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BASELOAD

Current Topics in the Power and Utilities Capital Markets

APRIL 2018

Contents

Time Is Not On Your Side: Equity Press Releases

The sequence of events in launching an equity deal is critical. And the most important event in such sequence is the posting of the launch press release that announces the deal. Even the most mild-mannered ECM banker will turn vitriolic if the launch press release does not hit the wire services soon after 4:01 p.m. for a post-close launch.

Similarly, after pricing a deal, issuers frequently issue a press release announcing the results of the pricing. Most deal participants are fine with such a communication, but — depending on the manner in which equity is sold — banks may have a strong preference about the type of pricing information that is included in the pricing press release.

This article will discuss various legal and practical considerations in the use of press releases in launching and pricing equity deals. There are several different scenarios for launching an equity deal. This article assumes a more standard process where the issuer is a WKSI with an effective shelf registration statement and utilizes a preliminary prospectus supplement, along with the launch press release, to launch the deal. Finally, because most power and utility companies are listed on the New York Stock Exchange (NYSE), this article will focus solely on the applicable NYSE related rules.

First: Get Acquainted with Rule 134

Drafts of the launch and pricing press releases ought to be circulated, reviewed and finalized well before launch. Each press release ought to be compliant with Rule 134 under the Securities Act of 1933. Rule 134 is entitled “Communications Not Deemed a Prospectus” and contains a list of certain information that may be included (e.g., issuer’s name, type of business, type of security, and the names of the underwriters) and certain information that must be included (e.g., where investors can obtain a written prospectus) in the press release.

As its title implies, Rule 134 allows certain information relating to a securities offering to be included in a press release without having the press release being deemed a prospectus. To the extent the content of the press release veers from the strict confines of Rule 134, the deal team risks the press release being deemed a prospectus, which may necessitate its filing with the Securities and Exchange Commission (SEC). Certain deal participants may be unfazed by this filing requirement. We have certainly experienced issuers that sought to include marketing-type information or even CEO quotes in launch and pricing press releases. If required to file either press release as a prospectus or FWP, however, the deal team will need to consider additional liability and compliance issues. For instance, if the launch press release contains marketing language beyond the scope of Rule 134 and needs to be filed as an FWP, will the underwriters and their internal counsel be comfortable with such information being deemed part of the disclosure package? Conversely, will the issuer be comfortable indemnifying the underwriter for any liability relating to the contents of the press release? Although these issues may not be fatal, they can certainly complicate a launch if not resolved beforehand.

Second: Bring IR into the Fold

Most issuers will instruct their investor relations/corporate communications group (IR) to take possession of the finalized press release and deal with the logistics of posting the release on the wire services. Although this task is certainly within the normal day-to-day responsibilities of a public company's IR department, the deal participants need to stress to IR the acute timing requirements for posting the launch press release. Frequently, IR teams are unaware of the underwriters' need to get the launch press release posted as soon as possible after market close. A failure to explicitly communicate this requirement to IR can jeopardize a successful launch. Our experience has been that IR will need the finalized launch press release, at the latest, by noon on the day of launch (assuming a post-close launch) in order to interact with the wire services and ensure release soon after the market close.

Although the launch process is certainly the more demanding sequencing event, deal participants may also need to explain timing issues relating to the pricing of the equity. If a deal is priced before market open and a pricing press release is contemplated, the IR team will most likely be subject to NYSE notification deadlines. Undoubtedly, most IR professionals are well aware of the NYSE's Timely Alert Policy, which is discussed in detail below. Some equity deals, however, can price as late as 8:30 a.m. on the morning following launch. In that scenario, the NYSE Timely Alert Policy will require the IR team or other representatives of the issuer tasked with dealing with the NYSE to call the NYSE 10 minutes <u>before</u> posting the press release and to e-mail a copy of it. Furthermore, to the extent NYSE officials have any questions about the terms of the pricing (e.g., is the underwriters' discount material?), the IR group (or the applicable issuer representative) will need to be familiar with the pricing terms and able to answer any questions from NYSE officials.

Third: Keep Current with the NYSE's Timely Alert Policy

Both issuers and underwriters will need to consider Section 202.06 of the NYSE Listed Company Manual in relation to the dissemination of material news by listed companies (the Timely Alert Policy). Failure to comply with the Timely Alert Policy may lead to a trading halt in connection with material news events.[1]

For most issuers, the issuance of equity is a material event which warrants notification to the NYSE. Prior to December 2017, the NYSE had advised listed companies to delay the release of material news until the earlier of (i) publication of such company's official closing price on the NYSE or (ii) 4:15 p.m., in order to allow for the orderly closing auction process. In the context of an equity offering, waiting until 4:15 p.m. to post the launch press release seemed like an eternity to an ECM desk.

[1] We previously covered the Timely Alert Policy, particularly with respect to the preparation of a pricing press release in connection with a bought deal, in our September 2014 Baseload article entitled "Bought Deals and the NYSE", available at https://www.hunton.com/images/content/3/5/v3/3591/Baseload-September-2014.pdf.

In December 2017, the SEC, however, approved an amendment to the Timely Alert Policy, which became effective immediately[2], specifically prohibiting (rather than simply advising) listed companies from publishing material news after the official closing time for the NYSE's trading session until the earlier of (i) publication of the official closing price of the listed company's security or (ii) 4:05 p.m.[3]

The revised Timely Alert Policy was implemented to alleviate confusion caused by price discrepancies between the NYSE closing price and trading prices on other markets after the NYSE official closing time and before the NYSE closing auction is completed, which can be after 4:00 p.m. Although trading on the NYSE stops at 4:00 p.m., the order book for each listed security on the NYSE is manually closed by such security's designated market maker. This process may occasionally take a brief period of time before the closing auction is completed. In addition, often times, even after 4:00 p.m., there is trading on other exchange and non-exchange venues (other markets). And so, if a listed company releases material news immediately after 4:00 p.m., but prior to the completion of the closing auction on the NYSE, a significant price difference in nearly contemporaneous trades on other markets and the official closing price on the NYSE can occur, which can cause investor confusion.

Significantly, the 4:05 p.m. release time of material news set forth in the revised Timely Alert Policy is more in line with the speedy timing requirements of equity offerings. If underwriters are uncomfortable with a 4:05 p.m. posting of the launch press release, an issuer can refer to NYSE Connect (https://www.nyse.com/connect) to obtain real-time information about the timing of completion of the closing auction for their security or, in the alternative, can obtain this information from major market data vendors.[4]

[2] https://www.sec.gov/rules/sro/nyse/2017/34-82213.pdf. See also https://www.nyse.com/publicdocs/nyse/regulation/nyse/Material_News_Issued_Immediately_After_NYSE_Closing_Time_20171207.pdf

[3] It should be noted, however, that the revised Timely Alert Policy continues to retain the advisory text that recommends that listed companies intending to issue material news after the close of trading on the NYSE delay such announcement until the earlier of (i) publication of such company's official closing price or (ii) fifteen minutes after the close of trading.

[4] In the alternative, issuers can ask an underwriter to obtain this information on a real-time basis, which is the approach that was utilized in two recent equity deals involving Hunton lawyers.

After pricing, the deal team will also need to consider the necessity of a pricing press release. As previously mentioned, for most issuers, equity issuances are material. Although a pricing press release is not specifically required under SEC rules, issuers frequently utilize a press release after pricing to communicate pricing information and, in so doing, alleviate any Regulation FD concerns. In a standard marketed deal (i.e., where the underwriters engage in a marketing period after launch in order to build a book prior to pricing), the contents of a press release are fairly uniform, including the amount sold, the public offering price and net proceeds to the company.

In a bought deal (i.e., where the underwriters agree to purchase the stock generally prior to receiving firm commitments from purchasers) the contents of the pricing press release can be a little more complicated. For marketing purposes, the underwriters will not want to include in the pricing press release the net proceeds to the issuer or the price per share paid by the underwriter (which, ultimately, will be disclosed in the final prospectus supplement). While the NYSE has stated that it understands the market practice for bought deals, with respect to pricing press releases, the NYSE has stated:

> While it is the listed company's obligation to determine whether a particular transaction is material, the [NYSE] believes the following factors should be considered. In the case of a "bought deal", the materiality of a particular transaction will depend on a number of factors, including, but not limited to, the number of shares sold, the size of the discount to the public market price paid by the underwriter and whether the transaction involves a sale by the company or one of its stockholders. **If the discount to the public market price is such that its disclosure would materially affect the market for the securities, then it may be appropriate to disclose the pricing terms (or amount of securities sold and net proceeds to the company or stockholder) even if the number of shares sold in the transaction is not itself material.**[5]

[5] NYSE, *Application of NYSE/NYSE Amex Timely Alert Policy to Follow-On and Secondary Offerings* (2011).

For non-distressed companies in the utility industry, it would be unusual for the underwriters' discount on a bought deal to "materially affect the market for the securities." Regardless, representatives of the issuer responsible for dealing with the NYSE must be familiar with the pricing terms of the equity to engage in dialogue with the NYSE. As mentioned above, if IR is designated with the task of dealing with the NYSE, they must prepare for this possibility.

The below sample timeline may be helpful in sequencing the issuance of launch and pricing press releases in light of the revised Timely Alert Policy.

Sample Timeline for Transaction Launching After Market Close on Day 1

Launch Press Release (After Market Close on Day 1)

The NYSE prohibits dissemination of material news by listed companies until **the earlier of**: (1) publication of the issuer's official stock closing price on the NYSE or (2) 4:05 p.m.

"To-Do"

- Issuer to confirm publication of the issuer's official stock closing price on the NYSE either through (1) NYSE Connect (https://www.nyse.com/connect) or (2) an underwriter, in each case, on a real-time basis (if between 4:01 p.m. and 4:05 p.m.).
- Issue the launch press release.
- Issuer (or its counsel) should promptly e-mail a copy of the issued launch press release to NYSEalert@nyse.com. Note there is no need for the issuer to call the NYSE in advance.

Pricing Press Release (Either After Market Close on Day 1 or Before Market Open on Day 2)

Assuming a transaction has priced (1) on Day 1 or (2) the morning of Day 2 prior to market open, the issuer will need to release the pricing press release **no later than 9:15 a.m. on Day 2**. Depending on the time of release, there are two scenarios:

1. If pricing press release will be issued on Day 1 or the morning of Day 2 **prior to 7:00 a.m.**:

"To-Do"

- Issue the pricing press release.
- Issuer (or its counsel) should promptly e-mail a copy of the issued pricing press release to NYSEalert@nyse.com. Note there is no need for the issuer to call the NYSE in advance.

2. If pricing press release will be issued the morning of Day 2 **at or after 7:00 a.m.**:

"To-Do"

- At least 10 minutes before the release of the pricing press release, issuer will need to (1) call the NYSE Market Watch & Proxy Compliance Team (1-877-699-2578 or 212-656-5414), informing the NYSE that the issuer is going to be issuing a pricing press release and (2) send an e-mail to NYSEalert@nyse.com, attaching a copy of the pricing press release.
- Issue the pricing press release.

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*Note that if the issuer has not released the pricing press release by 9:15 a.m. on Day 2 after providing advance notification, the NYSE will contact the issuer and could halt trading.

 

Offshore Drilling Down: Offering into Europe Gets Trickier

A series of recent regulations and enforcement actions promulgated by regulators in the European Union (E.U.) and the United States (U.S.) have introduced new complexity for issuers seeking to access European debt and equity markets, offer certain foreign currency-denominated securities, conduct an offering through E.U. broker-dealers or list their securities on certain E.U. trading venues. This article highlights some recent considerations for U.S. corporate equity and debt issuers and their underwriters by examining (1) the new Markets in Financial Instruments Directive (MiFID II) put in place in the European Economic Area (EEA) earlier this year, (2) 2016 reforms regarding E.U. Market Abuse Regulations and (3) U.S. Federal Reserve requirements for U.S. corporate issuers to submit Treasury International Capital Form SLT.[1]

I. MiFID II

In January 2018, E.U. regulators implemented MiFID II, a far-reaching package of financial reforms designed to offer (1) greater transparency into trading across a range of securities and derivatives and (2) enhanced investor protection.[2] While a key aim of MiFID II is to regulate off-exchange markets, such as trading in over-the-counter derivatives, the regulatory regime also has significant implications on traditional underwriting activities related to corporate equity and debt offerings of U.S. issuers.

One key aspect of MiFID II is the introduction of "product governance" rules. "Product governance" refers to the systems and controls firms have in place for the design, approval, marketing and ongoing management of products throughout their lifecycle to ensure they meet legal and regulatory requirements. The new rules apply to (1) *manufacturers* (e.g., an EEA investment firm advises a corporate issuer on a bond offering in a traditional lead underwriting capacity) and (2) *distributors* (e.g., an EEA investment firm that offers or recommends financial instruments to clients).[3] For example, an EEA investment firm serving as a lead underwriter on a bond offering for a U.S. corporate issuer would likely be deemed both a manufacturer and distributor, while an EEA investment firm serving in the syndicate in a passive capacity would likely just be deemed a distributor.[4] Non-EEA investment firms are also indirectly impacted under this regime by virtue of distributing financial instruments manufactured by an EEA investment firm (within and outside the EEA). Under MiFID II, any product governance obligation falls only on an EEA investment firm, however (e.g., when a non-EEA investment firm offers bonds "manufactured" by an EEA investment firm), the EEA investment firm will be tasked with obtaining sufficient information about the bonds and the target market of such bonds from the non-EEA investment firm.

[1] This article was prepared primarily by lawyers in the New York office of Hunton Andrews Kurth LLP. The information in this publication, including information about laws other than U.S. law, is provided for informational purposes only and should not be construed as legal advice.

[2] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) , *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2014_173_R_0009&from=EN&_sm_au_=iVVq5NHM5SQ6nZHN. The MiFID II Directive (2014/65/EU) and Markets in Financial Instruments Regulation (Regulation 600/2014) (MiFIR) repealed and recast the Markets in Financial Instruments Directive (2004/39/EC) (MiFID).

[3] See Articles 16(3) and 24(2) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2014_173_R_0009&from=EN&_sm_au_=iVVq5NHM5SQ6nZHN.

[4] See Article 9 of Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L0593&from=EN.

Practically speaking, MiFID II imposes a few introductory considerations for U.S. corporate issuers and their underwriters for every transaction, as highlighted in a few example transactions below:

1. SEC-registered senior notes offering by U.S. corporate issuer underwritten by two firms (both are U.S. broker-dealers).
2. Rule 144A/Regulation S senior notes offering by U.S. corporate issuer underwritten by two firms (both are U.S. broker-dealers).
3. Rule 144A/Regulation S senior notes offering by U.S. corporate issuer underwritten by two firms (both of which are EEA broker-dealers).

First, in examples (1) and (2), non EEA investment firms are serving as underwriters. Even if the issuer permits sales into the EEA, underwriters only need to be cognizant of the general selling restrictions by non EEA firms to EEA investors. Both the issuer and the underwriters should discuss the appropriate selling legend to be added to the prospectus. supplement or offering memorandum, respectively, regarding sales into the EEA. Note that since the implementation of MiFID II in January 2018, issuers have frequently included updated selling legends[5] warning, among other things, that the securities being offered are not intended to be offered, sold or otherwise made available to and should not be offered, sold or otherwise made available to any retail investor in the EEA.

Example (3) offers a scenario whereby EEA investment firms are serving as underwriters in the transaction. The reason for their participation might be a desire to execute the transaction in the EEA (e.g., a Euro-denominated bond offering or a reverse inquiry Rule 144A/Regulation S bond offering targeted toward a few investors where executing the transaction in the EEA is more practical from a time-zone perspective). The underwriters in this transaction could be subject to product governance rules and will thus need to consider whether appropriate disclosure and identification of the target market of investors for MiFID II purposes is required.

II. E.U. Market Abuse Regulation

In addition to new considerations under MiFID II, issuers with securities admitted to trading in the E.U. also face increased compliance hurdles as a result of the market abuse regulation (MAR) in the E.U. that took effect in July 2016, which aims to combat market abuse, market manipulation and insider dealing.[6] U.S. issuers with debt or equity securities admitted to trading in the E.U., including Euro-denominated bonds trading on certain exchanges, face certain regulations from E.U. regulators under MAR.

Under the prior iteration of the MAR regime, U.S. issuers with securities trading on an E.U. regulated market (such as the London Stock Exchange) were subject to MAR.[7] Under the revised 2016 rule, U.S. issuers with securities trading on a multilateral trading facility (MTF) (such as Luxembourg's Euro MTF and Ireland's Global Exchange Market) or securities traded on organized trading facilities (OTF) (a new trading venue created by MiFID II) are now also subject to MAR. A significant amount of Euro-denominated debt securities trading on multilateral trading facilities were previously unregulated by MAR.

[5] An example selling legend is: "The bonds are not intended to be offered, sold or otherwise made available to and should not be offered, sold or otherwise made available to any retail investor in the European Economic Area ("EEA"). For these purposes, a retail investor means a person who is one (or more) of: (i) a retail client as defined in point (11) of Article 4(1) of Directive 2014/65/EU (as amended, "MiFID II"); or (ii) a customer within the meaning of Directive 2002/92/EC (as amended, the "Insurance Mediation Directive"), where that customer would not qualify as a professional client as defined in point (10) of Article 4(1) of MiFID II; or (iii) not a qualified investor as defined in Directive 2003/71/EC (as amended, the "Prospectus Directive"). Consequently no key information document required by Regulation (EU) No 1286/2014 (as amended, the "PRIIPs Regulation") for offering or selling the bonds or otherwise making them available to retail investors in the EEA has been prepared and therefore offering or selling the bonds or otherwise making them available to any retail investor in the EEA may be unlawful under the PRIIPS Regulation."

[6] Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (and market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, ***available at*** https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0596&from=EN.

[7] See *Id.*, Preamble (8).

The effect of the expanded coverage of MAR for U.S. issuers who have consented to or approved trading of its securities on an E.U. trading venue regulated by MAR depends on whether the issuer's securities trade on an E.U. regulated market or an MTF or OTF. Issuers with securities trading on an E.U. regulated market will already be familiar with MAR compliance requirements, while issuers with securities that trade on an MTF or OTF will not. Issuers currently in this situation or contemplating listing their securities on one of these three types of E.U. markets should familiarize themselves with the ongoing disclosure, recordkeeping and regulations on dealings by senior management regarding the subject securities MAR imposes. Issuers should note that under MAR, there is a difference between issuers who have consented to or approved the trading of their securities on an E.U. trading venue regulated by MAR and those who have not. If a third party arranged for admission of the issuer's securities on an E.U. trading venue without notification to the issuer, the issuer would not have the disclosure, recordkeeping and management trading restrictions of an issuer that consented to or approved trading of its securities. MAR would still apply, however, to those trading in the securities.

III. Treasury International Capital Form SLT

One additional consideration for U.S. issuers is the Federal Reserve's requirement to file Treasury International Capital Form SLT (Form SLT). Form SLT is a monthly report on cross-border portfolio investment in long-term marketable securities by U.S. and foreign residents and is used by the U.S. government for formulating international financial and monetary policy. The form is designed to collect data on (1) the securities of a U.S. person that are held by foreign resident investors (not through a U.S.-resident custodian) and (2) a U.S. person's investments in foreign securities that are not held by a U.S.-resident custodian, in each case, when the aggregate amount of all such securities exceeds $1 billion.

If the fair value of the issuer's aggregate "reportable securities" equals or exceed $1 billion on the last business day of the reporting period, the issuer is required to file a Form SLT for that reporting period and each remaining reporting period in that calendar year. Such obligation to file Form SLT will continue for the issuer for the remainder of the calendar year even if the fair value of such "reportable securities" falls below $1 billion.[8]

"Reportable securities" are the aggregate amount of: (1) securities of a U.S. person[9] held by a foreign resident investor and (2) a U.S. person's investments in foreign securities. Typically, these would include foreign bonds held by investors through foreign-resident securities depositories such as Clearstream Banking, S.A. and Euroclear Bank S.A./N.V., but not through a U.S. depository such as The Depository Trust Company.[10] Types of securities applicable to this definition are: (1) equity interests such as common stock, preferred stock, restricted stock, depositary receipts/shares, and other types of equity interests such as limited partnership interests and (2) long-term debt securities such as senior notes, convertible bonds, asset-backed securities, and floating rate securities. Note that the reporting requirements exempt securities with an original maturity of one year or less.[11] Holdings of certain foreign securities by the issuer are also included in this calculation. Non-U.S. dollar denominated securities must be converted to U.S. dollars using the spot exchange rate at the close of business on the last business day of the month.[12] The Treasury Department also advises that filers should consolidate all of their subsidiaries in accordance with U.S. Generally Accepted Accounting Principles.[13]

The implications of Form SLT for U.S. corporate issuers require that such issuers evaluate their foreign securities issuances and foreign holdings in accordance with Form SLT's requirements on an ongoing basis. Any issuer that regularly offers its securities outside of the U.S. to foreign investors could potentially be subject to these requirements.

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[8] Department of the Treasury, Instructions for the Monthly Treasury International Capital Form SLT (February 2018), 8, *available at* http://ticdata.treasury.gov/Publish/sltinstr-june2018.pdf.

[9] Such definition includes all U.S. persons (as defined in 22 U.S.C. §3102) who are U.S.-resident custodians (including U.S.-resident central securities depositories), U.S.-resident issuers and U.S.-resident end-investors who meet or exceed the $1 billion reporting threshold.

[10] *Supra* Note 8 at 5-6.

[11] *Id.*, 11.

[12] *Id.*, 9.

[13] *Id.*, 7.

Electronic Road Shows – Talk Is Not Cheap (Why the Voiceover Matters)

Pre-recorded electronic road show presentations are often used to enhance marketing efforts. But there are often differing views among the deal participants about the exact format of the electronic road show and certainly with respect to its content. See the January 2014 issue of Baseload, "*Electronic Road Shows- What to Leave In, What to Leave Out*".

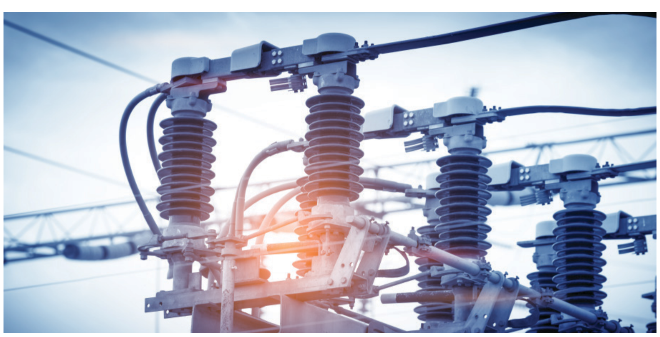
Recently we have been involved in several 1933 Act registered transactions in which the deal team considered posting slides to an electronic road show platform without a recorded voiceover from the issuer's management. We will assume for the purpose of this article that the electronic road show at hand is an "offer" of securities in a 1933 Act registered offering. Therefore, we are not discussing a "non-deal road show" wherein the issuer is conducting a road show outside of the context of a concurrent or upcoming securities offering.[1] Further, we will also assume that that the electronic road show is not presented live or together with a live management presentation. (For road shows that are transmitted live, there is generally more flexibility under the securities laws for an associated slide deck[2])

[1] The Rule 168 safe harbor under the 1933 act permits, under certain circumstances, an issuer to conduct a non-deal road show with confidence that the presentation will not be deemed an "offer". To adhere to the Rule 168 safe harbor, the issuer must be required to file, and be in compliance with the filing of, its 1934 Act reports and the "timing, manner and form" of the non deal road show must be consistent with similar past presentations.

[2] The explanatory note to Rule 433(d) states:

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

So, road show slides are not considered to be written offers as long as copies are not left behind.



The problem with posting a set of road show slides on an electronic road show platform with no voiceover (and not otherwise delivered in connection with a live management presentation) is that such slides arguably do not constitute a "road show" under the SEC rules. Rule 433 of the 1933 Act defines a road show as an offer ***that contains a presentation made by one or more members of the issuer's management***, which includes a discussion of the issuer, the management or the securities being offered.

So, if the set of road show slides posted on an electronic road show platform with no voiceover (and not otherwise delivered in connection with a live management presentation) is not a road show under the SEC rules, then what is it? Under Rule 405 of the 1933 Act, a free writing prospectus (FWP) is any written communication that constitutes an offer to sell or a solicitation of an offer to buy the securities that are the subject of a registered offering that is used after a registration statement has been filed. FWPs are governed by Rules 164 and 433. Rule 164 provides that once a registration statement has been filed, an issuer or an underwriter may use an FWP if, among other things, the issuer is an eligible issuer, the offering is an eligible offering and certain other conditions of Rule 433 are met.

Even with a voiceover, the pre-recorded electronic road show is an FWP. However, because of the guidance provided by Rule 433(d)(8)(i), as long as there is a voiceover it is an FWP that is not required to be filed. If there is no voiceover, then arguably there is no "presentation made by one or more members of the issuer's management". And therefore there is no road show. And therefore the guidance provided by Rule 433(d)(8)(i) is unavailable and the FWP must be filed. Failure to comply with the filing requirements of Rule 433 will essentially result in a violation of Section 5(b)(1) of the 1933 Act. And Section 12(a)(1) of the 1933 Act provides a rescission right to any investor who buys securities in a transaction violating Section 5 of the 1933 Act.

There are instances in which the deal team may agree that it's beneficial to nonetheless use the slides and file them as an FWP with the SEC. The FWP, even when filed, will not be a part of the issuer's registration statement and will therefore not be subject to the rigorous liability standard of Section 11 of the 1933 Act. The FWP will likely, however, become part of the disclosure package and therefore will be covered in the 10b-5 opinions delivered at closing. The difficulty with this approach, however, is that the deal slides very rarely stick to the "four corners" of the information contained in the prospectus and the documents incorporated by reference. As outlined in the January 2014 issue of Baseload, the "old school" rule about road shows cautioned that the only information that could appear in road show slides was information that was within the "four corners of the prospectus" (the prospectus and the incorporated documents). But today, most securities lawyers take a more nuanced view of proper disclosure in road show slides when it comes to information that is not material (especially if it can be derived from public information).

The decision to skip the voiceover in a set of road show slides posted on an electronic road show platform can be a significant one. Without the voiceover, the set of road show slides is arguably not a road show at all under the SEC's rules. Confronted with this choice, members of the deal team are well advised to think through the consequences before deciding on the best path forward for the deal.

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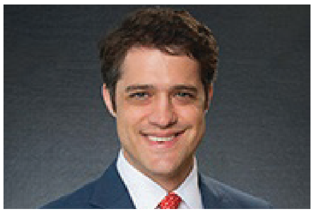
Merger Announcement

We are delighted to announce that on April 2, 2018 Hunton & Williams LLP merged with Andrews Kurth Kenyon LLP, creating a one-stop shop for the energy marketplace. Hunton Andrews Kurth LLP has more than 1,000 lawyers in 20 offices across the world, with 300 attorneys focused on the energy industry across the spectrum from oil & gas to power. In addition, the new Firm has extraordinary capabilities in the real estate, structured finance and REIT areas, with more than 100 experienced real estate lawyers. Our combined capital markets experience totals more than 900 transactions worth over $375 billion during the last five years. We have listed below the legacy Andrews Kurth Kenyon LLP members of our Hunton Andrews Kurth LLP capital markets and securities practice.



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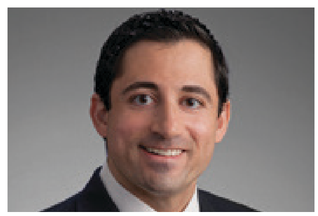

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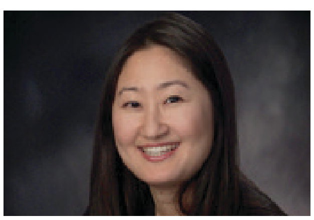

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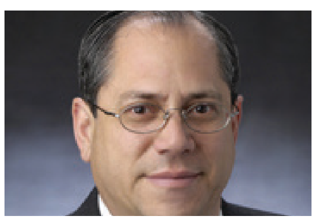

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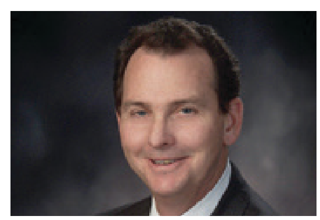

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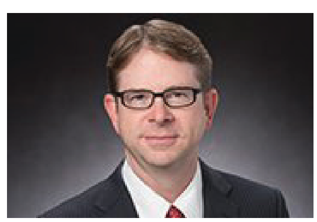

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