

Morgan Lewis

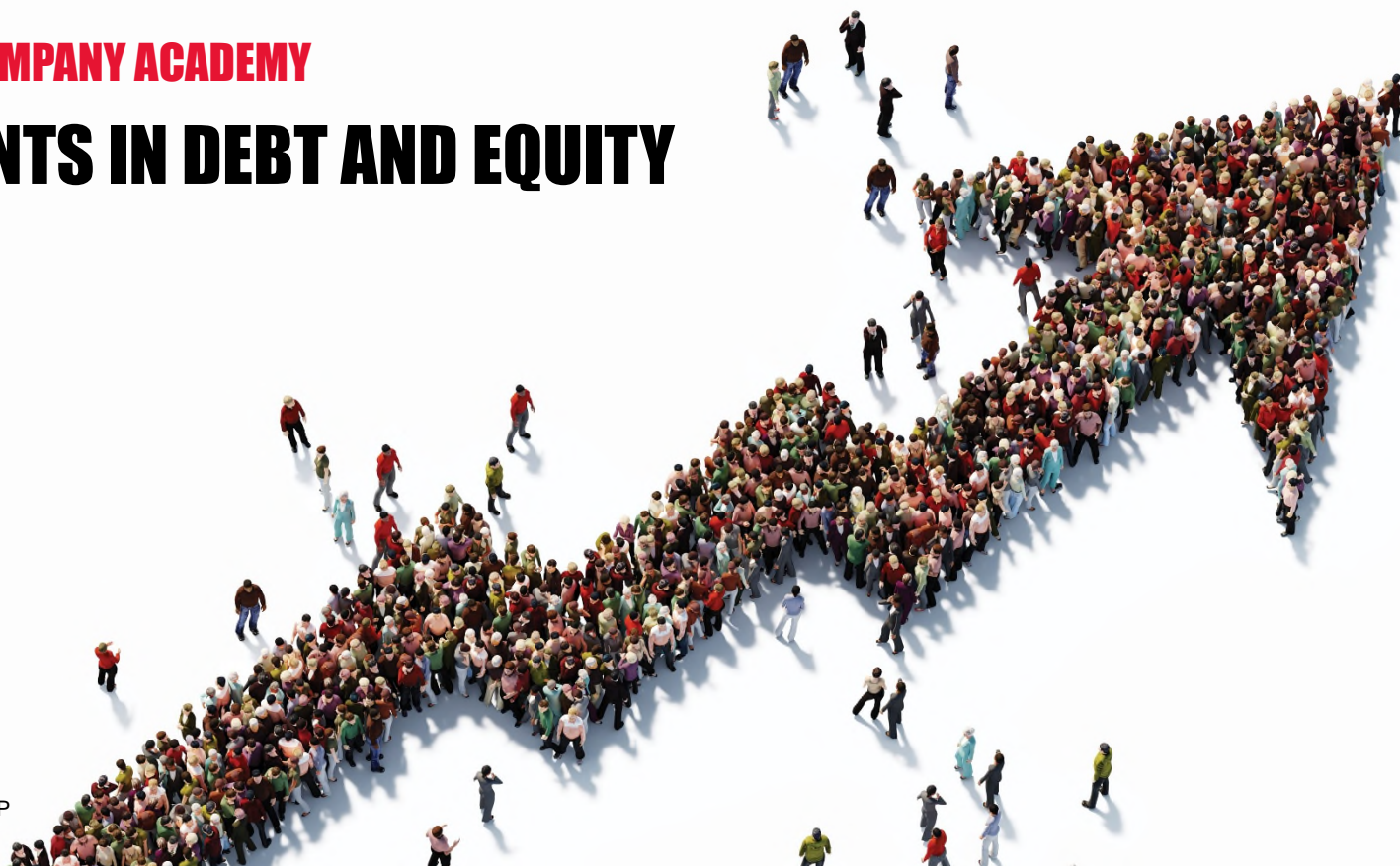
GLOBAL PUBLIC COMPANY ACADEMY

DEVELOPMENTS IN DEBT AND EQUITY OFFERINGS

Justin Chairman
Tom Giblin
Brian Soares

May 8, 2019

© 2019 Morgan, Lewis & Bockius LLP



AGENDA

- Debt and equity capital markets in 2018
- Current IPO trends
- Equity forward offerings
- At-the-market offerings and equity lines
- Floating rate debt
- QFC stay rules
- Debt and equity capital markets in 2019

DEBT AND EQUITY CAPITAL MARKETS IN 2018

- Investment grade corporate bond issuances topped \$1 trillion for the fifth year in a row
 - \$1.2 trillion raised in 2018 was about 10% lower from 2017's record of \$1.42 trillion
- Drivers:
 - Debt-financed M&A
 - Getting ahead of refinancing needs amid a rising rate environment
- Headwind:
 - Tax reform

DEBT AND EQUITY CAPITAL MARKETS IN 2018

- IPOs
 - 2018 was the best year for U.S. IPOs since 2014
 - 205 IPOs raised \$52.8 billion, compared to 174 IPOs in 2017 raising \$39.5 billion
 - Leading sectors: technology and health care
 - 26 unicorns in 2018 (\$15 billion in proceeds)
 - SPACs maintained a significant presence, with 43 IPOs (19% of total proceeds)
 - First direct listing: Spotify (more on this later)

CURRENT IPO TRENDS – DUAL CLASS STRUCTURE

- Capital structure with multiple classes of common stock
- Generally, main or only difference between classes is # of votes per share
 - Ratio between “high-vote” and “low-vote” shares determined by issuer
 - High-vote shares may or may not be convertible to low-vote
 - High-vote shares may or may not be transferable
- Dual-class structures have been used in various scenarios, including M&A activity with restructuring element
- Dual class structure usage in IPOs relatively high, but may be decreasing
- Of 124 IPOs in 2017 (excluding FPIs, SPACs and MLPs), 23, or 19%, had dual-class structures with unequal voting rights
- Of 140 IPOs in 2018 (excluding FPIs, SPACs and MLPs), 15, or 11%, had dual-class structures with unequal voting rights

CURRENT IPO TRENDS – DUAL CLASS STRUCTURE

- Particularly prevalent among tech companies (34.2% of 2018 tech IPOs; 12.5% non-tech)
- Unicorns (e.g., Lyft, Pinterest, both 20:1) often use dual-class, but not always (30% of unicorn 2018 IPOs)
- Corporate governance advocates opposed to structure
- Some stock indices (e.g., S&P 500) exclude certain dual-class stocks
- Advocates of dual-class structures argue that they promote stability and effective management, thereby benefitting all stockholders
- Market reaction: dual-class stocks appear to have superior initial returns as compared to single-class
 - Likely more related to nature of issuers than capital structure
- Hybrid structures (e.g., sunseting dual class) are possible

EMERGING IPO TRENDS – DIRECT LISTING

- Direct listing: issuer lists its securities directly on an exchange while bypassing the traditional underwriting process
- Direct listing characteristics
 - No new issuance of shares to investors, and no dilution to existing stockholders
 - Company does not raise any money
 - Less control over pricing of shares
 - No underwriting fees
 - No lock-up agreements

EMERGING IPO TRENDS – DIRECT LISTING

- Spotify led the way, now Slack Technologies is following suit
- Spotify's 2018 direct listing:
 - Shares debuted at \$165.90, against a NYSE reference price of \$132 set the day before
 - No major trading glitches and little volatility
- Slack Technologies has a Form S-1 on file with the SEC currently under review
- Potential drivers of this trend
 - Plenty of money in private markets
 - Pressure coming from private investors seeking liquidity
- Remember Google's Dutch auction IPO?

EMERGING IPO TRENDS – DIRECT LISTING

- What does this mean for traditional IPOs?
- Changes to traditional aspects of IPOs might be on the horizon
 - Lock-up agreements
 - Greenshoe options

EQUITY FORWARD OFFERINGS

- Equity offering with derivative element
- Designed to provide company with ability to take down capital over period of time based on price determined at time offering is conducted
- Allow issuers to lock in price and offering size that they believe to be attractive

EQUITY FORWARD OFFERINGS

- Issuer files prospectus supplement for offering of its securities from shelf registration statement
- Forward purchaser, pursuant to an agreement with the issuer and the underwriter, borrows shares in market and delivers them to the underwriter to sell in the offering
- Issuer enters into agreement with forward purchaser to sell an equal number of shares to the forward purchaser, over a period of time (generally 12-18 months) following the offering at a predetermined sale price (generally the public offering price in initial offering, subject to various adjustments)
- Issuer receives proceeds as it delivers shares to the forward purchaser; issuer generally controls timing of such deliveries
- Issuer may elect in certain circumstances to deliver cash instead of shares

ATMS AND EQUITY LINES

- Alternatives to traditional equity offerings
- Designed to provide flexible and efficient access to capital, as needed, for companies that may face obstacles in utilizing traditional structures
- Cost-effective, both as to fees and discounts
- Relatively easy to establish
- Allow issuers to be opportunistic in response to market conditions
- Eliminate need to engage in extensive marketing/selling efforts
- May allow company facing liquidity issues to establish access to capital and address concerns (market/investor or going-concern related)

AT-THE-MARKET (ATM) OFFERINGS

- Offering made from shelf registration statement (existing or newly effective)
- Issuer must meet certain requirements:
 - Equity securities listed on U.S. securities exchange
 - Eligible for primary offering on Form S-3
 - May include issuers eligible under “baby shelf” rules (Form S-3 General Instruction I.B.6)
 - Foreign private issuers eligible if equity securities (including ADSs/ADRs) listed on U.S. exchange
- Can be for common or preferred stock (or both) or ADRs
- Offering announced at establishment of ATM program
 - Issuer files prospectus supplement and enters into sales agreement at inception of program
 - Sales agreement similar to underwriting agreement for traditional shelf offering
- Due diligence undertaken at establishment of program
 - Similar process to traditional shelf offering (comfort letter, opinions, etc.)

AT-THE-MARKET (ATM) OFFERINGS

- ATM will allow sales up to maximum number of shares or maximum gross proceeds
- Sales are at discretion of issuer; establishing program does not require issuance
 - Sales may be restricted during quarterly “blackout” periods
 - Sales agent does have limited ability to decline instructions to sell
- Periodic diligence bring-downs and delivery of opinions; periodic delivery of comfort letter bring-downs may be limited
- Restrictions on other transactions by issuer may be established
- ATM can typically be terminated by issuer at any time
 - Some programs establish minimum fee obligation if agreed sales threshold not met
- Regulation M and FINRA issues must be addressed

EQUITY LINES

- Offering made either as a public offering from shelf registration statement (existing or newly effective) or as a private placement with subsequent resale registration obligation
- Issuer in *public* equity line must meet certain requirements:
 - Equity securities listed on U.S. securities exchange
 - Eligible for primary offering on Form S-3
 - May include issuers eligible under “baby shelf” rules (Form S-3 General Instruction I.B.6)
 - Foreign private issuers eligible if equity securities (including ADSs/ADRs) listed on U.S. exchange
- Issuer in *private* equity line must meet fewer requirements, but programs have more limits on structure and operation
- Offering announced at establishment of equity line program
 - For public equity line, issuer files prospectus supplement and enters into sales agreement at inception of program
 - Sales agreement similar to underwriting agreement for traditional shelf offering
- Commitment fee (generally payable in common stock) typically due at establishment of program

EQUITY LINES

- Due diligence undertaken at establishment of program
 - Similar process to traditional shelf offering (comfort letter, opinions, etc.)
- Equity lines will allow sales up to maximum number of shares or maximum gross proceeds, but may have additional terms such as length of the facility, number of draws, etc.
- Selling price is formula-based, often but not always forward looking
- Sales are at discretion of issuer; establishing program does not require sales
 - Generally limited restrictions on sales
- Limited periodic maintenance (i.e., diligence bring-downs, delivery of opinions and comfort letter bring-downs)
- Restrictions on other transactions by issuer may be established
- ATM can typically be terminated by issuer at any time
- Section 16, SEC Regulation M and FINRA issues must be addressed

FLOATING RATE DEBT

- LIBOR is widely used as the reference rate in floating rate debt issuances in the capital markets
- LIBOR is expected to be discontinued by the end of 2021
- LIBOR discontinuance will impact outstanding debt issuances
- As a result of LIBOR's expected discontinuance, new issuances of floating rate debt securities have provided mechanisms for substitute alternative reference rates if selected by a central bank, reserve bank, monetary authority or similar institution
- On April 25th, the Alternative Reference Rates Committee, convened by the Federal Reserve Bank of New York, issued recommended fallback language for new issuances of LIBOR-referenced U.S. dollar-denominated floating rate notes
- On April 29th, JPMorgan issued notes that incorporated that recommended fallback language

QFC STAY RULES

- Starting January 1st, the new U.S. “QFC Stay Rules” required U.S. global systematically important banking organizations (GSIBs) and their subsidiaries worldwide are required to include new language in underwriting agreements and similar agreements
- The application of the QFC Stay Rules was described in a SIFMA December 13, 2018 memo
- The QFC Stay Rules requires covered entities to include contractual stay language in certain of qualified financial contracts (QFCs) to mitigate the risk of potential destabilizing closeouts of those QFCs
- The SIFMA memo set forth a rider to include in underwriting agreements
- While the QFC Stay Rules apply on to a subset of underwriting agreements, in practice the underwriters have required that the QFC Stay Rules be addressed in all underwriting agreements

DEBT AND EQUITY CAPITAL MARKETS IN 2019

- Expect slight decrease in volume, but trends from 2018 should continue
 - Volume expected to top \$1 trillion for the sixth year in a row
 - Rate uncertainty around rates
 - Global companies will continue to access to off-shore cash
 - M&A should continue, though also at a reduced pace
- Additional drivers:
 - Issuers evaluating issuance opportunities across different markets
 - U.S. companies likely to seek lower interest expense in European markets
 - European and Asian companies likely to come to U.S. for depth of liquidity and to extend duration relative to their home markets

DEBT AND EQUITY CAPITAL MARKETS IN 2019

- IPOs
 - Volumes expected to remain steady, with several other unicorns in line for 2019 offerings
 - Lyft already raised \$2.34 billion in March, while Uber, Pinterest, and Postmates are expected to debut in the first half of 2019
 - SPACs continue strong – 18 IPOs thus far
 - Another direct listing slated for 2019: Slack Technologies

Q&A

Justin W. Chairman



Partner

Morgan Lewis

justin.chairman@morganlewis.com

+1.215.963.5061

Justin W. Chairman counsels both public and private companies on issues that arise in capital raising, mergers and acquisitions (M&A), securities compliance and corporate governance activities, as well as contract, finance, securities, and general corporate matters. Justin specializes in working with real estate investment trusts (REITs), and also represents clients in various other industries, including the life sciences, technology, media, staffing, consulting, and other industries.

- In keeping with Morgan Lewis's commitment to community service, Justin is actively involved on the boards of several nonprofit organizations, including the Philadelphia branch of the Anti-Defamation League.
- Justin often speaks at client and industry events on topics such as security industry trends and US Securities and Exchange Commission (SEC) initiatives.

Morgan Lewis

Thomas P. Giblin



Partner

Morgan Lewis

thomas.giblin@morganlewis.com

+1.212.309.6277

Thomas P. Giblin, Jr., advises clients on securities law matters, with a particular focus on representing utility and energy clients in capital markets transactions. Tom's practice includes representing clients in registered offerings of debt and equity securities, Rule 144A and Regulation S transactions, and private placements. Tom also advises public companies on Securities Exchange Act of 1934 disclosure obligations and assists clients with compliance with the Sarbanes-Oxley Act of 2002 and other corporate governance requirements.

Morgan Lewis

Brian V. Soares



Associate
Morgan Lewis
brian.soares@morganlewis.com
+1.202.739.5482

Brian V. Soares counsels public companies with respect to public and private securities offerings, securities regulation, corporate governance, and activist shareholder campaigns. He assists clients in capital raisings, follow-on and secondary offerings, and tender offers. Before joining Morgan Lewis, Brian served as an attorney-adviser with the US Securities and Exchange Commission in the Division of Corporation Finance, where he worked on several transactional and securities compliance matters, including initial public offerings, M&A transactions, and proxy statements. Brian is a native Portuguese speaker.

Morgan Lewis

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Almaty	Chicago	Houston	Orange County	Shanghai*
Astana	Dallas	London	Paris	Silicon Valley
Beijing*	Dubai	Los Angeles	Philadelphia	Singapore
Boston	Frankfurt	Miami	Pittsburgh	Tokyo
Brussels	Hartford	Moscow	Princeton	Washington, DC
Century City	Hong Kong*	New York	San Francisco	Wilmington



Morgan Lewis

*Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

THANK YOU

© 2019 Morgan, Lewis & Bockius LLP
© 2019 Morgan Lewis Stamford LLC
© 2019 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.

Morgan Lewis