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Equity Press Release: When Time is Not on Your Side

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The sequence of events in launching an equity deal is critical. And the most important event in such a sequence is the posting of the launch press release that announces the deal. Even the most mild-mannered equity capital markets banker will turn vitriolic if the launch press release does not hit the wire services soon after 4:01 p.m. for a post-close launch.

Similarly, after pricing a deal, issuers frequently issue a press release announcing the results of the pricing. Most deal participants are fine with such a communication, but — depending on the manner in which the equity is sold — banks may have a strong preference about the type of pricing information that is included in the pricing press release.

This article will discuss various legal and practical considerations in the use of press releases in launching and pricing equity deals. There are several different scenarios for launching an equity deal. This article assumes a more standard process where the issuer is a well-known seasoned issuer, or WKSI, with an effective shelf registration statement and utilizes a preliminary prospectus supplement, along with the launch press release, to launch the deal. Finally, this article will focus solely on the applicable New York Stock Exchange-related rules.

First: Get Acquainted with Rule 134

Drafts of the launch and pricing press releases ought to be circulated, reviewed and finalized well before launch. Each press release ought to be compliant with Rule 134 under the Securities Act of 1933. Rule 134 is titled “Communications Not Deemed a Prospectus” and contains a list of certain information that may be included (e.g., issuer’s name, type of business, type of security, and the names of the underwriters) and certain information that must be included (e.g., where investors can obtain a written prospectus) in the press release.

As its title implies, Rule 134 allows certain information relating to a securities offering to be included in a press release without having the press release being deemed a prospectus. To the extent the content of the press release veers from the strict confines of Rule 134, the deal team risks the press release being deemed a prospectus, which may necessitate its filing with the U.S. Securities and Exchange Commission. Certain deal participants may be unfazed by this filing requirement. We have certainly experienced issuers that sought to include marketing-type information or even CEO quotes in launch and pricing press releases. If required to file either press release as a prospectus or free writing prospectus,

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however, the deal team will need to consider additional liability and compliance issues.

For instance, if the launch press release contains marketing language beyond the scope of Rule 134 and needs to be filed as an FWP, will the underwriters and their internal counsel be comfortable with such information being deemed part of the disclosure package? Conversely, will the issuer be comfortable indemnifying the underwriter for any liability relating to the contents of the press release? Although these issues may not be fatal, they can certainly complicate a launch if not resolved beforehand.

Second: Bring IR Into the Fold

Most issuers will instruct their investor relations/corporate communications group to take possession of the finalized press release and deal with the logistics of posting the release on the wire services. Although this task is certainly within the normal day-to-day responsibilities of a public company's IR department, the deal participants need to stress to IR the acute timing requirements for posting the launch press release. Frequently, IR teams are unaware of the underwriters' need to get the launch press release posted as soon as possible after market close. A failure to explicitly communicate this requirement to IR can jeopardize a successful launch. Our experience has been that IR will need the finalized launch press release, at the latest, by noon on the day of launch (assuming a post-close launch) in order to interact with the wire services and ensure release soon after the market close.

Although the launch process is certainly the more demanding sequencing event, deal participants may also need to explain timing issues relating to the pricing of the equity. If a deal is priced before market open and a pricing press release is contemplated, the IR team will most likely be subject to NYSE notification deadlines. Undoubtedly, most IR professionals are well-aware of the NYSE's timely alert policy, which is discussed in detail below. Some equity deals, however, can price as late as 8:30 a.m. on the morning following the launch. In that scenario, the NYSE timely alert policy will require the IR team (or other representatives of the issuer tasked with dealing with the NYSE) to call the NYSE 10 minutes *before* posting the press release and to e-mail a copy of it. Furthermore, to the extent NYSE officials have any questions about the terms of the pricing (e.g., is the underwriters' discount material?), the IR group (or the applicable issuer representative) will need to be familiar with the pricing terms and able to answer any questions from NYSE officials.

Third: Keep Current With the NYSE's Timely Alert Policy

Both issuers and underwriters will need to consider Section 202.06 of the NYSE Listed Company Manual in relation to the dissemination of material news by listed companies, known as the timely alert policy. Failure to comply with the policy may lead to a trading halt in connection with material news events.

For most issuers, the issuance of equity is a material event that warrants notification to the NYSE. Prior to December 2017, the NYSE had advised listed companies to delay the release of material news until the earlier of (1) publication of such company's official closing price on the NYSE or (2) 4:15 p.m. in order to allow for an orderly closing auction process. In the context of an equity offering, waiting until 4:15 p.m. to post the launch press release seemed like an eternity to an ECM desk.

In December 2017, the SEC, however, approved an amendment to the timely alert policy, which became effective immediately,¹ specifically prohibiting (rather than simply advising) listed companies from publishing material news after the official closing time for the NYSE's trading session until the earlier of

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(1) publication of the official closing price of the listed company's security or (2) 4:05 p.m.²

The revised timely alert policy was implemented to alleviate confusion caused by price discrepancies between the NYSE closing price and trading prices on other markets after the NYSE official closing time and before the NYSE closing auction is completed, which can be after 4 p.m. Although trading on the NYSE stops at 4 p.m., the order book for each listed security on the NYSE is manually closed by such security's designated market maker. This process may occasionally take a brief period of time before the closing auction is completed. In addition, often, even after 4 p.m., there is trading on other exchange and nonexchange venues (other markets). And so, if a listed company releases material news immediately after 4 p.m., but prior to the completion of the closing auction on the NYSE, a significant price difference in nearly contemporaneous trades on other markets and the official closing price on the NYSE can occur, which can cause investor confusion.

Significantly, the 4:05 p.m. release time of material news set forth in the revised timely alert policy is more in line with the speedy timing requirements of equity offerings. If underwriters are uncomfortable with a 4:05 p.m. posting of the launch press release, an issuer can refer to NYSE Connect to obtain real-time information about the timing of completion of the closing auction for their security or, in the alternative, can obtain this information from major market data vendors.³

After pricing, the deal team will also need to consider the necessity of a pricing press release. As previously mentioned, for most issuers, equity issuances are material. Although a pricing press release is not specifically required under SEC rules, issuers frequently utilize a press release after pricing to communicate pricing information and, in so doing, alleviate any Regulation FD concerns. In a standard marketed deal (i.e., where the underwriters engage in a marketing period after launch in order to build a book prior to pricing), the contents of a press release are fairly uniform, including the amount sold, the public offering price and net proceeds to the company.

In a bought deal (i.e., where the underwriters agree to purchase the stock generally prior to receiving firm commitments from purchasers), the contents of the pricing press release can be a little more complicated. For marketing purposes, the underwriters will not want to include in the pricing press release the net proceeds to the issuer or the price per share paid by the underwriter (which, ultimately, will be disclosed in the final prospectus supplement). While the NYSE has stated that it understands the market practice for bought deals, with respect to pricing press releases, the NYSE has stated:

While it is the listed company's obligation to determine whether a particular transaction is material, the [NYSE] believes the following factors should be considered. In the case of a "bought deal," the materiality of a particular transaction will depend on a number of factors, including, but not limited to, the number of shares sold, the size of the discount to the public market price paid by the underwriter and whether the transaction involves a sale by the company or one of its stockholders. If the discount to the public market price is such that its disclosure would materially affect the market for the securities, then it may be appropriate to disclose the pricing terms (or amount of securities sold and net proceeds to the company or stockholder) even if the number of shares sold in the transaction is not itself material.⁴

For an adequately capitalized company that is not in distress, it would be unusual for the underwriters' discount on a bought deal to "materially affect the market for the securities." Regardless, representatives of the issuer responsible for dealing with the NYSE must be familiar with the pricing terms of the equity to

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engage in dialogue with the NYSE. As mentioned above, if IR is designated with the task of dealing with the NYSE, they must prepare for this possibility.

The below sample timeline may be helpful in sequencing the issuance of launch and pricing press releases in light of the revised timely alert policy.

Sample Timeline for Transaction Launching After Market Close on Day One

Launch Press Release (After Market Close on Day One)

The NYSE prohibits dissemination of material news by listed companies until *the earlier of*: (1) publication of the issuer's official stock closing price on the NYSE or (2) 4:05 p.m.

"To-Do"

- The issuer to confirm publication of the issuer's official stock closing price on the NYSE either through (1) **NYSE Connect** or (2) an underwriter, in each case, on a real-time basis (if between 4:01 p.m. and 4:05 p.m.).
- Issue the launch press release.
- The issuer (or its counsel) should promptly e-mail a copy of the issued launch press release to NYSEalert@nyse.com. Note that there is no need for the issuer to call the NYSE in advance.

Pricing Press Release (Either After Market Close on Day One or Before Market Open on Day Two)

Assuming a transaction has priced (1) on day one or (2) the morning of day two prior to market open, the issuer will need to release the pricing press release *no later than 9:15 a.m. on day two*. Depending on the time of release, there are two scenarios:

1. If pricing press release will be issued on day one or the morning of day two *prior to 7 a.m.*:

"To-Do"

- Issue the pricing press release.
- The issuer (or its counsel) should promptly e-mail a copy of the issued pricing press release to NYSEalert@nyse.com. Note that there is no need for the issuer to call the NYSE in advance.

2. If pricing press release will be issued the morning of day 2 *at or after 7 a.m.*:

"To-Do"

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- At least 10 minutes before the release of the pricing press release, the issuer will need to (1) call the NYSE market watch and proxy compliance team (1-877-699-2578 or 212-656-5414), informing the NYSE that the issuer is going to be issuing a pricing press release and (2) send an e-mail to NYSEalert@nyse.com, attaching a copy of the pricing press release.
- Issue the pricing press release.

*Note that if the issuer has not released the pricing press release by 9:15 a.m. on day two after providing advance notification, the NYSE will contact the issuer and could halt trading.

Notes

¹ <https://www.sec.gov/rules/sro/nyse/2017/34-82213.pdf>. See also https://www.nyse.com/publicdocs/nyse/regulation/nyse/Material_News_Issued_Immediately_After_NYSE_Closing_Time_20171207.pdf.

² It should be noted, however, that the revised timely alert policy continues to retain the advisory text that recommends that listed companies intending to issue material news after the close of trading on the NYSE delay such announcement until the earlier of (1) publication of such company's official closing price or (2) 15 minutes after the close of trading.

³ In the alternative, issuers can ask an underwriter to obtain this information on a real-time basis.

⁴ NYSE, Application of NYSE/NYSE Amex Timely Alert Policy to Follow-On and Secondary Offerings (2011).

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