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## **Staff Legal Position 103-43: Marketing of Public Issues and Receiving Orders from Sophisticated Investors in a Public Issue of Securities based on a Prospectus**

### **Background**

The Securities Law 5728-1968 (“the Securities Law”) and the Securities Regulations (Manner of Offering Securities to the Public) 5767-2007 (“Manner of Offering Regulations”) govern how corporations may offer securities to the public. Until recently, most public offers were made as uniform offerings to the general public (“uniform offerings”). In the past year, the use of non-uniform offerings in IPOs has increased. In this method (known as “book building”), which is the most common method of issuing securities in the US and other developed countries, the company and the underwriters retain discretion to select the investors who will purchase the securities in the offering and to decide on the quantity of securities that the company allocates to each investor. Non-uniform offerings are directed to institutional investors, as this term is defined in the Manner of Offering Regulations, and are subject to additional conditions that are specified in these regulations.<sup>1</sup>

The growing use of non-uniform offerings triggered several issues related to marketing and pricing and to the practices of supervised entities, companies, and underwriters in public

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<sup>1</sup> According to regulations in effect, up to 30% of a securities issue can also be offered to the public at large, at the same price as the offer to institutional investors.

offerings. Most of these issues are also relevant to uniform offerings, however they recently came to attention due to the increased use of non-uniform offerings in which the final issue price is determined in negotiations between the issuer and underwriters and the institutional investors, rather than by tender. To address these issues ISA Staff conducted an inspection to study the various aspects of the non-uniform offering process through a series of meetings and discussions with institutional investors, advisors, and underwriters, and collected and analyzed data on a sample of securities issues conducted in 2020 and early 2021 (“the Audit”). This Legal Position addresses several of these issues and is largely relevant to both uniform and non-uniform offerings.

### **Conveying information to institutional investors and preliminary discussions on the feasibility of an issue**

According to the Securities Law, an issuer may offer securities to the public on the basis of a prospectus or draft prospectus.

In a Staff Position published in 2007 and in a Q&A document published in 2017, ISA Staff clarified that in the process of a public issue, issuers may not convey information that does not appear in the draft prospectus to institutional or qualified investors, as these terms are defined in the Manner of Offering Regulations (jointly, “Sophisticated Investors”).<sup>2</sup> In 2016, however, ISA Staff published Staff Position 103-38: Initial Discussions with Qualified Investors – “Testing the Waters” (“Staff Position on TTW”),<sup>3</sup> clarifying that there is no impediment that prevents a company contemplating an IPO from conveying information on its operations to qualified investors with which the company conducts preliminary discussions to explore the feasibility of the issue, even before the company offers its securities to the public on the basis of a prospectus or draft prospectus, and may do so up to 15 days prior to the receipt of the permit for the prospectus (“the TTW Process”).

Based on ISA Staff’s Audit and the discussions it held with various market players, ISA Staff learned that the TTW Process is frequently used by companies that conduct discussions with investors before publishing a draft prospectus for the public and before a public offering is initiated. However, it also emerged that market players were uncertain about the type of information that may be conveyed in the TTW Process, and specifically whether a company may

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<sup>2</sup> Staff position 106-2 “Underwriting Q&A on the New Regulations,” Q&A 5.2 published in June 2007 [LINK].

<sup>3</sup> Staff Position 103-38 “Initial Discussions with Qualified Investors” – “Testing the Waters” (“Staff Position on TTW”)

give qualified investors information on the issue price, and whether the company may negotiate with investors on the price and obtain indications of their interest in the issue.

**On the basis of the experience accumulated so far from the growing use of non-uniform offerings in Israel, ISA staff defined the following guidelines for the information that may be conveyed in an IPO:**

1. Companies and/or underwriters may convey information to Sophisticated Investors and conduct discussions with them (including discussions on the quantity and price of the offered securities in the issue) before a draft prospectus is issued. This applies both to information conveyed to institutional investors in non-uniform offerings and information conveyed to qualified investors in uniform offerings.
2. To ensure that the negotiations and pricing discovery process are, in principle, based on a public document that is drafted and published according to the Securities Law — a prospectus or a draft prospectus — a reasonable interval is required to conduct the issue proceeding on the basis of said document. Companies and/or underwriters must also ensure that investors' give notice of their intentions to participate in the issue on the basis of information that is not substantively different from the information that will be included in the prospectus. To ensure that this is the case, the following two conditions must be met:

First, early commitments or notices of intentions to purchase securities in the issue ("Notices") must be made at least 10 days after the first publication date of a draft prospectus. Second, if the company publishes a draft prospectus that contains substantive modifications compared to the previous public draft prospectus, an additional two business days from the publication date of the revised draft prospectus to the date on which Notices are received is required, and if any Notices based on the previous draft prospectus must be re-confirmed after the elapse of at least two business days from the publication date of the revised draft prospectus.

ISA Staff stresses that the issuers who sign the prospectus must verify that any material information presented at any stage to Sophisticated Investors, either directly or indirectly through underwriters or analysts, must be included in the draft prospectus and in the prospectus.<sup>4</sup>

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<sup>4</sup> This does not imply a requirement to attach an analyst report and/or appraisal if such is not required by law, provided that information that establishes such analyses and that originates from the company or the underwriter is included in the draft prospectus.

ISA Staff clarifies that it remains the case that a company or its representative is prohibited from conveying information **to the public**, including through the media, on the company or on the company's assessments of its value prior to the publication of a draft prospectus. The manner in which issuers may convey information on the company and the issue is through a draft prospectus or a prospectus.<sup>5</sup>

ISA Staff intend to continue to monitor the developments in the issue market and its proper operations to test whether the rules presented in this Staff Position are sufficient to achieve its stated goals.

### **Disclosure on the type of investors who submitted orders to purchase securities and who participated in a non-uniform offering**

Information on Sophisticated Investors and other entities related to an issue<sup>6</sup> that submitted early commitments, and information on Sophisticated Investors and other entities that participated in an issue is important information for potential investors, both in an IPO and in a secondary offering, because such information constitutes an indication of the quality of the issue and the demand for the securities.

Therefore the issuer must include information on these investors' early commitments in the prospectus or in a supplementary notice (currently, this requirement is implemented mainly with respect to early commitments in uniform offerings)<sup>7</sup> and when reporting the results of the issue the issuer must also include information on the effective allocation of the securities.<sup>8</sup>

Due to the features of non-uniform offerings, and specifically the manner in which securities are allocated in non-uniform offerings, ISA **Staff believes that** the above information on entities not related to the issue should be presented in aggregate terms, separately for each institutional investor category, while the following information should be included with respect to all types of investors:<sup>9</sup>

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<sup>5</sup> See Staff Position 104-9 "Publication of Presentations to Analysts and Investors," which was published in March 2007 (LINK).

<sup>6</sup> Entities related to an issue are the company, stakeholders, and entities entitled to proceeds with respect to the issue proceeding, including entities related to underwriters and distributors. On this issue also see Q&A 103.31 (LINK).

<sup>7</sup> See Q&A 103-31.

<sup>8</sup> Regulation 7 of the Securities Regulations (Notices of Results of Offer by Prospectus )) 5730-1969

<sup>9</sup> Institutional investors, as this term is defined in the First Addendum to the Securities Law, distinguishing between the institutional and nostro investments of each.

In a prospectus, a supplementary notice, or a shelf offering report —

- (a) The number<sup>10</sup> of institutional investors in each category and their total share of orders of the total quantity offered securities and of the total number of orders;
- (b) The number of investors in each category that submitted orders that constitute more than 10% of the offered securities.

And the following information is included in the report of the results of an issue:

- (a) The number of institutional investors in each category to which the company allocated securities in the issue, the number of allocated securities and their share of the total quantity of securities issued;
- (b) The number of institutional investors in each category that were allocated securities that constitute more than 10% of the total quantity of securities issued.

See Appendix A on the proposed format for said disclosures.

With respect to entities related to the issue, non-uniform offerings also require a full disclosure: the prospectus or supplementary notice will include a disclosure of the names of the entities related to the issue and the quantity of securities each committed to purchase; The report of the results of the issue will include a disclosure of the names and quantity of securities purchased by each investor.

This Staff position replaces and cancels Staff Position 103-38: Initial Discussions with Qualified Investors – “Testing the Waters” (Staff Position on TTW”) and Q&A 5.2 in Staff Position 106-2: “Underwriting Q&A on the New Regulations.”

For additional information please contact:

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<sup>10</sup> In counting the number of investors required by this Staff Position, each class (e.g., mutual funds, provident funds, etc.) of an institutional reporting group is counted as a single investor, including investments made through external investment managers (such as mutual funds in a hosting model). Companies may separately provide additional information on the number of investors of each class in each institutional reporting group or on the distinctions between the investors in each group based on other features.

**Appendix A**

**Format for Disclosure in Prospectus or Supplementary Notice of Investors Who Submitted Early Commitments, by Investor Category**

	<b>Institutional investor category<sup>11</sup></b>	<b>No. of investors that submitted an order<sup>12</sup></b>	<b>Quantity of securities ordered</b>	<b>Share of total quantity of securities offered</b>	<b>Share of total orders</b>	<b>No. of investors whose order is for their nostro account</b>	<b>No. of investors that submitted orders for securities that constitute more than 10% of the securities offered</b>
1.	For example – mutual funds						
2.	For example – provident funds						
3.							
4.							
5.							
6.							
7.							

<sup>11</sup> Institutional investors, as this term is defined in the First Addendum to the Securities Law, distinguishing between the institutional and nostro investments of each, and entities related to the issue — the company, stakeholders, and all other entities entitled to a consideration with respect to the issue proceeding.

<sup>12</sup> In counting the number of investors required by this Staff Position, each class (e.g., mutual funds, provident funds, etc.) of an institutional reporting group is counted as a single investor. Additional information on the number of investors of each class in each institutional reporting group or on the distinctions between the investors in each group based on other features should be provided outside this table.

**Format for Disclosure of Allocation of Securities in the Report of Issue Results**

	<b>Institutional investor category<sup>13</sup></b>	<b>No. of investors</b>	<b>Quantity of securities allocated to investors</b>	<b>Share of total quantity of securities allocated in the issue</b>	<b>No. of investors that purchased securities for their nostro account</b>	<b>No. of investors that were allocated securities that constitute more than 10% of the securities allocated</b>
1.	For example – mutual funds					
2.	For example – provident funds					
3.						
4.						
5.						
6.						
7.						

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<sup>13</sup> See footnote 9.