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## Electronic Roadshows: What To Leave In, What To Leave Out

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Some deals in the capital markets sell easily and quickly. Others need more help. Prerecorded electronic roadshow presentations are often used to enhance marketing efforts. Follow-on equity offerings, offerings by issuers faced with unique circumstances and offerings by infrequent issuers will, for example, typically utilize an electronic roadshow.

In our experience, there is often a lack of consensus among the deal team about the proper contents of the roadshow slides. Nonlawyers view the electronic roadshow slides as a marketing document, not strictly subject to the U.S. Securities and Exchange Commission's content rules.

Most lawyers will acknowledge the marketing focus of the document, but often, different counsel employ different standards of proper disclosure. The diverging views on the content and treatment of roadshows can lead to confusion and frustration. We thought it would be helpful to review the basic legal framework surrounding the use of an electronic roadshow and offer some thoughts about what should and what should not be included.<sup>1</sup>

### Basics

#### *What It Is*

SEC rules (Rule 433) define a roadshow as an offer that contains a presentation made by one or more members of the issuer's management, which includes a discussion of the issuer, the management or the securities being offered.

Electronic roadshows typically use a PowerPoint format to provide a generic description of the issuer and its financial results, with descriptions of strategy, management and the subject securities also included. As discussed herein, the roadshow slides will often also contain much more granular statistical information than that contained in the issuer's 10-Ks and 10-Qs.

#### *Whether to File*

Under the 2005 securities offering reform rules, a prerecorded electronic roadshow prepared after the registration statement is filed is a permitted free writing prospectus, an "FWP," subject to certain SEC legending and other requirements.<sup>2</sup> Despite being an FWP,<sup>3</sup> however, a prerecorded electronic roadshow (outside of the context of initial public offerings of common or convertible equity) normally does not need to be filed with the SEC.<sup>4</sup>

## **Who Steps Up to the Plate?**

A critical initial issue for the deal team is the extent to which the various members of the working group agree to take responsibility for the information contained in the electronic roadshow slides.

### ***Issuers***

The underwriting agreement contains representations from the issuer to the underwriters or initial purchasers. In these “reps,” issuers routinely cover the information that is contained in the roadshow slides, with the roadshow deemed an “issuer free writing prospectus” (defined in Rule 433 as a roadshow prepared by or on behalf of the issuer).<sup>5</sup>

The underwriting agreement will also contain an indemnity section whereby the issuer indemnifies the underwriter for damages related to certain material misstatements or omissions in the offering documents. It is market norm for this indemnity to cover, among other things, any issuer free writing prospectus. The roadshow slides prepared by the issuer and the deal team are typically specifically identified in the underwriting agreement as falling within this category.

### ***Lawyers***

At closing, counsel will be asked to provide a negative assurance statement (a “10b-5 opinion”) that the disclosure package did not contain any material misstatements or omissions. However, it is very unusual for the attorneys, whether issuer’s (internal or external) or underwriters’ counsel, to cover the roadshow slides in the lawyers’ 10b-5 opinions delivered at closing.

### ***Accountants***

Similar to the attorneys’ practice with 10b-5 opinions, accountants typically do not provide tick mark comfort on roadshow financial information. Applicable accounting guidance and the internal guidelines of many accounting firms limit the documents that they will cover in a comfort letter. That said, the point can be a negotiated one.

## **How Much Is Too Much?**

The “old school” rule about roadshows cautioned that the only information that could appear in roadshow slides was information that “was within the four corners of the prospectus.” Prior to the 2005 securities offering reform, the “four corners” typically included the prospectus and the incorporated documents. The rationale for the rule was two-fold.

First, because not all investors are privy to the roadshow, there ought not be any information in the roadshow that is not also contained in the prospectus (or the incorporated documents). Second, and more importantly, any material information that appeared in the roadshow slides must be included in the prospectus (or the incorporated documents).

Today, most seasoned securities lawyers take a more nuanced view of proper disclosure in roadshow slides when it comes to information that is not material (especially if it can be derived from public information). But the underlying legal liability principle is still valid. Namely, issuers must not include material information in the roadshow slides that does not appear in the disclosure package available to investors at the time of their investment decision.

Accordingly, an initial task for the deal team (which usually falls to the lawyers) is to confirm whether the material information contained in the draft roadshow deck is information that is consistent with and currently contained in the disclosure package then being utilized for the transaction. The lawyers' 10b-5 opinion delivered at closing will, among other things, include their belief that the disclosure package<sup>6</sup> at pricing does not omit any material fact necessary to be included therein.<sup>7</sup>

Therefore, information included in the roadshow slides that is not contained in the disclosure package must be evaluated, first, for materiality and the need to include it in the disclosure package and, second, for consistency of content and presentation with the disclosure package. Deal participants need to be mindful of the prohibition in Rule 433 on information in an FWP, the roadshow in this case, which conflicts with information in the disclosure package.

If information is not material (especially if it can be derived from public information), most lawyers get comfortable that it may be included in the roadshow, despite not being contained in the disclosure package. Such information is desirable because it can be used to provide color and context for an issuer.

Even if the working group concludes that certain roadshow information does not need to be in the disclosure package, the information needs to be correct. To the extent there is information in the electronic roadshow that cannot be verified independently, the underwriters or their counsel may require backup material from the issuer to verify its accuracy and, in so doing, satisfy its legal obligation to perform reasonable due diligence.

It's also important to note, as discussed above, that information in the electronic roadshow that is not included in the offering document is likely not covered by either the attorneys' 10b-5 opinion to the underwriters or the accountants' comfort letter to the underwriters. Finally, even if information is soft information and arguably not material, most lawyers will evaluate it for puffing issues that could come back to haunt deal participants in a dispute.

### ***Guidance***

For equity offerings, the question often arises as to whether earnings guidance should be included in the roadshow slides. Many companies and their underwriters choose not to include guidance in equity offering documentation, including within any electronic roadshow deck. Many prefer to exclude guidance from securities offering materials because of the predictive nature of guidance and risk of liability if earnings prove to be different from the guided amounts.

In lieu of including it in the offering materials, many issuers provide guidance through press releases at regularly scheduled intervals (usually the quarterly "earnings releases") or investor

slides in connection with industry conferences or nondeal roadshows (discussed below). These press releases and investor slides are typically “furnished” and not “filed” with the SEC and, as a result, are not incorporated by reference into securities offering documentation.

By excluding guidance from the offering documents, liability surrounding the guidance should be limited to claims under Rule 10b-5. Certain issuers and underwriters will, alternatively, accept the risks of including guidance in the roadshow slides and underwriters will need to perform the required diligence to verify its accuracy.

### **The Deal with Nondeal Roadshows**

Some issuers conduct nondeal roadshows with the investment community. These roadshows are designed to update or raise the issuer’s profile with the investment community, outside the context of a securities offering. Being outside the offering process provides greater flexibility in the content that can be included. To have this flexibility, care must be taken that any such presentation is not deemed part of a subsequent offering.

The Rule 168 safe harbor under the 1933 Act permits, under certain circumstances, an issuer to conduct a nondeal roadshow with confidence that the presentation will not be deemed an “offer” under the securities laws. To meet the Rule 168 standard, the issuer must be required to file, and be in compliance with the filing of, its 1934 Act reports and the “timing, manner and form” of the nondeal roadshow must be consistent with similar past presentations.<sup>8</sup>

The availability of Rule 168 is a fact-sensitive analysis and the consistency of the presentation as to timing, manner and form with prior practice must be reviewed with all counsel representing principals in the offering.

Certain nondeal roadshows, however, occur without the benefit of Rule 168 and with the possibility, subject to market conditions, of launching a transaction in the near future. Assuming Rule 168 is not available, if a deal is launched on the heels of a nondeal roadshow, it is possible that the nondeal roadshow could be construed as an offer of securities (even though the slides make no reference to the upcoming offering).

A nondeal roadshow done in proximity to a securities offering may constitute a written offer, with the slides deemed an FWP or a prospectus.<sup>9</sup> To avoid this result, counsel should explore the availability of the Rule 168 safe harbor or, alternatively, include the Rule 433 legend<sup>10</sup> and agree that, given the proximity of the nondeal roadshow to a potential offering, the roadshow could be deemed an offering of securities.<sup>11</sup>

Note that Section 2(a)(3) of the 1933 Act defines the term “offer” expansively to include “every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.” The SEC has gone on record to state that any publicity that may “contribute to conditioning the public mind or arousing public interest” in an offering can itself constitute an offer.<sup>12</sup>

To the extent there is concern that the information in the nondeal roadshow may be considered an offer of securities, the underwriters will likely request a specific representation and indemnity for the information contained therein. Further, the underwriters will seek to ensure that the information contained in the nondeal roadshow is identical to what will be contained in the deal roadshow (other than, of course, the slide for the actual terms of the offering) if any, and meet the other standards we have discussed.

As long as a deal roadshow is prepared and is identical to the information in the nondeal roadshow, the representation and indemnity with respect to the deal roadshow in the underwriting agreement will provide some comfort as to the information in the nondeal roadshow.

If no deal roadshow is prepared, as long as the information in the nondeal roadshow is the information that is ultimately included in the disclosure package for the offering, the information in the nondeal roadshow will be effectively covered not only by the representations and indemnity by the issuer, but also by the opinions and the accountants' comfort on the disclosure package.

## **Principal Legal Framework**

### ***Section 11***

For a registered offering, Section 11 of the 1933 Act imposes liability when a registration statement contains a material misstatement or omission.<sup>13</sup> Even though an electronic roadshow will be considered an FWP, FWPs are not considered part of the registration statement.

Even under the unusual circumstance where the issuer opts to, or is required to, file the electronic roadshow as an FWP, it nonetheless will not be part of the registration statement. Therefore, the electronic roadshow should not be subject to Section 11 liability.

This is an important distinction, as Section 11 imposes strict liability for any material misstatement or omission in the registration statement upon, among others, the issuer, its directors and the underwriters for the offering.

### ***Section 12(a)(2)***

For a registered offering, roadshows that are offers of securities are, however, subject to liability under Section 12(a)(2) of the 1933 Act. Section 12(a)(2) provides the buyer of a security with a remedy for material misstatements or omissions<sup>14</sup> made by anyone who offers or sells the security by means of a prospectus (including an FWP) or an oral communication.

### ***Rule 10b-5***

Rule 10b-5 under the 1934 Act deems it unlawful to employ any scheme or device to defraud, to make any material misstatements or omissions<sup>15</sup> or to engage in any acts or practices that would operate as a fraud or deceit on any person in connection with the purchase or sale of a security.

In order to establish a claim under Rule 10b-5, an investor must prove that (1) there was a material misstatement or omission, (2) it was in connection with the purchase or sale of a security and (3) there was “scienter” — defined as the intent or knowledge of manipulation or deception.

What is clear is that statements included in, or omitted from, an electronic roadshow can give rise to liability under Rule 10b-5. Because of the “scienter” requirement, however, a plaintiff’s case under Rule 10b-5 is likely more difficult than under Section 12 and certainly more difficult than under Section 11.

### ***Regulation FD***

Regulation FD addresses the selective disclosure of information by issuers.<sup>16</sup> Regulation FD provides that when an issuer discloses material nonpublic information to certain individuals or entities — generally, securities market professionals, such as stock analysts, or holders of the issuer’s securities who may well trade on the basis of the information — the issuer must make public disclosure of that information.

There is an exception for information disclosed “in connection with a securities offering registered under the Securities Act.” Therefore, while most electronic roadshows used in primary registered offerings are not subject to the restrictions of Regulation FD, other roadshows are.

As such, for electronic roadshows conducted before the registration statement is filed, secondary offerings, unregistered offerings or nondeal roadshows, the working group will need to confirm that the electronic roadshow does not contain any material nonpublic information.

Even in the case of a registered offering, issuers may prefer not to avail themselves of the Regulation FD exclusion for registered offerings and first make public any material nonpublic information to be contained in the electronic roadshow (or other offering documents).

### **Conclusion**

The rules and practicalities involved with roadshows are complicated. Changes in law and evolving “market norm” practice have added more complexity to the analysis of the proper content and treatment of roadshow disclosure.

Although the marketing benefits of a well-versed roadshow cannot be denied, deal participants must be mindful that the contents of roadshows — both deal and nondeal — are subject to securities laws that, if violated, could cause drastic consequences.

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<sup>1</sup> This article covers prerecorded deal and nondeal roadshows in registered and 144A offerings and (for the most part) does not cover issues related to live, in-person roadshows or roadshows conducted in connection with an initial public offering.

<sup>2</sup> A electronic roadshow that constitutes an FWP should include the legend described in Rule 433 indicating that the issuer has filed a registration statement, that the prospectus for the offering is available on the SEC's website and that the prospectus can be requested from the issuer or any underwriter or dealer by calling a toll-free number. Regardless of whether the offering is registered, the roadshow slides should also include a standard list of forward-looking statement factors, consistent with an issuer's 1934 Act reports.

<sup>3</sup> Certain roadshows transmitted live, however, are considered "oral communications" under Rule 405 and therefore are not FWPs. Note that for a 144A offering, an electronic roadshow does not need to follow the distinction between written and oral communications. Section 5 of the 1933 Act does not apply to properly structured private offerings.

<sup>4</sup> See Rule 433(d)(8).

<sup>5</sup> This representation often states that at the "applicable time," the disclosure package together with any issuer free writing prospectuses, including electronic roadshows, taken as a whole, does not contain any material misstatements or omissions.

<sup>6</sup> For a typical securities offering, the disclosure package is made up of the preliminary prospectus (including incorporated information) and, in many instances, a term sheet containing the pricing information.

<sup>7</sup> The specific language of Section 12(a)(2) reads, "... an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading ..."

<sup>8</sup> The issuer would still need to mind anti-fraud considerations. See also Rules 163 and 163A for certain communications made prior to the filing of a registration statement.

<sup>9</sup> If this offer occurs prior to the filing of a registration statement, for any issuer other than a "WKSI," it would represent an illegal offer under Section 5(c) of the 1933 Act.

<sup>10</sup> See Rule 164 under the 1933 Act which, for certain "eligible issuers," provides cure provisions for the failure to file and failure to include proper legends in an FWP.

<sup>11</sup> Note also that there are additional prospectus delivery requirements in connection with the use of an FWP for issuers that are neither WKSI's nor "seasoned issuers" under the 1933 Act.

<sup>12</sup> See Publication of Information Prior to or After the Effective Date of a Registration Statement, Release No. 33 3844 (Oct. 8, 1957).

<sup>13</sup> The specific language of Section 11 reads, "... an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading ..."

<sup>14</sup> The specific language of Section 12(a)(2) reads, "... an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading ..."

<sup>15</sup> The specific language of Rule 10b-5 reads, "... any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading ..."

<sup>16</sup> An "issuer" is defined in Regulation FD as one that has a class of securities registered under Section 12 of the 1934 Act or is required to file reports under Section 15(d) of the 1934 Act, subject to certain exceptions. Note that the definition of "registrant" in Regulation G is very similar to "issuer" in Regulation FD; therefore, pursuant to Regulation G, if the issuer meets such "registrant" definition and is providing any non-GAAP financial measures in the electronic roadshow, the most comparable GAAP measure and a reconciliation will need to be provided in the roadshow.