

Can We Talk? Communicating Your IPO

April 11, 2023



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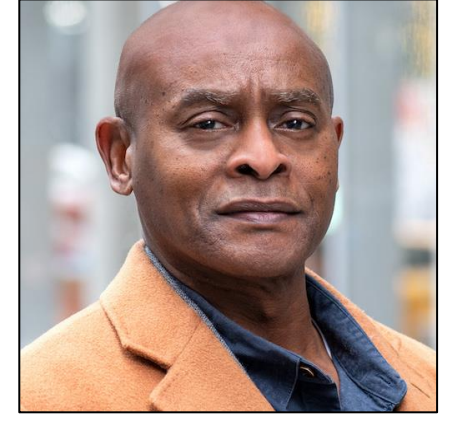
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IPO Communications

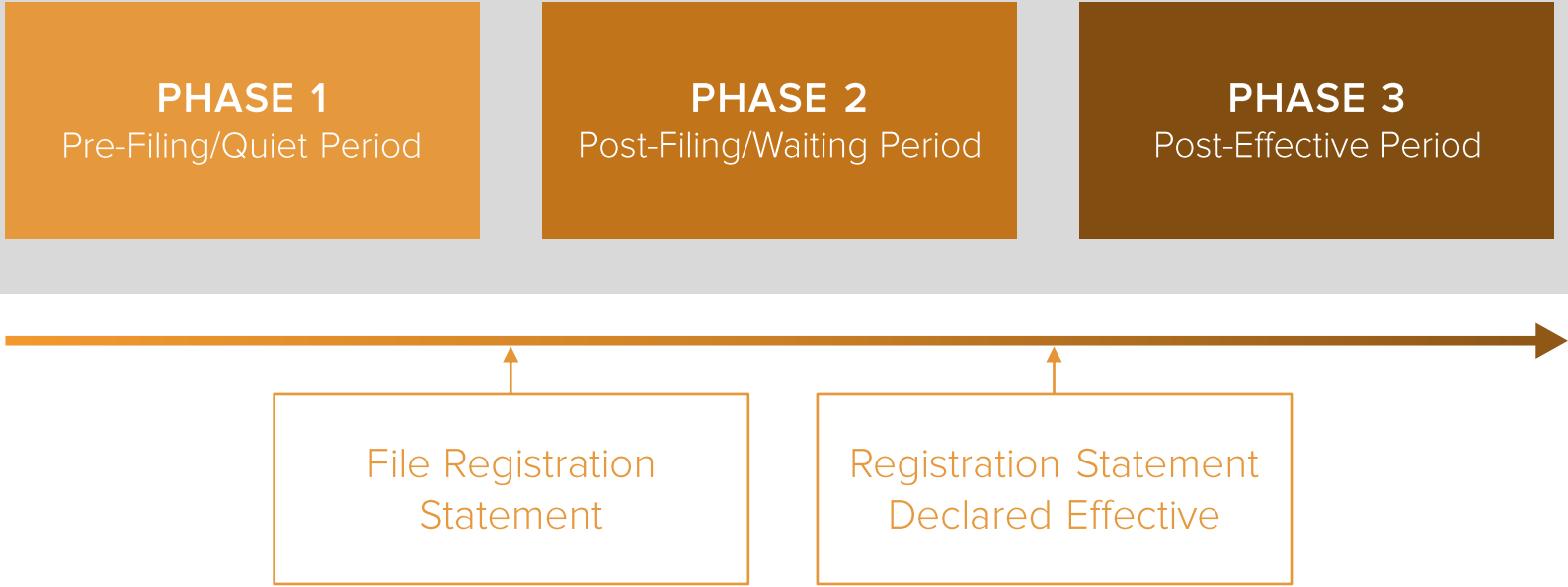
SECURITIES ACT OF 1933

- Section 2(a)(3) of the Securities Act broadly 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.”
- Section 5: prohibits companies from making **written offers** to sell its securities in an IPO until a registration statement that includes a prospectus with a price range is **filed with the SEC**.
- Section 5: prohibits companies from **selling** its securities until a registration statement is **declared effective by the SEC**.
- **Exemptions:** Section 5 of the Securities Act allows a company to make offers to sell its security under certain conditions.
 - Section 5(b)(1) permits oral offers (e.g., roadshows).
 - Testing-the-waters communications with certain institutional investors

GUN-JUMPING AND TESTING-THE-WATERS

- **“Gun-Jumping”:** occurs when a company makes an offer prior to the period when offers are permitted.
- **Gun-Jumping Consequences:**
 - Strict liability for statements which have not been vetted through the diligence process
 - Delay in IPO due to SEC imposed “colling off” period
 - Recission rights for share purchasers due to violation of the Securities Act.
- **Testing-The-Waters:**
 - Allows companies to assess market interest in a potential IPO (or other registered securities offering); permits discussions of the IPO with certain institutional investors before, or after, the filing of a registration statement.
 - Purpose: (1) communication with potential investors and (2) cost-effective market evaluation.

IPO Communications – Phases and Publicity



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1. Pre-Filing (Quiet Period)

- Most restrictive period. No offers or sales are permitted.
- Offer: every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value. Generally, any information may be considered an “offer” if it is released primarily to encourage direct or indirect interest in the IPO. It may be made orally, in writing, or through any medium.
- Commences when a company decides to make an offering but hasn’t filed registration statement with the SEC, no later than engagement of underwriters.

2. Post-Filing (Waiting Period)

- Commences when a company **publicly** files a registration statement with the SEC.
- Period ends with the SEC declares the public registration statement effective.
- Oral offers are permitted during this period. However, written offers are restricted.
 - **Exception:** Written offers are permitted only by means of a prospectus that satisfies the requirements of the Securities Act or safe harbor.

3. Post-Effectiveness Period

- Commences once the SEC declares the public registration statement effective.

IPO Communications

PERMITTED COMMUNICATIONS

- If consistent with past practices:
 - Advertising of products and/or services.
 - Dissemination of regularly released factual information regarding business and financial developments unrelated to the IPO.
 - Participation in trade shows and industry meetings.
 - Publication of articles in trade press.
 - Responses to inquiries regarding factual matters unrelated to the IPO.
 - Announcements to the media concerning factual business and financial developments unrelated to the IPO.

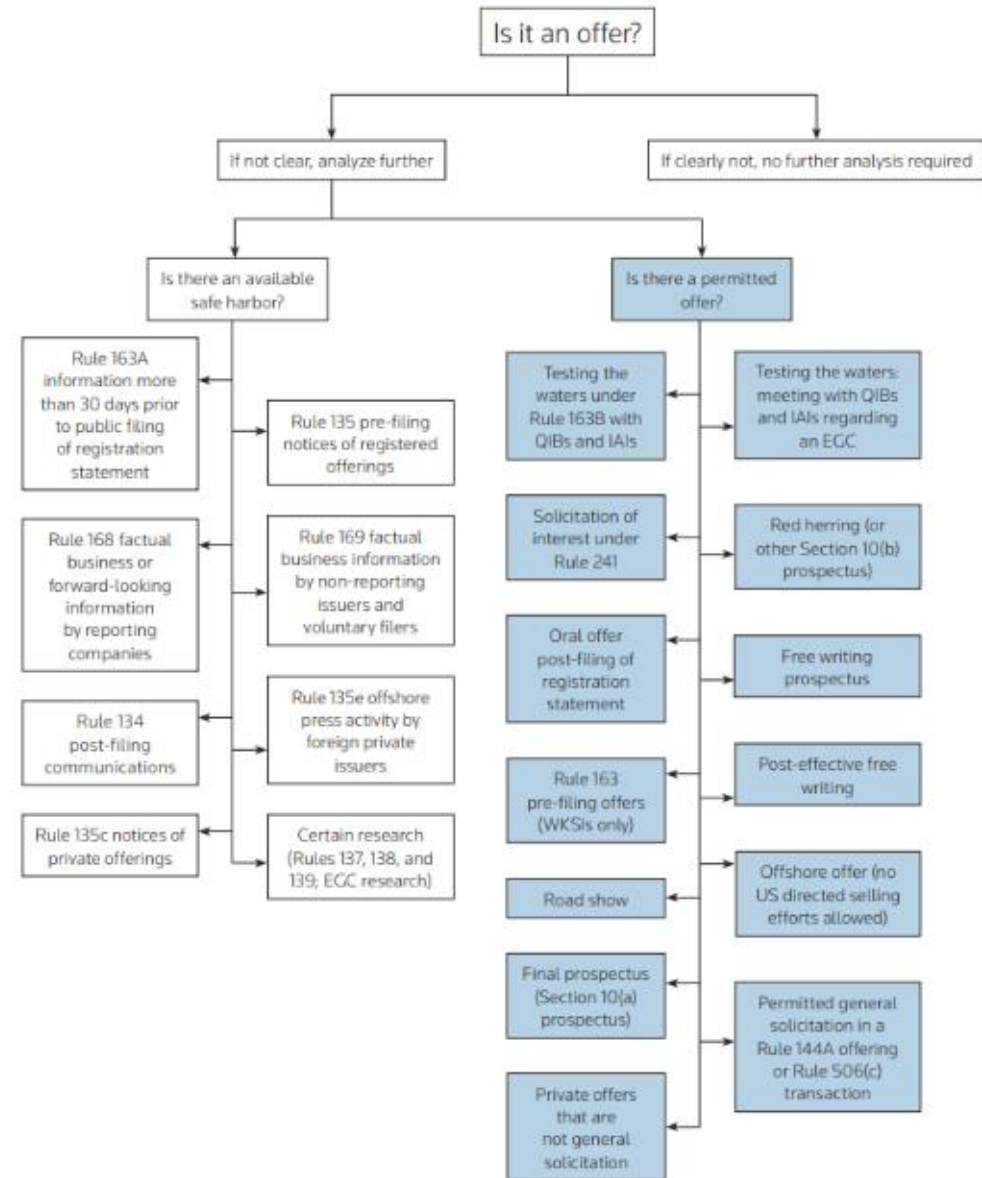
PROHIBITED COMMUNICATIONS

- Any communications that may be viewed by the SEC as conditioning the market (e.g., new or significantly expanded advertising campaigns related to corporate branding).
- Statements or forecasts regarding the company's revenues, income, growth prospects, or industry growth prospects.
- Discussions with the media or public announcements regarding the IPO or the business strategy, financial performance or general prospects of the company.
- Discussions with securities analysts regarding the company or IPO (subject to exceptions).
- Participation in investor/analyst conferences (subject to exceptions – road show with underwriters).
- Advertisements of securities.

CLE Code

- CLE Code – 81732
- CLE code forms will be distributed in the post-event email.
- Please email your forms to Lewis Marin at lmarin@winston.com

IPO Communications



Getting Started

In preparation for an IPO, companies must establish correct communications fundamentals from the outset.

- All activity must be conducted in strict adherence to the legal team's guidance.
- The company, its bankers, lawyers, investor relations, and communications teams must be aligned on the goals, objectives, metrics, and key messages to be communicated in the IPO process.
- Build a calendar of events to target the company's most important audiences.
- Coordinate as appropriate on all documents and filings to ensure consistent messaging from the outset, for example, investor decks, "About" section of the S-4, in addition to press releases, etc.
- Message consistency is especially critical given challenging market conditions and increased skepticism of SPACs.

Communications for A Successful Listing

An IPO is a defining moment, and the process must be executed perfectly and on your terms.

- Companies must consider communications challenges at every step of the process, whether they are going public via a traditional IPO, a SPAC transaction, or a direct listing.
- Communications efforts should help define the company and the leadership team while establishing guideposts for its initial life as a public company.
- It must drive valuation with proactive communications for the company, key investors or SPAC sponsor, the leadership team, and company product offerings.
- Help create public company-ready communications and IR functions, execute listing days and prepare management teams for the quarterly cadence as a public entity. The new era in the life of the public company must be precisely and creatively managed to properly seize the opportunity before it.

Strategic Communication Imperatives

There are a small number of strategic imperatives that will guide your IPO communications.

- Shape the company's messaging around the strength of the management team, the business strategy, growth prospects, and competitive positioning.
- Develop a comprehensive approach to address any potential criticism of the company, craft and execute a strategy focusing on earned media efforts on a targeted list of outlets focused on investors (retail and institutional) and priority financial channels.
- Set up the process to achieve strong message pull through and earn the right quantity and quality of media coverage to support a healthy stock price.
- Following the listing, continue to drive awareness with investors and other priority stakeholders by communicating company growth plans and providing strategic counsel to manage and enhance reputation.

IPO Communications Timing

Advanced communications planning is essential.

- Companies pursuing an IPO often make a fundamental mistake: they don't think about IPO communications until right before their filing is set to become public. At this point, the company is already deep into an SEC-mandated quiet period which severely restricts their ability to communicate.
- Listing day is far from the ideal time to begin telling the company story. How can you expect the media to get your story right if listing day is the first time they've ever heard it — or even worse, of you?
- Companies benefit from managing the narrative around their IPO and growth story as much as they can and as early as they can.
- Companies needing to raise awareness or correct misperceptions in the business and financial media must build more time into their planning. Launching a rebrand or announcing new strategic plans a few weeks before the start of a quiet period won't be nearly as effective as a program beginning six months to a year ahead.

Pre-IPO Communications Challenges

Companies on the path to going public often face a host of communications challenges:

- Overall lack of media presence.
- Covered by sector media but either ignored or misunderstood by the financial press.
- Media darlings but border on being overhyped.
- Lack relationships with the most important journalists.

Regardless of the unique situation, companies benefit from managing the message around their IPO and growth story as much as they can, as early as they can.

To share their story and have it unfold correctly, companies must seed the key elements with the media and build the critical relationships with the right journalists well ahead of publicly announcing their IPO intentions.

Upcoming Winston & Strawn Webinars

- 4/25 at 12:00pm CST – Now You Are Public, What's Next?
- Early May – Marketing and Underwriting Process
- Mid-May – D&O Insurance and other Post-Public items