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Electronic Roadshows: Why The Voice-Over Matters

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Prerecorded electronic roadshow presentations are often used to enhance marketing efforts. But there are often differing views among deal participants about the exact format of the electronic roadshow and certainly with respect to its content. What may seem to be small changes to the format and content can have significant consequences for the securities law treatment of the information in the electronic roadshow and the respective liability therefor.

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

The problem with posting a set of roadshow slides on an electronic roadshow platform with no voice-over (and not otherwise delivered in connection with a live management presentation) is that such slides arguably do not constitute a "roadshow" under the U.S. Securities and Exchange Commission rules. Rule 433 of the 1933 Act defines a roadshow 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. Therefore, if there is no voice-over for the slides provided by management, arguably there is no "presentation made by one or more members of the issuer's management."

So, if the set of roadshow slides posted on an electronic roadshow platform with no voice-over (and not otherwise delivered in connection with a live management presentation) is not a roadshow under the SEC rules, then what is it? Under Rule 405 of the 1933 Act, a free writing prospectus, or 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 voice-over, the prerecorded electronic roadshow is an FWP. However, because of the guidance provided by Rule 433(d)(8)(i), as long as there is a voice-over it is an FWP that is not required

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to be filed with the SEC. If there is no voice-over, then arguably there is no “presentation made by one or more members of the issuer’s management.” And therefore there is no roadshow. And therefore the guidance provided by Rule 433(d)(8)(i) is unavailable and the FWP must be filed with the SEC. 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. The “old school” rule about roadshows cautioned that the only information that could appear in roadshow 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 roadshow slides when it comes to information that is not material (especially if it can be derived from public information). Therefore, at a minimum, counsel must review the slides that are to be filed with the SEC and get comfortable in giving legal opinions on the material therein.

The decision to skip the voice-over in a set of roadshow slides posted on an electronic roadshow platform can be a significant one. Without the voice-over, the set of roadshow slides is arguably not a roadshow at all under the SEC’s rules. When 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. When presented with the various options and the consequences for each, many deal teams will decide to go ahead and request that management spend the time to record a voice-over. And, given any additional market considerations, some deal teams will certainly decide to abandon the slides altogether.

Notes

¹ The Rule 168 safe harbor under the 1933 Act permits, under certain circumstances, an issuer to conduct a nondeal roadshow 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 nondeal roadshow 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 roadshow and is provided or transmitted in a manner designed to make the communication available only as part of the roadshow and not separately is deemed to be part of the roadshow. Therefore, if the roadshow 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, roadshow slides are not considered to be written offers as long as copies are not left behind.

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