



# How to Prepare an Initial Public Offering

## Gun Jumping or Conditioning the Market

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## One Minute Overview

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- ▶ Restrictions apply only to issuers, underwriters and dealers (§4(1))
- ▶ Restrictions begin when the issuer reaches an understanding with the managing underwriter
- ▶ Restrictions end
  - Issuer — when the offering is over
  - Underwriter — when its allotment is sold
  - Dealer — after 25 or 90 days (§4(3), Rule 174)

## Three Part Division

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- ▶ Prefiling period — unlawful to offer to sell a security (§5(c))
- ▶ Waiting period — unlawful to transmit a prospectus unless it is a section 10(b) prospectus (§5(b))
  - Unlawful to sell a security (§5(a))
- ▶ Post-effective period — unlawful to transmit a prospectus unless it is a section 10 final prospectus (§5(b))

# Purpose – Full and Fair Disclosure to Prevent Fraud

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- ▶ Prefiling period — skeletal information
- ▶ Waiting period — preliminary prospectus (and possibly free writing prospectuses)
- ▶ Post-effective period — final prospectus

# Sanctions

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- ▶ Injunction against continuing violation
- ▶ Denial of acceleration of effective date
- ▶ Exclusion of offending firm from selling group
- ▶ Transmittal of final prospectus to every recipient of unlawful prospectus

## Prefiling Period

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- ▶ Definition of “offer to sell” — every attempt or offer to dispose of a security for value
- ▶ Liberally construed — stimulation of investor or dealer interest; conditioning the public’s mind
- ▶ Historically permitted communications —
  - Section 2(a)(3) — preliminary negotiations and agreements with underwriters in privity of contract
  - Rule 135 — prefiling press release or notice
  - SEC interpretative releases permitted disclosures
    - that were in customary form;
    - that were consistent with past practice;
    - that did not contain projections; and
    - the content, timing and distribution of which did not suggest a selling effort.

## Prefiling Period (*cont'd*)

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### ▶ SEC Rule 163A

- A communication more than 30 days before the IPO registration statement filing is not an offer to sell if:
  - The communication does not reference the IPO
  - The company takes steps to prevent further distribution of the communication within the 30-day period

## Prefiling Period (*cont'd*)

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- ▶ SEC Rule 169 – Regular release of factual business information not an offer to sell if:
  - The company has previously released information of similar type in the ordinary course of business
  - The timing, manner and form is consistent with similar releases
  - The information is intended for persons other than in their capacities as investors
  - The information is released by company agents who have historically provided such information
  - The information is not IPO information and not part of the offering activity



# Waiting Period

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- ▶ Oral offers permissible, but written offers are still prohibited “prospectuses”
- ▶ Rule 430 — preliminary prospectus
- ▶ Rule 134 — press release or notice — permissible content expanded in December 2005
- ▶ Dissemination of factual business information and advertising in normal conduct of business — see Rule 169 and historical SEC interpretative releases
- ▶ “Free writing prospectuses” after SEC filing includes an estimated IPO price range — see Rules 164 and 433
  - Unaffiliated press exception

## Post-Effective Period

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- ▶ Access = delivery — Rules 172-174
- ▶ Final prospectus — stickering
- ▶ Sales, confirmations and securities delivery permitted
- ▶ Supplemental sales literature defined not to be a “prospectus” if accompanied or preceded by a prospectus