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**A COVID IPO;
The Virtual Roadshow**

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Although many aspects of an [IPO](#) are unaffected by a pandemic, assuming the capital markets continue to have an appetite for [public offerings](#), the grueling road show has gone virtual, and it may be here to stay. An old-fashioned road show involved an intense travel schedule and expensive setup. The new virtual road show can be completed in half the time and a fraction of the price, and interestingly, the [IPO's](#) that have been completed since March 2020, have all priced their deals at the midpoint or higher of their ranges. The lack of face-to-face presentations is not hurting the deals.

I tend to believe the world has changed forever. However, fluidity of memory and a capacity to adapt are fundamental human traits and we have and will adapt our business style to adjust to a world where germs are a real enemy and getting sick doesn't just mean a day or two out of the office. There has been a perfect storm of advanced technology that allows us to see and hear each other in real time, coupled with a need to avoid crowds and close person-to-person contact with people you don't live with. We are all comfortable with Zoom, and very quickly 3D holographic images, avatars and other AR/VR technologies could become business commonplace.

In addition to the dramatic change of the road show, [IPO's](#) in the [COVID](#) world require a more complex carefully crafted registration statement and prospectus. As I've discussed in a series of blogs on [COVID-related disclosures](#) (see [here](#) for the most recent which contains links to prior blogs on the topic regulators and the marketplace expect in-depth discussions on the current and anticipated effects of the virus on businesses, with updates as those effects and projections evolve. Risk factors are generally much more robust with drill-downs on an array of potential issues from debt management to human resource uncertainties.

The good news is that the markets are booming. Tech and [pharma IPO's](#) continue unabated and even increased compared to other mid-summer years, especially election years. The country is mired in the worst pandemic in a century and suffered its steepest-ever quarterly plunge in economic activity in the second quarter. Yet the equity markets are rallying, and tech and pharma stocks are trading at historical premiums. Some are predicting there will be at least 15 [venture-backed tech IPO's](#) before the end of the year. Also, although analysts and venture firms focus on the [big-board IPO's](#), the small and lower middle market deals are busier than ever with [IPO's](#), a record-setting number of SPAC deals, and a non-stop string of follow on offerings.

We are resilient and the success of the virtual road show is just an example of that resilience. In addition, to the decreased time and expense, as explained below, a virtual road show will almost never involve a written offering or free writing prospectus, allowing for widespread use by all levels of companies.

The Road Show

We often hear the words "road show" associated with a securities offering. A road show is simply a series of presentations made by company management to key members of buy-side market participants such as broker-dealers that may participate in the syndication of an offering, and institutional investor groups and money managers that may invest into an offering. A [road show](#) is designed to provide these market participants with more information about the issuer and the offering and a chance to meet and assess management, including their presentation skills and competence in a Q&A setting. Investors often place a high level of importance on road show presentations and as such, a well-run road show can make the difference as to the level of success of an offering. In a virtual road show it is extremely important that the best technology be utilized so the audience can clearly see and hear the presenter to be able to make the same type of assessment as they would in person.



A road show historically involved an intensive period of multiple meetings and presentations in a number of different cities over a one-to-two-week period. Although road shows were generally live, even before [COVID](#) they were sometimes by teleconference, or electronic using prepared written presentation materials. Road shows are often recorded from a live presentation and made available publicly for a period of time. The meetings and presentations can vary in length and depth depending on the size and importance of the particular audience. During the road show, the underwriters are building a book of interest which will help determine the pricing for the offering.

A company can also conduct a [“non-deal road show”](#) for the purpose of driving interest in the company and its stock, where no particular offering is planned.

Unless it is a non-deal road show, the road show involves an offer of securities. “Offers” of securities are very broadly defined. Section 2(a)(3) of the Securities Act defines “offer to sell,” “offer for sale,” or “offer” 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.”

The timing and manner of all offers of securities are regulated, and especially so in registered offerings. All issuers that have filed a registration statement are permitted to make oral offers of their securities, but only certain types of written offers are allowed. Written offers must comply with [Section 10 of the Securities Act](#), including a requirement that a prospectus meeting the information requirements in Section 10(a) be delivered at the time of or prior to the offer. Delivery can be accomplished through the filing of a preliminary prospectus with the [SEC](#), which is publicly available on the EDGAR system.

In addition, certain eligible issuers may provide supplemental written information and graphic communications not otherwise included in the prospectus that is filed with the [SEC](#) (i.e., a free writing prospectus) as part of an offer of securities. All of these oral and written communication rules are implicated in the road show process and must be considered when planning and completing the road show whether it is live or virtual.

A road show is generally timed to be completed in the last few weeks before a registration statement goes effective or a [Regulation A offering](#) circular becomes qualified. In a registered offering, Section 5(c) prohibits offers prior to the filing of the registration statement and as such, the road show would never commence pre-filing. Regulation A is not a registered offering for purposes of Section 5(c), but for practical purposes, a Regulation A road show also commences right before [SEC qualification](#).

Securities Act Rule 163 provides an exception to the pre-filing offer rules only available to well-known seasoned issuers. A well-known seasoned issuer is generally one with a non-affiliate public float of more than \$700 million or has issued at least \$1 billion in non-convertible securities in primary offerings for cash in the last 3 years, is S-3 eligible (see [HERE](#) is not an ineligible issuer (described below), is not an asset-backed issuer and is not an investment company.

For a private offering, the road show occurs once the offering documents are completed. A company that has filed its registration statement on a confidential basis must make the initial filing and all confidentially submitted amendments public a minimum of 15 days prior to starting the road show. For more information on confidential filings, and when a company is eligible to do so, see [HERE](#).

A road show is subject to the test-the-waters and pre-effective communication rules. For a review of testing the waters in a registered offering, see [HERE](#) and [HERE](#) and for Regulation A offerings, see [HERE](#).

A road show is specifically regulated under [Rule 433 of the Securities Act](#) and the free writing prospectus rules. Securities Act Rule 433(h)(4) defines a road show as an offer, other than a statutory prospectus, that “contains a presentation regarding an offering by one or more of the members of the issuer’s management and includes discussion of one or more of the issuer, such management, and the securities being offered.”



The SEC definition of road show includes the language “other than a statutory prospectus.” The statutory prospectus is one that meets the requirements of Section 10(a) of the Securities Act and is generally the filed prospectus that contains the disclosures outlined in the particular offering form being used (for example, [Form S-1](#) or 1-A) and including disclosures delineated in Regulations S-K and S-X. To meet the requirements of Section 10(a), the prospectus must include a price range and estimate of volume of shares to be registered.

In general, if the information being presented in a road show is nothing more than what is already included in the prospectus filed with the SEC, there are no particular SEC filing requirements. On the other hand, if the information is written and goes beyond the statutory prospectus, it may be considered a “free writing prospectus” and be subject to specific eligibility requirements for use, form and content and [SEC filing requirements](#) all as set forth in Rule 433 and discussed herein.

Securities Act Rule 405 of the Securities Act defines a free writing prospectus (“FWP”) as “any written communication as defined in this section that constitutes an offer to sell or a solicitation of an offer to buy the securities relating to a registered offering that is used after the registration statement in respect of the offering is filed... and is made by means other than (i) a prospectus satisfying the requirements of Section 10(a) of the Act...; (2) a written communication used in reliance on Rule 167 and Rule 426 (note that both rules relate to offerings by asset backed issuers); or (3) a written communication that constitutes an offer to sell or solicitation of an offer to buy such securities that falls within the exception from the definition of prospectus in clause (a) of Section 2(a)(10) of the Act.” [Section 2\(a\)\(10\)\(a\)](#), in turn, exempts written communications that are provided after a registration statement goes effective with the SEC as long as the effective registration statement is provided to the recipient prior to or at the same time.

Types of Road Shows; Oral/Live vs. Written; Free Writing Prospectus (FWP) Requirements

The rules distinguish between a “live” vs. a “written” road show communication, with one being an “oral offer” and more freely allowed and the other being a “written offer” and more strictly regulated. In addition, the rules differentiate requirements based on whether a road show is for a registered or private offering and, if a registered offering, whether such offering is an [initial public offering \(IPO\)](#) involving common or convertible equity.

Where a road show communication is purely oral, even if virtual, it is not an FWP and thus there are no specific [SEC filing requirements](#) (though see the discussion on Regulation FD below). Where an oral communication implicates Regulation FD, a Form 8-K would need to be filed regardless of whether the communication is during a road show or in any other forum.

Although road shows are generally live and specifically designed to constitute oral offers, they can also be electronic using prepared written presentation materials. Both live and electronic road shows may be made available for replay electronically over the Internet. The live virtual road show has made the recording and replay process even easier.

Live road shows include: (i) a live, in-person presentation to a live, in-person audience; (ii) a live, real-time presentation to a live audience or simultaneous multiple audiences transmitted electronically; (iii) a concurrent live presentation and real-time electronic transmittal of such presentation; (iv) a webcast or video conference that originates live and is transmitted in real time; (v) a live telephone conversation, even if it is recorded; and (vi) the slide deck or other presentation materials used during the road show unless investors are allowed to print or take copies of the information.

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.”



Accordingly, 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) and are subject to Securities Act Rules 164 and 433, including a requirement that the materials be filed with the SEC. Accordingly, if a company is not [FWP eligible](#), it is important to make sure that there are no downloadable materials when completing a virtual road show.

A video recording of the road show meeting will not need to be filed as an FWP so long as it is available on the Internet to everyone and covers the same ground as the live road show. Such video road shows are considered a “bona fide electronic road show.” [Rule 433\(h\)\(5\)](#) defines a “bona fide electronic road show” as a road show “that is a written communication transmitted by graphic means that contains a presentation by one or more officers of an issuer or other persons in an issuer’s management...” It is permissible to have multiple versions of a bona fide electronic road show as long as all versions are available to an unrestricted audience. For example, different members of management may record different presentations and, although access must be unrestricted, management may record versions that are more retail investor facing or institutional investor facing.

On the other hand, a [FWP](#) would include any written communication that could constitute an offer to sell or a solicitation of an offer to buy securities subject to a registration statement that is used after the filing of a registration statement and before its effectiveness. A FWP is a supplemental writing that is not part of the filed registration statement. If the writing is simply a repetition of information contained in the filed registration statement, it may be used without regard to the separate FWP rule.

[Rule 405 of the Securities Act](#) defines a written communication as 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 websites, 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.” Basically, for purposes of rules related to FWP’s, all communications that can be reduced to writing are considered a written communication. Accordingly, radio and TV interviews, other than those published by unaffiliated and uncompensated media, would be considered a FWP and subject to the [SEC](#) use and filing rules.

Electronic road shows that do not originate live and in real time are considered written communications and FWP’s. Once it is determined that a road show includes a FWP, unless an exemption applies, an [SEC filing](#) is required. As mentioned, bona fide electronic road shows are not required to be filed with the SEC. In addition, Rule 433 only requires the filing of a FWP for an IPO of common or convertible equity.

A non-exempted FWP must be filed with the [SEC](#), using Form 8-K, no later than the date of first use. An after-hours filing will satisfy this requirement as long as it is on the same calendar day. Moreover, all FWP’s must be filed with the SEC, whether distributed by the registrant or another offering participant and whether such distribution was intentional or unintentional.

The use of a FWP has specific eligibility requirements. A [FWP](#) may not be used by any issuer that is “ineligible” for such use. The following entities are ineligible to use a free writing prospectus: (i) companies that are or were in the past three years a blank-check company; (ii) companies that are or were in the past three years a shell company; (iii) penny-stock issuers; (iv) companies that conducted a penny-stock offering within the past three years; (v) business development companies; (vi) companies that are delinquent in their Exchange Act reporting requirements; (vii) limited partnerships that are engaged in an offering that is not a firm commitment offering; and (viii) companies that have filed or have been forced into bankruptcy in the last three years.



Small- and [micro-cap issuers](#) will rarely be eligible to use a free writing prospectus. Accordingly, small and micro-cap companies generally are limited to live road shows involving oral offers not constituting a FWP.

Moreover, underwriters generally require specific representations and warranties and indemnification related to FWP's regardless of whether they are required to be filed with the [SEC](#).

Content

The road show presentation usually covers key aspects of the offering itself, including the reasons for the offering and use of proceeds. In addition, management will also cover important aspects of their business and growth plans, industry trends, competition and the market for their products or services. An important aspect of the [road show](#) is the question-and-answer period or Q&A, though obviously this is only included in live or virtual real-time interactive road shows. It is common for materials to include drilled-down information that is provided on a higher level in the prospectus as well as theory and thoughts behind business plans and management goals.

The preparation of the road show content is usually a collaborative effort between the company, underwriters and legal counsel. Although the [road show](#) begins much later in the process, since its content is derived from the registration statement, ideally the planning begins at the same time as the registration statement drafting. Also, slides, PowerPoint presentations and other presentation materials should be carefully prepared to get the most out of their effectiveness.

The lawyer generally reviews all materials for compliance with the rules related to offering communications as well as potential liability for the representations themselves. Part of the compliance review is ensuring that no statements conflict with or provide a material change to the information in the filed offering prospectus that could be deemed materially misleading by content or omission, and compliance with [Regulation FD](#) if applicable.

Also from a technical legal perspective, all road show materials should contain a disclaimer for [forward-looking statements](#), and that disclaimer should be read in live, virtual or prerecorded road show presentations. Where the road show content includes a FWP, it is required to contain a legend indicating that a prospectus has been filed, where it can be read (a hyperlink can satisfy this requirement), and advising prospectus investors to read the prospectus.

Pursuant to [Rule 433\(b\)\(2\)](#), the FWP for a non-reporting or unseasoned company must be accompanied with or preceded by the prospectus filed with the SEC. The delivery requirement can be satisfied by providing a hyperlink to the filed prospectus on the EDGAR database.

Road show materials, even those that are also a FWP, generally are not subject to liability under Section 11 of the Securities Act. Section 11 provides a private cause of action in favor of purchasers of securities, against those involved in filing a false or misleading public offering registration statement. Road-show materials, including FWPs, are not a part of the registration statement, but rather are supplemental materials. Section 12 liability, however, does apply to road-show materials. Section 12 provides liability against the seller of securities for material misstatements or omissions in connection with that sale, whether oral or in writing.



Follow-on Offerings and Regulation FD

[Regulation FD](#) requires that companies subject to the [SEC reporting requirements](#) take steps to ensure that material information is disclosed to the general public in a fair and fully accessible manner such that the public as a whole has simultaneous access to the information. Consequently, Regulation FD would be implicated in connection with communications in a road show for a follow-on offering by a company already subject to the Exchange Act reporting requirements. Regulation FD excludes communications (i) to a person who owes the issuer a duty of trust or confidence, such as legal counsel and financial advisors; (ii) communications to any person who expressly agrees to maintain the information in confidence; and (iii) communications in connection with certain offerings of securities registered under the Securities Act of 1933 (this exemption does not include registered shelf offerings).

Where a road show is being conducted by a company subject to the Exchange Act reporting requirements, counsel should ensure that that the presentation either does not include material non-public information or that the information is simultaneously disclosed to the public in a [Form 8-K](#). As a backstop where Regulation FD applies, the company should also consider having all road-show attendees sign a confidentiality agreement.



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[Palm Beach securities attorney Laura Anthony](#) and her experienced legal team provide ongoing corporate counsel to small and mid-size private companies, OTC and exchange traded public companies as well as private companies going public on the Nasdaq, NYSE American or over-the-counter market, such as the OTCQB and OTCQX. For more than two decades [Anthony L.G., PLLC](#) has served clients providing fast, personalized, cutting-edge legal service. The firm's focus includes, but is not limited to Regulation D and Regulation S and PIPE Transactions, securities token offerings and initial coin offerings, [Regulation A/A+ offerings](#), as well as registration statements on Forms S-1, S-3, S-8 and merger registrations on Form S-4; compliance with the Securities Exchange Act of 1934, including registration on Form 10, reporting on Forms 10-Q, 10-K and 8-K, and 14C Information and 14A Proxy Statements; all forms of going public transactions; mergers and acquisitions including both reverse mergers and forward mergers; applications to and compliance with the corporate governance requirements of securities exchanges including [Nasdaq](#) and [NYSE American](#). Palm Beach attorney Laura Anthony is also the author of [SecuritiesLawBlog.com](#), the producer and host of [LawCast.com](#), Corporate Finance in Focus, and a contributor to The Huffington Post and Law360.

[Ms. Anthony](#) is involved throughout the community of Palm Beach. She is on the board of directors for the American Red Cross for Palm Beach and Martin Counties, and provides financial support to the Susan Komen Foundation, Opportunity, Inc., New Hope Charities, the Society of the Four Arts, the Norton Museum of Art, Palm Beach County Zoo Society, the Kravis Center for the Performing Arts and several other organizations. She is also a financial and hands-on supporter of Palm Beach Day Academy, one of Palm Beach's oldest and most respected educational institutions. She currently resides in Palm Beach with her husband and daughter.

Ms. Anthony is an honors graduate from Florida State University College of Law and has been practicing law since 1993.

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