，并有效地协助公司同未来投资人进行沟通。

### 财务顾问

财务顾问是连接企业与投资人的桥梁。他能够为企业与行业趋势、竞争定位以及提高股价和市值关键因素有关的信息。同时，还向公司提供资本募集或战略性交易的战略意见。在首次公开上市中，财务顾问担任将企业的股份向公众投资人出售承销商的角色，或协助公司挑选承销商。

在美国提供投资银行服务的公司，包括股票交易的经纪人或交易员，都必须在SEC处注册。除此以外，公司还希望对财务顾问以往的交割记录或首次交易后支持其他交易的记录以及业内经验进行确认。由于企业与财务顾问签订的聘用协议具有排他性，并保障财务顾问在将来的交易中获得报酬的权利，因此，公司希望审慎地审查财务顾问的资质。最优秀的财务顾问能够与投资人建立联系、向公司提出符合短期与长期财务目标的缩减资本成本的框架建议，并确定公司所在行业的核心价值驱动因素。

## 结论

美国的证券交易吸引了全世界投资人的目光，不仅增加了证交所的日交易量，还大大激发了分析人士的热情，使新闻媒体聚焦证券市场。如果成功的话，上市程序可以加速企业的发展。上市公司能够运用其市场地位吸引投资人的注意、增加其股票需求量并抬升其股价。同时高涨的股价和市场注意力又激发了公众对上市公司产品的兴趣，从而增加了公司收益，还可以令公司低价募集资本，并使并购交易的成本更加合理。成功上市的第一步是正确认识上市操作流程、制定合理的计划并建立一支经验丰富办事高效的团队。 

# Preparing the Chinese Company for a Successful Listing in the United States (I)



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Going public can provide a company with increased access to capital, brand awareness, acquisition opportunities, and liquidity for investors. The larger U.S. stock exchanges including the NYSE and Nasdaq exchanges are the "gold standard" for global stock exchanges, providing an efficient market to purchase securities. These exchanges attract significant attention from investors and media worldwide, and provide the highest dollar volume of trading activity of any exchanges in the world.

There are over 400 Chinese companies that have, directly or indirectly, listed their shares for trading on United States stock exchanges. However, only a fraction of these companies are traded on the NYSE or Nasdaq exchanges. There are hundreds of Chinese companies whose shares are thinly traded on the over the counter Bulletin Board or the Pink Sheets. These companies may have little investor following, low stock prices and very little daily trading in their shares. For those companies, the U.S. listing provides little more than additional operating expense, and potential liability for shareholder lawsuits.

There are steps that the Chinese operating company can take to increase its chances for a successful listing in the United States. These include proper planning and the right team.

## The Plan

Not every company or management team is prepared for the scrutiny and challenges of being a publicly-traded company. The

key to a successful listing begins with an honest appraisal of the operating company with whether its business and personnel suited to being publicly traded. Companies often go public to increase access to capital and to facilitate acquisitions for stock. But there are costs associated with becoming and remaining a publicly traded company, which must be evaluated.

There are direct costs associated with being publicly traded, including internal staff to prepare the SEC filings, investor relations expenses, audit fees, legal fees, and stock exchange listing fees. These costs will aggregate to a \$500,000 annually or more.

There are also indirect costs to being public. Publicly traded companies must disclose their financial results as well as negative events that affect their business. Competitors can use information concerning gross margins, cost structure, profitability, and financial resources to disrupt sales and compete more effectively.

Finally, the U.S. securities regulations are based on regular reporting of all material information about the company's business and operations. Consequently, if the company does not believe that it has the internal controls necessary to timely and accurately report the material information, or if the company does not wish to disclose material information, including negative information, it should re-evaluate its strategy for going public.

If the company determines to go public, the plan must also recognize that listing on an exchange is a step toward the company's goals, but not the endpoint. A listing does

not guaranty business growth, a large market capitalization, or liquidity for stockholders. A stock price, and hence a company's overall market capitalization, is a function of supply and demand for stock. In order to generate demand for the stock, investors must be aware of the company, and have adequate information to make their investment decision. Addressing the public market, making contact with prospective investors, publishing quality financial information is a part of the business process for a public company which must be maintained.

For companies that fail to maintain investor interest in their stock, the lower demand for results in a lower per share price. It can result a stock price that is lower than the intrinsic value of the company, making the company vulnerable to a hostile takeover attempt. The low price will also increase the cost of capital, and make it more difficult to raise capital when needed.

Investors on the U.S. exchanges can make money from an increase or a decrease in the price of the stock. Investors can try to "corner the market" or effect movement in the stock price simply to create an opportunity for profit, without regard to the business fundamentals affecting the company. In the larger public companies the volume of buyers and sellers reduces the likelihood of this type of manipulation, but it is a real concern for smaller companies. Consequently, the company's operating plan and budget must include investor relations and public relations elements to attract and expand investor interest.



## The Team

There are several key internal team members necessary for a successful U.S. listing. The company must have a Chief Executive Officer with the leadership to make effective business decisions. It must also have a Chief Financial Officer that can oversee the accounting and control processes needed to timely prepare and report financial information. Finally, either the CEO, CFO, or a special investor relations specialist, will need both English language skills and capital markets experience, in order to discuss the company's business results and prospects with media, analysts and prospective investors in the United States.

In addition to internal team members the Company will need three principal outside consultants: the auditor, the lawyer and the financial advisor.

### The Auditor

In order to go public in the United States, the company's financial records are going to have to meet international or U.S. financial accounting standards and be auditable. The auditor should be engaged early in the process. If the company's records are not sufficient to audit, the company cannot meet its filing requirements with the SEC. In addition, companies often find that generally accepted accounting principals require them to change certain of their historical accounting practices. The results can be significant and may impact whether or not the company meets the listing standards to be traded on an exchange.

The SEC requires that auditors for publicly traded companies be registered with the Public Company Accounting Oversight Board, or PCAOB. Consequently, the Chinese operating company should select an audit firm that is PCAOB registered, or is affiliated with a PCAOB firm. Beyond PCAOB registration, selection of an accounting firm should be made on the basis of the quality of their work product, and the quality of their service. A company wants an audit firm that will be responsive and complete its work on

time and on budget. However, it is critical that the work be done correctly. Improper accounting or poor disclosure may draw comments from the SEC's accounting staff, delaying the registration process, and making the IPO more costly. Accounting issues that are discovered or occur after a company goes public can result in restatement of past financial statements to correct errors. This can cause a significant drop in stock price, and results in lawsuits from investors claiming securities fraud.

### The Lawyer

The lawyer's principal function in the IPO process is to ensure that filings made with the SEC meets the SEC's disclosure requirements. In addition, the lawyer conducts a due diligence review of the company's business, material contracts and certain operating matters to verify that its filings do not violate U.S. securities laws by misstating or omitting material information from SEC filings. The lawyer also takes the lead in preparing filings and communicating with the SEC.

There is no specific registration for a lawyer to practice before the SEC. The Chinese operating company will want to select experienced counsel, with knowledge of the SEC filing requirements, and well as experience positioning companies for success. The underwriter in an IPO generally requires a legal opinion as part of the closing process, and may insist that the company engage a recognized law firm to render this opinion. Effective legal counsel will speed the process for SEC approval, improve the accuracy of SEC filings, reduce the chance of shareholder lawsuit, assist the company in communicating effectively with investors, and consequently improve the stock price.

### The Financial Advisor

The financial advisor is the connection between the company and the investors, providing valuable information to the company on industry trends, competitive positioning, and key drivers for increasing share price and market capitalization. The financial advisor also

provides the company with strategic advice on options for raising capital or strategic transactions. In an IPO, the financial advisor will act as, or will assist in the selection of, the underwriter who arranges the sale of shares from the company to the public investors.

Firms that provide investment banking services in the United States, including acting as a broker or dealer in stock transactions are required to be registered with the SEC. In addition to registration, companies will want to confirm a financial advisor's track record for closing deals and for supporting deals after the initial transaction, and experience in the industry. The agreement with the financial advisor often provides for exclusivity or gives the advisor the right to fees on future transactions. Consequently, the company will want to review the qualifications carefully. The best financial advisor will have access to investors, will advise the company on structures to reduce the cost of capital while meeting both short term and long term financial goals, and will identify the key drivers of value for the company's industry.

## Conclusion

The U.S. stock exchanges attract investment globally. The intense interest increases daily trading volume on the exchanges, and provides incentive for analysts, news outlets to follow stocks and disseminate information into the marketplace. Done successfully, the public offering process can accelerate a company's growth. The company that establishes momentum can use its public status to draw attention to its business, increase demand for its stock, and raise its stock price. The higher stock price and market attention draws interest to the company's products, increasing revenue. It also lets the company raise capital at lower cost, and makes acquisitions more affordable. The first step to a successful public offering is understanding the process, making a reasonable plan for success, and establishing an experienced and effect team. **LN**