

## The Good, the Bad and the Offer: Law, Lore and FAQs

### *An Updated Look at the World of Offers*

It all seems simple enough. The concept of “offer” is broad under the securities laws, so companies and underwriters need to be careful about any publicity in connection with a securities transaction. But in practice, the puzzling questions come thick and fast. Can the company issue a press release about its latest product? Can the CEO speak at the upcoming industry conference? Can the CEO be interviewed on CNBC the day after the IPO? And if publicity is so tightly controlled, why is it fine to hold a road show?

Sorting out these issues can be challenging, especially in real time. And you have to be sure of yourself, because you will need a compelling reason to nix a hard-charging CEO’s upcoming “Mad Money” appearance. This updated *Client Alert* provides a comprehensive summary of the law and lore relating to offers in securities transactions and a guide to maneuvering safely through the maze of available safe harbors and industry customs. This update to our 2011 publication reflects the changes made in 2012 by Titles I and II of the Jumpstart Our Business Startups (JOBS) Act of 2012. We also include a variety of FAQs to help you answer questions that often come up in practice.

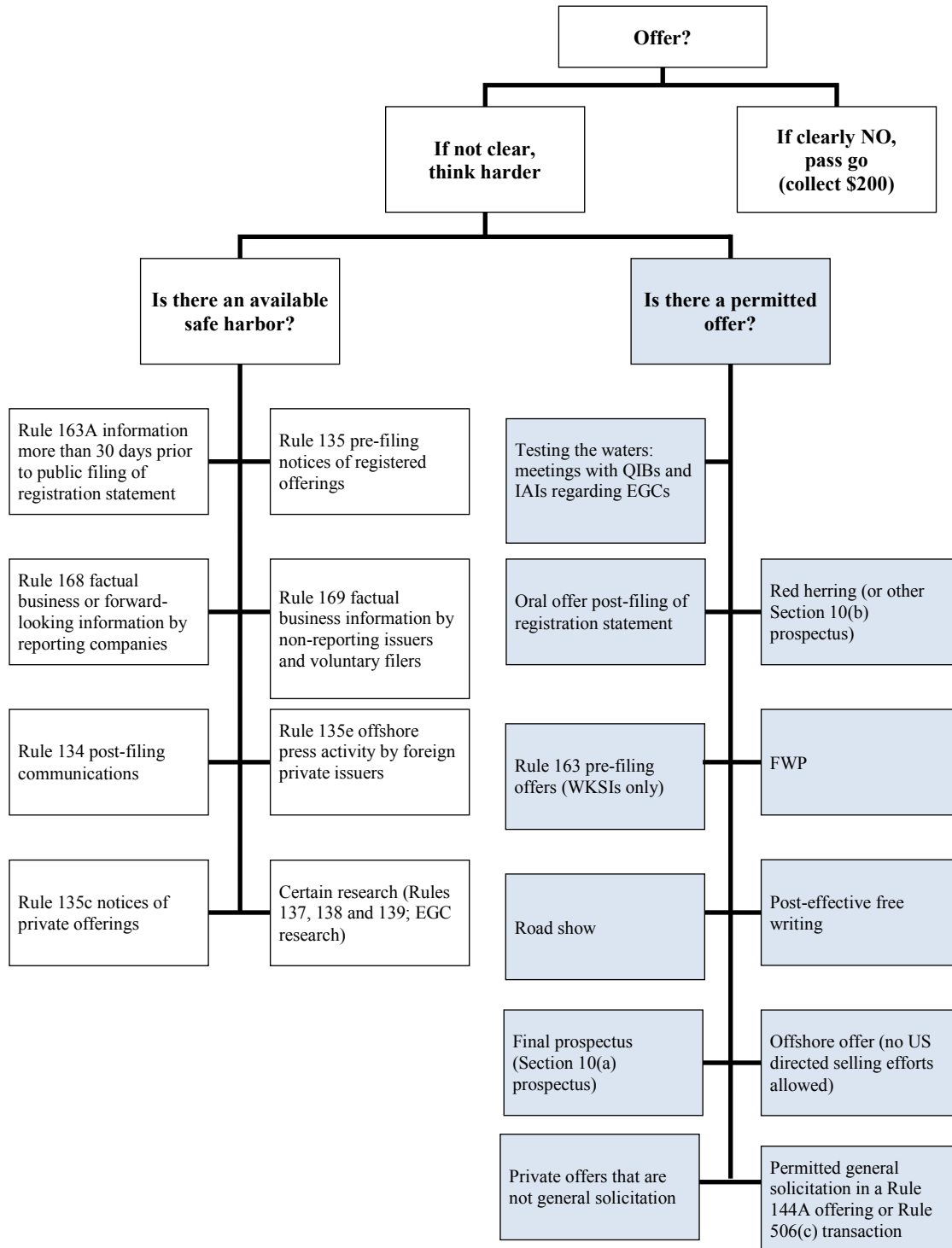
### **Background — Regulation of the Offer**

Let’s begin at the beginning. Section 2(a)(3) of the Securities Act defines the term “offer” expansively to include “every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.” You can see the problem right off the bat—given the breadth of this language, it can be difficult to say with certainty what is or is not an offer under this definition. And the SEC long ago stated that any publicity that may “contribute to conditioning the public mind or arousing public interest” in the offering can itself constitute an offer under the Securities Act.<sup>1</sup>

Section 2(a)(3) works closely with Section 5 of the Securities Act, which imposes an intricate framework of restrictions on offers in connection with securities transactions. It also closely regulates the use of a “prospectus”—a term defined in Section 2(a)(10) of the Securities Act in a manner that captures all written offers of any kind (and some that are not obviously written, as we discuss in more detail below). Private offerings, such as those made to qualified institutional buyers (QIBs) in reliance on Securities Act Rule 144A, are exempt from Section 5 but have their own set of restrictions. Over the years, the SEC has adopted a number of safe harbors to protect various activities that are either harmless or necessary to the proper functioning of the capital markets. In 2012, the JOBS Act introduced additional communication freedoms in connection with certain offerings by issuers that qualify as emerging growth companies (EGCs).<sup>2</sup> The Appendix to this *Client Alert* includes a brief refresher course on the workings of Section 5 and the important provisions of private and offshore offerings and transactions. It also contains additional information on the rules related to research analyst reports and large companies known as well-known seasoned issuers (WKSIs).

## How It All Hangs Together — The Offer Flowchart

The following flowchart gives an overview of how you can approach questions on offers that come your way.<sup>3</sup>



## Is It an Offer?

The first question to ask when analyzing any particular fact pattern is the common-sense question, “Is it an offer?” Despite the broad definition of offer, some activities are not problematic because they are clearly not offers or because an SEC rule provides a safe harbor exclusion from the definition of offer.

## Clearly Not Offers

Some communications are far enough afield from an offer of securities that you do not need to worry further. Depending on your specific facts and circumstances, examples of things that may fall outside the definition include:

- *Product Advertising and Factual Business Communications.* Just because a securities offering is planned or ongoing, a company need not stop advertising its products or refrain from issuing press releases regarding factual developments in the business (the opening of a new office, for example).<sup>4</sup>

As the SEC put it in the context of securities offering reform in 2005, “In general, as we recognized many years ago, ordinary factual business communications that an issuer regularly releases are not considered an offer of securities . . . Such communications will not be presumed to be offers, and whether they are offers will depend on the facts and circumstances.”<sup>5</sup>

- *The Collision Principle.* As a general matter, where a company faces an obligation under the Exchange Act to make a public statement, or where good corporate citizenship calls for disclosure of important events to existing public security holders, the required disclosure should not be considered an offer.

We think of this as the collision principle: In a collision between the requirements of the Exchange Act and those of the Securities Act, the Exchange Act’s ongoing disclosure requirements ought to prevail over the Securities Act’s close regulation of offers. As the SEC has explained, “We do not believe that it is beneficial to investors or the markets to force reporting issuers to suspend their ordinary course communications of regularly released information that they would otherwise choose to make because they are raising capital in a registered offering.”<sup>6</sup>

- *Release of Material Non-Public Information to Satisfy Regulation FD.* The SEC Staff has recognized that a reporting company engaged in a private offering may have obligations under Regulation FD to publicly disclose material non-public information it provides to potential investors in the private offering. If so, the SEC Staff has indicated that it is permissible to release the material non-public information on a Form 8-K, so long as the entire private offering memorandum is not included in the filing.<sup>7</sup> Arguably, this is simply an application of the collision principle discussed above.

If common sense doesn’t clearly answer whether a particular fact pattern constitutes an offer, the next step is to review the many safe harbors and determine if any of them would apply.

## Safe Harbors — Public Transactions

### Securities Act Rule 163A — The 30-Day Bright-Line Safe Harbor

Rule 163A provides all issuers (whether or not already public filers) with a non-exclusive safe harbor from Section 5(c)’s prohibition on pre-filing offers for certain communications made more than 30 days before the public filing of a registration statement, even if those communications might otherwise have been considered to be an offer under Section 2(a)(3). For an EGC that confidentially submits a draft registration

statement for non-public review by the SEC, the date of the first *public filing* of the registration statement, not the date of the confidential submission, determines the availability of the Rule 163A safe harbor. Rule 163A is not available to prospective underwriters, even those authorized by an issuer to approach the market on the issuer's behalf.

The requirements for Rule 163A include that:

- the communication cannot refer to the securities offering;
- the communication must be made by or on behalf of an issuer—in other words, the issuer will need to authorize or approve each Rule 163A communication (and any communications by an underwriter will not come within the safe harbor); and
- the issuer must take “reasonable steps within its control” to prevent further distribution of the communicated information during the 30-day period before filing the registration statement (although the SEC has suggested that the issuer may maintain this information on its website, if the information is appropriately dated, identified as historical material and not referred to as part of the offering activities).<sup>8</sup>

### **Securities Act Rule 135 — Pre-Filing Public Announcements of a Planned Registered Offering**

Rule 135 provides that an issuer will not be deemed to make an offer of securities under Section 5(c) as a result of certain public announcements of a planned registered offering. Rule 135 notices can be released at any time, including before a registration statement is filed.

Under Rule 135, the announcement must contain a legend, as well as limited information, including:

- the name of the issuer;
- the title, amount and basic terms of the securities offered;
- the anticipated timing of the offering; and
- a brief statement of the manner and purpose of the offering, without naming the prospective underwriters for the offering.

### **Securities Act Rule 168 — Factual Business Communications by Reporting Companies**

Rule 168 is a non-exclusive safe harbor from Section 5(c)'s prohibition on pre-filing offers (and from Section 2(a)(10)'s definition of prospectus) that is available only to reporting issuers with a history of making similar public disclosures. It allows a reporting issuer (and certain widely traded non-reporting foreign private issuers (FPIs)) to make continued regular release or dissemination of “factual business information” and “forward-looking information,”<sup>9</sup> but not information about an offering or information released as part of offering activities. Like Rule 163A, Rule 168 is not available to underwriters (even if they have the issuer's blessing). In addition, voluntary filers may not rely on this Rule, and instead must look to Rule 169.<sup>10</sup>

Disclosure of Rule 168 information is permitted at any time, including before and after the filing of a registration statement, but only if:

- the issuer has previously released or disseminated Rule 168 information in the ordinary course of its business; and
- the timing, manner and form in which the information is released is materially consistent with similar past disclosures.

For the information to be considered regularly released in the ordinary course of business, the method of releasing or disseminating the information, and not just the content, is required to be consistent in material respects with prior practice.<sup>11</sup> Therefore, under Rule 168, the issuer will need to be able to show a record of releasing the particular type of information in the same particular manner, although the SEC has acknowledged that one prior release could establish a sufficient record.<sup>12</sup> The SEC has, however, cautioned that an issuer's release of "new types of financial information or projections just before or during a registered offering will likely prevent a conclusion" that the issuer regularly releases that information.<sup>13</sup>

Where does this leave you? Because Rule 168 looks to track record, a newly public company should establish a pattern of issuing information and then stick to it. Concluding that the safe harbor for any particular situation is available is going to be easier if a company can point to a prior record of releasing the same general information on reasonably similar timing.

### **Securities Act Rule 169 — Factual Business Communications by Non-Reporting Issuers and Voluntary Filers**

Rule 169 is similar to Rule 168 in that it provides a non-exclusive safe harbor from both Section 5(c)'s restriction on pre-filing offers and Section 2(a)(10)'s definition of prospectus. Unlike Rule 168, Rule 169 is available to non-reporting issuers and voluntary filers. It is also more limited than Rule 168 in a number of ways. First, under Rule 169, non-reporting issuers are permitted to continue to release factual business information, *but not forward-looking information*. Second, Rule 169 is available only for communications intended for customers, suppliers and other non-investors. The SEC has nonetheless made clear that the safe harbor will continue to be available if the information released is received by a person who is both a customer and an investor.<sup>14</sup>

### **Securities Act Rule 134 — Limited Post-Filing Communications**

Rule 134 provides that certain limited written communications related to a securities offering as to which a registration statement has been filed will not be considered to be a prospectus (in other words, will be exempt from SEC restrictions applicable to written offers). Rule 134 is only available once a preliminary prospectus that meets the requirements of Section 10 has been filed, which would include a base prospectus in a shelf registration statement that covers the securities offered. IPO issuers may rely on Rule 134 before filing a price range prospectus, although the Rule does require a price range prospectus for certain specific statements, as discussed below.<sup>15</sup> Rule 134 is often used for the press release announcing the commencement of a registered offering, as well as the tombstone advertisement following the closing.

The information permitted by Rule 134 includes:

- certain basic factual information about the legal identity and business location of the issuer, including contact details for the issuer;

- the title and amount of securities being offered;
- a brief description of the general type of business of the issuer, limited to information such as the general types of products it sells;
- the price of the security or the method for determining price (in the case of an IPO, this information cannot be provided until a price range prospectus has been filed);
- in the case of a fixed-income security, the final maturity, interest rate or yield (in the case of an IPO, this information cannot be provided until a price range prospectus has been filed);
- anticipated use of proceeds, if then disclosed in the prospectus on file;
- the name, address, phone number and email address of the sender of the communication, and whether or not it is participating in the offering;
- the names of the underwriters participating in the offering and their additional roles in the underwriting syndicate;
- the anticipated schedule for the offering, and a description of marketing events;
- a description of the procedures by which the underwriters will conduct the offering and information about procedures for opening accounts and submitting indications of interest, including in connection with directed share programs;
- in the case of rights offerings, the class of securities the holders of which will be entitled to subscribe, the subscription ratio and certain additional information;
- certain additional information, including the names of selling security holders, the exchanges on which the securities will be listed and the ticker symbols; and
- a required legend.

## **Safe Harbors — Private Transactions**

### **Securities Act Rule 135c — Limited Notices of Unregistered Offerings**

Rule 135c provides that a company subject to the reporting requirements of the Exchange Act (and certain non-reporting FPIs) will not be deemed to make an offer of securities under Section 5(c) if it issues a notice about a proposed or completed unregistered offering. Rule 135c is the safe harbor relied on for the press release announcing the commencement of a private offering by a public company. Rule 135c is not technically available to voluntary filers.

A Rule 135c notice—which can take the form of a press release or a written communication directed to shareholders or employees—does not constitute “general solicitation” or “directed selling efforts.”<sup>16</sup>

Rule 135c specifies that the notice must:

- state that the securities offered have not been or will not be registered under the Securities Act and may not be offered absent registration or an exemption from registration;

- contain only limited information, including:
  - the name of the issuer;
  - the title, amount and basic terms of the securities being offered;
  - the amount of the offering, if any, being made by selling shareholders;
  - the time of the offering; and
  - a brief statement of the manner and purpose of the offering, *without naming the underwriters*.
- be filed on Form 8-K (or furnished on Form 6-K, in the case of an FPI).

## Safe Harbors — Foreign Private Issuers

### Securities Act Rule 135e

Rule 135e provides a safe harbor from the definition of offer for FPIs. Offshore press activity meeting Rule 135e does not constitute general solicitation or directed selling efforts.<sup>17</sup>

Rule 135e allows an FPI to provide journalists with access to:

- its press conferences held outside the United States;
- meetings with issuer (or selling security holder) representatives conducted outside the United States; and
- written press-related materials released outside the United States at or in which the issuer discusses its intention to undertake an offering.

To take advantage of Rule 135e, the offering must not be conducted solely in the United States—that is, the issuer must have a *bona fide* intent to make an offering offshore concurrently with the US offering. The issuer must also provide access to both US and non-US journalists, and ensure that any written press releases are distributed to journalists (including US journalists) outside the United States and contain a specified legend.

### What About Voluntary Filers?

Voluntary filers are not true reporting companies in the SEC's eyes because, even though they file Exchange Act reports, voluntary filers are not required to do so under Exchange Act Section 13 or 15(d).<sup>18</sup> As a result, a number of the safe harbors discussed above are not expressly available to voluntary filers.

But that may not be the end of the story. For example, even though Rule 135c is technically limited to reporting companies, the policy concern that underlies Rule 135c—namely, that reporting companies have a legitimate interest in communicating with their security holders about financing activities—apply with equal force to voluntary filers. As a result, practitioners often conclude that the Rule should by analogy protect communications by voluntary filers as well, in the same way that the SEC has itself applied Rule 135c principles by analogy.<sup>19</sup>

Similarly, ordinary ongoing communications by a voluntary filer with its investors (such as quarterly earnings releases) are within the spirit, but not the letter, of the Rule 168 safe harbor. (Rule 169 is no help here because it is available only for communications to non-investors.) Fortunately, though, there is life outside Rules 168 and 169. As the SEC said when adopting Rules 168 and 169, they are not intended to “affect in any way the Securities Act analysis regarding ordinary course business communications that are not within the safe harbors.”<sup>20</sup> Accordingly, where a particular public statement by a voluntary filer is consistent with past practice, Exchange Act reporting principles or the policies underlying Regulation FD, most practitioners are inclined to find that it is not problematic for Securities Act purposes. This is just another example of the collision principle at work.

## **Certain Research Reports Published By Broker-Dealers**

Publication of research about an issuer by an underwriter participating in an offering during any stage of the registration process raises questions regarding whether the research report could be considered to be an offer of securities or a non-conforming prospectus. Securities Act Rules 137, 138 and 139 set out circumstances under which a broker-dealer may publish research contemporaneously with a registered offering without running afoul of the statutory definition of “underwriter” (Rule 137) or Section 5 (Rules 138 and 139). In addition, the JOBS Act extends certain principles underlying Rule 139 to provide broker-dealers with an exclusion from the definition of offer in Section 2(a)(3) for research reports relating to EGCs in connection with common equity offerings.<sup>21</sup>

We discuss the research safe harbors—which are not available to issuers—in the Appendix.

## **It’s an Offer — But It’s OK**

### **Public Transactions**

#### **Securities Act Rule 163 — Pre-Filing Offers By WKSIs**

Rule 163 creates a non-exclusive safe harbor for WKSIs from Section 5(c)’s prohibition on pre-filing offers. The exemption is currently not available to underwriters, although the SEC has proposed (but not yet adopted) broadening its scope to include certain underwriters and dealers authorized by an issuer to approach the market on the issuer’s behalf.<sup>22</sup>

Under Rule 163, offers by or on behalf of a WKSIs before the filing of a registration statement are free from the restraints of Section 5(c) if certain conditions are met. These include that any written offer must contain a prescribed legend and must be filed with the SEC promptly upon filing of the registration statement for the offering unless the communication has previously been filed with the SEC or is exempt from filing under Rule 433 (discussed below). If no registration statement is ever filed, however, a Rule 163 communication will not need to be filed.<sup>23</sup>

#### **Testing the Waters in EGC Offerings — Securities Act Section 5(d)**

The JOBS Act added Section 5(d) to the Securities Act. Section 5(d) allows EGCs and their authorized persons (including underwriters), before or after confidentially submitting or publicly filing a registration statement, to meet with QIBs and other institutional accredited investors (IAIs) to gauge their interest in a contemplated offering.<sup>24</sup> These meetings can include oral and written communications. This practice is known as “testing the waters.”<sup>25</sup>

EGCs who are considering testing the waters with potential investors should proceed thoughtfully. The deal team will want to carefully review what is to be said at these meetings, bearing in mind that the



information in the draft registration statement will continue to change during the registration process and that the antifraud provisions of the federal securities laws apply to the content of testing-the-waters communications.

As with traditional road show materials, testing-the-waters materials should also be reviewed for consistency with the information contained (or expected to be contained) in the registration statement. The SEC Staff has taken an interest in testing-the-waters communications and routinely issues a comment seeking copies of written materials used to test the waters. When testing the waters, issuers and their authorized persons generally take care not to leave any written materials behind.

### **Oral Offers After Filing**

For any issuer (whether or not an EGC) that has filed a registration statement, Section 5 permits all oral offers but only certain types of written offers.

All written offers must comply with Section 10 of the Securities Act:

- Section 10(b) authorizes the SEC to adopt rules permitting written offers through a preliminary offering document, often called a Section 10(b) prospectus, which Section 5 permits an issuer to use to offer securities.
- Section 10(a) prescribes the information required in a final prospectus, the delivery of which Section 5 requires at or before any sale in a registered offering.

Permitting oral offers while restricting certain written offers seems simple enough in theory. As usual, though, the devil is in the details. The category of “written offers” includes a few surprises.

For example, what do radio broadcasts, blast voicemails and TV advertisements have in common? They all are *written* offers for purposes of Section 5. The slightly roundabout way to reach this conclusion starts with the definition of prospectus in Section 2(a)(10), which includes any offer made by means of a written communication, or any radio or TV broadcast. The term written communication in turn includes any “graphic communication,” which is itself defined to cover all forms of electronic media.

There is, however, one important exception to the definition of graphic communication: It does not include a communication that originates live, in real-time to a live audience (not in recorded form or otherwise as a graphic communication), although it may be transmitted electronically as long as the transmission is live.<sup>26</sup> This is the exception that permits live road shows, which we discuss below.

### **Red Herrings**

A “red herring” or “red” is the colloquial term for a type of preliminary prospectus permitted by Section 10(b) of the Securities Act. A red herring can be used to make written offers but cannot be used to satisfy the prospectus delivery obligations that apply when orders are confirmed and securities are sold. This is because a red herring is a Section 10(b) prospectus but not a Section 10(a) prospectus.

Securities Act Rule 430 provides that, in order to be a Section 10(b) prospectus, a red herring must include substantially all of the information required in a final prospectus, other than the final offering price and matters that depend on the offering price, such as offering proceeds and underwriting discounts.

In addition, Regulation S-K Item 501(b)(3) requires a preliminary prospectus used in an IPO to contain a “*bona fide* estimate” of the price range. The SEC Staff generally takes the position that a *bona fide* price

range means a range no larger than \$2 (for ranges below \$10) or 20 percent of the high end of the range (for maximum prices above \$10).<sup>27</sup> Regulation S-K Item 501(b)(10) specifies the required “subject to completion” legend that must appear on the front cover of any preliminary prospectus. This legend, printed in red ink, gives rise to the name red herring.

If a filed prospectus does not yet include a *bona fide* price range (in the case of an IPO) or otherwise does not comply with Rule 430, it is known in the trade as a “pink herring”—*i.e.*, a filed prospectus that is not quite a red because it does not yet meet the requirements of Section 10(b) and hence cannot be used to solicit customer orders. Note, however, that a pink herring can be used in connection with permitted EGC testing-the-waters activities.

## Road Shows

Road shows are the duck-billed platypus of the securities world—the evolutionary missing link with traits of both oral and written offers. Securities Act Rule 433(h)(4) provides the formal definition of “road show” as an offer (other than a statutory prospectus) that “contains a presentation regarding an offering by one or more members of an issuer’s management . . . and includes discussion of one or more of the issuer, such management and the securities being offered.”

You can see why a traditional road show (an intensive series of in-person meetings with key members of the buy-side community over a multi-day period in multiple cities and, sometimes, in multiple countries) would be an oral offer. But what about the slide deck that is traditionally handed out and reviewed at road show meetings? And what if the road show is recorded and broadcast over the internet?

The explanatory note to Rule 433(d)(8) 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.

As a result, road show slides and video clips are not considered to be written offers as long as copies are not left behind. Even handouts are not written offers so long as they are collected at the end of the presentation. If they are left behind, however, they become a free writing prospectus (FWP) subject to a variety of detailed requirements spelled out in Securities Act Rules 164 and 433, which we discuss further below.

## FWPs

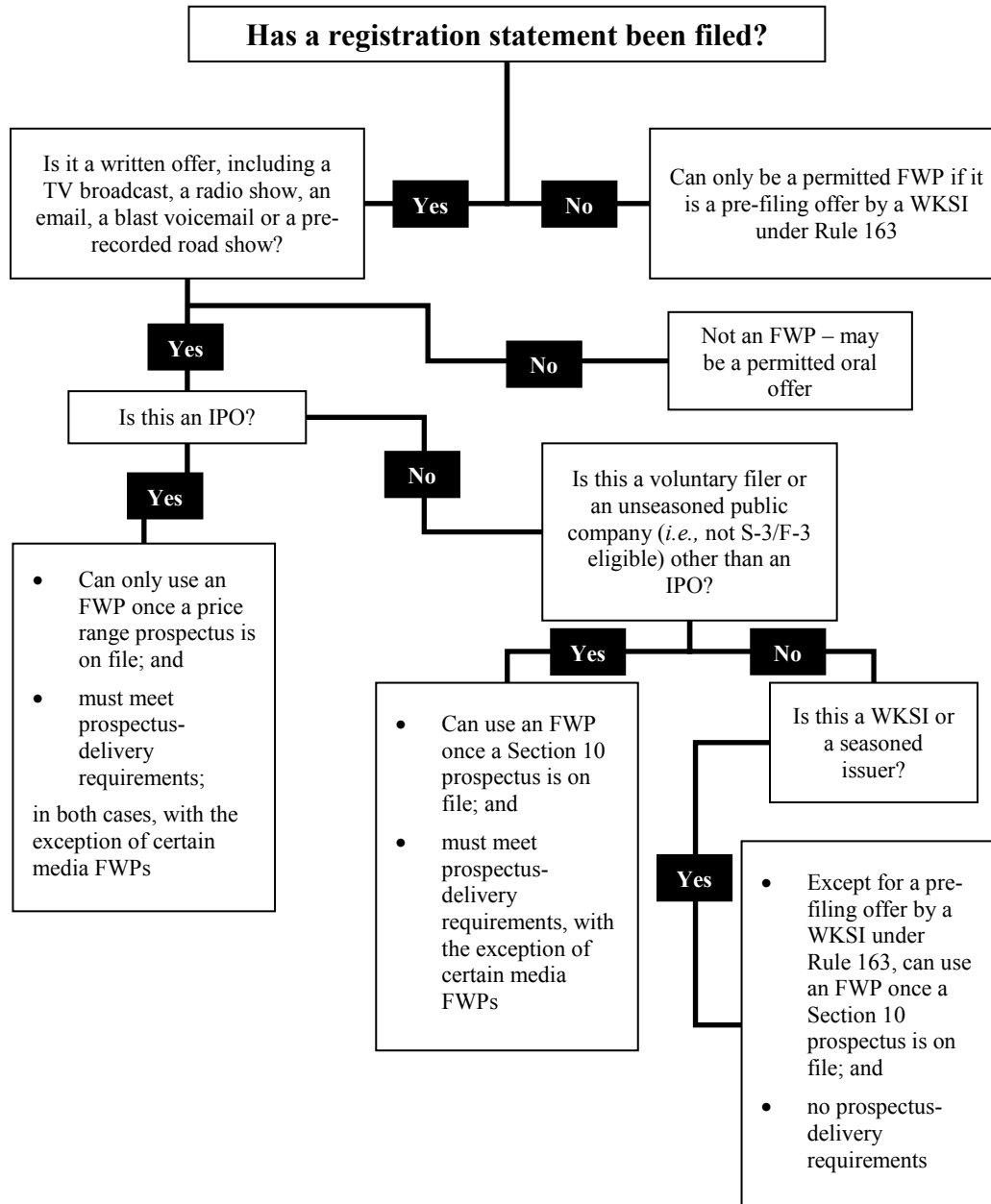
Under Securities Act Rule 405, a free writing prospectus is any written communication that constitutes an offer to sell or a solicitation of an offer to buy the securities that are the subject of a registered offering that is used *after* a registration statement has been filed. A confidential submission does not trigger the Rule’s definition of FWP. A supplement to a statutory prospectus can be an FWP, as can press releases, emails, blast voicemails and even press interviews.

The use of FWPs is governed by Securities Act 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 the additional conditions of Rule 433 are met.<sup>28</sup>

Recall that, under Section 5(b)(1), no prospectus other than a prospectus meeting the requirements of Section 10 may be used to make offers. Rule 164(a) provides that an FWP meeting the requirements of Rule 433 will be a Section 10(b) prospectus—that is, a prospectus that may be used to make offers after a registration statement has been filed. However, an FWP may not be used as a *final* prospectus to satisfy the prospectus delivery requirements associated with the delivery of securities after pricing.

The following flowchart provides a road map to help guide you through the rules applicable to FWPs.

### When Can You Use an FWP?



## Securities Act Rule 433(b) — Use of FWP

Rule 433(b) distinguishes between the use of FWPs by certain seasoned and unseasoned issuers.

WKSIs, issuers eligible for Form S-3 or F-3 and certain majority-owned subsidiaries of the foregoing may generally use FWPs after filing a registration statement that includes a Section 10 prospectus.

Things work differently for unseasoned issuers and voluntary filers. Unseasoned issuers for these purposes include IPO issuers, as well as SEC reporting companies that are not eligible to register offerings on Form S-3 or F-3, for example, because they have not timely filed required Exchange Act reports in the previous 12 calendar months.

- First, recall that for an IPO, the prospectus must contain a *bona fide* price range in order to qualify as a Section 10(b) prospectus. So, IPO issuers cannot use an FWP until they have filed a price range prospectus. The requirement to have a price range prospectus does not apply, however, in the case of a media FWP that was not published in exchange for payment and was filed with a required legend within four business days (as we discuss below).
- Second, a Section 10 prospectus must accompany or precede the FWP, unless either:
  - a statutory prospectus has already been provided and there is no material change from the most recent prospectus on file with the SEC; or
  - the FWP is a media FWP that was not published in exchange for payment and was timely filed with a legend.

Note that an electronic FWP emailed with the proper hyperlink will obviate the need for physical delivery of a prospectus.

## Securities Act Rule 433(c) — What Can Be in an FWP?

An FWP may include information “the substance of which is not included in the registration statement.” But this information must not conflict with either:

- information contained in the registration statement; or
- information in any of the issuer’s Exchange Act reports that are incorporated by reference into the registration statement.

FWPs must also contain a prescribed legend, and may not include disclaimers of responsibility or liability that are impermissible in a statutory prospectus.<sup>29</sup> These include disclaimers regarding accuracy, completeness or reliance by investors; statements requiring investors to read the registration statement; language indicating that the free writing prospectus is not an offer; and, for filed FWPs, statements that the information is confidential.<sup>30</sup>

## Securities Act Rule 433(d) — When Must FWPs Be Filed?

The general rule is that an FWP must be filed with the SEC no later than the day the FWP is first used. If you miss the SEC’s EDGAR filing cut-off for that day (5:30 pm Eastern time) you should still file the FWP as soon as you can.<sup>31</sup>

Issuers must generally file any issuer FWP, which is defined broadly to include an FWP prepared by or on behalf of the issuer or an FWP used or referred to by the issuer, as well as a description of the final terms of the securities in a pricing term sheet (whether contained in an issuer or an underwriter FWP). By contrast, an underwriter only needs to file an FWP that it distributes in a manner reasonably designed to lead to its “broad unrestricted dissemination.” The SEC has explained that an FWP prepared by an underwriter that is only made available on a website restricted to the underwriter’s customers or a subset of its customers will not require filing with the SEC, nor will an email sent by an underwriter to its customers, regardless of the number of customers involved.<sup>32</sup>

There are certain exceptions to the requirement to file an FWP. These include:

- an FWP does not need to be filed if it does not contain substantive “changes from or additions” to a previously filed FWP;
- an issuer does not need to file issuer information contained in an underwriter FWP if that information is already included in a previously filed statutory prospectus or FWP relating to the offering; and
- an FWP that is a preliminary term sheet does not need to be filed (an FWP that is a final pricing term sheet must be filed by the issuer within two days of the later of establishing the terms and the date of first use).

### When Does an FWP Need to Be Filed?

*For all issuers (including IPO issuers, EGCs, voluntary filers, S-3/F-3 eligible issuers and WKSIs):*

Scenario	Filing Requirement
Media FWP for which no consideration was paid	Must file with required legend within four business days of becoming aware of publication
Media FWP for which consideration was paid	Must file with required legend no later than day of first use
Issuer FWP	<ul style="list-style-type: none"> <li>• Must file with required legend no later than day of first use</li> <li>• Note that typical practice is to file concurrently with first use of material</li> </ul>
Underwriter FWP	Need not file unless broadly distributed
Pre-recorded electronic road show	<ul style="list-style-type: none"> <li>• For an IPO, need not file if at least one version of a <i>bona fide</i> electronic road show is publicly available without restriction</li> <li>• For other offerings, need not file</li> </ul>
Preliminary term sheet	Need not file
Final term sheet	Issuer must file within two days of the later of pricing and date of first use

## **Securities Act Rule 164 — Certain Failures to File and Failures to Include the Required Legend**

Failure to comply with the conditions of Rule 433 will essentially result in a violation of Section 5(b)(1). Rule 164 provides some welcome relief from these harsh consequences in the case of certain “immaterial or unintentional” deviations from the requirements of Rule 433. In particular:

- a failure to file or a delay in filing an FWP will not be a violation so long as a good faith and reasonable effort was made to comply with the filing requirement and the FWP is filed as soon as practicable after the discovery of the failure to file;
- a failure to include the required legend will not be a violation, so long as (1) a good faith and reasonable effort was made to comply with the legending requirement, (2) the FWP is amended to include the required legend as soon as practicable after the discovery of the omitted or incorrect legend and (3) if the FWP was transmitted without the required legend, it is subsequently retransmitted with the legend by substantially the same means as, and directed to substantially the same purchasers to whom, the original FWP was sent; and
- a failure to comply with the record retention requirements of Rule 433 will not be a violation so long as a good faith and reasonable effort is made to comply with these record retention requirements.

## **Securities Act Rule 433(f) — Media FWPs**

Rule 433(f) provides that any written offer that includes information provided, authorized or approved by the issuer or any other offering participant that is prepared and disseminated by an unaffiliated media third party will be deemed to be an issuer FWP. Nevertheless, the requirements for prospectus delivery, legending and filing on the date of first use that would otherwise apply to FWPs will not apply if:

- no payment is made or consideration given for the publication by the issuer or other offering participants; and
- the issuer or other offering participant files the media FWP with the required legend within four business days after the issuer or other offering participant becomes aware of publication or dissemination (but note that the FWP need not be filed if the substance of the written communication has previously been filed).

Any filing of a media FWP in these circumstances may include information that the issuer or offering participant believes is needed to correct information included in the media FWP. In addition, in lieu of filing the media communication as actually published, the issuer or offering participant may file a copy of the materials provided to the media, including transcripts of interviews.

## **Final Prospectuses**

A final prospectus (also called a Section 10(a) prospectus) is the prospectus contained in an effective registration statement. Only a final prospectus can be used to meet the Section 5 prospectus delivery requirements associated with actual delivery of securities after pricing.

Shelf registration statements are different, because Securities Act Rule 430B permits the base prospectus at effectiveness to omit certain types of information that would normally be required in a final prospectus. This is especially true of WKSI automatic shelf registration statements, which can omit basic information such as whether the offering is primary or secondary, or a detailed description of the securities being offered.

For a shelf registration statement, the base prospectus would be a Section 10(b) prospectus but not a Section 10(a) prospectus—in other words, it could be used to make offers but a final version must be prepared and filed to meet the Section 5 prospectus delivery requirement associated with delivery of the securities sold.<sup>33</sup>

## Post-Effective Free Writings

Section 2(a)(10)(a) of the Securities Act contains a carve-out for documents sometimes referred to as “statutory free writings”—that is, any written offer that is accompanied or preceded by a “final prospectus that meets the requirements of Securities Act Section 10(a) (such as sales literature used after effectiveness).”<sup>34</sup> These are not widely encountered in practice, but it’s useful to remember this provision.

## Private Transactions

### Offers That Are Not General Solicitations

As we note above, Section 5 does not apply to properly structured private offerings. In the private offering context (other than transactions undertaken in accordance with Rule 144A or, in certain instances, Rule 506, as discussed below), the key requirement is that general solicitation cannot take place. Absent unusual circumstances, a communication that is not an offer will not give rise to general solicitation concerns. For example, Rule 135c notices of upcoming private offerings, Rule 169 press releases announcing new products and Rule 168 earnings releases are not offers and so should not be considered problematic. And even if a particular communication is in fact an offer, it would still pass muster in the context of a private offering if appropriately made.

In private offerings where Section 5 does not apply, there is no need to observe the distinction between oral and written offers that governs in registered deals. So long as the offer is made in a manner that does not involve a general solicitation or the offering is undertaken in accordance with Rule 144A or Rule 506(c), the fact that a particular communication is a written offer is not an issue. In connection with these activities, it is always important to consider the antifraud provisions of the securities laws, such as Exchange Act Rule 10b-5, but those concerns are beyond the scope of this *Client Alert*.

### Permitted General Solicitations in a Rule 144A Offering and Certain Rule 506 Transactions

The JOBS Act directed the SEC to eliminate the prohibition on general solicitation in Rule 144A and certain Rule 506 offerings. The SEC rules implementing this statutory directive took effect on September 23, 2013.

Under the final rules:<sup>35</sup>

- **General solicitation is permitted in all Rule 144A transactions.** Revised Rule 144A(d)(1) requires simply that securities must be *sold*—not *offered and sold*, as under former Rule 144A—only to QIBs or to purchasers that the seller and any person acting on behalf of the seller reasonably believe are QIBs. As a result, the Rule 144A exemption is now available even where general solicitation is actively used in the marketing process or has occurred inadvertently.
- **Rule 506(c) permits general solicitation in Regulation D private placements under certain conditions.** New Rule 506(c) permits the use of general solicitation if:
  - the issuer takes “reasonable steps to verify” that purchasers are accredited investors (AIs);
  - all purchasers are AIs, or the issuer reasonably believes that they are, at the time of the sale; and

- all requirements of Rules 501 (definitions), 502(a) (integration) and 502(d) (resale restrictions) are met.
- **The “reasonable steps to verify” determination is flexible.** Whether verification steps are reasonable depends on the facts and circumstances. The SEC suggested that some relevant factors include:
  - the nature of the purchaser and the type of AI that the purchaser claims to be;
  - the amount and type of information the issuer has about the purchaser; and
  - the nature of the offering, such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering, such as a minimum investment amount.
- **There is a non-exclusive list of four verification methods.** The new rule includes four specific non-exclusive methods of verifying AI status:
  - when verifying whether an individual meets the AI income test, reviewing for the two most recent years any IRS forms that report the individual’s income, and obtaining a written representation from the individual with respect to the expectation of income for the current year;
  - when verifying whether an individual meets the AI net worth test, reviewing certain bank, brokerage and similar documents and obtaining a written representation from the individual with respect to the disclosure of all liabilities;
  - obtaining written confirmation from an SEC registered broker-dealer or investment adviser, a licensed attorney or a CPA that has itself taken reasonable steps to verify, and has determined within the prior three months, that the purchaser is an AI; and
  - obtaining a certification of AI status at the time of sale from an individual who invested in an issuer’s Rule 506(b) offering as an AI prior to the effective date of Rule 506(c), for any Rule 506(c) offering conducted by the same issuer.

In a separate release in July 2013, the SEC also proposed additional requirements for Rule 506(c) offerings involving general solicitation.<sup>36</sup> These additional requirements have not yet been adopted.

## Road Shows

A road show for a private offering does not need to follow the distinction between written and oral communications. Instead, unless the transaction is undertaken in accordance with Rule 144A or Rule 506(c), the key is to limit attendance to permitted offerees and, if needed, to avoid general solicitation. Even though there is no technical problem with handing out copies of road show slides in private offerings, copies of slides are not typically left behind based on prudential concerns. Issuers and underwriters generally prefer to rely solely on the carefully vetted text of the offering memorandum as the official written offering material.

## Offshore Offers

Regulation S under the Securities Act provides an exemption from Section 5 for offshore offers and sales.

We discuss the requirements of Regulation S in more detail in the Appendix. The most important provision of Regulation S to bear in mind is its prohibition on directed selling efforts in the United States.



Regulation S reflects the SEC's historical concern about "flowback" into the United States of securities sold abroad.

The term "directed selling efforts" is broadly defined to include any activities that have, or can reasonably be expected to have, the effect of conditioning the market in the United States for the securities being offered in reliance on Regulation S.<sup>37</sup> Prohibited efforts include :

- mailing offering materials into the United States;
- conducting promotional seminars in the United States;
- granting interviews about the offering in the United States (including by telephone); or
- placing advertisements with radio or television stations broadcasting in the United States.<sup>38</sup>

Importantly, selling activities in the United States in connection with concurrent US offerings—whether registered or private—do not constitute directed selling efforts if such activities relate to the offering taking place in the United States.<sup>39</sup> More generally, offshore transactions in compliance with Regulation S are not integrated with registered or exempt US domestic offerings.<sup>40</sup> This means that permitted general solicitation conducted under Rule 144A or Rule 506(c) will not constitute directed selling efforts that would jeopardize a concurrent Regulation S offering.<sup>41</sup>

## The Consequences of Getting It Wrong

Section 12(a)(1) of the Securities Act provides a rescission right to any investor who buys securities in a transaction violating Section 5. In other words, an investor can rescind the sale and recover the purchase price paid (plus interest, less any amount received on the securities) if the offering is conducted in violation of Section 5. An investor who no longer owns the securities can recover damages equal to the difference between the purchase and the sale price of the securities, again, plus interest, less any amount received on the securities. That is one of the reasons why it is important to follow the restrictions on offers so carefully.

Section 12(a)(1) imposes strict liability, and an investor is not required to demonstrate any causal link between his or her damages and the violation of Section 5. In order to be liable, however, a defendant must be a seller—that is, a person who successfully solicits the purchase, motivated at least in part by financial interest—and the plaintiff must actually have bought the securities from that defendant. Underwriters are potentially liable under Section 12(a)(1) because their role is precisely to solicit purchasers.

## Some Frequently Asked Questions About Offers

### IPOs

**1) Q: We are on file with the SEC but have not yet filed a price range prospectus for our IPO. Can we circulate the filed S-1?**

**A:** No, you cannot circulate a prospectus—even a filed one—to prospective investors in an IPO until it includes a *bona fide* price range, *unless* you are an EGC conducting permitted testing-the-waters activities with QIBs and IAs.

**2) Q: Can an EGC set up meetings with select institutional investors?**

A: Yes, EGCs may test the waters with QIBs and IAs under Section 5(d) of the Securities Act. Testing the waters can happen before or after a registration statement is submitted to the SEC for review, and can be accomplished using oral or written communications. Most market participants are careful not to leave written materials behind.<sup>42</sup> EGCs should consider how much detail to include in testing-the-waters materials, based on when testing the waters occurs and bearing in mind that the antifraud provisions of the federal securities laws apply to the content of these communications. The SEC Staff has indicated a desire to review testing-the-waters materials for consistency with the registration statement and routinely issues a comment seeking copies of these materials.

**3) Q: So, with the passage of the JOBS Act, is the prohibition on gun-jumping in EGC offerings dead?**

A: No, the JOBS Act authorizes EGCs to engage in testing-the-waters activities with QIBs and IAs only. It is still possible for an EGC to gun jump with respect to retail investors.

**4) Q: How about a non-EGC? Can it set up some meetings with select institutional investors after filing its IPO registration statement but before the preliminary prospectus with a price range has been filed?**

A: Yes, meetings of this sort can be held under the right circumstances. Typically, the deal team will limit the number of institutions that can be approached for these early meetings to a small handful. And there are some important rules of the road to keep in mind:

- *Only oral offers permitted.* You can communicate only orally because Section 5 permits oral offers after a registration statement is filed, but written offers are not permitted except by way of a price range prospectus or an FWP. Recall that the term written offer is a broad one in this context, so watch out for things like emails in connection with the meetings. As noted above, you cannot circulate a pink herring, even though potential investors will likely know how to find it on the SEC's EDGAR system.
- *Cannot solicit orders.* Apart from Section 5, there are separate limitations (under Exchange Act Rule 15c2-8) on the ability of underwriters to solicit actual orders prior to the availability of a price range prospectus in the IPO.
- *Stick to the script.* Statements at the meetings are subject to general antifraud provisions (for example, Section 10 and Rule 10b-5) and the information provided at the meetings should be limited to the information contained in the prospectus.

**5) Q: We are thinking about a "dual track" M&A/IPO process. Can we send information to potential M&A buyers?**

A: Yes. This is common practice. The circulation of information to the potential M&A buyers is unrelated to the public offering and is properly viewed as a private offering. In the case of an EGC, it could also constitute permitted testing-the-waters activity. If the M&A transaction is consummated, there will be no public offering, and if it is abandoned, it would be a permissible concurrent private offering of securities. However, it may be difficult for anyone who was approached in the M&A process to buy in the IPO if it moves forward.

**6) Q: We are thinking about conducting a Rule 144A or Rule 506(c) offering using general solicitation concurrently with our IPO. What are the gun-jumping concerns in this scenario?**

A: Recall that Securities Act Section 4(a) provides an exemption from Section 5's various restrictions, and that Rule 144A and Rule 506(c) transactions are exempt under Section 4(a). As a result, general solicitation in connection with a Rule 144A or Rule 506(c) private offering should not be considered gun jumping for a concurrent public offering, so long as there is an appropriate separation between the two sets of offerees. We expect that issuers will want to take care to segregate offerees to avoid the claim that the purported general solicitation for the private offering was in fact being used to solicit investors in the public offering.

**7) Q: The *Wall Street Journal* just ran an article about our IPO quoting from our S-1. Is this a problem?**

A: Assuming that neither the company nor other members of the working group had any involvement in the article, this is not a problem.<sup>43</sup>

**8) Q: What if the article quotes the CEO?**

A: Remember that the requirements for prior or current prospectus delivery, legending and filing that would otherwise apply to FWPs do not apply if no consideration was given by the company for the article. So, if those are your facts, the article could qualify as a media FWP and hence a permitted offer. However, you will have to keep the requirements for filing (and legending) media FWPs in mind, and also consider whether any statements in the article need to be corrected or whether any of those statements suggest that the disclosure in the S-1 should be amended or expanded.

**9) Q: Can we send an email to our employees talking about the IPO?**

A: Yes, it is appropriate for top management to inform employees that an IPO registration statement has been filed. Emails of this sort often discuss the IPO process and remind employees of the need to avoid publicity. You should keep the restrictions of Rule 134 in mind in designing such a communication (although communications outside the four corners of the Rule 134 safe harbor may still pass muster depending on the facts and circumstances, since the rule is a non-exclusive safe harbor).

**10) Q: Can the email discuss the directed share program?**

A: Yes, although there is a distinction to keep in mind here between communications about the procedures for the DSP and solicitations of indications of interest in buying in the DSP. Rule 134 was amended in 2005 to "allow more factual information regarding procedures for directed share plans and other participation in offerings by officers, directors and employees."<sup>44</sup> Rule 134(d) provides that a communication may solicit indications of interest in an IPO only if the solicitation is accompanied or preceded by a price-range prospectus. Forms of DSP communications can be obtained from market participants that navigate this process.<sup>45</sup>

**11) Q: Can we complete a planned rebranding initiative before launching the IPO? How about a remodeling of the website?**

A: Yes. The rebranding initiative should not be viewed as an offer if its purpose is clearly advertising or positioning the company's products and services. Similarly, the website remodeling should not be an offer of securities if its purpose is simply to refresh the company's marketing materials. Of course, care should be taken to be sure that press generated by these activities and any new text added to the website can be justified as communicating with customers and suppliers rather than investors (although some incidental exposure to investors is not fatal).

**12) Q: Can the CEO go on "Mad Money" the day after the IPO closes?**

A: Good question. The short answer is that while this is sometimes done, it may not always be the best idea. First, there are potential antifraud concerns to take into account. While a company does not need to update the registration statement for most developments, the prospectus that is being delivered still needs to be accurate and complete for the duration of the prospectus delivery period (25 days for most IPOs).<sup>46</sup> TV journalists are in the business of getting their guests to say something newsworthy on camera, and Jim Cramer is no exception. If a CEO departs from the prepared talking points and discloses material new information during the interview, it raises the question whether the prospectus needs to be amended or supplemented to incorporate that information.

Second, you need to bear in mind Section 5 concerns. It may be hard to reach the conclusion that the CEO's statements are not an offer, since they are largely directed to a Wall Street audience. If the statements are an offer, they will be considered to be a written offer because TV broadcasts are considered "written" for these purposes. You would accordingly need to treat the broadcast as a media FWP to avoid creating a non-conforming prospectus, which would then need to be filed with the SEC.<sup>47</sup> It is not typical market practice to create additional FWPs at this stage of the transaction, so an FWP filing at this juncture may raise some eyebrows.

### **Non-Deal Road Shows and Industry Reports**

**13) Q: We don't have a particular offering in mind, and haven't filed a shelf registration statement yet, but our bankers have suggested we set up some meetings with our existing or likely investors just to keep on their radar. They are calling it a "non-deal road show." Can we do this?**

A: Yes. Non-deal road shows are common and should be viewed as good Exchange Act citizenship. Outside the context of a particular offering, it is usually easy to conclude that these investor meetings are for information purposes only and not an offer of any particular security. You will, of course, want to steer clear of any mention of a potential offering, unless the company is (i) an EGC and the persons with whom you are meeting are QIBs or IAs or (ii) a WKSJ and is willing to satisfy the requirements of Rule 163 relating to pre-filing offers. You will also need to keep Regulation FD considerations in mind.

In addition, since Rule 10b-5 applies to all material misstatements and omissions made in connection with a sale of securities, the contents of non-deal road show presentations will require careful vetting, particularly where there is only a short amount of time between the non-deal road show and the launch of the offering.

**14) Q: We have been doing regular non-deal road shows for some time. Can we hold the next regularly scheduled non-deal road show even though we have an upcoming shelf filing or takedown off of an existing shelf?**

A: Yes. Assuming you can fit within Rule 168, the non-deal road show would not be considered an offer. If you already have a registration statement on file, the non-deal road show may be able to be conducted as a permitted oral offer under Section 5.

If the non-deal road show takes place more than 30 days prior to filing a shelf registration statement, Rule 163A may also be available (note that Rule 163A is not available after a registration statement is filed).<sup>48</sup> After a shelf registration statement has been filed and declared effective, a non-deal road show presentation is permissible even if it is deemed to be an offer since oral offers are permitted under Section 5 (but don't leave copies of the slides behind!).

Needless to say, you also would need to keep antifraud and Regulation FD considerations in mind.

**15) Q: Can the CEO speak at an upcoming industry conference aimed at customers, even though the road show starts tomorrow?**

A: Yes. It's always OK to sell your products. However, it may be prudent to provide your CEO with appropriate parameters to help ensure that only products are being sold.

**16) Q: What about an upcoming investment bank-sponsored conference aimed at investors, scheduled for the day before the road show?**

A: This could be trickier, because the SEC has cautioned that the Rule 168 safe harbor is not available for releases of factual information that are part of offering activities.<sup>49</sup> You may be able to fit this in as a permissible non-deal road show. However, if the conference is close in time to the offering, it might be more prudent to treat the conference as a road show. Among other things, this means attendees should be provided with a preliminary prospectus. As a practical matter, the company and its banking and legal advisors will typically want to maintain tight control of information flowing to investors in proximity to an actual offering. Note that investment bank conferences may be attended by journalists and analysts who expect to be able to republish information they learn during the course of the conference.<sup>50</sup> For all these reasons, companies frequently cancel these engagements (often at the last minute) if they find they will be in offering mode on the date of the conference.

## **Earnings Guidance**

**17) Q: The company wants to launch an offering next week but it does not expect to meet its previously published quarterly guidance. Can the company revise guidance downward just prior to launching its offering?**

A: Yes. This is good corporate citizenship. Updating guidance to reduce the market's expectations ordinarily would not be considered to be an offer under the Securities Act. Even if it were deemed an offer, the collision principle discussed above counsels that the company's Exchange Act obligation to communicate its reduced expectations to investors should trump the Securities Act restrictions on offers.

**18) Q: What if the company wants to confirm or increase guidance immediately prior to launching an offering?**

A: This is a more difficult scenario. Rule 168's safe harbor for forward-looking information is only available for information released in the ordinary course of business in a manner that is consistent with past practice. It is possible that the company regularly confirms (or increases) its guidance during the course of a quarter or year, but increasing guidance between earnings calls is not in most companies' ordinary-course playbook. The proximity of the increase in guidance to the launch of the offering is another uncomfortable fact. Bottom line: Confirming or increasing guidance within days of launching an offering is potentially problematic and deserves careful consideration in light of all applicable facts.

**19) Q: The company just announced an increase in its annual guidance and the market reacted very favorably. How long do we need to wait before we can launch an offering?**

A: It depends. The first question must be whether the Rule 168 safe harbor is available. Did the increase in guidance occur on a regularly scheduled earnings release or call? Does the company have a track record of adjusting guidance between earnings calls? These would be good facts for Rule 168. If the Rule 168 safe harbor is not available, the more prudent course would be to hold off launching the offering for a period of time sufficiently long to break the connection between the increase in guidance and the offering. How long is that? The answer will depend on all of the facts and circumstances.

**20) Q: The company issued guidance for the year on its annual earnings call in March. It's now July. The company still expects to meet (or slightly exceed) the guidance. Can the company put a slide in the road show that reiterates its annual guidance?**

A: This is tricky for two reasons. First the presence of the slide may suggest that the company is confirming its annual guidance, which is effectively the same as publishing new guidance. That raises the second question of whether material non-public information is being communicated to investors at the road show. If it is, then prudential concerns suggest a public press release confirming annual guidance, which in turn raises questions about whether the new annual guidance is an offer and whether Rule 168's safe harbor is available.<sup>51</sup> Many companies elect not to include such a slide in their road show deck and deflect questions like "Are you still comfortable with your annual guidance?" with an answer like this: "We published our annual guidance in March and it is our policy not to update guidance between earnings releases."<sup>52</sup>

## **Road Shows**

**21) Q: I want to hand out the road show slides—should I take them back?**

A: Yes, it would be prudent to take them back. But if the slides are not taken back, they become a separate FWP. For this reason, some prefer not to hand out slides at all.

**22) Q: Can I simultaneously broadcast my road show to audiences in different locations?**

A: Yes. A live road show is not a written offer, even if it is simultaneously retransmitted electronically to other locations, such as overflow rooms.<sup>53</sup>

**23) Q: Can I webcast my road show?**

A: Yes. Bear in mind, however, that since a prerecorded webcast is not delivered live, it is considered to be an FWP. A road show that is an FWP does not need to be filed, except in the case of an IPO. Even in the IPO context there is an exception to the filing requirement if the issuer makes at least one version of a *bona fide* electronic road show available without restriction electronically to any person (for example on an unrestricted portion of its website).

**24) Q: What do you mean by a “*bona fide* electronic road show”?**

A: Securities Act Rule 433(h)(5) defines a “*bona fide* electronic road show” as a road show that is a written communication transmitted by graphic means. In the context of an IPO, it is common to record the first road show presentation and post it on the internet for viewing by all prospective investors. This version is usually called the “retail road show.” The issuer may elect to prepare a different version of the electronic road show for viewing by institutional investors.

As long as the retail road show includes a discussion of the “same general areas of information regarding the issuer,” management and the securities being offered as contained in other electronic road shows or road shows for the same offering, the *bona fide* electronic road show “need not address all of the same subjects or provide the same information as the other versions of an electronic road show.”<sup>54</sup> Despite this principle, there are divergent views among practitioners about the pros and cons of having separate retail and institutional investor road shows.

**25) Q: What can I put in my road show slides?**

A: As a general matter, road show slide content should fall into three categories: (1) information contained in your prospectus (including via incorporation by reference), (2) publicly available information (typically about your industry) and (3) information reasonably derivable from the foregoing. The third category is where the most questions arise. An example of something that is generally fine is the presentation of a ratio, where the ratio is not in the prospectus but its components are. Of course, you can save yourself some hand-wringing by just putting the ratio in the prospectus.

**26) Q: What can't I put in my road show slides?**

A: Given the answer to the question above, it is probably not surprising that the stuff you can't put in the road show slides, generally speaking, is the stuff we don't want to put in the prospectus due to liability or selective disclosure concerns. Here are some classic examples:

- previously unpublished guidance, projections or predictions regarding future company financial performance or market share;
- measures of historical financial performance or industry metrics that were not in the prospectus due to the unavailability of appropriate back-up;
- predictions about future stock price performance;
- information regarding prospective new contracts and business partners;
- information regarding prospective M&A transactions or future financing plans; or

- other material business plans or expansion opportunities not discussed in the prospectus.

Note that the problem with each of these examples is, first and foremost, they were not in the prospectus. If the working group is comfortable putting the information in the prospectus, then putting the information in the road show slides is generally fine. If information was excluded from the prospectus for one or more good reasons, then it should not find a home in the road show slides. Chances are, these same good reasons will apply to the road show slides. There may also be Regulation FD considerations if the added information is material and non-public.

**27) Q: OK, that covers the slides, but what can I say orally during the road show presentation?**

A: To start with, the road show slides will typically have been reviewed by counsel and the company can freely convey all of the information reflected in those slides. Management can also elaborate on that information and answer audience questions, provided that they do not discuss material information regarding the company that is not reflected in the prospectus. Providing more granular detail in response to a question is generally fine, so long as the extra information is not itself material. For example, if the prospectus discloses that next year's capital expenditure budget is \$50 million, it's appropriate to answer the road show question "How does your capex break down by quarter?" In general, topics that were excluded from the prospectus and the road show slides for one or more good reasons should not be covered orally at the road show.

**28) Q: But my deal is a Rule 144A offering. Do any of these guidelines still apply?**

A: Yes. Although many of the technical rules are inapplicable in this context, the rules of prudence remain the same. A road show for a private offering does not need to follow the written/oral distinction, but slides are usually taken back after being handed out. Practice surrounding Rule 144A road shows tracks that of public offerings. In the case of an SEC reporting company, there is one additional wrinkle to bear in mind. As we note above, a reporting company engaged in a private offering may have obligations under Regulation FD to publicly disclose material non-public information it provides to potential investors in the private offering (for example, by filing the material non-public information on a Form 8-K).



## APPENDIX

*This Appendix is included for your convenience. It provides a slightly deeper dive with respect to some of the topics discussed in this Client Alert.*

### Section 5

Section 5 divides the registration process into three distinct time periods:

- *Pre-filing or “quiet” period.* The pre-filing or quiet period begins when a company decides to make a public offering (usually by retaining an investment bank or banks to undertake the offering) and ends when the registration statement relating to the offering is first filed publicly with the SEC. During this period, Section 5(c) of the Securities Act prohibits any person from offering the company’s securities. Accordingly, other than certain testing-the-waters activities by EGCs permitted by Section 5(d) of the Securities Act, absent an exemption from registration, such as the private placement exemption of Section 4(a)(2) or an exception from the definition of offer, nothing that would be considered to be an offer of securities is permitted during the pre-filing period.
- *Period between filing and effectiveness (also often called the “waiting period”).* The waiting period extends from the time that the registration statement is filed publicly with the SEC until the time that it is declared effective by the SEC. During this period, offers but not sales of the security are permitted by Section 5. However, under Section 5(b)(1), no prospectus other than a prospectus meeting the requirements of Section 10 of the Securities Act may be used to make written offers. Because the term prospectus picks up nearly all forms of written offers (and many forms of oral communication, including TV broadcasts, blast voicemail messages and the like), only certain types of oral offers and a carefully limited group of written offers may be made during the waiting period. A properly designed road show is one form of oral offer that satisfies the intricate requirements of Section 5. EGCs may test the waters with QIBs and other IAs during the waiting period.
- *Post-effective period.* After effectiveness of the registration statement, underwriters and other distribution participants may only sell the securities by means of a final prospectus meeting the requirements of Section 10(a) of the Securities Act. In addition, underwriters will have an obligation to deliver a final prospectus during a period of time following effectiveness, even in connection with secondary market resales. Accordingly, until the later of (1) completion of the “distribution” of the securities (that is, when the securities have been sold to investors) and (2) expiration of the relevant prospectus-delivery period, limitations on publicity by the issuer will remain in place.

### Private Offerings

The regulatory structure for private offerings is much simpler than the public offering regime. Section 5 does not apply to appropriately structured private offerings, so there is no concept of a quiet period or a waiting period. Offers of securities in connection with private deals are nonetheless subject to significant limitations, depending on the exemption from registration on which a company is seeking to rely.

In particular, for private placements conducted under Rule 506(b) of Regulation D or Section 4(a)(2) of the Securities Act, no general solicitation or general advertising can be used to offer or sell the securities. However, this prohibition does not apply to Rule 144A offerings or offerings under new Regulation D Rule 506(c).

## Regulation S

Regulation S provides a safe harbor for unregistered offerings outside the United States. If the conditions of Regulation S are met, the transaction is deemed to take place outside the United States and hence does not trigger the registration requirements of Section 5 of the Securities Act.

All Regulation S transactions start with the same basic requirements. Then, Regulation S layers on additional restrictions depending on the nature of the issuer.

The basic requirements are that:

- the offer or sale must be made in an “offshore transaction”; and
- there must be no “directed selling efforts” in the United States. Importantly, selling activities in the United States in connection with concurrent US offerings—whether registered or private—do not constitute directed selling efforts in the context of the offshore offering.<sup>55</sup>

An “offshore transaction” is defined as an offer which is not made to a person in the United States, and either:

- at the time the buy order is originated, the buyer is outside the United States or the seller (and any person acting on the seller’s behalf) reasonably believes that the buyer is outside of the United States;
- for purposes of the issuer safe harbor, the transaction is executed in, on or through the physical trading floor of an established foreign securities exchange located outside of the United States; or
- for purposes of the resale safe harbor, the transaction is executed in, on or through the facilities of a designated offshore securities market and neither the seller (nor any person acting on the seller’s behalf) knows that the transaction has been prearranged with a buyer in the United States.

## What Is a WKSI?

The definition of WKSI<sup>56</sup> includes an issuer (and its majority-owned subsidiaries under certain circumstances) that:

- meets the registrant requirements of General Instruction I.A of Form S-3 or F-3, which include that the issuer:
  - has securities registered with the SEC under Section 12(b) of the Exchange Act, a class of equity securities registered under Section 12(g) or is required to file reports under Section 15(d) of the Exchange Act;
  - has filed at least one annual report on Form 10-K or 20-F;
  - has filed on time all material required to be filed with the SEC during the 12 calendar months and any portion of a month immediately preceding the filing of the registration statement; and
  - has not had any material defaults under debt or long-term lease agreements since the end of the last fiscal year;

- as of a date within 60 days of the determination date,<sup>57</sup> has:
  - a worldwide market value of outstanding voting and non-voting common equity held by non-affiliates of at least \$700 million; or
  - issued at least \$1 billion in aggregate principal amount of non-convertible securities in transactions registered under the Securities Act, other than equity securities, in primary offerings for cash during the past three years; and
- is not an ineligible issuer or asset-backed issuer.<sup>58</sup>

## Research

### **Securities Act Rule 137 — Publication of Research by Non-Participating Broker-Dealers**

Rule 137 provides that a broker-dealer that is not a participant in a registered offering at the time it publishes or distributes research will not be deemed to offer securities in a distribution and, therefore, will not fall within the statutory definition of “underwriter” set forth in Section 2(a)(11) of the Securities Act. Rule 137 applies in the context of offerings by reporting companies as well as voluntary filers. It is available only to non-participating broker-dealers that have not and will not receive compensation for distributing the research report from any person participating in the securities distribution. Rule 137 also requires that the broker-dealer publish or distribute the research report in the regular course of its business.

It should be possible for a broker-dealer that is not part of an underwriting syndicate to rely on the Rule 137 safe harbor for research reports that were published or distributed by it (or an affiliate) before being invited to join the syndicate in an underwritten offering. However, since Rule 137 does not provide a safe harbor from the definition of “offer” for purposes of Section 2(a)(10) or Section 5(c), the issuer and managing underwriter for the offering will want to look closely at all of the facts and circumstances before inviting that broker-dealer to become an underwriter. Prudential concerns may suggest excluding the publishing broker-dealer from the underwriting syndicate, particularly if the research report was favorable and published shortly before the commencement of the offering.

### **Securities Act Rule 138 — Publication of Research by an Underwriter on Other Securities of an Issuer**

Rule 138 provides that an underwriter participating in a distribution of securities by either a US reporting issuer or a non-reporting FPI that meets certain criteria (such as a large non-US public float) is not deemed to make an offer of those securities if it publishes or distributes research that is confined to a different type of security of that same issuer. For example, Rule 138 allows publication of research with respect to non-convertible debt securities by an underwriter that is participating in a distribution of the issuer’s common stock, and vice versa.

Rule 138:

- covers research reports on reporting issuers that are current in their Exchange Act reporting (*i.e.*, it does not cover voluntary filers); and
- includes a requirement that the broker or dealer publish research reports on the types of securities in question in the regular course of its business.

The SEC has explained that the underwriter need not have a history of publishing research reports about the particular issuer or its securities, although it expressed concerns about situations in which an underwriter “begins publishing research about a different type of security around the time of a public offering of an issuer’s security and does not have a history of publishing research on those types of securities.”<sup>59</sup>

### **Securities Act Rule 139 — Publication of Research About the Securities Being Offered by an Underwriter**

Rule 139 provides that an underwriter participating in a distribution of securities by certain seasoned issuers can publish ongoing research about the issuer and its securities without being deemed to offer those securities by way of its research reports. Rule 139 research can take the form of issuer-specific reports, or more general reports covering an industry or sector. Rule 139 covers Form S-3 or F-3 eligible issuers that are current in their Exchange Act reporting for issuer-specific research reports; all Exchange Act reporting companies for industry research reports; and certain non-reporting FPIs for both types of reports. The Rule does not, however, cover voluntary filers.

- *Issuer-specific reports.* To qualify for the Rule 139 safe harbor, the issuer-specific research reports must be published by the underwriter in the regular course of its business. That publication may not represent the initiation of publication of research about the issuer or its securities (or re-initiation of publication following discontinuation). However, the SEC has explained that this requirement will be deemed satisfied if the underwriter has previously published research on the issuer or its securities at least once, or has published one such report following discontinuing coverage.<sup>60</sup> The concept of discontinuation of coverage is not defined in Rule 139.
- *Industry reports.* Rule 139 requires that the underwriter must publish research in the regular course of its business and, at the time of the publication of the industry research report, must include similar information about the issuer or its securities in similar reports. Rule 139 no longer contains the requirement that the broker-dealer not make a recommendation in the report more favorable than that contained in previous reports, and in fact the broker-dealer need not have included any recommendation in its prior reports.<sup>61</sup>

### **EGC Research**

The JOBS Act extends certain of the principles underlying existing Securities Act Rule 139 to provide broker-dealers with an exception from the definition of offer in Securities Act Section 2(a)(3) for research reports relating to EGCs that are the subject of a proposed public offering of common equity securities.<sup>62</sup> Similar to Rule 139, the new Section 2(a)(3) safe harbor provides that a broker-dealer’s publication or distribution of research reports about an EGC will not constitute an offer for purposes of Section 2(a)(10) (which sets forth the definition of prospectus) or Section 5(c), even if the broker-dealer is part of the syndicate for the offering. Unlike Rule 139, Section 2(a)(3) permits initiations of research reports and covers both oral and written research reports.

Despite the availability of Section 2(a)(3), it has become common for the lead underwriters in EGC IPOs to impose a contractual research quiet period on members of the underwriting syndicate. This voluntary research quiet period typically lasts (in the case of EGC IPOs that will be listed on an SEC registered national securities exchange) until the 25th calendar day following the IPO effective date. This approach reflects the view of many industry participants that investors should be looking only to the information provided in the prospectus during the prospectus delivery (or availability) period set forth in Securities Act Rule 174(d). The industry-standard 25-day blackout period has the added benefit of allowing the covering

analysts time to prepare their research reports and provide analysis that takes into account the information included in the final prospectus as well as post-offering developments.

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#### Endnotes

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<sup>1</sup> See *Publication of Information Prior to or After the Effective Date of a Registration Statement*, Release No. 33-3844 (Oct. 8, 1957).

<sup>2</sup> In order to qualify as an EGC, a company must have annual revenue for its most recently completed fiscal year of less than \$1.0 billion. See JOBS Act Sections 101(a) and (b) (adding new Securities Act Section 2(a)(19) and Exchange Act Section 3(a)(80)). After the initial determination of EGC status, a company will remain an EGC until the earliest of:

- the last day of any fiscal year in which the company earns \$1.0 billion or more in revenue;
- the date when the company qualifies as a "large accelerated filer," with at least \$700 million in public equity float;

- 
- the last day of the fiscal year ending after the fifth anniversary of the IPO pricing date; or
  - the date of issuance, in any three-year period, of more than \$1.0 billion in non-convertible debt securities.

<sup>3</sup> This flowchart outlines the “offer” analysis under US federal law. It does not address state securities laws.

<sup>4</sup> See *Guidelines for the Release of Information by Issuers Whose Securities are in Registration*, Release No. 33-5180 (Aug. 16, 1971).

<sup>5</sup> See *Securities Offering Reform*, Release No. 33-8591 (July 19, 2005) at 82 n.122 (*Securities Offering Reform Release*).

<sup>6</sup> *Id.* at 58-59; cf. Securities Act Section 19(a) (providing that no liability provision of the Securities Act “shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission”).

<sup>7</sup> See SEC Division of Corporation Finance, Securities Act Sections Compliance and Disclosure Interpretations (C&DI), Question 139.32.

<sup>8</sup> *Securities Offering Reform Release* at 76-77.

<sup>9</sup> Under Rule 168, “factual business information” means:

- factual information about the issuer, its business or financial developments, or other aspects of its business;
- advertisements of, or other information about, the issuer’s products or services; and
- dividend notices.

“Forward-looking information” means:

- projections of an issuer’s revenues, income or loss, earnings or loss per share, capital expenditures, dividends, capital structure, or other financial items;
- statements about management’s plans and objectives for future operations, including plans or objectives relating to the products or services of the issuer;
- statements about the issuer’s future economic performance, including statements generally contemplated by the issuer’s MD&A; and
- assumptions underlying or relating to the foregoing.

<sup>10</sup> *Securities Offering Reform Release* at n.81.

<sup>11</sup> *Id.* at 63.

<sup>12</sup> *Id.* at 64.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at n.147.

<sup>15</sup> See *Securities Offering Reform Release* at n.185.

<sup>16</sup> Securities Act Rules 502(c) and 902(c)(3)(vi).

<sup>17</sup> Securities Act Rules 502(c) and 902(c)(3)(vii).

<sup>18</sup> See Exchange Act Rules C&DI, Question 130.02.

<sup>19</sup> See *Commission Guidance Regarding Management’s Discussion and Analysis of Financial Condition and Results of Operations*, Release No. 33-8350 (Dec. 19, 2003) at n.54 and accompanying text (stating that discussion and analysis of future financing plans “should be considered and may be required” and that “disclosure satisfying the requirements of MD&A can be made consistently with the restrictions of Section 5 of the Securities Act” (citing Rule 135c)).

<sup>20</sup> See *Securities Offering Reform Release* at n.122 (citing the Preliminary Note to Rule 168).

<sup>21</sup> See JOBS Act Section 105(a) (revising Securities Act Section 2(a)(3)).

<sup>22</sup> See *Proposed Rule: Revisions to Rule 163*, Release No. 33-9098 (Dec. 18, 2009).

<sup>23</sup> See *Securities Offering Reform Release* at 82.

<sup>24</sup> See JOBS Act Section 105(c) (adding new Securities Act Section 5(d)).

<sup>25</sup> The application of Exchange Act Rule 15c2-8(e) to testing-the-waters activities was clarified by the SEC in FAQs issued by the Division of Trading and Markets on August 22, 2013. See SEC Division of Trading and Markets, “Jumpstart Our Business Startups Act Frequent Asked Questions About Research Analysts and Underwriters,” available at <http://www.sec.gov/divisions/marketreg/tmjobsact-researchanalystsfaq.htm> (*Research FAQs*). As discussed in the response to Question 1 of the *Research FAQs*, it should be possible for testing-the-waters activities to take place in a manner consistent with the requirements of Rule 15c2-8(e) (which generally has been interpreted to require the availability of a red herring prospectus prior to soliciting orders for the registered securities). In particular, the answer to Question 1 states that an underwriter should generally be able to seek non-binding indications of interest from prospective investors (including as to the number of shares they may seek to purchase at various price ranges) so long as the underwriters are not soliciting actual orders and the investors are not otherwise asked to commit to purchase any particular securities.

<sup>26</sup> Securities Act Rule 405 (defining “Graphic Communication”).

27 For a comprehensive discussion of the law and lore around pricing outside the range, see our *Client Alert* “Upsizing and Downsizing Your IPO,” available at [http://www.lw.com/upload/pubContent/pdf/pub3611\\_1.pdf](http://www.lw.com/upload/pubContent/pdf/pub3611_1.pdf).

28 Ineligible issuers include blank check companies and shell companies, while ineligible offerings include business combinations. See Rule 164(e), (f) and (g).

29 *Securities Offering Reform Release* at 111-12.

30 *Id.*

31 See Securities Act Rules C&DI, Question 232.02.

32 *Securities Offering Reform Release* at n.267.

33 See *id.* at n.206.

34 See *id.*

35 See *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, Release No. 33-9415 (July 10, 2013) (*General Solicitation Adopting Release*). For a comprehensive discussion of these rule changes, see our *Client Alert* “You Talkin’ to Me? FAQs About the SEC’s New General Solicitation, Regulation D and Bad Actor Rules,” available at <http://www.lw.com/thoughtLeadership/general-solicitation-reg-d-faq>.

36 See *Amendments to Regulation D, Form D and Rule 156*, Release No. 33-9416 (July 10, 2013).

37 Securities Act Rule 902(c)(1).

38 Securities Act Rule 902(c).

39 *Final Rule: Offshore Offers and Sales*, Release No. 33-6863, text accompanying n.64 (Apr. 24, 1990).

40 *Id.*, text accompanying n.145.

41 See *General Solicitation Adopting Release* at 58.

42 Many market participants also restrict the number of testing-the-waters meetings held.

43 See *Securities Offering Reform Release* at 92 and n.211.

44 *Id.* at 85 and n.188.

45 For an overview of the issues that need to be considered in connection with a directed share program, see our Words of Wisdom blog entry “Taking Sides with the Family – Directed Share Programs,” available at <http://www.wowlw.com/initial-public-offerings/taking-sides-with-the-family---directed-share-programs/>.

46 See *SEC v. Manor Nursing Centers*, 458 F.2d 1082, 1095-1096 (2d Cir. 1972).

47 *Securities Offering Reform Release* at n.561; see also SEC Division of Corporation Finance, “Securities Offering Reform Frequently Asked Questions,” Question 23 (Nov. 30, 2005).

48 *Securities Offering Reform Release* at n.155.

49 *Id.* at 66-67.

50 An analyst employed by an underwriting firm participating in the offering cannot attend (other than in “listen-only” mode from a remote location) the road show for the offering under FINRA rules.

51 As a technical matter, Regulation FD may not apply here because Rule 100(b)(2)(iii) of Regulation FD provides an exclusion from FD’s requirements for disclosure made in connection with road shows for certain registered securities offerings. However, it is not typical to rely on that exclusion based on principles of equal disclosure. The safer course is to proceed as if Regulation FD applies.

52 For a thorough discussion of earnings guidance, including practice points and answers to frequently asked questions, see our *Client Alert* “Giving Good Guidance: What Every Public Company Should Know,” available at <http://www.lw.com/thoughtLeadership/giving-good-guidance-public-company>.

53 *Securities Offering Reform Release* at n.292.

54 *Id.* at n.297.

55 *Final Rule: Offshore Offers and Sales*, Release No. 33-6863 at n.64 and accompanying text (Apr. 24, 1990).

56 Securities Act Rule 405 (defining “Well-Known Seasoned Issuer,” ¶ (1)).

57 *Id.* at ¶ (2). For purposes of determining whether an issuer qualifies as a WKSII, the determination date is the later of: (1) the time of filing of the issuer’s most recent shelf registration statement; (2) the time of the most recent amendment to its shelf registration statement for purposes of satisfying Section 10(a)(3); or (3) the date of filing of the issuer’s most recent annual report on Form 10-K or Form 20-F (if it has not filed a shelf registration statement for 16 months).

58 “Ineligible issuers” include those that: (1) are not current in their Exchange Act reporting obligations (other than certain enumerated Form 8-K filings); (2) are blank check companies, shell companies, penny stock issuers or limited partnerships offering other than through a firm commitment underwriting; (3) have filed for bankruptcy within the past three years, although ineligibility will terminate if an issuer has filed an annual report with audited financial statements subsequent to its emergence

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from bankruptcy; (4) within the past three years, have been convicted of any felony or misdemeanor under certain provisions of the Exchange Act; (5) within the past three years, were made the subject of any judicial or administrative decree or order arising out of a government action that: prohibits certain conduct or activities regarding (including future violations of) the US federal securities laws, requires them to cease and desist from violating the antifraud provisions of the US federal securities laws or determines that they have violated those antifraud provisions; or (6) have had any registration statement subject to a refusal order or stop order within the past three years. See Securities Act Rule 405 (defining “Ineligible Issuer”).

<sup>59</sup> *Securities Offering Reform Release* at 164.

<sup>60</sup> *Id.* at 167.

<sup>61</sup> *Id.* at 168.

<sup>62</sup> See JOBS Act Section 105(a) (revising Securities Act Section 2(a)(3)).