NDRs/TTWs/Roadshows

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Why is this topic important?

• Non-deal roadshows and Testing-the-Waters and are some of the earliest opportunities to educate potential public company investors about your company

• Opportunity to gauge investor reactions to and receive feedback on your company and market appetite for a potential offering

• Mistakes in pre-IPO communications can delay the timing of your IPO and have other consequences
Legal and Regulatory Overview

• There are strict rules governing how companies can market their IPOs

• These rules govern how and when companies can “offer” their securities to investors. An “offer” is defined broadly and can encompass fairly benign presentations to potential investors

• If a company is deemed to have made an offer to investors, but not followed the SEC’s rules in doing so, it can create issues for the IPO
Permitted Investor Communications

• There are three main ways companies can communicate with investors ahead of an IPO:
  – Make sure meetings are NOT deemed to involve an offer to potential investors (non-deal roadshow);
  – Conduct meetings in compliance with the SEC’s “testing the waters” rules, in which case a company is permitted to make an offer (non-binding indication of interest) at the meeting; or
  – Conduct a deal roadshow accompanied by a conforming prospectus, in which case a company is permitted to make an offer (which will be confirmed once the deal prices) at the meeting
    ▶ Can include a recorded road show presentation
Permitted Investor Communications: Non-Deal Roadshows

- In-person meetings with investors for informational purposes that does not involve an “offer” to sell securities
- Permits a company to get to know its investors better, build relationships
- Rule 163A permits communications more than 30 days before filing a registration statement, as long as the communications do not reference an offering
Permitted Investor Communications: Testing the Waters

• Section 105(c) of JOBS Act now permits “testing the waters” (“TTW”) communications by emerging growth companies
  – Communications may be written or oral
  – Communications can be made before or after confidentially submitting or filing a registration with the SEC

• Limitations on TTW Communications
  – Must be made by the issuer or a person authorized to act on its behalf
  – Must be made to qualified institutional buyers or institutional investors who qualify as accredited investors
  – Cannot solicit firm orders or binding commitments
    ▶ Non-binding indications of interest are okay
  – Statements cannot be materially misleading or omit material facts
Practical Considerations of Testing the Waters Communications

• Contents
  – No materials misstatements or omissions of fact; anti-fraud provisions of federal securities laws apply
  – If TTW, information must be consistent with the registration statement
  – Cannot solicit binding offers
  – SEC may request copies of TTW materials supplementally

• Coordinating with Bankers
  – Bankers will typically have policies, procedures and guidelines regarding TTW communications
  – TTW presentations can be an opportunity to evaluate bankers
Practical Considerations of Testing the Waters Communications (cont’d)

- Consistency of message (across time and sources)
  - Make sure messaging to the public is consistent, regardless of who is making the statement
  - Communications should remain consistent throughout the IPO process. Changes resulting from ongoing developments should be accurately explained
    - Investors have long memories
    - Inconsistent messaging can impact IPO timing and success, as well as post-IPO investor relations
    - SEC may ask to review any TTW communications to ensure consistency with registration statement
Permitted Investor Communications: Deal Roadshows

• Presentation by a company’s senior management to market a securities offering
  – Can be conducted as live, in-person meetings or recorded presentation made available electronically (retail road show)
  – Not limited to qualified institutional buyers and institutional accredited investors only

• Can only commence after a registration statement for the offering which includes a bona fide price range has been filed.

• The SEC generally requires that you “offer” to sell your stock only through your IPO prospectus and in accordance with the SEC mandated process
  – Deal Roadshow is considered an “offer”
  – Deal Roadshow usually completed before the registration statement is declared effective and the securities are priced
Penalties

• If the SEC determines that the company has violated its rules with respect to communications surrounding an offering, the penalties could include:
  – “Cooling off” period—delay in IPO for up to 6 months
  – Embarrassing disavowals and risk factor disclosures in press
  – Recision rights for IPO investors
  – Fines and sanctions against company and responsible officers
  – Exclusion of particular underwriters
  – SEC investigation
Key Takeaways

• Pre-IPO communications can be a useful tool for educating investors about your company, keeping investors apprised of key developments and gauging market interest

• Involve all the key players (management, bankers, lawyers) in the process to ensure communications don’t impact offering timing or success

• Consistency
Thank you!

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