



THE NUTS AND BOLTS OF ROAD SHOWS

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A well-run road show can generate significant interest in an upcoming securities offering and assure investors that management will be able to successfully execute the issuer's strategy.

Road shows are presentations by an issuer's senior management (often accompanied by representatives of the lead underwriters) to market an upcoming securities offering to prospective investors. The investor participants typically include representatives of large institutional investors, money managers and brokerage firms. Road shows are part of the marketing process for offerings of various types of securities, but not all securities offerings involve road show presentations.

This article provides an overview of the key practical and legal considerations involved when marketing securities through a road show. It covers the following topics:

- The content, format, length and importance of road shows.
- Road show timing.
- The process for putting together a road show.
- Counsel's role in reviewing a road show presentation.
- Who attends road shows.
- The rules and filing requirements of the Securities and Exchange Commission (SEC) pertaining to road shows for registered offerings.
- The treatment of road shows in the context of private placements and other unregistered offerings.

- How underwriting agreements address road shows.
- How 10b-5 letters address road shows.
- The liability standards applicable to road shows.

It is not uncommon for companies to conduct "non-deal" road shows, which are meetings or presentations with investors when no specific offering is planned or before a planned offering has been announced. Most of this article does not apply to "non-deal" road shows.

Because the facts and circumstances surrounding each issuer and each securities offering are unique, the issues discussed in this article are not exhaustive and the relevant considerations concerning a road show should be tailored to each specific circumstance.

WHAT IS A ROAD SHOW?

Rule 433 under the Securities Act of 1933, as amended (Securities Act) defines a road show as an offer (other than a statutory prospectus or a portion of one filed as part of a registration statement) 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.

Road shows are used in connection with offerings of various types of securities, including:

- Equity securities.
- Debt securities.
- Convertible securities.

Road shows are used by both US and foreign issuers as part of the marketing process for:

- Registered offerings, including initial public offerings (IPOs) and follow-on offerings.
- Unregistered offerings, including Rule 144A and Regulation S offerings.

Road shows are designed to provide prospective investors with additional information about the issuer and its business, and often a more personal opportunity to evaluate the issuer, its management team and the securities offering. Road shows can be an integral component of the underwriters' selling efforts, helping them to "build a book" of investors for the offering.

While road shows are common in securities offerings, issuers that regularly issue securities and have investors that are very familiar with their business may only need to issue a press release and hold a brief investor conference call to alert investors and the market to their proposed securities offering.

CONTENT

The content of road show presentations varies depending on the circumstances of the offering, including:

- The nature of the securities being offered.
- Investors' familiarity with the issuer, which may depend on how often the issuer issues securities in the capital markets.
- Why the issuer is offering the securities.

Road show presentations generally cover key aspects of the securities being offered and the reasons the issuer is offering the securities. Management may also highlight what they believe are the important aspects of the issuer's business and discuss industry trends, the market for the issuer's products and other matters of interest. Road shows also typically provide investors with the opportunity to ask questions directly to management.

FORMAT AND LENGTH

Road show presentations are made through various means, including:

- By phone (conducting conference calls).
- In person (face-to-face meetings with various prospective investors).

- By webcast (publication of a recorded version of a presentation, or live streaming of a presentation, on the internet).

Road shows vary in length. Some may be as brief as a single telephone presentation to a large number of potential investors. Others require management to travel for several weeks, both throughout the US and abroad. For important investors, meetings are often "one-on-one," with the chief executive officer or chief financial officer of the issuer dedicating time (sometimes several hours) to a single potential investor.

Road shows for IPOs are often longer and more extensive than road shows for follow-on offerings because of the limited history of public information about the issuer.

IMPORTANCE

Investors often place great importance on meetings with management, making road shows a critical element in many securities offerings. Some large investors will not invest in an issuer's securities without having the opportunity to meet with senior management.

By allowing investors to interact with, and ask questions of, management in a live setting, road shows provide investors with the opportunity to:

- Better understand management's or the underwriters' perspective on, and enthusiasm for, the offering and the issuer's business.
- Personally assess the character and commitment of management.

A poorly-run road show can cause poor results for the securities offering. A well-run road show, on the other hand, can generate significant interest in an upcoming securities offering and assure investors that management will be able to successfully execute the issuer's strategy as set out in the prospectus.

TIMING OF THE ROAD SHOW

GENERAL RULE

In a registered offering, a road show can only begin after a registration statement for the offering has been filed, because Section 5(c) of the Securities Act prohibits public offers of securities before the filing of a registration statement. In practice, road shows rarely begin until a preliminary prospectus is available to investors. In an IPO, before an issuer can use any road show materials that are considered written (which includes some electronic road shows (see below *Road Shows for Registered Offerings*)), under Rule 433, it must file a preliminary prospectus that includes a price

range. The road show is usually completed before the registration statement is declared effective and the securities are priced.

In an unregistered offering, the road show generally begins after the preliminary offering memorandum is sent or made available to potential investors and before the securities are priced.

EXCEPTION FOR WKSIs IN REGISTERED OFFERINGS

Rule 163 under the Securities Act provides an exception to Section 5(c) that allows well-known seasoned issuers (WKSIs) to make oral and written offers (including road shows) before a registration statement for an offering is filed with the SEC, provided the offer is made “by or on behalf of” the issuer (that is, the issuer itself or its agent or representative, other than an offering participant who is an underwriter or a dealer, authorizes or approves the communication before it is made). For information on the SEC’s 2009 proposed amendments to Rule 163 that would broaden this exception to include underwriters, see *Box, Proposed Changes to Rule 163*.

Although Rule 163 permits WKSIs to conduct a road show before filing a registration statement, the issuer and its counsel should consider the following issues:

- **Liability and consistency with registration statement.** The road show presentation will be subject to the liability standards that apply to oral and written offers (see below *Liability Standards*). Therefore, the road show presentation should be reviewed for accuracy of its content and consistency with any draft registration statement (see below *Counsel’s Review of the Road Show*).
- **Regulation FD.** Regulation FD applies to WSKI road shows that are conducted before the filing of the registration statement. Road shows in this context cannot benefit from Regulation FD’s exception for communications in connection with a registered securities offering, even if a registration statement for the offering will be filed after the road show. Therefore, the issuer should consider whether any portion of the information in the road show presentation has not been made publicly available yet. If so, it must either remove that information from the presentation, ensure it is otherwise publicly available or require that anyone given access to the road show agrees to keep it confidential (see below *Regulation FD*).
- **Legend.** The road show presentation must include a legend similar to that required for a free

PROPOSED CHANGES TO RULE 163

In December 2009, the SEC issued a proposing release that would expand Rule 163 under the Securities Act to allow WKSIs to access a broader group of prospective investors by using underwriters to make offers before the filing of a registration statement. Under the proposed rules, an underwriter could be considered an agent or representative of the WSKI (and therefore eligible to rely on Rule 163) if:

- The underwriter receives written authorization from the WSKI to act as its agent or representative before any communications are made.
- The issuer authorizes or approves the written or oral communication before it is made.
- Any authorized underwriter relying on the Rule 163 exemption is later identified in the prospectus that is contained in the registration statement for the offering.

If adopted, the amended Rule 163 would not only allow WKSIs to conduct road shows before a registration statement is filed, but would allow them to conduct these road shows with the assistance of underwriters. This would offer WKSIs the benefit of the underwriters’ knowledge, expertise and investor base before filing a registration statement.

With the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and resulting rulemaking demands on the Staff of the SEC, as well as the current political climate, it appears that adoption of these proposed changes in the near future is unlikely.

writing prospectus (FWP) (see *Box, Additional Tips on Road Show Presentations*).

- **Filing.** Every written communication that is an offer made in reliance on Rule 163 must be filed as an FWP with the SEC when the registration statement is filed (see below *Filing FWPs with the SEC*).

PUTTING TOGETHER THE ROAD SHOW

The road show is an oral marketing presentation, usually accompanied by slides. Often, the presenters rely on a script of talking points prepared in advance. The first draft of the road show presentation is usually prepared by the lead underwriters and revised based on the issuer’s feedback. The underwriters and issuer will sometimes delay sending the road show presentation to counsel for review until a draft is agreed on between them. However, counsel should proactively request to review drafts of the presentation as it is being prepared.

The lead underwriters will also plan the road show, including the schedule and the cities and investors that management will visit. The underwriters will typically be present at, or may even be involved in,

ADDITIONAL TIPS ON ROAD SHOW PRESENTATIONS

The following are practice points for reviewing and advising on road show presentations:

- Review each part of a road show presentation before it is made available to investors. In addition to reviewing the electronic road show slides or handouts, it is important to listen to the live presentation itself because it may contain material misstatements or omissions or information that conflicts with the prospectus, even if the corresponding slides and handouts do not.
- Make sure consistent messaging is used in selling the securities. This includes the preliminary prospectus, the pricing term sheet, the final prospectus, the oral and electronic road shows, press releases and any other FWP's.
- For a road show that is considered an FWP, confirm that it includes a legend that:
 - specifies where the prospectus for the offering is available;
 - advises prospective investors to read the prospectus;
 - indicates that the prospectus can be requested from the issuer or any underwriter or dealer by calling a toll-free number; and
 - states that the FWP relates to a registered public offering.

(See *Rule 433(c)(2), Securities Act.*)

- Check that a disclaimer is included for forward-looking statements in the road show slides or handouts and have someone read the disclaimer in live or pre-recorded road show presentations.
- For a non-reporting or unseasoned issuer, make sure a road show that is considered an FWP is accompanied or preceded by the prospectus filed with the registration statement, as required by Rule 433 under the Securities Act. This condition is met if an FWP that is an electronic communication contains a hyperlink to the prospectus for the offering.

the road show presentation. Counsel, however, are rarely involved in, or present during, the road show presentation (see below *Who Attends the Road Show*).

COUNSEL'S REVIEW OF THE ROAD SHOW

There are legal rules applicable to road shows and there may be liability for statements made in the presentations (see below *Liability Standards*). Therefore, although counsel have a limited role in preparing the road show slides and talking points, they should always review these materials, as well as any recorded version of the presentation itself that will be made available to potential investors.

Both the issuer's and underwriters' counsel should review the road show presentation to ensure that it does not contain:

- Information that conflicts with or goes materially beyond information in the preliminary prospectus.
- Materially misleading misstatements or omissions.

Counsel should confirm that statements in the road show presentation are factually accurate and ensure that the issuer generally avoids making material disclosures that are not included in the preliminary prospectus. The subject matter and statements, however, do not need to be exactly the same. It is also not unusual for road show presentations to include detailed information that is not in the prospectus, if that information is consistent with the prospectus.

In reviewing the road show presentation, counsel should also consider:

- Whether the restrictions of Regulation FD apply.
- Whether to request comfort from the issuer's auditors on financial figures.
- How any non-GAAP financial information is presented.

REGULATION FD

Under Regulation FD, when a reporting issuer, or a person acting on its behalf, discloses material non-public information to certain persons (including brokers, dealers, investment advisors and holders of the issuer's securities) in circumstances where it is reasonably foreseeable that those persons will trade on the basis of that information, the issuer must make simultaneous public disclosure of that material non-public information. There is, however, an exception for information disclosed "in connection with a securities offering registered under the Securities Act," that is itself subject to certain exceptions.

Road shows for IPOs are not subject to Regulation FD (because the issuer is not yet a reporting issuer) and most road shows used in follow-on primary registered offerings can benefit from an exception to Regulation FD. All other road shows by reporting issuers, including those for unregistered offerings and follow-on secondary offerings, as well as road shows conducted before the filing of a registration statement by WKSIs under Rule 163, are subject to the restrictions of Regulation FD (see above *Exception*

for WKSIs in Registered Offerings). However, Regulation FD allows disclosure of material non-public information without public disclosure if the person who receives the information expressly agrees to maintain the disclosed information in confidence.

>> For more information on using confidentiality agreements to comply with Regulation FD, search [Bringing Investors Over the Wall](#) on our website.

When the restrictions of Regulation FD apply, counsel should carefully evaluate the content of the road show to confirm that either:

- The presentation does not contain any material non-public information.
- Any material non-public information in the presentation will be simultaneously disclosed to the public.

Otherwise, counsel should require that anyone given access to the road show presentation agrees to keep the information confidential. Because investors typically prefer not to sign confidentiality agreements in this context, issuers more often remove any material non-public information from the road show presentation or otherwise make it publicly available.

COMFORT FROM AUDITORS AND FACT BACK-UP

Road show presentations may include financial figures that are not included in the prospectus. This issue does not arise very often, however, because most financial figures used in the road show, especially those that are material, should also be included in the prospectus, or at least should be capable of being derived from other figures in the prospectus.

Still, in some instances, underwriters and their counsel will request that the issuer's auditors provide comfort (similar to that which is provided for accounting or financial figures in the prospectus) on figures in the road show presentations that are not included in the prospectus. Auditors typically do not comfort these figures because the applicable accounting guidance and the internal rules of most accounting firms strictly limit the documents that they will cover in a comfort letter.

>> For an overview of the purpose, scope and content of a comfort letter, search [Comfort Letters: Purpose and Process](#) on our website.

Road show presentations may also contain figures that are not linked to the issuer's accounting records or statements based on facts that are not included in the

prospectus. To verify the accuracy of this information, the underwriters and their counsel may ask the issuer to provide factual support, or "fact back-up," for these figures or statements. This process is usually undertaken for the prospectus, but can also be requested for figures or statements in the road show presentation. Statements may include remarks about the issuer's:

- Growth.
- Relative position among peers.
- Current projects.

The amount and type of factual support needed will vary based on the specific circumstances surrounding the request and the statements or figures it seeks to support.

NON-GAAP FINANCIAL INFORMATION

Issuers and underwriters will often include non-GAAP financial information, such as "Adjusted EBITDA" or "Free Cash Flow," in the road show presentation. Counsel should ensure that any non-GAAP financial information is both:

- Adequately reconciled to the most directly comparable GAAP measure.
- Presented in a manner that is consistent with the presentation of any non-GAAP financial information in the prospectus.

Regulation G requires a reporting company that publicly discloses a non-GAAP financial measure to reconcile it to the most directly comparable GAAP financial measure. Some road show presentations, including road show presentations for registered offerings or road show presentations that are posted on an issuer's website, would likely be considered public disclosures for purposes of Regulation G. Even for road show presentations that are arguably not public disclosures, such as those for private placements by non-reporting companies, it is still advisable as a best practice to ensure that non-GAAP financial measures are reconciled in accordance with Regulation G.

>> For an overview of Regulation G, search [Using Non-GAAP Financial Information](#) on our website.

WHO ATTENDS THE ROAD SHOW

Road shows are typically attended by:

- Institutional investors.
- Retail investors.
- Money managers.
- Brokerage firms.

Generally, the only persons prohibited from attending road shows where the investment banking sales force and the issuer are present are research analysts and other persons with research positions. Under NYSE Rule 472(b)(6)(i) and NASD Rule 2711(c)(5), a research analyst is prohibited, directly or indirectly, from:

- Participating in a road show that is related to an investment banking services transaction.
- Engaging in any communication about an investment banking services transaction with a current or prospective customer in the presence of personnel from the investment banking department or issuer management.

Likewise, personnel from the investment banking department are also prohibited, directly or indirectly, from directing a research analyst to engage in:

- Sales or marketing efforts related to an investment banking services transaction.
- Any communication with a current or prospective customer about an investment banking services transaction.

These rules were adopted to:

- Eliminate three-way communications among research analysts, customers and investment banking personnel.
- Eliminate three-way communications among research analysts, customers and the issuer.
- Reduce pressure on research analysts to give overly optimistic views regarding the issuer and its future and to protect research objectivity.

Research analysts can, however, generally listen in or view road show presentations in listen-only mode and from a separate location.

>> For more information on the rules governing research analysts, search [Research Analysts and Research Reports](#) on our website.

For an unregistered offering under Rule 144A and Regulation S, only qualified institutional buyers (QIBs) and non-US persons may have access to the road show. Therefore, companies and underwriters should protect road show presentations transmitted over the internet with passwords and should only provide these confidential passwords to entities that the company and the underwriters believe are QIBs or non-US persons. Usually a company and the underwriters will require that each QIB and non-US person represent to the company that it qualifies as such. As a practical matter, most investment banks have well-established procedures for conducting

Rule 144A/Regulation S road shows (see below *Road Shows for Unregistered Offerings*).

Although they are not prohibited from attending road shows, counsel typically do not attend.

ROAD SHOWS FOR REGISTERED OFFERINGS

Traditionally, road shows were live, in-person meetings with prospective investors and both the presentations themselves and any materials handed out during the meetings were considered oral communications (so long as the materials were collected at the end of the meeting and were not separately available). With the advent of the internet, road shows are now often webcast and, depending on the circumstances, may be considered written communications under the Securities Act.

The determination of whether a road show is considered an oral or a written communication (and, in turn, whether it is considered an FWP), impacts whether the road show materials must be filed with the SEC (see *Box, SEC Filing Requirements*). It also affects how the road show will be addressed in the underwriting agreement (see below *Underwriting Agreements*).

Road shows that are used for unregistered offerings are not subject to these rules and filing requirements (see below *Road Shows for Unregistered Offerings*).

FREE WRITING PROSPECTUS

An FWP is a permissible written communication that WKSIs can issue at any time and other eligible issuers can issue after the filing of a registration statement, subject to certain conditions.

A road show is considered an FWP if it is deemed a written communication. Depending on the circumstances, an electronic road show might be considered an FWP. Road shows that are not considered written communications are not FWPs.

In some cases, road shows that are FWPs must be filed with the SEC (see below *Filing FWPs with the SEC*).

ROAD SHOWS THAT CONSTITUTE WRITTEN COMMUNICATIONS AND FWPs

A road show will be considered a written communication if it falls within the definition of a graphic communication in Rule 405 under the Securities Act. Rule 405 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 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.”

Graphic communications can be produced in a studio and edited, and made available to investors to download and play on their own time.

Rule 405 excludes from the definition of graphic communication any communication that:

“originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication, although it is transmitted through graphic means.”

Electronic road shows that do not originate live and in real-time are considered graphic communications and therefore are written communications. As a result, they are also FWP's. They include:

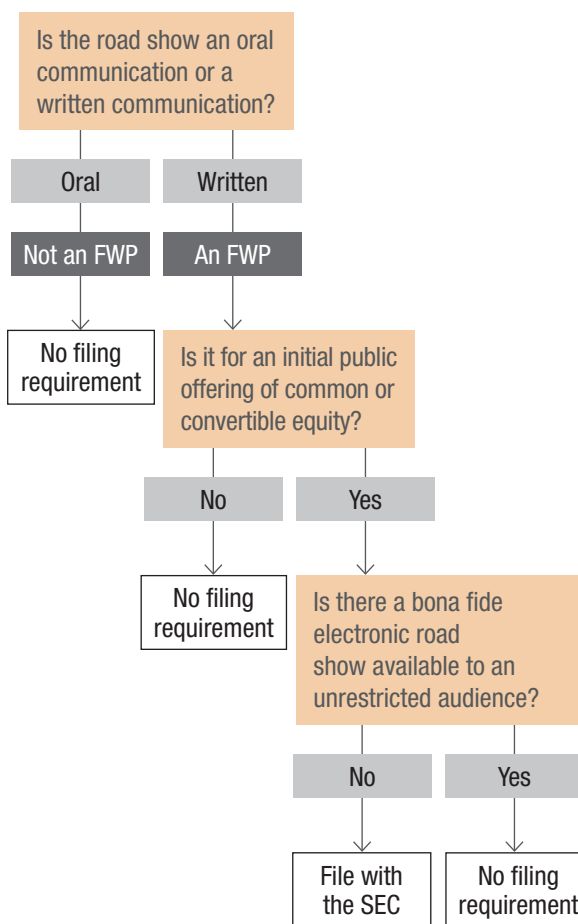
- Live telephone calls, videos or webcast conferences that are recorded by or on behalf of the originating party or by a participant and later retransmitted.
- E-mails, facsimiles and electronic postings on websites.
- Slides and handouts distributed during electronic road shows that are not collected or that are otherwise separately available.
- All radio or television broadcasts, whether or not live and regardless of how the radio or television broadcast is transmitted, whether through airwaves, cable, satellite or the internet, and regardless of how the recipient receives it.

LIVE ROAD SHOWS ARE CONSIDERED ORAL COMMUNICATIONS

Based on the exclusion from the definition of graphic communication in Rule 405, the following communications are not considered graphic communications and, as a result, are not written communications or FWP's and do not need to be filed with the SEC:

- Traditional live road shows where the issuer and the underwriters meet in person with prospective investors.
- Any visual aids, such as slides, that are used as part of the live road show that are not handed out or otherwise separately made available to investors.
- Handouts that are distributed at live road shows if attendees return them before leaving the presentation.

SEC FILING REQUIREMENTS



- Live telephone conversations, even if recorded by a participant.
- Transmissions of live road shows to overflow rooms, even to those in other cities, that are not recorded and are transmitted live by either telephone or internet.
- Webcasts and video conferences that originate live and in real-time and are transmitted through video conferencing facilities or to a live audience (the ability of a member of the audience to record the webcast or video conference does not affect its classification as an oral communication).

FILING FWPs WITH THE SEC

If a road show is considered an oral communication and therefore not an FWP, it does not need to be filed with the SEC. Even if a road show is considered a written communication and therefore an FWP, it does not necessarily need to be filed.

The filing requirements of Rule 433 do not apply to road shows that are considered FWP's unless they are used in an IPO of common or convertible equity. Even in this case, under Rule 433(d)(8)(ii), an IPO issuer can avoid the filing requirement by making at least one bona fide version of the road show readily available to an unrestricted audience electronically. If more than one version of a road show constituting a written communication exists, the bona fide electronic road show must be available to the unrestricted audience no later than the time at which other versions are available.

This bona fide electronic road show or "retail" electronic road show is defined in Rule 433 as a road show that is a written communication transmitted by graphic means that contains a presentation by one or more officers or persons in an issuer's management. If the issuer is using one or more other versions of the road show that are written communications, the bona fide road show must include discussion of the "same general areas of information" regarding the issuer, management and the securities being offered as in the other versions.

The bona fide road show does not need to:

- Address all of the same subjects or cover the exact information as in the other versions (for instance, those that may be provided to institutional investors).
- Have the same members of management present as in the others versions.
- Contain all of the projections as the version that is available to a restricted audience.
- Provide an opportunity for questions and answers, even if the other versions do.

All road shows that are offers and written communications are FWP's. This means they may be subject to representations and warranties and indemnities in the underwriting agreement regardless of whether they are required to be filed (see below *Underwriting Agreements*).

ROAD SHOWS FOR UNREGISTERED OFFERINGS

Road shows are also used to market unregistered offerings. Many practices from registered offerings are observed in the context of unregistered offerings. For example:

- Counsel should review the road show presentation in an unregistered offering and eliminate or revise any statements in the road show presentation preliminary that are inconsistent with statements in the preliminary offering memorandum.

- The treatment of the road show presentation in a purchase agreement and 10b-5 letter in the unregistered context is similar to the registered context (see below *Underwriting Agreements* and *10b-5 Letters*).

While the treatment of road shows in an unregistered offering is similar in most respects to the treatment of road shows in a registered offering, the concept of an FWP is not applicable to unregistered offerings and the filing requirements for FWP's do not apply. If the issuer is a reporting company, however, Regulation FD will apply to the road show, since the exception from the restrictions of Regulation FD for disclosures in connection with registered offerings will not apply (see above *Regulation FD*).

UNDERWRITING AGREEMENTS

The underwriting agreement for a securities offering contains certain representations and warranties from the issuer. One common representation and warranty relates to road shows, or "issuer free writing prospectuses," which include electronic road shows, even those that are not required to be filed. The portions of live road shows that are considered oral communications (and therefore not FWP's) are typically not covered.

The representation will generally state that the issuer FWP did not, and will not, include any information that conflicted or conflicts with the information contained in the registration statement (including the prospectus). It may also state that if at any time there is a conflict between the information in the issuer FWP and the registration statement, or if the issuer FWP contains a material misstatement or omission, then the issuer will promptly notify the underwriters and amend or supplement the issuer FWP to eliminate the conflict, material misstatement or omission.

Underwriting agreements will also typically contain a representation that at the applicable time (the time when the pricing terms are first distributed to prospective investors), any issuer FWP's, including electronic road shows and other FWP's, taken together with the "general disclosure package" (which typically includes the preliminary prospectus and the pricing term sheet or pricing terms), do not contain any material misstatements or omissions.

Generally an issuer will not be asked to represent that the electronic road show alone contains no material misstatements or omissions, because investors are expected to have the preliminary prospectus and other components of the general disclosure package in hand when making their investment decision.

In some underwriting agreements, this representation only covers the disclosure package and other FWP's, but not electronic road shows. Whether this representation covers electronic road shows can depend on the circumstances and may be negotiated.

10b-5 LETTERS

It is unusual for a 10b-5 letter delivered by outside counsel to cover a road show presentation. Law firms generally limit their 10b-5 letters (which state that nothing came to counsel's attention that makes the offering document materially misleading) to the statutory disclosure package that is delivered at the time the registration statement becomes effective, the time the securities offering is priced and the time the securities offering closes.

The road show presentation is supplemental to the statutory disclosure package, meaning that all the information that investors need to have to make an informed investment decision should be included in the statutory disclosure package, without a need to refer to the road show presentation.

>> For more information on 10b-5 letters, including the distinction between 10b-5 letters and legal opinions, search [Legal Opinions in Securities Offerings](#) on our website.

LIABILITY STANDARDS

The principal federal securities law provisions that potentially impose liability on an issuer and offering participants in connection with a securities offering are Sections 11 and 12 of the Securities Act and Rule 10b-5 under the Securities Exchange Act of 1934, as amended.

SECTION 11 LIABILITY

Section 11 of the Securities Act imposes liability when a registration statement, at the time it becomes effective, contains a material misstatement or omission. Because a road show presentation that is considered an FWP is not considered to be part of the registration statement, it is generally not subject to liability under Section 11, even if it is required to be filed.

SECTION 12 LIABILITY

All road shows that are offers are subject to liability under Section 12(a)(2) of the Securities Act, regardless of whether the road show is considered written or oral.

Section 12(a)(2) provides buyers of a security with a remedy for material misstatements and omissions

PRACTICE
NOTES

DOCUMENTS

CLAUSES

CHECKLISTS

ARTICLES

The following related Practice Notes can be found on [practicallaw.com](#)

>> **Simply search the title OR resource number**

[Registration Process: Overview or 7-380-8736](#)

[Conducting an Unregistered Offering: Overview or 3-385-2547](#)

[Registration Process: Publicity or 1-381-0191](#)

[Free Writing Prospectuses or 4-381-9680](#)

[Complying with Regulation FD \(Fair Disclosure\) or 1-383-2635](#)

made by anyone who offers or sells a security by means of a prospectus or an oral communication.

RULE 10b-5 LIABILITY

Rule 10b-5 makes it unlawful to employ any scheme or device to defraud, make any material misstatements or omissions 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 any security. Rule 10b-5 has been used by investors against issuers, officers and directors who sign the registration statement, auditors and underwriters, all of whom are potentially liable under this rule, for alleged misstatements in road shows.

To establish a claim under Rule 10b-5, an investor must show that:

- There was a material misstatement or omission.
- The misstatement or omission was "in connection with" the purchase or sale of securities.
- There was scienter, the intent or knowledge of manipulation or deception.

>> For more information on liability under federal securities laws, search [Liability Provisions: Securities Offerings](#) on our website.