January 2017

NEWS ROUND UP

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

IN THIS ISSUE

Looking Ahead….

We write this as a new administration looks to make its mark with an agenda that was premised on promoting capital formation by easing regulatory burdens. Once a new chair of the Securities and Exchange Commission ("SEC") is confirmed and the two vacant commissioner positions are filled, it is fair to expect that the SEC will consider taking forward a few of the initiatives that were advanced by the SEC under Chair Mary Jo White's tenure. For example, it is reasonable to anticipate that a reconstituted SEC will advance the disclosure effectiveness initiative. The objective of the review of business and financial disclosure requirements by the staff of the SEC's Division of Corporation Finance (the "SEC Staff") was to eliminate outdated or redundant requirements. Certainly, arriving at more focused disclosures that are user-friendly for investors should meet with bipartisan support. In addition, we anticipate that the SEC will consider advancing other measures intended to provide some regulatory relief for smaller companies, such as the proposed amendments to the definition of smaller reporting company. We share some of our predictions in this piece, https://goo.gl/sLlkMk.

We will be reporting on these and related developments in upcoming issues of this publication, as well as on our Jumpstarter blog.

SEC Staff Issues New C&DIs Related to Foreign Issuers

On December 8, 2016, the SEC Staff released several new compliance and disclosure interpretations ("C&DIs") clarifying the definition of "foreign private issuer" ("FPI") under Rule 405 under the Securities Act of 1933, as amended (the "Securities Act"), and Rule 3b-4(c) under the Securities Exchange Act of 1934, as amended. On the same day, the SEC Staff issued additional C&DIs, which provide explanations on the permitted use of an F-Series registration statement and Form 20-F by an FPI (and its subsidiaries) in certain contexts.

For additional discussion and analysis, our Client Alert is available here: https://goo.gl/RggwvW. Additionally, see our updated Frequently Asked Questions about Foreign Private Issuers available here: https://goo.gl/Rf86uK.

Staff Guidance on Rule 144A Related Issues

On December 8, 2016, the SEC Staff released additional C&DIs related to the types of securities that may be counted toward the $100 million threshold under Rule 144A under the Securities Act. For example, the C&DIs confirm that securities purchased and held on margin may be counted as "owned" for purposes of calculating whether the $100 million threshold, provided that the securities are not subject to a repurchase agreement. (Question 138.05). Similarly, an entity may count securities that have been loaned to borrowers. (Question 138.06) However, the entity cannot count securities that it has borrowed, since these securities are not "owned." (Question 138.07) An entity also cannot count short positions in securities for the same reason—these do not represent an ownership interest. (Question 138.08).

For additional discussion and analysis, our blog post is available here: https://goo.gl/aSxIas.

Practice Pointers on Non-GAAP Financial Measures

On June 27, 2016, SEC Chair Mary Jo White, speaking at the International Corporate Governance Network's Annual Conference in San Francisco, reiterated the SEC's growing concern regarding the use by public companies of non-GAAP financial measures. In her keynote address, Chair White lamented that "[i]n too many cases, the non-GAAP information, which is meant to supplement the GAAP information, has become the key message to investors, crowding out and effectively supplanting the GAAP presentation." While companies are allowed to present non-GAAP financial measures in their public disclosures to enable them to convey a clearer picture of their results of operations and "tell their own stories" to investors, Chair White voiced her concern that, recently, companies have been "taking this flexibility too far and beyond what is intended and allowed by our rules."

For additional discussion and analysis, our Practice Pointer is available here: https://goo.gl/ohcLvH.

Thoughts on Internal Control Over Financial Reporting

Many companies will be focused on preparing their annual reports. Recent comments from various representatives of the SEC accounting staff emphasized the importance of maintaining strong and effective internal control over financial reporting ("ICFR"). At the American Institute of Certified Public Accountants Conference in Washington, D.C., SEC Chief Accountant Wesley R. Bricker and SEC Deputy Chief Accountant Marc Panucci both addressed ICFR. Mr. Panucci stated that ICFR remains a significant area of focus for the SEC, including through the coordinated efforts of the SEC's Office of the Chief Accountant, the Division of Corporation Finance and the Division of Enforcement. Mr. Panucci also noted that earlier this year, the SEC brought and settled a case against an issuer, members of its management, the audit partner and the issuer's third-party consultant involving the inadequate evaluation of an identified control deficiency.

For additional discussion and analysis, our blog post is available here: https://goo.gl/KmxbXe.

Reminders for Companies Preparing Annual Reports on Form 20-F

The SEC Staff has been focused on disclosures by reporting companies related to:

Cybersecurity Risks: Since the SEC Staff's release of disclosure guidance on cybersecurity risks in 2011, cybersecurity issues and breaches have become even more significant. The SEC guidance was intended to assist companies in assessing the type of disclosure that would be expected regarding the risks associated with the occurrence of a cybersecurity incident.

Sanctions related Issues: The SEC Staff also has become more focused on disclosures relating to the activities of reporting companies in sanction countries, including Cuba, Iran, Sudan and Syria.

Non-GAAP Measures: As noted above, the SEC Staff remains focused on the types of non-GAAP measures used by SEC reporting companies. In reviewing annual reports on Form 20-F, the Staff is sure to evaluate the prominence of non-GAAP measures, the reconciliation to GAAP of non-GAAP measures, MD&A disclosures relating to non-GAAP measures and the manner in which the reporting company employs non-GAAP measures relative to peer companies in the industry sector.

Oftentimes, we find it helpful to review trends in SEC comment letters as we prepare or assist clients in preparing their annual reports on Form 20-F. While in recent years, the number of SEC comment letters issued to SEC-reporting companies has declined, there has been a focus on reviewing filings of larger issuers. In addition to the focus on the use of non-GAAP measures, SEC comment letters have concentrated on some of the following issues:

- *Management's Discussion and Analysis*: the SEC Staff continues to emphasize the need for SEC reporting companies to provide insight for investors regarding changes in line items, the reason for the changes, known trends, material uncertainties, and loss contingencies.
- *Critical Accounting Policies*: the SEC Staff has begun to comment on "repetition" and "duplicative" disclosures, especially as it relates to critical accounting policies.
- *Quantification*: the SEC Staff has urged registrants to quantify and explain fully the

impact of factors that cause fluctuations in line items from period to period within the discussion of results of operations.

- *Loss Contingencies*: the SEC Staff has commented on whether the registrant is able to make a reasonable estimate of the amount or range of possible losses
- *Segment Reporting*: the SEC Staff has commented on the identification of segments and the analysis underlying the SEC reporting company's characterization of its segments and has required more transparent and detailed disclosures by segment.
- *Taxes*: The SEC Staff has commented on tax policy, treatment of foreign earnings, repatriation of foreign earnings, deferred tax assets.
- *Internal Control Over Financial Reporting*: The SEC Staff has commented on management's assessment of control deficiencies, remediation, disclosures relating to the impact of material weaknesses, restatements and disclosures relating to ICFR following a restatement.
- *Acquisitions*: the SEC staff has focused on purchase price allocations, the inclusion of pro forma financial information, the presentation of pro forma financial information and the appropriateness of pro forma adjustments.

Reporting companies also should consider rules adopted by the securities exchanges during 2016, including the following:

- On February 19, 2016, the NYSE's final rule adding new Section 203.03 to its Listed Company Manual became effective, which requires NYSE-listed FPIs to submit to the SEC on Form 6-K, at a minimum: (1) an interim balance sheet as of the end of its second fiscal quarter; and (2) a semi-annual income statement that covers its first two fiscal quarters.
- Nasdaq Rule 5250(b)(3) became effective on August 1, 2016, which requires Nasdaq-listed companies, including FPIs, to publicly disclose third-party compensation arrangements for board members and board nominees (these are commonly referred to as "golden leash arrangements"). Rule 5250(b)(3) requires, among other things, each Nasdaq-listed company to disclose, by the date the company files its definitive proxy statement for its next annual meeting, the material terms of all agreements and arrangements between any director or nominee, and any person or entity other than the company, relating to compensation or other payments related to that person's candidacy or service as a director of the board.

2016 U.S. IPO Market Review

Renaissance Capital reported several record lows in their 2016 Annual Review of the U.S. IPO Market. A total of 105 IPOs were completed in 2016, raising $18.8 billion in proceeds—the lowest activity level since 2009, and the lowest proceeds level since 2003, respectively. The median deal size for 2016 IPOs was $95 million, which is attributed to the number of smaller biotech offerings in 2016. Only four IPOs raised more than $1 billion this year. Additionally, 2016 had the lowest number of IPO filings since 2009 with just 120 companies filing for an IPO, an almost 50% decrease from 2015.

For additional discussion and analysis, our blog post is available here: https://goo.gl/H8p5vc.

In addition, see our Initial Public Offerings at a Glance infographic available here: https://goo.gl/OJqtk3.

Follow-On Offering Trends

Trends that had begun to surface in prior years were so accentuated in 2016 that they have become impossible to ignore. Over the years, we have urged clients that are eligible to file a shelf registration statement (on Form S-3 or F-3) to do so in order to have maximum flexibility to seize financing opportunities when the markets are receptive to offerings. Nowadays, of course, more issuers are eligible to file a shelf registration statement, and, indeed, most issuers that are eligible to do so take advantage of this ability. This is notable. Perhaps more significant, it is now the case that the majority of follow-on offerings (offerings by companies that are already public) take the form of shelf take-downs, and most shelf take-downs are completed on an accelerated basis without traditional marketing. In certain industry sectors, the vast majority of follow-on offerings are completed as confidentially marketed public offerings. In 2015 and 2016, the over 70% of completed follow-ons were completed as shelf take-downs. Follow-on offering activity declined significantly in 2016. Perhaps this was attributable to lower IPO volumes in the latter half of 2015 or to the volatility experienced in 2016 as a result of Brexit and the U.S. presidential elections (among other factors). In any case, in both 2015 and 2016, the percentage of follow-on offerings that were completed as "block" or "bought" deals increased quite significantly over prior periods. According to various published statistics, approximately 52% of all follow-on offerings in 2016 took the form of bought deals. In a block trade (or "bought" deal), the issuer or a selling stockholder have certainty regarding price and execution; however, the investment banks that bid to participate as the underwriters and buy the block are not able to pre-market the offering. The underwriters bear the price risk. It is too early to make predictions as to whether bought deals will continue to dominate the follow-on activity in 2017; however, it is an important "tool" with which companies, private equity sponsors and venture capital sponsors should be familiar.

The ATM Corner

Every company that has, or is eligible to have, an effective U.S. shelf registration statement should consider implementing an "at-the-market" (ATM) program as an additional financing alternative. An ATM program is an ideal liquidity management tool that can be easily implemented to provide a company with a quick and efficient ability to raise modest amounts of capital over a long period of time. ATM offerings often remain an effective source of capital for companies whether or not the market is presently receptive to other types of securities offerings.

An ATM offering typically involves the sale of a company's securities into its existing trading market at publicly available bid prices. Therefore, the price at which the ATM offering securities are purchased varies and is based on the given public trading price. The company retains sole discretion in deciding when and how much to use an ATM program, even after it is put in place. The company also has the flexibility to use an ATM program for the sale of new securities or securities held by its existing security holders.

ATM offerings provide companies with several distinct advantages over traditional follow-on offerings. Securities can be quickly sold into the market without having to market or announce a formal offering. As a result of avoiding the marketing and road show process, the impact to the company's public share price is minimal as compared to a traditional underwritten offering. Moreover, the company determines the timing, price and size of any ATM sales allowing it to match the amount of capital received with known capital needs. The company also retains the flexibility under an ATM program to structure the offering as a block trade instead of a sale into its existing trading market. As a result of these differences, the distribution costs for an ATM offering are typically significantly less than those for a traditional underwritten offering.

For more information about ATM offerings, see our Frequently Asked Questions about At-The-Market Offerings available here: https://goo.gl/pB1kYu.

PIPE Transactions

In a year of significant volatility, it is not surprising that there was increased reliance on PIPE (private investment in public equity) transactions. Traditionally, PIPE transactions have provided a useful capital-raising alternative when the public markets are inhospitable. During this past year, energy companies relied on PIPE transactions in order to recapitalize their companies and many of these transactions resulted in a change of control.

We summarize the PIPE activity for 2016 in our infographic available here: https://goo.gl/XqeFMw.

UPCOMING EVENTS

SECURITIES DEVELOPMENTS MEDLEY
MoFo Teleconference Series

The SEC and the SEC Staff had a busy second half of 2016. In late 2016, the SEC Staff issued guidance principally in the form of C&DIs on various topics. Join Morrison & Foerster for our two-part recap of items you may have missed.

Session One
Wednesday, February 8, 2017
11:00 a.m. – 12:00 p.m. ET

During our first session, we will review Regulation A: what do we know about how the exemption is working?; Regulation Crowdfunding; C&DIs on Regulation Crowdfunding; FINRA crowdfunding enforcement matter; Rule 147/Rule 504; Integration C&DI; C&DIs on Rule 701; and Guidance on Rule 144.

Speakers: Partners Ze'-ev Eiger and Anna Pinedo

Session Two
Thursday, February 9, 2017
11:00 a.m. – 12:00 p.m. ET

During our second session, we will review C&DIs on Rule 144A, FPIs and Regulation S. We also will discuss guidance on Exxon Capital exchange offer representations, guidance on shortened tenders, and recent Trust Indenture Act related court cases.

Speakers: Partners Lloyd Harmetz and Anna Pinedo

To register, please e-mail: CMG-Events@mofo.com

CLIENT RESOURCE CORNER

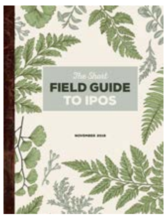
We have a number of resources available to our clients and friends including:

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.

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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.

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.