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May 16, 2017



Road Shows

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Introduction; Definitions

We often hear the words “road show” associated with a securities offering. A road show is simply a series of presentations made by company management to key members of buy-side market participants such as broker-dealers that may participate in the syndication of an offering, and institutional investor groups and money managers that may invest into an offering. A road show is designed to provide these market participants with more information about the issuer and the offering and a chance to meet and assess management, including their presentation skills and competence in a Q&A setting. Investors often place a high level of importance on road show meetings and as such, a well-run road show can make the difference as to the level of success of an offering.

A road show usually involves an intensive period of multiple meetings and presentations in a number of different cities over a one-to-two-week period. Although road shows are generally live, they can be by teleconference, or electronic using prepared written presentation materials. In today’s Internet world, road shows are often recorded from a live presentation and made available publicly for a period of time. The meetings and presentations can vary in length and depth depending on the size and importance of the particular audience. During the road show, the underwriters are building a book of interest which will help determine the pricing for the offering.

A company can also conduct a “non-deal road show” for the purpose of driving interest in the company and its stock, where no particular offering is planned.

Unless it is a non-deal road show, the road show involves an offer of securities. “Offers” of securities are very broadly defined. Section 2(a)(3) of the Securities Act defines “offer to sell,” “offer for sale,” or “offer” 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 timing and manner of all offers of securities are regulated, and especially so in registered offerings. All issuers that have filed a registration statement are permitted to make oral offers of their securities, but only certain types of written offers are allowed. Written offers must comply with Section 10 of the Securities Act, including a requirement that a prospectus meeting the information requirements in Section 10(a) be delivered at the time of or prior to the offer. In addition, certain eligible issuers may provide supplemental written information and graphic communications not otherwise included in the prospectus filed with the SEC (i.e., a free writing prospectus) as part of an offer of securities. All of these oral and written communication rules are implicated in the road show process and must be considered when planning and completing the road show.

A road show is generally timed to be completed in the last few weeks before a registration statement goes effective or a Regulation A offering circular becomes qualified. In a registered offering, Section 5(c) prohibits offers prior to the filing of the registration statement and as such, the road show would never commence pre-filing. Regulation A is not a registered offering for purposes of Section 5(c), but for practical purposes, a Regulation A road show also commences right before SEC qualification. Rule 163 provides an exception to the pre-filing offer rules only available to well-known seasoned issuers (very big companies), which is not discussed in this blog.

For a private offering, the road show occurs once the offering documents are completed. An Emerging Growth Company (EGC) that has filed its registration statement on a confidential basis must make the initial filing and all confidentially submitted amendments public a minimum of 15 days prior to starting the road show.

A road show is subject to the test-the-waters and pre-effective communication rules.

A road show is specifically regulated under Rule 433 of the Securities Act and the free writing prospectus rules. Securities Act Rule 433(h)(4) defines a road show as an offer, other than a statutory prospectus, that “contains a presentation regarding an offering by one or more of the members of the issuer’s management and includes discussion of one or more of the issuer, such management, and the securities being offered.”

The SEC definition of road show includes the language “other than a statutory prospectus.” The statutory prospectus is one that meets the requirements of Section 10(a) of the Securities Act and is generally the filed final prospectus that contains the disclosures outlined in the particular offering form being used (for example, Form S-1 or 1-A) and including disclosures delineated in Regulations S-K and S-X.

In general, if the information being presented in a road show is nothing more than what is already included in the prospectus filed with the SEC, there are no particular SEC filing requirements. On the other hand, if the information is written and goes beyond the statutory prospectus, it may be considered a “free writing prospectus” and be subject to specific eligibility requirements for use, form and content and SEC filing requirements all as set forth in Rule 433 and discussed herein.

Rule 405 of the Securities Act defines a free writing prospectus (“FWP”) as “any written communication as defined in this section that constitutes an offer to sell or a solicitation of an offer to buy the securities relating to a registered offering that is used after the registration statement in respect of the offering is filed... and is made by means other than (i) a prospectus satisfying the requirements of Section 10(a) of the Act...; (2) a written communication used in reliance on Rule 167 and Rule 426 (note that both rules relate to offerings by asset backed issuers); or (3) a written communication that constitutes an offer to sell or solicitation of an offer to buy such securities that falls within the exception from the definition of prospectus in clause (a) of Section 2(a)(10) of the Act.” Section 2(a)(10)(a) in turn exempts written communications that are provided after a registration statement goes effective with the SEC as long as the effective registration statement is provided to the recipient prior to or at the same time.

Types of Road Shows; Oral/Live vs. Written; Free Writing Prospectus (FWP) Requirements

The rules distinguish between a “live” vs. a “written” road show communication, with one being an “oral offer” and more freely allowed and the other being a “written offer” and more strictly regulated. In addition, the rules differentiate requirements based on whether a road show is for a registered or private offering and, if a registered offering, whether such offering is an initial public offering (IPO) involving common or convertible equity.

Where a road show communication is purely oral, it is not an FWP and thus there are no specific SEC filing requirements (though see the discussion on Regulation FD below). Where an oral communication implicates Regulation FD, a Form 8-K would need to be filed regardless of whether the communication is during a road show or in any other forum.

Although road shows are generally live and specifically designed to constitute oral offers, they can also be electronic using prepared written presentation materials. Both live and electronic road shows may be available for replay electronically over the Internet.

Live road shows include: (i) a live, in-person presentation to a live, in-person audience; (ii) a live, real-time presentation to a live audience or simultaneous multiple audiences transmitted electronically; (iii) a concurrent live presentation and real-time electronic transmittal of such presentation; (iv) a webcast or video conference that originates live and is transmitted in real time; (v) a live telephone conversation, even if it is recorded; and (vi) the slide deck or other presentation materials used during the road show unless investors are allowed to print or take copies of the information.

The explanatory note to Rule 433(d)(8) states: “A communication that is provided or transmitted simultaneously with a road show and is provided or transmitted in a manner designed to make the communication available only as part of the road show and not separately is deemed to be part of the road show. Therefore, if the road show is not a written communication, such a simultaneous communication (even if it would otherwise be a graphic communication or other written communication) is also deemed not to be written.”

Accordingly, road show slides and video clips are not considered to be written offers as long as copies are not left behind. Even handouts are not written offers so long as they are collected at the end of the presentation. If they are left behind, however, they become a free writing prospectus (FWP) and are subject to Securities Act Rules 164 and 433, including a requirement that the materials be filed with the SEC.

A video recording of the road show meeting will not need to be filed as an FWP so long as it is available on the Internet to everyone and covers the same ground as the live road show. Such video road shows are considered a “bona fide electronic road show.” Rule 433(h)(5) defines a “bona fide electronic road show” as a road show “that is a written communication transmitted by graphic means that contains a presentation by one or more officers of an issuer or other persons in an issuer’s management....” It is permissible to have multiple versions of a bona fide electronic road show as long as all versions are available to an unrestricted audience. For example, different members of management may record different presentations and, although access must be unrestricted, management may record versions that are more retail investor facing or institutional investor facing.

On the other hand, a FWP would include any written communication that could constitute an offer to sell or a solicitation of an offer to buy securities subject to a registration statement that is used after the filing of a registration statement and before its effectiveness. A FWP is a supplemental writing that is not part of the filed registration statement. If the writing is simply a repetition of information contained in the filed registration statement, it may be used without regard to the separate FWP rule.

Rule 405 of the Securities Act defines a written communication as any communication that is “written, printed, a radio or television broadcast or a graphic communication.” A graphic communication includes “all forms of electronic media, including but not limited to, audiotapes, videotapes, facsimiles, CD Rom, electronic mail, internet websites, substantially similar messages widely distributed (rather than individually distributed) on telephone answering or voice mail systems, computers, computer networks and other forms of computer data compilation.” Basically, for purposes of rules related to FWP’s, all communications that can be reduced to writing are considered a written communication. Accordingly, radio and TV interviews, other than those published by unaffiliated and uncompensated media, would be considered a FWP and subject to the SEC use and filing rules.

Electronic road shows that do not originate live and in real time are considered written communications and FWP's. Once it is determined that a road show includes a FWP, unless an exemption applies, an SEC filing is required. As mentioned, bona fide electronic road shows, although technically a FWP, are not required to be filed with the SEC. In addition, Rule 433 only requires the filing of a FWP for an IPO of common or convertible equity.

A non-exempted FWP must be filed with the SEC, using Form 8-K, no later than the date of first use. An after-hours filing will satisfy this requirement as long as it is on the same calendar day. Moreover, all FWP's must be filed with the SEC, whether distributed by the registrant or another offering participant and whether such distribution was intentional or unintentional.

The use of a FWP has specific eligibility requirements. A FWP may not be used by any issuer that is "ineligible" for such use. The following entities are ineligible to use a free writing prospectus: (i) companies that are or were in the past three years a blank-check company; (ii) companies that are or were in the past three years a shell company; (iii) penny-stock issuers; (iv) companies that conducted a penny-stock offering within the past three years; (v) business development companies; (vi) companies that are delinquent in their Exchange Act reporting requirements; (vii) limited partnerships that are engaged in an offering that is not a firm commitment offering; and (viii) companies that have filed or have been forced into bankruptcy in the last three years.

Small- and micro-cap issuers will rarely be eligible to use a free writing prospectus. Accordingly, small and micro-cap companies generally are limited to live road shows involving oral offers not constituting a FWP.

Moreover, underwriters generally require specific representations and warranties and indemnification related to FWP's regardless of whether they are required to be filed with the SEC.

Content

The road show presentation usually covers key aspects of the offering itself, including the reasons for the offering and use of proceeds. In addition, management will also cover important aspects of their business and growth plans, industry trends, competition and the market for their products or services. An important aspect of the road show is the question-and-answer period or Q&A, though obviously this is only included in live interactive road shows. It is common for materials to include drilled-down information that is provided on a higher level in the prospectus as well as theory and thoughts behind business plans and management goals.

The preparation of the road show content is usually a collaborative effort between the company, underwriters and legal counsel. Although the road show begins much later in the process, since its content is derived from the registration statement, ideally the planning begins at the same time as the registration statement drafting. Also, slides, PowerPoint presentations and other presentation materials should be carefully prepared to get the most out of their effectiveness.

The lawyer generally reviews all materials for compliance with the rules related to offering communications as well as potential liability for the representations themselves. Part of the compliance review is ensuring that no statements conflict with or provide a material change to the information in the filed offering prospectus; that could be deemed materially misleading by content or omission; and compliance with Regulation FD if applicable.

Also from a technical legal perspective, all road show materials should contain a disclaimer for forward-looking statements, and that disclaimer should be read in live or prerecorded road show presentations. Where the road show content includes a FWP, it is required to contain a legend indicating that a prospectus has been filed, where it can be read (a hyperlink can satisfy this requirement), and advising prospectus investors to read the prospectus.

Under Rule 433(b)(2), the FWP for a non-reporting or unseasoned company must be accompanied with or preceded by the prospectus filed with the SEC. The delivery requirement can be satisfied by providing a hyperlink to the filed prospectus on the EDGAR database.

Road show materials, even those that are also a FWP, generally are not subject to liability under Section 11 of the Securities Act. Section 11 provides a private cause of action in favor of purchasers of securities, against those involved in filing a false or misleading public offering registration statement. Road-show materials, including FWPs, are not a part of the registration statement, but rather are supplemental materials. Section 12 liability, however, does apply to road-show materials. Section 12 provides liability against the seller of securities for material misstatements or omissions in connection with that sale, whether oral or in writing.

Follow-on Offerings and Regulation FD

Regulation FD requires that companies subject to the SEC reporting requirements take steps to ensure that material information is disclosed to the general public in a fair and fully accessible manner such that the public as a whole has simultaneous access to the information. Consequently, Regulation FD would be implicated in connection with communications in a road show for a follow-on offering by a company already subject to the Exchange Act reporting requirements. Regulation FD excludes communications (i) to a person who owes the issuer a duty of trust or confidence, such as legal counsel and financial advisors; (ii) communications to any person who expressly agrees to maintain the information in confidence; and (iii) communications in connection with certain offerings of securities registered under the Securities Act of 1933 (this exemption does not include registered shelf offerings).

Where a road show is being conducted by a company subject to the Exchange Act reporting requirements, counsel should ensure that that the presentation either does not include material non-public information or that the information is simultaneously disclosed to the public in a Form 8-K. As a backstop where Regulation FD applies, the company should also consider having all road-show attendees sign a confidentiality agreement.

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Securities Law Blog is written by Laura Anthony, Esq., a going public lawyer focused on OTC Listing Requirements, Direct Public Offerings, Going Public Transactions, Reverse Mergers, Form 10 Registration Statements, and Form S-1 Registration Statements. Securities Law Blog covers topics ranging from SEC Compliance, FINRA Compliance, DTC Chills, Going Public on the OTC, and OTCQX and OTCQB Reporting Requirements. Ms. Anthony is also the host of LawCast.com, the securities law network.

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