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Other Financing Alternatives

Introduction – Day Two

Private Placements and Hybrid Securities Offerings 2020

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Publics more private

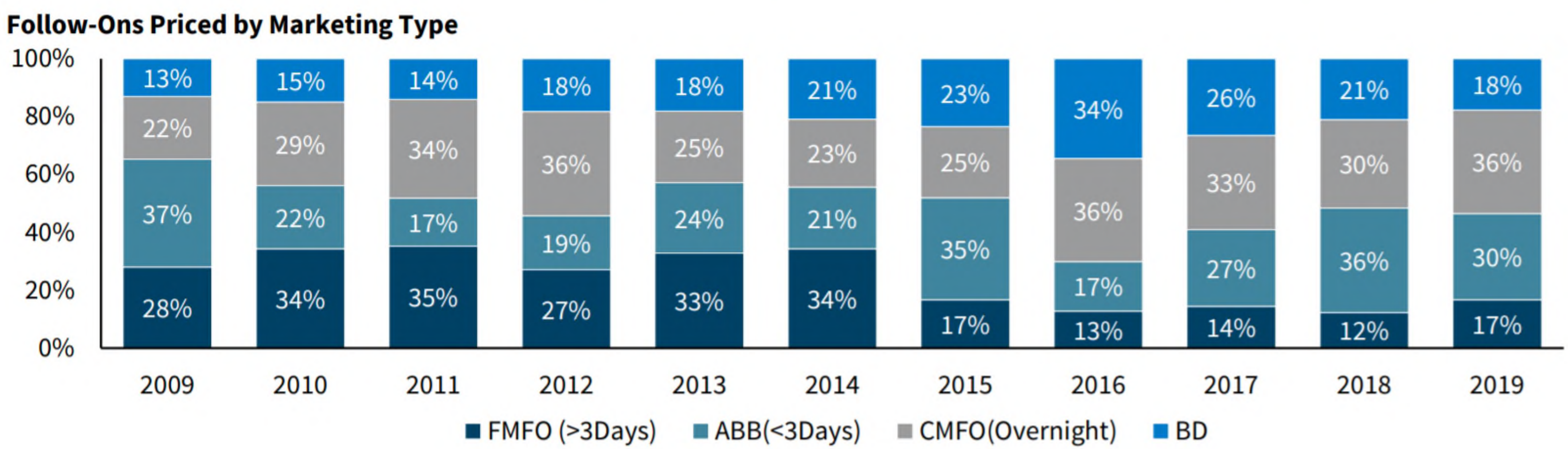
- Hybrid offering alternatives remain significant
  - Generally, the structuring goal was to formulate a securities offering methodology that was a private or an "exempt" offering, but to try by various means to improve the liquidity of the security
    - This was important in order to avoid the liquidity discount demanded by investors in private offerings that preferred not to hold "restricted securities" and wanted securities that could be freely transferred
    - PIPE transactions were developed, in part, to address these considerations
    - One could say that the Rule 144A market also developed, in part, as a means of addressing these considerations
- Soon, other features became important as well, such as, for example, attempting to structure a "public offering" that would be marketed on a targeted or limited basis in much the same way that PIPE transactions or private offerings were marketed
  - Registered direct offerings evolved from this approach

Publics more private *(cont'd)*

- Following the promulgation of Regulation FD and as a result of changes in the market, many public issuers, with shelf registration statements, sought greater certainty regarding deal execution prior to making any public announcement regarding a potential financing
  - This has led to underwritten public offerings completed on an accelerated basis, as well as to confidentially marketed public offerings, or CMPOs
  - These use the marketing approaches historically employed for private offerings
  - In effect, making "publics" more "private"
  - This trend will become more pronounced given that more issuers can now conduct test the waters discussions

Equity follow-on offerings

- Approximately 36% of follow-on offerings in 2019 were confidentially marketed/overnight deals, a slight increase from 2018. Bought deals and follow-on offerings marketed on accelerated basis comprised the significant percentages of follow-on offering volume.



Sources: Dealogic, William Blair

SEC adopts final testing the waters rule

- The SEC adopted a new safe harbor, Rule 163B, which became effective on December 3, 2019.
- Rule 163B permits an issuer or a person acting on the issuer's behalf (an underwriter) to engage in oral or written communications with entities *reasonably believed* to be QIBs and IAIs, either prior to or following confidential submission and public filing of a registration statement in order to gauge interest in a possible offering.
- The rule is applicable to all issuers, whether or not EGCs, and including funds (closed end funds, business development companies, etc.)

Who does this help?

- Most IPO issuers are EGCs that already may engage in TTW communications; however, to the extent that an IPO issuer is not an EGC, it would benefit from this TTW safe harbor for its IPO
- For follow-on offerings, there are already a number of communication safe harbors, so this TTW safe harbor may not be necessary. The rule would provide a non-exclusive safe harbor
- For many follow-ons, market participants already rely on "wall-crossing" potential investors in order to gauge interest in a possible offering

Who does this help? *(cont'd)*

- Other than in the case of a well-known seasoned issuer ("WKSI"), an issuer must have a registration statement on file prior to having an underwriter wall-cross investors and discuss a possible offering by the issuer. This new TTW expansion addresses this:
  - All issuers can submit registration statements for confidential review in connection with their initial public offerings and/or their initial Exchange Act listing, as well as with the first follow-on offerings made within the 12 months following such initial registrations
  - When combined with the ability to submit registration statements for confidential review, the expansion of the TTW provision is very helpful because it allows for TTW meetings to take place and inform the path forward
- The TTW expansion also address a circumstance in which an issuer's registration statement does not cover the type of security that the underwriters propose to offer