April 2017

NEWS ROUND UP

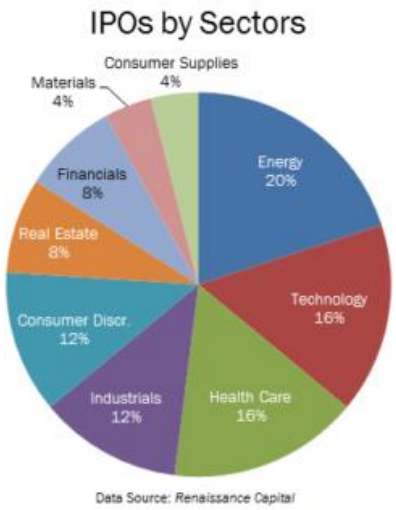
A Morrison & Foerster summary of recent developments affecting Israeli companies active in the capital markets.

IN THIS ISSUE

Momentum Builds in the U.S. IPO Market

Renaissance Capital reported a strong start to the year in its U.S. IPO Market 1Q 2017 Quarterly Review. The first quarter of 2017 saw 25 IPOs, which raised $9.9 billion, a jump from 1Q 2016's eight IPOs raising less than $1 billion. This was a seven-quarter high for capital raised. Median deal size also rose to $190 million.

There was an even distribution of IPO activity across various sectors. The energy sector made up 20% of 1Q 2017 IPOs, raising $1.5 billion. The tech sector raised the most capital this quarter, $4.0 billion from its four IPOs. Biotech IPO activity saw its lowest levels since 4Q 2012 with only three IPOs this quarter. The tech sector had the largest U.S. IPO since the Alibaba IPO in 2014, with the Snap IPO raising $3.4 billion.



Private equity-backed IPOs accounted for 12 IPOs, raising $5.1 billion in proceeds. This was the first time in four years that PE-backed IPOs accounted for more capital raised and a greater number of deals than venture capital-backed IPOs. VC-backed IPOs made up 32% of the first quarter's IPOs, with eight IPOs, raising $4.1 billion in proceeds.

There were 16 IPO withdrawals and 33 new filings during 1Q 2017. A number of unicorn companies, valued at over $1 billion, were on track for their IPOs but instead opted for M&A exits this quarter.

SEC Adopts T+2 Settlement Cycle for Securities Transactions

On March 22, 2017, as previously anticipated by the market, the Securities and Exchange Commission (SEC) adopted an amendment to Rule 15c6-1 under the Securities Exchange Act of 1934 to shorten the standard settlement cycle for most broker-dealer transactions from three business days after the trade date (T+3) to two business days (T+2). The SEC proposed the amendment on September 28, 2016, in connection with a variety of related changes to the SEC's rules and the rules of self-regulatory organizations such as FINRA to facilitate the U.S.'s move to a T+2 settlement cycle.

According to the SEC, Rule 15c6-1, as amended, is designed to enhance efficiency, reduce risk, and ensure a coordinated and expeditious transition by market participants to the shortened standard settlement cycle.

Broker-dealers will be required to comply with the rule beginning on September 5, 2017, and to assist them (and other securities professionals and the investing public) in their preparation for the implementation, the SEC has established an e-mail address (T2settlement@sec.gov) for the submission of inquiries to the SEC staff.

For additional discussions of the proposed T+2 changes, see our previous articles here (FINRA), here (NSCC and NYSE) and here (SEC Rule 15c6-1(a)).

JOBS Act-Related Technical Amendments

The SEC adopted technical amendments to conform several rules and forms to amendments made to the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act") by Title I of the Jumpstart Our Business Startups (JOBS) Act. For example, under the definition of the term "emerging growth company" (EGC), the JOBS Act required inflation indexing the annual gross revenue amount. With the amendments, the revenue threshold for EGCs is now $1.07 billion. The final rules also address various provisions of the Securities Act and the Exchange Act, as well as Exchange Act periodic and current reports, Regulation S-K, and Regulation S-X that did not currently reflect JOBS Act provisions. Sections 4(a)(6) and 4A of the Securities Act set forth dollar amounts used in connection with the crowdfunding exemption, and Section 4A(h)(1) states that such dollar amounts shall be adjusted by the SEC not less frequently than once every five years to reflect Consumer Price Index (CPI) changes.

See the final rule: https://www.sec.gov/rules/final/2017/33-10332.pdf.

See the SEC press release: https://www.sec.gov/news/press-release/2017-78.

SEC Provides Relief from Enforcement Actions Regarding Certain Portions of the Conflict Minerals Rule

On April 3, 2017, the District Court for the District of Columbia (the "District Court") entered a final judgment (the "Final Judgment") in the case of *National Association of Manufacturers, et al., v. SEC.* The Final Judgment affirms the prior holding of the U.S. Court of Appeals for the District of Columbia in *National Association of Manufacturers* that Exchange Act Section 13(p)(1) and Rule 13p-1 (together, the "Conflict Minerals Rule") violate the First Amendment to the extent the Conflict Minerals Rule requires regulated entities to report to the SEC and to state on their websites that any of their products have "not been found to be DRC (Democratic Republic of Congo) conflict free." The Final Judgment solely sets aside the portion of the Conflict Minerals Rule that requires regulated entities to report to the SEC and make the website statements. The District Court remanded the Rule in all other respects, to the SEC.

On April 7, 2017, the staff of the SEC's Division of Corporation Finance (the "Staff") issued guidance on the impact of the Final Judgment on the Conflict Minerals Rule (the "SEC Guidance"). The SEC Guidance seeks to reduce the uncertainty surrounding the Conflict Minerals Rule with regard to potential enforcement actions, given that the Final Judgment and the decision of the U.S. Court of Appeals in *National Association of Manufacturers* leaves open the question of whether the description of being "DRC conflict free" is required by statute, or instead, a product of the SEC's rulemaking. The Staff explained that it will not recommend enforcement action if companies (including those subject to paragraph (c) of Item 1.01 of Form SD) only file disclosure under the provisions of paragraphs (a) and (b) of Item 1.01 of Form SD. However, the Staff expressly noted that the SEC Guidance is still subject to any further action taken by the SEC and does not express any legal conclusion on the Conflict Minerals Rule itself.

The Final Judgement is available here.

The U.S. Court of Appeals for the District of Columbia in *National Association of Manufacturers* is available here.

The SEC Guidance is available here.

Delaware Paves the Way for the Use of Blockchain Technology

Following last May's announcement of the "Delaware Blockchain Initiative" by former Delaware Governor Jack Markell, on March 13, 2017, the Corporate Council of the Corporation Law Section of the Delaware State Bar Association released groundbreaking draft legislation proposing to amend several sections of the Delaware General Corporation Law (DGCL) in an attempt to clarify the application of existing laws to, and facilitate the use of, blockchain technology for various corporate purposes.

Our client alert covers the proposed legislation as it relates to the use of blockchain technology for (i) the creation and administration of corporate records and (ii) the electronic transmission of stockholders' communications.

To read our full client alert, please visit: https://goo.gl/pAgVzh.

Securities Liability for Foreign Issuers

On March 28, 2017, the U.S. District Court for the District of Salt Lake City granted the SEC's request for a preliminary injunction in *SEC v. Traffic Monsoon, LLC*. The SEC's complaint was brought in connection with Traffic Monsoon's operation as a web traffic exchange, in which it sold several different products designed to deliver "clicks" or "visits" to the websites of its customers, which the SEC alleged violated Exchange Act Section 10(b) and Rule 10b-5. In its argument against the SEC's request for a preliminary injunction, Traffic Monsoon relied on *Morrison v. Nat'l Australia Bank Ltd.* to assert that Exchange Act Sections 10(b) and Section 17 do not authorize a U.S. district court to enjoin activity related to foreign transactions, claiming that approximately 90% of Traffic Monsoon's customers purchased products over the internet while located outside the United States. In *Morrison*, the Supreme Court replaced the longstanding "conduct and effects test" with the "transactional test," holding that Section 10(b) and Rule 10b-5 could be applied only in connection with the purchase or sale of a security listed on an American stock exchange and the purchase or sale of any other security in the U.S.

In *Traffic Monsoon*, the defendants claimed that notwithstanding the passage of Section 929P(b) of the Dodd-Frank Act, which reinstated the conduct and effects test that had been repudiated in *Morrison*, the SEC lacked jurisdiction in *Traffic Monsoon* in accordance with *Morrison*'s transactional test. Section 929P(b) clarified, among other things, that U.S. district courts have jurisdiction over Exchange Act Section 10(b) and Section 17(a) actions brought by the SEC if the conduct and effects test has been satisfied. However, the *Traffic Monsoon* court disagreed with the defendants' claim, holding that the legal context in which Section 929P(b) was drafted, legislative history and express purpose of Section 929P(b) all point to a congressional intent that Section 10(b) and Section 17(a) should be applied to extraterritorial transactions to the extent that the conduct and effects test can be satisfied. Using the conducts and effects test, the *Traffic Monsoon* court found that the SEC had jurisdiction to bring an injunction against the defendants, given that Traffic Monsoon was conceived and created in the United States, along with the promotion of its products. This decision is notable because it represents the first time that a U.S. district court has affirmatively held that Section 929P(b) supersedes *Morrison*. More importantly, it functions as a warning to issuers that their foreign activities may nevertheless be subject to liability under U.S. securities laws, even if other U.S. district courts have continued to use *Morrison*'s transactional test.

A copy of the *Traffic Monsoon* decision is available at: https://goo.gl/72bMzA.

Rise in Securities Suits

The Securities Regulation & Law Report recently published a report that surveyed the number of securities class actions against foreign private issuers with a class of securities listed on a U.S. securities exchange. The number of securities class actions against foreign private issuers has steadily risen in the last four years. Much of the increase had in prior years been attributable to lawsuits involving Chinese reverse mergers. In the recent report, there was a notable spike in the number of suits against Israeli issuers, with eight new suits having been brought against Israeli issuers in 2016. This accounted for the nearly 20 percent of the securities class actions involving foreign private issuers. Of course, this may be attributable to the fact that many such suits target technology-based companies that often have significant volatility, and Israeli companies pursuing listings in the United States by and large tend to be tech companies.

SEC Chief Accountant's Remarks on Enhancing Audit Committee Effectiveness and Advancing Effective ICFR

In a pair of recent speeches, SEC Chief Accountant Wesley R. Bricker emphasized the importance of reinforcing and advancing credible financial reporting through effective audit committees and effective internal control over financial reporting (ICFR). Mr. Bricker highlighted several ways to advance the role and effectiveness of audit committees, including the following:

- Audit committees should understand the businesses they serve and the impact of the operating environment – the economic, technological, and societal changes – on corporate strategies.
- Balancing audit committee workload is critical given the need for audit committees to stay current on emerging issues, whether financial, ICFR, or disclosure-related through continuing education and other means.
- Audit committees should consider training and education programs to ensure that their membership has the proper background and stays current as to relevant developments in accounting and financial reporting, including the recently issued

accounting standards relating to revenue recognition, leasing, financial instruments, and credit losses.

With respect to ICFR, Mr. Bricker noted that management's ability to fulfill its financial reporting responsibilities significantly depends on the design and effectiveness of ICFR. Companies should also be aware that certain areas of ICFR may be impacted by the transition to the new revenue standards and that they should take appropriate steps to ensure the effectiveness of ICFR, including the following:

- Refreshing other components of internal control over financial reporting, including professional competence.
- Considering whether the existing controls support the formation and enforcement of sound judgments (regarding the nature of revenue recognition, the economic substance of revenue arrangements, whether to report revenue on a gross or net basis, etc.) or whether changes are necessary.
- Making sure they have appropriate resources to evaluate revenue arrangements and properly apply the principles of the new standards.
- Considering whether their reporting systems are designed to accurately capture the effects of changes to customer contracts and other information required for compliance with the new standards.
- Keeping in mind that the effectiveness of any changes to internal controls is predicated on a comprehensive and timely assessment of risks that may arise as a result of applying the new standards. Appropriate identification and assessment of risks may require involvement of management and employees from both the accounting and financial reporting functions and other functional areas of a company.

Mr. Bricker's speeches are available at: https://goo.gl/ZoUE3k and https://goo.gl/LfcrLV.

UPCOMING EVENTS

Foreign Private Issuers: SEC Disclosure Issues and Developments
Bloomberg BNA Webinar

Thursday, April 20, 2017
1:00 p.m. – 2:00 p.m. EDT

During this session, we will review the benefits and accommodations available to foreign private issuers, or non-U.S. domiciled companies, that choose to access the U.S. capital markets. We will discuss assessing status as a foreign private issuer, the initial and ongoing disclosure requirements for foreign private issuers, liability considerations, and related topics. The speakers also will address important recent developments significant to foreign private issuers.

For a 25% off promotional code, e-mail CMG-Events@mofo.com.

To register, or for more information, visit: https://goo.gl/UndXgm.

The U.S. IPO Market: Market and Legal Developments
IFLR Webinar

Wednesday, April 26, 2017
11:00 a.m. – 12:30 p.m. EDT

After the 2016 decline in the number of U.S. initial public offerings (IPOs), commentators questioned whether the trend toward companies deferring initial public offerings and remaining private longer would be a new norm. Already this year's IPO market appears to be rebounding. Join us for a discussion of the current IPO market and legal developments.

To register for this *free webinar*, please visit: https://goo.gl/osQHRU.

CLIENT RESOURCE CORNER

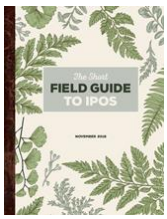
We have a number of resources available to our clients and friends including:

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 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 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

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.