August 2017

NEWS ROUND UP

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

IN THIS ISSUE

SEC Permits Draft Registration Statements for All Initial Public Offerings and Direct Listings

On June 29, 2017, the Securities and Exchange Commission (SEC) announced that the Division of Corporation Finance will permit all companies to submit draft registration statements relating to initial public offerings (IPOs) for review on a nonpublic basis. Previously, this process was only available for use by emerging growth companies (EGCs) and, in certain circumstances, foreign private issuers. Now, with this change, all issuers may submit a registration statement in draft form for an initial registration, as well as for offerings made within the first year after a company has become an SEC-reporting company.

This new policy took effect on July 10, 2017.

Draft Registration Statements Previously Only Permitted for Use by EGCs

Section 6(e) of the Securities Act of 1933 (Securities Act) provides that a company that qualifies as an EGC at the time of submission may confidentially submit to the SEC a draft registration statement for confidential, nonpublic review by the SEC staff prior to public filing.

The EGC filer status was created by the Jumpstart Our Business Startups Act of 2012 (JOBS Act). The Securities Act and the Securities Exchange Act of 1934 (Exchange Act) defines an EGC as an issuer with "total annual gross revenues" of less than $1 billion during its most recently completed fiscal year. A company will retain EGC status until the earliest of the: (i) fifth anniversary of the company's IPO; (ii) last day of the first fiscal year in which its annual gross revenue exceeds $1.07 billion; (iii) date it becomes a large accelerated filer; or (iv) date on which the company has issued more than $1 billion in non-convertible debt during the preceding three-year period.

EGCs receive favorable accommodations during the IPO process, including, among other benefits, confidential submission and review of IPO registration statements. The number of EGC filers has grown rapidly since the passage of the JOBS Act, and EGCs now represent approximately 15% of exchange-listed companies. (See the additional discussion in the article below for recent trends.)

Submission of a Draft Registration Statement

Following effectiveness of these new procedures, issuers may submit the following registration statements in draft form:

- a Securities Act registration statement for an IPO;
- an Exchange Act registration statement for registration of a class of securities under Section 12(b), relating to the listing of that class on a national securities exchange; and
- a Securities Act registration statement submitted prior to the end of the twelfth month following the effective date of an issuer's initial Securities Act registration statement or an issuer's Exchange Act Section 12(b) registration statement.

Note that issuers may not submit draft registration statements for post-effective amendments to effective registration statements.

Foreign private issuers may elect to proceed in accordance with the new guidance, the procedures available to EGCs (if they so qualify) or the Division of Corporation staff guidance issued on May 30, 2012.

Issuers will submit the draft of their initial registration statement and exhibits to the SEC on a confidential basis through the EDGAR system. An issuer submitting a draft registration statement in these circumstances must confirm in a cover letter to the registration statement that the issuer will file publicly its registration statement and nonpublic draft submissions:

- in the case of an IPO, at least 15 days before the date on which the issuer conducts a road show, as such term is defined in Securities Act Rule 433(h)(4);
- in the case of an initial registration statement under Exchange Act Section 12(b), at least 15 days prior to the anticipated effective date of the registration statement; and
- in the case of a follow-on offering within the first twelve months following the effective date of the IPO or Section 12(b) registration statement, at least 48 hours prior to any requested effective time and date.

For non-EGC companies pursuing an IPO or registration of a class of securities under Exchange Act Section 12(b), the SEC will review, on a non-public basis, the initial submission of a draft registration statement and related revisions. For non-EGC issuers conducting a follow-on offering within twelve months of an IPO or Section 12(b) registration, the SEC will limit its nonpublic review to the initial submission; such issuers responding to SEC staff comments on a draft registration statement must do so with a public filing and not with a revised, nonpublic draft registration statement.

Benefits of Submitting a Draft Registration Statement

The confidential submission and review process provides issuers with greater control over the timing of their IPO process and keeps them out of the public spotlight during the planning phase of the transaction. The confidential process also affords issuers an opportunity to determine whether there will likely be significant issues in getting the registration statement through the registration process. The nonpublic review process for follow-on offerings soon after the IPO reduces the potential for lengthy exposure to market fluctuations that can adversely affect the offering and harm existing shareholders. By requiring a public filing period prior to the launch of marketing, the process incorporates a feature of the EGC review process that provides a sufficient opportunity for the public to evaluate those offerings.

"Direct" Listings

Although issuers that meet the relevant securities exchange standards have always been able to register a class of securities under the Exchange Act using a registration statement on Form 10 (for U.S. issuers) or Form 20-F (for foreign private issuers), registration under the Exchange Act without a concurrent capital raise has been infrequent.

Nonetheless, given changes in the capital markets and increased reliance on private placements, many companies that are deferring IPOs may not seek to raise capital in the public markets, but may value having a class of securities listed on a securities exchange. Having a listed security may provide a company with an acquisition currency, may provide for better alternatives for stock-based compensation, and may provide for liquidity opportunities for existing holders. The SEC's change aligns treatment of Exchange Act registration statements with the treatment afforded to Securities Act registration statements, potentially making direct listings more appealing.

Additional SEC Guidance

Following its announcement, the SEC released frequently asked questions related to these new procedures. Among other topics, these FAQs clarify the processes concerning the submission of a draft registration statement on the EDGAR system. Notably, the FAQs explain that an issuer may seek confidential treatment when it submits its responses to staff comments on draft registration statements; the issuer is directed by the FAQs to appropriately identify information for which it intends to seek confidential treatment upon public filing to ensure that the staff

does not include that information in its comment letters.

In addition, the FAQs addressed public communications made in connection with the submission of draft registration statements. The SEC clarified that the Securities Act Rule 134 safe harbor for public communications is not available until the issuer files a registration statement that satisfies the requirements of Rule 134. The issuer may make a public communication about its draft registration statement in reliance on Securities Act Rule 135, but a public statement about its offering may affect whether the SEC can withhold the draft registration statement in response to a request under the Freedom of Information Act.

Mid-Year IPO Trends: Promising Activity in the U.S. IPO Market

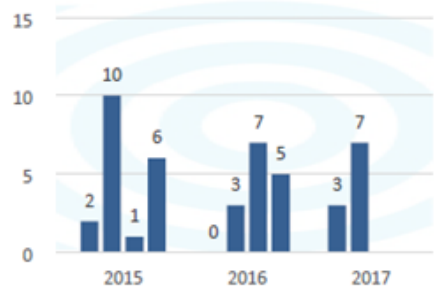
Renaissance Capital published their Review of the U.S. IPO Market for the second quarter of 2017. In its most active quarter in two years, the IPO market saw 54 IPOs, raising approximately $11 billion. The median deal size dropped to $115 million for the second quarter.

The healthcare and tech sectors accounted for more than 52% of IPOs in the second quarter with 16 healthcare deals, raising $1.2 billion and 12 tech IPOs, raising $1.6 billion. The energy sector raised $1.9 billion, but included the worst-performing IPOs of the quarter. The telecom sector warrants mention, raising $2.2 billion, which included the largest IPO of the quarter.

Private equity-backed IPOs have steadily increased in numbers. There were 15 PE-backed IPOs this past quarter, raising $5.1 billion.

Biotech and tech IPOs accounted for the doubling of venture capital-backed IPOs since 2017Q1. In the second quarter of 2017, VC-backed IPOs accounted for 16 IPOs, raising $1.8 billion. There were seven tech IPOs that were VC-backed, which included three valued at more than $1 billion.

US IPO Activity – VC Tech



Source: Renaissance Capital

The second quarter included one withdrawal and 51 new IPO filings. We will continue to monitor the activity of the U.S. IPO market.

The Practical Law Company reviewed trends in the U.S. IPO market for the first half of 2017. In the first five months of 2017, 46 IPO issuers identified themselves as emerging growth companies (EGCs). Under the JOBS Act, EGCs are able to confidentially submit draft registration statements prior to a public filing. Of the 46 EGC IPOs issuers, all but one submitted draft registration statements to the SEC. The first public filing followed, on average, 141 days after their draft filing. 12 of the 46 EGC IPO issuers were foreign private issuers (FPIs) and also submitted confidential draft registration statements.

Of the 46 EGC IPO issuers, 31 included two years of audited financial statements. For EGCs, including two instead of three years of audited financial statements is permitted under the JOBS Act. 14 EGC issuers included three years of audited financials, opting not to take advantage of the JOBS Act accommodation. Six FPIs elected to prepare their financial statements following the International Financial Reporting Standards (IFRS), while the other six opted for the U.S.'s Generally Accepted Accounting Principles (GAAP).

See Practical Law's full article here.

Howey Got Here: SEC Issues Guidance on Token Offerings

The *Howey* test lives on—now in a lesson in what not to do when it comes to token offerings.

Token offerings, also known as "initial token offerings," "token launches," "token sales," "initial coin offerings," or "ICOs," represent a new capital-raising method being explored by many emerging companies; venture, hedge, and private equity funds; large and well-established corporations; and others hoping to raise significant amounts of money quickly and from a broad base of potential participants.

On July 25, 2017, the U.S. Securities and Exchange Commission spoke formally on the topic for the first time, disappointing some individuals and issuers that had hoped tokens might fall outside of the definition of "securities" and clarifying that the platforms on which these tokens are traded may need to register as securities exchanges. The SEC also issued an investor bulletin on initial coin offerings as part of its investor-education and investor protection mission.

To learn more, read our client alert.

S&P Announces Methodology Change for Multi-Class Shares

On July 31, 2017, S&P Dow Jones Indices ("S&P") issued a press release announcing a methodology change for multi-class shares following its consultation published on April 3, 2017. The S&P Composite 1500 and its component indices will no longer add companies with multiple share class

structures, such as Snap Inc. and Blue Apron Holdings, Inc. The methodology change is effective immediately. However, existing constituents of the S&P Composite 1500, such as Alphabet Inc. and Facebook, Inc., will be grandfathered in and will not be affected by the methodology change. The S&P Global BMI Indices and S&P Total Market Index will continue to include companies with multiple share classes or with limited or no shareholder voting. S&P noted that unlike the S&P Global BMI Indices and S&P Total Market Index, the S&P Composite 1500 (comprised of the S&P 500, S&P MidCap 400 and S&P SmallCap 600) follows more restrictive eligibility rules, including a minimum float of 50% and positive earnings as measured by GAAP. S&P also clarified that the methodologies of other S&P and Dow Jones branded indices remain unchanged.

In a related development, effective September 2017, FTSE Russell, the sponsor of the Russell 2000 Index, announced that it will require companies to have more than 5% of their voting rights (aggregated across all equity securities) held by "free float" shareholders.

It remains to be seen whether these changes will influence the capital structure of companies contemplating IPOs. On the one hand, inclusion in these indices may help bring greater visibility, and share ownership by investment funds and other parties that track the relevant index. On the other hand, these factors may not be sufficient to convince company founders to dilute their control.

A copy of the S&P press release is available here.

FTSE Russell's proposal may be accessed here.

It's Back: NYSE Amends Proposal Allowing Listing Without IPO

On July 31, 2017, the NYSE amended its proposal, originally issued on March 13, 2017 and then withdrawn on July 19, 2017, to modify its listing qualifications to facilitate direct offerings. Section 102.01B of the NYSE Listed Company Manual currently recognizes that some companies that have not previously registered their common equity securities under the Exchange Act, but which have sold common equity securities in a private placement, may wish to list those common equity securities on the NYSE at the time of effectiveness of a resale registration statement filed solely for the resale of the securities held by selling stockholders. Footnote (E) of Section 102.01B currently provides that the NYSE will exercise its discretion to list these companies by determining that a company has met the $100 million aggregate market value of publicly-held shares requirement based on a combination of both (1) an independent third-party valuation of the company (the "Valuation") and (ii) the most recent trading price for the company's common stock in a trading system for unregistered securities operated by a national securities exchange or a registered broker-dealer (a "Private Placement Market").

The amended proposal retains the changes to Footnote (E) included in the original proposal, including, among others, changes to (1) explicitly provide that these provisions apply to companies listing upon effectiveness of a Form 10 or 20-F without a concurrent Securities Act registration and (b) upon effectiveness of a resale registration statement, and (2) provide an exception to the Private Placement Market trading requirement for companies with a recent Valuation available indicating at least $250 million in market value of publicly-held shares.

The amended proposal also includes the following new changes:

- Amending Footnote (E) to establish criteria for assessing the independence of a valuation agent;
- Amending NYSE Rule 104(a)(2) to specify the role of a financial adviser to an issuer that is listing under Footnote (E) and that has not had any recent trading in a Private Placement Market;
- Amending NYSE Rule 123D to provide that the NYSE may declare a regulatory halt in a security that is the subject of: (1) an IPO on the NYSE; or (2) an initial pricing on the NYSE of a security that has not been listed on a national securities exchange or traded in the over-the-counter market pursuant to FINRA Form 211 immediately prior to the initial pricing.

The SEC has until September 18, 2017, to approve, disapprove or institute proceedings for the amended proposal.

The independence criteria and the provisions addressing the role of a financial advisor added to this amended NYSE proposal would seem to provide a roadmap for any issuer seeking to undertake a direct listing, perhaps as an alternative to a traditional IPO, and that might have engaged or is considering engaging advisers to assist the issuer with the direct listing process.

UPCOMING EVENTS

MoFo is rolling out the classics—MoFo Classics Series, that is. These two CLE sessions will focus on developments in the private placement market. Mark your calendar for these in-person only sessions, held at our New York office from 8:30 a.m. to 9:30 a.m.

Private Placement Market Developments
Thursday, September 14, 2017

During this session, we will discuss developments affecting private placements, including: Increased reliance on Section 4(a)(2) instead of the Rule 506 safe harbor; addressing no registration opinions; bad actor diligence for issuers and placement agents; diligence and the use of "big boy" letters; FINRA Rule 5123 updates; FINRA and SEC enforcement developments affecting private placements; and Nasdaq's 20% rule.

Late Stage Private Placements
Tuesday, September 19, 2017

Successful privately held companies considering their liquidity opportunities or eyeing an IPO often turn to late stage private placements. Late stage private placements with institutional investors, cross-over investors and strategic investors raise a number of considerations distinct from those arising in earlier stage and venture financing transactions.

During this session, we will discuss: Timing and process for late stage private placements; terms of late stage private placements; principal concerns for cross-over funds; diligence, projections and information sharing; IPO and acquisition ratchets; governance issues; the placement agent's role; and planning for a sale or an IPO.

To register, please click here.

New York & California CLE credit is pending.

Location: 250 West 55th Street, New York, NY 10019

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:

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For jumpstarts, upstarts and start-ups

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 recently updated 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 recently updated IPO Field Guide we provide an overview of the path to an initial public offering and address a number of recent developments. Our guide is available here: https://goo.gl/Cvxa4S.

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/FizH9N.

SOCIALLY AWARE
THE SOCIAL MEDIA LAW UPDATE

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 MORRISON & FOERSTER

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life sciences companies. We've been included on *The American Lawyer*'s A-List for 13 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.