Planning Tip

Electronic Road Shows

If the company's CEO and CFO have never attended a live road show, which is often the case, they may find it helpful to view several publicly accessible electronic road show presentations as they prepare their own.

§ 18:6 Rules of the Road

Road shows have always been an indispensable part of an IPO. Until the past decade or so, however, road shows were largely unseen by the public or the SEC and, in a sense, were unregulated. With the advent of electronic road shows and the heightened scrutiny of every aspect of IPOs, the legal significance of road shows now matches their longstanding investment importance. As a result, the company should observe the following basic guidelines in preparing for and conducting live and electronic road shows.

§ 18:6.1 Legal Review

In a bygone era it was commonplace for the road show materials not to be shared with counsel—"out of sight, out of mind" seemed to be the rationale—but legal review is now essential. Company counsel and underwriters' counsel should review the presentation slides to be used in live road show presentations and review the electronic road show before posting. Counsel will probe to make sure the information presented is substantiated and consistent with the preliminary prospectus. Although road show presentations often put a slight marketing gloss on the information contained in the preliminary prospectus, counsel usually suggest that hyperbole be removed or scaled back. Counsel's input on the road show materials will be prompted both by liability concerns and the fact that the SEC staff examiners will have access to the electronic road show.

§ 18:6.2 Availability of Documents

Copies of the current version of the preliminary prospectus, including any free writing prospectuses, should be handed out to all live road show attendees. No other written materials—such as copies of the presentation slides, sales literature used by the managing underwriters' sales forces, company background sheets, recent press releases, or any other materials other than the current version of the preliminary prospectus—should be provided, to avoid converting them into free writing prospectuses that must be filed and may generate liability. Any written materials (other than the preliminary prospectus and any free writing prospectuses) provided to live road show attendees must be returned at the conclusion of the presentation or will be subject to the free writing prospectus rules. Because of the risk that one or more attendees will not return such written materials before leaving the presentation, and the potential liability of the company and the underwriters for the contents of any such written materials, the better practice is not to distribute any written materials at live road show presentations other than the preliminary prospectus and any free writing prospectuses. The company should coordinate with the lead managers to ensure no other documents—including internal sales materials—are distributed at live road show meetings.

§ 18:6.3 Consistency with Preliminary Prospectus

The road show slides and statements made during live and electronic road show presentations should be consistent with the preliminary prospectus and any free writing prospectuses and should not include other material information. The adage is that information presented in the road show should come from "within the four corners" of the preliminary prospectus (including any free writing prospectuses) or be derivable from information contained in the preliminary prospectus. Road show presentations sometimes include the company's operating targets or model, but rarely include financial projections. If the company plans to disclose additional material information in the road show, the company should consider whether the information should also be added to the preliminary prospectus in order to avoid a material omission. Road show presentations should not downplay the significance of the risk factors or other cautionary information, and all statements in the road show must be accurate and not misleading.

§ 18:6.4 Q&A Sessions and Other Investor Follow-Up

An essential component of a live road show presentation is the accompanying Q&A session. In responding to questions from prospective investors, company management should adhere to the same guidelines that govern the information contained in the road show slides and the scripted presentation. Although it is permissible to amplify on the information contained in the preliminary prospectus, management should avoid providing new, material information. On occasion, investors contact management with follow-up questions after attending a road show presentation. In effect, this is an extension of the Q&A session, and management may respond orally to investor inquiries within the same general guidelines (follow-up Q&A should not be conducted through email exchanges, however, because of the risk that the emails will be subject to the free writing prospectus rules). Some investors go further and conduct their own due diligence on the company and its business. Investors are entitled to do so, of course, but the company and underwriters should not facilitate the process (for example, by arranging for customer calls or providing written information beyond the statutory prospectus).

§ 18:6.5 Attendance

Research analysts employed by the underwriters are prohibited from attending live road show presentations. In addition, journalists should not be invited to attend live road show presentations. A subsequent article written by a journalist who was invited to attend the presentation may constitute a media free writing prospectus[12] that is required to be filed with the SEC and may subject the company to liability. On the other hand, a published story based on a journalist's viewing of a publicly accessible electronic road show, with no involvement by the company or the underwriters, should not be treated as a media free writing prospectus.

§ 18:6.6 Forward-Looking Statements

If the company elects to make any forward-looking statements, these statements should represent the company's current best estimates and should identify key assumptions and risks upon which the estimates are based. The company should not make any forward-looking statements that it would be unable or unwilling to commit to writing and include in the prospectus. The company cannot take advantage of the safe harbor for forward-looking statements provided by the PSLRA,[13] but similar cautionary language should be included in order to invoke the "bespeaks caution" doctrine.

§ 18:6.7 Presentation Slides

In preparing the road show presentation slides, companies should be mindful of the following general tips for effective presentations:

- Presentations should be succinct and focused—usually no more than twenty-five to thirty slides, no more than five words in a slide's heading, and no more than five bullets per slide, with no more than two lines of text per bullet.
- Slides should contain key concepts rather than voluminous text and should be summaries rather than recreations of the

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12. *See* section 11:2.3.
13. The PSLRA safe harbor is discussed in chapter 23. *See* section 23:2.3.

prospectus—as more words are added to each slide, the font becomes smaller and more difficult to read.

- Presentations are more effective if they incorporate graphs, charts, tables, and other visual depictions of data or words.
- Slides should communicate key points and function as an outline for the presentation—management should not risk boring the audience by simply reading the slides.

§ 18:6.8 Potential Liability

Despite the informality of road show presentations (compared to the formality of the prospectus) and the spontaneity of accompanying Q&A sessions, most of the liability provisions that apply to the Form S-1 also apply to the contents of the road show. The company faces potential liability to investors pursuant to sections 12(a)(2) and 17(a) of the Securities Act and Rule 10b-5 under the Exchange Act for material misstatements or omissions in the presentation slides and oral statements in the road show. The company does not, however, have potential liability for the road show under section 11 of the Securities Act (which applies only to the Form S-1), and the contents of road show presentations are not subject to the company's indemnification obligations in the underwriting agreement (except to the extent the same information is contained in an electronic road show).

§ 18:7 Impermissible Offering Communications

A variety of communications—both public and private—are prohibited in conjunction with IPOs and other securities offerings. Issues regularly arise from company activities that may constitute impermissible "offers" of securities during the quiet period. The consequences of quiet-period violations vary, depending on the timing and nature of the infraction, but can include a delay in the offering, "rescission risk disclosure" in the prospectus, corrective disclosure in the prospectus, or the SEC's imposition of civil penalties.[14]

Similar concerns can result from communications made by underwriter personnel, even when the communications are unauthorized. One recurring fact pattern involves an underwriter's employee contacting prospective investors in writing—typically by email—to discuss the proposed offering prior to the availability of a preliminary prospectus containing a price range. A communication of this nature may be an unlawful offer, potentially subjecting the underwriter and the

14. The quiet period is discussed in more detail in chapter 11.