



The Nuts and Bolts of Road Shows

This Article provides an overview of the key practical and legal considerations involved when marketing securities through a road show.

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

This Article focuses on road shows in the context of securities offerings and discusses issues that should generally be considered when using a road show in this context. Topics that the Article covers include:

- A discussion of the content, length and importance of road shows.
- Timing for the road show in the context of a securities offering.
- The process for putting together a road show and the lawyer's role in reviewing a road show presentation.
- How road show presentations are made, and the rules and filing requirements of the Securities and Exchange Commission (SEC).
- Road shows in the context of private placements and other private offerings.
- How the underwriting agreement and 10b-5 letters address road shows.
- Who attends road shows.
- The liability standards applicable to road shows.

It is not uncommon for companies to conduct "non-deal" road shows, which are meetings or presentations put together by a company to potential investors, without a specific offering being planned. Most of this Article is not applicable to "non-deal" road shows.

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

WHAT IS A ROAD SHOW?

SEC rules define a road show as an offer (other than a statutory prospectus or portion of one filed as part of a registration statement) that contains a presentation made by one or more members of the issuer's management, which includes a discussion of the issuer, the management or the securities being offered (Rule 433, Securities Act of 1933, as amended (Securities Act)).

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

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

They are used in the marketing process for initial public offerings (IPOs) and follow-on offerings, in registered offerings, as well as in private placements (including private offerings pursuant to Rule 144A under the Securities Act and offshore offerings under Regulation S), by both domestic issuers and foreign issuers. While road shows are common in securities offerings, issuers that regularly issue securities and have investors that are very familiar with their business may only need to issue a press release and hold a brief investor conference call in order to alert investors and the market to their proposed securities offering.

Road shows are designed to provide prospective investors with additional information about the issuer and its business, and often a more personal opportunity to evaluate the issuer, its management team and the securities



offering. Road shows can be an integral component of the underwriters' selling efforts, helping them to "build a book" of investors for the offering.

Content

Road show presentations vary in content, length and format depending on the circumstances of the offering, including:

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

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

Length

Road shows vary in length, with some being as brief as a single telephone presentation to a large number of potential investors, while others require management to travel for several weeks, both throughout the US and abroad. They may involve:

- Face-to-face meetings with various prospective investors.
- Conducting conference calls.
- Publishing materials on the internet.

For important investors, meetings are often "one-on-one", with the chief executive officer or chief financial officer of the issuer dedicating time (sometimes several hours) to a single potential investor.

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

Importance

By allowing investors to interact with management in a live setting, and by allowing question and answer sessions,

road shows provide the opportunity to better understand, first-hand, management's or the underwriters' perspective on, and enthusiasm for, the offering and the issuer's business; investors can personally assess the character and commitment of management.

Investors often place great importance on meetings with management, and road shows have become a critical element in many securities offerings. Some large investors will not invest in an issuer's securities without having the opportunity to meet with senior management, and a poorly run road show can result in poor results for the securities offering. A well-run road show, on the other hand, can generate enthusiasm for, and interest in, an upcoming securities offering, and assure investors that management will be able to successfully execute the issuer's strategy as set out in the prospectus.

WHEN DOES THE ROAD SHOW OCCUR?

General Rule

In a registered offering, a road show can only commence after a registration statement for the offering has been filed, because Section 5(c) of the Securities Act prohibits public offers of securities before the filing of a registration statement. In practice, road shows rarely commence until a preliminary prospectus is available for investors, and in initial public offerings a price range must be included in a preliminary prospectus before any written road show materials can be used. The road show is usually completed before the registration statement is declared effective and the securities are priced.

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

Exception for Well-Known Seasoned Issuers in Registered Offerings

Rule 163(c) of the Securities Act provides an exception to Section 5(c) that allows well-known seasoned issuers (WKSIs) to make oral and written offers (including road shows) before a registration statement for the offering is filed with the SEC, provided the offer is made "by or on behalf of" the issuer; that is, the issuer itself or an agent or representative of the issuer, other than an offering participant who is an underwriter or a dealer, authorizes or approves the communication before it is made.



Although Rule 163 permits WKSIs to conduct a road show before filing a registration statement, the road show presentation will still be subject to the liability standards that apply to oral and written offers. Regulation FD also applies to WKSI road shows that are conducted before the filing of the registration statement, because such communications do not fall under Regulation FD's exception for communications in connection with a registered securities offering (even if the registration statement will be filed). The road show presentation must also include a legend similar to that required for free writing prospectuses (FWP). Furthermore, every written communication that is an offer made in reliance on Rule 163 must be filed as an FWP with the SEC when the registration statement is filed.

For information on recent proposed amendments to Rule 163, see *Box, Proposed Changes to Rule 163*.

WHAT IS THE PROCESS FOR PUTTING TOGETHER A ROAD SHOW?

The road show is a marketing presentation consisting of slides and, often, a script of talking points. The first draft of the road show is usually prepared by the underwriters and revised based on the issuer's feedback. The underwriters and issuer will sometimes delay sending the road show presentation to counsel for review until a draft is agreed between them; however, counsel should proactively request to review drafts of the road show as it is being prepared. The lead underwriters will also plan the road show, including the schedule and the cities and the investors that management will visit.

The underwriters will typically be present at, or may even be involved in, the presentation of the road show material; lawyers are rarely involved in, or present during, the road show presentations.

Although the lawyer's role may be more limited in preparing the road show presentation, the presentation should always be reviewed by counsel because there are legal rules applicable to road shows, and there may be liability for statements made in these presentations, as further discussed under *Liability Standards*.

LAWYER'S REVIEW OF A ROAD SHOW

The lawyers, whether representing the issuer or the underwriters, should review the road show presentation to ensure that it does not contain:

PROPOSED CHANGES TO RULE 163

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

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

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

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

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

Regulation FD

Under Regulation FD, when a reporting issuer, or a person acting on its behalf, discloses material non-public information to certain persons (including brokers, dealers, investment advisors and holders of the issuer's securities) in circumstances where it is reasonably foreseeable that



they will trade on the basis of that information, the issuer must make simultaneous public disclosure of that material non-public information. There is, however, an exception for information disclosed "in connection with a securities offering registered under the Securities Act," that is itself subject to certain exceptions.

While most road shows used in primary registered offerings are not subject to the restrictions of Regulation FD, all other road shows are. Road shows used in unregistered offerings and in secondary offerings, as well as road shows that are conducted before the filing of a registration statement by WKSIs under Rule 163, are all subject to the restrictions of Regulation FD (see also *Exception for Well-Known Seasoned Issuers in Registered Offerings*). However, Regulation FD does allow disclosure of material non-public information without public disclosure if the person who receives the information expressly agrees to maintain the disclosed information in confidence. For more information, see *Practice Note, Bringing Investors Over the Wall* (www.practicallaw.com/4-422-1741).

Therefore, in the context of road shows conducted before the filing of the registration statement, for a secondary offering or for an unregistered offering, counsel should carefully evaluate the content of the road show to confirm that either the presentation contains no material non-public information or that this information is simultaneously disclosed to the public. Otherwise, lawyers should require that all persons to whom the road show presentation is made agree to keep the information confidential.

Comfort from Accountants and Fact Back-Up

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

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

Road shows may contain figures that are not linked to accounting statements, or statements based on facts, which are also not included in the prospectus. To verify their factual accuracy, underwriters and their counsel will ask the issuer to provide factual support, or "fact back-up", for these figures or statements. This process is usually undertaken for the prospectus, but can also be requested for figures or statements in the road show presentation. Statements may include remarks about:

- The issuer's growth.
- Its relative position among peers.
- Facts about current projects.

The amount and type of factual support adequate to satisfy such a request depends on the specific circumstances surrounding the request and the statements or figures it seeks to support.

See also, *Box, Additional Tips on Road Show Presentations*.

TREATMENT OF ROAD SHOWS UNDER THE SECURITIES ACT

Road show presentations can be made through various means, including:

- By phone.
- In-person.
- By webcast over the internet.

Traditionally, road shows were live, in-person meetings with prospective investors, but the advent of the internet has changed that in recent years. Road shows are now often webcast. The form of the road show and whether it is considered an oral or written communication will affect its treatment under the relevant SEC rules.

Pre-Reform Treatment of Road Shows

Before the adoption in 2005 of a set of amendments to the SEC's rules under the Securities Act (known as Securities Offering Reform), between the filing of the registration statement and its effectiveness, offers that were written communications (which included e-mails and communications made through the internet) could only be made if they met the requirements of a "statutory prospectus" under Section 10 of the Securities Act,



ADDITIONAL TIPS ON ROAD SHOW PRESENTATIONS

The list below sets out selected practice points in the context of reviewing and advising on road show presentations.

- Review each part of a road show presentation. In addition to reviewing the electronic road show slides or handouts, it is also important to listen to the live presentation itself because it may contain material misstatements or omissions or information that conflicts with the prospectus, even if the corresponding slides and handouts do not.
- Make sure to use consistent messaging in selling the securities. This includes the preliminary prospectus, the pricing term sheet, the final prospectus, the oral and electronic road shows, press releases and any other FWP.
- A road show that constitutes an FWP should include a legend indicating where the prospectus for the offering is available, advising prospective investors to read the prospectus, indicating that the prospectus can be requested from the issuer or any underwriter or dealer by calling a toll-free number and stating that the FWP relates to a registered public offering.
- Include a disclaimer for forward-looking statements in the road show slides or handouts, and have someone read the disclaimer in live or pre-recorded road show presentations.
- Under Rule 433 of the Securities Act, the FWP of a non-reporting or unseasoned issuer must be accompanied or preceded by the prospectus filed with the registration statement. This condition is met if an FWP that is an electronic communication contains a hyperlink to the prospectus for the offering.

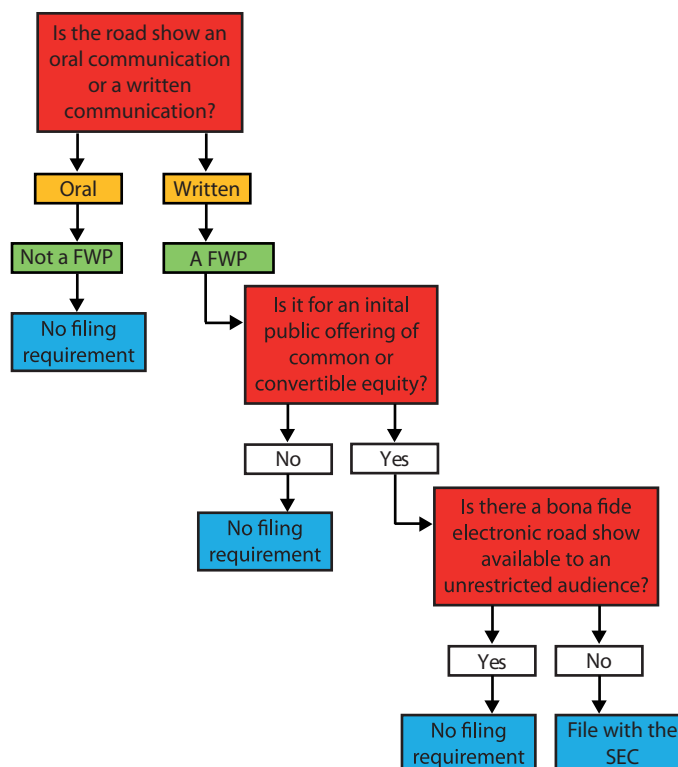
which was a preliminary prospectus filed with the SEC. Therefore, aside from the statutory prospectus, only oral communications were permissible, and it was essential to ensure that road shows constituted oral communications.

Road shows that were conducted live and in-person were considered to be oral communications and therefore permissible. Any materials that were used as part of

the live road show were also considered to be oral and therefore permissible, so long as they were not separately available and attendees did not take them with them. Because the internet enabled electronic road shows to reach a much larger group of investors while avoiding the costs of traveling to multiple cities and other time restraints, the SEC set out, in a series of no-action letters, conditions that would allow issuers to treat these re-transmitted or pre-recorded road shows as oral communications. These conditions were confusing, and restricted the use of these types of electronic road shows in some cases. The SEC, therefore, adopted amendments as part of Securities Offering Reform to address these issues and to replace the no-action letters.

Current Treatment of Road Shows

The following flowchart summarizes the current treatment of road shows for registered offerings under the Securities Act. The paragraphs below explain in further detail each element of the flowchart. Road shows that are used for unregistered offerings are not subject to the rules and filing requirements set out below.





Free-Writing Prospectus

Securities Offering Reform sought to expand the amount and types of written communications that could be made by an issuer or other offering participants. The amendments established the new concept of a "free writing prospectus", a permissible written communication that WKSIs could issue at any time and all other eligible issuers could issue after the filing of a registration statement, subject to certain conditions. Electronic road shows were deemed permissible as FWP.

Whether a road show is considered an FWP depends on whether it is considered a written communication. Road shows that are not considered written communications are not FWPs. Issuers are often asked to make a representation or warranty in the underwriting agreement with respect to road shows that are considered FWPs, while road shows that are not considered FWPs are generally not covered by the underwriting agreement (see further *Underwriting Agreement and 10b-5 Letters*). In some cases, FWPs must be filed with the SEC while oral communications that are not FWPs are not subject to a filing requirement.

Live Road Shows are Considered Oral Communications

Under Rule 405, a graphic communication, which is also a written communication, excludes any communication that:

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

Therefore, a live, real-time road show to a live audience will not be considered a graphic communication, and therefore is not a written communication or an FWP.

Oral communications that are therefore not written communications or FWPs, and that do not need to be filed with the SEC, include:

- Traditional live road shows where the issuer and the underwriters meet in person with prospective investors.
- Any visual aids such as slides that are used as part of the live road show that are not separately available to investors.
- Handouts that are distributed at live road shows if they are returned and attendees do not take them with them after the road show presentation.

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

Road Shows that Constitute Written Communications and FWPs

Under Rule 405, a written communication is any communication that is "written, printed, a radio or television broadcast, or a graphic communication." A graphic communication includes:

"all forms of electronic media, including, but not limited to, audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, Internet Web sites, substantially similar messages widely distributed (rather than individually distributed) on telephone answering or voice mail systems, computers, computer networks and other forms of computer data compilation."

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

Therefore, electronic road shows that do not originate live and in real-time are considered written communications and are also FWPs. They include:

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



transmitted, whether through airwaves, cable, satellite or the internet, and regardless of how the recipient receives it.

Filing FWP's with the SEC

If a road show is considered an oral communication and therefore not an FWP, it does not need to be filed with the SEC. In addition, the filing requirements of Rule 433 of the Securities Act do not apply to road shows that are considered FWP's unless they are used in an IPO of common or convertible equity. Road shows that are considered FWP's and which are also used in IPOs of common or convertible equity must be filed with the SEC unless at least one bona fide version of the road show is readily available to an unrestricted audience electronically (Rule 433(d)(8)(ii), *Securities Act*). If more than one version of a road show constituting a written communication exists, the bona fide electronic road show must be available to the unrestricted audience no later than the time at which other versions are available.

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

The bona fide road show does not need to address all of the same subjects or cover the same information as the other versions (for instance, those that may be provided to institutional investors). The same members of management need not present in the bona fide road show as in the others. Importantly, the version that is available to a restricted audience may contain projections that are not available in the bona fide version. The bona fide version also need not provide an opportunity for questions and answers, even if the other versions do.

All road shows that are offers and written communications are FWP's. This means they may be subject to representations and warranties and indemnities in the underwriting agreement regardless of whether they are required to be filed (see further *Underwriting Agreement and 10b-5 Letters*).

PRIVATE OFFERINGS

Road shows may be used not only in registered offerings, but also in private placement transactions and other unregistered offerings. The practical rules that apply to road shows in registered offerings are generally also observed in the context of unregistered offerings. For example, counsel should review the road show presentation in an unregistered offering and eliminate any statements in the road show presentation that are inconsistent with statements in the offering memorandum. The treatment of the road show presentation in a purchase agreement and 10b-5 letter in the private context is similar to the treatment of the road show presentation in an underwriting agreement and 10b-5 letter in a registered offering.

While the treatment of road shows in a private offering is similar in most respects to the treatment of road shows in a registered offering, the concept of an FWP is not applicable to private offerings, and the filing requirements for FWP's do not apply in the private context. In addition, the exception from the restrictions of Regulation FD does not apply since the offering is not registered under the Securities Act.

UNDERWRITING AGREEMENT AND 10B-5 LETTERS

Underwriting Agreement

The underwriting agreement for a securities offering contains certain representations and warranties from the issuer. One such representation and warranty commonly found in an underwriting agreement relates to road shows, or "issuer free writing prospectuses", which include institutional and retail electronic road shows, even if they are not required to be filed. Live road shows that are considered oral communications are typically not covered.

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

Some underwriting agreements will also contain a representation that at the applicable time (the time when the



pricing terms are first distributed to prospective investors), the disclosure package (which usually includes the preliminary prospectus and the pricing term sheet or pricing terms), any issuer free writing prospectuses, including electronic road shows and other free writing prospectuses, taken as a whole, do not contain any material misstatements or omissions. Generally an issuer will not be asked to represent that the electronic road show alone contains no material misstatements or omissions, because investors are expected to have the preliminary prospectus and other components of the disclosure package in hand when making their investment decision. In other underwriting agreements, this representation only covers the disclosure package and other FWP's, but not electronic road shows. Whether this representation covers electronic road shows can depend on the circumstances and is a point that may be negotiated.

10b-5 Letters

It is unusual for a 10b-5 letter, delivered by outside counsel, to cover a road show presentation. Law firms generally limit their 10b-5 letters to the statutory disclosure package that is delivered at the time the registration statement becomes effective, the time the securities offering is priced, and the time the securities offering closes. The road show presentation is "supplemental" to the statutory disclosure package, meaning that all the information that investors need to have in order to make an informed investment decision should be included in the statutory disclosure package.

WHO CAN ATTEND A ROAD SHOW?

Road shows are typically attended by:

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

Generally, the only persons prohibited from attending road shows where the investment banking sales force and the issuer are present are research analysts and other persons with research positions.

Under NYSE Rule 472(b)(6)(i) and NASD Rule 2711(c)(5), a research analyst is prohibited, directly or indirectly, from:

- Participating in a road show that is related to an investment banking services transaction.

- Engaging in any communication with a current or prospective customer in the presence of personnel from the investment banking department or issuer management about an investment banking services transaction.

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

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

These rules were adopted to:

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

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

For a private offering under Rule 144A and Regulation S, only qualified institutional buyers (QIBs) and non-US persons may have access to the road show. Companies should, therefore, protect road shows transmitted over the internet with passwords, and should only provide these confidential passwords to entities that the company believes are QIBs or non-US persons. Usually a company will require that each QIB and non-US person represent to the company that it qualifies as such an entity.

LIABILITY STANDARDS

Section 11 Liability

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



Section 12 Liability

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

Section 12(a)(2) provides buyers of a security with a remedy for material misstatements and omissions made by anyone who offers or sells a security by means of a prospectus or an oral communication.

Section 10(b) and Rule 10b-5 Liability

Rule 10b-5 makes it unlawful to employ any scheme or device to defraud, make any material misstatements or omissions or to engage in any acts or practices that would operate as a fraud or deceit on any person in connection with the purchase or sale of any security. Rule 10b-5

has been used by investors against issuers, officers and directors who sign the registration statement, accountants and underwriters, all of whom are potentially liable under this rule, for alleged misstatements in road shows.

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

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

For more information on liability under federal securities laws, see *Practice Note, Liability Provisions: Securities Offerings* (www.practicallaw.com/6-381-1466).