IPOs, Follow-On Offerings, Road Shows, and Earnings Guidance: FAQs on Publicity, Communications, and Offers

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This practice note provides answers to questions frequently asked by securities lawyers and their clients regarding the federal securities laws applicable to communications and publicity matters involving companies conducting initial public offerings (IPOs) and other securities offerings under the Securities Act of 1933, as amended (Securities Act).

Specifically, this practice note includes questions relating to:

- Publicity Guidelines during IPOs
- Publicity Guidelines for Follow-On Offerings
- Road Shows and Non-deal Road Shows
- Earnings Guidance Issued Close to a Registered Offering

For more information about communications during an IPO, see IPO Process: Permitted Communications, Permitted Communications Memorandum (IPO), and SEC Communications Rules for Issuers in Registered Offerings (Chart). For additional information about road shows, see Preparing for a Road Show and Pre-Road Show Checklist. For more information about issuing earnings guidance, see Earnings Guidance, Earnings Releases: Regulatory Framework and Disclosure Process, and Filing an Earnings Release for a Public Company Checklist. For a general overview of, and links to available resources regarding, these disclosure and publicity issues, see Publicity and Communications Resource Kit.

PUBLICITY GUIDELINES DURING IPOS

Under the Securities Act, and rules adopted by the Securities and Exchange Commission (SEC), a company engaged in an IPO is restricted in what it may communicate to the public and potential investors, and the methods of communication it may use, for the IPO.

The following questions discuss the SEC's rules that seek to ensure that a company's communications do not improperly condition the market during the three phases of the IPO process: the quiet (or pre-filing) period, the waiting (or post-filing) period, and the post-effective period.

What is gun jumping?

"Gun jumping" generally refers to unlawful offers made during the IPO process. More specifically, it refers to written or oral offers made before the registration statement is filed, and to written offers made after the registration statement is filed other than by means of a prospectus that complies with Section 10 of the Securities Act (15 U.S.C. § 77j) (a so-called statutory prospectus), a free writing prospectus, or a communication falling within one of the SEC-created safe harbors (discussed below) for communications made in proximity to an offering. While gun jumping is a serious concern, the SEC's safe harbors provide considerable flexibility for companies. In addition, the ability of emerging growth companies (EGCs) (and, perhaps, in the future, all companies, as being considered by the SEC) to test the waters before filing a registration statement, together with the recent elimination of the ban on in connection with certain exempt offerings, have significantly reduced concerns about gun jumping.

What are the consequences of engaging in gun jumping?

If the SEC determines that a company is conditioning the market or gun jumping, the SEC may require the company to delay the offering or to add disclosure to the registration statement regarding the risk that the company has violated Section 5 of the Securities Act (15 U.S.C. § 77e).

Additionally, Section 12(a)(1) of the Securities Act (15 U.S.C. § 77l) provides a rescission right to an investor who buys securities in a transaction that violates Section 5, which enables the investor to recover the purchase price paid or, if it no longer owns the securities, the difference between the purchase and the sale price of the securities, plus interest, less any amount (e.g., dividends or interest) received on the securities.

For more information about liability under Section 12(a) and other federal securities laws applicable to IPOs, see Liability under the Federal Securities Laws for Securities Offerings.

May a company publicly announce that it may go public in the next two to three years?

Yes, if that is its intent. However, if the company is actively working on its IPO at the time and estimates a two-year process, counsel may recommend not making the statement for fear of a potential gun-jumping violation. See "When does the company need to start to take steps to prevent leaks about its upcoming IPO?", below.

When does the company need to start to take steps to prevent leaks about its upcoming IPO?

The company should consider itself to be "in registration" when it decides to proceed with the IPO, which is generally considered to be at the time of the initial "all-hands" organizational meeting to discuss the proposed IPO, or, if underwriters are not yet involved, an equivalent starting point. The quiet (or pre-filing) period begins at this time and continues until the registration statement is publicly filed on the SEC's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system.

During the quiet period, the company is not permitted to make offers to sell its securities. The SEC has broadly construed an offer to include "every attempt or offer to dispose of, or solicitation of an offer to buy" as well as any publicity that has the effect of "conditioning the public mind or arousing public interest in the company." Consequently, certain activities or types of publicity (including information appearing on the company's website or hyperlinked to it), may result in a gun-jumping violation, even if that activity or publicity is not expressly phrased in terms of an offer to sell securities.

What steps should a company take?

At the beginning of the quiet period, the company and its counsel should review the company's website and social media accounts and remove information that is inaccurate or could conflict with the registration statement, as well as anything that could be construed as an offer of securities. The company should also implement internal controls and adopt a communications policy that, among other things, requires that all press releases and public statements about the company undergo review by counsel, limits the ability of employees to talk to or comment to the press or on social media about the company, identifies which channels of communication are approved for business use, and identifies the persons authorized to speak (or post) on the company's behalf.

If a company is large or there is a high risk of leaks, the company may consider requiring employees working on the IPO to sign confidentiality agreements.

A company starts working on its IPO but has not publicly filed its registration statement. May the company continue to communicate to the public about its business?

Yes, within certain parameters. The following communications with the public are permitted during the quiet period:

- **Communications made more than 30 days before the registration statement is filed.** A communication made 30 days before the company first files the registration statement will not constitute an unlawful offer if all of the following are true:
  - The communication (whether written or oral) does not mention the IPO and is made by or on behalf of the company and not any underwriter or proposed underwriter.
  - The company takes reasonable steps to prevent further distribution or publication of the communication during the 30 days immediately preceding the initial public filing of the registration statement.
  - The company is not (and during the last three years was not) a blank check company, a shell company, an issuer offering penny stocks, a registered investment company, or a business development company. See Securities Act Rule 163A (17 CFR 230.163A).
- **Regularly released factual business information.** A company may continue to release factual business information during the quiet period, if it satisfies all the following requirements:
  - The communication does not mention the IPO.
  - It is an ordinary course communication that provides only factual business information.
  - The timing, manner, and form in which the information to be released or disseminated is consistent in all material respects with past releases or disseminations (this requirement may disqualify issuers lacking a track record of making such disclosures).
  - The information is intended for persons, such as customers and suppliers, other than in their capacities as investors or potential investors.
  - The company is not a registered investment company or a business development company. See Securities Act Rule 169 (17 CFR 230.169).
- **Notice of a proposed registered offering.** A company may publish a brief written notice that provides the company's name, certain basic statements about the IPO, including its size and anticipated timing, and the securities to be offered, and a legend stating that the communication is not an offer, but does not name any underwriter or potential underwriter or describe the company's business. See

Securities Act Rule 135 (17 CFR 230.135).

- **Offshore communications by foreign private issuers.** A foreign private issuer, a foreign government issuer, or a selling securityholder of either of such issuers, may engage in certain offshore communications that mention the IPO if all of the following are true:
  - The IPO is not conducted solely in the United States.
  - Access to any meetings or press conferences is provided to both U.S. and non-U.S. journalists.
  - Any written press-related materials state that the materials do not constitute an offer of securities in the United States and specify whether the issuer or any selling security holder intends to register any part of the proposed offering in the United States, and do not include any purchase order or coupon that could be returned indicating an interest in participating in the offering. See Securities Act Rule 135(e) (17 CFR 230.135e).

In addition to these permitted communications, EGCs may test the waters for a proposed IPO by communicating with qualified institutional buyers (QIBs) and institutional accredited investors, as discussed below.

Companies may conduct exempt offerings in the United States (e.g., private placements made in reliance on Section 4(a)(2) or Regulation D), and outside the United States in compliance with Regulation S, concurrently with conducting an IPO. See "May a company concurrently pursue an IPO and a private placement?" and "May a company concurrently pursue an unregistered offshore offering and an IPO?", below.

A company submits its IPO registration statement on a confidential basis to the SEC. May the company now tell the public about the IPO?

Yes. Although the SEC will keep the registration statement confidential (i.e., it will not be made available on EDGAR), the company may communicate in compliance with one of the safe harbors discussed above, and EGCs may make testing-the-waters communications to QIBs and institutional accredited investors, as discussed immediately below.

What are "testing-the-waters" communications?

The JOBS Act amended Section 5 of the Securities Act (15 U.S.C. § 77e) to provide that an EGC, or any other person, such as an underwriter, that it authorizes to act on its behalf, may engage in oral or written communications with QIBs and institutional accredited investors to gauge their interest in a proposed offering, whether before or after the first public filing of any registration statement, subject to the requirement that no binding orders can be solicited or accepted at that time. Though the "testing-the-waters" process is currently available only to EGCs and their authorized representatives, the SEC staff has stated that it is considering allowing all issuers and their authorized representatives to take advantage of this more flexible marketing process.

There are no form or content restrictions on these communications, but any information provided must be consistent with that in the registration statement. No written materials should be provided to the potential investors, and the company and the underwriters should review and agree on any scripts, slides, and other presentation materials before they are used. Before any communications are made, the underwriters will typically require the company to sign a letter outlining the permitted process and stating that the information presented in the testing-the-waters materials is limited to the information included in the registration statement, and that no written materials will be distributed to the prospective investors. The underwriters may also limit the number of institutions contacted.

The underwriters will typically request that the company agree in the underwriting agreement to indemnify them against liability for any material misstatements in or omissions from the testing-the-waters materials. The SEC typically requests to see any written testing-the-waters materials and may require the company to amend the registration statement to reflect any information in the materials that is missing from, or inconsistent with, the registration statement.

For more information about testing-the-waters by EGCs, see Emerging Growth Company Practice Guide and Top 10 Practice Tips: Emerging Growth Companies.

If the company is relatively unknown to the market and does not yet have an underwriter for its IPO, can the company prepare a "teaser" summary about the company and send it via a blast email to family, friends, former colleagues, and potential underwriters?

Counsel should review the teaser closely to assess whether it would qualify for the Rule 163A safe harbor discussed above. Accordingly, the teaser should not mention the IPO and should be emailed more than 30 days before the initial public filing of the registration statement. Additionally, the company should take reasonable steps to prevent further distribution or publication of the communication during the 30 days immediately preceding the initial public filing, and the company may not be (and during the last three years was not) a blank check company, a shell company, an issuer offering penny stocks, a registered investment company, or a business development company.

A company that is preparing for an IPO would like to identify an underwriter, appoint a director, or hire an officer. May the company email its draft registration statement to potential candidates before the initial filing or confidential submission?

In general, this is permitted. The company should inform the recipient, however, that the recipient is receiving the document only as a potential underwriter/director/officer, and that the information should be kept confidential.

May a company communicate with its shareholders before the registration statement is publicly filed?

A company may generally communicate with its shareholders at any time. An IPO company may need to communicate with its shareholders for a variety of reasons, both before and after the registration statement is filed, including when selling shareholders are participating in the IPO, the company needs to obtain lock-up agreements from shareholders, or the company requires shareholder approval to proceed with the IPO.

Before the registration statement is publicly filed any such communications should be limited to only the information reasonably necessary to accomplish the purpose for which the communication is made and should provide that the information must remain confidential. For example, if shareholder approval for the IPO is required, the company would have to provide sufficient information about the proposed offering to allow for a reasonably informed shareholder vote.

Should individuals and entities named in the registration statement be notified by the company?

Generally, yes. All persons named in the registration statement should be given the opportunity to review, revise, and consent to the disclosure about them included in the registration statement (subject to the SEC's disclosure requirements, which may mandate disclosure that a party would prefer to exclude). In addition to considering

whether to submit a confidential treatment request for any sensitive business information, market practice involves doing the following before the registration statement is publicly filed on EDGAR:

- Directors, director nominees, and executive officers should review and approve the biographical information about them, as well as their shareholdings, and each director nominee should sign the consent to be named in the registration statement required to be filed pursuant to Securities Act Rule 438 (17 CFR 230.438).
- Experts (e.g., the issuer's independent public accounting firm) should confirm they are referenced properly in the registration statement and sign any consents required to be filed pursuant to Securities Act Rule 436 (17 CFR 230.436).
- Parties to agreements containing confidentiality provisions should waive the provisions to the extent necessary to prevent the company from breaching those agreements.
- Any other third parties named in the registration statement should consent in writing to the disclosure to avoid any potential negative commercial impact to the company. For example, a company should consider whether to obtain consents from its celebrity clients before disclosing their names in the prospectus.
- Principal and selling shareholders should confirm their addresses, beneficial ownership details, and any other information included in the prospectus describing their relationship to the company.
- Any lenders or other counterparties should provide any waivers required to allow the IPO to proceed (e.g., change of control covenants waivers) and the prospectus should disclose whether the offering is still subject to their consent.
- Any nonpublic provider (such as a subscription service) of information included in the registration statement should review and consent in writing to the disclosure that references the provider.

It is generally not necessary to obtain consents for referencing or reprinting information from publicly available sources or from parties to agreements that are required to be described in, or filed as exhibits to, the registration statement (and who, such as the parties to a loan agreement, are unlikely to object), but there are exceptions that may still make consents in such cases appropriate, such as with respect to commercially sensitive disclosure.

If a third party refuses to provide a consent, the company may need to redraft the disclosure, subject to the registration statement form disclosure requirements. The company could also request confidential treatment of the sensitive information from the SEC. However, the lack of a third-party consent does not permit the company to omit any required information from the registration statement.

A company publicly files its registration statement for the first time, and a friend of an officer of the company asks via email for details about the IPO. May this officer reply with a link to the publicly filed registration statement?

No, because the prospectus included in the registration statement is not likely to constitute a Section 10 prospectus, which, for an IPO, requires stating a price range. As a result, sending the link would be an impermissible written offer. The price range is usually included later in the IPO process, at which time the prospectus may be emailed (or a link to it forwarded) to members of the public, although it would be preferable for the underwriters to handle all such communications.

To help address these situations, a company can publicly identify its investor relations contact immediately prior to the first public filing, and all inquiries about the offering received by company personnel should be forwarded to

that person for consistent replies. In this case, the investor relations contact could provide an oral or email reply stating that a registration statement has been filed with the SEC, without linking the filing.

Additionally, some companies issue a press release concurrently with making their first public filing, which typically states that a registration statement has been publicly filed with the SEC but is not yet effective (without including a link to the filing on EDGAR), and including other information about the company and the offering permitted by Securities Act Rule 134 (17 CFR 230.134). For the information permitted in a communication complying with Rule 134, see Contents of a Communication Permitted Under Rule 134 Checklist.

May a company's CEO give an interview to the press immediately after the company publicly files its registration statement for the first time?

It depends, but it is rare for a CEO to intentionally give an interview to the press immediately after the first public filing of the registration statement. The public filing of the registration statement begins the waiting period, during which oral offers and certain written offers are permitted but binding agreements to sell securities are prohibited.

For an interview with the press to not constitute an unlawful written offer, it would have to qualify for the safe harbor protection of either Securities Act Rule 134 or Rule 169, which, because of the limited information allowed under the conditions of the safe harbors, is not likely to be the case. Alternatively, the interview may possibly not constitute a written offer, but given the very broad definition of a "written communication" in Securities Act Rule 405 (17 CFR 230.405), which includes any publication or rebroadcast of an interview, and the difficulty in controlling whether an interview is recorded, transcribed, etc., a high level of caution is warranted.

The interview may qualify as media free writing prospectus under Rule 433(f), and thus would be permissible. Rule 433(f), unlike other subsections of Rule 433 (17 CFR 230.433), does not require the registration statement to include a price range. However, all the following criteria must be satisfied:

- The company or any other IPO participant or their representatives, provided, authorized, or approved the information in the communication.
- A Section 10 prospectus has been publicly filed (with or without a price range).
- The interview was prepared and published or disseminated by a person:
  - Unaffiliated with the company or other IPO participant –and–
  - In the business of publishing, radio, or television broadcasting or otherwise disseminating written communications
- If the company or one of its affiliates is itself the media company that wrote the relevant article:
  - It must be a bona fide newspaper, magazine, or business or financial publication of general and regular circulation, or bona fide broadcaster of news, including business and financial news.
  - It must have established policies and procedures for the independence of its publications or broadcasts from the offering activities of the issuer.
  - It must have written or published the article in the ordinary course.
- No payment was made or consideration given by or on behalf of the company or other IPO participant for the written communication or its dissemination.
- The company or other IPO participant in question files the written communication with the SEC with the required legend within four business days after its publication, broadcast, or dissemination.

A company will be subject to liability under Section 12(a)(2) of the Securities Act (15 U.S.C. § 77l) for the information included in a media free writing prospectus, although it may correct the information in the free writing prospectus when making the filing. In addition, a CEO who says something in an interview that is inconsistent with, or not included in, the information in the registration statement, could expose the company to liability under the federal securities laws for misrepresentations or omissions in the registration statement or prospectus. Consequently, Rule 433(f) media free writing prospectuses are not often used in connection with IPOs.

For more information about the use of free writing prospectuses in IPOs, see Free Writing Prospectuses in IPOs.

A reporter writing an article on the IPO calls management to ask them to confirm/deny certain statements. How should management handle it?

A "no comment," that is, neither confirming nor denying statements in an upcoming article, is the recommended approach. If management confirms a statement—even an obvious truth—the reporter could write "as confirmed by the company," which could create the appearance that the company participated in the preparation of the article and that the article may be viewed as an attempt to unlawfully condition the market.

May the company send an email to its employees with information about a directed share program?

Yes, but sharing information and asking about participation in the program must be undertaken at different stages of the IPO process. A company may, pursuant to Rule 134, share information about a directed share program any time after a Section 10 prospectus has been publicly filed, even if it does not include a price range. However, Rule 134(d) requires that any request that employees indicate their interest in participating in the directed share program must be accompanied or preceded by a Section 10 prospectus that includes a price range.

For information about directed share programs, see Directed Share Programs.

May a company concurrently pursue an IPO and a private placement?

Yes, provided that prospective private placement purchasers are not identified or solicited because of the IPO or through use of the registration statement, that is, they must become interested in or aware of the private placement through some other means, for example, having a substantive, preexisting relationship with the company or the underwriters. In that case, the private placement will not be integrated with the IPO because the registration statement would not constitute prohibited general solicitation for the private placement (which would cause the loss of the exemption). See Securities Act Sections Compliance and Disclosure Interpretation Question 139.25 [Nov. 26, 2008] and Securities Act Release No. 33-8828, available at https://www.sec.gov/rules/proposed/2007/33-8828.pdf. General solicitation should not be used for a private placement that is conducted concurrently with an IPO, even if the exemption relied on for the offering permits general solicitation (such as Securities Act Rule 506(c) (17 CFR 230.506)).

For information about integration of private and public offerings, see Securities Offerings Integration, Integration Issues for Private Offerings, and Top 10 Practice Tips: Private Placements.

May a company concurrently pursue an unregistered offshore offering and an IPO?

Yes, provided that the offering is conducted in compliance with the requirements of Rule 903 of Regulation S (17 CFR 230.903), including the requirement that the company and persons acting on its behalf not engage in any directed selling efforts in the United States regarding the offshore offering.

For information about offshore offerings by U.S. companies, see Offshore Offerings by U.S. Issuers and Regulation S Transactions.

May a company simultaneously pursue an IPO and an M&A transaction? And if so, can it share information with a potential M&A buyer?

Yes. Dual-track processes are quite common. Sharing information confidentially with potential M&A buyers is permitted, even while the issuer is working on an IPO, for a possible sale of the company rather than to solicit interest in the IPO. A potential issue in any dual-track approach, however, is that if the company proceeds with the IPO rather than the sale, any potential buyers that received material nonpublic information from the company might not be able to buy or sell the company's securities until the information is publicly disclosed or has become stale, or the company releases the buyers from any contractual prohibition on trading in its securities.

For more information about conducting a dual track process, see Dual-Track IPO and Sale Process.

Should the CEO conduct an interview the day after the IPO closing?

The best practice would be to not conduct this interview because the CEO might say something material that is not disclosed in the prospectus. If that happens during the 25-day (or 90-day) period following the date the securities were first offered to the public, the company would have to amend the registration statement to include the information or prepare and file the interview as a free writing prospectus. See Section 4(a)(3) of the Securities Act (15 U.S.C. § 77d) and Securities Act Rule 174 (17 CFR 230.174). Whether an amendment or a free writing prospectus is used typically depends on which format more clearly communicates the changes. However, for certain changes, an amendment would be required, such as if the company cannot use a free writing prospectus because it is an ineligible issuer or an excluded issuer, as set forth in Securities Act Rule 164 (17 CFR 230.164).

What happens once the IPO prospectus includes a price range?

Typically, this is when the full marketing effort for the IPO begins, because written offers accompanied or preceded by the company's Section 10 prospectus setting forth the price range are now permitted. There is also some additional leeway regarding the use of media free writing prospectuses (pursuant to Rule 433(f)). Because the registration statement has not yet been deemed effective by the SEC, however, binding agreements to purchase the securities are still prohibited.

A company will typically file the Section 10 prospectus with the price range (often called the "red herring") shortly before beginning its road show.

PUBLICITY GUIDELINES FOR FOLLOW-ON OFFERINGS

A company conducting an offering following its IPO is subject to many of the same publicity and communications guidelines as it was for the IPO, but there are some differences.

How are publicity guidelines different for companies that are already public but are contemplating a registered offering?

When an SEC reporting company conducts a follow-on offering (i.e., a registered public offering following its IPO), it must still carefully monitor its communications, especially any communication that might be deemed to constitute an offer of its securities.

A reporting company that has established a pattern of communicating factual business information and forward-looking information to the public may rely on Securities Act Rule 168 (17 CFR 230.168) to continue to do so while

engaged in an offering. IPO companies may rely only on Rule 169, which permits disclosure of factual business information but not forward-looking information.

Seasoned issuers (generally, issuers that meet the eligibility requirements to conduct a primary offering on registration statement Form S-3 or F-3) may use free writing prospectuses after a registration statement is filed, and well-known seasoned issuers (WKSIs) may use free writing prospectuses at any time, pursuant to Rules 433 and 164 (17 CFR 230.164), but may need to file them with the SEC. WKSIs may make oral and written offers before and after filing a registration statement with the SEC pursuant to Rule 163 (17 CFR 230.163) (although a written offer would need to include a legend, and may need to be filed with the SEC as a free writing prospectus), and WKSIs have some additional flexibility to issue media free writing prospectuses pursuant to Rule 433(f). (For a discussion of the media free writing prospectus requirements, see "May a company's CEO give an interview to the press immediately after the company publicly files its registration statement for the first time?") EGCs may continue to test the waters in connection with follow-on offerings.

For additional information about communications by WKSIs and seasoned issuers, see WKSIs and Seasoned Issuers.

ROAD SHOWS AND NON-DEAL ROAD SHOWS

A road show is the principal way to market most IPOs and follow-on offerings, and securities lawyers should be aware of the SEC's rules and concerns with the conduct of road shows.

What is a road show?

Rule 433(h)(4) defines a road show as an offer (other than a statutory prospectus or a portion of a statutory prospectus filed as part of a registration statement) that contains a presentation regarding an offering by one or more members of the company's management and includes discussion of one or more of the issuer, its management, and the securities being offered. A road show is a concentrated marketing effort that typically begins shortly after a company's preliminary, or red herring, prospectus is filed with the SEC. A road show for an IPO usually lasts from one to two weeks and comprises a series of live meetings between management and prospective investors at which management discusses the company's business and financial performance, and the offering and planned use of proceeds. Management prepares its presentation, which usually includes a slide show, in advance and typically answers questions from the audience. Underwriters customarily manage the schedule for, and invitees to, the road show meetings. A live road show presentation, even if it includes visual aids, is typically not considered to be a written communication, as defined in Rule 405 (discussed below), and is thus not a free writing prospectus required to be filed with the SEC.

Companies often prerecord one or more versions of the road show for presentation to different investor groups. A video road show would be a "written communication," as defined in Rule 405, and thus required to be filed with the SEC as a free writing prospectus unless the company makes at least one bona fide electronic road show readily available to an unrestricted audience electronically (i.e., a so-called retail road show). See Rule 433(d)(8)(ii). Rule 433(h)(5) defines a "bona fide electronic road show" as a written communication transmitted by graphic means that contains a presentation by one or more officers of a company or other persons of the company's management and, if more than one road show that is a written communication is being used, includes a discussion of the same general areas of information regarding the issuer, management, and the securities being offered, as such other issuer road show or shows for the same offering that are written communications.

Under Rule 405, a written communication is 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 Web sites, 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."

A company should not allow any slides used in a road show to be retained by attendees. If attendees download the slides or take printouts with them after the meeting, the slides could be deemed a written communication that is neither a road show nor a bona fide electronic road show, and thus could constitute a free writing prospectus that likely would have to be filed with the SEC.

For reporting companies, especially those eligible to file shelf registration statements on Form S-3 (or Form F-3), road shows are generally much shorter, and often consist of prerecorded videos available only to prospective investors. The road show may only be available for viewing for a very limited time, and the launch, marketing, and pricing of the offering may occur in a compressed timeframe. Most follow-on offerings are now marketed either on an accelerated basis, usually over two to three days, or are marketed on a confidential, or wall-crossed, basis without a formal road show.

For more information about conducting road shows for offerings, see Preparing for a Road Show.

What is a non-deal road show?

A non-deal road show is a live or video presentation by a company's management to investors that does not mention any specific offering but rather provides information about the company and its financial performance. Non-deal road shows are commonly conducted to establish and strengthen relationships with existing and prospective investors and to establish a track record of communicating regularly with them.

May a company start a deal road show the day after a non-deal road show?

A deal road show may follow a non-deal road show, but it may be prudent to allow some time to elapse between the two. The SEC has cautioned that Rule 168 (the safe harbor for releasing factual business information and forward-looking statements by reporting companies) is not available for offering-related activities. The market has evolved over the years, however, and market participants have become more comfortable with a shorter time between a non-deal road show and a road show, as well as between the completion of a non-deal road show and the launch of a follow-on offering.

Most underwriters have a process for handling these situations, including a script for the format of the communication, the types of individuals who may be invited to non-deal meetings, and whether any meeting requires "wall-crossing" procedures (in which the persons contacted agree to keep confidential the information shared with them).

For information about the wall-crossing process, see Investor Wall-Crossing Script and Email Confirmations.

May a deal road show be immediately followed by the CEO speaking at a business conference?

Generally, yes. The attendees at business conferences are typically participants in the business or industry that is the subject of the conference, or related persons such as suppliers and customers, who are not necessarily attending as investors or potential investors. A company that regularly presents at business conferences could do so at any time pursuant to Rule 168 or Rule 169 safe harbor, even immediately prior to commencing a deal road show. A company should limit its communications at business conferences to those it customarily makes about its

business and should not refer to an offering. If a company does not regularly present at business conferences, the CEO's presentation at such a meeting around the time of a road show may raise gun-jumping concerns.

What type of information is included in road show slides?

Deal road show slides are subject to liability under the federal securities laws. Non-deal road show slides could also be subject to the anti-fraud provisions of the securities laws.

For IPOs, information included in (and, for follow-on offerings, also incorporated by reference into) the prospectus can be included in the road show slides. The grey area for information included in the road show slides commonly falls into the following categories:

- The information is derived from information included in the prospectus through simple calculations or, in some cases, is derived from a combination of the prospectus and management's presentation.

  Example. The prospectus includes the company's profits over the last five years, and the road show includes the company's cumulative annual growth rate (CAGR) over that five-year period. This may be permissible in the road show because anyone with access to the prospectus could calculate the CAGR.

- The information is publicly available or may obtained by anyone.

  Example. A bar graph of the company's revenue is overlaid with a red line that shows the average revenue for the company's industry (with the source footnoted). Including the industry revenue in the road show may be permissible even though it is not in the prospectus if the prospectus includes disclosure that is generally consistent with the information in the slide and the information is publicly available.

- The information is otherwise not material.

  Example. The prospectus may include five years of net income data, but a road show slide may show eight years of net income data. If the older data did not reflect any significant material trend, including that additional information should not be problematic.

The road show should not include any forward-looking information (e.g., projections about future events) that was not included in the prospectus. All the information in the road show should be substantiated through the typical diligence process.

A question that sometimes arises is whether a reporting company should reaffirm its annual earnings guidance during a road show. Doing so may be considered issuing new guidance, which would be material information to investors. In that event, the company would need to include the guidance in the prospectus and disclose it in a Form 8-K (or Form 6-K, for a foreign private issuer) submitted under the Exchange Act.

The road show slides include various disclaimers, legends, and required information. These should be tailored to the presentation, but typically include disclaimers relating to forward-looking statements (to allow the company to avail itself of either the statutory safe harbor for such statements or the judicially created "bespeaks caution" defense), a notice that a registration statement has been filed, and any non-GAAP financial measure reconciliations required by SEC rules. Any non-GAAP (or non-IFRS) financial measures included in the presentation must comply with the requirements of SEC Regulation G and the requirements of Item 10(e) of Regulation S-K (17 CFR 229.10) if the road show is filed with or furnished to the SEC, including the mandated reconciliation to GAAP (or IFRS) financial measures.

For information about forward-looking statements, see Safe Harbors for Forward-Looking Statements. For guidance on preparing forward-looking statements, see Forward-Looking Statement: Drafting a Compliant Statement. For information about the SEC's regulation of non-GAAP financial measures, see SEC Regulation of Non-GAAP Financial Measures.

The underwriting agreement for an IPO or follow-on offering will customarily provide that the company will indemnify the underwriters against any losses incurred in connection with material misstatements in or omissions from road show slides and will not market the IPO using materials other than those that have been agreed upon with the underwriters.

Should companies be concerned about Regulation FD when preparing and conducting a road show?

Road shows used in primary registered offerings are exempt from Regulation FD pursuant to Rule 100(b)(2)(iii)(F) (17 CFR 243.100). See also Regulation FD Compliance and Disclosure Interpretation Question 101.07 [Aug. 14, 2009]. But road shows used in exempt offerings and solely secondary offerings and road shows conducted by WKSIs before the filing of a registration statement in reliance on Rule 163, are subject to Regulation FD. Generally, reporting companies should keep a current investor presentation available on the investor relations section of their websites and, for Regulation FD purposes, should announce their participation in industry conferences and make such presentations publicly available.

For more information about Regulation FD, see Regulation FD.

What can management say in the road show presentation and when answering the audience questions?

Management should follow the script prepared for the road show. During a Q&A session following the presentation, the executives may provide any information that is in the prospectus or is otherwise publicly available. Determining what information to provide may be difficult in a live presentation, so companies, underwriters, and their counsel should prepare as thoroughly as possible for anticipated questions. If any material information not included in the prospectus is inadvertently disclosed, company counsel and the underwriters should determine whether any remedial steps are required, including amending the prospectus or filing a FWP.

EARNINGS GUIDANCE ISSUED CLOSE TO A REGISTERED OFFERING

Issuing earnings guidance around the time of a registered offering presents several issues. For information about issuing earnings guidance generally, see Earnings Guidance and Earnings Releases: Regulatory Framework and Disclosure Process.

May a reporting company revise its earnings guidance downwards just before launching an offering?

Yes, this should be fine and could mitigate the company's potential liability. Updating guidance to moderate the market's expectations ordinarily would not be considered an offer under the Securities Act.

May a reporting company revise its earnings guidance upwards just before launching an offering?

Yes. Rule 168 allows for forward-looking information, including earnings guidance, to be released only in the ordinary course of business in a manner that is consistent with past practice. Concerns may be raised, however,

regarding the timing of such an announcement and whether the announcement may be viewed as unlawfully conditioning the market.

If a reporting company revises its earning guidance upwards, how long should it wait before launching an offering?

If the company earnings release falls within the Rule 168 safe harbor (i.e., the company regularly releases similar information at the same time(s) each year), a cooling off period may not be required. If Rule 168 is not available, however, then a cooling-off period would be recommended, the length of which will depend on the company's circumstances, such as the risk that the new guidance will be subject to further changes. A company should be careful to avoid forward-looking statements from being included in marketing materials for an offering unless a forward-looking statements safe harbor is available.

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Anna Pinedo is a partner in Mayer Brown's New York office and a member of the Corporate & Securities practice. She concentrates her practice on securities and derivatives. Anna represents issuers, investment banks/financial intermediaries and investors in financing transactions, including public offerings and private placements of equity and debt securities, as well as structured notes and other hybrid and structured products.

She works closely with financial institutions to create and structure innovative financing techniques, including new securities distribution methodologies and financial products. She has particular financing experience in certain industries, including technology, telecommunications, healthcare, financial institutions, REITs and consumer finance. Anna has worked closely with foreign private issuers in their securities offerings in the United States and in the Euro markets. She also works with financial institutions in connection with international offerings of equity and debt securities, equity- and credit-linked notes, and hybrid and structured products, as well as medium term note and other continuous offering programs.

In the derivatives area, Anna counsels a number of major financial institutions acting as dealers and participants in the commodities and derivatives markets. She advises on structuring issues as well as on regulatory issues, including those arising under the Dodd-Frank Act. Her work focuses on foreign exchange, equity and credit derivatives products, and structured derivatives transactions. Anna has experience with a wide range of transactions and structures, including collars, swaps, forward and accelerated repurchases, forward sales, hybrid preferred stock and off-balance sheet structures. She also has advised derivatives dealers regarding their Internet sites and other Internet and electronic signature/delivery issues, as well as on compliance matters.

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Vanessa K. Browder is an attorney at Mayer Brown LLP in New York. She focuses on securities law in the context of registered and unregistered domestic and cross-border transactions. Ms. Browder received an A.B. in philosophy from Harvard University and a J.D. from Boston College Law School. She also studied philosophy at the University of Chicago and violin with James Buswell (of New England Conservatory).