

December 2017

NEWS ROUND UP

A Morrison & Foerster summary of recent developments affecting Israeli companies active in the capital markets.

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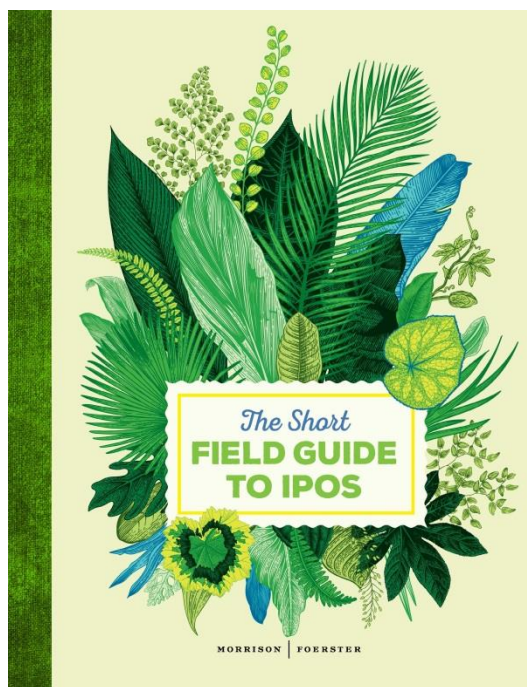
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The Short Field Guide to IPOs

For many years, most successful companies followed a relatively predictable capital-raising path. A lot has changed. The companies that tend to pursue IPOs in recent years are more mature, better capitalized, and often seek to pursue IPOs for different reasons than did their predecessors. In our updated Short Field Guide to IPOs, we detail the path to an IPO, discuss some of the important steps along the way and highlight some of the detours or forks in the road.







[Download a copy of the guide.](#)

For a discussion of other financing alternatives, including employing general solicitation in private offerings and Regulation A offerings, as well as timely updates on the JOBS Act and securities disclosures, [visit or subscribe to our blog.](#)



Many Paths for IPO Submissions

The following [chart](#) highlights the alternatives for emerging growth companies (“EGCs”) and non-EGCs, and now the three paths for foreign private issuers (“FPIs”) pursuing IPOs.

Available Accommodations	An EGC	An EGC FPI	A non-EGC	A non-EGC FPI
 Confidential submission?	<p>Yes, an EGC may submit its IPO registration statement to the SEC for confidential review as a result of JOBS Act provisions.</p> <p>Confidentiality is established by statute. <i>Securities Act Section 6(e)(2)</i>.</p>		<p>New policy allows a non-EGC to submit its registration statement to the SEC for confidential review.</p> <p>A non-EGC must request confidential treatment for its submission under Rule 83.</p>	<p>Certain FPIs, even non-EGCs, are permitted to submit their IPO registration statements for confidential review. The new SEC policy extends this to FPIs beyond those identified in 2011/2012.¹</p> <p>A non-EGC FPI other than those addressed in SEC guidance would have to request confidential treatment for its submission under Rule 83.</p>
 When must registration statement be filed publicly?	15 days prior to commencement of a traditional roadshow.			<p>If relying on new SEC policy, 15 days prior to commencement of a traditional roadshow.</p> <p>Other FPIs do not have a deadline for public filing.¹</p>
 Test-the-waters?	Yes.		No.	
 Disclosure accommodations?	Yes. These are discussed earlier under “EGC Accommodations.”	Yes. Those discussed under “EGC Accommodations” and accommodations available to FPIs.	No.	Accommodations available to FPIs.
 Financial information that may be omitted?	Confidential submissions may omit annual and interim financial statements that will not be required to be presented at the time of the offering.		In reliance on new guidance, confidential submissions may omit annual and interim financial statements that will not be required to be presented at the time of the first public filing.	
 Governance and other SOX-related accommodations?	Yes. These are discussed earlier under “EGC Accommodations.”	An EGC FPI benefits from the accommodations available to EGCs and those available under the securities rules and the regulations of the national securities exchanges for FPIs.	No.	An FPI will benefit from the accommodations available to FPIs under the securities rules and the regulations of the national securities exchanges

[1] See Non-Public Submissions from Foreign Private Issuers, Dec. 8, 2011, amended May 30, 2012, at <http://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm>.

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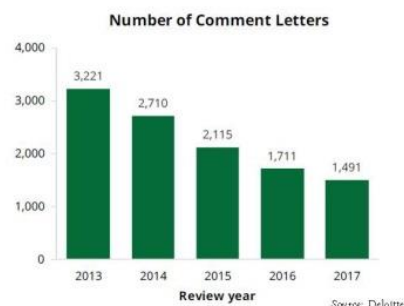
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SEC Comment Letter Trends

In November 2017, Deloitte & Touche LLP released its [annual study](#) on the Securities and Exchange Commission's ("SEC") recent comment letters. The study relates to comments on the financial statements in periodic filings, such as Forms 10-K, Forms 10-Q and Forms 20-F, as well as comments relating to IPOs and other securities offerings.

The 2017 study notes a decline in the overall number of SEC reviews with comment letters and in the number of SEC comments issued over the past several years. In 2017, 1,491 comment letters were issued by the SEC, a 13% decline from 2016 and a 54% decline over the prior five-year period. The SEC has attributed this trend to the effectiveness and transparency of the review process and improved financial reporting by issuers. The number of comment letters per review has also declined steadily over the five-year period, with 1.33 comment letters received on average by registrants, and only 20% of issuers receiving two or more comment letters in a review. (As readers of this publication know, there tend to be more comment letters in the context of IPOs, where there can be significant back-and-forth with the SEC staff.)

The study also contains a useful section describing SEC comments that have been made as to foreign



private issuers, including the presentation of financial statements, the impairment of assets, and the use of non-GAAP financial measures.

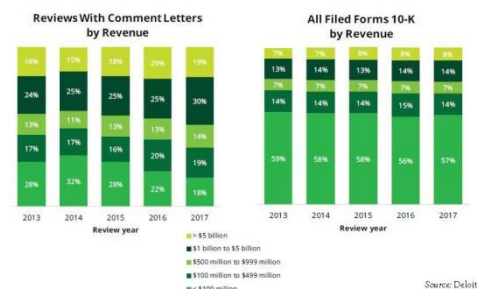
In the report, Deloitte identified the most frequently addressed areas in SEC comment letters:

- Non-GAAP financial measures overtook MD&A as the top topic addressed in reviews with comment letters and overall comment letters issued by the SEC. 474 reviews with comment letters relating to non-GAAP measures accounted for 43% all reviews in 2017. However, the number of comment letters on this topic represented a decline from the prior year, as registrants have revised annual disclosures to address prior SEC comments.
- MD&A disclosures have continued to be a leading source of SEC comments (18% of all reviews in the past year), with a particular focus on uncertainties affecting results of operations, estimates in critical accounting policies, liquidity and capital resources, disclosure of contractual obligations, early-warning disclosures and income tax disclosure.
- Additional topics heavily represented in SEC comment letters issued in 2017 include disclosures relating to fair value, segment reporting and revenue recognition.

Finally, the report offered an analysis of the specific filing status and revenues of issuers who received SEC comment letters in recent years:

- While large accelerated filers have consistently been subject to the most reviews with comment letters since 2013 (56%), large accelerated filers have only accounted for 29% of the filed 10-Ks over the same five year period.

Companies that have generated more revenue have received a disproportionately higher number of reviews with comment letters than companies generating less revenue. Since 2013, on average,



issuers generating \$1 billion or more revenue accounted for 44% of the reviews with comment letters, although they only represented 21% of the filed Form 10-Ks eligible for review.

Reminder – XBRL Format Available for IFRS Issues Filing Their Form 20-F for Fiscal Years Ending After 12/15/17

As we approach the end of 2017...

Israeli companies that prepare their financial statements in accordance with International Financial Reporting Standards ("IFRS") should bear in mind that they will be required to submit their financial data in XBRL format¹ with their first annual report on Form 20-F for fiscal periods ending on or after December 15, 2017. For most Israeli companies that are public in the United States, this will be their annual report scheduled for filing in the first half of 2018.

Background. In 2009, the SEC adopted rules requiring operating companies to provide the information from the financial statements accompanying their registration statements and periodic and current reports in XBRL format. Companies are required to submit this information in exhibits to registration statements and reports, and to post it on their websites. These XBRL

¹ XBRL, or eXtensible Business Reporting Language, is an XML standard for tagging financial reports to increase the comparability of information by using a uniform format.

requirements apply to operating companies that prepare their financial statements in accordance with U.S. GAAP or IFRS (as issued by the International Accounting Standards Board (the “IASB”). Filers subject to the XBRL requirements must submit an Interactive Data File, including XBRL tagged data, as an exhibit to the traditional HTML or ASCII format.

However, the SEC’s EDGAR filing system was initially not able to support an IFRS taxonomy. As a result, foreign private issuers had been relieved of that requirement until the SEC published its IFRS taxonomy. The SEC published this taxonomy in March 2017. With this publication, foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB will need to begin submitting their financial data in XBRL format with their first annual report on Form 20-F for fiscal periods ending on or after December 15, 2017.

For more information, see our client alert available [here](#).

Survey Released on Active Investors and Reliance on Non-GAAP Reporting

On October 16, 2017, Clermont Partners released a survey on the reliance of active investors on non-GAAP versus GAAP reporting, intangible assets and non-financial metrics. Unlike passive investors who invest in index funds, active investors select securities to buy and sell. 56 active investors, focused on a variety of industries and investment strategies, participated in the survey. Highlights of the survey include the following:

- 74% of the respondents rely on non-GAAP more than GAAP reporting when evaluating a company’s performance.
- 44% of the respondents believe

that non-GAAP measures have become more important over time.

- 90% of the respondents will frequently make their own adjustments to a company’s GAAP results based on what they believe is relevant in evaluating performance.
- 64% of the respondents believe that intangible assets are important factors in evaluating performance.

The results of the survey suggest that non-GAAP metrics are viewed more favorably by active investors as they buy and sell securities, and that the SEC rules emphasizing GAAP metrics are largely ignored by active investors. A copy of the survey is available [here](#).

SEC Issues New C&DIs on the Use of Non-GAAP Financial Measures in Forecasts for Business Combination Transactions

On October 17, 2017, the staff (the “Staff”) of the SEC’s Division of Corporation Finance issued two new compliance and disclosure interpretations (“C&DIs”) on the use of non-GAAP financial measures in forecasts for business combination transactions. In the first C&DI, the Staff clarified that financial measures provided to a financial advisor, including financial measures included in forecasts used in connection with a business combination transaction, would be excluded from the definition of non-GAAP financial measures, and therefore not subject to Item 10(e) of Regulation S-K and Regulation G, if and to the extent:

- the financial measures are included in forecasts provided to the financial advisor for the purpose of rendering an opinion that is materially related to the business combination transaction; and

- the forecasts are being disclosed in order to comply with Item 1015 of Regulation M-A or requirements under state or foreign law, including case law, regarding disclosure of the financial advisor’s analyses or substantive work.

Therefore, assuming these two conditions are satisfied, the guidance should provide comfort to M&A deal participants that the disclosure of management forecasts in merger registration statements, proxy statements and tender offer statements would not be subject to Item 10(e) of Regulation S-K and Regulation G. In the second C&DI, the Staff clarified that the exemption from Item 10(e) of Regulation S-K and Regulation G for non-GAAP financial measures disclosed in communications relating to a business combination transaction does not extend to the same non-GAAP financial measures disclosed in registration statements, proxy statements and tender offer statements.

The new C&DIs are available [here](#).

The Treatment of Companies with Multi-Class Shares by Major Index Providers

During a recent PLI Seminar on Securities Regulation that took place in New York City on November 8-10, 2017, panelists briefly discussed the recent decisions by major index providers to change their index eligibility rules and limit the inclusion of companies with multi-class capital structures. For example, in July 2017, S&P issued a press release announcing a methodology change for multi-class shares following its consultation published on April 2017 (see our prior blog post available [here](#)). The panel noted, among other things, the concern that such actions may discourage private companies from going public and may impose costs on

retail investors that can be avoided by larger investors.

On November 9, 2017, BlackRock issued a statement expressing its disagreement with index providers' decisions to exclude certain companies from broad market indices due to governance concerns. BlackRock noted that the benchmark indices should be as expansive and diverse as the underlying industries and economics whose performance they seek to capture. BlackRock further noted that such exclusions may limit BlackRock's index-based clients' access to the investable universe of public companies and deprive them of opportunities for returns. BlackRock, like many other critics, believe that it should be the role of regulators or stock exchanges, rather than index providers, to address the issue of unequal voting structures and non-voting shares. A copy of BlackRock's statement may be found [here](#).

A few days earlier, on November 2, 2017, MSCI announced that it planned to broaden the consultation on the treatment of shares with no voting rights within the MSCI Equity Indexes, to include a discussion on the treatment of all types of unequal voting structures (the "Consultation"). The Consultation follows an earlier consultation on a proposal to exclude non-voting shares from the MSCI Global Investable Market Indexes (GIMI) and MSCI US Equity Indexes in cases where the company level voting power is less than 25%.

MSCI also announced that it will temporarily treat any securities of companies exhibiting unequal voting structures as ineligible for addition to the MSCI ACQI IMI and MSCI US Investable Market 2500 Index. Specifically, a security will be temporarily ineligible if it belongs to a company that has multiple classes of equity securities and that exhibits any of the following characteristics:

- Shareholder voting rights are not proportionate to their economic interest;
- Any share class has restrictions on voting on agenda items; or
- Voting rights for any share class are conditional upon certain events.

The temporary treatment does not affect any current index constituents, and only applies to the potential additions of securities during regular Index Reviews as well as early inclusion of securities. A summary of the temporary treatment may be found [here](#).

Cryptocurrency Exchanges – the New Front of the IRS War on Tax Evasion?

On November 29, 2017, the U.S. District Court for the Northern District of California dealt a partial blow to the U.S. Department of Justice and the IRS in connection with their collective efforts to enforce an expansive and overly broad "John Doe summons" request in relation to the customers of Coinbase Inc. ("Coinbase"). Coinbase is the largest cryptocurrency exchange in the United States and the fourth largest in the world. The narrowed court order represents an important victory for Coinbase and its customers, and sets a generally favorable precedent for other cryptocurrency exchanges that may face similar informational requests in the future.

For more information, see our client alert available [here](#).

NEW ON-DEMAND WEBINAR NOW AVAILABLE

Getting Your Message Across: Best Practices for Private and Public Companies

IFLR Webinar

With companies remaining private longer, their stockholder base often becomes more widely dispersed. More and more privately held companies are facing interesting challenges in communicating effectively with various stakeholders, without violating securities laws. Companies contemplating or undertaking an initial public offering face particularly acute issues as they try to establish effective communications approaches. Finally, public companies face Regulation FD and other regulatory requirements that may require that they map out a careful communications approach. During this session, we address the following:

- Trends and developments in capital markets communications;
- New modes of communication and engagement (e.g., social, digital);
- Non-GAAP financial measures;
- Navigating disclosure risks and requirements, including Regulation FD;
- Assessing materiality and whether there is an obligation to disclose (and when);
- Forward-looking statements, financial guidance and communicating with investment professionals, including analysts and rating agencies;
- Competitive benchmarking and key metrics;
- Optimizing value in an exit strategy, whether it is an IPO or an M&A exit; and
- Best practices in public debt communications (as a private company).

Speakers:

- Jeff Grossman
Co-CEO, Solebury Communications Group
- [Scott Lesmes](#)
Partner, Morrison & Foerster LLP
- [Anna Pinedo](#)
Partner, Morrison & Foerster LLP

To view this complimentary webinar, please [click here](#).

BLOCKCHAIN + SMART CONTRACTS



The opportunities and legal considerations raised by blockchain and other distributed ledger technologies are vast and implicate nearly every legal content area.

Morrison & Foerster's Blockchain + Smart Contracts Group provides a holistic, comprehensive approach to the emerging blockchain, smart contracts and distributed ledger space. Our cross-practice, cross-industry, global team unites attorneys in our Financial Transactions, FinTech, Technology Transactions + Internet of Things, Data Security + Privacy, Financial Services Regulatory, Tax, Capital Markets + Securities and other legal content areas, and provides our clients with cutting-edge knowledge and strategic guidance.

Our clients appreciate our dexterity and experience in crafting new financial products and offering methodologies when off-the-shelf approaches do not work. It's true: we like complex financings and addressing novel legal questions.

Visit our [Blockchain + Smart Contracts Resource Center](#).

CLIENT RESOURCE CORNER

We have a number of resources available to our clients and friends including:



MoFo Jumpstarter.

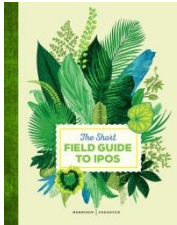
Our Jumpstart blog is intended to provide entrepreneurs, domestic and

foreign companies of all shapes and sizes, and financial intermediaries, with up to the minute news and commentary on the JOBS Act. Visit: www.mofojumpstarter.com



MoFo's Quick Guide to REIT IPOs.

Our Quick Guide to REIT IPOs provides an overview of the path to an IPO for a REIT. The guide also addresses regulatory, tax and accounting considerations relevant to sponsors considering forming a REIT. Our guide is available here: <https://goo.gl/jwrKE1>.



The Short Field Guide to IPOs.

In our updated Short Field Guide to IPOs, we detail the path to an IPO, discuss some of the important steps along the way and highlight some of the detours or forks in the road. Our guide is available here: <https://goo.gl/GzUrTD>.

Capital Markets Practice Pointers.

In our practice pointers, which address a range of topics of interest, we offer guidance on frequent issues encountered in connection with securities disclosures and filings. Visit our Practice Pointer webpage at: <https://goo.gl/FizH0N>.



Social media sites are transforming not only the daily lives of consumers, but also how companies interact with consumers. Social media generates new legal questions at a far faster pace than the law's ability to provide answers to such questions. In an effort to stay on top of these emerging issues, and to keep our clients and friends informed of new developments, Morrison & Foerster has launched a newsletter devoted to the law and business of social media. Visit: www.mofo.com/sociallyaware.

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ABOUT OUR ISRAEL PRACTICE

For more than four decades, Morrison & Foerster has participated in the development of the Israeli market, representing numerous Israeli companies globally, at every stage of their evolution, as well as the foreign investors or investment banks that finance those companies. We provide innovative securities and capital markets advice that is sharply focused on providing global capital markets access to technology-centric companies. We believe that this expertise, as well as our historic commitment to Israel, has contributed to our long and successful track record with Israeli clients. For more information, visit: <https://www.mofo.com/practices/international/israel/>.

ABOUT MORRISON & FOERSTER

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