# Debt Capital Markets

*Contributing editors*
**David Lopez, Adam E Fleisher and Daseul Kim**

2017

GETTING THE DEAL THROUGH

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DEAL THROUGH

# Debt Capital Markets 2017

*Contributing editors*


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**Cleary Gottlieb Steen & Hamilton LLP**



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# Preface

## Debt Capital Markets 2017

Fourth edition

**Getting the Deal Through** is delighted to publish the fourth edition of *Debt Capital Markets*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Portugal, Singapore and Spain.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, David Lopez, Adam E Fleisher and Daseul Kim of Cleary Gottlieb Steen & Hamilton LLP, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
April 2017

# Global overview

**David Lopez, Adam E Fleisher and Daseul Kim**
**Cleary Gottlieb Steen & Hamilton LLP**

2016 was a year that defied prediction. For the duration of the campaign that culminated in the United Kingdom's vote on 23 June to leave the European Union (Brexit), most polls forecast a decision to remain; just five hours before the referendum results became clear, betting markets gave 'remain' an 88 per cent chance of victory. The story repeated itself on 8 November, when the American people confounded the prognostications of pollsters and political analysts and elected Donald Trump president of the United States. The reaction of the financial markets to these macroeconomic shocks was likewise unexpected. Despite economists' warnings of a recession in the wake of Brexit, UK economic growth has been stronger than anticipated, with stocks quickly making up initial losses. In the US, after Dow futures fell as much as 800 points on the night of the election, tripping circuit breakers that halted trading, all major stock indices were up the following day, and the Dow closed just shy of its all-time high.

The unexpected resilience of the markets is all the more striking given that 2016 has been a difficult year overall for the world economy, with global growth estimated at a post-crisis low of 2.3 per cent, according to the World Bank's Global Economic Prospects. The World Bank identified stalling global trade, subdued investment, and increased policy uncertainty in major advanced economies as factors precipitating the slowdown. Continuing a trend that began in the second half of 2015, the world's central banks have responded to the slowdown in divergent ways. In December 2016, the US Federal Reserve raised the federal funds rate, from 0.25–0.5 per cent to 0.5–0.75 per cent, and again in March 2017 to 0.75–1 per cent. Additionally, the Fed has indicated that it expects two more rate hikes in 2017. Meanwhile, the Governing Council of the Frankfurt-based European Central Bank announced in September that it would keep its stimulus programme unchanged from March, leaving the main refinancing rate at zero, the deposit rate at -0.40 per cent and asset purchases at €80 billion a month. The bank of Japan has likewise reduced its benchmark interest rate below zero per cent.

Despite the macroeconomic challenges, 2016 was a very strong year for debt capital markets, bolstered by an era of historically low interest rates and robust mergers and acquisitions activity. Global debt capital markets issuances in 2016 totalled US$7 trillion, according to Thomson Reuters, a 16 per cent increase over 2015 and the strongest annual period for debt issuance on record. The US investment-grade corporate debt market was particularly strong, with offerings reaching a record US$1.3 trillion during the full year, an 8 per cent increase compared with 2015. InBev's January issuance of US$46 billion of bonds across seven tranches to finance its acquisition of SABMiller was the largest deal of the year, and the second-largest syndicated bond deal on record after Verizon's issuance of US$49 billion of bonds in 2013. After the InBev issuance, the largest deals in the US investment-grade category for 2016 were the US$20 billion bond issuance by Dell in May to fund its acquisition of EMC and the US$19.75 billion bond issuance by Microsoft in August to fund its acquisition of LinkedIn. In July, Teva raised approximately US$20 billion in a series of offerings of US dollar, euro and Swiss franc-denominated bonds to finance its acquisition of Allergan's generic pharmaceuticals business. Investment-grade bond issuance has remained strong in early 2017, according to Dealogic, as corporations moved quickly to lock in lower borrowing costs ahead of a predicted rise in interest rates. Surprising investors with a second large deal just six months after its August offering, Microsoft sold US$17 billion of bonds in January 2017.

In contrast, global high-yield corporate debt volume fell 13 per cent to US$305.8 billion in full year 2016, according to Thomson Reuters, which was the slowest annual period for global high-yield issuance since 2011. In the wake of the US election, however, the promise of lower corporate taxes and reduced regulation has whetted investors' appetite for risk, driving down yields on debt with the lowest quality credit rating towards 10 per cent by the first week of February 2017, according to data gathered by Bank of America Merrill Lynch. Optimism about the new administration's policies has driven risk premiums on high-yield and investment grade corporate debt to within 259 basis points of each other, Bank of America data shows, compared with 650 basis points in February 2016.

After the global economic slowdown of 2016, the International Monetary Fund (IMF) projects that economic activity will accelerate in 2017, particularly in emerging market and developing economies (EMDEs). Between October 2016 and January 2017, the IMF revised upward its estimates of near-term growth prospects for China due to continued policy stimulus, but adjusted estimates downward for other large economies, including India, Brazil and Mexico. After a weak first half of 2016, the US economy is now approaching full employment, and the IMF predicts near-term fiscal stimulus in 2017 and a gradual normalisation of monetary policy.

Just as 2016 proved resistant to economic or political prediction, however, forecasts for 2017 remain subject to substantial uncertainty. In January, the *Financial Times* reported that BlackRock, the world's largest asset manager, is warning bondholders that Brexit remains a major risk for investment portfolios this year as the UK begins to negotiate its exit from the European Union. The warning highlights the political uncertainty and potential for market volatility in Europe in 2017 as the UK prepares to trigger article 50, while pivotal elections approach in eurozone countries, including France and Germany. Political uncertainty in Europe in turn has the potential to substantially affect investment growth in EMDEs, according to the World Bank, particularly in eastern Europe and central Asia, for which Europe is an important export market and source of finance. Meanwhile, US bond investors may find the supply of new corporate bonds drying up if a proposed corporate tax overhaul permitting multinational firms to repatriate foreign profits and denying most deductions for interest makes its way into law. As the *Wall Street Journal* reported in February, the ability to repatriate profits earned overseas combined with the loss of interest deductibility could make companies less inclined to fund US acquisitions and investments with borrowed money.

Several factors that represented wild cards at the outset of 2016 remain open questions, including central bank policy, election results and actions out of Beijing. Added to these now are the macroeconomic risks of a possible shift toward protectionism under President Trump, who has repeatedly espoused principles of economic nationalism, and a broader skepticism toward the benefits of international economic integration, trade liberalisation and immigration in advanced economies. With elections ahead this year in countries accounting for more than 25 per cent of global GDP, according to the World Bank, uncertainty about future policy direction may depress investment and raise risk premiums.

# Brazil

**Ricardo Simões Russo, Fernando Zorzo, Camila Misciasci Derisio and Gustavo Chauffaille**

**Pinheiro Neto Advogados**

### 1 What types of debt securities offerings are typical, and how active is the market?

Debt securities can take a wide range of structures in Brazil, of which the most well-known transactions involve the public offering of debentures and commercial papers (also known locally as promissory notes).

Brazilian companies organised as corporations may issue debentures. A debenture is a type of debt security regulated under Law No. 6,404, of 15 December 1976 and it is an instrument generally defined by Brazilian practitioners as a title representing a fraction of a loan granted to the issuing company. The issuance of debentures is generally considered as one of the instruments available for a company to raise funds that, in certain cases, may even be converted into equity (ie, debentures convertible into shares) depending on the characteristics of the offer. The debentures may also be issued as non-convertible debentures. The main document of a debenture is its indenture, in which its main terms and conditions are described.

Promissory notes are another well-known debt instrument. They are considered as credit instruments that may be issued by either joint-stock companies or limited liability companies and must have in principle a maximum term of 360 days, depending on the characteristics of the offer. Such limitation does not apply for promissory notes (i) offered under a restricted public offering (as per Instruction No. 476, described in item 2 below) and (ii) in which the note holders are represented by the Brazilian trustee.

In summary, if a company is willing to obtain short-term financing, it may access the local capital markets though the issuance of promissory notes. If it is willing to access medium or long-term financing, it typically accesses the market by means of debentures offerings.

### 2 Describe the general regime for debt securities offerings.

The principal applicable rules for the debt securities offerings are the following:

- Law No. 6,404, of 15 December 1976 (the Brazilian Corporate Law), which contains rules on the organisation of local companies, corporate governance, issuance of debentures, among others;
- Law No. 6,385, of 7 December 1976 (the Brazilian Capital Markets Law), with provisions related to the local capital markets (also created the Brazilian Securities and Exchange Commission (CVM));
- CVM Instruction No. 358, of 3 January 2002 (CVM Instruction No. 358), which contains rules on the disclosure and use of relevant information regarding publicly held corporations, and restrictions on the trading of securities;
- CVM Instruction No. 400, of 29 December 2003 (CVM Instruction No. 400), which sets forth rules applicable to public offerings of securities in the local market;
- CVM Instruction No. 476, of 16 January 2009 (CVM Instruction No. 476), which contains rules applicable to automatic registration of restricted public offerings (to professional investors only);
- CVM Instruction No. 480, of 7 December 2009 (CVM Instruction No. 480), with provisions on the registration of legal entities as publicly held corporations in Brazil; and
- CVM Instruction No. 566, of 31 July 2015 (CVM Instruction No. 566), with provisions regarding registration of public offerings of commercial papers (promissory notes).

Local securities laws contain provisions on the nature, scope and requirements regarding public offerings (there is no legal definition as to what constitutes a private placement). There are two modalities of public offerings: (i) public offerings in the broad sense, covered by CVM Instruction No. 400, which require prior registration (of the issuer and the offer itself) with the local securities commission; and (ii) restricted public offerings, covered by CVM Instruction No. 476. It is not necessary for the latter to be registered with the CVM, whereas the offering is directed only to a limited number of professional investors.

There is a broad set of rules and regulations governing registered public offerings of securities. Such rules not only establish the type of companies that can access the market with these offerings (ie, listed corporations), but also contain provisions related to (i) procedures for offerings registrations; (ii) minimum documents involved in any offer; (iii) disclosure requirements and information that must be informed to investors by those involved in the offer; (iv) definition of public offer; and (v) sanctions that may be applied in case of breaches to securities laws, among others.

In the case of restricted public offerings, it is not necessary for the companies to be registered with the CVM and the offering itself does not need any registration with such authority. Nevertheless, the communication of the offering's characteristics is mandatory. A disclosure material can be prepared, although it is not necessary. Furthermore, restricted public offerings have some limitations, such as the type of investors that may acquire the securities and the number of investors that can participate on the offer (up to 75 investors for selling efforts and no more than 50 may purchase the securities). It is directed only to professional investors, such as investment funds, financial institutions and other institutions authorised to operate by the Central Bank of Brazil, insurance companies, capitalisation companies and investors with investment portfolios exceeding 10 million reais.

### 3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.

For public offerings, which are covered by CVM Instruction No. 400, it is necessary for the company to be registered with the CVM. Likewise, the offering must be registered with the CVM as well. According to Brazilian Capital Market Laws, it is not necessary to register the securities if those are already registered on a qualified market and it is possible for the investors to sell these assets on such markets.

In order to register with the CVM as a public company, it is necessary to submit an application in one of two available classes (class 'A' or class 'B' registration), followed by supporting documents. The first class allows trading of any company's securities on regulated securities markets, whereas the second class restricts some of the company's securities that could be traded. Shares and share depositary receipts are not allowed in class B companies.

The documents that are indispensable for public offerings are the disclosure documents, a prospectus with the terms, conditions and risk factors of the offer and a standard annual report for public companies (called a reference form), which is similar to the 20-F form in the US.

There are no major differences between the rules and regulations governing equity securities offerings, as compared to debt securities offerings.

As mentioned in item 2 above, in case of restricted public offerings there is no need for the company to register with the CVM and the offer itself is already granted with automatic registration.

### 4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?

In case of registered public offerings (CVM Instruction No. 400), it is necessary to have a prospectus (which contains information on the offer) that fulfils certain minimum regulatory requirements. Furthermore, a reference form must be also prepared considering the requirements of CVM Instruction No. 480. The prospectus and reference form – together with other ancillary documentations – must be sent to the CVM's approval by the issuer and the lead underwriter. For restricted public offerings, prospectus, reference forms or similar documents are not necessary.

According to CVM Instruction No. 400, it is required a prospectus that contains 'complete, precise, truthful, clear, objective and necessary information regarding the issuer and the offering, using non-technical and easily understood language'. The prospectus contains information related to the terms and conditions of the offering, the use of proceeds, capitalisation, the risk factors in connection with the offering, among other information. Furthermore, the prospectus must incorporate the reference form or include it as a schedule.

The reference form must include financial statements and selected financial data covering the three most recent financial years, and the most recent subsequent interim period. Attention must be given to the 'black-out' periods in which CVM does not grant registration of the offering, which cover a few days before the official deadline for the release of annual or quarterly financial information. These deadlines vary slightly from year to year, but generally are: 31 March for the annual financial statements; 15 May, 14 August and 14 November for quarterly financial statements. After each of the dates mentioned above, the companies have to update their reference forms with financial information related to the most recent quarterly financial statement release or to be released by them.

### 5 Describe the drafting process for the offering document.

There is no standard procedure in the drafting process for the offering documents. The process generally starts with the issuers sending the drafting schedule, which will be analysed by underwriters and legal advisers. Subsequently, the parties will decide which documents each party will be responsible for. These documents must follow the terms and conditions set forth under CVM Instruction No. 400, Instruction No. 480 and the Regulatory and Best Practices Code for Public Offerings of the Brazilian Financial and Capital Markets Association (ANBIMA). There are no legal thresholds to determine whether the documents should be disclosed or not, such criteria is negotiated between the parties under materiality principles. For public offerings under CVM Instruction No. 400, the CVM is responsible for approving the offering documents, which are prepared by the issuer, the legal advisers and the underwriters.

In the case of restricted public offerings, basically only the indenture is prepared, with the main conditions of the offer (amount, interest rate, events of default, covenants, representations and warranties, among others). In general terms, in addition to the respective underwriting agreement, no other relevant document is prepared (since this type of offer is granted automatic registration by the CVM).

### 6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

The documentation may differ according to the type of debt security involved. In general, the documents include:

- an indenture containing the main terms and conditions of the offer (in terms of amount, interest rate, events of default, covenants, representations and warranties, among others);
- the relevant underwriting agreement to be executed between the issuer, any eventual guarantor and the underwriters;
- specific corporate approvals for the issuance; and
- in the case of registered public offerings, a prospectus, the company's reference form, among other ancillary instruments required by securities regulations.

On public offerings, it is mandatory for issuers to send the offering documents to investors. These documents can be made available electronically and the prospectus must be disclosed in the issuer's website, as well as in the underwriter's and CVM's websites. The issuer and the lead underwriter will be responsible for any misstatement or non-included information in the offering documents.

### 7 Does offering documentation require approval before publication? In what forms should it be available?

Restricted public offerings does not require approval by any regulator. Registered public offerings that are regulated by CVM Instruction No. 400, on the other hand, must be approved by the CVM before any publication, and the documents must contain all information needed for investors to analyse the terms, conditions and risks of the offering.

The CVM does not prohibit underwriters from preparing any extra material besides the prospectus. However, all documentation must contain the same information and must be sent to the CVM for recording and approval purposes prior to its disclosure.

Marketing materials prepared for public offerings must be approved by the CVM as well. Its information must be consistent with those in the prospectus and its use is only allowed after (i) the application for registration is filed with the CVM; and (ii) a preliminary prospectus is available for prospective investors. The only exception is investors' education materials, which can be available before submitting the process to CVM.

For registered public offerings regulated by CVM Instruction No. 400, the website of the issuer and the underwriters should contain the prospectus and marketing materials. This information must be shown in printed books during roadshow presentations as well. In restricted public offerings, the use of marketing materials is limited.

### 8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?

Registered public offerings under CVM Instruction No. 400 must be reviewed and authorised by the CVM. The structure of Brazilian financial and capital markets is also composed of the ANBIMA, which created a set of rules with increased corporate governance for its associates to comply with. Currently, the ANBIMA has a partnership with CVM, regulated by CVM Instruction No. 471, of 8 August 2008 (CVM Instruction No. 471), in order to expedite follow-on procedures. Through such partnership, the ANBIMA is responsible for examining and making demands as regards offering documents (ANBIMA's time limit to make demands is much shorter than the CVM's on a regular follow on) and after the ANBIMA is satisfied with the documents, the documentation is subjected to the CVM for its approval of the public offering.

Typically, a CVM registration procedure takes around eight to 10 weeks to be completed. The ANBIMA follow-on registration procedure takes around six to eight weeks to be completed. In the case of restricted public offerings, in which no CVM registration is required, financial settlement of the offer usually takes four to five weeks.

CVM Instruction No. 400 states that the issuer, its managers and controlling shareholders, in addition to the individuals with whom they may be working or being assisted by, must refrain from making any comment on the offer or the issuer until the end of the offering, announced through the publication of the offer termination announcement (the quiet period). The purpose of the quiet period, which was inspired by the quiet period of the US securities law, is to avoid market manipulation or artificial changes in price before closing of the offer upon disclosure of information in the press. The quiet period begins 60 days prior to the filing of the request of registration of the public offer distribution, or as from the date in which the public offer distribution was decided or projected, whatever occurs last.

In addition, the issuer and the underwriters have a restriction on trading by such parties, until publication of the offer termination announcement, of securities issued by the issuer, or referenced by them, except in specific cases, such as: (i) execution of a stabilisation plan duly approved by the CVM; (ii) total or partial disposal of a securities lot that is the object of firm commitment; (iii) negotiation for the account and order of third parties; and (iv) transactions clearly meant for accompanying a share index, certificate or receipt of securities, among others.

**9 On what grounds may the regulators refuse to approve a public offering of securities?**

Once the documentation involved in the offer is prepared with all minimum information on the offer and the issuer, a request may be submitted to the CVM for its analysis. As mentioned above, such analysis may last around 40 business days, and during such period a number of comments, additional requests, clarification letters, etc may be presented to the issuing company and to the underwriters. After the filing of the request of registration, the CVM must review the request and the documents. Once such requests are made, discussions may be held between the issuing company and the CVM for the purposes of determining the best way to approach the CVM for comments and considerations. Eventual registration refusals may be related to the ability of the company to provide adequate and sufficient answers to the CVM; to address the CVM's comments in a timely manner. Eventually, approval refusals may also be related to acts performed by the issuing company or the underwriters while the registration application request is still pending (eg, in the event of breaches of the quiet period, breach of black-out period regulations, etc).

**10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?**

Brazilian law does not provide a definition of what constitutes a private offering of debt securities. In other words, there is no 'safe harbour rule' as to what constitutes a private offering. Consequently, the concept of private offering is based on what would not constitute a public offering under Brazilian law and, therefore, would not require registration with CVM. For a long time, the CVM did not expressly acknowledge neither the existence of the private offering concept nor the accuracy of such interpretation.

Since Brazilian legislation does not contain sufficient elements for a clear distinction between a public offering and a private offering of debt securities, there is a potential risk of characterisation, by the CVM, of a private offering as a public one. Therefore, any party intending to market and sell securities or investment opportunities in Brazil on a private basis (without registration with the CVM) should be very careful about the methods to be used in connection with such activities, in order to mitigate the risk of questioning by the CVM.

**11 Describe the public offering process for debt securities. How does the private offering process differ?**

The public offering process for debt securities in Brazil may follow two regulatory paths. The first involves the so-called registered public offerings (implemented under CVM Instruction No. 400), and the second is related to restricted public offerings (addressed solely to professional investors, with automatic registration), as per the terms of CVM Instruction No. 476.

An offering under CVM Instruction No. 400 goes under CVM's review and usually takes a couple of months to be registered, but it is allowed to reach any kind of investor. In its turn, CVM Instruction No. 476 purpose is to ease the access to the capital markets, reduce costs and make available a fast track for the implementation of a public offering (depending on the kind of offering, it may be launched in a couple of weeks) and, therefore, offerings under this rule must comply with a number of limitations, such as to be targeted only to qualified institutional buyers (offered to up to 75 investors and subscribed by up to 50 investors) and must not be offered in public places, such as journals, television and public websites.

Offerings under both CVM Instruction No. 400 and CVM Instruction No. 476 must be intermediated by members of the securities underwriting system and count with a main offering document (eg, prospectus or indenture) and ancillary documents (eg, underwriting agreements and legal opinions).

As a general rule, private placement of securities is not subject to the prior registration with the CVM or to any other filing requirements in Brazil. However, Brazilian law does not provide a definition of what constitutes a private offering of debt securities. In other words, there is no 'safe harbour rule' as to what constitutes a private offering.

**12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?**

The usual closing documents on debt offerings in Brazil are (i) executed versions of the offering documents; (ii) evidence of registration of the documents with local authorities (as the case may be), registries of deeds and documents, commercial registries, among others depending on the nature of the document; (iii) legal opinions issued by the company's and the underwriters' legal counsels stating that the offering complies with the related regulation and that according to the due diligence it performed, the information presented in the offering documents is correct; (iv) the negative assurance letter issued by an independent auditor stating that the financial statements related to the offering are correct, among other ancillary documentation.

**13 What are the typical fees for listing debt securities on the principal exchanges?**

The typical fees for listing debt securities on the principal exchanges vary depending on the type of security and the size of the offering, but, mainly, the related fees are:

- the CVM's registration costs (in the case of registered offerings implemented under CVM Instruction No. 400);
- secondary market fees (fees of BM&FBovespa SA – Bolsa de Valores, Mercadorias e Futuros (BM&FBovespa) or fees of CETIP SA – Mercados Organizados (Cetip));
- underwriters' fees;
- legal counsels' fees;
- independent auditors' fees; and
- roadshow and marketing costs and expenses.

**14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?**

Convertible or exchangeable debt offerings have been present on the Brazilian capital markets for a while. Typically, these types of securities are issued in the context of structured transactions such as M&A deals and long-term financing that demand different types of collateral. The so-called structure transaction certificates (COEs), which are certificates issued against initial investment, representing a single and indivisible set of rights and obligations, with a remuneration structure presenting characteristics of derivative financial instruments, have been present on Brazilian capital markets since 2014, and have boosted its presence since the enactment of specific regulation on its public offering by the CVM. Also, the Brazilian market for derivatives is greatly developed. In a country where the most exported products are commodities and where exchange rate fluctuations are verified on a daily basis, hedging is key for certain companies and the use of derivative instruments is usual in the local market.

**15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?**

There are specific rules and regulations involving certain types of securities (basically with conditions and requirements related to the security itself), such as the provisions set forth under local corporation laws regarding debentures, CVM Instruction No. 566 on promissory notes, CVM Instruction No. 569, of 14 October 2015 (CVM Instruction 569) regarding structure transaction certificates (COEs), etc. Notwithstanding this, as a general rule, the procedures regarding public offerings of any of these debt securities are governed by the terms of CVM Instruction No. 400 (in the case of registered offerings) and CVM Instruction No. 476, in the case of restricted public offerings.

**16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?**

The characteristics of a security determine if it should be classified as debt or equity. Equity instruments usually grant ownership or a participation in the capital stock of a given company (in terms of rights to dividends and, as the case may be, voting rights), and debt instruments usually represent financial obligations of the issuer (and creditors – not equity holders – are entitled to interest payments and have a credit right in the face of the issuing company).

### 17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?

There are no transfer restrictions or other limitations imposed on privately offered debt securities, except for the fact that they cannot be traded on local exchanges or regulated markets (since their offer was not a public one). The transfer and assignment of such securities is done by means of direct negotiations between seller and buyer, and the transfer may be formalised by means of endorsement, execution of a transfer agreement, and, as the case may be, registration of the documents at a registry of deeds and documents.

### 18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?

In principle, offshore debt securities constitute non-Brazilian securities, and, therefore, do not qualify for public placement in Brazil, since local regulations do not provide for registration procedures of such securities. Therefore, offshore debt securities could only be offered on a limited private basis in Brazil (one-to-one basis) and should avoid any potential conflicts with the Brazilian Capital Markets Law. Private placement of securities is not subject to prior registration with the CVM, whether made by Brazilian or foreign companies. As stated in question 10, there is no safe harbour rule as to what constitutes a private offering. Consequently, the concept of private offering is based on what would not constitute a public offering under Brazilian law, and placement always faces the risk of being questioned by the CVM (that may understand that a public offer – and not a private one – was verified).

On 30 September 2005 the CVM issued Opinion No. 33 which sets forth certain rules with respect to the offering of foreign securities to Brazilian residents: (i) there is no specific registration exemption of public offering of securities issued by entities located offshore ('outside issuers') to Brazilian residents; (ii) public offerings by outside issuers, with search of potential investors domiciled in Brazil should be previously registered with the CVM; and (iii) the use of oral or written advertisements, letters, announcements, notices, particularly through mass or electronic media may characterise an offer made by outside issuers as a public offer for the purposes of local regulations.

Access to offshore investments by local residents is being gradually opened and permitted by local regulators. Recently, certain rules and regulations were enacted and made it more flexible for individuals or legal entities resident or located in Brazil to invest in the capital markets abroad. In addition, a specific rule was updated in 2014 by the Brazilian Monetary Counsel (Resolution 4,373) allowing the access by local issuers to offshore capital markets through the use of depositary receipt mechanisms (depositary receipts traded abroad, backed by debt securities issued locally by Brazilian companies).

### 19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

Apart from eventual bilateral tax agreements executed between Brazil and certain other countries (which provide for favourable tax treatment involving financing transactions – among other transactions – executed between entities of both countries), we are not aware of any arrangements with other jurisdictions to help foreign issuers access debt capital markets in Brazil.

### 20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

Underwriting agreements for local public offerings are very similar to those verified in other jurisdictions. Typical provisions include description of the basic terms of the offering, the type of commitment assumed by the underwriter for the placement or offering of the debt securities to the market (best efforts, firm commitment), the procedures to be taken by the bank to sell the securities, the target investors (retail, institutional, qualified investors), indemnification provisions, among others. As mentioned above, there are no rules for private placements in Brazil and the mere participation of an underwriter in the sales efforts of a given debt security may create a risk of the offer being characterised as a public one, thus requiring registration with the CVM.

**Update and trends**

Over the past years, Brazil has been facing constant and significant development of its debt capital markets' regulatory framework in an attempt by local regulators to foster access to the capital markets by Brazilian issuers and investors. Rules were enacted to promote the use of debt capital markets for the long-term financing of infrastructure projects of local companies and the development of the debt securities secondary market (a specific type of debt security was created in 2011 to address this matter: the infrastructure debentures). Also, in order to attract investors to debt capital markets, a number of debt securities is currently exempt from withholding taxes, such as agricultural receivable certificates (CRAs), infrastructure debentures, real estate letters of credit (LCIs), agricultural letters of credit (LCAs), and real estate receivable certificates (CRIs), among others. The results of such efforts can be verified by the fact that although Brazil is currently facing an economic crisis, an increasing number of debt securities public offerings have been observed over the past months, evidencing that both investors and issuers are relying on the capital markets for their funding needs.

### 21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

In order to act as an underwriter, local entities must be duly registered as financial institutions with the Central Bank of Brazil. Usually, local underwriters are licensed to operate as investment banks, brokerage firms or multi-service banks. In addition to the supervision of the Central Bank, underwriting activities are also subject to securities laws and regulations, and to the scrutiny and control performed by the CVM. When acting in public offers of local securities, underwriters must also observe requirements and procedure set forth by the ANBIMA. There is no particular approval required with respect to underwriting arrangements.

### 22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?

Typically, the implementation of a public debt offering involves the following key aspects.

The structure of the offer must be defined; in other words, whether the offer is going to be targeted to the market in general (in the case of registered offerings) or if the debt securities are to be offered solely to institutions' investors (in the case of restricted offerings).

Once the offering structure is defined, another aspect involves the type of entity that is willing to issue the debt securities (and whether it may need to become a listed corporation).

Usual key aspects also involve discussions on payment terms, the issuer's ability to repay or redeem the debt securities early; required investor approval of and consent to any changes to the offering documents, discussions on acceleration and early maturity provisions, among others.

Once the public offering is implemented, the involved debt securities must be enrolled for trading in a local secondary market. In this regard, the trading is verified at CETIP or BM&FBovespa. A custodian and a paying agent are appointed by the issuer company. Upon enrollment, all payments due under the debt securities (principal, interest, etc) are implemented through these fixed income registration markets.

### 23 How are public debt securities typically held and traded after an offering?

Debt securities are typically held in registered, book entry forms. The main terms and conditions of the security are usually described in an issuance deed (or indenture) that is signed by the issuer company, any eventual guarantors and a trustee (representing the security holders). Upon settlement of the offering, the securities must be enrolled with a fixed income depositary clearinghouse (as mentioned above, typically this enrollment is made with CETIP or BM&FBovespa). The financial aspects of the debt securities are informed to such entities and trading (as well as payments of principal and interest) is verified by means of their systems and controls.

**24 Describe how issuers manage their outstanding debt securities.**

Management of outstanding debt securities can be made by issuers primarily based on the terms and conditions set forth in the respective issuing documents. Based on such provisions, issuers may call an investors' meeting to address any relevant aspect of their operations, request specific waivers, or provide information that may be relevant to the investors. Issuers may also manage their securities by acquiring them in the secondary market, redeem partially or totally outstanding securities or place purchase tender offers on the market.

**25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?**

The level of reporting that is required to issuing companies of debt securities varies depending on the type of public offer that it has implemented. In the case of restricted offerings (structured according to CVM Instruction No. 476), there is a limited reporting obligation to the issuer, which involves basically disclosure of its annual audit financial statements, information on any material facts involving the company and its business, among others. In case of registered offerings – which can only be implemented by listed corporations – issuers must observe their reporting obligations that are verified due to their listed status (in terms of updating on their reference form – similar to forms 20-F verified in the US, disclosure of quarterly and annual financial statements, disclosures of any facts involving the company that may affect its securities, etc). Additionally, issuers must also comply with any reporting obligations that may be established in the relevant issuing documents (in terms of disclosure covenants).

**26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?**

The primary basis of liability in a securities transaction is regulated by Instruction 400, which establishes the liability of the issuer, underwriters and their respective managers for material misstatements and omissions in the offering documents (irrespective of the type of security that is being publicly offered). The lead underwriter is primarily liable, among the underwriters, for any damage caused to investors as a result of material misstatements and omissions. A lead underwriter may only be held accountable by an investor for lack of diligence in performing its obligation to ensure that the offering documents are free of material misstatements and omissions. The issuer, however, is fully liable for any material misstatements and omissions.

Apart from civil claims, issuers and underwriters may also suffer administrative sanctions. The CVM may initiate disciplinary proceedings and impose sanctions ranging from warnings to fines to permanent disqualification from public capital markets. The CVM enforces compliance with the Brazilian corporate laws, the Brazilian capital markets laws and its own regulations. During the course of an offering, the CVM may also suspend the offering if it determines that the offering is being conducted in a manner inconsistent with its purpose, or is illegal, fraudulent or violates CVM regulations.

**27 What types of remedies are available to the investors in debt securities?**

Investors in debt securities may rely initially on the remedies set forth in the issuing documents (such as the indenture). Under such documents, investors may call investors' meetings, request additional information from the issuing company and in certain cases request acceleration of outstanding payments due under the issue. Investors that face losses derived from information disclosed by the issuing company or the underwriters at the time of the sale or purchase, as well as information (or lack of relevant information) described in the issuing documents, may also have the right to file civil claims against the involved entities that contributed to the losses. Eventually, investors may also present their case to the CVM, which may initiate administrative proceedings against the issuer or the underwriters.

**28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?**

The main regulator of the local capital markets (CVM) may initiate administrative proceedings and, as the case may be, impose sanctions on issuers and underwriters that may vary from simple warnings, requests for further information, cease and desist orders, pecuniary fines and, eventually, permanent disqualification from the local capital markets. Sanctions may be imposed not only on the involved legal entities but also on their respective managers. Depending on the case, and taking into consideration that underwriters have banking licences, the Central Bank of Brazil may also impose administrative sanctions on such entities, as well as on their managers (which sanctions may also vary from simple warnings to deregistrations as financial institutions).

**29 What are the main tax issues for issuers and bondholders?**

In bond offerings, payments of interest by local issuers to investors located abroad is subject to withholding income tax in Brazil (WHT) at a 15 per cent rate (25 per cent if the investor is located in a so-called 'tax haven'). Such rates may be different in case a tax treaty is in effect between Brazil and the country where the foreign investor is located. In addition, as a general rule, bonds issued and registered abroad should not fall within the definition of assets located in Brazil and therefore the gains on the sale or other disposition of bonds made outside Brazil by a non-Brazilian bondholder to another non-Brazilian resident should not be subject to Brazilian taxes. However, considering the general and

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unclear scope of the applicable legislation and the absence of judicial guidance in respect thereof, no assurance can be given that such interpretation will prevail in local courts. If the WHT is deemed to be due in these cases, capital gains may be subject to income tax in Brazil at progressive rates, as provided for by Law No. 13,259, applicable as from 1 January 2017, that may vary from 15 to 22.5 per cent depending on the amount of the gain: (i) 15 per cent for the part of the gains up to 5 million reais, (ii) 17.5 per cent for the part of the gain that exceeds 5 million reais but does not exceed 10 million reias, (iii) 20 per cent for the part of the gain that exceeds 10 million reais but does not exceed 30 million reais, and (iv) 22.5 per cent for the part of the gain that exceeds 30 million reais.

# China

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### 1 What types of debt securities offerings are typical, and how active is the market? (Please use this question to provide any general background or a framework for more specific responses below.)

The most typical type of debt securities offering in China is within the inter-bank bond market. Attached to the China Foreign Exchange Trading Center (CFETC, also known as the National Interbank Lending Center) and the China Central Depository and Clearing Co Ltd (CCDC), the inter-bank bond market is a bond purchase and repo market where various financial institutions participate, including merchant banks, rural credit cooperatives, insurance companies and securities companies. The inter-bank bond market composes a large part of China's bond market and is its principal component. Measured from the number of bonds in custody, both the amount of bond storage and bond trading in the inter-bank bond market encompass more than 90 per cent of China's bond market.

### 2 Describe the general regime for debt securities offerings.

The legal framework of the inter-bank bond market is as follows.

Laws enacted by the National People's Congress:

- securities laws of the People's Republic of China;
- the Law on the People's Bank of China;
- the Guarantee Law; and
- the Property Law, among others.

Regulations issued by the Peoples' Bank of China include:

- Notice on Issues Regarding Financial Institutions Joining the National Inter-bank Bond Market, Administrative Measures for Debt Financing Instruments of Non-financial Enterprises in the Inter-bank Bond Market;
- Rules for Checking the Circulation of Bond Transaction in the Nationwide Inter-bank Bond Market, Notice on the Listing of National Inter-bank Bonds, Notice on the Issuance, Trading, Registration and Escrow of Corporate Bonds in the Inter-bank Bond Market; and
- Rules on the Issuance of Subordinated Bonds by Commercial Banks, Interim Measures for the Issuance of RMB Bonds by International Development Institutions (2010 Revision) and Measures for the Administration of the Issuance of Financial Bonds in the National Inter-bank Bond Market, among others.

Self-regulatory rules and guidelines issued by the National Association of Financial Market Institutional Investors (NAFMII):

- Self-regulatory Rules for Bond Transactions in the Inter-bank Bond Market;
- Guidelines for Commercial Paper Business of Non-financial Enterprises in the Inter-bank Bond Market;
- Guidelines on Medium-term Notes Business of Non-financial Enterprises in the Inter-bank Bond Market;
- Rules for the Registration of Debt Financing Instruments of Non-financial Enterprises in the Inter-bank Bond Market;
- Rules for Information Disclosure on Debt Financing Instruments of Non-financial Enterprises in the Inter-bank Bond Market; and
- Rules on the Registration of Debt Financing Instruments of Non-financial Enterprises in the Inter-bank Bond Market, among others.

### 3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.

For public offerings of debt securities, the enterprises should file the following registration documents to the Registration Office through the lead underwriter. The registration documents include:

- the registration report of debt financing instruments (attaching the resolutions of the authorised body in the 'Constitutions of Association' of the enterprise);
- a letter of recommendation from the lead underwriter and a letter of commitment from related intermediaries;
- the documents of debt financing instruments issuance that the enterprises plan to disclose; and
- other documents that prove the truthfulness, accuracy, completeness and timeliness of information disclosed by the enterprises and related intermediaries.

Generally, the registration report is not a necessary filing requirement. Exceptions include the resolutions of an authorised body in the Constitutions of Association of the enterprise. The two requirements mentioned above are not applicable to offerings of other securities.

### 4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?

A prospectus forms a necessary part of the issuance documents in a public offering of debt securities. Generally speaking, a prospectus should include the following information: risk factors, details of the offer, use of proceeds, general information of the issuer, financial information of the issuer, guarantee of the bond, taxation, intermediaries and other institutions relating to the issuance.

### 5 Describe the drafting process for the offering document.

An issuer should prepare the following documents for the offering:

- a public announcement of issuance;
- a prospectus;
- a credit rating report and arrangements for follow-up ratings;
- legal documentation; and
- audited financial statements of the past three years and up-to-date financial data.

Initial issuance of debt financing instruments should release the above documents at least five working days before the offering date. Enterprises with sequential issue of debt financing instruments should release the documents at least three working days before the offering.

The self-regulatory rules of the NAFMII give a general background of information disclosure during the bond offerings. One of the most helpful rules is the Rules for Information Disclosure on Debt Financing Instruments of Non-financial Enterprises in the Inter-bank Bond Market. It regulates information disclosure both made through issuance documents and within the duration of the debt financing instrument. Disclosure requirements cover financial information, company operation, debt defaulting, etc.

Similarly, for private offerings, enterprises shall deliver registration documents to the registration office. The filing requirements are the same for public offerings (see question 3). One of the differences is that, for private offerings, the issuer reaches a targeted investment agreement with the potential investors before the offering.

**6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?**

The offering circular and the prospectus give descriptions of the terms and conditions of the debt securities. They are executed and released by the issuer, and can be obtained through the China Money website (www.chinamoney.com.cn) and the China Bond website (www.chinabond.com.cn).

**7 Does offering documentation require approval before publication? In what forms should it be available?**

The issuance registration of debt financing instruments adopts the registration committee mechanism. The offering documentation, together with other registration documents, is subject to the review of the registration committee. The committee reserves the right to require explanation, demand additional materials to registration documents or disapprove the registration during the process of evaluation. Upon issuance, the offering documentation shall be available on the China Money website and the China Bond website (see question 6).

**8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?**

The NAFMII is in charge of the review and issuance registration of debt financing instruments. The registration committee decides whether the issuance registration should be accepted. There should first be a pre-review by the registration office. One person carries out the pre-review and another carries out the double-checking. Within 20 working days, the person responsible for the pre-review issues a letter to suggest that the applicant enterprise add information to registration documents if necessary. Registration documents approved by both pre-reviewers are submitted to the registration meeting. The registration committee meets weekly in principle to review the documents and to issue one of the following opinions:

- acceptance of registration;
- conditional acceptance of registration; or
- deferred acceptance of registration.

The registration office delivers feedback to the enterprises within three working days if the opinion is conditional acceptance, and the enterprise or relevant intermediaries should submit supplementary materials within 10 working days after receipt.

**9 On what grounds may the regulators refuse to approve a public offering of securities?**

The offering of debt financing instruments observes the principles of good faith and self-regulation. Applicant enterprises should make information disclosures to the governing authorities in the proper manner. Information disclosures should be true and honest and should not contain any false presentations, misleading statements or major omissions. Applications that fail to observe the self-regulatory rules or fail to satisfy the issuance requirements are rejected by the NAFMII.

**10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?**

Public and private offerings have different investors. Thus, public offerings have standard requirements for issuance while private offerings can be more flexible and self-regulatory, and are not subjected to the requirement that 'the balanced issuing amount shall not exceed 40 per cent of the issuer's net assets'. However, private offerings still need to register with the NAFMII, but NAFMII only conducts a completeness check on the filing documents. In a private offering, the issuer reaches a targeted investor agreement with certain investors. The agreement lays down the disclosure standards and the disclosure is made to the targeted investors only. The price is fixed in a market-oriented manner, and credit rating is not compulsory.

**11 Describe the public offering process for debt securities. How does the private offering process differ?**

After the NAFMII sends the Notice for Registration Acceptance to the enterprises, the lead underwriter, together with the underwriting group, is in charge of the offering. The offering takes the form of either book building or bidding. The parties in a bidding usually include the issuer, the bidding participant and intermediaries. The issuer reaches a written agreement with the bidding participants and discloses the following information at least one day before the issuance:

- the method of issuance;
- the invitation for bids; and
- the list of the bidding participants.

The parties to a book building include the issuer, the lead underwriter, the bookrunner and intermediaries. The issuer discloses the price fixing rules, book building rules and processes in accordance with the prospectus and other relevant rules. Price inquiries are carried out before the issuance and a price range is fixed upon the inquiries. Investors make purchase applications according to the rules, while the bookrunner is in charge of the placement.

In the private offerings, the parties shall include the issuer, the lead underwriter, the directed investors, intermediaries and the bookrunner (if any). The issuance takes either of the above forms.

**12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?**

The usual closing documents include a credit rating report and arrangements for follow-up ratings issued by credit rating institutions, legal opinions issued by law firms and audited financial statements of the past three years issued by accounting firms, with up-to-date financial data.

**13 What are the typical fees for listing debt securities on the principal exchanges?**

Typical fees for listing debt securities within the inter-bank bond market include fees for intermediaries and other registration fees. The intermediaries usually are underwriters, law firms, credit rating institutions and accounting firms.

**14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?**

There are no special debt instruments in the inter-bank bond market. However, listing companies can issue convertible debts through major exchanges.

**15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?**

Convertible debts are debts issued by listing companies. Apart from the general rules applicable to bond issuance, they comply with the rules for issuance of stocks and are approved by the State Council's securities regulatory authorities.

The following accounting requirements should be met to issue convertible debts:

- the weighted average yield rates of net asset for the past three years should not be lower than 6 per cent;
- after the present issuance, the balance of the accumulative corporate bonds should not exceed 40 per cent of the amount of net assets at the end of the latest accounting period; and
- the annual average amount of the distributable profits realised in the past three years should not be less than the annual amount of interests of the corporate bonds.

**16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?**

There are some major differences between equity securities and debt securities as in the following.

**Issuers**
As a means of financing, most national or local public bodies and companies can issue debt securities, but equity securities can only be issued by joint-stock companies.

**Stability of gains**
As a way of investment, the gains from the two securities are different. Debt securities have fixed interest, while investors usually get uncertain incomes from equity securities.

**Legal relations**
Equity and debt securities reflect totally different legal relations. The debt securities reflect legal relations in debt and credit, but the equity securities reflect the ownership of the company in the investors.

**Risk**
Debt securities are general investments, whose trading turnover rate is lower than equity securities. Equity securities are not only an investment, but also a major investment in the financial markets; although low-security and high-risk, it provides high expected revenues and attracts more risk-oriented investors.

### 17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?

Relevant rules require that privately offered debt securities be transferred only among investors specified in the targeted investment agreement (see question 5). Institutions that provide registration, custody or transfer services for such instruments are obliged to report bond information to the NAFMII on a regular basis.

### 18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?

One of the main rules for offering of debt securities by foreign issuers in China is the Interim Measures for the Administration of the Issuance of Renminbi Bonds by International Development Institutions.

One of the main rules for domestic issuers offering debt securities only outside China is the Guiding Opinions of the State Planning Commission and People's Bank of China on Further Strengthening the Management of Issuance of Foreign Debt (Opinions). According to the Opinions, issuance of foreign debts by domestic institutions is subject to the approval of the State Planning Commission, the People's Bank of China, the State Council and relevant governing authorities, and qualified entities, are subject to a qualification review every two years.

In addition, two special rules govern the bond issuance by domestic institutions in Hong Kong: the Notice of the National Development and Reform Commission on Matters Concerning the Issue of Renminbi Bonds in the Hong Kong Special Administrative Region by Domestic Non-financial Institutions and the Interim Measures for the Administration of the Issuance of Renminbi Bonds in Hong Kong Special Administrative Region by Domestic Financial Institutions. According to the rules, bond issuance by financial institutions is subject to the approval of the National Development and Reform Commission, the People's Bank of China and the State Council. However, non-financial institutions should apply directly to the Development and Reform Commissions for bond issuance.

### 19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

Apart from what is stated in the Interim Measures for the Administration of the Issuance of Renminbi Bonds by International Development Institutions, it is still difficult for foreign issuers to access the debt capital market in China. The government and relevant security exchanges are working hard to establish certain mechanisms for bond issuance by foreign companies.

### 20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

There are two types of underwriting arrangements in a public offering: firm commitment and best efforts. Firm commitment is typical in the inter-bank securities market. In a firm commitment, the underwriters purchase the securities from the issuer and then sell them to the public. The underwriters assume the risk that the securities cannot be sold to the public or can only be sold below the purchase price. The underwriters usually form a syndicate to spread the risk. The other underwriting arrangement often used is the best efforts arrangement. Instead of purchasing all the issued securities, the underwriters use their expertise to act as an intermediary to sell the securities, and earn the gross spread on what they sell.

In a private offering of debt securities, the underwriters assist the applicant enterprise in their registration with the NAFMII and look for qualified investors. The investors reach agreements with the issuer and purchase securities directly from the issuer.

### 21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

Various rules of the NAFMII provide relevant provisions relating to the behaviour of the underwriters. Some of the main rules include the Rules for Intermediate Service of Debt Financing Instruments of Non-financial Enterprises in the Inter-bank Bond Market and the Rules for the Self-regulatory Discipline of the Debt Financing Instruments of Non-financial Enterprises in the Inter-bank Bond Market. According to the rules, underwriters assist the applicant enterprises in their offering process and observe the self-regulatory rules of the NAFMII, as well as other relevant laws and regulations governing the bonds and securities market. Both the NAFMII and the People's Bank of China regulate and govern the inter-bank bond market and their participants. There are no specific approval requirements for underwriting arrangements, if the arrangements meet relevant legal requirements.

### 22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?

The issuer signs the underwriting agreement with the underwriters. Before the issuance, the lead underwriters assist the issuer in their registration with the NAFMII, as well as relevant disclosure issues. After that, the issuer reaches a confirmation agreement with the underwriters on the interest rates and price of the debt securities. The issuer shall also reach an agreement with certain registration and custody entities about relevant registration and custody issues.

The proceeds are usually received by the issuer in one of two ways: the bookrunner transfers the balance of proceeds excluding the underwriting costs to the bank account of the issuer at the payment date; or the bookrunner transfers all the proceeds to the issuer at the payment date. The underwriting obligations cease once the issuer receives the proceeds.

### 23 How are public debt securities typically held and traded after an offering?

The regulatory rules require bond holders to appoint a bond registration, custody and settlement institution to hold their bonds. Bond holders open certain bond accounts in such institutions for the management of the bonds. The CCDC is such an institution, designated by the People's Bank of China. It is in charge of the registration, custody and settlement of bonds in the inter-bank market.

### 24 Describe how issuers manage their outstanding debt securities.

The issuer usually repurchases the outstanding debt securities.

### 25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?

The main reporting obligations post-offering are found in the Rules for Information Disclosure on Debt Financing Instruments of Non-financial enterprises in the inter-bank bond market.

The enterprises continuously disclose the following information within the duration of the debt financing instrument:

- before 30 April of each year, companies must disclose annual financial statements and an audit report for the previous year;
- before 31 August of each year, companies must disclose their balance sheet, income statement and cash flow statement for the first half of the current year; and
- before 30 April and 31 October of each year, companies must disclose their balance sheet, income statement and cash flow statement of the first quarter and the third quarter of the current year.

Apart from the above, companies must disclose major issues that occur in the duration of debt financing instruments, which may affect their solvency. For example, major issues include:
- significant changes in business policies and business scope of the enterprises;
- significant losses of more than 10 per cent of the net assets;
- decisions for capital reduction, merger, division, dissolution and filing for bankruptcy; and
- involvement in major litigation, arbitration or severe administrative penalties.

**26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?**

According to the Measures for the Administration of Bond Transactions in the National Inter-bank Bond Market, the Rules for Information Disclosure on Debt Financing Instruments of Non-financial Enterprises in the Inter-bank Bond Market (2012 Revision), and the Rules for the Private Placement of Debt Financing Instruments of Non-financial Enterprises in the Inter-bank Bond Market, the People's Bank of China and the NAFMII both set out rules for liability penalties related to debt securities offerings. All transaction participants, including the issuer, may be subject to liabilities according to the above rules. The liability regime varies from other security types. Corporate bonds, enterprise bonds and stocks are subject to the supervision of different government authorities and regulations.

**27 What types of remedies are available to the investors in debt securities?**

The NAFMII maintains a mechanism of bondholder meetings, and relevant self-regulatory rules are already in place to support the mechanism. Investors in the inter-bank debt securities market are able to protect their interests and lawful rights through such mechanism. Failing this, investors could also solve the disputes through lawsuits or arbitrations.

**28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?**

The NAFMII manages debt-financing instruments of non-financial enterprises, and relevant issue and trade of such instruments in a self-discipline fashion, and submits the record to the People's Bank of China for filing.

The National Interbank Lending Center is responsible for the routine monitoring of the trade of debt-financing instruments and collect trade analysis, and reports to the NAFMII on a monthly basis.

The CCDC is in charge of the routine monitoring of the issuance, registration, trusteeship, settlement and cash of the debt-financing instruments. It gathers information and reports to the NAFMII on a monthly basis.

The NAFMII reports to the People's Bank of China about registration totals, self-regulatory status, market operation status and execution of the self-regulatory rules.

The NAFMII may take measures such as admonition, persuasion and public censure against persons and authorities that violate the self-regulatory rules.

The People's Bank of China shall exercise supervision and administration towards the NAFMII, National Interbank Lending Center and the CCDC according to law. The NAFMII, National Interbank Lending Center and CCDC shall report to the People's Bank of China in a timely fashion regarding the issue and trade of debt-financing instruments, and relevant information in accordance with requirement.

Individuals and authorities that violate the law and rules are punished by the People's Bank of China, according to article 46 of the Law of the People's Bank of China. Where a case constitutes a crime, criminal responsibility shall be affixed.

**29 What are the main tax issues for issuers and bondholders?**

In accordance with tax laws and regulations in China, bond holders of debt financing instruments, as one kind of negotiable securities, shall pay the business tax in the trading earnings of the debt financing instruments. Since the bondholders in the inter-bank bond market are financing institutions, they must pay the corporate income tax based on the interest income and trading earnings of debt financing instruments. At present, the debt financing instruments transaction in the inter-bank bond market for the issuers and bondholders has not been imposed on the stamp tax.

* *The information in this chapter is accurate as of 2016.*

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# France

**Jeremy Grant and Arnaud Pince**

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**1 What types of debt securities offerings are typical, and how active is the market?**

The French debt securities market is well-established and active. In the third quarter of 2016, according to statistics published by the Bank of France, total net issuance was €100 billion.

Issuers consist of corporates, public entities, and banks and other financial institutions, and instruments issued include straight debt as well as special debt products (see the answer to question 14).

A large part of the activity comes from large, investment-grade issuers who issue frequently, often using euro medium-term note (EMTN) programmes governed by French or English law. Issuances are usually done by way of listed private placement rather than public offer and the securities would typically be traded on France's regulated market – Euronext Paris: this follows successful efforts by the authorities to encourage French companies to repatriate their programmes, many of which were previously listed elsewhere, to Paris. According to statistics published by Euronext, the number of bonds listed on Euronext Paris at the end of 2016 was 2,647 (2,628 at the end of 2015) including 853 new listings in 2016 (981 in 2015).

Many of these frequent issuers have listed equity and so take advantage of being able to incorporate much of the issuer-related-information by reference from their annual report into their debt issuance prospectuses (see question 4).

For other corporates, especially mid-caps, the euro private placement market has become an increasingly important source of financing: a 'charter' for euro private placement issuances was drawn up in 2015 by a Paris-based working group and a code of best practice for euro private placement arrangers published in 2016 by the French Financial Markets Association.

Among sub-investment-grade issuers, there is a relatively large high-yield bond market – these are generally privately placed, unlisted and documented according to US norms and New York law.

The majority of French debt is held by non-resident investors, and French companies are regular issuers of foreign and international bonds in the US and Asian markets, among others.

French issuers have also historically been among the most dynamic and innovative in accessing new markets such as the 'dim-sum' market and, more recently, the market for panda bonds and green bonds.

France has a number of large banks, and domestic and international issuances of vanilla and structured products are common. Structured products are generally sold to institutional investors pursuant to a private placement exemption. A particular focus since 2014 has been regulatory capital products such as Tier 1 and Tier 2 notes designed to fulfil the requirements of the European capital regulations. In the most recent period, issuances of TLAC-compliant Tier 3 notes have started to emerge (see 'Update and trends').

In this chapter we shall focus on plain vanilla debt instruments issued by French issuers using French law.

**2 Describe the general regime for debt securities offerings.**

French law relating to debt securities offerings is derived from Directive 2003/71/EC (the Prospectus Directive) and other European Directives and Regulations (in particular the Market Abuse Regulation, the Market Abuse Directive and the Transparency Directive), and as such is harmonised with other European regimes.

The principal sources of law and guidance are:

- the French Monetary and Financial Code (MFC), which sets out the main rules applicable to the classification of financial instruments including debt securities (articles L.211-1 to L.211-4 and articles L.213-1 to L.213-35), bond issuances (articles L.228-38 et seq), public offerings of securities and exemptions for private placements (articles L. 411-1 et seq);
- articles L.228-91 et seq of the French Commercial code relating to equity-linked notes;
- regulations of the AMF, which encompass the General Regulations of the AMF, and other instructions and recommendations; and
- policies and recommendations of professional associations.

The body supervising the issue of debt securities in France is the AMF. The AMF is the competent authority under the Prospectus Directive. The main duties and powers of the AMF are:

- preparing rules of good conduct for debt securities issuers and regulated markets;
- supervising investment services providers; and
- imposing disciplinary sanctions on supervised entities by means of a separate and independent enforcement committee.

Credit institutions and insurance companies are subject to additional regulatory requirements when they issue debt securities, as the characteristics of the debt instruments to be issued, particularly those relating to permanent availability and subordination, will determine whether they are eligible as regulated own funds for the purpose of prudential regulations (Directive 2013/36/EU (CRD IV)) and Directive 2009/138/EC (Solvency II Directive). Supervision is carried out for both credit institutions and insurance companies by the French banking regulator, the ACPR.

The main regulated securities market is operated by Euronext – it is an active market and most types of debt and equity securities are traded on it. There is also an organised multilateral trading facility – Alternext Paris – on which equities and bonds can be traded, but which is not a regulated market; and a smaller 'free market'. These markets each have their own by-laws.

Euroclear France is the French Central Securities Depository.

**3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities?**

An offer to the public will be triggered in either of the following circumstances:

- the making of an advertisement, regardless of its form or method of dissemination, which contains sufficient information about the conditions of the offer and the securities being offered to enable an investor to decide whether to buy or subscribe such securities;
- a placing of securities by financial intermediaries.

Certain exceptions from the public offer regime are explained in our response to question 10.

Before conducting a public offer of debt securities or seeking admission to trading on the regulated market of Euronext Paris, the issuer must prepare prospectus and submit it for approval by the AMF (or the competent authority of another European Union or European

Economic Area state, following which the approval must be notified to the AMF).

Issuance of debt securities designed to be eligible as regulated own funds by credit institutions and insurance companies will, under certain circumstances, be subject to prior authorisation by the ACPR.

**4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?**

As stated in the response to the previous question, in a public offering of securities, a prospectus must be produced. A prospectus must also be produced for securities which are admitted to trading on the regulated market of Euronext even if no public offer is made.

The prospectus must contain all information which is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities. This information must be presented in an easily analysable and comprehensible form.

Detailed requirements for information to be included in the prospectus derive from the Prospectus Directive and its implementing Prospectus Regulation (Regulation (EC) 809/2004 of 29 April 2004), and will depend on the type of issuer and the category of financial securities concerned. In particular, the Prospectus Regulation requires different levels of disclosure depending on whether debt securities are wholesale (ie, with a denomination per unit of at least €100,000) or retail (ie, with a denomination per unit of less than €100,000). Prospectuses for the latter will also need to include a summary section in a specified format. In addition, guidance as to what information needs to go into the prospectus is provided by the European Securities and Markets Authority (ESMA) recommendations.

A prospectus for debt securities will usually contain the following principal sections:

- a summary (for retail-denominated issues);
- risk factors relating to the issuer, the securities and the offering;
- a section containing information about the issuer (and any guarantor), its business and organisational structure;
- audited financial information for at least the two financial years prior to the date of the prospectus, prepared under International Financial Reporting Standards; and
- information about the securities being offered or listed: the terms and conditions, credit rating, use of proceeds, admission to trading, subscription and sale and terms of any public offer.

The prospectus may take two forms:

- a stand-alone prospectus prepared for a one-off offering; or
- a base prospectus, prepared and updated on an annual basis, and supplemented each time a new series of securities is issued with a document setting out the final terms of issuance, which must be filed with the AMF. The base prospectus format is typically used for EMTN and covered bonds programmes.

There is a mechanism for incorporating by reference information on the issuer that has already been filed with the AMF. Consequently, an issuer with already-listed equity will typically chose to incorporate much of its disclosure by reference from its annual report.

**5 Describe the drafting process for the offering document.**

French practice does not differ from international practice in respect of the drafting of the offering document.

Thus, the disclosure relating to the issuer (issuer-related risk factors and business description) will usually be prepared by the issuer and its counsel, while the legal parts of the document (terms and conditions and other information relating to the securities) are drafted by underwriters' counsel.

Alongside the formal requirements of the Prospectus Regulation described in question 5, materiality in the context of the issuer and the securities in question will remain the key consideration for determining what information should go into the offering document. Thus, the contents of the prospectus will still be dictated to a large extent by the nature of the issuer, its business and issuance history, the type of security being offered, the credit rating, whether it is a domestic or international offering, and any disclosure issues that come out of the due diligence process.

The contents of a prospectus used for a listed private placement will not usually differ from that used for public offering purposes, except that the former will not need to contain details of the offer. One difference from other European jurisdictions is that where, in the context of a privately placed bond, a preliminary prospectus is used for marketing the securities, such preliminary prospectus will be subject to a special pre-approval process by the AMF.

Non-listed private placements do not require an approved prospectus and are generally sold on the basis of a term sheet or non-approved information memorandum only.

**6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?**

If a prospectus is produced, it will usually contain the terms and conditions of the debt securities. In a non-listed private placement where no prospectus is produced, the terms and conditions will usually be annexed to the placement agreement.

Prospectuses are accessible on the website of Euronext and on the website of the issuer (see question 7).

**7 Does offering documentation require approval before publication? In what forms should it be available?**

Any prospectus produced in the context of a public offer or admission to trading on Euronext Paris must be approved by the AMF before it is published.

The prospectus must be made available by one of the following means: (i) publication in a widely circulated newspaper; (ii) being made available in printed form from the issuer's registered office, at the office of the stock exchange and at the office of the financial intermediaries; (iii) posting on the website of the issuer and the financial intermediaries; or (iv) posting on Euronext's website. In practice most issuers chose to post on the website of Euronext and their own website.

The other offering documentation (such as the agency agreement) does not require AMF approval. However, any advertising or marketing materials to be used in France for a public offer of securities or an admission of securities to trading on the regulated market of Euronext must be communicated to the AMF before being disseminated.

**8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?**

The AMF will start reviewing the draft prospectus once a complete application file is has been submitted. The content and submission procedure is specified in the delegated regulation (EU) 2016/301 of 30 November 2015 relating to the approval and publication of the prospectus and dissemination of advertisements, and in an AMF instruction.

The AMF will revert within 10 business days of the filing date (or 20 business days for a first-time issuer). It is possible to shorten these periods to five business days if the issuer has already filed or registered a registration document with the AMF.

As with other regulators, the process usually involves exchanges of drafts of the prospectus until the AMF has no further comments. The review process is confidential.

No offer to the public may be made, and the securities will not be admitted to trading, before approval is granted and the prospectus published. In addition, issuers and underwriters are subject to certain restrictions regarding advertisements and information that can be disseminated to the public prior to approval of the prospectus.

**9 On what grounds may the regulators refuse to approve a public offering of securities?**

The AMF has the right to refuse to approve a prospectus when it has reasonable grounds for suspecting that the offer to the public or the admission to trading to the regulated market is contrary to applicable laws or regulations. This refusal must be communicated by the AMF to the issuer together with an explanation of the decision and the relevant law or regulation.

The issuer can challenge the decision before the Paris Court of Appeal.

Refusal can also arise from failure to supply the AMF with the required information and documents during the review process, or if the documents are insufficiently complete.

### 10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?

The principal exceptions to the public offer regime relied on by issuers and underwriters are: (i) offers of securities with a minimum denomination of €100,000 or its equivalent in other currencies; (ii) offers restricted to qualified investors; and (iii) offers to a limited circle of investors (fewer than 150).

For an exempt offer, no public offering prospectus will need to be produced, though an approved prospectus will still be required if an application is made for admission to trading on the regulated market.

### 11 Describe the public offering process for debt securities. How does the private offering process differ?

The timetable and documentation used in a standard French bond issue is similar to that seen in other jurisdictions.

Below is a typical transaction timeline:

- phase 1 (six to eight weeks):
  - appointment of underwriters and other transaction parties;
  - signing of mandate letter;
  - preparation of prospectus, other transaction documents and corporate authorisations;
  - review of draft prospectus by the AMF;
  - preparation of roadshow materials;
  - discussions with rating agencies;
  - due diligence process;
- phase 2 (one to two weeks):
  - approval of the prospectus by the AMF (in the case of a public offer);
  - marketing of the bond (based on an approved prospectus in the case of a public offer or a preliminary prospectus or termsheet and other marketing materials in the case of a private placement);
  - book-build and pricing;
- phase 3 (two days before settlement):
  - signing;
  - approval of the prospectus (in the case of a private placement);
  - publication of the Euronext listing notice; and
- phase 4:
  - delivery of closing conditions precedent (see question 12);
  - payment and delivery (see question 22); and
  - admission to trading.

In the context of a drawdown under an EMTN programme, the preparatory phase (phase 1) will be much shorter since an up-to-date base prospectus will usually already be available.

### 12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?

Conditions precedent for French debt securities transactions do not differ from those used in other parts of the world.

So, the underwriters will generally ask for opinions from external counsel as to the legal, valid, binding and enforceable nature of the transaction documents and as to the capacity and authorisation of the issuer to enter into the transaction. Tax opinions are also sometimes required. Disclosure letters are not delivered on debt transactions except in the case of securities sold into the United States pursuant to Rule 144A.

In the case of offerings where a prospectus is produced, comfort letters are also typically provided. French comfort letters are similar in form to the SAS76 letter used in the United States. They will contain 'agreed-upon procedures' but no 'negative assurance', even in situations where they are delivered close to the last audited or reviewed balance sheet date. ICMA standard form letters are not used in France.

Other conditions precedent will include closing certificates, ratings letters and corporate and regulatory authorisations, as applicable.

One French-specific condition precedent is the accounting letter delivered to Euroclear France for the creation of book-entry securities.

### 13 What are the typical fees for listing debt securities on the principal exchanges?

Fees for listing debt securities on Euronext or Alternext will include an upfront admission fee and an annual maintenance fee. Fees are based on the amount and duration of the issue in question.

### 14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?

The French market for special debt instruments is active. Products include the following.

**Equity linked securities**

Two types which are frequently seen in France are OCEANEs (bonds convertible or exchangeable into new or existing shares) and ORNANEs (bonds repayable in cash, or new or existing shares). These products are typically not listed on the regulated market. Synthetic convertibles (combining a non-convertible debt instrument with an option or warrant to create the characteristics of a convertible issue) have also recently seen some popularity in France.

**Bank and insurance company regulatory capital instruments**

See 'Update and trends'.

**Corporate hybrid instruments**

Usually issued in compliance with rating agency criteria and to ensure appropriate accounting treatment as equity and tax treatment as debt.

**Derivative products**

The French Banking Federation has developed a set of standardised documentation, similar to ISDA, for French-law governed products.

**Asset-backed securities**

Including securitisations and covered bonds. The French covered bond market is particularly well established and dates back many years.

### 15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?

The rules for offering special debt securities are generally the same as those for standard debt securities: in particular if a non-exempt public offer is made or admission to trading on the regulated market of Euronext is sought, then an approved prospectus needs to be published.

The Prospectus Regulation sets out the particular disclosures that will need to be made in the prospectus for various types of special debt instruments (notably Annexes I and III for equity-linked, Annexes IV, IX and XII for derivatives, and Annexes VII and VIII for asset-backed).

Special debt instruments may require different corporate approvals from regular debt securities. Securities giving access to capital or other debt securities will usually need to be authorised by the issuer's shareholders, though shareholders may give a general authorisation to the board to decide to issue this type of security from time to time, subject to certain legal conditions.

In addition, the marketing of structured debt securities is subject to specific regulation when non-professional clients are targeted. The AMF has adopted specific guidelines to prevent these products being mis-sold to retail clients. The AMF has also adopted specific positions regarding the preparation of marketing documents relating to structured debt securities. Such products include debt securities offering capital protection at maturity of at least 90 per cent of the capital invested, and debt securities backed by other assets or linked to the performance of other assets.

Special debt instruments may also differ from regular debt securities in their tax and accounting treatment.

### 16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?

Under French law, debt securities and equity securities both fall under the category of financial securities, which is itself a sub-section of the category of financial instruments.

Equity securities are issued by joint stock companies and include shares and other securities giving access to the share capital of, or voting rights in, the company.

Debt securities include the following types of securities:

- bonds;
- securities issued by the French state;
- profit participation certificates ; and
- negotiable debt instruments (TCNs).

Bills of exchange and interest-bearing notes are not deemed to constitute financial instruments.

The classification of an instrument as debt or equity is important for a number of reasons including the determination of:

- which authority is competent to approve the prospectus in the case of a non-exempt public offer or admission to trading on a regulated market;
- which annexes to the Prospectus Regulation need to be observed when preparing the prospectus;
- the corporate authorisation of the issuance; and
- the tax and accounting treatment.

### 17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?

French law does not limit or restrict the transfer of privately offered debt securities. Nonetheless, a person or entity making an offer of debt securities under a private placement exemption must inform investors that any direct or indirect distribution of the securities must be done in compliance with French public offering rules (ie, either by filing a prospectus with the AMF in the case of a public offer or under a private placement exemption).

### 18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?

A foreign issuer whose debt security prospectus has been approved by the competent authority of another member state of the EU or an EEA member state may ask for the prospectus to be passported into France without re-review by the AMF. Except for small-denomination issues, the prospectus may be in English; though any summary prepared for retail investors will need to be translated into French.

Issuers offering French-law-governed debt securities outside of France may currently opt out of certain provisions of the French Commercial Code governing the conduct of bondholder meetings and quorum and majority requirements. There are plans afoot to relax this further (see 'Update and trends') to allow French-law-governed bonds under certain circumstances to dispense entirely with the provisions of the French Commercial Code relating to bondholder meetings and to replace them with contractually agreed provisions of the kind seen in English or US law bonds. Foreign-law-governed debt securities of French issuers are not required to follow the rules set out in the French Commercial Code regarding bondholder meetings.

### 19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

See our answers to the previous question regarding the European single passport mechanism.

Non-European issuers may prepare a prospectus compliant with the Prospectus Directive or meeting the standards of the International Organisation of Securities Commissions and apply to the AMF to have that prospectus approved in France. The issuer must provide additional information in the case of first admission to trading on the regulated market of Euronext.

In addition, the AMF has concluded an agreement with the Israeli Securities Authority to grant equivalence to the French and Israeli regulatory regimes for drawing up prospectuses (this agreement was modified in 2011 to take account of the ESMA assessment of Israeli laws and regulations on prospectuses).

### 20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

Typical practice for offerings by French issuers underwritten out of Paris or London is a joint and several underwriting commitment. Where the syndicate is based elsewhere (eg, New York), the underwriting arrangements will generally follow the practice of that jurisdiction.

Placement on a 'best efforts' basis without an underwriting commitment is rare in the context of public offerings and listed bonds, but is often seen in the French private placement market, especially where the intermediary between the issuer and the investors is not a bank.

Underwriting arrangements will also be affected by when the deal is priced and whether it is open priced or pre-priced.

The underwriting agreement is usually entered into two business days prior to settlement rather than on the pricing or launch date.

### 21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

Underwriting financial instruments constitutes an investment service under French law and therefore only duly licensed (or duly passported) investment services providers (investment firms and credit institutions) are authorised to carry out such activities.

The ACPR is the body that grants licences to French investment firms and credit institutions wishing to render investment services. The ACPR must consult with the AMF before granting a licence to an applicant.

Underwriting arrangements for particular transactions are not subject to specific approvals.

### 22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?

The bank acting as settlement manager will usually arrange for the issue proceeds to be paid to the issuer by wire transfer against confirmation that the securities have been credited to the accounts of the participants in Euroclear France.

Settlement periods differ depending on whether the offering is domestic or international and the governing law, but will usually range from two to five days after pricing.

See the answer to the following question as to how the bonds are held.

Securities are usually admitted to trading on the settlement date.

### 23 How are public debt securities typically held and traded after an offering?

Debt securities issued in France and governed by French law are dematerialised and can be in bearer or registered form. They are evidenced by book entries in a securities account held either by the issuer or by a regulated intermediary. Securities may be created in materialised form if they are issued outside France.

Debt securities admitted to trading on a regulated market or a multilateral trading facility are in most cases issued in bearer form, with Euroclear France acting as central depository. Conversely, non-listed debt securities are generally issued in registered form, represented by book entries in the bondholder's name in the books of the issuer or its agent.

### 24 Describe how issuers manage their outstanding debt securities.

French issuers actively manage their debt securities post-issuance.

As in other jurisdictions liability management takes three main forms:

- redeeming the securities early pursuant to a contractual call option, through a public tender offer or through open market purchases;

### Update and trends

A decree of 30 May 2016 reformed the legal framework applicable to French *titres de créances negotiables* (TCNs). The purpose of the reform is to simplify the regulatory framework applicable to the issue of the TCNs with the aim of enlarging the investor and issuer base and increasing the transparency of the TCN market.

An ordinance of 28 April 2016 and an implementing decree of 28 October 2016 reformed the regime for the issuance of *bons de caisse* (a short-term acknowledgement of debt that can be issued by certain types of French entities). A new category of *bons de caisse* was created called a *minibon*, which can be marketed in particular by French crowdfunding advisers.

On 9 December 2016, the implementation of the new European Market Abuse Regulation into French law was finalised by way of law 2016-1691, which strengthens the administrative and criminal sanctions applicable in case of market abuse.

On 9 December 2016, French law was reformed to allow French credit institutions to issue TLAC-eligible instruments ranking senior to ordinary subordinated instruments. This has led to a recent wave of TLAC-compliant bond issues by major French banks.

A reform of the French bond regime is likely to be implemented during the course of 2017. The objective is to render the French bond market more competitive. The reform will include, in particular, a revision of the existing provisions for the conduct of bondholder meetings.

- swapping existing bonds for new bonds with different terms by way of an exchange offer; or
- modifying the terms of an existing bond by way of a consent solicitation.

Exchange offers involving the issue of new securities which are to be admitted to trading on the regulated market of Euronext will require an approved prospectus.

For a cash tender offer, no prospectus is required, but a notice has to be filed with the AMF on launch.

French issuers have also been frequent users of the 'intermediated offer' structure, which combines an exchange offer by the issuer with a tender offer and new money issue intermediated by a bank.

In addition to public tender offers and exchange offers, issuers may also conduct open market purchases. Listed bonds may be repurchased up to a maximum amount of 15 per cent of a given issuance for a maximum duration of one year, at the expiration of which they must be cancelled.

Consent solicitations under French law are carried out somewhat differently than those for English and US-law-governed bonds owing to the specific procedures governing the convening of bondholder meetings and the passing of resolutions. See our answer to question 18.

Euroclear France does not currently have the facilities to deal with electronic instructions, so participants need to use paper instructions to communicate decisions relating to corporate actions. This is set to change in 2018.

### 25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?

Issuers whose debt securities are listed on the regulated market of Euronext are subject to ongoing reporting obligations relating to inside information and disclosure of periodic financial reporting.

Except in certain limited circumstances where it would be harmful to the issuer's legitimate interests, an issuer must disclose inside information to the public as soon as possible. Inside information is information of a precise nature, which has not been made public, relating, directly or indirectly, to the issuer or to the securities, and which, if it were made public, would be likely to have a significant effect on the price of those securities or on the price of related derivative financial instruments.

Issuers of debt securities are also subject to financial reporting obligations, in particular the publication of annual and semi-annual financial reports within specific time frames.

### 26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?

Issuers of securities and their directors have a general obligation to provide investors with precise, accurate and non-misleading information with respect to their company.

Breach of this obligation can lead to civil liability, administrative sanctions or, in certain circumstances, a criminal offence.

An investor bringing a civil case against the issuer will have to prove that it suffered a loss resulting from an inaccuracy in the prospectus. This can consist of a lost opportunity to better invest the investor's money. In the case of a director, the investor will face the additional burden of proving that the director committed a 'gross fault incompatible with the exercise of his or her duties'.

In certain circumstances, other parties such as independent experts and auditors may be responsible for discrete parts of the prospectus that they have prepared.

In order to impose administrative sanctions, the enforcement committee of the AMF has to prove the existence of a breach of the disclosure obligation by the issuer or its directors. The director may be exonerated if it can be demonstrated that 'peculiar circumstances deprived him or her of the total or partial exercise of his or her functions'.

There are various criminal offences relating to securities offerings. Alongside offences resulting from the European Market Abuse Regulation, the French Monetary and Financial Code prohibits 'the disclosure by any person of information that gives false or misleading representations about the status or prospects of an issuer or the offer, demand or price of a financial instrument or which are likely to set the price of a financial instrument at an abnormal or artificial level'. This offence is punishable by up to five years in prison or a €100 million fine, or both. It will also constitute an offence if an issuer publishes or presents misleading accounts.

There is no fundamental difference in the liability regimes between debt securities and other types of securities. Courts and regulators will, however, take into account the nature of the security in question and the target investors when considering whether an offence has been committed or liability incurred. Thus, debt security prices are less price sensitive than shares and consequently less likely to give rise to investor losses. French law will also give more scrutiny to complex debt securities and afford more protection to retail investors, who will be presumed to be less knowledgeable and thus require more information about investments than professional investors.

### 27 What types of remedies are available to the investors in debt securities?

For remedies relating to prospectus misrepresentation, see question 26. In the case of non-payment by the issuer, bondholders (or their representative on their behalf) can bring legal actions before civil courts.

### 28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?

For sanctions against issuers and directors for prospectus misrepresentation, see question 26.

The enforcement committee of the AMF, which is made up of judges and professionals, is authorised to impose sanctions against professional entities under the supervision of the AMF if they breach their professional obligations as stipulated by European regulations, French law and regulation, AMF regulation and professional rules approved by the AMF.

Persons subject to sanctioning include individuals acting under the authority or on behalf of the professional entities supervised by the AMF and, under certain circumstances, any person that commits an insider dealing offence or market manipulation offence or who disseminates false information.

Sanctions may be financial, in the form of a fine of up to €100 million or 10 times the profit gained; or disciplinary, consisting of a temporary suspension or withdrawal of professional licence, a temporary or permanent ban on conducting some or all businesses or a temporary or permanent ban on providing some or all services.

**29 What are the main tax issues for issuers and bondholders?**

Interest payments on debt securities are generally deductible from the issuer's taxable income.

The tax regime applicable to bondholders depends on their state of residence.

French resident companies' interest income is subject to corporate tax at the standard rate.

French resident individuals' interest income is subject to personal individual income tax.

Payments of interest to non-French residents are generally not subject to a withholding tax. The exception to this would be where payments are made in a non-cooperative jurisdiction (being, as at 1 January 2017: Botswana, Brunei, Guatemala, Marshall Islands, Nauru, Niue and Panama) and the securities in question have not been publicly offered, admitted to trading on a regulated market or admitted to the operations of a central depositary or other type of ICSD. In this case, a withholding tax would be levied at 75 per cent.

No French registration, capital, stamp duty, transfer tax, customs or other similar taxes are applicable to the issue and offering of debt securities, or their subscription or transfer provided the transfer is not recorded or referred to in any manner whatsoever in a deed registered with the tax authorities in France.

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# Germany

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**1 What types of debt securities offerings are typical, and how active is the market?**

The German debt capital market is very diverse. You can distinguish the various market segments in classic investment grade corporate bonds, high-yield bonds, equity-like debt instruments, in particular issued by credit institutions and insurance companies (subordinated debt, Tier 2 capital), equity-linked products (convertibles, exchangeables, profit participation notes), commercial paper, retail structured derivatives products (certificates, warrants, options), exchange traded derivatives, covered bonds, asset-backed securities and special private placement markets (such as certificates of indebtedness and registered bonds). These various debt products are often listed, either on the regulated markets (Luxembourg, Frankfurt or at some of the regional stock exchanges like Düsseldorf, Stuttgart or Hamburg) or the unregulated open market of the Frankfurt Stock Exchange. Schuldscheine and German law registered bonds are not capable of being listed. On the investor side, there are distinct retail markets (such as the certificates and options market) and at the other spectrum distinct institutional markets (like the private placement markets). Other markets like the equity-linked bond market is also a pure institutional market as the products are predominately issued in denominations above the €100,000 mark. Many corporate bond issuers are frequent issuers and have established a debt issuance platform allowing fast and consistent drawdowns during the year.

**2 Describe the general regime for debt securities offerings.**

Various laws and regulations are relevant to the issuance, placement, listing, sale, trading and buy-back of debt securities in Germany. The following list mentions the most important laws and rules.

**German Securities Prospectus Act**

This is the key legislation in respect of offering debt securities in Germany. It implements the European Prospectus Directive 2003/71/EC, which was amended by Directive 2010/73/EC in 2010. It provides for the obligation to produce a prospectus for public offers or listings, any applicable exemptions, the main content of a prospectus as well as the procedure and the responsible authority – the German financial regulator, the BaFin.

**European Securities Prospectus Regulation (EC) No. 809/2004**

This European regulation which directly applies in Germany implements parts of the European prospectus directive as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses. It lays down principles to be observed when drawing up prospectuses. In addition, the European Securities and Markets Authority (ESMA) has delivered regulatory technical standards for publication of supplements to the prospectus as well as for the approval and publication of the prospectus. Furthermore, ESMA has published various guidelines and FAQs in respect of the format and the content of prospectuses. Although the prospectuses need to be approved by the relevant local regulator (in Germany: BaFin), ESMA provides relevant guidance in interpretation of various provisions of the prospectus regulation (for which ESMA is the respective European authority).

**New European Prospectus regime**

The European Parliament, the Council of the European Union and the Commission have agreed on the text of a new Prospectus Regulation. This new regulation will replace the existing Prospectus Directive and introduce new rules on prospectus contents as well as providing broader exemptions for small offerings, where no prospectus is required. The main changes from the current prospectus regime include:

- capital raisings up to €1 million will not need a prospectus at all;
- offerings below €8 million will not require an EU Prospectus and will be subject to local rules;
- a new frequent issuer regime, which will halve approval times from 10 days to five;
- a shorter prospectus for secondary issuances;
- shorter prospectus summaries using language that is easier for investors to understand; and
- a paper prospectus will only be required if a potential investor explicitly requests one.

These new rules are likely to come into force at the end of 2018 or the beginning of 2019 with a likely phasing-in period.

**German Investment Act**

This act has been introduced in 2012 and regulates investment products which are not captured by the securities prospectus act and the relevant European legislation. It aims at previously unregulated products (which may take the form of debt securities). For example, German registered bonds as well as participation rights (which are not in the form of securities) fall within the scope of this act. The Investment Act sets out if and what kind of prospectus needs to be produced. It also provides for safe harbours. The obligations are very similar to the ones in the Securities Prospectus Act.

**German Listing Act**

This piece of legislation regulates the stock exchanges in Germany, the participation and trading thereon. Although the stock exchanges are mainly run by private companies (such as Deutsche Börse AG in Frankfurt), the exchanges are public law institutions governed by the listing act and its implementing secondary regulations.

**German Custody Act**

The custody act regulates the custodial arrangements when holding bearer securities, in particular if securities are held in collective safe custody. In the debt capital market in Germany Clearstream Frankfurt is the main clearing house falling under this regime complying with the respective rules and requirements.

**German Securities Trading Act**

This act applies to financial instruments, which include debt instruments. This German legislation has implemented, inter alia, the Markets in Financial Instruments Directive (MiFiD I) Directive 2004/39/EC)). This Directive is currently being updated and in its revised form will be known as MiFiD II or MiFiR. It was due to apply from the beginning of 2017, but owing to delays in drafting the regulatory technical standards and difficulties by market participants to implement the relevant tools, the implementation will be delayed until 1 January 2018. The German Securities Trading Act deals with insider trading, market abuse (in addition to the European legislation on market abuse, see below), disclosure of voting rights, organisation, transparency and prudent behaviour in relation to advising, selling and dealing in financial instruments (including derivative transactions), supervision of BaFin, and sanctions. In particular, the Securities Trading Act sets out the continuing obligations for issuers of debt capital markets in Germany.

**German Banking Act**

This Act regulates certain activities requiring a licence. In the context of derivatives transactions, financial services institutions are required to hold a licence for the following activities, to the extent these activities are commercially organised on a large scale:

- the brokering of business involving the purchase and sale of financial instruments, which includes derivative transactions (investment brokering);
- providing customers or their representatives with personal recommendations in respect of transactions relating to certain financial instruments where the recommendation is based on an evaluation of the investor's personal circumstances or is presented as being suitable for the investor, and is not provided exclusively via information distribution channels or for the general public (investment advice);
- the placing of financial instruments without a firm commitment basis (placement business);
- the purchase and sale of financial instruments on behalf of others (contract brokering);
- the management of individual portfolios of financial instruments for others on a discretionary basis (portfolio management); and
- the purchase and sale of financial instruments for own account as a service for others or the purchase and sale of financial instruments for own account as a direct or indirect participant in a domestic organised market or multilateral trading facility (proprietary trading).

**The Market Abuse Regulation (MAR)**

This Regulation No. 596/2014 on market abuse came into effect on 3 July 2016. It aims to increase market integrity and investor protection, enhancing the attractiveness of securities markets for capital raising. Although the Market Abuse Directive (MAD) was already adopted in 2013, the European Commission felt it was necessary to frame the legislative revision of MAD in a European regulation (rather than a directive, as before) as its direct applicability would reduce regulatory complexity and offer greater legal certainty for firms. MAR strengthens the previous German market abuse framework by extending its scope to new markets, new platforms and new behaviours. It contains prohibitions of insider dealing, unlawful disclosure of insider information and market manipulation, and provisions to prevent and detect these.

**German Civil Code and German Commercial Code**

These acts set out certain general principles of contract law, which also affect documentation and interpretation of debt capital markets instruments governed by German law.

**ICMA Rules**

Although these rules are not legally binding, the International Capital Markets Association has established rules of conduct and market standards in the area of debt capital markets, which market participants should be aware of. These rules mainly provide recommendations, guidance and standard language and documentation, generally relating to offers of syndicated international bonds in the primary market, to programmes under which such offers may be made and to eurocommercial paper programmes and trades made under them.

**DDV Rules**

The German Derivative Association (DDV), is the industry representative body for the 15 leading issuers of derivatives in Germany. DDV's aim is to improve the general political and regulatory conditions for structured products in Germany and at European level, and to encourage increasing numbers of private investors to choose certificates and warrants. It provides standardised terminology, a fairness codex and product categorisation establishing a set of industry standards.

**3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.**

The German Prospectus Act requires that, where securities are offered to the public but are not admitted to trading on an EU regulated market, a prospectus must be produced by the person making the offer.

The definition of 'offer of securities to the public' should be noted for this purpose. It is 'communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities'. However, there are exemptions available, of which the more important are as follows.

**Qualified investors**

This is the terminology for 'professionals'. The definition of 'qualified investors' was amended by the PD Amending Directive to include those persons who are classified as professional clients or eligible counterparties in accordance with Annex II of the Markets in Financial Instruments Directive 2004/39/EC (MiFID). This harmonisation was intended to reduce administrative burden of determining investor status when conducting exempt offers. The MiFID definition is broadly equivalent to the previous definition in the Prospectus Directive and includes authorised persons (such as investment banks, insurance companies and pension funds), supranational institutions and sovereigns and other institutions whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions. Large corporate investors are also included. These are large corporations (which have any two of the following three criteria: (i) 'own funds' over €2 million, (ii) a 'balance sheet total' over €20 million and (iii) a 'net turnover' exceeding €40 million.

**High denominations**

Non-equity securities with a denomination above €100,000 will also be excluded.

**High consideration**

Offers where investors will have to subscribe at least €100,000.

**Limited offers**

Offers to fewer than 150 persons per member state.

Any such offering prospectus must be produced in compliance with the German Securities Prospectus Act and the European Prospectus regulation and be approved by BaFin (or, if available, another EU member states' authority and passported into Germany under the European prospectus passport regime). Compared to equity securities, non-equity securities (ie, debt securities) require a less stringent disclosure regime and do not have specific requirements.

**4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?**

Yes, the issuer of debt securities offering those to the public must produce a prospectus. The issuer can choose the form of the prospectus. If the issuer accesses the markets on a frequent basis, it may decide to produce a prospectus consisting of three parts (a 'tripartite prospectus'). The first part, the registration document, contains the business disclosure. The second part, the securities note, is produced as and when an issue is made and contains details of the securities being issued. And, unless the issue is of non-equity securities in denominations of €100,000 or more, a summary note must also be produced at the time of issue. Alternatively, if the issuer is not a frequent user of the markets, it may opt to produce its prospectus as a single document. This must also contain all the elements that would be in a tripartite prospectus, including, unless the securities being issued are non-equity securities and have a denomination of at least €100,000, the summary. As a variant of the registration document or securities note format, it is possible to produce a base prospectus under a programme, with each issue or drawdown being documented by a set of final terms.

In either case, the prospectus shall contain all information that, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attached to the securities.

As mentioned in question 2, if the debt securities fall outside the scope of the German securities prospectus act, the prospectus regime for alternative investments under the German Investment Act may apply. In respect of certificates of indebtedness (forming part of the German private placement market) no disclosure regime applies as these are regarded as loans and not securities.

Currently, a specific German requirement is the preparation of an additional product information sheet (three pages) in accordance with paragraph 31(3a) of the German Securities Trading Act in the case of financial advice provided to retail investors. This regime will be replaced or complemented by the European Regulation No. 1286/2014 for prepackaged retail and insurance-based investment products (PRIIPs). Issuers will then have to produce a key information document to the extent the relevant products are made available to retail investors. This will come into force on 1 January 2018.

### 5 Describe the drafting process for the offering document.

The key issues when drafting a prospectus-directive-compliant prospectus are the issuer disclosure, the issuer-related risk factors and the financial information. The issuer of debt securities needs to be ready for capital markets disclosure. This means the following, in particular.

**Information about the issuer**

The issuer needs to describe its history and development. This includes the legal and commercial name of the issuer, the place of registration of the issuer and its registration number, the date of incorporation and the length of life of the issuer, except where indefinite, the domicile and legal form of the issuer, any recent events particular to the issuer which are to a material extent relevant to the evaluation of the issuer's solvency. In addition, the Issuer has to describe its investments (ie, principal investments made since the date of the last published financial statements, information concerning the issuer's principal future investments, information regarding the anticipated sources of funds). Furthermore the issuer needs to provide a business overview (ie, a description of the issuer's principal activities stating the main categories of products sold or services performed and an indication of any significant new products or activities). This is complemented by a brief description of the principal markets in which the issuer competes. Finally, the issuer needs to provide trend information as well as profit forecasts or estimates.

**Risk factors**

In line with the information about the issuer, the key risk related to the business of the issuer needs to be described and published.

**Financial information**

The issuer must produce audited historical financial information covering the latest two financial years (or such shorter period that the issuer has been in operation) and the audit report in respect of each year. Such financial information must be prepared according to Regulation (EC) No. 1606/2002, or if not applicable to a member states' national accounting standards. For third-country issuers, such financial information must be prepared according to the international accounting standards adopted pursuant to the procedure of article 3 of Regulation (EC) No. 1606/2002 or to a third country's national accounting standards equivalent to these standards. If such financial information is not equivalent to these standards, it must be presented in the form of restated financial statements.

Please note that in the case of a private placement, no prospectus is usually required as the private placement is usually structured to fall within the disclosure exemptions provided under the German Securities Act and the Prospectus Directive, respectively.

### 6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

Under German law a security is created by signing of the relevant debt security by the issuer and issuing it to a third party (principles of scripture and public). Usually, debt securities are in bearer format and are documented in global form (ie, only the global bond is signed by the issuer and the fractions of such global bond are then booked via the clearing systems into the accounts of the ultimate holders). The terms and conditions are attached to the global bond and are published in the prospectus. If no prospectus is required, holders are entitled to receive a copy of the global bond at any time.

### 7 Does offering documentation require approval before publication? In what forms should it be available?

If a public offering of debt securities is planned, the prior approval of the prospectus by BaFin is required. Only upon such approval the prospectus may be made available to the public. Following approval of the prospectus it has to be published either in a newspaper in Germany, in print format and available to investors, or via the webpage of the issuer.

### 8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?

Yes, BaFin has to review and approve the offer prospectus. BaFin has 10 business days for any comments on the prospectus (20 business days in the case of a first-time issuer). Each time the prospectus is resubmitted BaFin has a further 10 business days. During the review process no restrictions are imposed on the issuer or underwriters. Of course, no public offer may start prior to final approval of the prospectus.

### 9 On what grounds may the regulators refuse to approve a public offering of securities?

BaFin is examining the prospectus against the requirements imposed by the German Securities Act and the related European legislation. The prospectus has to be complete in light of the required information. BaFin may refuse a prospectus, if the information provided is not sufficient in light of the prospectus rules.

### 10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?

A private offering is usually structured in a way that it falls outside the scope of the prospectus rules. Hence, no prospectus is required in such case. Please see the answer to question 3, which sets out the requirements to fall outside the prospectus regime in Germany.

### 11 Describe the public offering process for debt securities. How does the private offering process differ?

The public offering usually provides for a subscription period in which the product is marketed. This could be two to four weeks or even longer. The prospectus is used in that process together with any marketing material and the product information sheet (see answer to question 4). Investors will subscribe to the product and only after the end of the subscription period will the product be issued and paid for. All investor communication is based on the information contained in the prospectus.

In contrast, the private offering differs substantially. Potential investors are approached prior to the launch of the transaction to solicit demand for the product. The product is launched on a specific day, investor commitments are collected by way of an accelerated book building during the launch date and finally the deal is priced on the same day. The deal is then settled and closed within a few days.

### 12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?

In a closing of an investment grade corporate bond, the following documents are usually required for closing:

- legal opinion of underwriter's counsel in respect of enforceability of transaction documents;
- legal opinion of issuer's counsel in respect of capacity of issuer;
- corporate authorisations;
- comfort letter by issuer's auditor; and
- signature list.

**13 What are the typical fees for listing debt securities on the principal exchanges?**

In respect of a listing at the open market of the Frankfurt Stock Exchange the following level of fees should be expected:
- one-off fee for inclusion;
- generally €50;
- €100, provided that applications of more than one participant exist for the same security;
- €500, provided that the security is included in connection with an application for shares, certificates or fund shares (eg, any underlying shares);
- no ongoing listing fee; and
- fees payable to the participant for market making services.

In respect of a listing at the regulated market the fees are approximately:
- listing fee payable to the Frankfurt stock exchange: €5,500;
- annual listing fee payable to the Frankfurt Stock exchange: €7,500 to €10,000;
- application fee for BaFin approval: €6,500; and
- fee to credit institution for introduction of bonds to the regulated market.

**14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?**

The German market for convertibles and exchangeables is very active and many issuers are frequently issuing these type of instruments. In the last two years 'equity-neutral transactions' have become quite popular. The company issues a cash-settled convertible and enters into a call option to hedge the price risk under the convertible (in contrast the German market does not see any call spread overlays transactions in order to hedge the strike price of the convertible owing to statutory limitations and usually limited authorisations by shareholder meetings).

In addition, the German derivatives market is very popular with retail investors. Certificates provide retail investors with an equity derivative exposure (eg, share-linked certificates, bonus certificates, express certificates, knock-in and knock-out certificates, index and performance certificates and discount certificates) – the retail equity derivatives market in Germany is worth €70–100 billion.

**15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?**

No specific rules apply to these instrument. Convertibles and exchangeables in the German market are issued exclusively to the private placement market.

**16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?**

For German capital markets law the distinction derives from the German securities act in order to classify securities as debt or equity securities. The distinction is fundamental as different disclosure regimes apply to each set of securities. Equity securities are shares and other transferable securities equivalent to shares in companies, as well as any other type of transferable securities giving the right to acquire any of the aforementioned securities as a consequence of their being converted or the rights conferred by them being exercised, provided that securities of the latter type are issued by the issuer of the underlying shares or by an entity belonging to the group of the said issuer.

**17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?**

There are not any transfer or trading restrictions applicable to privately offered debt securities. If the privately offered debt securities are onsold, the transferor needs to ensure to fall under the exemption from the obligation to produce an offer prospectus. Each onsale needs to be analysed to see whether it constitutes a public offer and requires a prospectus. See question 3 in respect of the typical safe harbours for private placements and subsequent transfers.

**18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?**

There are no specific rules for either case. However, within the European Union the European passport regime for securities prospectuses exists. The current EU prospectus rules ensure that adequate and equivalent disclosure standards are in place in all EU countries so that investors can benefit from the same level of information. Under these rules, once a prospectus has been approved in one EU country, it is valid throughout the EU (single passport for the issuers). Consequently, a foreign issuer (from within the EU) may offer debt securities in Germany based on a prospectus approved in its home country without approval by BaFin.

**19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?**

Yes, BaFin may approve the prospectus of an issuer incorporated in a third country, if the competent authority of the issuer has approved such prospectus provided that (i) the prospectus has been drawn up in accordance with international standards set by international securities commission organisations, including the IOSCO disclosure standards, and (ii) the information requirements, including information of a financial nature, are equivalent to the requirements under the German Securities Act.

In order to ensure uniform application, the Commission has adopted implementing measures stating that a third country ensures the equivalence of prospectuses drawn up in that country with European law, national law, or practices or procedures based on international standards set by international organisations, including the IOSCO disclosure standards.

**20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?**

It is rarely that underwriters provide for a hard commitment prior to any back-to-back commitment from investors. Hence, in public offerings as well as in private offerings the underwriters only commit their underwriting at the end of the book building phase. Hence, the underwriting arrangements mainly covers the period from pricing to closing of the transaction. The underwriting banks have an incentive to get an attractive deal for issuers (size, maturity and pricing) as the fee schedule is based on these parameters. However, issuers do not know the market acceptance until the real launch. The main difference between a public and private offering in respect of the underwriting arrangement are the representations in respect of the disclosure. In the case of a public offering, the underwriters are also responsible in realtion to investors regarding the prospectus and, hence, want to ensure that the issuer's parts are correct, complete and not misleading. These representations are usually backed by a strong indemnity in favour of the underwriters.

**21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?**

Underwriters are in all cases credit institutions as the activity requires a banking licence. Investment broking, investment advice as well as placement business are all regulated activities that require a banking licence. See question 2. No specific approval with respect to the

**Update and trends**

From a legal perspective the market is preparing for the new prospectus regime that comes into force at the end of 2018 and is very engaged in the discussions related to the level 2 and level 3 measures. The new prospectus regime forms part of the overall political project to form a European capital market union to overcome fragmentation, increase liquidity and bolster crisis absorption. Not all cornerstones of the capital market union are in place yet, but it remains to be seen whether this major political project has a huge impact on the debt capital markets.

underwriting arrangement is required under German law (except for any internal corporate approvals).

**22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?**

Following the pricing of the transaction a standard bond transaction will be settled within t+2. The issuer has signed the global bond and send the original to the issuing and paying agent on 't'. The paying agent 'activates' the global bond by authenticating it with its signature. It will deliver the global bond physically to Clearstream Frankfurt as the safe custodian. Meanwhile the underwriters have collected the issuance proceeds and on the settlement date, the paying agent ensures delivery of the bonds versus payment of the proceeds (DVP settlement). The issuance proceeds will be paid outside the clearing system directly by the paying agent (on behalf of the underwriters) to the issuer (fees and costs are usually directly deducted). The bonds will be booked into the accounts of the clearing members with Clearstream Frankfurt and to the relevant investors. The bonds are admitted to trading on the settlement date.

**23 How are public debt securities typically held and traded after an offering?**

Debt securities are commonly held in bearer form and in global format. The bonds are immobilised which means they are held in book entry format via Clearstream Frankfurt as the clearing system. Each investor is a co-owner of the global bond. Definitive bonds are commonly excluded (except for specific tax reasons or a disruption of the clearing system).

**24 Describe how issuers manage their outstanding debt securities.**

Issuers may buy back any outstanding debt securities in the market at any time. Common bond terms and conditions provide for a specific clause allowing for such repurchase and a potential reissuance. Although such repurchase may be done on a case-by-case basis individually in the market, issuers often prefer a public tender offer in order to avoid any market abuse and insider considerations. Any such tender offer in Germany is usually structured as an invitation to bondholders to offer their bonds, which the issuer may accept after the end of the tender period. Hence, the issuer is in control to buy back the bonds.

**25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?**

The initial prospectus makes disclosure of all the information investors need to take into account to make their investment decision. Thereafter, every year an issuer has to publish an annual or semi-annual report to the market under the Transparency Directive, which has been transformed into German law in the Securities Trading Act. Pursuant to section 37v para. 1 of the German Securities Trading Act, companies that issue securities as domestic issuers are required to prepare and publish annual financial reports four months following the end of the reporting period. Pursuant to section 37w paragraph 1 of the German Securities Trading Act, companies that as domestic issuers issue shares or debt securities are required to prepare and publish semi-annual financial reports covering the first six months of the financial year. Pursuant to section 37z WpHG, companies that exclusively issue debt securities with a minimum denomination per unit of €100,000 (or the equivalent thereof) or companies that exclusively issued outstanding debt securities with a minimum denomination per unit of €50,000 (or the equivalent thereof) and which were admitted to trading prior to 31 December 2010 are exempted from the reporting obligations.

Under the market abuse regime, an issuer has to disclose price-sensitive information to the market as soon as possible after it receives it.

**26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?**

The main areas of liability are (i) prospectus liability and (ii) mis-selling claims.

The prospectus liability is mainly regulated in the Securities Prospectus Act (although the general principles under German civil law may also apply in addition). Paragraph 21 of the securities prospectus act defines the potential debtor of any claim: (i) the person who takes responsibility for the prospectus (who is usually the issuer); and (ii) any person who has initiated the prospectus (who is usually the underwriter and arranger). These persons are liable for any materially wrong or incomplete information. The same is true for any missing prospectus.

The other area is the liability regime for mis-selling. German courts often construe the relationship between underwriter or arranger and investor as a financial advisory arrangement. Even without a specific advisory contract, credit institutions find themselves very easily (based on recent judgments) in the area of providing financial advice to investors (professional as well as retail investors). In such scenario, specific requirements need to be fulfilled in the sales and marketing process that may otherwise give rise to a mis-selling claim (a clear description of the product, exploring the needs of the investor, avoiding any personal conflicts of interest when providing investment advice).

**27 What types of remedies are available to the investors in debt securities?**

Bondholders may have various remedies in respect of an investment in debt securities:

- mis-selling claims (including claims in tort and fraud);
- pre-contractual wrongdoing when selling the product;
- breach of subscription agreement;
- breach of the terms and conditions of bond (including additional supplemental duties of the issuer); and
- prospectus liability.

**28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?**

BaFin has a broad range of tools to ensure compliance with the various regulations. Apart from information rights, it may request amendments to a prospectus, prohibit the distribution of a product or even request the unwinding of a transaction. In addition, BaFin may issue substantial monetary fines and prohibit the further issuance of securities. With the introduction of MifiD II, BaFin has more product intervention rights and may even prohibit specific type of products (which it has planned for credit-linked notes but pulled back for now).

**29 What are the main tax issues for issuers and bondholders?**

If straight corporate bonds are held as private assets by an individual investor whose residence or habitual abode is in Germany, payments of interest under the bonds are generally taxed as investment income at a 25 per cent flat tax (plus a 5.5 per cent solidarity surcharge thereon and, if applicable to the individual investor, church tax). The flat tax is generally collected by way of withholding and the tax withheld shall generally satisfy the individual investor's tax liability with respect to bonds.

If straight corporate bonds are held as business assets by an individual or corporate investor who is tax resident in Germany (ie, a corporation with its statutory seat or place of management in Germany), interest income from the notes is subject to personal income tax at individual progressive rates or corporate income tax (each plus a 5.5 per cent solidarity surcharge thereon and church tax, if applicable to the individual investor) and, in general, trade tax.

Subject to the saver's lump sum tax allowance for investment income, capital gains from the sale or redemption of any bonds held as private assets are taxed at the 25 per cent flat tax (plus a 5.5 per cent solidarity surcharge thereon and, if applicable to the individual investor, church tax). The capital gain is generally determined as the difference between the proceeds from the sale or redemption of the bonds and the acquisition costs. Capital losses from bonds held as private assets are generally tax-recognised irrespective of the holding period of the bonds. If bonds are held as business assets by an individual or corporate investor who is tax resident in Germany, capital gains from the bonds are subject to personal income tax at individual progressive tax rates or corporate income tax (plus solidarity surcharge thereon and church tax, if applicable to the individual investor) and, in general, trade tax. Capital losses from the sale or redemption of any bonds should generally be tax-recognised and may generally be offset against other income.

In respect of non-German tax resident investors generally no withholding tax shall be withheld, unless (i) the bonds are held as business assets of a German permanent establishment of the investor or by a permanent German representative of the investor or (ii) the income derived from the bonds otherwise constitutes German-source income (such as income derived from the letting and leasing of certain property located in Germany).

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# Hong Kong

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**1 What types of debt securities offerings are typical, and how active is the market?**

Hong Kong has emerged as a global leader in international finance, ranking third behind New York and London on the Global Financial Centres Index. Its financial markets operate under a well-developed and transparent regulatory regime and a stable legal framework. Foreign issuers and international investors alike can gain access to its debt markets relatively free of restrictions.

As a result of its favourable legal environment Hong Kong enjoys a diverse debt capital market, with a wide range of debt instruments being frequently issued in Hong Kong, from corporate and convertible or exchangeable bonds to exchange fund notes and bonds issued by governments and supranationals.

The commercial terms and conditions of bonds issued to professional investors in Hong Kong are not legally prescribed and thus are driven by commercial requirements. They may be issued on a stand-alone basis or under a programme denominated in a range of currencies and interest bases, and may feature credit enhancements in the form of guarantees, security, keepwells, stand-by letters of credit or other forms of credit support. They may also contain derivative elements such as an option to convert or exchange into equity or another form of security. High-yield bonds issued by issuers who are unrated or have credit ratings below investment grade will contain certain restrictive covenants designed to make the bonds more attractive to investors. In addition, deeply subordinated 'debt-like' instruments that comply with regulatory capital requirements are issued by banks in Hong Kong.

The development of Hong Kong's debt capital market has been facilitated by support from the Hong Kong government. For example, the Hong Kong Monetary Authority (HKMA) has established links with clearing systems overseas to facilitate real-time settlement of US dollar, euro and yuan-denominated debt securities. In addition, legislation has been passed to allow the Hong Kong government to issue Islamic sukuk bonds in an effort to make Hong Kong a world leader in the sukuk bond market. The Hong Kong regulators have worked with their mainland Chinese counterparts to develop Hong Kong as an international centre for offshore yuan, as demonstrated by the HKMA's elucidation of supervisory principles and operational arrangements regarding yuan in 2010, which opened the offshore yuan bond market in Hong Kong ('dim sum bonds'). China's Ministry of Finance has issued dim sum bonds every year since 2009.

Hong Kong has a thriving bond market, with approximately US$181 billion outstanding Hong Kong dollar debt instruments at the end of 2014. Dim sum bonds (ie, offshore RMB bonds) recently emerged as a driving force with both Hong Kong and foreign issuers issuing fixed and floating rate bonds. According to the Hong Kong Trade and Development Council, issuance of dim sum bonds in Hong Kong from more than 100 issuers reached 197 billion yuan in 2014, compared with that of 116.6 billion yuan in 2013. The outstanding dim sum bonds issued in Hong Kong amounted to 381 billion yuan as of end-2014. The issuer base of dim sum bonds became more diversified. According to the HKMA, for dim sum bonds issues up to end-December 2014, mainland authority, banks and enterprises jointly issued 42 per cent of the bonds, banks and enterprises from Hong Kong issued 19 per cent of the bonds, while overseas corporations contributed the remaining share.

**2 Describe the general regime for debt securities offerings.**

Broadly speaking, the Companies (Winding Up and Miscellaneous Provisions) Ordinance (COWUMPO) sets out the prospectus requirements for the offering of shares in or debentures of a company (whether Hong Kong-incorporated or overseas-incorporated) to the public in Hong Kong. The COWUMPO also contains the safe harbours for the private placement of debt securities (see question 10). The prospectus requirements in the COWUMPO apply to shares and 'debentures' which, in broad terms, are defined in the COWUMPO to mean plain vanilla debt securities.

If the debt securities are structured products, then the offering of such securities is governed by the Securities and Futures Ordinance (SFO), in particular, Part IV (Offers of Investments) of such ordinance. The SFO is a comprehensive piece of legislation in Hong Kong governing various aspects of securities regulation including the offering of financial products, the licensing of intermediaries and market behaviour.

If the debt securities are to be listed on the Stock Exchange of Hong Kong Limited (SEHK), then the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Ltd (the Listing Rules) also apply. There is no specific statutory requirement in Hong Kong for debt securities offerings in Hong Kong to be listed (whether on the SEHK or an overseas exchange).

**3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.**

For public offers of plain vanilla debt securities to the public in Hong Kong, a prospectus is required to be registered by the Registrar of Companies. The prospectus has to be first approved for registration by the Hong Kong Securities and Futures Commission (SFC).

For certain capital instruments issued by banks, the issuer has to confirm to the HKMA that the debt securities will be issued with terms and conditions that meet the qualifying criteria set out in the Banking (Capital) Rules of Hong Kong for inclusion, as the issuer's additional tier 1 capital or tier 2 capital and the issuer has to obtain the consent of the HKMA for early redemption of any such capital instruments.

**4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?**

Under the COWUMPO, a prospectus is required to be produced for a public offer of plain vanilla debt securities in Hong Kong. The prospectus has to be registered by the Registrar of Companies and the SFC has to approve the registration. Practically speaking, the SFC is the authority for reviewing and vetting the prospectus to ensure that it satisfies the contents requirements as contained in Schedule 3 to the COWUMPO.

Schedule 3 to the COWUMPO sets out the detailed information required in prospectuses. Among other things, one of the items set out in Schedule 3 requires:

> *sufficient particulars and information to enable a reasonable person to form as a result thereof a valid and justifiable opinion of the [...] debentures and the financial condition and profitability of the company at the time of the issue of the prospectus, taking*

*into account the nature of the [...] debentures being offered and the nature of the company, and the nature of the persons likely to consider acquiring them.*

As mentioned in question 2, the COWUMPO also contains the safe harbours for the private placement of debt securities, for which the prospectus requirements do not apply. The safe harbours will be discussed in further detail in question 10.

If the debt securities are to be listed on the SEHK, then the SEHK's requirements for the contents of listing documents as set out in the Listing Rules (in addition to the COWUMPO requirements) must also be complied with. There are special requirements for listing documents issued by investment companies, states, supranations, state corporations and banks.

### 5 Describe the drafting process for the offering document.

The drafting process for a prospectus or offering document in Hong Kong is much the same as the process in other well-developed jurisdictions and follows international standards, with the issuer and its counsel taking primary responsibility for the drafting and contents of the offering document. The offering document generally includes, among other things, a description of the securities and the issuer's business operations and associated risk factors, and in some cases a section on management's discussion and analysis of the results of operations and the financial condition of the issuer, derived from the issuer's audited financial statements, which are typically reproduced as an appendix to the offering document. However, the underwriters and their counsel will normally take the lead in the preparation of the description of the debt securities and certain sections of the offering document pertaining to the underwriting and distribution of the securities.

The offering document is subject to review and due diligence by the underwriters of the bond issue, with the underwriters and their counsel often participating in one or more drafting sessions with the issuer and its counsel, as well as the issuer's auditors, to discuss the offering document. In particular, the underwriters will want to ensure that the offering document does not contain any material misstatements or omissions, which will include careful discussion with the issuer of its key risks and the key drivers behind its operating and financial performance and ability to repay its debt securities.

### 6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

Debt securities in Hong Kong are typically issued under a trust deed or (in the case of New York law) indenture, or under a fiscal agency agreement, governed under English, New York or Hong Kong law. The terms and conditions of the notes are typically set forth as covenants in a trust indenture as supplemented by global notes, or are set out as an annex to a trust deed or agency agreement and incorporated into the debt securities (which are typically issued in, and represented by, notes in global form that are deposited with and held by a nominee of the custodian or 'common depositary' of the relevant clearing systems) issued to investors.

The terms and conditions of the debt securities are typically described or set forth in full in the prospectus or offering document, and copies of the trust deed or indenture and fiscal agency agreement can generally be obtained from the trustee or fiscal agent.

### 7 Does offering documentation require approval before publication? In what forms should it be available?

For offers of plain vanilla debt securities to the public in Hong Kong, the prospectus must be registered with the Registrar of Companies on or before the date of its publication. Before registration the prospectus has to be vetted, and approval for the registration granted, by the SFC. The COWUMPO requires the prospectus to be published in both English and Chinese languages. There are also stringent content requirements for the prospectus as set out in the COWUMPO. If the debt securities are to be listed on the SEHK, then the offering documents must also comply with the requirements in the Listing Rules and be vetted by the SEHK prior to publication. The requirement under the COWUMPO for prospectuses to be published in both English and Chinese languages is generally considered by the market to be a burdensome requirement.

If the offer of the plain vanilla debt securities is made pursuant to one of the safe harbours in the COWUMPO (see question 10), then an offering document compliant with the prospectus requirements in the COWUMPO is not required to be published. For such offerings, it is usual market practice that an offering document consistent with international standards in the Eurobond market be produced to investors. If the debt securities are to be listed on the SEHK, the Listing Rules also contain a simplified process for the listing of debt issues to professional investors only. In particular, there is no specific content requirement for the listing document for such listings, and the listing document only has to contain 'the information that the investors an issuer is offering the securities to would customarily expect it to contain'.

### 8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?

For offerings of plain vanilla debt securities to the public in Hong Kong, the COWUMPO requires publication of a prospectus. The prospectus has to be registered by the Registrar of Companies and the SFC has to approve the registration. The SFC is the authority for reviewing and vetting the prospectus to ensure that it satisfies the contents requirements as contained in Schedule 3 to the COWUMPO. The vetting of the prospectus by the SFC is a detailed process and usually takes at least six to eight weeks.

The COWUMPO places limitations on publicity before the prospectus has been approved. Essentially, any advertisement or any other document circulated to invite the public to subscribe for the debt securities will be subject to the prospectus requirements (hence requiring SFC approval). Consequently, issuers and underwriters cannot market the debt securities to the public by means of any document during the review process.

Offerings of debt securities to the public in Hong Kong are more involved than offerings to professionals only, as they are subject to the approval of a prospectus by the SFC and registration of such prospectus with the Registrar of Companies. If the debt securities are to be listed on the SEHK, the prospectus would also have to be vetted and approved by the SEHK. For offerings of debt securities to professionals only (hence exempt from the prospectus requirement), which are to be listed on the SEHK, the relevant offering document would nonetheless require SEHK approval.

For a public offer of debt securities, the listing process culminates in a listing hearing, with the offering document being issued approximately one week after the listing hearing. The initial listing application with supporting documentation is typically submitted to the SEHK at least two clear weeks before bulk printing of the offering document. The SEHK approval process is iterative, and drafts of the offering document are reviewed by the SEHK and the SFC until they have no further comments and the listing committee approves the offering document.

### 9 On what grounds may the regulators refuse to approve a public offering of securities?

The SFC will not approve the registration of a prospectus unless it is satisfied that the prospectus contains the information required under the COWUMPO. The SFC may dispense with certain requirements but only on limited grounds.

### 10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?

The COWUMPO contains certain 'private placement' safe harbours. If plain vanilla debt securities are offered in reliance on one of these safe harbours, then the prospectus requirements under the COWUMPO do not apply. The most frequently relied-upon safe harbours are:

- an offer to professional investors;
- an offer in respect of which the minimum denomination of the debt securities is not less than HK$500,000 (or its equivalent in another currency); and
- an offer to not more than 50 persons.

'Professional investors' is defined in the SFO and the term includes: institutional investors such as licensed intermediaries, authorised financial institutions, insurers, collective investment schemes and pension schemes; and high-net-worth individuals, corporations and trusts.

Note that even if the prospectus requirements under the COWUMPO do not apply to a private placement, it is usual market practice that an offering document consistent with international standards in the Eurobond market be produced to investors.

As noted above, the Listing Rules contain a simplified process for the listing of debt issues to professional investors only. In particular, there is no specific content requirement for the listing document for such listings and the listing document only has to contain 'the information that the investors an issuer is offering the securities to would customarily expect it to contain'. The SEHK will not therefore vet the substantive contents of the listing documents to assess whether they are in compliance with the Listing Rules. In order to be eligible to be listed under this simplified process, the debt securities must be (among other things) freely transferable with a minimum denomination of at least HK$500,000 (or the equivalent in other currencies).

### 11 Describe the public offering process for debt securities. How does the private offering process differ?

A large proportion of the market for debt securities in Hong Kong is done by way of a private placement (ie, in reliance on one of the safe harbours as explained in question 10), so the prospectus requirements under the COWUMPO will not have to be complied with. The private placement offering process for debt securities in Hong Kong is similar to that in other jurisdictions, as set forth below.

**Mandate and execution phase**

An offering kicks off once an issuer in an offering of debt securities has mandated one or more lead managers to market the securities to investors. The principal commercial terms and the timetable will then be agreed. The timetable is typically driven by the need to find a suitable 'market window' in which the issuer and the lead managers believe that the offering of the issuer's debt securities would most likely succeed. If the issuer is a seasoned issuer that regularly goes to market with offering materials drafted to international standards, the timetable can be considerably shorter than where the issuer is a debut issuer with no existing documentation for use as a starting point. In addition, a drawdown off of an established programme could typically happen more quickly than a drawdown done in connection with a new programme establishment or a stand-alone offering.

Depending on these factors, the typical timing of a deal could range from a few days (such as for a drawdown under a programme) to a number of months (such as for a debut issuer). The documentation process is an iterative one, with the issuer and the lead managers working with professional service providers including counsel, auditors, the trustee and fiscal and paying agents to get the prospectus or offering document and other transaction documentation in agreed form before launch.

If the debt securities are to be listed on the SEHK, then sufficient time should be built into the timetable to allow for the vetting and approval of the listing document by the SEHK.

**Marketing phase**

Once the documentation has been agreed, the launch of the offering will take place, with the debt issuance being announced publicly and the lead managers commencing the marketing phase of the transaction. This marketing phase can last a matter of hours for seasoned issuers that are well-known to investors, or can involve a multi-day 'road show' lasting up to two weeks. Although, typically, securities are marketed on the basis of a preliminary offering document setting out the information relating to the securities being offered other than the final pricing details, where securities are being marketed on an 'accelerated bookbuild' basis, which is not uncommon in the Hong Kong convertible bond market, they are marketed on the basis of a termsheet. Such public announcement and marketing activities are conducted in accordance with offering and publicity restrictions under the COWUMPO and SFO, as discussed above.

**Pricing**

Once the underwriters have 'built the book' and priced the securities with the issuer, the parties will sign a subscription agreement, which sets out the pricing terms and contractual obligations of the issuer to issue and for the underwriters to subscribe and pay for, or procure subscriptions and payment for, the securities on an agreed-upon closing date, subject to satisfaction of certain conditions precedent. The period from signing to closing is typically up to five business days, depending on the complexities of the closing mechanics.

**Settlement**

At closing, the transaction documents are executed, the securities are issued and the proceeds are paid to the issuer.

In contrast to private placements, it is usual for debt securities offered to the retail public in Hong Kong to be distributed by 'placing banks', which are the retail banks in Hong Kong. The offering period will typically be around one month, allowing retail investors to subscribe for the securities at a placing bank branch.

### 12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?

The key closing documents for a stand-alone issue are the executed fiscal agency agreement and deed of covenant (in the case of a fiscal agency structure), or the executed trust deed or indenture and paying agency agreement (in the case of a trustee structure), global notes, legal opinions, auditors' comfort letters, ratings confirmations, closing certificates, payment instructions and receipt letters. For a drawdown off a programme, typically a subscription agreement and pricing supplement are the key contractual documents with the same ancillary documents as for a stand-alone issue.

### 13 What are the typical fees for listing debt securities on the principal exchanges?

The principal exchange in Hong Kong for the listing of debt securities is the SEHK. The listing fees on the SEHK range from HK$10,000 to HK$90,000 for debt securities, depending on the tenor and principal amount of the securities offered.

### 14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?

The market for equity-linked instruments issued by corporates for capital fundraising purposes (in the form of exchangeable bonds (EBs) or convertible bonds (CBs), for example) is relatively active in Hong Kong, although confined mainly to the institutional side. It is rare for such instruments to be offered to the retail public in Hong Kong.

In terms of derivative products issued for investment purposes, historically, Hong Kong had a vibrant market for retail structured products, of which credit-linked and equity-linked notes were the most prevalent. However, following the 2008–2009 financial crisis, such products have largely fallen out of favour with retail investors and the SFC has made obtaining approval for such products significantly more difficult. The retail market for listed derivative warrants remains relatively active in Hong Kong.

Structured products are still seen in the private placement market.

### 15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?

As mentioned in question 2, if a debt security falls under the definition of 'structured product', the offering will be governed by the SFO instead of the COWUMPO. Equity-linked instruments issued by corporates for capital fundraising purposes in the form of EBs and CBs do not fall under the definition of 'structured product' and hence the prospectus requirements and safe harbours contained in the COWUMPO described above apply equally to EBs and CBs issued by corporates for capital fundraising purposes.

For debt securities falling under the definition of 'structured products', the offering of investments regime in the SFO applies. In general terms, for offers of structured products to the public in Hong Kong, an SFC-authorised offering document is required. In addition, the structured product itself has to be authorised by the SFC, which will apply a set of stringent product eligibility criteria. There are certain safe harbours from these requirements, with offers to professional investors being the one most frequently relied upon.

### 16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?

The prospectus requirements under the COWUMPO apply to 'shares' and 'debentures'. Shares are generally defined to mean shares in a company's share capital, while debentures include bonds and other debt securities. The provisions in the COWUMPO on prospectus requirements, private place safe harbours and contents requirements for prospectuses apply similarly to both debt and equity securities.

The more important product classification for the purpose of Hong Kong securities laws is the structured product or debt securities classification. If a debt security is a debenture, then the offering would be governed by the COWUMPO. On the other hand, if a debt security is a structure product, the offering would be governed by the SFO, and the SFC would need to authorise the product in addition to the offering document if such structured product is offered to the public in Hong Kong.

The Listing Rules contain different chapters on listing equity and debt securities on the SEHK. EBs and CBs are generally regarded as debt securities.

### 17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?

No general restrictions on the transferability of debt securities are imposed in connection with private placements, unless any subsequent placement of the relevant securities would qualify as a public offer, in which case the requirement to draw up a prospectus would apply (see question 2). In the context of private placements, it is customary for the transaction documentation (notably the underwriting agreement and the offering memorandum) to include an undertaking by the underwriters or managers not to offer and sell the debt instruments in a way that could trigger the requirement to draw up a prospectus under the applicable laws and regulations. Typically, these undertakings are devised to make sure that the relevant offer of securities falls under one of the safe harbours provided for in the COWUMPO (see question 10).

### 18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?

The prospectus requirements in the COWUMPO generally apply equally to issuers incorporated in Hong Kong and outside Hong Kong. For issuers incorporated outside Hong Kong, there is the additional 'professional exemption' under which offers of shares or debentures to 'persons whose ordinary business is to buy or sell shares or debentures, whether as principal or agent' are deemed not to be offers to the public.

### 19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

Hong Kong has a liberal debt regulatory regime, with no limitation on foreign issuers accessing its debt markets as well as free access for international investors to purchase debt instruments issued in Hong Kong.

The HKMA operates the Central Moneymarkets Unit (CMU), which is a clearing and settlement system for Hong Kong dollar as well as certain non-Hong Kong dollar-denominated bonds, such as dim sum bonds, with links to other overseas clearing systems that facilitate the cross-border settlement of debt securities. The CMU operates the 'CMU BID' bond tendering service that, for example, China's Ministry of Finance has used to issue sovereign yuan bonds in Hong Kong.

In addition, the HKMA maintains US dollar and euro real-time-gross-settlement systems (RGTS systems) that facilitate the efficient settlement of US dollar and euro-denominated debt securities on a real-time basis, as well as a yuan RTGS system to cater for the clearing and settlement of yuan in Hong Kong. The RGTS systems operate on an open platform riding on SWIFTNet to enhance inter-operability with global settlement systems.

### 20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

Offerings of debt securities in Hong Kong typically involve 'several and not joint' underwriting. This means that if one manager defaults, the other managers are not obliged to take up the defaulting manager's commitment. If there is more than one manager, the managers will typically enter into an agreement among themselves, which is separate from the subscription agreement between the managers and issuer, to specify the principal amount that each manager agrees to subscribe for, as well as the distribution of commissions between themselves. Typically, the managers will use the form of agreement among managers published by the International Capital Markets Association. However, under certain circumstances, the managers might not agree to underwrite an offering and would instead agree to use only 'best efforts' or 'reasonable endeavours' to find investors for the debt securities offered.

In general, there is no fundamental difference between the underwriting arrangements for public offers and private placements.

### 21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

Underwriters in Hong Kong must be licensed and supervised by the SFC. However, other than the requirements otherwise described herein, underwriting agreements entered into in connection with debt securities issuances in Hong Kong are not subject to approval by the SFC.

### 22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?

If the debt securities are going to be offered to the retail public in Hong Kong, then the prospectus requirements under the COWUMPO apply. The key transaction issues in such offerings typically include managing the review process by the SFC of the draft prospectus and dealing with SFC comments, which can take up to several weeks. The prospectus would also have to be registered by the Registrar of Companies before publication. Communication with the SFC is key to ensure that the required approvals and registration are obtained and made before the targeted offer period commences.

Other than that, the typical issues that are encountered in the professionals market would equally apply. For example, issues that are uncovered by due diligence that require additional disclosure in the prospectus or offering document. In particular, lead managers have become increasingly vigilant around issues pertaining to international sanctions, anti-bribery and corruption legislation and money-laundering, and seek to carry out enhanced due diligence depending on the jurisdictions in which the issuer conducts its business and, in some cases, the issuer's industry.

In addition, discussions with an issuer's auditors in respect of whether they are able to provide comfort on relevant figures in the prospectus or offering document can be protracted, and if the bonds being offered are to be secured, issues often arise with the taking of security owing to limitations under local laws.

Normally, lawyers will hold a pre-closing where they exchange executed copies of the transaction documentation to hold in escrow for release at the closing date. Pre-closings are especially prevalent in transactions involving guarantees or security over multiple jurisdictions.

On the closing date, the counsel for the managers will confirm that all of the conditions precedent in the subscription agreement have been met, at which time the parties to the transaction will confirm release of their executed documents from escrow and the managers will initiate the settlement of the transaction.

Settlement then involves the managers releasing the funds to the issuer (typically net of fees and expenses), and the issuer delivering the global securities to a common depositary that will credit the securities to the investors' securities accounts in the clearing system.

### 23 How are public debt securities typically held and traded after an offering?

Debt securities are usually represented by one or more global securities, whether in bearer or registered form. A global security may be exchangeable for definitive securities under limited circumstances, such as the occurrence of an event of default or if the clearing systems have closed down.

The global securities are usually held by or on behalf of the CMU or the relevant international clearing systems, such as Euroclear and Clearstream. Investors hold their entitlement to the securities either directly in accounts at the clearing systems, indirectly through custodians who have accounts at the clearing systems or indirectly through a chain of intermediaries leading to a direct account holder at the clearing systems. Trading after an offering is effected pursuant to electronic account transfers.

**24 Describe how issuers manage their outstanding debt securities.**

Issuers may manage their outstanding debt securities through a variety of liability management transactions, such as open-market purchases, consent solicitations, tender and exchange offers.

Under an English or Hong Kong law-governed bond (or a New York-law governed bond with a fiscal agency structure), the issuer may amend the terms of the bond by having a resolution passed at a meeting of holders. The process for bondholder meetings is typically set out in the trust deed or the agency agreement.

Under a New York-law governed bond under a trust indenture, the issuer may amend the bond indenture by way of a supplemental indenture upon evidence of the necessary bondholder consents being provided to the trustee.

The issuer may make an offer to holders of its outstanding debt securities to purchase the securities for cash or in exchange for new securities pursuant to a tender offer. The offer price or exchange price may be structured as a fixed price or a margin over a benchmark bond and typically includes a small premium to incentivise holders to tender. In the case of exchange offers, the new securities offered will need to be issued in accordance with Hong Kong securities laws.

Both tender offers and exchange offers may be coupled with 'exit consents', whereby tendering holders must give their consent to remove the financial covenants from the underlying bond instrument as a condition of their tender. However, exit consents are considered to be very coercive, since holdouts could potentially be left with worthless securities, a result that a court could construe as an abuse of minority investors.

**25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?**

There is generally no statutory reporting obligation imposed after an offering of debt securities. For certain capital instruments issued by banks, the issuer has to confirm to the HKMA that the debt securities will be issued with terms and conditions that meet the qualifying criteria set out in the Banking (Capital) Rules of Hong Kong for inclusion as the issuer's additional tier 1 capital or tier 2 capital and the issuer has to obtain the consent of the HKMA for early redemption of any such capital instruments.

If the debt securities are listed on the SEHK, then the Listing Rules prescribe certain continuing obligations. These include, among other things, making annual reports available to investors and notifying investors of certain material changes to the issuer's business or to its debt securities, as well as releasing information to the market in Hong Kong at the same time as the same information is released to any other markets where the same debt securities are traded.

Although technically not a reporting obligation relating to the offering of debt securities, issuers that are incorporated in Hong Kong are reminded of certain housekeeping matters which may require a filing to the Registrar of Companies.

**26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?**

Prospectus liability (both civil and criminal) is imposed under the COWUMPO in respect of prospectuses published pursuant to the COWUMPO. Specifically, where a prospectus invites persons to subscribe for shares in or debentures of a company, the following categories of persons may be liable to pay compensation to all persons who subscribe for any shares or debentures, on the faith of the prospectus, for the loss or damage they may have sustained by reason of any untrue statement included in and material omission from the prospectus:

- directors of the issuer at the time of the issue of the prospectus;
- persons who have authorised themselves to be named and are named in the prospectus as directors, or as having agreed to become directors either immediately or after an interval of time;
- promoters of the issuer; and
- persons who have authorised the issue of the prospectus. This category would catch the issuer itself and potentially any managers or underwriters.

The civil liability described above can therefore extend to the directors of the issuer in their personal capacity. In addition to such civil liability, the COWUMPO also imposes a criminal liability. Specifically, where a prospectus includes any untrue statements or material omissions, persons who authorised the issue of the prospectus shall be liable to imprisonment and a fine, unless they prove either that the statement was immaterial or that they had reasonable grounds to believe, and did up to the time of the issue of the prospectus believe, that the statement was true.

The civil and criminal liability described above under the COWUMPO applies to prospectuses published for public offers of debt securities. More generally, under the SFO, it is a criminal offence for anyone who fraudulently or recklessly induces others to invest money. There is also a corresponding civil liability for any person who induces other persons to invest money in certain circumstances. The SFO applies generally to any offering documents.

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### 27 What types of remedies are available to the investors in debt securities?

In addition to the statutory liabilities described above, investors in debt securities can also pursue a claim in contract or tort for misrepresentation under the offering documents.

### 28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?

The SFC has the power to seek a broad range of declaratory orders and injunctions for contravention of the prospectus-related provisions of the Companies Ordinance. Both the SFC and SEHK have the power to require additional prospectus disclosure and to halt a public offer or distribution of offer materials. This power includes the power to publicly announce that an issuer is failing to comply with regulatory obligations. In addition, the SEHK has the power to delist securities for contraventions of the Listing Rules and the SFC may institute civil and criminal proceedings for material misstatements and omissions in offering materials.

### 29 What are the main tax issues for issuers and bondholders?

Hong Kong has a relatively straightforward and liberal tax regime. For bond issues in Hong Kong, as in other jurisdictions, the tax issues centre on:

- from the issuer's income tax perspective, the tax deductibility of interest payments under the bonds;
- withholding tax in respect of payments under the bonds (which international investors would typically expect an issuer to 'gross up');
- stamp duties on the issue or transfer of the bonds; and
- profits and capital gains tax.

# Ireland

**Cormac Kissane, Glenn Butt and Fiona Cotter**

**Arthur Cox**

**1 What types of debt securities offerings are typical, and how active is the market?**

Debt securities offered in Ireland include asset-backed securities, vanilla debt securities, derivative-linked securities, government debt, covered bonds, secured and unsecured corporate bonds, high-yield bonds, loan participation notes and medium-term notes.

Issuers include the Irish government, sovereign states, financial institutions, global corporates and special purpose vehicles.

Issuers who decide to trade and list their debt in Ireland may choose between the Main Securities Market (MSM) or the General Exchange Market (GEM) operated by the Irish Stock Exchange (ISE). The MSM is an EU and EEA regulated market whereas the GEM is an exchange regulated market.

Due to access to Irish and international investors, the option of dual listing with certain international markets and what is generally considered to be an efficient listing process, the Irish debt capital markets are particularly active. According to the Central Bank of Ireland (Central Bank), at the end of 2016 the outstanding amount of debt securities issued by Irish resident entities totalled €725.7 billion.

The ISE is among the leading centres globally for listing bonds with statistics showing its debt listings growing by over 7 per cent to reach over 29,000 securities at the end of 2016. According to rankings released by the World Federation of Exchanges in early December last year, the ISE is now ranked second among global exchanges.

**2 Describe the general regime for debt securities offerings.**

The Irish regime comprises EU and Irish legislation and rules published by both the Central Bank and the ISE.

**EU legislation**

The legal framework is mainly based on EU legislation including the Prospectus Directive and EU Prospectus Regulation, the EU Market Abuse Regulation (which is directly effective and became law across the EU on 3 July 2016) and the Market Abuse Directive on Criminal Sanctions, and the Transparency Directive.

**Irish legislation**

Ireland has transposed the above directives by way of the Irish Prospectus Regulation, the Irish Market Abuse Regulation and the Transparency Regulation.

The Companies Act 2014 (the Companies Act) provides PLCs (public limited companies) with capacity to offer listed debt securities to the public. A private limited company cannot issue listed debt or make offers to the public. However, DACs (designated activity companies), a type of private company, have capacity to list and trade debt securities.

The Companies Act also sets out the criminal and civil liability regime for breaches of the prospectus, transparency and market abuse regimes.

**Central Bank Rules**

The Central Bank, as competent authority for the enforcement of the above legislation, has published the Prospectus Handbook, Transparency Rules and Market Abuse Rules, Guidance and Q&A, which set out procedural and administrative requirements and guidance in respect of the relevant directives and regulations.

**Listing Rules**

The ISE has published a comprehensive set of rules for listing a variety of debt securities on the MSM and GEM. These rules impose obligations on issuers of debt securities at the time of application for admission to trading and listing, and on an ongoing basis.

**The European Securities and Markets Authority (ESMA) Guidance**

ESMA, an independent EU Authority, has published guidance to help issuers and their advisers understand their disclosure requirements and other obligations under EU securities law.

**3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.**

An issuer who intends to make an offer of securities to the public in Ireland, or apply to have those securities listed on a regulated market, including the MSM, must first prepare and publish a prospectus that is subject to prior approval by the Central Bank.

In the Prospectus Directive, securities mean 'transferable securities' as defined in the Markets in Financial Instruments Directive (MiFID I). Public offerings of certain types of debt securities (eg, government bonds) are exempt from this requirement.

The issuer must submit the prospectus and relevant fee to the Central Bank together with any required supporting documentation, as set out in the Prospectus Handbook.

If the issuer applies to have the securities listed on the ISE, it must appoint a listing agent and submit the prospectus, application for admission to trading and the relevant fee to the ISE together with any supporting documentation required under the Listing Rules.

Once the prospectus is approved by the Central Bank, an issuer that is an Irish company registered under the Companies Act must file a copy of the approved prospectus with the Companies Registration Office (CRO) within 14 days of publication.

**4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?**

If securities are to be offered to the public, a prospectus must be produced, unless the offer is exempt, namely the offer is made:

- to qualified investors;
- to 150 or fewer persons (other than qualified investors);
- for a total consideration of at least €100,000 per investor;
- comprising securities with a minimum denomination of €100,000; or
- for a total consideration in the EU of less than €100,000, as calculated over 12 months.

A 'public offer' is defined very broadly under the Irish Prospectus Regulation and means a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities or apply to purchase or subscribe for those securities.

In all circumstances, if securities are admitted to trading on a regulated market, including the MSM, a prospectus must be prepared and approved by the Central Bank.

The following table indicates when a prospectus is required.

| Type of offer and securities | Is a prospectus required? |
| --- | --- |
| Exemption applies<br>Securities will not be listed on MSM | No |
| Exemption applies<br>Securities will be listed on MSM | Yes |
| Exemption applies<br>Securities will be listed on GEM | No |
| No exemption available | Yes |

The prospectus must comply with all EU and Irish Prospectus legislation and include information necessary to enable investors to make an informed assessment of the financial status and potential of the issuer and rights attaching to the securities.

The Prospectus Handbook provides that the prospectus may be prepared in one of the following formats:

- a single stand-alone document;
- a tripartite document (comprising a registration document, securities note and summary);
- a base prospectus and subsequent final terms; or
- a drawdown prospectus (a single stand-alone document which incorporates by reference all or part of a base prospectus).

The Prospectus Handbook also prescribes the content of a prospectus, which at a minimum must include a clear and detailed table of contents, a summary (if the minimum denomination of the securities is less than €100,000), risk factors and the information contained in the annexes to the EU Prospectus Regulation.

The prospectus must also contain a responsibility statement. The issuer, offeror and person seeking admission to trading must take responsibility for the whole prospectus. Certain persons can take responsibility for specified parts. This, however, is in addition to the responsibility attaching to the issuer, offeror and person seeking admission to trading.

Disclosures required to be made in the prospectus are set out in the Prospectus Handbook and the annexes to the EU Prospectus Regulation which contains helpful checklists of the minimum disclosure requirements for various types of securities.

The Central Bank may authorise the omission of certain information from a prospectus if, on receipt of an omission request from the issuer, it considers that:

- disclosure would be contrary to the public interest;
- disclosure would be seriously detrimental to the issuer, provided the omission would not be likely to mislead the public as to facts and circumstances essential for an informed assessment of the issuer and rights attached to the securities; or
- the information is of minor importance only for a specific offer or admission to trading and would not influence the assessment of the financial position and prospects of the issuer, offeror or guarantor (if any).

### 5 Describe the drafting process for the offering document.

The offering document for a public offer of debt securities is the prospectus. It is normally prepared by the issuer and its legal counsel although the underwriters and their counsel will review the drafts.

In determining whether to make certain disclosures or not, the issuer must bear in mind the requirement that the prospectus include all information necessary to enable investors to make an informed assessment of the financial status and prospects of the issuer and any guarantor and of the rights attaching to the securities. The prospectus must include the minimum disclosure requirements contained in the annexes to the EU Prospectus Regulation.

If the issuer or its advisers have doubts about the extent of the disclosures to be made, ESMA's guidance and Q&A on prospectus law may help them make judgements about the extent of the information to be supplied in the prospectus. As a member of ESMA's Board of Supervisors, the Central Bank will take this guidance into account in considering whether the issuer has complied with the Irish Prospectus Regulation.

In the drafting process, the area of most debate is often the description of the risk factors. The underwriters or lead manager may often want to disclose risks more fully than the issuer. Similarly, in the description of business or description of the issuer sections, the issuer may often want to paint a more positive picture than the underwriter or lead manager may agree with.

### 6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

The terms and conditions of the debt securities are usually governed by a trust deed made between the issuer and trustee (a financial institution appointed to represent interests of debt securities holders). The EU Prospectus Regulation and ESMA's guidance require an issuer to make documents referred to in the prospectus, including the trust deed, available for inspection and indicate in the prospectus where they may be inspected, by physical or electronic means.

The trust arrangement benefits the issuer and debt securities holders.

It provides flexibility for the issuer as the trustee may agree waivers and modifications without having to arrange meetings of debt securities holders to resolve and agree such waivers or modifications. In an enforcement action, the issuer would only have to defend one unified action from the trustee rather than multiple actions from individual securities holders. Also, an event of default normally only arises if the trustee forms the view that it materially prejudices the interests of the debt securities holders, and this again limits the issuer's exposure to multiple claims from individual securities holders.

On the other side, debt securities holders also benefit, for example, from the trustee's strong bargaining position as a representative of a large amount of debt. This can result in the inclusion of more protective covenants and more sophisticated monitoring of the issuer's compliance with those covenants. A unified enforcement action generally results in a more favourable outcome for a debt securities holder compared to an individual action against the issuer.

### 7 Does offering documentation require approval before publication? In what forms should it be available?

The prospectus must be approved by the Central Bank before it is made available to the public. The issuer must make the prospectus available to the public as soon as practicable and in any case, at a reasonable time in advance of, and at the latest at the beginning of, the offer or the admission to trading of the securities involved.

The prospectus is made available to the public in one of the following ways:

(i) by insertion in a newspaper widely circulated in Ireland;
(ii) in printed form and free of charge at the ISE's offices, or at the issuer's registered office and at the offices of the financial intermediaries placing or selling the securities, including paying agents;
(iii) in electronic form on the issuer's website, or, if applicable, on the website of the financial intermediaries placing or selling the securities, including paying agents;
(iv) in electronic form on the ISE's website; or
(v) in electronic form on the Central Bank's website.

If option (i) or (ii) is used, an electronic copy must also be made available in accordance with option (iii).

The Central Bank will publish all approved prospectuses on its website unless the issuer submits a non-publication request. Where such a request is submitted the issuer must confirm to the Central Bank that the prospectus will be published in another electronic format. The Central Bank will then publish a notice on its website with a link to the issuer's website where the prospectus has been published.

If an application for admission to trade on the GEM is made, the listing particulars must be approved by the ISE and made available to the public in one of the following ways:

(i) in a printed form to be made available, free of charge, to the public at the ISE's offices;
(ii) at the registered office of the issuer and at the offices of the financial intermediaries placing or selling the securities, including paying agents;

(iii) in electronic form on the issuer's website and, if applicable, on the website of the financial intermediaries placing or selling the securities, including paying agents; or
(iv) in electronic form on the ISE's website.

**8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?**

If debt securities are offered to the public, the prospectus must be reviewed and approved by the Central Bank. If an application to admit the securities to trade on a regulated market, including the MSM, is made, a dual submission to the Central Bank and ISE is required.

The dual submission process involves the following steps:
- the issuer (or its agent) submits the initial draft prospectus and supporting documentation to the Central Bank and ISE;
- comments may be provided within three business days. Effective 2 August 2016, the Central Bank reduced the turnaround times assigned to the review of supplements. Comments on supplements received before 5pm are now returned within one business day (ie, by close of business the following business day). Previously, the review time was three business days for non-financial supplements;
- the issuer submits a revised draft prospectus with replies to comments to the Central Bank and ISE;
- further comments may be provided within two business days;
- once the Central Bank and ISE are satisfied that all the relevant provisions of Irish and EU prospectus law have been fully addressed and all comments have been resolved, the prospectus can be approved;
- on the approval date, the issuer submits a final copy of the prospectus and supporting documentation to the Central Bank and ISE;
- the relevant fees should be paid in advance of approval;
- once the Central Bank approves the prospectus it will notify the issuer and ISE; and
- the ISE will then confirm its approval and the issuer's listing and admission to trading.

The time frame for approval depends on a number of factors including the level of completeness of the initial draft prospectus, the complexity of the securities, any issues arising in relation to compliance with the provisions of Irish and EU prospectus law and the time taken by the issuer to respond to comments issued on each draft of the prospectus and the extent to which comments are adequately addressed in subsequent drafts.

**9 On what grounds may the regulators refuse to approve a public offering of securities?**

The Central Bank may refuse to approve a prospectus, and therefore a public offering of securities, if it does not comply with all the relevant provisions of Irish and EU prospectus law or if during the review and authorisation process all comments raised by the Central Bank have not been resolved to its satisfaction.

The ISE may refuse an application for admission to list if it considers that admission of the securities would be detrimental to the interests of investors or that the issuer has not complied with the relevant listing rules or, for securities already listed in another EEA state, if the issuer has failed to comply with the obligations to which it is subject by virtue of that listing.

**10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?**

See response to question 3 for the filing requirements applicable to a public offer of debt securities.

If an offer falls within one of the exemptions listed in the response to question 4 and an application to list the securities on the GEM is made, listing particulars must be prepared in compliance with the GEM Listing Rules, approved by the ISE and made available to the public before the application is made. Such an issuer is also subject to the provisions of its constitutional documentation and, if it is an Irish company, the Companies Act.

The only exemption applies to an offering document for unlisted debt securities falling within one of the exemptions listed in the response to question 4, which are not subject to any registration requirements and there are no requirements for the content of the offer document.

**11 Describe the public offering process for debt securities. How does the private offering process differ?**

The public and private offering processes typically involve similar steps as set out below. The key difference is the publication of a prospectus approved by the Central Bank before an offer of securities is made to the public.

**Roadshow**

In many cases, in particular for first-time or infrequent issuers, a roadshow is conducted. On the roadshow, representatives of the issuer and underwriters or managers will meet prospective investors to assess interest in the deal, likely pricing and size of the transaction.

**Documentation**

The underwriter's legal counsel is normally responsible for preparing the documentation for the issuance, other than the prospectus or offering circular, which is prepared by the issuer's legal counsel. If applicable, time for the prospectus approval process described in the response to question 8 will have to be followed and factored into the schedule.

**Launch and syndication**

On the launch date, the issue will be announced to the market and, if the issue is syndicated, a lead manager will send the invitation telex, which shows the price and agreed fees, to the co-managers. Acceptance is not binding but there is a generally perceived moral obligation to purchase securities once acceptance has been sent.

**Listing**

If the securities are to be listed on the ISE, the process described in the response to question 8 will have to be followed and factored into the schedule.

**Signing**

On the signing date, a subscription agreement is signed by the issuer and underwriter or managers and listing documentation is submitted to a listing agent and delivered to the ISE. Documentation to be delivered on closing will be in agreed form on this date.

**Closing**

This is the final stage of the issue process and is when the securities are issued and the issuer receives the cash proceeds. On the closing date, conditions precedent to the issue, as set out in the subscription agreement, must be satisfied including the delivery of all remaining closing documents such as the issuer's closing and corporate certificates, legal opinions, payment instructions and confirmations, the auditors' comfort letter and letters from the relevant rating agencies, if required. If the securities are to be listed, the ISE will issue a formal notice of admission to trade and list on the relevant market.

**12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?**

The key documents that underwriters or initial purchasers require in public and private offerings of debt securities from the issuer or third parties include the following:
- offering circular summarising the issue;
- subscription agreement containing conditions precedent to the issue, interest rate, fees payable to underwriters and representations and warranties from the issuer;
- auditors' arrangement and comfort letter confirming there has been no adverse financial change since the date of the issuer's last audited accounts;
- legal opinions from the issuer's and underwriters' legal counsel as to the issuer's capacity and authority to issue the securities and the enforceability of the documents;
- trust deed pursuant to which a financial institution agrees to act as trustee of and represent all of the debt securities holders with a

duty to safeguard their interests and the issuer agrees to create the securities subject to certain terms and conditions;
- agency agreement containing the terms upon which paying agents are appointed and setting out the payment mechanics;
- closing and corporate certificate of the issuer containing all required approvals and authorisations;
- payment instructions and confirmations; and
- global bonds (permanent and temporary) signed by the issuer, authenticated by its agent and delivered to the common depository for safekeeping on behalf of the clearing system.

Underwriters or initial purchasers of a public offer of securities or an offer of securities that are admitted to trade on a regulated market, including the MSM, also require a copy of the approved prospectus, supplement, final terms and the notice of admission to trade, as appropriate.

**13 What are the typical fees for listing debt securities on the principal exchanges?**

Depending on the type of submission made (for example, a standalone prospectus or final terms under a programme), fees for listing on the MSM may comprise a combination of all or some of the following:
- ISE document fee;
- Central Bank document fee;
- security listing and admission to trading fee;
- issuer annual fee (this is €2,000, or alternatively a one-off fee of €10,000 can be paid prior to listing); and
- formal notice fee.

Again, depending on the type of submission made, fees for listing on the GEM comprise a combination of all or some of the above fees other than the Central Bank document fee (a prospectus approved by the Central Bank is not required to list on the GEM unless the securities are offered to the public).

**14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?**

The market for special debt instruments is not particularly active for Irish companies. A number of non-Irish companies do list such securities on the ISE.

**15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?**

Public offerings of special debt securities are subject to the prospectus regime and so a prospectus must be approved by the Central Bank and made available to the public before a public offer or application to list on a regulated market is made.

The GEM Listing Rules apply equally to debt, convertible and derivative securities, and so the requirements for the listing particulars are the same for all such securities.

The MSM Listing Rules, however, distinguish between debt (which includes convertible and exchangeable securities) and derivative securities. An issuer seeking admission of derivative securities must satisfy certain conditions relating to the issuer itself, its audited accounts, derivative products and retail derivatives, before the ISE will accept the application. Convertible securities may be admitted to listing only if the securities into which they are convertible are already or will simultaneously become listed securities. However, the ISE may dispense with this requirement if it is satisfied that holders of the convertible securities have all the information necessary to form an opinion about the value of the underlying securities.

**16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?**

Irish securities law generally describes equity securities as shares, transferable securities equivalent to shares and transferable securities which, if converted or if the rights conferred by them are exercised, give rise to a right to acquire shares or securities equivalent to shares.

Debt securities are usually described as bonds or other forms of transferable securitised debts except equity securities, or simply, all securities that are not equity securities.

Both debt and equity securities are subject to the prospectus (where there is a public offer or the securities are listed on a regulated market), market abuse and transparency regimes and listing rules, if the securities are listed.

Issuers of equity securities are subject to more onerous disclosure and reporting obligations under the transparency regime, for example, in relation to the notification of acquisition and disposal of major shareholdings where Ireland is the home member state.

Under the EU Market Abuse Regulation, which is directly effective and became law across the EU on 3 July 2016, persons discharging managerial responsibilities (PDMRs), as well as persons closely associated with them, within an issuer of debt or equity securities must notify the issuer and the Central Bank of transactions in such securities conducted on their own account. The issuer must then make the information public. The time limit for notifying the issuer and the Central Bank is three business days after the transaction, and the issuer must publish the details within the same time frame. The new regime also introduced an annual threshold of €5,000 so that PDMRs do not have to make any notification until this has been met. While competent authorities can increase this threshold to €20,000 (but must notify ESMA and justify it by reference to market conditions), Ireland has not done so. ESMA's Q&A on prospectus law refers to the confusion about the classification of convertible and exchangeable securities and provides clarity on the applicable disclosure requirements. If the new shares arising on conversion or exchange are not yet traded on a regulated market, the disclosure requirements contained in the EU Prospectus Regulation relating to shares apply, whereas if the shares are already issued and admitted to trading, the debt security disclosure requirements apply.

**17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?**

Restrictions are typically imposed on transfers of privately offered debt securities to investors in jurisdictions where an Irish issuer would be required to withhold tax on interest payments to investors in those jurisdictions. This applies only in the case of privately held securities but not to listed securities.

In addition, issuers of privately offered debt securities should ensure that any subsequent offer of the securities remains within one of the exemptions listed in the response to question 4 and would not require the preparation of a prospectus.

There are usually no other transfer restrictions on privately offered debt securities.

**18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?**

The Irish Prospectus Regulation defines an issuer as 'a body corporate or other legal entity which issues or proposes to issue securities'. It is therefore irrelevant whether the issuer is Irish or not. If a body corporate is making an offer to the public in Ireland or seeking to list its securities on a regulated market, including the MSM, it must comply with the prospectus, transparency and market abuse regimes.

Any prospectus relating to the issue of securities by an Irish company must be filed with the CRO within 14 days of publication. Non-Irish issuers are not required to comply with this requirement.

**19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?**

Once an issuer's prospectus is approved by the competent authority of an EEA member state other than Ireland, it may seek to have its prospectus passported into Ireland to enable its securities to be offered in and admitted to trading in Ireland. An issuer who wishes to do so should request the competent authority of their home member state to provide the Central Bank with a certificate of approval.

### 20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

The underwriting arrangement for public offerings of debt securities is governed by an agreement made between the issuer and entity appointed to act as underwriter or, if the securities are offered on a syndicated basis, all of the entities forming the syndicate.

Under this agreement, the issuer agrees to issue and the underwriters agree to subscribe or procure subscribers for the debt securities at an agreed price in accordance with certain terms and conditions. The issuer will usually give representations, warranties and undertakings in relation to various matters including the nature of the securities, preparation of its accounts and compliance of the prospectus with relevant law. The underwriters will also give an undertaking to comply with any selling restrictions set out in the agreement.

Underwriters on higher quality issues are jointly and severally liable. If the issuer is not as strong, underwriters are severally liable.

There is no substantial difference in the arrangements for private offerings of debt securities save for the conditions to the offer (including prospectus and listing requirements) and representations and warranties given by the issuer.

### 21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

Underwriters of financial instruments, including transferable securities, are regulated and supervised by the Central Bank under the Irish MiFID Regulations which transposed MiFID I into Irish law. The MiFID Regulations impose licensing requirements and conduct of business rules on investment firms that provide investment services or conduct investment activities (including the underwriting or placing of financial instruments) on a professional basis within Ireland in relation to certain financial instruments. The licensing requirement is subject to certain exemptions.

The Irish MiFID Regulations prohibit the advertising, supply or offer to supply investment services, the making of any solicitation in respect of investment services or the representation that a person is a provider of investment services, if the provision of such services may not be offered pursuant to one of the exemptions and would be in breach of the licensing requirement.

The existing MiFID regime in Ireland will be significantly impacted by the implementation of the Markets in Financial Instruments Directive II (MiFID II). MiFID II builds upon the framework established under MiFID I. Member States (including Ireland) are required to transpose MiFID II into national law by 3 July 2017. MiFID II will come into effect in all Member States on 3 January 2018.

### 22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?

See response to question 23.

The issuer will usually receive the proceeds into its account on the closing date and the securities are admitted to trading on issue, namely on the closing date. Settlement normally takes place on a delivery against payment basis in the main European or US clearing systems. There is no domestic clearing system in Ireland.

### 23 How are public debt securities typically held and traded after an offering?

Public debt securities are typically held in bearer or registered form and almost always as a global security. The global security is signed by the issuer on closing, authenticated by the issuer's agent and delivered to a common depository for safekeeping on behalf of the clearing system. The advantage of a global security over the alternative definitive form is cost and safety. Issuing one global security avoids the cost involved in issuing an individual security to each investor. Delivering one security to a common depository avoids the possibility of fraud that could arise if an individual security was printed and issued to each investor.

### 24 Describe how issuers manage their outstanding debt securities.

Certain features may be built into the terms and conditions of debt securities in order to assist an issuer in managing its securities post issuance; for example, the securities may be convertible or exchangeable or they may provide for early redemption mechanics. Liability management transactions can also be entered into post-issuance, including open-market purchases, tender offers, exchange offers and consent solicitations.

In the case of an open-market purchase an issuer will enter into individual contracts with security holders in order to buy back its securities. A tender offer involves an issuer offering to purchase, for cash, all or a specified portion of its securities. An exchange offer involves an issuer offering to exchange the securities currently in issue for new securities with different terms and conditions or, potentially, for shares. A tender offer can be coupled with a consent solicitation whereby the security holders must agree to certain amendments to the terms and conditions of the securities (eg, the inclusion of an early redemption mechanic etc) in order to accept the tender offer. How a consent solicitation may be effected will depend upon the terms and conditions of the relevant securities.

In all cases care should be taken with respect to releasing information relating to these types of transactions in case such information is deemed to be 'regulated information' for the purposes of European and Irish securities law.

### 25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?

The main reporting obligations for issuers after offering debt securities relate to inside and financial information.

The market abuse regime requires issuers to disclose inside information to the public as soon as possible. Inside information is precise, not publicly available, relates to an issuer or its securities and would, if publicly available, have a significant effect on the price of the securities. The Committee of European Securities Regulators (the predecessor to ESMA) published helpful guidance and examples to assist in the determination of inside information. Price significance is determined using the reasonable investor test, namely, is a reasonable investor likely to use the information as a basis for making an investment decision? An issuer's financial condition and the performance of its business are examples of information a reasonable investor would consider. The EU Market Abuse Regulation assumes a reasonable investor's decision is based on the information already available to him. Important factors in assessing whether a reasonable investor would be likely to consider the new information include: the anticipated impact it has on the totality of the issuer's activities, how reliable the source of the information is and any other market variables likely to affect the securities. An issuer may delay disclosure in order to protect its legitimate interests provided the delay is not likely to mislead the public and the issuer is able to ensure the confidentiality of the information and follows the detailed processes set out in the implementing technical standards. An issuer may selectively disclose inside information to persons owing it a duty of confidentiality.

The transparency regime requires issuers of securities admitted to trading on a regulated market with a denomination of less than €100,000 and whose home member state is Ireland to publish annual and biannual financial information. An issuer outside the scope of this regime may still be required to disclose such information annually if its securities are listed with the ISE.

Other reporting obligations regarding non-financial and regulated information under the transparency regime include the publication of changes to the rights of debt securities holders, information to enable the exercise of their rights and notices of their meetings.

### 26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?

Issuers are exposed to the risk of civil and criminal liability under statute and common law on a number of grounds including the following:

**Omissions or misleading information in the prospectus**

Civil and criminal liability under the Companies Act and Irish Prospectus Regulation may attach to the following persons:

- the issuer, offeror or person who sought admission to trade on a regulated market;

## Update and trends

**New EU Market Abuse Regulation (3 July 2016)**
This new market abuse framework is directly effective and became law across the EU on 3 July 2016. The new framework seeks to ensure that regulation will keep pace with market developments such as the growth of new trading platforms and financial instruments, ban the manipulation of benchmarks (such as LIBOR), reinforce the investigative and administrative sanctioning powers of regulators and ensure a single rulebook across the EU while reducing, where possible, the administrative burdens on SME issuers.

Some of the key changes include:
- a broader application of the regime to a wider range of securities and trading platforms such as multilateral trading facilities and organised trading facilities and related financial instruments. For the first time, issuers of debt securities listed on unregulated markets across the EU, including the ISE's GEM are in scope;
- new rules on market soundings made by issuers to assess investor interest in offers of securities;
- new offences of manipulation of benchmarks and attempted market manipulation;
- new requirement to notify the regulator on announcement of inside information where the issuer has delayed disclosure of that information; and
- the requirement to use a prescribed insider list.

**New Prospectus Regulation (mid to end 2017)**
On 20 December 2016, the EU Council's Permanent Representatives Committee endorsed the informal trilogue agreement reached between the Commission, the EU Council and the Parliament on the proposed new prospectus regulation. The draft proposes to:
- retain the exemption from the obligation to produce a prospectus for offers of debt securities with a minimum denomination of €100,000 (the other exemptions would also still apply);
- categorise risk factors; and
- limit the prospectus summary to seven A4 pages and divide it into four sections (warnings and key information on the issuer, securities and offer).

- the guarantor (if any and only in respect of information relating to the guarantee); and
- anyone who accepted responsibility for the prospectus.

Civil liability does not extend to directors of the issuer (unless they voluntarily accept responsibility) or to any expert who consented to the inclusion of his or her statement in the prospectus. In contrast, civil liability may attach to directors of issuers of equity securities and to any expert whose statement was included in the prospectus. Civil liability in tort for misrepresentation may also arise against the issuer.

**Omissions or misleading information in financial information disclosed under the transparency regime**
Civil and criminal liability under the Companies Act and Transparency Regulation may attach to an issuer who is subject to the relevant financial reporting obligations provided the person discharging managerial responsibilities (including directors) within the issuer knew the statement was misleading, was reckless as to that fact or knew the omission was a dishonest concealment of a material fact. Again, civil liability in tort for misrepresentation may also arise against the issuer here.

**Breaches of market abuse law including failure to disclose inside information, insider dealing or market manipulation**
Civil and criminal liability under the Companies Act and the Irish Market Abuse Regulation may attach to the issuer and potentially a director or officer of the issuer who consented to or approved a breach of market abuse law.

### 27 What types of remedies are available to the investors in debt securities?

Remedies are available to investors in debt securities under statute, contract and common law.

Under the Companies Act, investors may be entitled to compensation from the issuer or guarantor (if any) for loss or damage suffered as a result of omissions or misleading information in a prospectus or for a breach of market abuse law.

Investors may also be entitled to compensation under the Transparency Regulation for loss or damage suffered as a result of omissions or misleading information in certain information disclosed under that regime.

In a claim for contractual misrepresentation, investors may be entitled to recission and damages depending on whether the misrepresentation was fraudulent, negligent or innocent.

An action at common law in tort for negligent misstatement may entitle the investor to damages.

### 28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?

If the Central Bank suspects the issuer has breached part of the Prospectus, Market Abuse or Transparency Regulations, it may appoint an assessor to investigate the alleged breach.

In the event of an adverse assessment under the Prospectus Regulation, the possible sanctions include:
- a private or public caution or reprimand;
- a direction disqualifying the issuer from being concerned in the management of, or having a qualifying holding in, any regulated financial service provider for a certain time; and
- a penalty of up to €2.5 million.

The Transparency Regulation also provides for the above sanctions except the financial penalty in the event of an adverse assessment against an individual is the higher of €2.5 million or twice the profit arising from the breach, or in the case of a company the higher of €10 million, 5 per cent of its turnover or twice the profit arising from the breach.

In the event of an adverse assessment under the new market abuse regime, the possible sanctions are wide-ranging and include:
- a private caution or reprimand;
- a public warning that identifies the assessee and the nature of the prescribed contravention;
- a direction disqualifying the issuer from being concerned in the management of, or having a qualifying holding in, any regulated financial service provider for a certain time; and
- penalties against issuers or individuals. The penalties range from €500,000 to €5 million for a natural person and from €1 million to €15 million or 15 per cent. of total annual turnover for a legal person.

If the ISE considers that an issuer has breached the Listing Rules, it may refer the matter to an ISE disciplinary committee which may censure the issuer, publish this censure, and suspend or cancel the listing of the issuer's securities.

If the breach is due to a failure by a director of the issuer to discharge his or her responsibilities, the disciplinary committee may censure that director and publish the censure. If the breach persists, the disciplinary committee may state publicly that it considers the retention by the director of this office is prejudicial to the interests of investors. If the director remains in office after this statement, the disciplinary committee may suspend or cancel the listing of the issuer's securities.

### 29 What are the main tax issues for issuers and bondholders?

Ireland operates a special tax regime for issuers of debt securities, which allows issuers to achieve a neutral tax position by using an Irish resident special purpose vehicle known as a section 110 company. Section 110 companies are entitled to take a tax deduction for their funding costs (ie, payments on debt securities), which minimise tax leakage when using section 110 companies as corporation tax will be maintained at a negligible level. Typically a section 110 entity will pay corporation tax on its minimum profit amount (usually approx €3,000) only. A tax deduction is allowed for payments of interest on profit participating debt. These section 110 companies are normally used for asset-backed issuances.

The main tax issue for holders of debt securities issued by an Irish company is the ability of the security holder to be paid interest free of Irish withholding tax. Ireland has a withholding tax exemption for quoted Eurobonds, as well as a series of domestic law withholding tax exemptions. Quoted Eurobonds are securities listed on a stock exchange and no withholding will arise where the quoted Eurobonds are either held in a clearing system or where payments are made through a non-Irish paying agent. Where securities are not listed, security holders can still receive interest from an Irish company where they are tax resident in an EU member state or a country with which Ireland has a double taxation treaty. Ireland currently has over 70 double taxation treaties. Typically, securities issued by an Irish company can be structured to eliminate Irish withholding tax.

No stamp duty or similar tax is imposed in Ireland on the issue, transfer or redemption of securities issued by an Irish company.

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# Japan

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**1 What types of debt securities offerings are typical, and how active is the market?**

Debt securities issued in Japan include government bonds, municipal bonds, government agency bonds including government-guaranteed bonds, bank debentures, corporate bonds, foreign bonds and special debt instruments such as convertible bonds. According to the Japan Securities Dealers Association (JSDA), the total amount raised by debt securities in 2016 was ¥197,217 billion, of which ¥168,854 billion was Japanese government bonds, ¥6,346 billion was municipal bonds, ¥3,335 billion was government-guaranteed bonds, ¥10,615 billion was corporate straight bonds issued by Japanese issuers and ¥1,167 billion was bonds issued by foreign issuers. As can be seen, the great majority of debt securities issued in Japan consist of Japanese government bonds.

Only a small number of debt securities, which mainly consists of some government bonds and convertible bonds, are listed on a securities exchange and the vast majority of trading is made through the over-the-counter market.

Secured bonds are subject to a special law named the Secured Bond Trust Act of Japan. However, secured bonds are seldom issued and the vast majority of bonds in Japan are unsecured.

Both public offering and private placement are commonly conducted for debt securities in Japan.

**2 Describe the general regime for debt securities offerings.**

The corporate law aspect of the issuance of debt securities is regulated by the Companies Act of Japan. One requirement is to appoint a commissioned company for bondholders, which has a role similar to a trustee in other jurisdictions (although it is subject to more responsibilities), unless the denomination is ¥100 million or more, or the number obtained by dividing the aggregate number of bonds by the amount of each bond is less than 50. Where commissioned companies for bondholders are not required for the offering of debt securities, usually a fiscal agent is appointed.

The Financial Instruments and Exchange Act of Japan (FIEA) regulates the securities law aspect of offering of debt securities in Japan. The Finance Services Agency of Japan (FSA) is the main government regulator that enforces the FIEA and the FSA delegates some of its power to the local finance bureaus. Public offerings of debt securities in Japan are generally subject to a registration requirement, and a Japanese prospectus is generally required (see questions 3 and 4).

The principle market is the Tokyo Stock Exchange (TSE), however, as discussed in question 1, only a small number of debt securities are listed in Japan and the vast majority of the debt securities are traded over-the-counter.

In addition, the JSDA is the industry group for securities companies and stipulates certain rules that securities companies have to comply with, including those relating to the offering and trading of debt securities.

**3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.**

An issuer is generally required to file a securities registration statement (SRS) to the local finance bureau when they conduct a public offering, the total amount of which is ¥100 million or more. Public offerings in this context generally mean offerings that do not satisfy the requirements for any of the private placement exemptions (see question 10). SRSs must be prepared in accordance with the forms prescribed under the FIEA for each type of offering. The filing of an SRS is made through an electronic filing system called EDINET, which is a system similar to EDGAR in the United States.

Shelf registration is also available for seasoned issuers who satisfy certain requirements, and is widely used in practice for offerings of debt securities. When the issuer conducts an offering of debt securities utilising shelf registration, it is required to submit a shelf registration statement first to provide ongoing disclosure about the issuer, and then a shelf registration supplement including pricing information upon the actual issuance of debt securities.

If securities registration is required, the solicitation of the relevant securities is prohibited unless and until the SRS or the shelf registration statement is filed. Binding agreements to sell and purchase the relevant securities cannot be made unless and until (where an SRS is filed) the SRS becomes effective or (where a shelf registration statement is filed) the shelf registration statement becomes effective and a shelf registration supplement is filed. In general, the SRS becomes effective on the sixteenth calendar day from the date of filing. In the case where the issuer is using shelf registration, this waiting period will generally be shortened to the eighth day from the date of filing of the shelf registration statement. In the case where the SRS or shelf registration statement is amended, the waiting period may be extended.

Certain issuers such as the Japanese government and Japanese local governments are exempt from the above-mentioned filing requirements.

The above-mentioned filing requirements generally apply to both debt securities and other types of securities.

**4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?**

In addition to the requirement to file an SRS, under the FIEA an issuer that is required to file an SRS is generally required to prepare a prospectus in accordance with the form prescribed under the FIEA (statutory prospectus) when they conduct a public offering where the total amount of the offering is ¥100 million or more. When such statutory prospectus is required, the issuer cannot sell the relevant securities unless they provide a copy of the statutory prospectus before or at the time they agree with the investor to sell and purchase the securities.

The statutory prospectus must be prepared in accordance with the form prescribed in the FIEA, and must contain information that is required under such form (generally the same as that required for the SRS). Such form differs depending on the nature or type of issuer or security; for example, the form for foreign issuers differs from that for Japanese issuers. Generally speaking, the prospectus is required to contain information relating to:

- the offering of the securities, including the terms and conditions of the securities and the schedule of the offering;
- the issuer, including information regarding the business, its group companies, its officers and employees, its capital structure, its shareholders, its financial statements and other financial information; and
- certain other information.

Foreign issuers are generally required to include an outline of the legal system and certain other information regarding its home jurisdiction in the statutory prospectus. Financial statements are also required to be included, and may be prepared under accounting principles or standards other than Japanese generally accepted accounting principles (GAAP) under certain conditions; however, an explanation of the material differences between such accounting principle or standard and Japanese GAAP must be provided.

**5 Describe the drafting process for the offering document.**

The key documents for public offerings of debt securities in Japan are:
- the terms and conditions (see question 6);
- the SRS or the shelf registration statement and shelf registration supplement;
- the statutory prospectus;
- the subscription agreement; and
- the agreement with commissioned company for bondholders (where there is a commissioned company for bondholders) or the fiscal agency agreement (where there is a fiscal agent).

The terms and conditions of publicly offered bonds in Japan have become standardised, and usually there are not many documentation issues. Similarly, there are usually not many documentation issues regarding the content of subscription agreements, agreements with commissioned company for bondholders and fiscal agency agreements.

As to the SRS or shelf registration statement and statutory prospectus, where the issuer is using shelf registration (a method commonly used by a seasoned issuer), reference can be made to the annual report and other continuous disclosure documents for information regarding the issuer, and thus there are usually not many documentation issues. Where an SRS is to be filed, an SRS containing information on the issuer must be prepared and there could be issues depending on the company, including those connected to the details or content of risks relating to the business. Generally speaking, there is no clear threshold as to whether certain disclosures should be made.

Documentation for private offerings is not generally regulated by law, and may differ from transaction to transaction.

**6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?**

In general, the terms and conditions will be prepared as a separate document, and this will be attached to the subscription agreement and the agreement with commissioned company for bondholders or the fiscal agency agreement, as the case may be.

The parties to the subscription agreement are the issuer and the underwriters. The parties to the agreement with commissioned company for bondholders are the issuer and the commissioned company for bondholders. The parties to the fiscal agency agreement are the issuer and the fiscal agent.

In general, these documents are not publicly available. However, in cases where the SRS or shelf registration statement and shelf registration supplement are filed, the content of the terms and conditions will be described in these documents, which are publicly available. SRSs, shelf registration statements and shelf registration supplements can be accessed through the EDINET system using the internet. In addition, in the case where the issuer is a foreign entity, the relevant agreements will generally be attached to the SRS or shelf registration supplements and will be publicly available.

**7 Does offering documentation require approval before publication? In what forms should it be available?**

There is no legal requirement under Japanese law that requires offering documentation to be approved before publication.

However, as discussed in question 3, in the case where securities registration is required, the solicitation of the relevant securities is prohibited unless and until the SRS or the shelf registration statement is filed and binding agreements to sell and purchase the relevant securities cannot be made unless and until (in the case where a SRS is filed) the SRS becomes effective or (in the case where a shelf registration statement is filed) the shelf registration statement becomes effective and a shelf registration supplement is filed. In this case, the regulator has the authority to order the issuer to file an amendment report or prevent the SRS or the shelf registration statement from becoming effective when there is a misstatement or omission of a material fact in the SRS, the shelf registration statement or shelf registration supplement. Further, the regulator has the authority to extend the waiting period when there is a misstatement of a material fact and such extension is necessary for the public interest or protection of investors. In practice, when an SRS is to be filed, to make sure that the local finance bureau has enough time to review the SRS, the issuer usually consults the content of the SRS with the local finance bureau in advance (usually around two to four weeks prior to the filing).

**8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?**

In general, public offerings of debt securities are not subject to review and authorisation under Japanese law.

However, as discussed in questions 3 and 7, where securities registration is required, the local finance bureau will review the SRS and has the authority to prevent the SRS from becoming ineffective when there is a misstatement or omission of a material fact in the SRS, the shelf registration statement or shelf registration supplement, or to extend the waiting period when there is a misstatement of a material fact and such extension is necessary for public interests or protection of investors.

In addition to the above, as a practical matter, the underwriters usually conduct due diligence upon each issuance and (especially for seasoned issuers who use shelf registration) when new financial statements or financial information become available. There might be a period during which the issuer has to wait for such review before it can offer the relevant debt securities.

**9 On what grounds may the regulators refuse to approve a public offering of securities?**

As discussed in question 8, in general, public offerings of securities are not subject to the approval of the regulators under Japanese law and thus, there is no ground upon which the regulators can refuse to approve a public offering of debt securities.

However, as discussed in questions 3, 7 and 8, where securities registration is required, the local finance bureau will review the SRS and has the authority to prevent the SRS from becoming ineffective when there is a misstatement or omission of a material fact in the SRS, the shelf registration statement or shelf registration supplement or to extend the waiting period when there is a misstatement of a material fact and such extension is necessary for the public interest or protection of investors.

**10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?**

The disclosure requirement under the FIEA, in other words, the requirement to file an SRS or a shelf registration statement and to prepare and deliver a statutory prospectus, which is discussed in questions 3 and 4, applies only to public offerings and does not apply to private placements.

There are three types of private placements for primary offerings of debt securities and these are:
- small-number private placements;
- qualified institutional investors' private placements; and
- specified investors' private placements (or the Japan professional securities market offerings).

**Small-number private placements**

A small-number private placement is a private placement that can be used when the solicitation of an offer to acquire a certain type of debt securities is made to less than 50 persons. The following requirements need to be satisfied for a small-number private placement of debt securities (assuming that the securities are straight bonds):
- the number of persons to whom solicitation of an offer to acquire the debt securities was made in Japan is 49 or less; to be more specific, the aggregate number of persons to whom such solicitation to acquire the same kind of issued securities was made within the past six months, excluding securities that were offered by way of a qualified institutional investors' private placement or with respect

to which an SRS or a shelf registration supplement has been filed, is 49 or less;

- securities of the same kind are not listed on a stock exchange in Japan and an SRS has not been filed, and was not required to be filed, for the same kind of securities;
- securities of the same kind are not 'securities for specified investors', which includes securities listed on the Tokyo Pro-Bond Market;
- either of the following transfer restrictions must be imposed and such transfer restriction must be (i) written on the bond certificates and such bond certificate must be handed to the investor, (ii) written on the offering documents that are to be handed to the investor or (iii) disclosed to the investor through the book-entry system of Japan Securities Depository Center Inc (JASDEC):
- a transfer is only allowed en bloc; or
- the total number of investment units (eg, the number of bond certificates) must be less than 50 and the investment units cannot be divided into smaller units; and
- a notification letter, describing the fact that no securities registration statement has been filed in connection with the private placement, and the content of the transfer restriction, is provided to the investors in Japan at the same time as or prior to the private placement.

**Qualified institutional investors' private placements**

The qualified institutional investors' private placement is a private placement that can be used when the solicitation of an offer to acquire a certain type of debt securities is made only to qualified institutional investors (QIIs) as defined under the FIEA. The following requirements need to be satisfied for a small-number private placement of debt securities (assuming that the securities are straight bonds):

- the solicitation of debt securities is made only to QIIs;
- securities of the same kind are not listed on a stock exchange in Japan and a SRS has not been filed, and was not required to be filed, for the same kind of securities;
- securities of the same kind are not 'securities for specified investors', which includes securities listed on the Tokyo Pro-Bond market;
- a transfer restriction that the securities may not be transferred to investors other than QIIs (QII transfer restriction) must be imposed and such transfer restriction must be (i) written on the bond certificates and such bond certificate must be handed to the investor, (ii) written on the offering documents that are to be handed to the investor or (iii) disclosed to the investor through the book-entry system of JASDEC;
- a notification letter describing the QII transfer restriction and the fact that no SRS has been filed in connection with the private placement is provided to the investors in Japan at the same time as or prior to the private placement; and
- in the case where the issuer is a foreign company, the issuer must appoint an agent who is a resident of Japan and has the authority to represent such issuer in connection with acts concerning the transfer of such securities.

**Specified investors' private placements**

The specified investors' private placement (or the Japan professional securities market offering) is a private placement that was introduced in 2008 to introduce a new professional securities market. The following requirements need to be satisfied for a specified investors' private placement of debt securities (assuming that the securities are straight bonds):

- the solicitation of debt securities must be made only to specified investors;
- except for solicitation to certain investors, the solicitation is made by securities companies or other financial institutions authorised to conduct securities business;
- securities of the same kind are not listed on a stock exchange in Japan; and
- solicitation is made on the condition that a purchase agreement that provides, among other things, that the person who has purchased the securities shall not transfer them otherwise than to specified investors or certain non-residents of Japan is executed.

To utilise the specified investors' private placement, the issuer of the securities must provide specific security information in accordance with the FIEA and the rules of the relevant securities exchange.

The TSE created a new market named the Tokyo Pro-Bond Market for trading of bonds, using this specified investors private placement.

**11 Describe the public offering process for debt securities. How does the private offering process differ?**

The offering process for a public offering of bonds will start with the issuer passing a resolution to issue bonds at a meeting of its board of directors. Usually, the issuer will also resolve that the bonds will be subject to the Act on Book-Entry Transfer of Company Bonds, Shares, etc, of Japan (Book-Entry Transfer Act) and will submit a consent form to JASDEC. Where the issuer is using shelf registration, the issuer will file a shelf registration statement.

On the launch date, the terms and conditions will be determined, usually by the director of the company based on the authority delegated by the board of directors. Where the issuer is using shelf registration, the issuer will file a supplement to the shelf registration statement. Where the issuer is not using shelf registration, an SRS will be filed on the launch date. Agreements relating to the offering will also be executed on this date.

On the closing date, the investors will pay the price for the bonds to the underwriters and usually the bonds will be recorded in the account of the investor via the book-entry system. Usually the closing date must be a date that is four business days or more after the launch date, to allow time to prepare for settlement through the book-entry system.

The main transaction documents for public offerings of debt securities in Japan are the terms and conditions, SRS or shelf registration statement or shelf registration supplement and statutory prospectus, subscription agreement and (where there is a commissioned company for bondholders), agreement with commissioned company for bondholders and (where there is a fiscal agent) the fiscal agency agreement.

The process for private offerings can differ from transaction to transaction and is difficult to generalise.

**12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?**

Auditor's comfort letters will usually be required, but legal opinions issued by a law firm will usually not be required as closing documents for a domestic public offering in Japan (ie, an offering in Japan by a Japanese issuer).

In the case of offerings of debt securities by foreign issuers, legal opinions issued by a law firm will be usually required in addition to auditor's comfort letters.

**13 What are the typical fees for listing debt securities on the principal exchanges?**

The listing fee for listing bonds on the Tokyo Stock Exchange, which is the main market in Japan, is ¥1 million. As discussed in question 1, however, only a small number of debt securities are listed in Japan and the vast majority of the debt securities are traded over the counter.

**14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?**

According to the JSDA, the total amount raised by convertible bonds in 2016 was ¥72 billion, and some of them are listed on the TSE. The issuance of other special debt instruments by Japanese companies in Japan is relatively uncommon.

**15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?**

The rules that apply to the offering of special debt securities are basically the same as the rules that apply to other debt securities. However, the issuance of convertible bonds by Japanese companies will be subject to certain rules relating to equity securities under the Companies Act, such as a requirement to leave at least two weeks from the date of filing of an SRS, or the date of public notice containing certain information relating to the offering, until the closing date.

**Update and trends**

Effective in April 2012, the FIEA was amended and the English-language disclosure rules under which foreign companies may file English language versions of certain securities filing documents including the SRS in Japan by substantially utilising their English-language disclosure documents from their home country or any other foreign country was expanded. Before this amendment, English-language disclosure was available under certain conditions for continuous disclosure documents, however, was not allowed for the SRS.

Effective in 2008, the FIEA was amended to establish the legal framework for a market for professional investors. More specifically, a new private placement, namely the specified investors private placement, was introduced together with certain requirements to provide information relating to the issuer and the security. The TSE created a new market named the Tokyo Pro-Bond Market for trading of bonds using this legal framework. As of February 2017, there are approximately 20 issuers listed on the Tokyo Pro-Bond Market.

**16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?**

In general, whether securities are classed as debt or equity will be determined by their legal formality. For example, preferred shares that contain features similar to bonds are, nevertheless, considered as equity securities, and bonds that contain features similar to shares are, nevertheless, considered as debt securities. As discussed in question 15, convertible bonds are subject to rules relating to equity securities under the Companies Act and are usually regarded as equity securities.

**17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?**

The content of the transfer restrictions for each type of private placement is described in question 10. For debt securities offerings by Japanese companies in Japan, transfer restrictions are usually implemented by being disclosed through the book-entry system of JASDEC.

**18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?**

In general, the same rules that apply to Japanese companies for offering of debt securities apply to foreign companies offering debt securities in Japan. There are, however, certain rules that only apply to foreign companies. For example, foreign companies are allowed to prepare offering documents such as the SRS in English if they satisfy certain conditions, while this is not allowed for Japanese companies.

Where domestic issuers offer debt securities only outside Japan, such offering will usually be subject to the law of the jurisdiction where the offering is made, and the law and regulation that regulates an offering under the FIEA, such as the requirement to file an SRS or to prepare and deliver a statutory prospectus, does not apply. Listed companies will generally be required to file an extraordinary report in the case where domestic issuers offer debt securities only outside Japan.

**19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?**

At present, there are no special legal arrangements with other jurisdictions to help foreign issuers access debt capital markets in Japan.

**20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?**

Firm commitment underwriting, where the underwriters agree to jointly and severally purchase the securities from the issuer, is usually used for a public offering. Arrangements for private offerings can differ from transaction to transaction and are difficult to generalise.

**21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?**

Underwriters are regulated by the FSA under the FIEA, as securities companies (which are called 'type 1 financial instruments business operators' under the FIEA). Registration as a type 1 financial instruments business operator is required to conduct securities business in Japan, including underwriting, and once a company is registered, such company will be subject to various rules and regulations under the FIEA including those relating to the business they conduct and their financial status. Under the FIEA, underwriters as securities companies are subject to inspections by the Securities and Exchange Surveillance Commission, and the FSA is empowered to require reports from securities companies and may issue business improvement orders or orders to suspend the whole or part of their business when they violate securities regulations.

Individual approvals are not required for each underwriting arrangement.

**22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?**

Where the bonds are subject to the Book-Entry Transfer Act, which is typical for public debt offerings, delivery versus payment settlement is available. In this case, at least four business days are required from the pricing date until the closing date. There are no global or individual notes under this system.

**23 How are public debt securities typically held and traded after an offering?**

Public debt securities are typically held under a book-entry system.

**24 Describe how issuers manage their outstanding debt securities.**

Issuers usually manage their outstanding debt securities through market purchases. Debt securities are not subject to the mandatory tender offer rule under the FIEA in Japan, and tender and exchange offers are not made very often.

**25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?**

Once an issuer conducts a public offering of debt securities and submits an SRS, such issuer will be subject to certain continuous disclosure requirements and will be required to submit an annual report and, in general, a semi-annual report. Such issuer will also be required to submit an extraordinary report upon the occurrence of certain events that are prescribed in the FIEA. These reports are submitted electronically through the EDNET system.

The annual report must be prepared in accordance with the form prescribed in the FIEA, and its content is generally the same as that of the SRS and the statutory prospectus, except that there is no information relating to any offering. The form of the annual report differs depending on the nature or type of issuer or security; for example, the form for foreign issuers differs from that for Japanese issuers. Generally speaking, the annual report will contain information relating to the issuer, including information regarding the business, its group companies, its officers and employees, its capital structure, its shareholders, its financial statements and other financial information, plus certain other information. As described in question 4 in relation to the statutory prospectus, foreign issuers are required to include an outline of the legal system and certain other information regarding their home jurisdiction, and financial statements prepared under accounting principles or standards other than Japanese GAAP may be permitted under certain conditions. However, an explanation of the material differences between such accounting principle or standard and Japanese GAAP must be provided.

**26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?**

Under the FIEA, in addition to the issuer, the directors, officers and corporate auditors of the issuer, the chartered public accountants, the underwriters and the selling security holder (if any) will be liable for compensation to any person who purchased any relevant securities in the case where there is a misstatement or an omission of a material fact in the SRS, shelf registration statement or statutory prospectus. While the issuer will be liable even if it can prove that there was no fault on its part, the other parties will not be liable if they can prove that they were not aware of the said misstatement or omission, having exercised due care.

A similar liability will be imposed on any person who has used the statutory prospectus to offer any relevant securities.

### 27 What types of remedies are available to the investors in debt securities?

Under the FIEA, where there is a misstatement or an omission of a material fact in the SRS, shelf registration statement or statutory prospectus, the issuer and its directors, officers and corporate auditors, CPAs, underwriters, and the selling security holder (if any) will be liable for damage to any person who purchased the relevant security. As such, investors who purchased such securities can seek damage from the above-mentioned parties

### 28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?

An issuer who filed an SRS with a misstatement or an omission of a material fact may be subject to criminal proceedings (and, on conviction, imprisonment for up to 10 years or a fine of up to ¥10 million, or both, together with a fine of up to ¥700 million in the case of a company) and an administrative surcharge. Violations of other regulations under the FIEA, such as failing to file the SRS when required, failing to deliver a registered prospectus and regulation on fraudulent market transactions, may also be subject to criminal proceedings and administrative surcharges.

Under the FIEA, the regulators also have sanction powers over securities companies, which enable them to require reporting, and may issue business improvement orders or suspend the whole or part of their business where securities regulations have been violated.

### 29 What are the main tax issues for issuers and bondholders?

The main tax issues for investors concern the withholding tax and the regular income or corporate tax (on a net basis), which are imposed on the interest payable on the bonds. Taxation on investors substantially differs depending upon the classification of the issuers and the investors for tax purposes (ie, being a Japanese resident or not).

If the issuer of the bonds is a Japanese corporation, and the investor is an individual non-resident of Japan or a non-Japanese corporation having no permanent establishment in Japan for Japanese tax purposes (foreign investor), as a general rule, a foreign investor will be subject to Japanese withholding tax at the rate of 15.315 per cent on the interest payable on the bonds. However, in the case of bonds issued within Japan using the Japanese book-entry system, interest payable on such bonds to a foreign investor is exempt from withholding tax as special taxation measures (commonly referred to as the J-BIEM or the New Japanese Bond Income Tax Exemption Scheme), subject to compliance with certain procedural requirements. This exemption, however, does not apply if the foreign investor is a 'specially-related person of the issuer' (ie, in general terms, a person who directly or indirectly controls or is directly or indirectly controlled by, or is under direct or indirect common control with, the issuer) or the bonds are 'taxable linked bonds' (ie, bonds of which the amount of interest is to be calculated by reference to certain indexes (eg, the amount of profits, revenues and dividends) relating to the issuer or a specially related person of the issuer.

If the issuer of the bonds is a non-Japanese corporation and the issue is made within Japan, as a general rule, a foreign investor will not be subject to any Japanese withholding tax. However, if such bonds are attributed to any permanent establishment in Japan of the issuer, the interest will be subject to withholding tax in substantially the same manner as bonds issued by a Japanese corporation described above.

Even if a foreign investor is subject to withholding tax under domestic tax law, tax treaties entered into between Japan and the country of tax residence of the foreign investor may provide for exemption or a reduced rate with respect to such withholding tax. At present, Japan has income tax treaties whereby the 15.315 per cent withholding tax rate is reduced, generally to 10 per cent, with, inter alia, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Hong Kong, Ireland, Italy, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Switzerland and the United States. Under the tax treaties between Japan and Sweden/the United Kingdom/Germany, interest paid to qualified Swedish/United Kingdom/German residents is generally exempt from Japanese withholding tax. Japan and the United States/Austria have signed an amendment to or renewal of the existing tax treaties generally exempting interest from Japanese withholding tax; however, this amendment or renewal has not yet entered into force. Certain filings with the Japanese local tax office are necessary to enjoy benefits under the applicable tax treaty.

Japanese taxation upon foreign investors is, as a general rule, finalised by the withholding tax and there is no need to file a Japanese tax return for regular income tax or corporate tax. No transfer or transaction taxes are imposed in general with respect to bonds issued within Japan. A foreign investor will in general not be subject to Japanese taxation on capital gains arising from the sale of bonds.

The main tax issues for issuers are deduction of interest on the bonds for their Japanese corporate tax purposes. As a general rule, interest payable by an issuer who is a Japanese corporation or a non-Japanese corporation (where the bonds are attributed to a permanent establishment of the issuer in Japan) will be deductible as expenses for its Japanese corporate tax purposes. However, with respect to interest payable to certain foreign affiliates of the issuer, interest deduction may be limited due to special taxation measures such as thin capitalisation rules, transfer pricing rules and earnings stripping rules.

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# Luxembourg

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**1 What types of debt securities offerings are typical, and how active is the market?**

The Grand Duchy of Luxembourg (Luxembourg) is a renowned financial centre, and particularly active in the debt segment of the capital markets. As a result of favourable legal and tax frameworks, debt issuances of all types are frequently structured through Luxembourg. In addition, the markets operated by the Luxembourg Stock Exchange (LuxSE) are prominent in the listing and negotiation of debt instruments. To date, the LuxSE operates two markets: the regulated market (within the meaning of the Directive 2004/39/EC on markets in financial instruments (MiFID)), which falls within the EU harmonised regime and offers simplified access to other European regulated markets thanks to the European passport for prospectuses (Regulated Market); and the exchange regulated market, set up in 2005 as a multilateral trading facility within the meaning of MiFID, which provides an alternative market to the Regulated Market (Euro MTF).

According to publicly available information and recent figures provided by the LuxSE, as of December 2016, the markets operated by the LuxSE had around 37,000 quotation lines of securities in 54 currencies from over 2,700 issuers in more than 100 countries. About 75 per cent of the debt securities listed in Luxembourg are listed on the Regulated Market. At present, a broad range of debt securities are traded on the LuxSE (representing around 70 per cent of all securities traded on the markets operated by the LuxSE). These debt securities include:

- international debt: the LuxSE is the European leader in terms of listed international bonds; around 40 per cent of international debt securities in Europe are listed on the LuxSE;
- high-yield bonds: the LuxSE is Europe's leading exchange for the listing of high-yield bonds. About 60 per cent of European high-yield bonds are listed on the LuxSE;
- green bonds: launched in 2016, the Luxembourg Green Exchange is the first platform dedicated exclusively to green securities. With 110 green bonds listed in 19 currencies by 24 international issuers, the LuxSE is the leading global exchange for green bonds;
- dim sum bonds: in 2011, the LuxSE admitted to trading the first dim sum bonds, denominated in the Chinese currency. Two-thirds of dim sum bonds that are listed on European stock exchanges are listed with the LuxSE and the first offshore yuan bonds in the eurozone by a mainland China issuer are also listed with the LuxSE;
- sovereign debt: the LuxSE lists at least one issue of the sovereign debt of 70 different countries;
- sukuk: the LuxSE was the first European stock exchange to list sukuk in 2002. Twenty-one sukuk have since then been listed on the LuxSE (including the sovereign sukuk recently issued by the Luxembourg state, the first sovereign sukuk to be denominated in euros);
- supranational debt: Luxembourg remains a prominent listing venue for supranational debt issuers, including the European Investment Bank, World Bank, European Bank for Reconstruction and Development, the European Stability Mechanism and the European Commission;
- asset-backed securities: in 2015, there were more than 3,500 asset-backed securities from over 650 issuers;
- convertible bonds: the LuxSE admitted the first ever contingent convertible bond for trading in 2011;
- debt issuance programmes: there were about 460 debt issuance programmes in operation on the LuxSE as of March 2017; and
- others: in addition, the LuxSE has listed other types of debt instruments, such as indexed bonds and commercial papers.

**2 Describe the general regime for debt securities offerings.**

The regulatory framework applicable to public offers of debt securities, and to the listing thereof, derives essentially from the law of 10 July 2005 on prospectuses for securities, as amended (Prospectus Law), implementing in Luxembourg Directive 2003/71/EC, as amended (Prospectus Directive). In addition, the admission to trading of debt securities on both markets operated by the LuxSE is subject to the internal rules and regulations of the LuxSE (edition 07/2016, which entered into force on 1 July 2016 (LuxSE Rules)).

Under the Prospectus Law, the issuance of debt securities may be subject to one of three different regimes, depending on the nature of the offering or the type of market where the securities are to be admitted to trading.

**First regime**

***Public offers and admission to trading on a regulated market subject to EU harmonisation under the Prospectus Directive***

No offer of debt securities to the public or admission to trading on a regulated market operating within the territory of Luxembourg is allowed unless a prospectus has been approved by the Luxembourg supervisory commission of the financial sector (CSSF). An offer of securities to the public is understood as a communication or solicitation to persons in any form and by any means presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to those securities. A prospectus drawn up in accordance with this regime is subject to EU harmonisation under the Prospectus Directive and Regulation 809/2004/CE, as amended (Prospectus Regulation) and benefits from the European passport.

**Second regime**

***Offers to the public of securities not encompassed by the Prospectus Directive***

No offer to the public or admission to trading on a regulated market of debt securities falling outside the scope of the Prospectus Directive (eg, debt securities issued by public international bodies of which one or more member states are members) will be allowed unless a simplified prospectus is approved by the CSSF. Such simplified prospectus does not benefit from the European passport and the rules on harmonised offers. The principles regarding their content are laid down in CSSF Circular 05/210 on the drawing-up of a simplified prospectus within the scope of Chapter 1 of Part III of the Prospectus Law.

**Third regime**

***Admission to trading on a non-regulated market***

The Prospectus Law provides that an admission to trading on a non-regulated market shall be decided upon by the relevant market operator. This is the regime that empowers the LuxSE to approve listing prospectuses for the Euro MTF in accordance with the LuxSE Rules. In this context, the CSSF acts as the authority responsible for supervising the LuxSE. High-yield bonds, a busy segment of the debt capital markets in Luxembourg, are in general subject to this framework, as they normally will qualify as exempted offers under one of the safe harbours described below (commonly referred to as private placements) and are typically listed on the Euro MTF.

### 3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.

Pursuant to the Prospectus Law, no offer of debt securities shall be made to the public within the territory of Luxembourg without the prior publication of a Prospectus Directive compliant prospectus duly approved by the CSSF or, as the case may be, approved by the competent authority in another member state and duly passported in Luxembourg. However, the Prospectus Law foresees certain exemptions from the obligation to draw up a Prospectus Directive compliant prospectus (see in this respect question 10).

The requirements in connection with an application with the CSSF for the approval of a prospectus are set out in the Prospectus Law and CSSF Circular 12/539 (as recently amended by CSSF Circular 15/632 in order to reflect the amendments introduced by Directive 2014/51/EU in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) and CSSF Circular 16/635 in order to reflect the amendments introduced by Commission Delegated Regulation (EU) 2016/301 with regard to regulatory technical standards for approval and publication of the prospectus and dissemination of advertisements). To the extent public offerings do not benefit from one of the exemptions to the obligation to draw up a Prospectus Directive compliant prospectus as laid down in the Prospectus Law, an application will need to be made with the CSSF. The application with the CSSF must include a draft prospectus containing all information required to enable investors to make an informed assessment. Additionally, the submission file for approval by the CSSF should contain:

- an entry form indicating the legal ground for the approval, the purpose of the submission, the reference to the relevant annex to the Prospectus Regulation according to which the document has been drawn up, the timetable of the transaction and the requested date of approval, contact details of the filing agent, the issuer, etc; and
- a cross-reference list indicating where the information required under the annexes to the Prospectus Regulation can be found in the prospectus. The prospectus can be filed by the issuer, the offeror or by a person acting on behalf of one of these persons. The prospectus can be filed via email or other means of communication.

The issuer may draw up the prospectus as a single document or as separate documents in accordance with the Prospectus Directive, namely, composed of a registration document that contains the information relating to the issuer, a securities note that contains information concerning the securities, and a summary. For debt securities listed in article 8(4) of the Prospectus Law and in article 22(6) of the Prospectus Regulation (eg, debt securities issued under an offering programme or on a continuous or repeated manner by credit institutions in certain circumstances), the prospectus can consist of a base prospectus containing all relevant information regarding the issuer and the securities. The final terms of the offered securities shall then be provided to investors and filed with the CSSF as soon as practicable when each public offer is made. The information given in the base prospectus shall be supplemented if necessary with updated information on the issuer and on the securities.

Similar rules apply in the case of an application to the CSSF to approve a prospectus in connection with an admission to trading on the Regulated Market. In such case, a separate application for the admission will also need to be filed with the LuxSE. Separately, the LuxSE Rules will govern the filing for approval of a prospectus in connection with the admission to trading on the Euro MTF.

### 4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?

As indicated above (see questions 2 and 3), no offer of securities can be made to the public within the territory of Luxembourg without prior publication of a Prospectus Directive compliant prospectus approved by the CSSF (or, as the case may be, approved by the competent authority in another member state and duly passported in Luxembourg). Prospectuses for public offers of debt securities need to comply with the information requirements set out in the Prospectus Law and in the Prospectus Regulation, including the relevant annexes applicable to debt instruments. In general, the prospectus will contain information on the assets and liabilities of the issuer, financial position, profits and losses, future prospects, as well as on the rights attached to the offered securities. The prospectus shall also include information on the applicable risk factors, business and markets descriptions, financial statements of the issuers and management discussion and analysis. Additionally, a prospectus for securities within the scope of the Prospectus Directive will need to contain a summary conveying, in a non-technical language, the essential characteristics and risks associated with the issuer, any guarantor and the securities. There is no requirement for a summary where the securities have a denomination of at least €100,000 (wholesale securities). The Prospectus Law details the features of such summary, which follows requirements harmonised at EU level. Documents included by reference in the prospectus or simplified prospectus must also be filed with the CSSF. The CSSF may request further information to be included in the prospectus for certain types of issuers.

Where Luxembourg is the home member state (within the meaning of the Prospectus Directive) and an offer to the public is made in Luxembourg only, the prospectus may be drawn up in Luxembourgish, English, French or German. The same applies where Luxembourg is the home member state and public offers are made in more than one member state, however, in such case the prospectus must also be made in a language accepted by the competent authority of the host member state.

### 5 Describe the drafting process for the offering document.

Market practice in Luxembourg for drafting of offering documentation, notably the prospectus, closely follows international practices, standards and procedures. Typically, the prospectus or offering memorandum is drafted by the issuer's counsel (often a joint effort by local and international counsel), in accordance with applicable rules and regulations, and closely reviewed by the issuer's management team, the investment banks acting as managers and initial underwriters or purchasers, the auditors and the banks' and issuer's counsels. It is common practice to hold regular drafting sessions involving all parties, notably for the most relevant sections such as description of the debt instruments and management analysis and discussion of business prospects.

There are key documentation issues concerning the level and detail of disclosure on the issuer's business and prospects, including the relevant risk factors, the description of certain matters of Luxembourg law relevant in the context of the issuance (insolvency law, corporate governance, tax) and the description of the main legal features of the debt instruments. Where the offer qualifies as an offer to the public and no exemption from the obligation to draw up a Prospectus Directive compliant prospectus applies (see question 10), or the debt instruments are to be admitted to trading on a regulated market, the drafting process also involves in principle the CSSF (see questions 2, 3 and 4), as the regulator will comment in detail on the draft document until it is approved.

While offering documents prepared in connection with private placements (ie, benefiting from an exemption under the Prospectus Law from the obligation to draw up a Prospectus Directive compliant prospectus) are not subject to the more demanding disclosure requirements stemming from the Prospectus Directive, the respective drafting follows a similar process and will be subject to high standards of care and transparency. In case the private placement is followed by an application for trading of the bonds on the Euro MTF, the LuxSE will be involved in the review process of the listing prospectus.

### 6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

Issuance and offers of debt securities are primarily governed by three key documents:

- the terms and conditions of the debt instruments set out in detail the legal content of the debt instruments to be offered, governing

the calculation and payment of interests, the amortisation of principal, the events triggering a mandatory or voluntary early redemption, the events of default, etc. Although these may be governed by Luxembourg law, it is common to have debt instruments offered in Luxembourg governed by English law or New York law. Specifically for the high-yield bonds segment, in which Luxembourg has been particularly active in the aftermath of the financial crisis, the debt instruments are created under an indenture or a bond trust deed, which, in addition to the terms and conditions, will also describe the applicable security package and guarantees, and also detail the usual incurrence and maintenance covenants agreed by the issuer;
- the underwriting or purchase agreement (or dealer agreement for debt programmes) governs the relationship between the issuer and the financial intermediaries who will assist in placing the instruments with the final investors (see questions 20 and 21); and
- the agency agreement governs the relationship between the issuer and the bank or banks appointed for the purpose of administering the outstanding debt instruments, including the making of payments of interest and principal, updates to the register of bondholders, if any, the sending of notices to investors and other actions on behalf of the issuer.

The terms and conditions are, as a rule, fully disclosed in the applicable prospectus or offering memorandum prepared in connection with the offer. In addition, the terms and conditions and agency agreement are usually made available to investors at the registered office of the issuer or the appointed agent. The underwriting agreement is normally a confidential agreement, not disclosed to investors.

In addition, other documents that may be prepared in connection with the offer include the relevant issuer's corporate authorisations, the global certificates representing the debt instruments, engagement letters for auditors and the listing applications. When a trustee or common representative acting on behalf of the holders of the debt instruments is appointed, which is also common, a trust deed or appointment agreement is put in place setting out the roles, rights and obligations of this entity appointed to act on behalf and for the interests of the investors. For high-yield bonds issues, this is achieved under the applicable indenture or bond trust deed. Also, for secured issuance, as often is the case with high-yield bonds, the contractual documentation will also include the relevant security documents.

### 7 Does offering documentation require approval before publication? In what forms should it be available?

As indicated (see questions 2, 3 and 4), no offer of securities can be made to the public within the territory of Luxembourg without prior publication of a prospectus approved by the CSSF or duly approved by the competent authority of another member state and passported in Luxembourg unless one of the exemptions described in question 10 applies. Approval of the prospectus by the CSSF will depend on the authority being satisfied that the disclosure requirements set out in the Prospectus Law and in the Prospectus Regulations are duly met. This approval does not guarantee the economic and financial soundness of the offering, nor the quality and solvency of the issuer. The CSSF will require the document to contain an express disclaimer to this effect.

Once approved, the prospectus must be filed with the CSSF and made available to the public in advance of, at the latest, the beginning of the public offer of the debt securities involved. The prospectus will be deemed available to the public when published either:
- by insertion in one or more of the newspapers widely circulated in Luxembourg;
- in a printed form, which is available, free of charge, to the public at the offices of the LuxSE, or at the registered office of the issuer and at the offices of the relevant financial intermediaries;
- in electronic form on the issuer's website or, if applicable, on the website of the relevant financial intermediaries; or
- in electronic form on the website of the LuxSE.

Offering documents for private placements (such as high-yield bonds benefiting from a safe harbour provision) are not subject to approval by the CSSF.

### 8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?

For public offers in Luxembourg, the Prospectus Law provides for a 10 business days review period by the CSSF (increased to 20 business days for first-time issuers), which starts to run when a complete file is submitted. If the CSSF finds, on reasonable grounds, that the documents submitted are incomplete or that supplementary information is needed, this review period shall start to run only from the date on which such information is provided. The CSSF shall notify the issuer or offeror if the documents are incomplete within 10 business days of the submission of the application. The failure of the CSSF to notify its decision within the review period set out above is considered to be an implicit decision of refusal.

The effective timetable for the approval of the prospectus can thus vary from two to three weeks to two or more months, mainly depending on whether the issuer is a first-time issuer, the existence of an existing registration document and the characteristics of the offer (cross-border, etc) or the securities offered (eg, the complexity of the terms and conditions). For a first-time offeror or in the case of a complex transaction, as well as for transactions aimed at the retail market, it is thus advisable to file the offering documentation well in advance.

During the offer period, any promotional communication or advertisement relating to an offer of securities to the public must be clearly recognisable as such, and the information contained therein cannot be inaccurate or misleading and needs to be in line with the prospectus. Such document must also indicate that a prospectus has been or will be published and must indicate where potential investors are able to retrieve a copy thereof. Similar rules apply regarding public offers made pursuant to a simplified prospectus.

Regulation (EU) No. 596/2014 on market abuse (Market Abuse Regulation) as supplemented by Commission Delegated Regulation (EU) 2016/958 now sets out an harmonised framework throughout the EU to which persons producing or disseminating investment recommendations relating to listed securities need to comply with in order to ensure high standards of fairness, probity and transparency so as not to mislead market participants or the public.

### 9 On what grounds may the regulators refuse to approve a public offering of securities?

The CSSF will not approve the prospectus until it is satisfied that the prospectus meets all requirements set out in the Prospectus Law and other applicable regulations. Depending on the framework chosen by the issuer, the requirements set out in the Prospectus Regulation and Part II of the Prospectus Law (in the case of a Prospectus-Directive-compliant prospectus) or Part III of the Prospectus Law (in the case of a simplified prospectus) will need to be satisfied in the opinion of the CSSF prior to any offer of the securities is made to the public. Similarly, the LuxSE will refuse to approve a prospectus drawn up for the purposes of admitting debt securities to trading on the Euro MTF to the extent that the requirements set out in the Rules are not met.

### 10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?

Public offers in Luxembourg will, as a rule, require the drawing up of a Prospectus Directive compliant prospectus either approved by the CSSF or by the competent authority of another member state and subsequently passported in Luxembourg. Closely following the Prospectus Directive, the Prospectus Law provides, however, for a set of safe harbours that allow an offer of securities to the public to be exempted from the obligation to publish a prospectus. This will be the case for offers of debt securities:
- addressed solely to qualified investors (as defined in the Prospectus Law);
- addressed to fewer than 150 natural or legal persons per member state, other than qualified investors;
- addressed to investors who acquire debt securities for a total consideration of at least €100,000 per investor, for each separate offer;
- whose denomination per unit amounts to at least €100,000; and
- with a total consideration in all member states of less than €100,000, which will be calculated over a period of 12 months.

As indicated, high-yield bonds issuances structured out of Luxembourg will typically be exempted from the requirement to draw up a Prospectus Directive compliant prospectus as such offers are usually addressed solely to qualified investors. However, note that any subsequent resale of debt securities that previously fell within one of these safe harbours will be regarded as a separate offer and could trigger an obligation to publish a Prospectus Directive compliant prospectus if said resale qualifies as an offer of securities to the public under the Prospectus Law, unless one of the aforementioned exemption applies. The placement of securities through financial intermediaries will be subject to the publication of a prospectus if none of the above-mentioned conditions are met for the final placement.

In addition, the obligation to publish a prospectus will not apply to public offers of debt securities:

- offered in connection with a takeover by means of an exchange offer, provided that a document is available containing information that is regarded by the CSSF as being equivalent to that of the prospectus, taking into account the requirements of EU legislation on takeover bids;
- offered, allotted or to be allotted in connection with a merger, division or any other similar restructuring operation, provided that a document is available containing information that is regarded by the CSSF as being equivalent to that of the prospectus, taking into account the requirements of EU legislation; or
- offered, allotted or to be allotted to existing or former directors or employees by their employer or by an affiliated undertaking provided that the issuer has its head office or registered office in one of the member states and a document is made available to the interested parties containing information on the number and nature of the debt securities and the reasons for and details of the offer.

While there are no specific rules governing exempted offers of securities, general principles of Luxembourg law will remain applicable, particularly in what concerns liability for inaccurate or incomplete information. Issuers and underwriters in the context of exempted offers are, therefore, required to treat all prospective investors (including qualified investors) fairly and equally, particularly concerning the material information made available in the context of the offer.

### 11 Describe the public offering process for debt securities. How does the private offering process differ?

For offers requiring the approval of a prospectus by the CSSF, the primary focus is on drafting such document in view of its submission to the regulator. This is a joint task by the issuer and underwriters and respective advisors and, depending on the characteristics and track record of the relevant issuer, will in normal circumstances take from four to 10 weeks (see question 8). The CSSF will accept to agree a tentative timetable for approval, although the approval will in any event be subject to all legal requirements being complied with. Once the prospectus is approved and, when appropriate, passported into other EU member states, the offer period can start, usually for a period ranging between five and 15 days. In parallel, the issuer's management team and the underwriters will conduct marketing and sales activities to reach out to investors. As the offer period comes to an end, the underwriters proceed with the allocation of the offer, and settlement thereof will as a rule occur on the following third day (see question 22). Price stabilisation activities, if any, will follow usually during a period of up to 30 days. For debt offerings exempted from the requirement to publish a Prospectus Directive compliant prospectus or not to be admitted to trading on the Regulated Market, which is typically the case for high-yield bonds, regulatory requirements are less stringent and, accordingly, the process is usually more flexible (particularly in relation to marketing activities, which may begin earlier in the process).

### 12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?

Customary documentation to be produced in connection with a closing of a debt issuance (both public offers and private placements) include:

- counsel legal opinions covering Luxembourg matters and, where applicable, any relevant foreign law (eg, when the issuer group is based abroad, or when the debt instruments are governed by another law);
- certificates issued by appropriate officers of the issuer, providing usual assurances as to solvency and authority to enter into the relevant transaction documents; and
- auditor's opinions and comfort letters.

### 13 What are the typical fees for listing debt securities on the principal exchanges?

The CSSF will charge a fee for the approval of the prospectus, ranging from €5,000 (for a prospectus) to €8,000 (for a base prospectus). Additional fees will apply for the approval of supplements, as well as in the case of multiple issuers or guarantors, up to a maximum of €15,000. For listings on the Regulated Market or the Euro MTF, the LuxSE charges a one-off visa fee for the review and approval of the prospectus of €2,500 for the first listing. A separate fee of €1,200 will be due for the listing and an annual maintenance fee, varying on the issuance size, from €500 to €800. Supranational issuers and recurrent issuers benefit from decreased fees.

### 14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?

The LuxSE lists and negotiates equity-linked notes, hybrids and exchangeable or convertible bonds and has a high market share in this area (see question 1). In particular, the post-crisis years have seen a relevant increase in these types of issuances, particularly by financial sector entities looking to meet the regulatory capital requirements through the issuance of hybrid instruments.

The launch in 2016 of the Luxembourg Green Exchange (LGX) is expected to boost interest for green securities listings in Luxembourg. The LGX is the first platform dedicated exclusively to green securities whose purpose is to help issuers market their green securities by generating awareness about their green projects. To date, the LuxSE is the leading exchange for green securities with half of the world's listed green bonds.

### 15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?

Issuance of special debt instruments generally follows the rules that apply to the offer and admission to trading of debt instruments. For Prospectus Directive compliant transactions, the relevant offering documentation will need to comply with the disclosure requirements set out in the Prospectus Regulation and, specifically, in the schedules that apply to special types of equity-linked debt issuances. Where equity-linked debt instruments are to be issued and offered by a Luxembourg entity, a requirement for approval by a general meeting of shareholders may as a rule apply, including for the purpose of withdrawing the statutory preferential rights of existing shareholders.

Under the LuxSE Rules, convertible or exchangeable bonds may only be admitted to trading on the official list if the underlying shares are also admitted to trading on the same market, or in another market offering similar assurances. By derogation, these securities may, however, be admitted to trading to the official list provided that the LuxSE is satisfied that the holders of the debt instruments are provided with all the information required to make a prudent investment decision.

As far as the listings of green bonds on the LuxSE are concerned, issuers will need to comply with certain specific disclosure and ex-post reporting obligations (to ensure that the proceeds are used for financing green projects) and will need to obtain independent assessment on the use and management of the proceeds in order to join the LGX.

### 16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?

For the purposes of Luxembourg law, classification of a security as equity or debt will be determined by a substance approach, taking into account the relevant features of the securities. Typical features of equity instruments include voting alongside holders of common share capital, participation in the profits of the issuer, right to liquidation proceeds and to the residual value of the issuer and subordination to all other creditors. Conversely, typical features of debt instruments include a claim for payment of principal, fixed or variable interests, no voting rights alongside shareholders, no participation in liquidation proceeds. The Prospectus Law contains an express definition of equity securities, according to which, equity securities are shares and other transferable securities equivalent to shares in companies, as well as any other type of transferable securities issued by the same issuer (or another entity belonging to the same group), giving the right to acquire shares or transferable securities equivalent to shares.

The content of a Prospectus Directive compliant prospectus will differ in an equity issue or a debt issue, as the relevant schedules of the Prospectus Regulation will require different elements to be provided to investors. In addition, debt instruments may benefit from certain safe harbour provisions, which may avoid the qualification of a securities offer as a public offer, or which may otherwise provide for an exemption to draw up and publish a prospectus (see question 10).

### 17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?

No general restrictions on transferability of debt securities are imposed in connection with offers of debt securities exempted from the obligation to draw up a Prospectus Directive compliant prospectus, unless any subsequent offer of the relevant securities would qualify as a public offer, in which case the requirement to draw up a Prospectus Directive compliant prospectus would apply to the extent no exemption thereto is applicable (see questions 2 and 10). In the context of private placements, it is customary for the transaction documentation (notably the underwriting agreement and the offering memorandum) to include an undertaking by the underwriters or managers not to offer and sell the debt securities in a way that could trigger the requirement to draw up a prospectus under the applicable laws and regulations. Typically, these undertakings are devised to make sure that the relevant offer of securities falls under one of the safe harbours provided for in the Prospectus Law (see question 10). In addition, it should be noted that certain restrictions may also apply under Luxembourg corporate law if the debt securities are issued by a Luxembourg private limited liability company, in which case the securities may not be offered to the public.

### 18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?

Under the EU harmonised legal framework for mutual recognition of prospectus under the Prospectus Directive, when Luxembourg is the host member state (as defined in the Prospectus Law), the prospectus, as well as any supplement to it, is valid for the purposes of a public offer in Luxembourg, or for admission to trading on a regulated marked operating in Luxembourg, as soon as the CSSF has received notification of the approval by the competent authority of the home member state of the relevant issuer. In such cases, the CSSF does not undertake any approval or administrative procedures relating to the prospectuses.

There are no special rules applying to securities offered outside Luxembourg by a Luxembourg issuer, except when Luxembourg is the home member state for the purposes of the Prospectus Directive, in which case the Prospectus Law and the EU harmonised framework for passporting of prospectus will similarly apply.

### 19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

Under the EU harmonised rules for mutual recognition of prospectus, issuers of debt securities that obtain the approval for a prospectus (in the context of a public offer or admission to trading in a regulated market) in another EEA member state may require the relevant home member state authority to notify the CSSF for the purposes of 'passporting' the prospectus. Once such process is completed, this will allow the issuer to offer the relevant debt securities in Luxembourg or admit such securities to trading on the regulated market of the LuxSE (in the latter case, the LuxSE in its capacity of market operator of the Regulated Market will still need to approve the listing application).

### 20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

Underwriting activities in connection with Luxembourg debt capital markets follow very closely the prevailing standards in the international capital markets, notably the standards set out by the International Capital Markets Association. Underwriters will typically agree to purchase the offered securities, for subsequent dissemination with investors. A typical underwriting agreement will include the issuer's representations and warranties, the agreement to purchase and sell the debt instruments, the covenants and undertakings of the issuer, the terms of the offering and the applicable indemnity clauses. In general, there are no fundamental differences in the underwriting arrangements for public offers and for private placements.

### 21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

Underwriters established in Luxembourg are subject to a licensing requirement with the CSSF and to the supervision of this regulator (unless duly licensed in other member states). Other than the requirements set out previously, underwriting agreements entered into in connection with debt issuances are not subject to approval by the CSSF.

### 22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?

As a relevant international financial centre, Luxembourg hosts several clearing and settlement agents with significant background and experience in public offers and admission to trading in Luxembourg. Clearstream Banking SA, LuxCSD SA, Euroclear Bank SA/NV and BNY Mellon CSD SA/NV are the main players. Settlement and execution of debt issuances will fundamentally depend on the form of representation of the securities (see question 23). In any event, settlement and delivery of debt instruments occurs typically on a payment-against-delivery basis, on the second day following the end of the offer or placement period. In such context, regardless of the actual form of the debt securities (bearer, registered or dematerialised), the debt instruments are subsequently inscribed in the books of the entity operating the relevant settlement system and thereafter credited to investors through the accounts held with the participant financial intermediaries. Admission to trading will, as a rule, occur on the date of settlement and issue of the debt securities.

### 23 How are public debt securities typically held and traded after an offering?

The traditional and still most commonly used form of representation for debt securities in Luxembourg is the registered form or bearer form. In both cases, the issuance is either represented by a global note deposited with a custodian or common depositary, who will keep the global note for the account of the central securities depositary(ies) or registered in the bondholders register maintained by the Luxembourg issuer at its registered office on behalf of a nominee for the account of the central securities depositary(ies). The latter then credits the accounts of its participants with the relevant number of issued debt instruments, who in turn will (directly or indirectly) credit the accounts of the ultimate investors. The applicable terms and conditions will provide for only certain exceptional circumstances in which definitive notes may be issued, notably in scenarios where there is a severe disruption of the accepted clearing systems.

The law of 6 April 2013 has introduced in Luxembourg the concept of dematerialised securities. This law requires the whole issuance of (debt) fungible instruments to be held through an issue account maintained with a central clearing entity, which is required to be based and recognised as such in Luxembourg, and are thereafter held through securities accounts maintained by investors (directly or indirectly) with financial intermediaries. The entry into force of the law on dematerialised securities has contributed to the modernisation of Luxembourg securities law by providing enhanced legal certainty and flexibility for cross-border issuances and holdings of securities.

**24 Describe how issuers manage their outstanding debt securities.**

Management of outstanding debt securities by Luxembourg issuers, or in relation to debt securities admitted to trading on one of the markets operated by the LuxSE, follows the prevailing market practices in the international capital markets. Such management will depend on the particular goals and needs of the relevant issuer, on the overall market conditions, and on the terms and conditions applicable to the relevant debt securities. The crisis years have evidenced a growing number of interactions between issuers and investors (acting through trustees or other fiduciaries), for the purpose of obtaining consent for certain actions (notably, in connection with rating triggers), as well as tender and exchange offers, as issuers seek either to take advantage of arbitrage opportunities or to extend the maturities of outstanding issuances. Issuers also frequently engage themselves in ongoing purchases of their securities on the open market. For listed debt securities, all these interactions are subject to mandatory disclosure and public dissemination (including in the LuxSE information system), so that interested investors can have access to the elements required to make informed investment decisions.

**25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?**

Where debt securities are admitted to trading on the LuxSE Regulated Market, reporting and disclosure obligations will apply to the issuers of such securities under the law of January 2008 on transparency requirements, as amended (the Transparency Law), the Market Abuse Regulation and the LuxSE Rules. Debt securities admitted to the Euro MTF market are not subject to the Transparency Law, but will be subject to the reporting and disclosure obligations set out in the Market Abuse Regulation and the LuxSE Rules.

Under the Transparency Law, issuers of debt securities admitted to trading on a regulated market having chosen Luxembourg as their home member state are notably required to file, store and publish regulated information, which comprises, inter alia, financial information and any inside information, as defined under the Market Abuse Regulation. Certain exemptions exist, notably for certain public law bodies and also for debt securities with a denomination above €100,000. In addition, issuers are also subject to ad hoc disclosure requirements, such as the disclosure of any change in the rights of holders of debt securities or issuance of new debt securities.

Under the LuxSE Rules, in turn, issuers whose debt securities are admitted to trading on one of the markets of the LuxSE must, inter alia, communicate certain information to the LuxSE including information relating to events affecting the debt securities, such as any amendment affecting the respective rights of different categories of debt securities, any issue or subscription of securities or a change of the name of the issuer. In addition, issuers with debt securities admitted to trading on the Euro MTF will need to comply with certain publication requirement set out in the LuxSE Rules (eg, relating to any changes to the rights of bondholders).

Issuers of debt securities admitted to trading on the Regulated Market or the Euro MTF are further required to disclose any inside information as soon as possible (under certain conditions, such publication can be delayed). Inside information must be disclosed in a manner enabling the public's fast access and complete, correct and timely assessment if the information. In practice, Luxembourg issuers rely for such purpose on the disclosure services offered by the LuxSE.

Additionally, the Market Abuse Regulation also requires each issuer of debt securities to ensure the prompt disclosure of all transactions on their issued securities effectuated by persons discharging managerial responsibilities of the issuer (or persons closely associated to such managers).

**26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?**

Responsibility for the information given in a prospectus attaches to the issuer, the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be. This principle applies generally for debt securities and securities of other kinds. The Prospectus Law does not as such foresee an autonomous civil liability regime as it mainly establishes the situations upon which civil liability may be sought and the relevant persons incurring (non-exclusive) liability. The persons responsible must be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices, as well as declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import. This declaration will not, however, exempt from liability (whether liability in tort or contractual liability as the case may be) other parties contributing to the preparation of the prospectus, if it is evidenced that they have provided false or misleading information.

The Prospectus Law specifies in its article 9 that no civil liability shall attach to any person solely on the basis of the summary or of the translation thereof, unless it is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus, or it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in such securities. The summary shall contain a clear statement to that effect.

**27 What types of remedies are available to the investors in debt securities?**

The most common remedy in the context of a debt securities offering is the liability for incorrect, inaccurate or incomplete information contained in the prospectus. Under Luxembourg law, the liability towards the underwriters by the issuer or the offeror will in general be contractual, whereas the liability of the issuer or the offeror towards the investors will as a general rule be based on civil liability in tort principles. For such purpose, civil litigation may be brought by investors seeking to recover any losses suffered in connection with the offer of securities. In addition, administrative proceedings may be started by the CSSF, both following a complaint by a private investor or by initiative of the regulator (see question 28).

**28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?**

The Prospectus Law provides the CSSF with broad powers to take remedies and sanctions in presence of improper activities in connection with offers of securities within Luxembourg. Under the Prospectus Law, the CSSF is entitled to:

- require additional disclosures in the prospectus;

**Update and trends**

The LuxSE launched in 2016 the Luxembourg Green Exchange, the first platform dedicated exclusively to green securities. It now has over 110 listed green bonds in various currencies. All securities listed on the Luxembourg Green Exchange are recognised globally as 100 per cent green. Issuers of green bonds listed on the Luxembourg Green Exchange need to comply with certain listing and post-listing requirements, reflecting the industry's best practices for green securities. In light of the COP 21 agreement reached in 2015 and signed by almost 200 countries, it is anticipated that the green market will considerably grow in the next few years. By establishing the Luxembourg Green Exchange, which aims to provide issuers and investors with the necessary framework to meet their needs in the green market, the LuxSE proves to be once again at the forefront of the securities industry.

The entry into force of the Market Abuse Regulation in the course of 2016 has raised many questions among issuers and investors throughout Europe. Although most of the obligations deriving from the Market Abuse Regulation were already applicable to issuers of debt securities admitted to trading on the Regulated Market, issuers of debt securities admitted to trading on the Euro MTF now need to get familiar with these new sets of rules (most of which were not applicable to the Euro MTF). To shed some light on the actual scope of obligations, the LuxSE has published a set of frequently asked question on Market Abuse Regulation particularly addressed to issuers of debt securities listed on either of its markets. Best practices will evolve with time, notably in light of the guidance and markets standards shaped by the ESMA and the CSSF.

- suspend a public offer or an admission to trading to the Regulated Market for a period of up to 10 working days;
- prohibit any advertisements regarding an offence; and
- prohibit a public offer or trading on the LuxSE.

In such context, the CSSF is entitled to publicly announce that a certain issuer or offeror is failing to comply with the regulatory obligations. Moreover, the CSSF has the power to impose administrative fines in connection with violations of the Prospectus Law. In this respect, it should be noted that, under Luxembourg law, a person who knowingly makes an offer of securities to the public in Luxembourg without having obtained an approved prospectus under the Prospectus Law may be subject to a fine ranging from €250 to €125,000. In certain cases, similar behaviour may qualify as a criminal offence.

The CSSF is also the competent authority to monitor compliance with and enforce the provisions of the Transparency Law and the Market Abuse Regulation. Directive 2014/57/EU on criminal sanctions for market abuse (Criminal Sanctions Market Abuse Directive) has recently been transposed into Luxembourg law by the law of 23 December 2016 on market abuses (Market Abuse Law).

Being the competent authority for the purpose of the MAR in Luxembourg, the CSSF supervises its application and may impose administrative sanctions as set out in the Market Abuse Law. The scope of sanctions is completed by a set of criminal sanctions also set out in the Market Abuse Law.

In terms of administrative sanctions, the CSSF is entitled to sanction market abuses (ie, insider dealing, unlawful disclosure of inside information or market manipulation) in different manners, from an injunction to stop the prohibited behaviour, the issue of a public warning disclosing the name of the person responsible for the prohibited behaviour to fines up to €5 million (or a fine up to €15 million or 15 per cent of the annual turnover in case of a violation by a legal person) or up to 10 times the profit derived from the illicit transaction.

Separately, the criminal sanctions relating to the same market abuses comprise, to the extent the person has the intention to obtain for himself or for the benefit of a third party an illicit gain, a fine up to €5,000,000 or an imprisonment of up to four years, or both, for violations of the insider dealing prohibition (including the recommendation to engage in insider dealing) and market manipulation (or a fine of up to €15 million in case of such a violation by a legal person). Those amounts can be increased up to 10 times the profit derived from the illicit transaction and shall in any event not be lower than the amount of the actual profit made, if such profit is determinable. In case of violations to the prohibition to unlawfully disclose inside information, and again to the extent the person has the intention to obtain for himself or for the benefit of a third party an illicit gain, a fine of up to €500,000 or imprisonment of up to two years for (or a fine of up to €1.5 million in case of such a violation by a legal person) can be imposed. It is worth noting, any attempt to commit any of the aforementioned prohibited activities shall be punishable by the same criminal sanctions.

Administrative sanctions (but no criminal sanctions) are also specified for violations of the notification obligations of managers for failures to notify the relevant issuer or the CSSF of transactions conducted on their own account relating to the securities of that issuer or derivatives or other financial instruments linked thereto.

In the case of securities admitted to trading in Luxembourg, the LuxSE supervises the compliance by the issuers with the LuxSE Rules. In terms of sanctioning powers, the LuxSE can suspend or withdraw from trading any debt security that no longer complies with, or whose issuer no longer conforms to, the provisions of the LuxSE Rules relating to the disclosure obligations, except where that measure would be likely to significantly damage the interests of investors or to compromise the orderly operation of the market. When an issuer no longer complies with the regulatory provisions applicable to debt securities admitted to trading on the Regulated Market, the LuxSE can, on its own initiative, operate a transfer of debt securities admitted to trading on the Regulated Market to the Euro MTF. Further, the LuxSE can, on its own initiative, delist debt securities from trading on a market when it is of the firm belief that for specific reasons, the normal and consistent market for these debt securities cannot be maintained.

**29 What are the main tax issues for issuers and bondholders?**

Payments of arm's-length interest and repayments of principal on non-profit sharing debt instruments are, as a general rule, not subject to withholding tax in Luxembourg. Interest paid on (wholly or partially) profit-sharing instruments can be qualified as a profit distribution subject to a 15 per cent withholding tax unless reduced or exempted by a domestic law exemption or applicable double tax treaty. A 20 per cent withholding tax may be levied in Luxembourg, to be applied by the paying agent or the recipient on a spontaneous self-assessment basis, to payments of interest on debt instruments that are owned by Luxembourg individual resident holders acting in the context of the management of their private wealth. This withholding tax would then apply as a final levy.

Non-resident individual and corporate holders of debt instruments, who have neither a permanent establishment nor a permanent representative nor a fixed place of business in Luxembourg to which the debt instruments are attributable, are not liable to any Luxembourg tax or filing obligations on repayments of principal or payments of interest on the debt instruments or capital gains realised upon a disposal of the debt instruments.

Luxembourg resident corporate holders of debt instruments not benefiting from a special tax regime must include any interest and gains derived from the debt instruments in their taxable income. Resident corporate holders benefiting from a special tax regime, for example, certain undertakings for collective investments, specialised investment funds or family wealth management vehicles, may be exempt from tax on interest and gains realised on debt instruments held.

Luxembourg individual resident holders of debt securities must include any interest and gains derived from the debt instruments in their taxable income that is regularly liable to income tax and surcharges at progressive rates, unless the final 20 per cent withholding (as referred to above) applies.

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No transfer taxes are applicable to debt instruments. In general, no registration duties will apply unless debt instruments are voluntarily registered with an official authority (there is no obligation to do so) or explicitly referred to in a notarial deed or in the course of litigation, in which cases, fixed or ad valorem registration duties might apply.

No Luxembourg value added tax is generally levied with respect to payments made in consideration of the issuance of debt instruments, payments of interest on debt instruments, repayments of principal or redemption of debt instruments or transfer of debt instruments.

# Mexico

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### 1 What types of debt securities offerings are typical, and how active is the market?

Typical offerings of debt securities in Mexico include public offerings of registered long-term and short-term debt securities, usually documented through *certificados bursátiles* (a Mexican security that provides sufficient flexibility to represent debt or equity-type investments). It is also usual for Mexican companies to conduct private placements of debt securities outside of Mexico, usually relying on Rule 144A or Regulation S of the Securities Act of 1933.

Although the Mexican debt capital markets have been active, the past years have seen a slowdown due in part to the increase in interest rates in the US and Mexico during 2016, the expected increases in 2017, and to the depreciation of the Mexican peso in relation to the US dollar. This has been particularly evident in cross-border issuances, which are typically used by mid to large-cap Mexican companies as an attractive means of financing. While we expect such issuances to continue in the future, due to the current value of the Mexican peso and the increase in interest rates, we are seeing Mexican issuers more and more interested in the Mexican domestic market, where we expect issuances to increase in the near term.

### 2 Describe the general regime for debt securities offerings.

Offerings of debt securities in Mexico are mainly governed by the Mexican Securities Market Law, the related regulations issued by the Mexican Banking and Securities Commission (CNBV) known as General Regulations Applicable to Issuers and other Market Participants, and the regulations issued by the Mexican Securities Exchange. Generally, debt securities may only be offered in the territory of Mexico through a public offering, unless the issuer can rely on a private placement exemption contained in the Securities Market Law.

A public offering in Mexico requires the prior authorisation of the CNBV, the registration of the securities in the National Securities Registry maintained by the CNBV and the favourable opinion of the Mexican Securities Exchange for the listing of such securities therein. Upon registration of the securities in the National Securities Registry, the issuer would become a reporting company in Mexico and would be subject to the reporting requirements contained in the Mexican securities legislation, including disclosing quarterly and annual financial information as well as relevant events. The CNBV and the Mexican Stock Exchange would be in charge of supervising and enforcing compliance of such reporting requirements.

Debt securities may also be offered in Mexico through a private placement to the extent that such securities are not registered in the National Securities Registry and the offer is made exclusively to institutional investors or qualified investors (individuals that have maintained during the last 12 months, on average, investments in securities in an amount equal to or greater than approximately US$417,000, or that have obtained in the past two years a gross annual income equal to or greater than approximately US$139,000).

Mexican law does not have an extraterritorial reach and offerings of debt securities by Mexican issuers outside of Mexico would have to be conducted in accordance with the securities laws of the jurisdiction in which such offerings take place. The Securities Market Law does, however, require such Mexican issuers to report their offerings outside of Mexico to the CNBV and the Mexican tax administration service.

### 3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.

In order to obtain the authorisation of the CNBV to conduct a public offering of debt securities in Mexico and to obtain the registration of such securities in the National Securities Registry, a filing must be carried out with the CNBV. In addition, another filing has to be done before the Mexican Securities Exchange to obtain its favourable opinion and listing of the securities. Both filings are required to include the following documents:

- an application executed by the issuer, a Mexican broker-dealer acting as underwriter, and the institution acting as common representative of the investors;
- a certified copy of the power of attorney of the issuer's legal representative;
- a secretary's certificate ascertaining the validity of such power of attorney;
- a certified copy of the deed of incorporation and current by-laws of the issuer;
- a certified copy of the issuer's corporate authorisation for the issuance;
- a draft of the global certificate which will document the securities;
- annual audited financial statements for the last three years prepared in accordance with the International Financial Reporting Standards (IFRS) and, to the extent such statements are more than six months old, limited review interim financial information, in the understanding, that the issuer may also have to provide internal unaudited quarterly information if the limited review interim financial information is more than three months old. Short-term issuances (commercial paper with less than one year maturity) would only require one year of annual audited financial statements;
- an independence letter from the issuer's external auditor;
- a legal opinion from the issuer's external legal adviser;
- a draft of the underwriting agreement;
- a draft of a public offering notice;
- a draft of a preliminary prospectus (or supplement, in the case the issuance is being made under a programme of registered securities), in the understanding that a prospectus is not required for short-term issuances;
- at least one credit rating (although the standard market is to provide two credit ratings); and
- evidence of payment of application fees.

All in all, the requirements to conduct a public offering of debt securities in Mexico are similar to the requirements that would apply to equity securities, except that equity issuances do not require credit ratings.

### 4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?

Generally, a public offering of debt securities requires that the issuer produce a prospectus containing all relevant information for the public to make an informed investment decision when purchasing the securities, except that issuances of short-term debt securities are exempt from this requirement. When a prospectus is required, it will have to include at least the following information:

- a summary of the issuer and its business;
- risk factors;
- a description of the offering, including the credit ratings of the issuer;
- the use of proceeds of the offering;
- the plan of distribution of the securities;
- detailed information of the issuer; and
- management's discussion and analysis of the issuer's financial statements.

**5 Describe the drafting process for the offering document.**

The drafting of an offering prospectus is commonly a joint effort between the issuer, the underwriters and the issuer's external legal counsel. The key issue in preparing any prospectus is finding the correct combination that will allow compliance with the legal requirement to disclose any and all information that is relevant for an investor to make an informed decision when purchasing the securities, and crafting an attractive selling document that will ultimately be used to sell the notes. This is particularly challenging with new issuers that are first coming to market, where careful due diligence by the underwriters and legal counsel will have to be conducted to ensure a fair, accurate and complete disclosure. For recurring issuers, the process of drafting the prospectus is much more streamlined, considering that Mexican securities regulations allow certain cross-references to other public filings to be included in the offering document.

The Securities Market Law and its regulations contain no clear, bright-line rule to determine the information that will be considered relevant for an investor to make an informed investment decision. The determination of what constitutes relevant information is subjective and will have to be made by the issuer together with the underwriters on a case-by-case basis. However, certain rules applicable to 'relevant events' that will have to be disclosed by an issuer once its securities have been registered can provide some guidance as to which information the regulator considers to be 'relevant'. For example, Mexican securities regulations contain a list of certain events that would be considered as relevant, such as changes to the corporate structure of the issuer. In addition, a threshold has also been included, which considers any act, circumstance or event to be deemed relevant when it represents more than 5 per cent of the total assets, liabilities or consolidated corporate capital of the issuer, or more than 3 per cent of the consolidated total sales of the issuer, in each case, for the immediately preceding fiscal year. It is important to note that an event can be deemed relevant even if it represents an amount that is below such thresholds if it is important enough to influence an investor's decision to purchase the securities.

Finally, we note that the offering documents to be used for private placements are not subject to regulation in Mexico, although issuers in the past have used simplified private placement memorandums containing the most relevant information of the particular investment.

**6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?**

The key documents that govern the terms and conditions of registered debt securities include a global certificate, which is the legal document that contains the terms of the note (including amount, interest rate, maturity date and covenants), a prospectus and a prospectus supplement (in case the issuance is being made under a programme of registered securities).

The global certificate has to be signed by an authorised representative of the issuer and the common representative of the bondholders.

The prospectus and prospectus supplement, which are not legal contracts but are the offering document for the issuance, contain 10b-5 type representations related to the accuracy, completeness and fairness of the information contained therein, which must be signed by the CEO, CFO and CLO of the issuer, an authorised representative of the underwriter, the issuer's external auditor, the issuer's external legal counsel and the common representative of the noteholders, among others.

The prospectus, once public, can be accessed through the electronic portals of the CNBV (STIV) and the Mexican Securities Exchange (Emisnet). The global certificate is usually included as an exhibit of the prospectus and is also generally available online.

**7 Does offering documentation require approval before publication? In what forms should it be available?**

Under the Mexican securities regulation, the issuer and the underwriters in a public offering of debt securities cannot conduct marketing efforts with respect to the securities unless a preliminary prospectus has been filed and uploaded to the electronic portals of the CNBV (STIV) and the Mexican Securities Exchange (Emisnet), and has been made publicly available. Before the prospectus is made publicly available, no marketing efforts can be conducted and any communications with potential investors must be limited to non-deal information.

**8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?**

In order to conduct a public offering of debt securities, an issuer is required to obtain the authorisation of the CNBV to register the securities in the National Securities Registry and to conduct a public offering thereof, as well as the favourable opinion of the Mexican Securities Exchange to list the securities therein.

The time frame for approval varies from deal to deal, depending on several factors including complexity of the deal, completeness of the filing documents and work load of the regulators. However, the authorisation process in general has become quite streamlined, and assuming all documents are complete and comply with all legal requirements, can be completed for first-time issuers in as little as two months from the date of the initial filing.

During the review process and as mentioned above, until the filing has been made publicly available in the electronic portals of the CNBV and the Mexican Securities Exchange, no marketing efforts can be conducted by the issuer or the underwriters. In addition, unless and until the CNBV has registered the securities in the National Securities Registry and has authorised the public offering, neither the issuer nor the underwriters may carry out the actual offering and pricing of the securities.

**9 On what grounds may the regulators refuse to approve a public offering of securities?**

The CNBV may refuse to approve a public offering of securities if the filing documents fail to comply with the requirements set forth in the Securities Market Law and its related regulations, particularly with respect to disclosure. In addition, if the issuer is already a reporting company, the CNBV may also refuse to approve an offering if the issuer is not compliant with its ongoing reporting obligations.

**10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?**

Generally, debt securities may only be offered in the territory of Mexico through a public offering, unless the issuer can rely on a private placement exemption contained in the Securities Market Law. As described in question 2, a public offering of debt securities in Mexico typically requires the prior authorisation of the CNBV, the registration of the securities in the National Securities Registry maintained by the CNBV and the favourable opinion of the Mexican Securities Exchange for the listing of such securities therein.

Debt securities may also be offered in Mexico through a private placement to the extent that such securities are not registered in the National Securities Registry and the offer is made exclusively to institutional investors or qualified investors. Although the offering documents to be used for private placements are not subject to regulation in Mexico, issuers in the past have used private placement memorandums containing the most relevant information applicable to the related investment. Issuers also obtain 'big boy' letters from potential investors to ascertain that the offering is indeed being made to institutional or qualified investors only.

**11 Describe the public offering process for debt securities. How does the private offering process differ?**

The process for conducting a public offering of debt securities generally involves a timeline comprised of four different segments:

**Process prior to first filing**

Prior to the first filing of a public offering, the issuer needs to appoint all parties involved in the process, including one or more underwriters, the external legal advisor, the institution that will act as common representative of the bondholders, the issuer's external auditor and the rating agencies. Once appointed, the issuer will commence the elaboration of the prospectus and the other issuance documents, as well as the financial information that will have to be presented as part of the filing.

**First filing and CNBV review**

Once the first filing documents are complete, the issuer will make the first filing before the CNBV and the Mexican Securities Exchange to commence their review process. Although not required, it is customary that the first filing is done on a confidential basis so as to give the CNBV and the Mexican Securities Exchange time to review the filing documents and provide comments before the documents are publicly available. This means, however, that no marketing efforts can be conducted until the filing is made public. Therefore, there may be instances where it may make sense to make the first filing public if marketing needs to commence on an expected basis.

**Public filing and road show**

Once the issuer and the underwriters are comfortable that the documents will not undergo further material changes (either as a consequence of the review process by the CNBV and the Mexican Securities Exchange or otherwise), the issuer will request the CNBV and the Mexican Securities Exchange to lift the confidentiality of the filing and the filing documents (including the prospectus). Upon lifting of the confidentiality of the filing, the issuer and the underwriters may commence the marketing of the securities, including conducting the respective road show. The issuer and the underwriters may use an investor presentation as a selling instrument for the road show, but only to the extent that the presentation contains information that is also included in the prospectus. Pursuant to the Securities Market Law, the prospectus is required to be the selling document during the road show. If a relevant event occurs during the road show and prior to pricing, the prospectus (and the investor presentation) must be updated to reflect such relevant event. Note that the preliminary prospectus containing all material information must be made available to the public at least five business days prior to the intended pricing date (or two business days for short-term bonds).

**Pricing and settlement**

On the day immediately preceding the pricing date, the issuer must publish a public offer notice in the electronic portal of Emisnet. On the pricing date, the issuer and the underwriters will carry out the public offering of the securities (whether through a public auction or a book building method), and determine the pricing thereof. Once the pricing has been determined, the definitive prospectus (including final numbers) would be published in the electronic portals of the Mexican Securities Exchange and the CNBV. Clearing and settlement of the transaction would typically occur one business day after the pricing date (although this time can be extended by prior written notice to the Mexican Securities Exchange).

The time frame for concluding a public offering of securities varies from deal to deal, depending on several factors including complexity of the deal, availability of financial statements and credit ratings, and the authorisation process with the CNBV and the Mexican Securities Exchange. Assuming all documents are available and complete, that the financial statements are current and in accordance with IFRS, and that the filing complies with all legal requirements, a public offering of the securities can be completed for first-time issuers in two to five months from the date of initiation of the transaction.

The process for a private offering is completely different in Mexico since it is not a regulated process. Generally, a private placement may involve the preparation of a selling document containing all relevant information of the respective investment, as well as obtaining 'big boy' letters from potential investors. However, neither of these items is strictly required, and therefore the timing and documents involved in a private placement of securities may vary depending on the issuer, the potential investors and the other parties involved in the structuring and execution of the private placement.

**12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?**

In a public offering in Mexico, the underwriters will enter into an underwriting agreement with the issuer that will establish the terms of the underwriting, including indemnities and closing conditions. Those closing conditions typically require that the issuer deliver to the underwriters the statutory legal opinion (which refers to legality and validity), the rating letters issued by the related rating agency, and other standard conditions. We note that in a public offering in Mexico it is not common for the underwriters to request auditors' comfort letters or 10b-5 type opinions since the CEO, CFO and CLO of the issuer, the external auditor and the external legal counsel sign the prospectus and assume responsibility for the information contained therein (insofar as it relates to their participation in the deal). However, we note that derived from cross-border issuances of debt securities by Mexican companies (in which underwriters or initial purchasers typically do require auditors' comfort letters and 10b-5 opinions), some underwriters have begun requesting such documents in the domestic market as well.

With respect to private offerings of debt securities, it would be customary for the intermediaries involved to request a legal opinion regarding legality, validity and enforceability of the transaction documents, as well as 'big boy' letters from prospective investors. If a private placement memorandum is used in the offering and sale of the securities, it would also be usual for intermediaries to receive a 10b-5 type statement from the issuer or its counsel with respect to the information contained therein, as well as a comfort letter from an independent auditor if numbers are being shown to prospective investors.

**13 What are the typical fees for listing debt securities on the principal exchanges?**

There are four types of fees for the listing of debt securities in the Mexican securities exchange:

- an application fee of the CNBV in an amount of approximately US$1,000;
- an application fee of the Mexican Securities Exchange in an amount of approximately US$1,000;
- a registration fee in an amount equal to the issued amount times 0.0007, without exceeding an amount of approximately US$164,000; and
- a Mexican Securities Exchange listing fee ranging from US$570 to US$3,335, depending on the amount issued.

**14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?**

Although the market for special debt instruments is relatively new in Mexico, there has been some proliferation in recent years in over-the-counter markets, particularly with respect to cross-border derivatives transactions. On the other hand, the Mexican derivatives exchange (MexDer) only offers futures and options over certain commodities.

**15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?**

Unless the counterparty is a regulated entity (such as a Mexican banking institution), there are no specific regulations that apply to over-the-counter special debt securities, and the terms thereof can be contractually agreed by the parties. These types of transactions may have different accounting implications depending on the way in which such special debt securities are structured, and therefore an analysis of the tax and accounting consequences for the parties would have to be conducted on a case-by-case basis.

**16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?**

Based on a Mexican securities law perspective, equity securities are securities representing the capital of a legal entity, while debt securities represent a participation in a loan or a collective credit.

Equity securities grant investors an ownership share in the business, and therefore, they generally provide voting rights and the possibility of obtaining gains derived from the issuer's future profits; whereas, debt securities grant investors the right to obtain a repayment of capital with interest thereon. As such, market practice identifies debt securities as those that bear interest, have a predictable payment schedule and a credit rating.

Whether a security qualifies as debt or equity can have several different implications. From a tax perspective, tax liabilities (including withholding tax payments) will be different between taxes on interest payments and taxes on equity or equity-like distributions. In addition, the investment regimes of institutional investors may allow for different exposures to debt securities or other equity-like instruments.

### 17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?

Debt securities may be offered privately to qualified or institutional investors pursuant to the registration exemptions provided for in the Securities Market Law. Notwithstanding the private offering safe-harbour, after the initial issuance there are no restrictions for the transfer of such securities to other persons, except that if such transfer is conducted by means of an offering, then a public offering would have to be carried out unless the seller relies on a private placement exemption.

### 18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?

Non-Mexican issuers may access Mexican debt capital markets either through: offering and registering the corresponding debt securities in the National Securities Registry and listing such registered securities in the Mexican Securities Exchange; or listing such securities in the International Quotation System operated by the Mexican Securities Exchange.

If a non-Mexican issuer opts for registering the debt securities in the National Securities Registry, it would have to follow a similar offering process to that applicable to Mexican issuers. Additionally, upon registration the non-Mexican issuer would be subject to ongoing reporting obligations that closely resemble those applicable to domestic issuers, with the exception that the issuer may file in Mexico the information it discloses in its market of origin. Furthermore, the information required to be disclosed may be provided initially in English, to the extent a Spanish translation is provided shortly thereafter.

On the other hand, a non-Mexican issuer may access debt capital markets in Mexico by listing the securities issued abroad within the International Quotation System provided certain requirements are met (including that such securities are issued in a market in which the regulator is on the International Organization of Securities Commissions (IOSCO) board or has otherwise obtained recognition from the Mexican securities regulator). Securities listed in the International Quotation System are exempt from registration in the National Securities Registry, and as such the corresponding non-Mexican issuer will not be required to file a registration request with the CNBV, nor will it be subject to the ongoing reporting obligations as an issuer of registered securities in Mexico. Once listed in the International Quotation System, the non-Mexican issuer's obligations would be limited to providing reports with the same periodicity and content as those provided in its home market.

### 19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

Mexico is a party of the Latin American Integrated Market (MILA), which is a common securities trading market that integrates the stock exchange markets of Chile, Mexico, Colombia and Peru. Such integration seeks to provide investors a greater variety of investment opportunities.

Although as of February 2017 MILA is still limited to equity securities, the trading of debt securities is provided for in MILA's strategic plans and is expected to be implemented later in the year.

### 20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

There are two types of underwriting arrangements for public offerings of debt securities: best efforts and firm commitment. It is worth noting that most public offerings of debt securities in Mexico are carried out under a best efforts arrangement.

We note that Mexican broker-dealers are restricted from carrying out intermediation activities with respect to unregistered debt securities, and such securities must in any case be offered directly by the issuers.

### 21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

Underwriters in Mexico must be licensed broker-dealers, duly authorised by the Mexican Ministry of Finance, and are subject to several provisions and guidelines contained in the Securities Market Law and its related regulations. The underwriting agreements entered into by Mexican broker-dealers must in all instances comply with the Securities Market Law and such regulations.

### 22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?

Generally, a public offering of debt securities in Mexico is cleared and settled one business day after the pricing date of the transaction. For such purposes, the issuer is required to deposit the global certificate representing such securities in SD Indeval Institución para el Depósito de Valores, SA de CV (Indeval), the central depository institution of the Mexican Securities Exchange. On the settlement date, the securities would be credited in book-entry form to the accounts of the lead underwriters in Indeval, and such lead underwriters would in turn credit such securities to their respective clients. Such underwriters would use the amounts deposited in their client accounts to deliver to the issuer, through Indeval, the proceeds of the public offering.

### 23 How are public debt securities typically held and traded after an offering?

Public debt securities are typically held in book-entry form in the accounts that Mexican broker-dealers hold with the Mexican securities depository, Indeval, and are listed in the Mexican Securities Exchange.

### 24 Describe how issuers manage their outstanding debt securities.

In order to manage their outstanding debt securities, issuers can repurchase such securities in the secondary market and carry out consent solicitations in order to amend the term and conditions of their respective debt securities (in the understanding that such amendments typically require certain consents from the respective bondholders' meetings).

### 25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?

The ongoing reporting obligations of an issuer can be divided into three broad categories:

- annual reports: no later than 30 April of each year, the issuer must file an annual report which, among other things, discusses the issuer's financial statements for the preceding fiscal year;
- quarterly information: on a quarterly basis, the issuer will have to file a report containing quarterly unaudited financial information for the corresponding quarter, with a comparison against the same quarter of the preceding fiscal year; and
- relevant events: the issuer will also have to disclose to the public the occurrence of any act, event or circumstance that has or may have an impact on the price of the securities of the respective issuer.

**26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?**

Mexican securities regulation contemplates liability for the CEO, CFO and CLO of the issuer, the common representative, the underwriter, the issuer's external legal counsel and the external auditor. Although all the aforementioned parties sign the prospectus, the extent to which they are liable for the information contained varies in each case. For example, the CEO, CFO and CLO of the issuer are required to personally state, under oath, that they have reviewed and prepared all the information contained in the prospectus, and that such information is correct, accurate and complete in all material respects. The underwriters are liable for ascertaining that the prospectus complies with all regulations applicable to it, including with respect to disclosure.

The penalties for including inaccurate, misleading or incomplete information in a prospectus could range from civil liability (which includes the payments of damages and lost profits), to administrative sanctions and in some cases criminal liability.

**27 What types of remedies are available to the investors in debt securities?**

Under Mexican law, investors in debt securities are allowed to exercise actions for liability against the issuer through the common representative, which is a Mexican financial institution that represents the collective interests of the investors. Additionally, investors may, through a summary trial, demand payment of any owed and unpaid coupons. More generally, under Mexican law, individuals or entities may sue for damages and lost profits.

**28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?**

The CNBV has broad supervisory authority, which in general terms allows it to issue comments, and if applicable, order an issuer to adopt measures to correct acts or omissions in connection with its obligations. In addition to its supervisory authority, the CNBV may also impose fines, administrative sanction, and in certain cases pursue certain conducts that are considered to constitute a criminal offence.

**29 What are the main tax issues for issuers and bondholders?**

The main tax issues for issuers and bondholders consist of the payment of income tax (directly or through withholding) and the payment of taxes upon transfers of certificates. Payments of interest made by Mexican issuers in respect of bonds to a non-Mexican holder will generally be subject to a Mexican withholding tax assessed at a rate of 4.9 per cent, if the following requirements are met:

- the bonds are placed outside Mexico through banks or broker-dealers, in a country with which Mexico has a treaty for the avoidance of double taxation in effect;
- a notice of the offering is filed before the CNBV describing the main characteristics of the bonds; and
- the issuer complies with the information requirements specified from time to time by the Mexican tax administration service.

If any of such requirements is not met, the withholding tax applicable to interest payments under bonds made to non-residents of Mexico may be imposed at a rate of 10 per cent or higher.

Under the Mexican Income Tax Law, payments of principal made by the issuer in respect of the bonds to a foreign holder will not be subject to Mexican withholding tax.

Gains resulting from the sale or disposition of bonds by a foreign holder to another foreign holder are not subject to income or other tax in Mexico. Gains resulting from the sale of bonds by a foreign holder to a purchaser who is a Mexican resident for tax purposes or to a foreign holder deemed to have a permanent establishment in Mexico for tax purposes, will be subject to Mexican federal income or other taxes pursuant to the rules described above in respect of interest payments, unless an applicable income tax treaty provides otherwise. The acquisition of bonds at a discount by a foreign holder will be deemed interest income, and subject to Mexican withholding taxes, if the seller is a Mexican resident or a foreign resident deemed to have a permanent establishment in Mexico.

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# Portugal

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### 1 What types of debt securities offerings are typical, and how active is the market?

The main debt securities offered in the Portuguese capital markets are bonds or notes, issued on a stand-alone basis or under a programme. Within the securities traded on a regulated market or issued by open companies (a concept that includes, but is not limited to, listed companies), the debt securities offered are mostly unsecured, unsubordinated and with floating interest rates.

The issuers of debt securities in Portugal are mostly state entities and banks. By the end of 2016, state-issued securities represented twice the amount of debt issuances made by private banks and corporations (€149.29 billion, €46.29 billion and €33.72 billion, respectively). Within the secondary spot market, the only listed debt securities were plain vanilla bonds and government bonds. The former are mostly traded in Euronext Lisbon, the only Portuguese regulated market, and in EasyNext Lisbon, a multilateral trading facility, while government bonds are traded in MTS Cash, a multilateral trading facility dedicated to the trading of debt securities.

### 2 Describe the general regime for debt securities offerings.

The general regime on the offering of debt securities may be found in the following laws:

- the Portuguese Securities Code, approved by Decree-Law No. 486/99, of 13 November, as amended (PSC), which includes the provisions implementing the Prospectus Directive, the Transparency Directive and the Market Abuse Directive into Portuguese law;
- the Portuguese Companies Code, approved by Decree-Law 262/86, of 2 September, as amended (PCC), containing provisions on the issuance of bonds, convertible bonds and bonds with warrants;
- Commission Regulation (EC) No. 809/2004 of 29 April 2004, as amended (Prospectus Regulation), implementing the Prospectus Directive;
- CMVM Regulation No. 3/2006, on public offerings (CMVM Regulation 3/2006);
- CMVM Regulation No. 2/2012, on complex financial products (CFP Regulation);
- Euronext Listing Rules on the Portuguese regulated market Euronext Lisbon; and
- Interbolsa Regulations.

The following laws govern specific types of debt securities, containing provisions on their offering:

- Decree-Law No. 69/2004, of 25 March, on commercial paper, as amended;
- Decree-Law No. 408/91, of 17 October, on cash bonds, as amended;
- Decree-Law No. 59/2006, of 20 March, on covered bonds; and
- Decree-Law No. 453/99, of 5 November, on securitisations (covering securitised bonds).

The competent authority to supervise public offerings of debt securities in Portugal is the Portuguese Securities Market Commission (CMVM), which has, inter alia, the competence to approve the relevant prospectus, when applicable. In the discharge of its functions, the CMVM cooperates closely with the Bank of Portugal and the Insurance and Pension Funds Supervision Authority.

The Lisbon Stock Exchange, Euronext Lisbon, is the sole regulated market in Portugal and is operated by Euronext Lisbon. All admissions to trading on Euronext Lisbon shall abide by its regulations. Interbolsa operates the only Portuguese centralised securities depository system, Central de Valores Mobiliários.

### 3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.

Under article 134 of the PSC, a public offer of debt securities shall be preceded by the disclosure of a prospectus approved by the competent authority of the home member state of the issuer.

A number of exemptions apply, notably with respect to:

- offers concerning securities with a unitary nominal value of at least €100,000 or whose subscription or sale price per offer, by addressee, corresponds to at least the same amount;
- offers of debt securities issued by credit institutions continuously or repeatedly, provided certain conditions are met;
- offers for securities whose total value in the European Union is less than €5 million, calculated by reference to offers made throughout a period of 12 months;
- offers of debt securities with a maturity less than 12 months (ie, commercial paper), though subject to the approval of an informative note by the CMVM; and
- offers of securities to current or former directors or employees by their employer, by a company in a control or group relation with the latter or by a company subject to common control, provided certain conditions are met.

When the home member state of the issuer is Portugal, the prospectus shall be approved by the CMVM. When the home member state of the issuer is not Portugal, the prospectus shall be approved by the competent authority of the home member state in question and passported into Portugal under the relevant provisions of the PSC implementing the Prospectus Directive.

Under article 236 of the PSC, independently of whether their issuance was made pursuant to a public offer or a private placement, an admission to trading of debt securities on a regulated market shall also be preceded by the disclosure of a prospectus approved by the competent authority of the home member state of the issuer. As in the case of public offerings, a number of exemptions apply.

Debt securities deemed complex financial products under the CFP Regulation, such as structured bonds, may only be marketed to five or more non-qualified (ie, retail) investors resident or established in Portugal if a key investor information document (KIID) complying with certain information requirements is previously made available to them by the relevant marketing entity. The KIID is not subject to a formal process of approval by the CMVM, but since the relevant securities may only be marketed after disclosure of the KIID in the disclosure system organised by the CMVM on its website (SDI), informal approval of this document by the CMVM is necessary in any case.

### 4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?

As referred to in question 3, a public offer of debt securities shall be preceded by the disclosure of a prospectus approved by the competent authority of the home member state of the issuer.

The prospectus may be drawn up as a single document, or by reference to separate documents.

The prospectus composed of separate documents is made up of a registration document, containing information on the issuer, a securities note, containing information on the securities offered, and a summary. If the registration document has been previously approved by the CMVM and is valid, only the securities note and the summary will be approved within the process for the approval of the prospectus. If not, all three documents will be approved under such process.

A base prospectus may be used in the context of the public offering of debt securities issued under an offering programme or in a continuous or repeated manner by credit institutions, provided certain conditions are met. The issuer shall disclose final conditions for every issuance of securities made under the base prospectus. The final conditions shall only contain information on the securities.

According to article 135 of the PSC, the prospectus shall contain complete, truthful, updated, clear, objective and lawful information, allowing the addressees to make an informed assessment of the offer, the securities concerned and the rights attached thereto, its specific characteristics and the assets and liabilities, as well as the economic and financial position and the prospects for the business and earnings of the issuer and the guarantor, if any.

The information to be contained in the prospectus or base prospectus shall be presented in accordance with the relevant provisions of the Prospectus Regulation (together with, for guidance, ESMA recommendations, questions and answers relating to prospectus) and will vary depending on the type of debt securities at hand (eg, debt securities with a denomination per unit of at least €100,000 do not require a summary). In any case, it includes: the risk factors relating to the issuer and the securities, information about the issuer, the terms and conditions of the securities, applicable selling restrictions, the contemplated use of proceeds, and information on corporate authorisation and admission to trading.

Certain information may be included in the prospectus by reference, provided the relevant documents have been previously approved or filed with the CMVM.

An addendum or rectification to the prospectus shall be approved by the CMVM and disclosed by the issuer if, between the date of approval of the prospectus and the end of the offer period, whichever occurs last, an error is detected in the prospectus or a new event occurs, or a previous fact event not taken into account in the prospectus becomes known, that is relevant for the decision of the addressees to invest or not in the securities. If necessary, the summary shall also be completed or rectified accordingly.

Finally, as also referred to in question 3, debt securities deemed complex financial products may only be marketed to five or more non-qualified investors if a KIID is made available to such investors. The information to be contained in the KIID is set out in the CFP Regulation and covers the main characteristics and risks of the securities.

### 5 Describe the drafting process for the offering document.

In practice, most sections of the prospectus, including the risk factors, the description of the issuer, of its business and activities, results and financial condition, use of proceeds and corporate authorisations for the offer, are primarily drafted by the issuer with the assistance of its legal counsel.

Lead underwriters and their counsel usually prepare a first draft of the terms and conditions and the sections that relate to the selling restrictions and listing process.

In order to draft the prospectus and verify the information contained therein, conference calls are held and attended by the issuer and its legal counsel, the underwriters and their legal counsel and the issuer's independent auditors for the issuance of the comfort letters. In addition, certain due diligence procedures are conducted.

As noted in question 4, the information to be included in the prospectus should follow the relevant provisions of the Prospectus Regulation.

If the debt securities offering is structured as a private placement (ie, it is deemed a private offer), no prospectus is required for the purposes of the offer itself, but will be required if the relevant securities are to be admitted to trading on a regulated market (see questions 3 and 10).

In addition and in cases where no prospectus is required, qualified investors may expect to be provided with a private placement document (often referred to as an offering memorandum or offering circular).

### 6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

In a public offering of debt securities, as well as when a prospectus is prepared in connection with an admission to trading of those securities on a regulated market, the terms and conditions of the debt securities are provided in the prospectus, which is made available to the public in electronic form through the SDI (see question 7).

In private placements (provided that the securities are not admitted to trading on a regulated market), the terms and conditions may correspond to a part of an offering memorandum (or to an autonomous document) which is made available to the investors, for example, through their financial intermediaries at the time of the subscription or purchase of the securities.

### 7 Does offering documentation require approval before publication? In what forms should it be available?

As referred to in question 3, subject to certain exemptions, when Portugal is the home member state of the relevant issuer or offeror, the prospectus or base prospectus is subject to the approval of the CMVM before being published.

Upon approval of the prospectus, its final version shall be sent to the CMVM and made available to the public. Even though the PSC provides for a number of alternative ways to comply with this requirement, in practice the prospectus is always made available to the public at least through its disclosure in the SDI.

In the event of a public offer preceded by the negotiation of rights, the prospectus shall be disclosed by the business day prior to the date where such rights are detached. In the remaining public offers, the prospectus shall be disclosed by the beginning of the offer, at the latest.

In the SDI, the CMVM shall also disclose a list of the approval certificates concerning prospectuses of public offers made in Portugal that have been approved by the competent authority of other EU member states. A reference to the website where such prospectuses may be found shall also be disclosed through the same means.

With regard to complex financial products marketed to at least five non-qualified investors, article 7 of the CFP Regulation determines that the KIID shall be delivered or made available to the investors prior to the acquisition or initial transaction of the securities. The KIID shall be delivered free of charge to the investors either in paper or through a durable medium or an internet website, provided that the evidence of reception of the KIID and related warnings by the investors is subject to an identical level of durability, authenticity and intelligibility.

All advertising materials regarding the public offer are subject to the prior approval of the CMVM. A specific prior approval regime also applies in the case that the securities offered are deemed complex financial products.

### 8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?

As referred to previously, the public offer shall be preceded by the disclosure of a prospectus approved by the CMVM. The review of the entire offer process and the verification of its compliance with applicable law are made by the CMVM within the process of approval of the prospectus.

The decision of the CMVM on the approval of the prospectus shall be communicated to the offeror within 10 days, except for issuers that never had made any public offer or admission to trading, in which case the deadline for approval shall be 20 days. These deadlines are counted as from the receipt of the request or any complementary information requested to the offeror or any third parties. A failure of the CMVM to decide on the approval of the prospectus within these deadlines will determine its automatic rejection.

The decision of the CMVM to approve the prospectus is disclosed through the SDI.

As referred to in question 3, in the case of a public offering of debt securities qualifying as complex financial products, the KIID is not subject to a formal process of approval by the CMVM. However, since such securities may only be marketed after disclosure of the KIID in the SDI, informal approval of this document by the CMVM will be necessary in any case.

During the review process and prior to the approval of the prospectus (and the disclosure of the KIID in the SDI, in the case of complex financial products), the relevant debt securities may not be offered or marketed to the relevant investors. Also, no advertising concerning the public offer may be conducted until the CMVM grants its approval to such advertising activities, which may be prior to the approval of the prospectus.

Notwithstanding this, under articles 164 et seq of the PSC, the collection of investment intentions prior to the approval of the prospectus, in order to ascertain the viability of the offer, is possible provided the CMVM approves a preliminary prospectus complying with the Prospectus Regulation. Any advertising activities carried out when collecting investment intentions shall also be subject to the prior approval of the CMVM.

### 9 On what grounds may the regulators refuse to approve a public offering of securities?

The approval of the prospectus implies the verification of its conformity in relation to the requirements of completeness, truthfulness, clarity, updating, objectivity and lawfulness of the information provided and may only be refused if any of the documents filed is false or in breach of the applicable legal or regulatory requirements.

The CMVM shall order the removal or prohibit the launching of a public offer if it verifies that the same is illegal and that such illegality may not be rectified. If the illegality is rectifiable, the CMVM shall suspend the public offer (as opposed to prohibiting it).

### 10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?

Article 109 of the PSC defines public offers as offers of securities addressed, wholly or in part, to unidentified addressees. Under this provision, the following offers shall also be deemed public:

- offers directed to all shareholders of an open company, even if its respective share capital is only represented by nominative shares;
- offers, wholly or in part, preceded or accompanied by prospection or the collection of investment intentions from undetermined addressees or by promotional advertising; and
- offers addressed to, at least, 150 non-qualified investors, per member state.

Article 110 of the PSC sets out that the following offers shall be deemed private placements:

- offers addressed solely to qualified (ie, professional) investors; and
- subscription offers made by closed companies (a concept that, inter alia, excludes listed companies) to the generality of their shareholders.

Private placements of debt securities are exempted from the obligation to have a prospectus approved by the CMVM and disclosed to the public prior to their beginning. Private placements made by open companies and companies otherwise having their securities listed in a market shall nevertheless be communicated to the CMVM after their completion, for statistical purposes.

Even in the case of a private placement, the approval by the CMVM and disclosure of a prospectus will be necessary in the case that the relevant securities are to be admitted to trading on a regulated market (see question 3).

Irrespectively of their qualification as public or private placement, the marketing of complex financial products to at least five non-qualified investors shall be subject to the provisions of the CFP Regulation.

### 11 Describe the public offering process for debt securities. How does the private offering process differ?

The timing of a debt securities offer may range from a few days or weeks (eg, a drawdown under a programme) to some months (eg, a first-time issuer).

The offering process can be divided into the following four main steps:

- at the beginning of the process, the lead manager and the legal advisers are appointed. The lead manager provides assistance regarding the structure and marketing of the issuance. It is during this phase that the disclosure documents and further transaction documentation, most notably the prospectus, are prepared. Once the terms of the prospectus are stabilised, it is filed with the CMVM for review (previous CMVM consultation may take place prior to the filing, depending on the complexity of the issuance);
- during the period from launch to pricing, the debt issuance is announced publicly and the managers market the securities to potential investors;
- at signing (usually one business day before closing), the price is agreed upon and the CMVM's approval is obtained on the prospectus; and
- finally, at the closing, the subscription agreement (and other transaction documents) are executed, the securities are issued, book-entries of the securities issued are made in the clearing system and in the securities accounts of the investors who bought in the offer, and the issue proceeds are transferred to the issuer.

Private offerings not subject to the CMVM's approval process will generally require shorter timings.

### 12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?

The closing documents (and other conditions precedent for the underwriters to purchase, pay for and take delivery of the debt securities) are usually included in the subscription agreement between the issuer and the underwriters and usually include:

- a prospectus (if required);
- additional agreements (such as an agency agreement);
- legal opinions from the issuer's legal counsel and the underwriters' legal counsel;
- comfort letters from the issuer and the auditors;
- a closing certificate from the issuer; and
- payment instructions, receipt letters and rating confirmations.

### 13 What are the typical fees for listing debt securities on the principal exchanges?

The listing fees for admission to trading of debt securities on Euronext Lisbon are composed of (i) an initial admission fee depending on the maturity and listed amounts (see Euronext and Alternext fee book 2017), and (ii) an additional fee if Euronext Lisbon performs centralisation services in respect of an admission to trading of debt securities.

Issuers shall not be required to pay an annual fee for straight debt securities unless explicitly prescribed in a notice published by Euronext. Each Issuer shall pay an annual fee of €2,500 per line for debt securities linked to equity securities (such as convertibles) issued by it.

Fees are also due to the CMVM (admission, refusal and annual fees) and to Interbolsa (central securities depository services).

### 14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?

In Portugal, there is an active market for special debt instruments such as asset-backed securities (ie, covered bonds and securitised bonds), equity-linked notes, warrants and other hybrid instruments.

Among these, the instruments with the biggest trading volumes are (i) covered bonds, which are secured by a pool of ring-fenced mortgages maintained by the issuer and are regularly issued under programmes set up by Portuguese credit institutions, and (ii) warrants, which grant their holders the option to acquire the equity of the issuer or a related company, and are one of the most traded securities in EasyNext Lisbon, a Portuguese multilateral trading facility, surpassing the trade of plain vanilla bonds in this trading venue.

### 15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?

The rules applicable to the public offering of special debt securities are generally the same as those for other debt securities. The requirement for the approval and publication of a prospectus is generally applicable to them, with the main differences depending on their specific characteristics, as well as their denomination, which may entail the application of different building blocks in drafting the prospectus, as per the relevant provisions of the Prospectus Regulation (see question 3).

Special corporate law rules also apply to the issuance of convertible bonds and bonds with warrants. There are also provisions applicable to cash bonds, commercial paper, mortgage bonds and securitised bonds provided in specific laws applicable to these types of securities (see question 2). Debt securities deemed complex financial products also face specific rules under the CFP Regulation (see question 3).

Finally, special debt securities may raise accounting issues that the issuer should be aware of, especially regarding their qualification as equity, debt or hybrid securities. Those accounting issues may have an impact, inter alia, on the tax treatment of the securities in relation to the issuer or, if the issuer is a financial institution, on the issuer's compliance with capital requirements applicable under banking law. The issuer should discuss these questions with its accountants when structuring these types of securities.

### 16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?

The qualification of securities as equity or debt depends on their characteristics. Typically:

- equity securities (i) have no maturity, (ii) do not grant the right to receive regular payments from the issuer (ie, they only grant the right to collect dividends), (iii) grant a residual claim to the company's assets on liquidation, to be paid after satisfaction of its creditors, and (iv) grant voting rights to be exercised in the company's general shareholders' meeting; and
- debt securities (i) have a maturity, (ii) grant the right to receive regular payments from the issuer (in the form of interest), (iii) grant credit rights over a certain principal, to be paid with priority in relation to shareholders' credits, and (iv) do not grant voting rights to exercise in the company's general shareholders' meeting.

Some securities combine characteristics of both equity and debt securities, being generally referred to as hybrid securities.

For the purposes hereunder, the main implications of this distinction concern the information required to be inserted in the prospectus under the Prospectus Regulation. This information varies in accordance with the nature of the securities in question, with securities categorised as equity or deemed as containing an equity element requiring the disclosure of more information than the remaining securities.

### 17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?

There are no specific transfer restrictions imposed by law on privately offered debt securities.

However, under the PSC, most rules applicable to public offerings, namely the need to have a prospectus, also apply to cascade offerings (a resale or a final allocation of securities by a financial intermediary falling under the scope of public offerings). In this case, the prospectus used in the previous offer may be used by the financial intermediary (provided that the issuer's consent is granted).

### 18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?

The rules applicable to foreign issuers in Portugal are those resulting from the implementation of the Prospectus Directive into Portuguese law.

There are no provisions applicable to the offering of debt securities only outside Portugal.

### 19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

There are no arrangements with other jurisdictions to help foreign issuers access the Portuguese debt capital markets other than those provided in the rules resulting from the implementation of the Prospectus Directive into Portuguese law.

### 20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

In general terms, the underwriting arrangements for the offering of debt securities do not differ depending on whether the offer is public or private, but on the characteristics of the issuer (namely its size, solvency and financial ability to pay higher fees to the relevant financial intermediaries), as well as on the circumstances in which the offering takes place (eg, the pricing and the demand for the securities).

Pursuant to the PSC, the underwriting arrangement for the offering of debt securities may be executed by means of:

- an unguaranteed placement, meaning that the financial intermediary responsible for the placing of the securities only undertakes the legal obligation to use its best efforts to distribute them;
- a guaranteed placement, according to which the financial intermediary (or financial intermediaries, if applicable) undertake the obligation to acquire from the issuer, partially or in whole, and for itself or a third party, the securities that on the closing date of the offer have not been subscribed or acquired by the addressees; or
- an underwriting agreement with one or more financial intermediaries (usually a syndicate of banks or financial companies), who undertake to fully underwrite the issued securities upfront, paying the full price to the issuer, and the securities will then be traded by the financial intermediaries at their own risk and for their own profit.

### 21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

Under the PSC, underwriting services constitute investment services and activities that may only be provided by financial intermediaries. In order to provide this investment service and activity in Portugal, the relevant financial intermediary shall either be authorised by the Bank of Portugal and registered as a financial intermediary with the CMVM, or act through the passport mechanisms provided in the Markets in Financial Instruments Directive (MiFID).

Underwriting arrangements are not subject to specific approvals by supervisory authorities.

### 22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?

Debt securities governed by Portuguese law that are included in the Central de Valores Mobiliários, the Portuguese centralised securities depository system managed by Interbolsa, are represented in book-entry form, through their immobilisation, in the case of securities represented by physical certificates, or are issued directly in dematerialised form (see question 23).

The issuer (or an entity duly authorised for these purposes) shall formalise a request regarding the inscription of the debt securities' issuance with the system. Upon such inscription, the system credits the debt securities in the participant's account.

Interbolsa is responsible for the organisation and management of the securities settlement systems, in order to ensure the effectiveness of cash transfers relating to the transfer of securities, to rights inherent to securities, or to guarantees regarding transactions over securities.

Settlement occurs two trading days after the date of the transaction, according to Euronext's T+2 Standard Settlement Lifecycle.

### 23 How are public debt securities typically held and traded after an offering?

Public debt securities should be issued in registered form and be represented and traded by book entries through the Central de Valores Mobiliários.

**24 Describe how issuers manage their outstanding debt securities.**

Issuers may manage their outstanding debt securities through a variety of transactions such as open market purchases and tender and exchange offers.

In respect of open market purchases, Portuguese companies may only acquire their own bonds under the same circumstances as they could acquire their own shares, meaning that, except in certain circumstances set out in the PCC, they may not acquire their own bonds representing more than 10 per cent of all their outstanding bonds. The rights attached to their own bonds are deemed suspended, without prejudice to the conversion or amortisation of such bonds.

Amendments to the terms and conditions of bonds governed by Portuguese law may be approved by a bondholder's meeting. Said resolution must be approved by half of the votes corresponding to all the bondholders, when resolved upon on the first date set for the meeting, or by two-thirds of the votes cast by the bondholders, if resolved upon on the second date set for the meeting.

The management of outstanding securities pursuant to tender or exchange offers will require the registration of the offers with the CMVM under a procedure laid down in the PSC, which will entail the approval of the relevant prospectus.

**25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?**

The PSC provides a number of disclosure requirements applicable to issuers of shares or debt securities having a nominal value inferior to €1,000, which are admitted to trading on a regulated market.

Such disclosure requirements are those resulting from the implementation of the Transparency Directive and the Market Abuse Directive (now superseded by the Market Abuse Regulation) into Portuguese law, and include the disclosure of: (i) annual financial reports; (ii) half-yearly reports; (iii) quarterly management statements, in the case of issuers that are simultaneously credit institutions or financial companies; (iv) inside information; and (v) managers' transactions.

**26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?**

The PSC contains a specific regime applicable to prospectus liability, according to which the following persons and entities are mandatorily responsible – jointly and severally – for any disconformity of a public offering prospectus for debt securities with the requirements set forth in article 135(1) of the PSC:

(i) the issuer or offeror;
(ii) the members of the issuer or offeror's board of directors;
(iii) the members of the supervisory board, accounting firms, chartered accountants and any other individuals that have certified or, in any other way, verified the accounting documents on which the prospectus is based;
(iv) the financial intermediaries in charge of assisting the offer; and
(v) any other entities that accepted being appointed in the prospectus as responsible for any information, forecast or study included in the same.

The persons and entities listed above are presumed to have acted with fault if the relevant prospectus is not compliant with the requirements set forth in article 135(1) of the PSC.

The following persons or entities will be deemed liable independently of fault:

- the offeror, in the case any of the persons or entities mentioned in paragraphs (ii), (iv) or (v) above is deemed liable;
- the issuer, if any of the persons or entities mentioned in paragraphs (ii) and (iii) above is deemed liable; or
- the leader of the assistance consortium, if the entity mentioned in paragraph (iv) above is deemed liable.

The liability regime is the same regarding both equity and debt securities.

**Update and trends**

In terms of Portuguese legislation, we highlight a draft law adapting Portuguese law to the Market Abuse Regulation and implementing the new Market Abuse Directive, the draft law not only amends the criminal provisions of insider dealing and market manipulation already provided in the PSC, but also provides new types of market crimes and strengthens the administrative sanctions to be applied by the CMVM for the breach of regulatory duties.

As for European legislation, the new Prospectus Regulation, which is aimed at replacing the existing Prospectus Directive in its entirety, as well as parts of the current Prospectus Regulation, is approaching the final stages of its legislative process, with the European Parliament, the Council and the Commission having formally come to a political agreement on 20 December 2016 as to its contents. Moreover, the PRIIPs Regulation, due to enter into force on 1 January 2018, is expected to have a significant impact on the Portuguese regulation of complex financial products, which is currently set out in the CFP Regulation.

**27 What types of remedies are available to the investors in debt securities?**

The investors may seek compensation for damages under the prospectus liability regime generally described in question 26 above.

The investors may also, in principle, rely on the possibility to accelerate the securities under their respective terms and conditions, in the case of non-payment, breach of representations and warranties, or breach of covenants. This would, however, depend on the particular terms and conditions of the securities.

**28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?**

The breach of the applicable legal or regulatory provisions on public offers is punishable through the application of fines that may range from €2,500 (the lower threshold for less serious offences) to €5 million (the higher threshold for very serious offences), or the double of the economic benefit arising from the infringement, if superior to the higher threshold applicable.

The CMVM may apply additional sanctions, notably: the temporary suspension of the exercise of the profession or activity to which the offence refers; the prohibition from exercising management, control or supervisory functions; and the revocation of the authorisation or cancellation of the registration necessary to perform financial intermediation activities.

In 2016, the CMVM issued 45 decisions on misdemeanor procedures (20 of them relating to the breach of information duties), whereas 101 procedures were still ongoing by year-end (23 of them relating to the breach of information duties).

**29 What are the main tax issues for issuers and bondholders?**

The following information is of a general nature without purporting to be complete and was prepared based on the assumption that the issuer is a Portuguese resident entity.

**Portuguese tax residents**

In the case of individuals, income from bonds paid to the bondholders considered tax residents in Portugal as a general rule is subject to a 28 per cent withholding tax, which is the final tax on that income unless the individual elects to include such income in his or her taxable income. Capital gains arising from the sale of the bonds issued by Portuguese entities are subject to taxation at the rate of 28 per cent when obtained by Portuguese tax resident individuals, unless the individual elects to include such income in his or her taxable income. If the individual elects to include those incomes in his or her taxable income, such income is subject to tax at progressive income tax rates ranging from 14.5 per cent to 48 per cent, plus (i) a surcharge of up to 3.21 per cent for the income exceeding €20,261, and (ii) an additional solidarity tax of 2.5 per cent on the part of the taxable income exceeding €80,000 up to €250,000, and of 5 per cent on the remaining part of the taxable income exceeding €250,000.

In the case of legal entities, income from bonds paid to the bondholders considered tax residents in Portugal as a general rule is subject to a 25 per cent withholding tax, which is deemed a payment on account of the final tax due. Portuguese financial institutions, pension funds, mutual funds, retirement and education savings funds, share savings funds, venture capital funds incorporated under the law of Portugal and some exempt entities are not subject to withholding tax. Interest and other investment income derived from bonds and capital gains realised with the transfer of bonds by legal entities with tax residence in Portugal and by permanent establishments in Portugal of non-resident legal entities to which the income or gains are attributable are included in their taxable income and are subject to a 21 per cent tax rate applicable on taxable profits, which may be subject to a municipal surcharge of up to 1.5 per cent on their taxable profits. A state surcharge rate will be of 3 per cent on the part of the taxable profits exceeding €1.5 million up to €7.5 million, of 5 per cent on the part of the taxable profits exceeding €7.5 million up to €35 million, and taxable income above €35 million will be subject to a 7 per cent rate.

In both cases (individuals and legal entities), a 35 per cent withholding tax is levied when the income is paid or made available to accounts in the name of one or more accountholders acting on behalf of undisclosed third parties, unless the beneficial owner of the income is disclosed, in which case the general rules apply.

**Non-Portuguese tax residents**

Income from bonds paid to bondholders considered non-tax residents in Portugal, and without a Portuguese permanent establishment to which the income is attributable is, as a general rule, subject to withholding tax at a definitive rate of 28 per cent, in the case of individuals, and 25 per cent, in the case of legal entities. In both cases, a 35 per cent withholding tax is levied when the income is paid or made available (i) to accounts in the name of one or more accountholders acting on behalf of undisclosed third parties, unless the beneficial owner of the income is disclosed, in which case the general rules apply, or (ii) to entities domiciled in a country, territory or region subject to a clearly more favourable tax regime included in the list approved by the Portuguese Minister of Finance and Public Administration.

As a general rule, capital gains obtained on the transfer of bonds by non-resident individuals or legal entities without a permanent establishment in Portugal to which gains are attributable are exempt from capital gains taxation unless the beneficiary is resident in a country, territory or region subject to a clearly more favourable tax regime included in the list approved by the Portuguese Minister of Finance and Public Administration, or in the case of legal entities, the shareholdings of the non-resident entity are more than 25 per cent directly or indirectly held by Portuguese resident entities. Capital gains obtained by individuals that are not entitled to said exemption will be subject to taxation at a 28 per cent tax rate. Capital gains obtained by legal entities that are not entitled to said exemption will be subject to taxation at a 25 per cent tax rate, unless an applicable tax treaty entered into by Portugal states that such gains are not subject to Portuguese tax.

In any case, pursuant to Decree-Law 193/2005, income paid to non-resident beneficial owners of the bonds, as well as capital gains deriving from the sale or other disposition of such bonds, may be exempt from taxation in Portugal, provided that (i) the beneficial owners have no residence, head office, effective management or permanent establishment in the Portuguese territory to which the income is attributable, (ii) they are not domiciled in a country, territory or region subject to a clearly more favourable tax regime included in the list approved by the Portuguese Minister of Finance and Public Administration that does not have a double tax treaty in force or a tax information exchange agreement with Portugal, with the exception of central banks and agencies with a governmental nature of those blacklisted jurisdictions, (iii) the bonds are held through a centralised system for securities managed by an entity resident for tax purposes in Portugal or an international clearing system operated by a managing entity established in a member state of the EU other than Portugal or in a European Economic Area member state provided, in this case, that such state is bound to cooperate with Portugal under an administrative cooperation arrangement in tax matters similar to the exchange of information schemes in relation to tax matters existing within the EU member states or integrated in other centralised systems not covered above provided that, in this last case, the Portuguese government authorises the application of Decree-Law 193/2005, and (iv) all the necessary formalities are duly fulfilled.

**Issuers**

Net financing expenses are only deductible for corporate income tax purposes up to the highest of the following amounts: €1 million or 30 per cent of the EBITDA. For the purposes of these limits, net financing expenses are defined as the difference between (i) the financial expenses, and (ii) the income derived from financing to third parties in a given tax year.

The amount of net financing expenses that is not deductible as it exceeds the maximum limit for the relevant tax year can be carried forward and deducted in the following five years (subject to the limit applicable in each year).

If, during a given year, the amount of the net financing expenses is lower than the limit of 30 per cent of the EBITDA of that year, the excess amount within this limit (ie, the difference between 30 per cent of the EBITDA, and the net financing expenses) could be offset against the net financing expenses of the following five years.

**Transfer taxes**

As a general rule, apart from the personal income tax and corporate income tax implications, no transfer taxes are due in Portugal. However, stamp tax at a rate of 10 per cent applies to the acquisition through gift or inheritance of bonds by an individual who is domiciled in Portugal. An exemption from stamp tax applies to transfers in favour of the spouse, de facto spouse, descendants, and parents or grandparents.

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# Singapore

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**1 What types of debt securities offerings are typical, and how active is the market?**

Corporate debt issuances dominate debt securities offerings in Singapore. Based on data released in an article in *The Business Times* on 6 December 2016, new issuances for the first 11 months of 2016 amounted to S$18.6 billion from 98 issues. Amid weaker economic outlook, this represented a decline of approximately 15 per cent for the first 11 months in 2015, which was S$21.8 billion from 157 issues. Issuance volume for whole of 2015 was S$22.8 billion.

As an international fixed income hub, local and foreign issuers can raise both Singapore dollar and non-Singapore dollar funding in Singapore. According to data in the 'Singapore Corporate Debt Market Development 2016' released by the Monetary Authority of Singapore (MAS), non-SGD corporate debt issuance accounted for 85 per cent of total debt issuance in 2015, underscoring the strong international characteristics of Singapore's corporate debt market.

As corporate issuers traditionally look to the non-retail bond market to meet their funding needs due to higher costs involved in tapping the retail market, MAS announced two new frameworks (the Bond Seasoning Framework and the Exempt Bond Issuer Framework) that aim to facilitate corporate issuers tapping the retail market by issuing plain vanilla bonds. These changes are also part of MAS's overall efforts to widen the investment options available to retail investors through better access to simple investment products that are relatively less risky.

In order to make it more attractive for Asian issuers to raise international capital in Singapore, MAS announced in November 2016 that it will introduce an Asian Bond Grant scheme in 2017. The scheme aims to broaden the issuer base in Singapore's bond market, which will add to the breadth and diversity of debt instruments for the investing community. For qualifying Asian issuances, the scheme will help to offset up to 50 per cent of one-time issuance costs such as international legal fees, arranger fees and credit rating fees.

**2 Describe the general regime for debt securities offerings.**

The debt capital markets in Singapore are principally regulated by MAS and the Singapore Exchange Securities Trading Limited (SGX-ST). MAS regulates the offering of debt securities while the SGX-ST regulates the listing and trading of the debt securities on its exchange.

The main legislation that applies to the offering and selling of debt securities in Singapore is the Securities and Futures Act (Chapter 289 of Singapore) (SFA) and its subsidiary legislation. Under the SFA, all offers of debt securities in Singapore must be accompanied by a prospectus unless any of the prospectus exemptions afforded under the SFA applies. See question 10 for further elaboration on the prospectus exemptions.

The SGX-ST is the only debt securities exchange in Singapore and the SGX-ST Listing Manual applies to all listings of debt securities on the SGX-ST. There are two bond markets available for the listing of debt securities on the SGX-ST:

- the wholesale bond market, which caters to wholesale bonds, meaning those bonds offered pursuant to the safe harbour exemptions under section 274 (offers made to institutional investors) and section 275 (offers made to certain specified persons, including accredited investors and investors in large denominations of at least S$200,000), of the SFA (collectively, 'specified investors'). Wholesale bonds are usually traded over the counter after issuance.
- the retail bond market. This caters to retail bonds offered to all investors, including retail investors.

**3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.**

In the case of a public offering, the starting position for debt issuers is that the offer must be accompanied by a prospectus that is registered by MAS. Debt issuers whose shares are also listed for quotation on a securities exchange are afforded the option of issuing an offer information statement instead of a prospectus. The prescribed contents for an offer information statement are less extensive than that prescribed for a prospectus.

Prospectuses and offer information statements must be lodged with MAS via its online OPERA database. In addition, prospectuses are subject to a public exposure period for at least seven days for the public to submit comments. MAS will also review the prospectus and provide comments during the same period. The standard time frame for MAS to register the prospectus is within seven to 21 days of the lodgment.

Prospectuses and offer information statements must be accompanied by a products highlight sheet (PHS) and the PHS must also be lodged with MAS via its online OPERA database.

For other offerings that do not require a prospectus or an offer information statement, the offering documents are made publicly available on SGX-ST's website if the debt securities are listed on the SGX-ST.

**4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?**

If the public offering does not fall within any of the prospectus exemptions set out in the SFA, a prospectus must be issued. The general rule is that the prospectus must contain all information investors and their professional advisers would reasonably require to make an informed assessment. In addition, the prospectus must contain the information prescribed in the 5th Schedule of the Securities and Futures (Offers of Investments) (Shares and Debentures Regulations 2005 (SFR)). If the debt securities are to be listed on the SGX-ST, the disclosure requirements in Chapter 6 of the SGX-ST Listing Manual must be also be complied with. Broadly speaking, the key information that is included in a prospectus includes: (i) information on directors, key executives, advisers and agents; (ii) offer details, method and timetable; (iii) financial information; (iv) use of proceeds; (v) risk factors; (vi) history and business of the issuer; (vii) trend information; and (viii) information on interested person transactions and conflict of interests.

If a prospectus exemption applies, the disclosure requirements are less extensive. In the case of an offer that can be accompanied by an offer information statement, the contents are prescribed in the 16th Schedule of the SFR. Certain disclosure contents required for a prospectus, such as information on interested person transactions and conflict of interests, are not required for an offer information statement.

As mentioned above, prospectuses and offer information statements must be accompanied by a PHS. A PHS is meant to set out, in a concise fashion, the key features and risks of the debt securities and is subject to a page limit of eight pages.

In May 2016, MAS introduced two additional frameworks to allow public offerings of debt securities to be made without the need for a prospectus:

- Under the Bond Seasoning Framework, bonds initially acquired by specified investors in reliance on the prospectus exemptions under sections 274 or 275 of the SFA can be re-denominated into smaller lot sizes (such bonds also referred to as seasoned bonds) and made available to retail investors via secondary trading on the SGX-ST after a six-month seasoning period. Qualifying issuers also have the flexibility to make subsequent offers of new debt securities to retail investors directly, at the end of the six-month seasoning period, on the same terms as the seasoned debt securities (such subsequent offer, a re-tap). In this case, the offer documents issued to the investors at the time of the initial offering and a PHS must be made available via the SGX-ST website at the time of the re-tap.
- Under the Exempt Bond Issuer Framework, debt issuers who satisfy certain specified thresholds (which are higher than the eligibility criteria for issuers under the Bond Seasoning Framework, may issue debt securities directly to retail investors at the onset of the initial offer without the any seasoning period. A simplified disclosure document (SDD) that complies with the disclosure requirements prescribed in the Securities and Futures (Offers of Investments) (Exemption for Offers of Straight Debentures) Regulations 2016 must be issued in lieu of a prospectus to the specified investors while retail investors should receive both the SDD and a PHS. Both the SDD and PHS must be made available via SGX-ST's website at the time of the offer.

The eligibility criteria for debt issuers to avail themselves of the prospectus exemption under either the Bond Seasoning Framework or the Exempt Bond Issuer Framework are further elaborated in question 10.

### 5 Describe the drafting process for the offering document.

Generally, the issuer and its legal advisers will prepare the contents of the offering document. In the case of a non-retail offering, the market practice in Singapore has been that the preparatory work for the offering document is coordinated between the lead manager's counsel (who will prepare the 'front-and-back' sections of the offering document) and the issuer and its counsel (who will prepare the sections relating to information of the issuer and its business, including risk factors relating to its business).

Issues that arise for discussion typically include the extent of disclosure, availability of financial information and whether there are any uncommon issues relating to the issuer, its business or the transaction structure that should be highlighted to potential investors.

### 6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

The terms and conditions would typically be appended to the trust deed. The trust deed is the document between the issuer and trustee appointed to act on behalf of holders of the debt securities. A copy of the trust deed is usually made available for inspection by holders of the debt securities at the office of the trustee or that of the paying agent.

In addition, it is standard practice for the full set of the terms and conditions to be disclosed in the offering document.

### 7 Does offering documentation require approval before publication? In what forms should it be available?

A prospectus is subject to MAS's registration and an electronic copy has to be lodged with MAS via its online OPERA database for a minimum seven-day exposure period for public comment and MAS's review.

Other forms of offering documents that are not subject to the registration requirement are similarly not subject to the exposure period or MAS's review. In the case of offering documents that must comply with prescribed disclosure requirements (such as the offer information statement), application must be made to MAS for an exemption if the issuer is able to comply with any specified disclosure requirement.

### 8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?

A prospectus is subject to MAS' registration and an electronic copy has to be lodged with MAS via its online OPERA database for a minimum seven-day exposure period for public comment and MAS's review. MAS will review the lodged prospectus solely for compliance with statutory disclosure requirements. Where a lodged prospectus is found to be deficient in complying with statutory requirement, MAS will indicate to the issuer in general terms where and how the prospectus does not comply with the law. MAS does not, however, vet prospectuses to determine whether they contain in accuracies in information or factual errors. MAS will register the prospectus within seven to 21 days of lodgment unless: (i) MAS extends the time period (maximum 28 days); (ii) the issuer requests registration at a later date; or (iii) MAS decides to refuse registration. MAS will not proceed with the registration unless it is satisfied with the contents of the prospectus.

During the public exposure period, the issuer can conduct roadshow presentations to institutional and accredited investors and the lead managers can conduct the book-building exercise. The offer can only be launched after the prospectus is registered by MAS. Prior to registration of the prospectus, any form of the prospectus is not allowed to be put up on any other website or disseminated in any way.

If the debt securities are to be listed on the SGX-ST, a listing application containing the prescribed information relating to details of the offer (accompanied by a near final form of the offering document) will also have to be submitted to the SGX-ST. The review process by the SGX-ST is typically confined to ascertaining whether information required under the SGX-ST Listing Manual has been included. In the case of a public offering, the duration of SGX-ST's review period can be between five and 10 business days depending on the complexity of the structure.

### 9 On what grounds may the regulators refuse to approve a public offering of securities?

MAS can refuse to register a prospectus if: (i) it is of the opinion that the prospectus contains a false or misleading statement; (ii) there is an omission from the prospectus of any information that is prescribed by the SFA to be included; (iii) the copy of the prospectus that is lodged with MAS is not signed in accordance with the requirement of the SFA; (iv) MAS is of the opinion that the prospectus does not comply with the requirements of the SFA; (v) any written consent of an expert, issue manager or underwriter (as the case may be) that is required under the SFA is not lodged with MAS; or (vi) MAS is of the opinion that it is not in the public interest to do so.

If a prospectus has been registered, MAS has the power to serve an order in writing on the person making the offer that no or no further securities be allotted, issued or sold (also known as a stop order) if: (i) MAS is of the opinion that the prospectus contains a false or misleading statement; (ii) there is an omission from the prospectus of any information that is prescribed by the SFA to be included; (iii) MAS is of the opinion that the prospectus does not comply with the requirements of the SFA; or (iv) MAS is of the opinion that it is in the public interest to do so.

The person making the offer has to be afforded the opportunity to be heard before MAS can refuse to register a prospectus or, as the case may be, serve a stop order, unless the refusal is on the ground that it is not in the public interest to register the prospectus on the basis of any of the following circumstances: (i) the person making the offer is in the course of being wound up or dissolved; (ii) the person making the offer (if it is an individual) is an undischarged bankrupt; or (iii) a receiver, receiver and manager or an equivalent person has been appointed in relation to or in respect of any property of the person making the offer.

### 10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?

The starting position under the SFA is that no person shall make an offer of securities unless the offer is accompanied by a prospectus (such prospectus being prepared in accordance with the requirements under the SFA) that is registered by MAS.

The issue of a prospectus is not required if an issuer is able to invoke any of the safe harbour exemptions afforded under the SFA. The more frequently relied upon safe harbours include:

- small offers where the total amount to be raised within any period of 12 months does not exceed S$5 million (or its equivalent in a foreign currency);
- private placements where offers are made to no more than 50 persons within any period of 12 months (section 272 of the SFA);
- offers made to institutional investors (section 274 of the SFA);
- offers made to certain specified persons (including accredited investors and persons who have acquired the securities at a consideration of not less than S$200,000 (or its equivalent in a foreign currency) for each transaction) (section 275 of the SFA); and
- offers made using offer information statement by an entity whose shares are listed for quotation on a securities exchange (section 277 of the SFA).

In Singapore, the most common exemptions invoked for debt securities offerings are those relating to institutional investors and specified persons under sections 274 and 275 of the SFA respectively. However, it is standard practice for an issuer relying of such exemptions to nevertheless issue an offering document (commonly referred to as an information memorandum in the Singapore context) in connection with the offer, which purports to describe, among other things, the securities being offered, and the business and affairs of the issuer.

For public offerings of debt securities, the exemption for offers made using an offer information statement under section 277 of the SFA have thus far been commonly invoked by issuers who are already listed on the SGX-ST .

The introduction of the Bond Seasoning Framework and the Exempt Bond Issuer Framework in May 2016 have eased the requirements for the making of an offer of debt securities to the retail public by allowing retail offers of debt securities to be made without the need for a prospectus in certain specified circumstances.

Under the Bond Seasoning Framework, seasoned debt securities may be issued to persons who are not institutional investors or who is not a relevant person under section 275 of the SFA (such as retail investors) through a re-tap (that is, the subsequent offer of new debt securities on principally the same terms as the seasoned debt securities) or made available to retail investors through secondary trading on the SGX-ST. Debt securities are seasoned when debt securities that have been initially offered only to specified investors are subsequently made available for trading on the SGX-ST by retail investors after the seasoning period (prescribed by law as six months after the date of listing on the SGX-ST of a bond issuance). The Bond Seasoning Framework is governed by the Securities and Futures (Offers of Investments) (Exemptions for Offers of Post-Seasoning Debentures) Regulations 2016 (Bond Seasoning Framework).

Under the Exempt Bond Issuer Framework, issuers who satisfy certain specified thresholds may issue debt securities directly to retail investors without any seasoning period. These thresholds are broadly similar to, but more stringent than, those under the Bond Seasoning Framework. The Exempt Bond Issuer Framework is governed by the Securities and Futures (Offers of Investments) (Exemptions for Offers of Straight Debentures) Regulations 2016 (Exempt Bond Issuer Framework).

Only plain vanilla bonds may be offered under each framework. Plain vanilla bonds refer to bonds that: (i) have a fixed term not exceeding 10 years; (ii) provide for repayment of the principal sum at the end of the fixed term; (iii) may provide for certain early redemption features; (iv) have period interest payments that cannot be deferred; (v) carry a fixed interest or floating rate comprised of a reference rate plus a mixed margin that cannot be decreased; (vi) are not convertible or exchangeable into other securities; (vii) are not subordinated; and (viii) are not asset-backed securities or structured notes.

The eligibility criteria for debt issuers to qualify for each framework is as follows:

| | Seasoning framework | Exempt bond issuer framework |
|---|---|---|
| Size test | The issuer must have either (i) a minimum market capitalisation of S$1 billion over the six months prior to the offer; or (ii) net assets of at least S$500 million in its most recent financial statements and a minimum annual average amount of at least S$500 million in net assets from its three most recent financial years. | |
| Listing test | The issuer must either (i) have had its equity securities listed on the SGX-ST or a recognised securities exchange for at least five years, or (ii) has listed or guaranteed the issuance of bonds on the SGX-ST for at least five years, before the date of the offer. | |
| Credit test | The issuer must either (i) receive a minimum credit rating of BBB from an international credit rating agency; or (ii) establish that it has not recorded an average net loss and recorded an average positive net cash flow for its three most recent financial years; or (iii) have listed or guaranteed the issuance of bonds on the SGX-ST for S$500 million over the previous five years and there has been no default in the repayment of moneys under the bonds. | The issuer must either (i) receive a minimum credit rating of AA- from an international credit rating agent; or (ii) establish that it has recorded a net profit of at least S$100 million and has a positive net cash inflow from its operating activities for its three most recent completed financial years; or (iii) have listed or guaranteed the issuance of bonds on the SGX-ST for at least S$1 billion over the previous five years and there has been no default in the repayment of moneys under the bonds. |

The conditions to be satisfied in order to qualify for each framework are as follows:

| Seasoning framework | Exempt bond issuer framework |
|---|---|
| (i) Seasoned bonds and bonds offered to retail investors via a re-tap must be listed and traded on the SGX-ST.<br>(ii) The issuer must fulfil a minimum initial offer size of S$150 million to specified investors.<br>(iii) The aggregate amount of bonds offered to retail investors via a re-tap must not exceed 50% of the total value of the initial offer of seasoned bonds.<br>(iv) The issuer must provide retail investors with a PHS when the bonds are re-denominated and made available for secondary trading on the SGX-ST and, when the issuer conducts a re-tap, at the time of the re-tap.<br>(v) The issuer must announce or otherwise disseminate and make available to investors on SGX-ST website the offer documents issued to specified investors when the bonds were first offered and a PHS. | (i) Bonds offered under the exemption must be listed and traded on the SGX-ST.<br>(ii) The offer must comprise tranches to retail investors and to specified persons.<br>(iii) The amount of bonds issued under the specified persons tranche must be at least 20% of the aggregate issue size.<br>(iv) The issuer must provide to both retail investors and specified persons with a SDD in lieu of a prospectus.<br>(v) The issuer must additionally provide retail investors with a PHS.<br>(vi) Both the SDD and PHS must be announced or otherwise disseminated and made available to investors via SGXNET at the time of the offer. |

**11 Describe the public offering process for debt securities. How does the private offering process differ?**

The initial execution and documentation phase is largely similar for public and private offerings. During this period, professional parties to the transaction will be appointed and the process will be underway for the preparation of the offering document and transaction documents as well as the conduct of due diligence. Professional parties customarily include the lead manager(s), legal advisers to the issuer, legal advisers to the lead manager(s), auditors to the issuer, the trustee as well as the paying agent. The transaction documents customarily include a subscription agreement (or in the case of a debt issuance programme, a programme agreement), trust deed, agency agreement and listing documents (if the bonds are to be listed). The form of the offering document will depend on whether a prospectus is required or whether the issuer can avail itself of one of the prospectus exemptions. Generally, the scope of due diligence to be conducted for a public offering will be more extensive than for a private offering.

In the case of a public offering, additional factors to take into account will be whether any regulatory approval is required to be sought. In particular, where a prospectus is required, there is a minimum public disclosure period during which the prospectus is lodged with MAS for review and for the public to provide comments.

The marketing period for a public offering is also considerably longer compared to that of a private offering. In Singapore, the public offer is typically open for at least seven business days. Marketing materials can only be distributed after the prospectus is registered by MAS or, in the case where only an offer information statement is required, the offer information statement is lodged with MAS. Conventional forms of marketing materials for public offerings in Singapore include brochures, press advertisements, posters, press releases and announcements. Representatives from the issuer may also speak to the media regarding the offer. Conventional modes of display or distribution of the prospectus (or the offer information statement as the case may be) include a specific booth set up for the offer in the central business district and in the bank branches of the lead manager(s). The general principle in respect of the contents of marketing materials as well as correspondences by the issuer with the media in relation to the offer should be entirely consistent with and not go beyond the contents included in the prospectus (or the offer information statement as the case may be).

**12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?**

The key closing documents include: (i) principal transaction documents such as the trust deed, agency agreement and applicable depository documents to be signed or executed; (ii) the global note or certificate representing the debt securities to be executed; (iii) legal opinions to be issued by the relevant legal advisers; (iv) a comfort letter to be issued by the auditors of the issuer; (v) signed closing and incumbency certificates to be provided by the issuer; (vi) copies of the corporate authorisations of the issuer in relation to the offering; and (vi) in the case of debt securities to be listed on the SGX-ST, the approval in-principle notification from the SGX-ST.

**13 What are the typical fees for listing debt securities on the principal exchanges?**

| | Processing fee | Listing fee |
|---|---|---|
| **Stand-alone issue** | S$10,000 | S$15,000 |
| **Debt securities programme** | Same as above<br>(No further charges for drawdowns under the programme) | Same as above<br>(No further charges for drawdowns under the programme) |
| **Each increment is programme size** | S$10,000 | Not applicable |
| **Re-tap from a series of debt securities already listed on the SGX-ST** | S$10,000 | Not applicable |

**14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?**

There is modest activity relating to equity-linked debt instruments such as convertible bonds and exchangeable bonds. These tend to be issued by way of private placements and are rarely offered to retail investors.

In recent years, offerings of perpetual securities have gained traction in Singapore. Perpetual securities are debt instruments that have certain features akin to equity securities. For instance, perpetual securities do not have a fixed redemption date and can only be redeemed at the option of the issuer. Another key feature of perpetual securities is that the pay-outs (commonly referred to as distribution instead of interest) can be deferred indefinitely at the option of the issuer. Under the terms of the perpetual securities, no event of default will arise as a result of any deferral of distributions.

**15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?**

In the case of equity-linked debt instruments such as convertible bonds or exchangeable bonds, if such bonds are convertible or exchangeable into shares of a company listed on the SGX-ST, the requirements under the SGX-ST Listing Manual for the listing of additional shares will apply. An important consideration for the issuer is whether it is able to issue the additional shares under its general mandate for share issuance; if not, the issuer will have to convene a meeting of its shareholders to seek their approval for the listing of these additional shares.

In the case of an issue of perpetual securities, such instruments may be classified as equity from an accounting standpoint.

**16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?**

Under the SFA, the definition of securities includes debentures and shares. The definition of shares refer to the share capital of a corporation whereas the definition of debentures includes bonds, notes and any other debt securities.

The prospectus requirements and exemptions under the SFA apply equally to both equity and debt securities. However, there are different listing requirements depending on whether equity or debt securities are to be listed on the SGX-ST.

From an accounting perspective, certain instruments such as perpetual securities may be classified as equity notwithstanding that such instruments are conventionally regarded as debt instruments from a legal standpoint. In which case, such instruments will be regarded as equity, rather than debt, in the issuer's financial statements.

The tax exemptions under the qualifying debt securities scheme (see question 29) apply only to debt securities.

**17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?**

Generally, there is no transfer restriction, apart from the requirement on the part of the lead manager(s) to comply with selling restrictions so that any registration or prospectus requirement under applicable laws will not apply.

**18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?**

Foreign issuers who wish to make an offering of debt securities in Singapore will have to comply with the requirements under the SFA, similar to domestic issuers.

In addition, a foreign issuer wishing to list an issue of debt securities on the SGX must be:

- a supranational body;
- a government, or a government agency whose obligations are guaranteed by a government;
- an entity whose equity securities are listed on the SGX-ST;
- a corporation that meets certain specified requirements for the listing of equity securities (namely those relating to profitability, financial position and liquidity as well as eligibility of directors and management);
- a corporation that has either a cumulative consolidated pre-tax profit of at least S$50 million (or its equivalent in foreign currency) for the last three years or a minimum pre-tax profit of S$20 million (or its equivalent in foreign currency) for any one of the three years; and consolidated net tangible assets of at least S$50 million (or its equivalent in foreign currencies); or
- a corporation whose obligations under the issue of the debt securities are guaranteed by any of the entities mentioned above.

If the issuer does not satisfy any of the above criteria, it must, as an alternative, meet one of the following:

- the issue of debt securities must be at least 80 per cent subscribed by specified investors;
- the issue of debt securities must have a credit rating of investment grade or above;
- the issuer or guarantor must meet the criteria for exemption under the Exempt Bond Issuer Framework (see question 10 for further details); or
- the issuer or guarantor must meet the eligibility criteria under the Bond Seasoning Framework (please refer to paragraph 10 for further details).

### 19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

Singapore is an accessible and attractive destination for foreign debt issuers, recognised as a dynamic global financial hub and consistently ranked as one of the best places in the world to do business. According to data from the SGX-ST's website, there is an estimated total assets under management in Singapore amounting to US$2.4 trillion. Foreign issuers tapping into the debt capital markets in Singapore are largely subject to similar requirements as domestic issuers.

In the case of the listing of bonds on the SGX-ST, the listing application process is electronic and listing applications can therefore be submitted from anywhere in the world and at any time. For the listing of wholesale bonds, the application can be processed and approved by the SGX-ST as quickly as within one business day.

### 20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

Any arrangement relating to underwriting is dependent on how such arrangement is negotiated between the issuer and underwriters. If the offer is underwritten, the arrangement will typically entail the underwriters underwriting up to a certain amount of the placement tranche. If there is more than one underwriter, the underwriting arrangement will usually be one that is several and not joint. The underwriting arrangement and the underwriting fee will have to be disclosed in the prospectus or, as the case may be, offer information statement.

In general, there is no fundamental difference between the underwriting arrangements for public offers and private offers. In the case of private offers, however, there is no requirement to disclose the underwriting arrangement or underwriting fee.

### 21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

Underwriters are subject to licensing requirements under the SFA and are supervised by MAS. No approval is required for underwriting arrangements.

### 22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?

The key assessment to be made at the outset is the type of offering document required for the offering; for instance, whether a full-blown prospectus is required or whether the issuer meets the requirement for any of the prospectus exemptions such that only a reduced form of an offering document such as the offer information statement or simplified disclosure document is required. In connection with the foregoing, the lead managers, together with the legal advisers, will also assess the scope of due diligence required.

In cases where an offering document is required to meet specific disclosure requirements under the SFA, parties will need to determine at an early stage whether the issuer is able to meet all such requirements or whether an exemption from disclosure is required to be sought from MAS (and to that end, whether there are grounds to apply for the exemption in the first place). This is critical to the transaction timeline as more time is usually required where exemptions are required to be sought from the relevant authorities.

Settlement of the transaction involves the lead managers (or the settlement bank, if one is designated) releasing the subscription proceeds to the issuer. For public offerings in Singapore, it is customary for issuers to appoint a receiving bank with whom subscription proceeds received through the public offer tranche will be deposited. Singapore offers a clearing system via the Central Depository (Pte) Limited (CDP). In the case of debt securities cleared through CDP, these debt securities are typically issued in the form of a global note or global certificate and delivered by the Singapore paying agent to CDP on the settlement date. The global note or global certificate is held by CDP for safekeeping. Delivery and transfer of debt securities between the respective accountholders are by way of electronic book-entry changes in the securities accounts maintained by such accountholders.

In the case of debt securities to be listed on the SGX-ST, the debt securities are admitted to trading one market day after settlement.

**Update and trends**

Market watchers are likely to pay attention to whether the introduction of the Bond Seasoning Framework and the Exempt Bond Issuer Framework will encourage more offerings of debt securities to retail investors.

### 23 How are public debt securities typically held and traded after an offering?

Public debt securities are typically in registered form and represented by a global certificate. The global certificate is held by CDP for safekeeping. Delivery and transfer of debt securities between the respective accountholders are by way of electronic book-entry changes in the securities accounts maintained by such accountholders.

### 24 Describe how issuers manage their outstanding debt securities.

This can be done through a variety of liability management exercises. The typical liability management exercises carried out in Singapore include open-market purchases, consent solicitations as well as tender and exchange offers.

In the case where a meeting of bondholders needs to be convened to seek the instructions or consents of bondholders, the process for convening such a meeting is set out in the trust deed.

### 25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?

The main continuing obligation applicable to issuers with listed debt securities is to immediately disclose to the SGX-ST any information that may have a material effect on the price or value of its debts securities or on an investor's decision on whether to trade in such debt securities.

Under the SGX-ST Listing Manual, a debt issuer must also immediately announce the following:

- the redemption or cancellation of the debt securities, when every 5 per cent of the total principal amount of those securities (calculated based on the principal amount at the time of initial listing) is redeemed or cancelled;
- the details of any interest payments to be made (except for fixed rate debt securities that are offered only to sophisticated and institutional investors and traded in a minimum board lot size of S$200,000 (or its equivalent in foreign currencies); and
- any appointment of a replacement trustee.

In the case of listed bonds offered to retail investors, the SGX-ST usually includes a condition in its approval in-principle notification that the debt issuer has to make periodic announcements as and when proceeds from such bonds are materially deployed and to provide a status report on the use of the proceeds in the annual reports of the debt issuer.

### 26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?

Under sections 253 and 254 of the SFA, civil and criminal liability for false or misleading statements or omissions to state any required information in the prospectus or offer information statement can attach to, among others:

- the issuer;
- each director of the issuer; and
- the issue manager to the offer and any underwriter to the offer.

In the case of criminal liability, the penalty is a fine not exceeding S$150,000 or imprisonment for a term not exceeding two years, or both.

In the case of private offerings accompanied by an offering document (not being a prospectus or offer information statement), there are general provisions under the SFA relating to market conduct that nevertheless have to be observed. For instance, section 199 of the SFA provides that no person shall make a statement, or disseminate information, that is false or misleading in a material particular and is likely to induce other persons to subscribe for securities if he or she does not care whether the statement or information is true or false or he or she knows or ought reasonably to have known that the statement or information is false or misleading in a material particular. Any person who contravenes the market conduct provisions under the SFA is guilty of an offence and is liable on conviction to a fine not exceeding S$250,000 or imprisonment for a term not exceeding seven years, or both.

**27 What types of remedies are available to the investors in debt securities?**

Investors who have suffered loss or damage as a result of the deficiency in the information disclosed in the offering document may commence civil actions to claim compensation.

**28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?**

See question 9 relating to MAS's powers to refuse to register a prospectus or to issue a stop order.

**29 What are the main tax issues for issuers and bondholders?**

These would centre around the tax deductibility of interest payments under the bonds as well as withholding tax in respect of payments under the bonds. The market practice is for the issuer to gross up in respect of any amount that is subject to withholding tax.

In Singapore, a key tax exemption available under the Income Tax Act (Chapter 134 of Singapore) is the qualifying debt securities (QDS) scheme. Under the QDS scheme, tax exemption (including withholding tax exemption) is granted on certain qualifying income (including interest) derived by investors who are non-resident holders of debt securities which qualify as QDS. The main conditions to qualify are as follows.

- The issue of the debt securities (or in the case of a debt issuance programme, the programme as a whole) must be arranged by certain financial institutions in Singapore that have been granted one of the following statuses: (i) financial sector incentive (bond market) company; or (ii) financial sector incentive (capital market) company; or (iii) financial sector incentive (standard tier) company.
- The issuer has included in all offering documents certain statements relating to QDS.
- During the primary launch of the offering of debt securities, the debt securities must be issued to four or more persons or less than 50 per cent of the principal amount of the debt securities issued is beneficially held or funded, directly or indirectly, by related parties of the issuer.
- The holder of the debt securities is not resident in Singapore and either does not have a permanent establishment in Singapore, or has a permanent establishment in Singapore but does not acquire the debt securities using any funds from Singapore operations.
- Payments of qualifying income under the debt securities are not derived by any related parties of the issuer or any other person who acquired the debt securities using funds from related parties of the issuer, if at any time during the tenor of the debt securities, 50 per cent or more of the debt securities outstanding at any time are beneficially held or funded by any related parties of the issuer.
- After the issue of the debt securities, a return on debt securities in the form prescribed by MAS is submitted to MAS within the prescribed time (currently, one month from the issue date).

As an additional incentive for eligible issuers under the Bond Seasoning Framework and the Exempt Bond Issuer Framework, the Minister for Finance will grant a tax deduction up to two times to qualifying retail bond issuers for issuance costs attributable to such retail bonds. The tax concession will be available for five years with effect from 19 May 2016, subject to a cap of S$500,000 per qualifying bond issue and a cumulative cap of S$1 million per issuer for the whole duration of the concession period.

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# Spain

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**1 What types of debt securities offerings are typical, and how active is the market?**

With a well-developed and agile banking sector and a widespread perception until recently that access to debt capital markets was generally inefficient from a cost perspective for non-listed potential issuers, Spanish companies have traditionally relied on bank loans as their principal source of financing. One of the lessons of the 2007–2012 credit crunch, though, has been that access by Spanish companies to debt capital markets must be promoted to diversify their sources of financing, reduce their dependence on bank loans and ultimately help them withstand future banking crises.

In pursuit of that objective, significant steps have been taken in the last few years such as the creation in May 2013 of a new specialised multilateral trading facility (MARF) for debt securities issued by small and medium-sized companies, in line with other European examples like EuroMTF in Luxembourg, and, more significantly, the enactment of Act 5/2015 that aimed to set up a more modern and flexible legal framework for debt issuances.

Without prejudice of the above, Spanish companies issue a broad range of debt securities that include principally:

- bonds: debt securities paying fixed or floating interest rates under a variety of forms (for example, zero coupon, high-yield), secured or unsecured, senior or subordinated, guaranteed or not;
- structured bonds;
- convertible or exchangeable bonds: debt securities that can be converted into equity;
- asset-backed securities: mainly Spanish covered bonds and mortgage bonds; and
- commercial paper: mainly short-term debt securities.

**2 Describe the general regime for debt securities offerings.**

The Companies Act contains the rules governing the issuance of debt securities by Spanish companies. In the past, certain issuers other than companies (including cooperatives, public sector business enterprises and public corporate bodies, among others) were subject to specific rules but that duality of legal regimes came to an end with Act 5/2015 so that their debt issuances are currently also subject to the general framework contained in the Companies Act.

The Securities Market Act (which was also partially amended by Act 5/2015) contains the principles governing both the primary and secondary markets for all sorts of securities in Spain, and is the law implementing most of the EU directives on securities. As such, capital markets regulations in Spain are substantially in line with those of the other EU countries.

The Spanish National Securities Market Commission (CNMV) is the agency in charge of supervising and inspecting the Spanish capital markets and the activities of all the participants in those markets.

Finally, Act 10/2014 sets out the tax regime applicable to virtually all issuances of debt securities by private issuers.

**3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.**

The Companies Act provides as a general principle that a Spanish company issuing debt securities must grant a public deed that shall contain specific information about the debt issuance (including a description of the terms and conditions of the securities). The public deed must be granted by the issuer and a representative of the bondholders (that Spanish law refers to as a commissioner). Moreover, pursuant to the Commercial Code, such public deed must be filed and registered with the Commercial Registry.

This connects with another feature of the Spanish legal regime on debt issuances, which is the obligation to form a syndicate of bondholders and appoint a commissioner. Following the entry into force of Act 5/2015, the appointment of a commissioner and the formation of a syndicate of bondholders is only necessary in debt issuances that comply with the following three requirements (cumulatively):

- when they qualify as public offerings for subscription;
- when their terms and conditions are governed by Spanish law or by the law of a state other than an EU member state or an OECD country; and
- when the issuance takes place within the Spanish territory or the securities are admitted to trading on an official Spanish secondary market or a multilateral trading facility established in Spain.

Thus, it is not necessary to set up a syndicate of bondholders and appoint a commissioner, among others, in debt issuances by Spanish companies when they do not qualify as public offerings or are governed by the law of a country of the OECD (typically English or New York law). Naturally, the above does not imply that Spanish issuers qualifying for the exception cannot voluntarily opt to set up a syndicate of bondholders and appoint a commissioner.

The Securities Market Act, as amended by Act 5/2015, has also more clearly set out the circumstances in which the requirement to grant and register a public deed with respect to the debt issuance no longer has to be complied with, which are:

- when the securities are to be admitted to trading on Spanish official secondary markets (such as AIAF) or are subject to a public offering that requires a prospectus subject to approval and registration by the CNMV; or
- when the securities are to be admitted to trading on a Spanish multilateral trading facility (such as the MARF).

In conclusion, although the requirement to grant and register a public deed of issuance remains in force, it only applies in practice to issuances carried out by Spanish companies on international markets, when the securities are not admitted to trading on official secondary markets or multilateral trading facilities established in Spain, and when they will not be subject to a public offering in Spain. In addition, issuances of bonds convertible or exchangeable into shares of the issuer or shares of a company of its group will not be eligible for the exception to the requirement of granting the public deed.

**4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?**

A prospectus will be required in Spain in connection with the issue of debt securities if either of the following circumstances applies:

- The securities are the subject of a public offering in Spain. Certain offers of debt securities do not qualify as public offers, as described in question 10.

- The securities are to be listed on a secondary official market in Spain.

In both cases, a prospectus must be approved by the CNMV (or alternatively, passported into Spain) and be published by the issuer at its expense. The listing prospectus can be the same as the offer prospectus.

A prospectus must contain all the information necessary for prospective investors to make an informed assessment of the issuer and securities offered, including sufficient information regarding the assets and liabilities, the financial situation, profits and losses and prospects of the issuer and, if applicable, the guarantors of the securities. The information must be drafted in a way such that it is easy to analyse and understand.

### 5 Describe the drafting process for the offering document.

In circumstances in which the drafting of a prospectus and its approval by the CNMV is dictated by the Securities Market Act, the prospectus will obviously comply with the standards on content and format imposed by the Prospectus Directive and other applicable regulations. If the prospectus is not legally required, the issuer will in any event ensure that the offering document meets the relevant market standards.

In both cases and although there is no one-size-fits-all approach, the primary responsibility of drafting the offering document typically lies on the issuer and its counsel, with the involvement of the underwriters and their counsel where appropriate. In this regard, it is worth noting that, under Spanish law and where the prospectus is legally required, the issuer and its directors, at least, will be liable for its content (as more fully described in question 26).

### 6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

The terms and conditions of the debt securities will initially be reflected in the corporate resolution of the issuer pursuant to which the debt securities are issued. Such terms and conditions will then be reflected in the public deed, if it has to be granted (see question 3), and in the prospectus or, in the case of a private placement, in the offering document.

The information contained in the public deed, once registered, will be publicly available through the Commercial Registry. When legally required, the prospectus, once approved by the CNMV, must be made available to the investors by the issuer and will be published in the official website of the CNMV (www.cnmv.es). Similarly, listing documents in respect of notes admitted to trading on the MARF can be found in its website (www.bmerf.es). There are no legal rules that govern the dissemination of the offering document in a private placement but the market standard is clearly for the offering memorandum to be delivered to each prospective purchaser of the relevant debt securities.

### 7 Does offering documentation require approval before publication? In what forms should it be available?

Following the enactment of Act 5/2015, from a corporate perspective and unless otherwise stated in the issuer's articles of association, the management body of a Spanish company is authorised to approve the issuance and admission to trading of standard debt securities that do not yield part of the profits of the issuer, as well as to grant guarantees or security interests in favour of standard debt securities of other companies. The general shareholders' meeting retains the power, though, to issue bonds convertible into shares or securities that yield part of the profits of the issuer.

From a regulatory perspective, if a prospectus is legally required, it will have to be approved by the CNMV before it is made available to the investors as more fully described in question 8.

### 8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?

See question 10 for a description of the debt offerings that do not require a prospectus.

In case of a public offering of debt securities which requires the prior approval and registration of a prospectus, the CNMV will assess that the prospectus is complete, may be understood and contains consistent information. The assessment of the CNMV does not imply, however, an evaluation of the creditworthiness of the issuer or as to the quality of the securities.

Generally and in accordance with the applicable regulations, the CNMV has a maximum period of 10 business days from the day the prospectus is submitted by the issuer to approve it. If the issuer does not have any other securities admitted to trading on a Spanish or EU regulated market and has not issued securities to the public before, such period will be extended to 20 business days. However, if the CNMV considers that the prospectus or the information provided is incomplete, it shall so notify the issuer identifying the additional information that has to be provided. In such case, the 10 or 20-day period will be suspended until the issuer files the requested information, which has to be filed within a maximum period of 10 business days. Given the amount and complexity of the information contained in a prospectus, the CNMV usually does require additional clarifications or changes to the document and, therefore, in practice, the process typically takes longer that the aforementioned 10 or 20-day period.

Once the CNMV has approved the prospectus it will have to be published and made available by the issuer to the public at its expense as soon as possible.

When a prospectus is legally required, the issuer and underwriters may not solicit investors for the debt securities or, further, accept purchase orders from investors before the prospectus has been so approved and published. It is possible, however, for the issuer and the underwriters to conduct advertising activities with respect to the debt securities in advance of registration of the prospectus provided that the information contained in any advertising materials is consistent with the information to be contained in the prospectus.

### 9 On what grounds may the regulators refuse to approve a public offering of securities?

In general, the Securities Market Act states that the issuance of securities is not subject to prior regulatory approval. However, this is provided that the issuer is validly incorporated in accordance with the laws of its jurisdiction of incorporation and is operating in accordance with its constitutional documents and that the securities issued comply with the legal requirements applicable pursuant to their legal nature and, to the extent that the offering requires the registration and approval of a prospectus, that the offering is conducted in accordance with the rules contained in the prospectus (suitability requirements). In addition to the suitability requirements, the CNMV will also assess the information requirements applicable to the offering, which will cover documentation evidencing compliance with the suitability requirements, audited financial statements of the issuer for at least the last two fiscal years and, in certain cases, as mentioned before, a prospectus.

### 10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?

A public offering for the sale or subscription of securities consists of any communication to persons in any form and by any means that provides sufficient information on the terms of the offering and the securities offered to allow an investor to decide whether to acquire or subscribe to said securities. This notwithstanding, the following are not considered public offerings by the Securities Market Act and are therefore exempted from the obligation to register a prospectus with the CNMV:

- offerings of securities exclusively directed to qualified investors;
- offerings of securities directed to less than 150 natural or legal persons per member state, without including qualified investors;
- offerings of securities addressed to investors who acquire securities for a total consideration of at least €100,000 each, per offering;
- offerings of securities whose unit nominal value amounts to at least €100,000; and
- offerings of securities amounting to a total of less than €5 million, which limit shall be calculated over a period of 12 months.

As private offerings do not require the registration of a prospectus with the CNMV they benefit from greater flexibility; a significant reduction of the time period required to implement the transaction; and lower costs.

**11 Describe the public offering process for debt securities. How does the private offering process differ?**

The process for an offering of debt securities depends very much on whether the transaction is a public offering or a private placement and also on whether it is a stand-alone transaction or the issuer has a base prospectus in place and is drawing down on a debt programme.

Public offerings of debt securities are relatively unusual and entail a longer process including the preparation, filing and approval of a prospectus by the CNMV, which can take from four to eight weeks before the transaction can be launched and marketed to investors. The prospectus typically contains the definitive pricing of the securities (issue price, coupon and maturity), so demand is filled on a first come first served basis. Alternatively, if a base prospectus is available in respect of a debt programme, the issuer can take advantage of the programme by simply filing with the CNMV the final terms of the bonds, which facilitates the process substantially.

In private placements, an offering memorandum is typically produced (except for certain types of deals such as, for example, equity-linked securities, which are frequently undocumented) which is submitted to the CNMV or the MARF for informal approval before distribution to investors. In these deals, pricing of the securities is determined on the basis of a bookbuilding by the underwriters and, following pricing, the offering memorandum is turned into a listing prospectus containing final pricing information for admission to listing purposes. A base prospectus and final terms can also be used in this context.

**12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?**

Statutes do not set out what document underwriters or initial purchasers may request from the issuer or third parties in the context of a debt issuance so that it is entirely up to the parties to contractually regulate this area. In any event, it is customary for underwriters to obtain legal opinions from legal advisers and comfort letters from auditors (without negative assurances in Regulation S offerings).

**13 What are the typical fees for listing debt securities on the principal exchanges?**

Both AIAF (the regulated market) and MARF (the multilateral trading facility) disclose complete information about the fees they charge for listing debt securities on their websites. In addition to such fees, in the context of an offering of debt securities, leaving aside the costs and expenses of advisers, advertising, etc, it has to be borne in mind that the issuer may be required to pay notarial and registration fees (to the extent the issuance has to be documented in a public deed, see question 3) and the fees charged by the CNMV, if a prospectus has to be approved by it. Fees charged by notaries, the Commercial Registry and the CNMV are set out by law.

**14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?**

The market is currently particularly active around the design and issuance of hybrid debt instruments by credit entities and insurance companies.

**15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?**

The issuance of hybrid debt instruments by credit entities and insurance companies in Spain is always structured through private offerings and is thus subject, as explained before, to less strict regulations under the Securities Market Act. From a substantive point of view, the main concern in these offerings is that the securities meet the requirements of the capital adequacy regulations for them to qualify for regulatory capital purposes.

**16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?**

The Securities Market Act draws a very simple distinction and defines debt securities as those securities that create or recognise the prior existence of a debt. The Securities Market Act uses that definition to establish what offerings of debt securities have to be documented in a public deed (see question 3) or require the creation of a syndicate of bondholders and the appointment of a commissioner. For these purposes, securities that are convertible or exchangeable into shares of the issuer or shares of a company of its group are considered equity securities and, consequently, do not benefit from the exemptions of the obligation to grant the public deed or to create the syndicate of bondholders.

Accounting wise, securities will be classified as equity or debt depending on their inherent economic attributes pursuant to accounting rules, which follow a substance over form approach.

**17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?**

No, there are no legally imposed transfer restrictions or limitations. However, a private offering of securities may not be followed by an offering by one of the purchasers of the debt securities that qualifies as a public offering under the Securities Market Act unless it is covered by a registered prospectus in accordance with the rules on cascade offerings contained in the Prospectus Directive.

**18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?**

The Companies Act (after Act 5/2015) expressly establishes that Spanish companies can issue debt securities abroad (a possibility that anyway was fully accepted before Act 5/2015) and it regulates some aspects of these issuances.

In particular, the Companies Act determines which law applies to the different aspects of a debt issuance carried out 'abroad' (a concept which is fairly unclear) by a Spanish company as follows:

- Spanish law (lex societatis) will determine the power, the competent body and the conditions for approval of the resolution through which the securities are issued;
- the foreign law to which the issuance is subject (lex contractus) will determine the rights of the bondholders against the issuer (ie, the contractual matters of the issuance), the forms of collective organisation and the securities' redemption and cancellation regime; and
- in the case of convertible bonds, the foreign law to which the issuance is subject will determine the content of the conversion right (within the limits set out by Spanish law) and Spanish law will determine the conversion value, the limits for the conversion and the exclusion of the pre-emption right rules.

In addition to the above, foreign issuers may offer debt securities in Spain provided they comply with the Securities Market Act and related regulations (including the rules on the obligation to create a syndicate of bondholders and appoint a commissioner in the cases outlined in question 3).

**19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?**

The CNMV may approve a prospectus of an issuer incorporated in a third country, drafted in accordance with the legislation of such country, provided that it has been drawn up in accordance with international standards (for instance, those of the International Organization of Securities Commission, IOSCO) and that the information requirements laid down by such foreign legislation are equivalent to those of the Spanish legislation. The Spanish central securities depository, Iberclear, requires additional information for the trading of foreign securities (ie, securities issued pursuant to a law other than Spanish law and by a non-Spanish issuer), irrespective of whether they are denominated in euro or in any other currency.

In addition to the above, a prospectus approved by the competent authority of another EU member state will be valid in Spain (regardless that the issuer may be incorporated in a third country, not a member

**Update and trends**

Increasing debt capital market activity supported by the European Central Bank's monetary policy involving quantitative easing and private debt purchase programmes. During the first two months of 2017, the issuance of debt securities has doubled compared to last year issuances. In Spain the main debt issuers continue to be the leading banks (ie, CaixaBank, Banco Santander, Santander Consumer and BBVA), with issuances amounting to €4.57 billion, along with corporates such as Telefonica and Iberdrola.

In terms of structure and conditions, the market seems to be receptive for longer maturity bonds and for special products such as green bonds, where Iberdrola is the global leader.

of the EU) benefiting from the European passport set forth by the Prospectus Directive.

### 20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

The underwriting for a public offering of debt securities is generally structured on a firm commitment basis involving the undertaking by the underwriters to subscribe a pre-agreed amount of debt at a fixed price set at the outset of the deal. The underwriting agreement is executed by the issuer and the underwriters of the public offer before the offer period starts.

Conversely, private offerings are generally underwritten only on a soft basis, meaning that the underwriters only enter into the underwriting agreement following a successful bookbuilding and pricing of the transaction whereby they only take on the settlement risk associated with final payment of the securities by the clients at closing.

### 21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

Underwriters who act in this capacity in Spain must be investment services companies or credit entities duly authorised or passported into Spain.

### 22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?

It should be noted that the Spanish clearing, settlement and registry system of debt securities is expected to undergo a significant reform this year to align it with the practices and standards of most European markets in the context of the TARGET2 Securities project.

Pending such reform, the legal regime applicable to the representation of fixed income securities in book-entry form in Spain is set forth in Royal Decrees 116/1992 and 878/2015.

Iberclear is the Spanish central securities depository in charge of both the register of securities held in book-entry form and the clearing and settlement of all trades in AIAF and MARF.

The function of Iberclear and the Iberclear participants includes keeping the book-entry register of debt securities traded on AIAF and MARF.

The book-entry register structure is divided as follows: (i) the Spanish Central Registry managed by Iberclear, that reflects the aggregate balance of the securities held by each of the Iberclear participants (segregated into the Iberclear participants' own account and accounts held on behalf of third parties), and (ii) an itemised individual register managed by each of the Iberclear participants, in which securities are listed under the security owner's name.

The settlement system used for securities admitted to trading in AIAF and MARF is the Model 1 delivery versus payment system, according to the classification of the Bank for International Settlements: that is, it is a 'transaction-to-transaction' cash and securities settlement system where finality is simultaneous.

Transactions are settled on the business day agreed by participants at the time of the trade.

### 23 How are public debt securities typically held and traded after an offering?

Debt securities in Spain are fully dematerialised, meaning that global certificates are not used and, instead, securities are created by way of registration in book-entry form with Iberclear.

### 24 Describe how issuers manage their outstanding debt securities.

Issuers may manage their outstanding debt securities through any of the various liability management transactions available in the marketplace, including through open market purchases (to the extent permissible under the terms and conditions of the notes), consent solicitations, tender and exchange offers.

### 25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?

Yes. Issuers of debt securities listed in a regulated market domiciled in the EU having Spain as home member state shall file with the CNMV and make available on the issuer's website the following:

- financial information, in particular, the annual audited financial statements and the semi-annual unaudited financial statements. The obligation to file such financial information does not apply to issuers of debt securities listed on a regulated market with a minimum denomination of €100,000; and
- any inside information relating to the issuer or the securities.

Separately, Regulation (EU) No. 596/2014 requires persons discharging managerial responsibilities in an issuer of debt securities to report to the issuer and the CNMV any dealing on securities of the issuer.

### 26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?

Liability for the information contained in the prospectus lies with: the issuer; the offeror; the person requesting admission to trading of the debt securities; the directors of all the referred parties; the guarantor, with respect to the information that this person prepares; and any other person who assumes liability for the content of the prospectus, as long as this acceptance is contained in the prospectus, and those persons who have authorised the content of the prospectus.

The prospectus must identify the individuals who are liable for the information contained therein with their name and position, or, in the case of entities, their corporate names and registered offices. These persons must declare that, to the best of their knowledge, the information contained in the prospectus is accurate and in accordance with reality and that the prospectus contains no omission that could affect its scope.

In this regard, the persons liable for the information contained in the prospectus will be liable for any damages caused to the holders of the securities acquired as a result of any misleading information or omissions in the prospectus. However, no civil liability can be attributed to any person solely on the basis of the summary of the prospectus, including any translation thereof, unless it is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.

The statutory limitation period applicable to claims on the above grounds is three years as of the time the claimant could have been aware of the misleading information or omission in the prospectus.

### 27 What types of remedies are available to the investors in debt securities?

Investors have an action to claim damages suffered against the persons that are liable for the content of the prospectus to the extent the securities were acquired in good faith and the damages are linked to any false information or omission in the prospectus and provided that the inaccuracy or omission is not corrected by means of a prospectus supplement that is disclosed to the market prior to the date on which the investor acquires the relevant securities.

Leaving aside the liability derived from inaccurate information or omissions in the prospectus, an investor will be entitled to claim liability from the issuer in case the issuer breaches any its contractual obligations or warranties in the offering documents.

**28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?**

Pursuant to the Criminal Code, directors of a company that knowingly falsify the annual accounts of the company, or any document that must reflect fairly the legal position of the entity, with the aim of causing damage to the company, its shareholders or a third party, will be imprisoned from one to three years and sanctioned for six to 12 months. If damage is actually caused, the penalties will be imposed in the upper middle range.

As a general principle, Spanish law does not allow dual sanctions (criminal and administrative) to be imposed on the same party as a result of the same conduct and with the same protective aim of the law. As an exception, the Constitutional and Supreme Courts have upheld the possibility for a criminal penalty to be imposed alongside an administrative sanction in those situations in which the infringing party is subject to a special relationship of dependence towards the administration. Financial institutions subject to supervision have been rendered for these purposes as subject to that special relationship of dependence.

The Securities Market Act contains a detailed list of infringements of securities market regulations and their sanctions. In this regard, the Securities Market Act sets out as a serious offence illicit publicity in breach of legal requirements, the omission of relevant information or including inaccuracies, false or misleading data in the relevant prospectus.

In addition, if the infringement is committed by a legal entity, and its directors are responsible, they may also be subject to sanctions on a personal basis.

**29 What are the main tax issues for issuers and bondholders?**

**Stamp duties**

There is no stamp or other issuance, registration or transfer taxes on the issue or transfer of debt securities issued by a Spanish tax resident issuer. No value added tax is triggered either.

**Withholding tax**

Provided that the requirements laid down in Additional Provision One of Act 10/2014 (which include that the securities be admitted to listing on a regulated market, multilateral trading facility or other organised market) are met and the formalities prescribed by Spanish tax regulations are complied with, payments under the bonds would not be subject to Spanish withholding tax. As regards income derived from the securities, it would be exempt from Spanish non-resident income tax for not-Spanish resident investors and fully subject to taxation in the case of Spanish residents.

**Deductibility of interest payments by the issuer**

Subject to the assumption referred to in the preceding paragraph, interest paid by the issuer on the securities will be fully deductible for Spanish income tax purposes without limitation and regardless of the accounting treatment of the instrument issued.

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# Sweden

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**1 What types of debt securities offerings are typical, and how active is the market?**

The domestic bond market in Sweden is still young compared to the international debt capital markets and accordingly is still relatively underdeveloped. It is characterised by two main types of debt securities offerings: Swedish medium-term note programmes (MTNs) and high-yield offerings.

Domestic medium-term note programmes are often used by financial institutions, municipalities and real estate companies, and also offer larger domestic corporates (who may not yet have evolved to the stage of requiring the volume and size of deals required to enter the international debt capital markets) access to an additional source of funding, which is both comparatively cheap and quick to market. These companies will often establish a medium-term note programme for the issuance of relatively small drawdowns (under 2 billion kronor and often below 1 billion kronor). Such programmes are usually only set up to issue vanilla bonds and do not contain the complexity or scope of products that can be issued under international programmes. They will usually be listed on NASDAQ Stockholm and securities issued thereunder will be held through the Swedish clearing system, Euroclear Sweden. The base prospectus is usually fairly light in content and is, in principle, written in Swedish, although English is generally accepted. The documentation is almost exclusively Swedish law governed and will be marketed primarily within Sweden, with the other Nordic markets often being approached as well as certain accounts in London and Luxembourg, although the spread of investor interest is becoming wider all the time, including German accounts, among others, depending on the nature of the issuer.

The Swedish high-yield market is growing year on year as the number of issuers and size of issues grow and liquidity increases. The origins of the terms of such issues are found in bank finance transactions and until fairly recently maintenance covenants were common, although as issuers and investors have become more sophisticated, the vast majority of issues are now incurrence-based. These issues are generally wholesale products (with a minimum denomination of 1 million kronor (over €100,000)) and offered on a private placement basis to institutional investors. The securities are usually listed on NASDAQ Stockholm within up to a year of issuance, but are marketed without an approved prospectus. The terms and conditions of the bonds are generally based on a standard form published in 2012, and updated in 2015, by the Swedish Securities Dealers Association in collaboration with market participants. The covenant package is usually in a fairly standardised form, which is a simplified and abbreviated version of the covenant package that can be found in the international markets. However, this standard is beginning to evolve to reflect certain international style norms as the investor base becomes increasingly international. This market provides access to funding to smaller Swedish companies that do not need the size of financing required to create sufficient liquidity to issue in international markets and do not want to pay the relatively high transaction costs of such funding. It has also more recently become a useful source of acquisition financing for private equity houses active in the region requiring local currency and providing an alternative to the bank financing that has historically been relied upon by sponsors but has become more and more elusive over recent years due to increased regulatory burdens.

The growth in the number and volume of new issues in the Swedish market increased rapidly in the years following the financial crisis. However, the boom in the international high-yield markets in 2014 was more muted in Sweden due to the strengths of the six main Nordic banks which, unlike many other European banks, were able to maintain their credit lines and relationships with many of the Swedish corporates. The growth trend halted in 2015, as geopolitical and macro-economic turbulence led to a reduced volume of new issuance compared with 2014, although, unlike the Norwegian market, the Swedish market continued to function: according to NASDAQ Stockholm figures, there were 223 new corporate bonds admitted to trading on NASDAQ Stockholm in 2015 with a total value of 116.7 billion kronor, compared to 281 corporate bonds in 2014 with a value of 130.3 billion kronor, and 218 corporate bonds in 2013. In 2016, transaction volumes remained at similar levels with 222 new corporate bonds admitted to trading on NASDAQ Stockholm, whereof 23 were admitted to NASDAQ Stockholm's newly established sustainable bonds' market, with an aggregate value of 118.5 billion kronor.

**2 Describe the general regime for debt securities offerings.**

As a member state of the European Union, Sweden has implemented Commission Regulation (EC) 809/2004 (the Prospectus Regulations) implementing Directive 2003/71/EC (the Prospectus Directive), which applies to public offerings in Sweden through the Swedish Financial Instruments Trading Act (1991:980) and the Regulatory Code of the Swedish Financial Services Authority (SFSA).

The competent authority for the purposes of the Prospectus Directive is the SFSA.

In addition to the Prospectus Directive framework, the Swedish Companies Act (2005:551), the Swedish Securities Market Act (2007:528), the Swedish Financial Instruments Accounts Act (1998:1479) and the Swedish Systems for the Settlement of Obligations on the Financial Market Act (1999:1309), inter alia, govern the offering and issuance of debt securities in Sweden.

The Swedish regulated market is the regulated market of NASDAQ Stockholm and the multilateral trading facility (MTF) is NASDAQ Stockholm's First North Bond Market. The listing rules are set out in NASDAQ Stockholm's Rule Book for Issuers and First North Bond Market's First North Bond Market Rulebook.

Euroclear Sweden's rules for issuers are, inter alia, set out in its Rules for Issuers and Issuer Agents.

**3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.**

In accordance with the Prospectus Directive, a prospectus relating to a public offer in Sweden must be approved by the SFSA and the contents must be in compliance with the Prospectus Regulations.

NASDAQ Stockholm requires, in addition to standardised affiliation agreements and forms:

- constitutional documents of the issuer;
- a prospectus approved by the SFSA;
- three years' consolidated annual financial accounts, prepared in accordance with local requirements, to have been published by the issuer (if this requirement cannot be met, derogation may, however, be sought if NASDAQ Stockholm deems the information

which is available sufficient for the purpose of properly assessing the offering);
- evidence of Euroclear affiliation;
- information about the issuer's third-party news distributor;
- signed final terms; and
- marketing materials, if any.

Euroclear Sweden, the Swedish clearing system, requires, in addition to standardised affiliation agreements and forms:
- constitutional documents;
- financial accounts;
- a bank guarantee from a Swedish bank or Swedish branch of an international bank (depending on the outcome of Euroclear's issuer review); and
- in relation to non-Swedish issuers only, a legal opinion.

### 4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?

As referred to above, public offerings in the Swedish market will require the approval and publication of a prospectus produced in compliance with the Prospectus Directive and the Prospectus Regulations. Accordingly, the prospectus will be required to comply with the requirements relating to the specific type of debt security and the type of issuer involved, as set out in the annexes to the Prospectus Regulations.

Public offerings may also be made under an approved base prospectus in relation to domestic MTN issuance, which allows issuers to issue debt securities regularly within a one-year period after approval without producing a new prospectus for each series of debt securities, although approved supplements may be required to update the market on periodic financial information and other key events. Under an MTN programme, the filing of a final terms document with the competent authority is sufficient and no approval is required.

The overarching principle, however, is that the prospectus should contain all information that is necessary to enable an investor to make an informed assessment of the assets and liabilities, financial position and prospects of the issuer (and, to the extent relevant, any guarantors) and the debt securities themselves.

### 5 Describe the drafting process for the offering document.

In the Swedish market, domestic MTN programme base prospectuses are relatively brief and often do not go beyond the strict requirements of the Prospectus Regulations. In most cases this will be drafted by the issuer's counsel in combination with the issuer, with input from the financial institutions involved in the process. Much of the information is based on the annual report of the issuer along with limited due diligence, which may serve to extend the risk factors from those contained in the annual report. The issuer and its board of directors must take full responsibility for the prospectus.

As regards the offering documentation for private placements, the debt securities can be sold on the basis of a term sheet, however, the prevailing practice is to combine a term sheet with, at the very least, a set of risk factors. In most cases, the issuer, in conjunction with the placement agent, will produce an investor presentation and in some cases an information memorandum with a more detailed description of the issuer. The risk factors in private placements, particularly in the high-yield market, are far more extensive than in investment grade deals and will be the result of the issuer and its counsel drafting the risks together, combined with an in-depth review by the placement agent and its counsel in the light of extensive financial and legal due diligence.

In either case there is no strict legal guidance on what is or is not considered material in the context of the issuance; issuers must make their own assessment as to what the materiality threshold should be. This depends on many factors including the size and nature of the issuer itself. However, in accordance with the Prospectus Regulations, there are different levels of disclosure required depending on whether the debt securities to be issued are wholesale (with a minimum denomination of over €100,000 (approximately 1 million kronor)) or retail securities (minimum denomination under €100,000).

### 6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

The terms and conditions of the debt securities is the key document which includes the entirety of the provisions governing an issue of debt securities including, inter alia, the repayment and prepayment terms, the covenants of the issuer, the events of default, provisions as to any security package and the acceleration and enforcement procedures, as well as the role and protections of the agent and the process for decisions to be taken by holders of the securities. There is no separate indenture or trust deed under the Swedish law documentation and, accordingly, the debt securities are effectively constituted by the terms and conditions themselves.

The parties to the terms and conditions are the issuer and the bond agent. The bond agent represents the interests of the security holders and is authorised to take certain decisions and make certain determinations on their behalf, but generally will consult the holders of the securities in the event that a decision of any real significance to the interests of the holders needs to be taken. The bond agency role is contractually established and not specifically provided for under Swedish law. In order to be able to act on behalf of the security holders, security holders must issue a power of attorney in favour of the bond agent. At the inception of the Swedish debt capital markets there was little harmonisation between the terms and conditions used for issues of debt securities. However, in 2012, following consultation with a number of market participants, the Swedish Securities Dealer's Association formulated a standard-form Swedish law terms and conditions document, which contains the technical details of bond issues and is silent on the commercial terms such as the covenants and the events of default. This standard form, which was updated in October 2015, is now used as the basis for the majority of issues of stand-alone debt securities in Sweden.

### 7 Does offering documentation require approval before publication? In what forms should it be available?

As previously mentioned, the majority of issues are carried out either under listed programmes or private placements. In the case of the former, the base prospectus must be approved by the SFSA prior to publication and listing. In the latter case, approval is only required for the listing prospectus prior to listing of the debt securities, but any investor presentation or information memorandum presented to potential investors at the time of the offering does not require approval by the SFSA.

In accordance with the Prospectus Directive, the base prospectus or prospectus, as applicable, once approved must be published on the SFSA's website and, pursuant to the SFSA's regulations, on the issuer's website.

### 8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?

Domestic public offerings are rare in Sweden but other than the requirement to approve the base prospectus (and any supplements thereto) in relation to MTN programmes or the prospectus in relation to stand-alone issues, no authorisation is required.

Approval of the prospectus may typically be expected within 20 business days of submission of a substantially complete prospectus for a debut issuer or 10 business days for a repeat issuer. Publication of the prospectus or offering of the debt securities in the context of a public offering is strictly prohibited prior to obtaining the approval of the SFSA, in line with the provisions of the Prospectus Directive.

### 9 On what grounds may the regulators refuse to approve a public offering of securities?

Regulators may refuse to approve a public offering of securities on the grounds of not meeting the stock exchange's listing requirements, not being compliant with applicable laws and regulations, or the issuer or the issuer's debt instruments being deemed unsuitable for listing by NASDAQ Stockholm, despite the fact that the issuer and the debt instruments fulfil all of the listing requirements.

To have its debt securities admitted to trading on NASDAQ Stockholm, an issuer must be a public limited company and have a registered capital of at least 500,000 kronor (or the equivalent thereof in any other currency). Furthermore, an issuer's constitutive documents may need to be adjusted to include a record day provision.

Although NASDAQ Stockholm generally does not impose any restrictions as to the currency denomination of debt securities, Euroclear Sweden will only accept kronor or euro-denominated bonds. It may be noted that listing on NASDAQ Stockholm does not presume clearing through Euroclear Sweden, however.

### 10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?

The requirements of the Prospectus Directive only apply to securities that are the subject of a public offer or are listed on an EU-regulated market. Accordingly, an unlisted, private placement (or one that is listed on First North Bond Market) will not be required to produce a Prospectus Directive-compliant prospectus.

Listings on First North Bond Market will require a listing document to be produced and the contents requirements of First North Bond Market's listing rules are less onerous than those of the Prospectus Directive itself.

Safe harbours from the public offer regime under the Prospectus Directive are as follows:

- offers addressed to qualified investors only;
- offers addressed to fewer than 150 persons (other than qualified investors) in a single member state;
- offers of securities with a denomination per unit of at least €100,000;
- offers of securities for a total consideration of at least €100,000 per investor; or
- offers for a total consideration of less than €5 million over a 12-month period.

### 11 Describe the public offering process for debt securities. How does the private offering process differ?

**Timeline**

As previously mentioned, public stand-alone offers are rare in the Swedish market and the timeline would be very similar to a public offer in any other EU jurisdiction, except that, as mentioned above, the review period for the prospectus may well be shorter than in a number of jurisdictions. Accordingly, the time frame for a new issuer would be likely to be close to two to three months, while a repeat issuer could rely on a one-month period to market. In relation to a private offering, a prospectus is not required prior to listing and the time to market will therefore be one to two months, depending on the nature of the issuer and the complexity of the transaction.

**Legal documentation**

The Swedish market is very documentation-light and the documentation usually consists of a short-form dealer agreement, standard-form agency agreement, the terms and conditions of the bonds and an investor application form. Private placements will use the same documentation (with potentially fewer protections for the participants).

**Marketing**

Marketing is based on a preliminary prospectus and investor presentation. Pre-sounding is common in this market for both public and private transactions. Private offers may rely on an unverified investor presentation and in some cases an information memorandum (not approved by the SFSA) in the marketing phase, with listing and an approved listing prospectus not coming until after issuance within up to a year of the issue date.

**Key parties**

The key parties are as follows in a public deal in Sweden: issuer; placement agent; bond agent (equivalent of the trustee or fiscal agent in international transactions); and law firms (historically one transaction counsel, more recently becoming one counsel for the issuer and one for the arrangers and the agent).

### 12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?

Swedish practices are becoming more international all the time, and while deals were originally carried out without any placement agent protections other than a single limited legal opinion from counsel, there is more emphasis on some form of agreed-upon procedures letter from the auditors assuring the accuracy of an investor presentation, but not stretching to a full International Capital Market Association standard comfort letter in private placements (as the prospectus is rarely in place on issue).

The conditions precedent are contained in the dealer agreement and will often depend upon whether an investment bank, as opposed to an independent broker, is placing the transaction.

The investment banks are recently becoming more aware of the risks involved and requiring greater protections but seldom to the extent seen in international markets.

Official ratings are rare in Swedish non-public deals. The cost is often prohibitive for the smaller Swedish bonds. Traditionally, investment banks placing the offering would use their own research function to provide 'shadow ratings' as opposed to relying on one of the international rating agencies. However, recent ESMA guidance has questioned the use of such shadow ratings and all Nordic banks except one have ceased to provide such services while the effect of the guidance is considered.

### 13 What are the typical fees for listing debt securities on the principal exchanges?

**NASDAQ Stockholm**

Wholesale bonds are subject to an admission fee of 15,000 kronor plus an annual fee of 15,000 kronor per ISIN. Retail bonds are subject to an admission fee of 10,000 kronor plus an annual fee of 40,000 kronor per ISIN. In each case, the annual fee is payable annually in advance.

**NASDAQ First North Bond Market**

Wholesale bonds are subject to an admission fee of 15,000 kronor plus an annual fee of up to 30,000 kronor (depending on the issue size). All other bonds are subject to an admission fee of 24,000 kronor plus an annual fee of up to 40,000 kronor (depending on the issue size). In each case, all fees are payable as a one-off fee paid up front at the time of admission to trading.

### 14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?

There is an active market for special debt instruments in Sweden, especially in relation to covered bonds. NASDAQ Stockholm recently launched a sustainable bonds market, the first of its kind, which reflects an increasing interest in debt securities such as 'green bonds'. Equity-linked notes and convertible bonds remain relatively rare, however.

### 15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?

The Prospectus Directive generally applies to the offering of special debt securities. Hence, offerings of special debt securities to the public or their admission to trading on a regulated market require approval and publication of a prospectus, unless an exemption applies.

In relation to covered bonds, the Swedish Act (2003:1223) on Issuance of Covered Bonds also applies.

As regards the accounting treatment of special debt instruments, traded on a registered market, applicable accounting standards would apply at the time the debt instrument is registered or an application for registration has been made. The derivatives are in principle accounted for at market-to-market.

### 16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?

SFSA classification is based on the Prospectus Directive classification and from an accounting perspective IFRS or Swedish GAAP classification would apply. The specific terms and conditions applicable to the securities are central to the determination of the classification.

### 17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?

There are no specific rules under Swedish law or regulation restricting the transfer of privately issued debt. However, if debt securities that were initially only sold to qualified investors are subsequently allocated or transferred to retail investors, such transaction may be considered a 'retail cascade' and therefore nevertheless be subject to the public offering regime.

### 18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?

Foreign issuers issuing securities within the Swedish market are required by Euroclear Sweden to provide a legal opinion issued by legal counsel of the relevant jurisdiction.

There are no specific requirements on domestic issuers issuing debt securities outside Sweden (other than those contained in EU law (Prospectus Directive, Transparency Directive, etc)).

### 19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

A prospectus approved by the competent authority of an EEA member state can be passported into any other EEA member state for the purpose of a public offering or an admission to trading without any further approval process, subject to certain requirements set out in the Prospectus Regulations.

On a general note, the nature of the Swedish market allows access to greater liquidity for other Nordic issuers, and the acceptable issuance size (from approximately 300 million kronor) and comparatively light documentation enables foreign issuers to access the market with significantly less upfront cost for much smaller amounts than the international markets.

### 20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

Hard underwriting of issues of debt securities is rare in the Swedish market. Issues are generally placed through financial institutions or placement agents without any underwriting commitments. Accordingly, such placement agents benefit from a less rigorous liability regime and can therefore be comfortable with fewer protections on issuance. This is particularly the case for private placements where there is generally no underwriting commitment at all.

### 21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

Underwriters are regulated through the Swedish Securities Market Act (2007:528) and generally require authorisation by the SFSA. Financial institutions, such as underwriters, are regulated and monitored by the SFSA.

### 22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?

The key transaction execution issues in debt offerings in Sweden are relatively limited as there are often far fewer conditions precedent to settlement and listing is carried out at a later stage. The common issues that are problematic in a Swedish settlement process include registration with Euroclear Sweden, which can be particularly problematic for non-Swedish issuers since Euroclear Sweden may demand an on-demand bank guarantee issued by a Swedish bank (depending on the outcome of Euroclear Sweden's review of the issuer) and will require a legal opinion by legal counsel of the issuer's jurisdiction in Euroclear Sweden's standard format. The period between pricing of the securities and settlement is often longer in the Swedish market than in the international markets as there is seen to be less transaction risk in the smaller Swedish market. Settlement itself is a very short process as there are very few conditions precedent to be satisfied or global securities to be physically executed.

As mentioned below, debt securities are in dematerialised form and there is no global or individual certificate or note. Accordingly there is no depositary and holdings are evidenced through the electronic register of Euroclear Sweden.

Settlement is typically done two or three business days after the trade date, but can extend up to five days or longer after the trade date, predominantly depending on the type of issue.

### 23 How are public debt securities typically held and traded after an offering?

Swedish law-governed debt securities are issued in dematerialised book-entry form and are cleared through Euroclear Sweden. Under Swedish law there is no concept of a bearer or registered global note. Interests are evidenced purely through the entry on the electronic register of Euroclear Sweden. Trading takes place through Euroclear Sweden's systems.

### 24 Describe how issuers manage their outstanding debt securities.

Liability management is carried out by the same methods as in most European markets, namely, through a combination of market repurchases, public tenders, exchange offers as well as consent solicitations, which are regularly pursued by issuers as terms of high-yield transactions are often closer to the terms of bank financings and consent is required more regularly than in other established markets.

### 25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?

The widely used standard-form Swedish terms and conditions include information undertakings including the provision of annual financial statements within a specified period of the financial year-end as well as semi-annual and in some cases quarterly reporting. Compliance certificates are common in connection with incurrence of indebtedness (in the case of incurrence-based covenants) or periodically (in the case of increasingly less common maintenance-based covenants).

NASDAQ Stockholm's continuing disclosure regime (covering significant events occurring in a corporate's existence) only apply once listing of the securities has occurred (up to one year from the issuance date). These include the following.

**Price-sensitive information**

The issuer shall, as soon as possible, disclose any 'price-sensitive' information. The Swedish Securities Market Act (2007:528) defines 'price-sensitive' information and states that an issuer shall disclose 'such information regarding its operations and securities which is of significance for assessment of the price of the securities'. Furthermore, the issuer must disclose information when it may be 'reasonably expected' that the price of the securities will be affected, namely, it is not required that actual changes in the price of the securities occur.

As a general principle, all market participants must have symmetric access to all and any price-sensitive information regarding the issuer or its debt securities. Hence, price-sensitive information should generally be made public by way of a press release and such publication should take place as soon as possible after unintentional disclosure to a third party who does not owe a duty of confidentiality.

The issuer must have its own website on which information disclosed by the issuer on the basis of the disclosure requirements shall be available for at least three years. However, financial reports shall be available for a minimum of five years from the date of disclosure. The information shall be made available on the website as soon as possible after the information has been disclosed.

The issuer is also obliged to have an agreement in place with a news distributor.

**Regular disclosure requirements**

The issuer shall prepare and disclose all financial reporting pursuant to accounting legislation and regulations applicable to the issuer,

**Update and trends**

The most significant changes to the Swedish market come as a result of regulatory changes affecting the banks, which will often place such securities in the market. The first is the ESMA guidance calling into question the practice of banks issuing shadow ratings (as referred to above), which has resulted in the majority of Nordic banks ceasing to provide such shadow ratings. The effect of the lack of shadow ratings on investments in bonds is yet to become clear, as a number of investors rely to a certain extent on such shadow ratings in assessing credits, however, the flow of transactions does not seem to have been adversely affected in 2016. The second is the emergence of ECB leverage guidelines for banks, which effectively places additional burdens on banks' involvement in highly leveraged transactions. Again the effect so far is uncertain as the guidelines remain in draft form but are potentially likely to limit banks' ability to lend to fund highly leveraged acquisition finance deals, which may help to open the market further to debt securities. Thirdly, the emergence of alternative finance providers in the Nordic markets is beginning to challenge the dominance of bond or bank financing, and is likely to increase its share of the market as such providers are not subject to the leverage restrictions placed on banks.

The issuance of high-yield debt securities in 2016 remained dominated by the real estate sector, and that trend is likely to continue in 2017.

provided, however, that issuers will always be obliged to disclose an annual financial statement release and a half-year report. This rule is not applicable if the issuer is a Swedish county council or a municipality.

The announcement containing the financial statement release and the half-year report shall at least include the information required by IAS 34 'Interim financial reporting'. The financial statement release and the half-year report shall be disclosed within two months from the expiry of the relevant reporting period.

**Other ongoing disclosure requirements**

An issuer is also obliged to disclose:

- where the issuer reasonably expects that its financial result or financial position will deviate significantly from a forecast disclosed by the issuer and such deviation is 'price-sensitive' information (as described above) about the deviation;
- an unexpected and significant deviation in financial result or financial position; and
- resolutions adopted by the general meeting of shareholders unless such resolutions are insignificant.

**Insider list**

Insider trading and market abuse are regulated in the Swedish Market Abuse Penal Act (2005:377). Pursuant to the Swedish Act concerning Reporting Obligations for Certain Holdings of Financial Instruments (2000:1087), a Swedish limited liability company with debt securities admitted to trading on a regulated market is obliged to maintain a list of persons who in their line of work for the issuer have access to insider information relating to the issuer. Such insider list shall include details of, among other things, the reason why a person has been listed and must be immediately updated upon any change in circumstances. Upon demand, an issuer's insider list must be made available to the SFSA.

**26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?**

**Prospectus liability**

Under the Swedish Companies Act, the members of the board of directors of a company issuing public debt are personally liable for the contents of an approved prospectus. This does not apply to non-approved prospectuses such as those used on First North Bond Market or non-approved information memoranda used in the course of marketing an offering.

Accordingly, prospectuses published by Swedish issuers must contain a responsibility statement by the board of directors that the information contained in the prospectus is, to the best of their knowledge, in accordance with the facts and contains no omission likely to affect its substance. Pursuant to the Prospectus Directive, the issuer is required to take full responsibility for the contents of the prospectus and therefore must itself make the same statement in the prospectus.

Proposals were made in 2013 to remove the direct liability of the board of directors for the contents of the prospectus from the Swedish Companies Act, however, there is still no certainty whether the proposals will become effective.

**Civil liability**

Liability may also be established under the Swedish Tort Liability Act. In this case any potential liability is governed by general principles of Swedish law relating to damages for pure economic loss. A general prerequisite for such liability in the event of a non-contractual obligation is that the damage is caused by, for example, the director(s) committing a criminal offence in connection with the preparation of the prospectus (such as fraud or deception under the Swedish Penal Code). In addition, although it has never been tested in court, prospectus liability may also arise as a result of negligence (ie, where there is no underlying criminal offence). The validity of such claim is, however, uncertain under Swedish law.

**Criminal liability**

The Swedish Penal Code may also attach to those participants in the offer:

- to the extent that knowing disclosure of misleading information or omission of material information in the offering material, which is intended to impact the price of the securities, is seen to constitute fraud on their part; or
- if a person intentionally, or through gross carelessness publishes or otherwise disseminates misleading information to influence the assessment of the issuer from a financial point of view and thereby causes damage (swindling).

The same liability would apply to the participants in an issue of any other form of security in the Swedish market.

**27 What types of remedies are available to the investors in debt securities?**

In addition to claims for losses incurred by breaches of the above provisions of Swedish law (see section 26 above), debt securities will generally provide for events of default within the terms and conditions of the security. These events of default differ in the extent of their coverage, generally dependent on the creditworthiness of the issuer, but in each case (subject to grace periods, etc) the occurrence of an event of default will give holders of the security (or a specific proportion thereof) the right to instruct the agent to accelerate the debt securities early. Failure to pay principal or interest under the debt securities will then give the holders the ability (through the agent) to enforce any security provided in relation to the transaction or bring a claim in Swedish courts against the issuer (and any guarantors, if applicable) for repayment of the moneys owed to them.

**28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?**

Regulatory inquiry or investigation has been very rare in the Swedish market, therefore, it is difficult to assess what are the typical results thereof, although the regulators have the power to warn listed entities as regards, for example, their compliance with continuing obligations and ultimately have the power to delist the securities.

The stock exchanges are responsible for monitoring issuers to ensure that they comply with the applicable provisions regarding the disclosure of periodic financial information and other price-sensitive information, and the SFSA in turn performs monitoring of the stock exchanges to ensure that they fulfil this task. If the issuer fails to comply with the disclosure obligations, the SFSA can request that the issuer corrects this and combine the request with a penalty if the issuer does not correct the breach.

If the periodic financial information is not prepared in accordance with the provisions applicable to the relevant issuer, the SFSA shall issue a caution, although a caution shall be waived if the breach is negligible or excusable. If the decision is made to issue a caution, the SFSA may decide to issue an administrative fine of a maximum of €10 million, 5 per cent of the revenue, or twice the profit that was acquired or the costs that were avoided through the violation. The SFSA may also decide to charge a member of the issuer's board of directors or the chief executive officer an administrative fine.

If there is reasonable cause to believe that an offer of transferable securities or an admission of transferable securities to trading on a regulated market is in breach of the applicable provisions, the SFSA may provisionally ban the offer or the admission to trading. Such a ban may apply for a maximum of 10 days. If a provision of the law or of the Prospectus Regulation has been breached, an offer of transferable securities to the general public may be permanently banned. The SFSA has the right to fine a party that does not apply for approval of a prospectus or supplement when there is such an obligation. In order to establish a clearer link to the seriousness of the misconduct, the size of the fine is determined by the value of the issue. A fine shall also be charged if the company has prepared a prospectus or supplement, but has not complied with the requirements for the publication of the prospectus or the supplement. For this type of breach, the value of the company is used as a basis for calculating the fine. The fine shall amount to a minimum of 50,000 kronor and a maximum of 10 million kronor. The size of the fine is determined by the nature and scope of the breach.

In the event of a failure by an issuer to comply with law, other regulations, NASDAQ Stockholm's rules, or generally acceptable behaviour in the securities market, NASDAQ Stockholm may, where such violation is serious, resolve to de-register the issuer's debt securities or, in other cases, impose on the issuer a fine of a minimum of 100,000 kronor and a maximum of 5 million kronor. Where the non-compliance is of a less serious nature or is otherwise excusable, NASDAQ Stockholm may issue a reprimand to the issuer in lieu of imposing a fine.

In relation to underwriters, if an underwriter has breached its obligations pursuant to the Securities Market Act, other statutory instruments that govern the undertaking's operations, the undertaking's articles of association, or statutes or rules or internal instructions that are based on legislation that governs the undertaking's operations, the SFSA shall intervene and issue an order to the underwriter to, within a specific time: limit or reduce the risks of the operations in some respect; limit or preclude in full payment of dividends or interest, or take measures to rectify the situation; issue an injunction against executing resolutions; or issue an adverse remark. If the infringement is serious, the underwriter's licence can be revoked or, where sufficient, a warning can be issued.

**29 What are the main tax issues for issuers and bondholders?**

**Value added tax (VAT)**
There is no VAT on the transfer of bonds or the interest payments made on bonds.

**Withholding tax**
Sweden does not levy withholding tax on interest on bonds (except on interest payments to Swedish tax-resident private individuals or Swedish tax-resident estates of deceased individuals).

**Transfer taxes**
Sweden does not levy registration tax, stamp duty or any other similar tax or duty on bonds.

**Corporate income tax**
In general, Swedish taxation of corporate bondholders may be limited under applicable double tax treaties. Below is a description of Swedish law only.

If a bondholder is a Swedish tax resident, it is generally subject to corporate income tax on income on bonds at a rate of 22 per cent annually (2016).

If a bondholder is not a Swedish tax resident, it will only be subject to corporate income tax if the bonds are effectively connected to a permanent establishment of the bondholder in Sweden.

**Personal income tax**
In general, Swedish taxation of individual bondholders may be limited under applicable double tax treaties. Below is a description of Swedish law only.

If an individual bondholder is a Swedish tax resident, the income tax treatment of the bonds is as follows: if the bonds qualify as a portfolio asset under the rules on investment savings accounts or endowment insurance, special rules may apply; and in all other cases, income on the bonds is taxed as capital income (interest and capital gains upon sale or redemption) at the rate of 30 per cent.

If an individual bondholder is not a Swedish tax resident, no Swedish income tax will be due on income on the bonds unless the bonds are effectively connected to a permanent establishment in Sweden.

**Wealth, inheritance and gift tax**
Sweden does not levy any tax on wealth, gifts or inheritances.

**Exchange of information**
Sweden and the United States have concluded an intergovernmental agreement to implement the tax reporting and withholding procedures associated with the Foreign Account Tax Compliance Act. Under this intergovernmental agreement, financial institutions (FIs) that are resident of Sweden (and their FI affiliates) will be required to comply with the US/Sweden intergovernmental agreement account documentation and reporting requirements and provide the Swedish Tax Agency with this information.

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# Switzerland

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**1 What types of debt securities offerings are typical, and how active is the market?**

For a better understanding of the Swiss market, it is worth highlighting that Switzerland is not a member of the EU or EEA. Consequently, the EU prospectus rules and other EU or EEA capital markets rules and regulations are not applicable to debt securities offerings in Switzerland. Further, while the Swiss Code of Obligations (CO) stipulates some minimum content requirements for prospectuses in public offerings, no related prospectus approval or registration requirements exist and, thus, the Swiss Financial Market Supervisory Authority (FINMA) exercises no approval function. More stringent rules, however, apply in the case of listed debt securities offerings, which are subject to a formal listing application proceeding before the relevant stock exchange, the most notable one being the SIX Swiss Exchange (SIX). Interestingly, however, SIX allows for a provisional admission to trading of debt securities, which means that the time to market can be very short for issuances of Swiss-listed debt securities. Moreover, a fundamental overhaul of Swiss prospectus rules is expected to enter into force in 2018 (see 'Update and trends').

SIX is the most relevant stock exchange in Switzerland. Therefore, to the extent that this chapter deals with securities listed in Switzerland, this will relate to a listing on SIX.

Typical debt securities offerings include:

- listed bonds or notes;
- unlisted public bonds or notes; and
- unlisted private placements of bonds or notes.

The terms 'bonds' and 'notes' are not used on a uniform basis. In our view, bond issues connote long-term debt securities and include straight bonds such as fixed-rate bonds, floating-rate bonds, convertible bonds, zero-coupon bonds, dual currency bonds, subordinated bonds, warrant bonds, asset-backed securities (ABSs), covered bonds, contingent convertible bonds (CoCos) and write-off bonds. Typical note issues imply short or mid-term debt securities and include plain vanilla notes or structured notes. For structured notes that qualify as structured products, special regulatory provisions are applicable (see question 15). However, several other definitions exist for the terms 'bonds' and 'notes' and a strict distinction according to the term of the debt security may not be possible at all times in practice.

The Swiss debt market is very active, in particular, with respect to bonds and structured notes issues. In recent years, Swiss and foreign banks and insurance companies have successfully issued innovative debt instruments for regulatory capital purposes, including CoCos, write-off bonds and other hybrid instruments. In addition, Swiss pension funds and private banks require a continuous supply of investment opportunities. The overall SIX turnover (of all listed securities) in 2016 was 1.279,311 trillion Swiss francs (whereas the turnover of bonds was 153.189 billion Swiss francs).

**2 Describe the general regime for debt securities offerings.**

The applicable rules with respect to debt securities offerings depend primarily on whether the offering is public or private. Among public offerings, a further distinction must be made based on whether the securities are intended for listing on SIX or not.

**Listed public offerings**

Whenever debt securities are publicly offered, in other words submitted for public subscription or listed on a stock exchange in Switzerland, the issuer must prepare and make available to investors a prospectus that complies with article 1156 paragraph 1 and 2 CO and, by way of reference, article 652a CO.

If the securities are to be listed on SIX, the detailed SIX listing requirements must be fulfilled in addition to the prospectus requirements pursuant to the CO. The SIX regulations relevant for the listing of debt instruments consist of the SIX Listing Rules (LR), the SIX-Scheme E (Bonds), the Additional Rules for the Listing of Bonds (ARB) and the Directive on the Procedures for Debt Securities (DPDS). No distinct prospectus scheme exists thus far for ABSs.

As the prospectus requirements pursuant to the CO are not particularly demanding, an LR-compliant prospectus generally contains the minimum disclosure requirements of the CO. Therefore, the same document is usually used as the listing and offering prospectus.

The listing of debt instruments on SIX requires the prior registration of the issuer, the filing and approval of the prospectus by SIX and finally the provisional and definitive listing of the debt instrument. It is important to note that SIX allows for a provisional admission to trading of debt securities. The application for provisional admission to trading is submitted online to SIX via the internet based listing (IBL) system. Provided that the form has been filled out completely and correctly, the provisional admission to trading can be granted as early as three trading days after submission of the application. The issuer then must submit the physical listing application (including the prospectus) to SIX within two months of the first trading day.

This is a significant advantage compared with other marketplaces (see questions 4 and 11).

**Requirements for the listing of debt securities on SIX**

Requirements for the issuer are as follows:

- track record: the issuer should have existed as a company for at least three years (subject to exceptions, eg, in the case of an ABS);
- financial record: the issuer should be able to produce the past three years' annual financial statements, presented in accordance with the financial reporting standards applicable to the issuer;
- audit report: the issuer's auditors must confirm the compliance of the accounts with the financial reporting standards applied;
- accounting standards: International Financial Reporting Standards (IFRS), US Generally Accepted Accounting Principles (GAAP) or under certain conditions the accounting standards of the issuer's home country (local GAAPs) may be used;
- equity capital: on the first day of trading, the issuer's reported equity capital must be at least 25 million Swiss francs (or an equivalent amount in another currency). If the issuer is the parent company of a group, this requirement refers to the consolidated reported equity capital; and
- guarantor: all the above requirements regarding track record, financial records, as well as the issuer's equity capital, may be waived if a third party provides a guarantee in respect of the securities (and the guarantor fulfils the above requirements).

The requirements for debt securities are as follows:

- applicable law: bonds governed by the laws of any OECD member state may be listed. Upon application, other foreign legal systems may be recognised, provided that they meet international standards in terms of investor protection and transparency regulation;
- minimum capitalisation: the aggregate nominal value of a bond issue must be at least 20 million Swiss francs (or an equivalent amount in another currency);
- paying agent: the issuer must ensure that services related to interest and capital, as well as all other corporate actions, are provided in Switzerland. The issuer may appoint a third party that has such capabilities in Switzerland (a bank, securities dealer or other institution that is subject to supervision by FINMA); and
- additional requirements for convertible securities: convertible securities may be listed if the equity securities to which they relate have already been listed on SIX or on another regulated market, or if they are being listed at the same time. The regulatory board may deviate from this principle if it is ensured that investors have the information they need to reach an informed assessment of the value of the underlying equity securities.

It should be noted that the regulatory board of SIX may grant exemptions from the above, provided that this is not against the interests of the investors or the stock exchange and provided that the applicant can provide evidence that the purpose of the provisions in question can be served satisfactorily by other means.

**Unlisted public offerings**

Besides the limited prospectus requirements set out in the CO, no other additional rules exist. The content and style of the offering documentation in unlisted public debt securities offerings are determined by the Swiss market standard.

**Private placements**

With regard to private placements (ie, the offering of debt securities exclusively to a restricted circle of investors), no particular prospectus duty exists. In practice, however, a prospectus is often prepared on a voluntary basis. The content and style of the offering documentation in unlisted private debt securities offerings are determined by the Swiss market standard.

### 3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.

In contrast to other jurisdictions (eg, the US and the EU/EEA), in principle, there is no requirement for a prospectus to be filed with or pre-approved by a supervisory body (ie, FINMA or another regulatory authority) in connection with the offering of debt securities in, from or into Switzerland. This constitutes a major advantage of Swiss securities offerings with respect to time to market. If the securities are to be listed on SIX, the formal process described in more detail below becomes applicable.

Further, special rules and regulations, which are not described in this context, apply for the issuance of certain regulatory capital instruments, equity offerings, units or shares of collective investment schemes and structured products (see question 15 for a very brief description concerning structured products).

### 4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?

Pursuant to article 1156 CO, bonds and notes may only be offered publicly on the basis of a prospectus. See question 2 regarding registration and filing requirements.

The requirements regarding the content of such prospectus depend on whether the securities are intended to be listed on SIX or not.

**Listed public offerings**

The SIX prospectus requirements are similar to the Prospectus Directive, but less extensive and more flexible. The content of the listing prospectus of debt securities is governed by SIX-Scheme E (Bonds). In particular, the listing prospectus must contain, inter alia, information about the issuer (and, where applicable, the guarantor), description of the securities, risk factors, selling restrictions, No-MAC statement, information on special features of the security (such as convertible bonds, exchangeable securities, or warrant bonds), security and ISIN number, a responsibility statement, etc. In the case of an ABS, a transaction summary and overview must be included. The listing prospectus may be provided in one of the following forms:

- a complete listing prospectus for each individual issue (stand-alone prospectus); or
- a complete issuing prospectus for each individual issue consisting of an issuance programme that has been registered with SIX and final terms (Final Terms) for each bond or note issued under the programme (SIX-registered issuance programme).

Apart from the listing prospectus, the following main documents are required for a listing of debt securities on SIX:

- issuer declaration;
- guarantor declaration (if applicable);
- declaration of consent;
- Swiss wrapper; and
- Final Terms.

If a foreign base prospectus does not fulfil the SIX requirements, in addition to the stand-alone prospectus or issuance programme, in the case of a SIX-registered issuance programme, a Swiss wrapper or country supplement that provides missing information that applies specifically to Switzerland must be submitted to SIX. Special provisions apply for bonds previously listed abroad, in particular, certain information marked in SIX-Scheme E may be omitted (article 31 et sequens ARB).

Moreover, for permanent global certificates, a copy of the certificate must be submitted (article 4 paragraph 1 point 4 DPDS). In the case of book-entry securities – if not required by the articles of association of the issuer or the general terms and conditions of the issuance – a description of the means by which those having rights may obtain proof of their holding must be submitted by the issuer. In the case of book-entry securities based on foreign law, the relevant legal text and its translation into German, French, Italian or English must also be submitted (article 4 paragraph 1 point 5 DPDS).

**Unlisted public offerings**

In the case of unlisted public debt offerings, very few requirements exist. Namely, a prospectus according to article 1156 paragraph 1 and 2 CO (and by way of reference, article 652a CO) must be published. It must contain the following information on the issuer and guarantor:

- content of commercial register entry;
- share capital;
- provisions of the articles of association relating to any authorised or contingent capital increase;
- the number of dividend rights certificates and the nature of the associated rights;
- the most recent annual accounts and consolidated accounts with audit report and, if more than nine months has elapsed since the accounting cut-off date, the interim accounts;
- the dividends distributed in the past five years or since the company was established; and
- the date of the resolution concerning the issue of new debt securities.

**Private placements**

For private debt offerings of foreign debt in Switzerland, the content requirements are based on foreign rules and regulations. However, Swiss market practice should also be considered, in particular, with respect to Swiss selling restrictions. For Swiss private debt offerings, the content of the prospectus should follow Swiss market practice.

### 5 Describe the drafting process for the offering document.

For straight debt securities (including such that shall be listed on SIX), the drafting process of the offering document is comparably straightforward and guided by the content requirements set forth in the LR and the CO for unlisted public offerings of debt securities (see question 4). Key topics are the availability of financials (typically incorporated by way of reference), the No-MAC and responsibility statements as required by the LR, tax disclosure, selling restrictions, and risk factors. In addition, when the prospectus is filed with SIX, a SIX-Scheme E check form (that evidences to SIX that all required information has been included) must be submitted.

The offering documents for private placements are drafted according to Swiss market standard. There are no clear legal thresholds that are decisive to help determine whether to make certain disclosure or not, but the prospectus must not contain any false, misleading or incomplete statements.

**6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?**

The issuance of Swiss law governed debt securities is normally dealt with in a bond or note purchase agreement concluded by the issuer and the lead manager(s). The terms and conditions of debt securities are also set out in the prospectus. In the case of an issuance programme that allows for the issuance of multiple products, the final terms are provided in the form of a separate document for each individual product that constitutes the offering documentation, together with the issuance programme.

No public register or authority exists where such documents can be accessed. They are made available by the issuer, lead manager or global coordinator of the securities issue, either on their webpage or upon request in printed form.

**7 Does offering documentation require approval before publication? In what forms should it be available?**

There is no general requirement for a prospectus to be filed with, or pre-approved by, a supervisory body in connection with the offering of debt securities in or into Switzerland. In the case of the issuance of debt instruments by Swiss banks and Swiss insurance companies that shall qualify as regulatory capital, pre-approval of FINMA is usually obtained in order to ensure that FINMA will acknowledge such instruments for regulatory capital purposes.

In the case of a listing on SIX, a listing application to SIX is required and SIX Exchange Regulation (SER) examines the compliance of the listing prospectus with SIX regulations based on the listing application. In the case of a successful application to provisional trading, the physical listing application (including the prospectus) must be submitted to SIX within two months of the first trading day, and SIX will thereafter examine the full documentation (see question 2).

If the debt securities are to be listed on SIX, a listing prospectus is required and must be published in one of the following forms:
(i) printed in at least one newspaper with a national distribution (not relevant in practice);
(ii) provided free of charge in printed form at the issuer's head office and at those financial institutions that are placing or selling the securities; or
(iii) electronic publication on the issuer's website and potentially also on the websites of those financial institutions that are placing or selling the securities.

A printed copy must be provided to investors free of charge on request. Exceptions to the prospectus duty may apply if certain conditions are met (article 33 et sequens LR). With respect to unlisted debt securities, no regulatory requirements similar to those applicable in the EU exist. Nevertheless, from a civil law perspective, options (ii) and (iii) are recommended.

**8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?**

Unless listed, public offerings of debt securities are, in principle, not subject to review and authorisation (see questions 2 and 7).

**9 On what grounds may the regulators refuse to approve a public offering of securities?**

In general, the regulators may not refuse a public offering of debt securities, as such offerings are not subject to regulatory approval (see question 7). However, in the case of SIX listed debt securities, SIX may not approve the offering documentation if it does not fulfil the formal listing requirements. Further, FINMA has the authority to impose restrictions on Swiss regulated financial institutions (eg, banks and insurance companies) in connection with the assumption of additional debt and has certain discretion in connection with the recognition of banking or insurance regulatory capital.

**10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?**

Public offerings are subject to article 1156 CO in connection with article 652a CO and, in the case of listed debt securities, to SIX regulations. Private offerings are, in principle, unregulated. In Switzerland, no registration with a supervisory authority is required and, therefore, no safe harbour provisions exist.

Due to a lack of clear guidance by Swiss courts, the meaning of the term 'public offering' for purposes of the CO has been, and continues to be, the subject of a legal debate, and there is no bright line test for determining whether an offering is public. Each offering should therefore be evaluated on a case-by-case basis, weighing all relevant facts (eg, marketing, number and type of investors, nature of any on-selling).

With respect to cross-border offerings by foreign issuers into (but without listing in) Switzerland, Credit Suisse, UBS and Zürcher Kantonalbank together with Niederer Kraft & Frey Ltd and other major Swiss law firms have issued a position paper, which, inter alia, discussed the delimitation of the terms public and non-public offerings in Switzerland and related practical aspects (see www.caplaw.ch/wp-content/uploads/2013/03/CapLaw_03_11.pdf).

**11 Describe the public offering process for debt securities. How does the private offering process differ?**

**Listed public offerings**

New issuers (ie, issuers or guarantors who have not listed any type of securities on SIX for the past three years) need to be pre-approved by SIX. The new issuer's 'recognised representative' (which may be a bank, law firm, auditing or advisory firm) must submit a written listing application (including a confirmation that the issuer fulfils all the requirements relating to the listing and maintaining of the listing (issuer declaration)). SIX will, in principle, make a decision regarding the admission of a new issuer to provisional trading within three trading days after receipt of all the required documents. If exceptions to the requirements for new issuers are requested, the decision will be made within 20 trading days.

Debt securities intended for listing may be admitted provisionally to trading on SIX (this is not to be confused with grey market trading). The recognised representative must submit the relevant application electronically through the automated web application IBL. The application must contain a description of the securities, provide assurance that all the listing requirements are fulfilled and confirm that a listing application (if applicable, including the prospectus) will follow.

Key steps in the listing process are detailed below:

| Preparing and fulfilling listing requirements | Listing | Post-listing requirements |
|---|---|---|
| • Selection of advisers<br>• Due diligence<br>• Verification of listing requirements<br>• Listing structure setup<br>• Pre-verification application<br>• Preparation of listing prospectus / listing documentation | • Application for provisional admission to trading<br>• Listing application | • Financial reporting<br>• Ad hoc publicity<br>• Other reporting requirements |

Provisional trading can begin within three trading days (in some cases just one trading day) following receipt of the electronic application. The issuer then has two months from the start of trading to file, through its recognised representative, the listing application together with the required declarations and the listing prospectus. The listing application must contain a short description of the transaction, the formal application to list the securities on SIX, and a reference to the required supporting documents. The decision will generally be issued within a maximum of 20 trading days.

The listing process on SIX is subject to an indicative timeline that can be found at www.six-swiss exchange.com/ebooks/issuers/bond_listing_guide/files/assets/basic-html/page13.html.

**Unlisted public offerings**
Debt securities not listed or admitted to trading, but offered to the public, must comply with the provisions set out in articles 1156 et sequens CO. In particular, they can only be offered based on an issue prospectus.

**Private placements**
A non-public offering of debt securities in or into Switzerland, which are not listed on any Swiss exchange or any other regulated market in Switzerland, is not subject to any requirements under the CO. The drafting of the offering documentation (if any) is determined by Swiss market standard (see question 4) and prepared to minimise potential civil liability issues.

However, special rules apply for private placements with clients of a Swiss bank of debt securities of non-Swiss issuers that are denominated in Swiss francs and are governed by Swiss law. The Swiss Bankers Association's Guidelines Regarding Notes from Foreign Issuers provide for a prospectus requirement if debt securities of non-Swiss issuers that are denominated in Swiss francs and governed by Swiss law are directly placed with the clients of Swiss banks involved in the issuance.

**12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?**

The usual closing documents are the prospectus, the purchase agreement, the agreement among underwriters, the agency agreement, the terms and conditions of the debt securities, legal opinions, comfort letters, subscription forms and the securities register or the global certificate.

**13 What are the typical fees for listing debt securities on the principal exchanges?**

The typical charges for listing bonds on SIX are the following:

| **General** | | |
|---|---|---|
| Basic charge | Processing of a listing application | 2,000 Swiss francs |
| Variable charge | Listing of new bonds or the increase of an existing listed bond issue | 10 Swiss francs per million Swiss francs nominal value |
| **Stand-alone prospectuses** | | |
| Additional charge | Examination of the listing prospectus (stand-alone prospectus) | 5,000 Swiss francs |
| **SIX-registered issuance programmes** | | |
| Basic charge | Initial examination and registration of a SIX-registered issuance programme | 6,000 Swiss francs |
| Additional charge | Examination of the listing prospectus (Final Terms) in connection with a SIX-registered issuance programme | 2,000 Swiss francs |
| Basic charge | Examination and registration of the annual update of a SIX-registered issuance programme | 3,000 Swiss francs (each year of an ongoing registration) |
| **Registration of new issuers** | | |
| Additional charge | Registration of a new issuer | 10,000 Swiss francs |

**14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?**

According to the SIX website (data as at 30 January 2017), a total of 1,753 bonds (of which 972 were Swiss bonds denominated in Swiss francs, 717 were foreign bonds denominated in Swiss francs, and 64 bonds were not denominated in Swiss francs) were listed on SIX. In addition, over 2,400 bonds were admitted to trading in the international bonds segment. Of the total bonds listed or admitted to trading on SIX, there were 19 convertible bonds, 36 CoCos and 18 ABSs. Further, there exists an active market for unlisted bonds and privately placed debt securities. In addition, Switzerland is (among very few other countries) leading with respect to the issuance of regulatory capital debt securities. Further, there exists a very active structured products market.

Statistics on the value added generated by the issuers of structured products in Switzerland are published by the Swiss Structured Products Association (SVSP). The statistics take account of listed as well as unlisted structured products. The quarterly turnover in Q3 2016 was 53.7 billion (2.9 per cent below the figure for Q3 2015), 65 per cent of which was generated by yield-optimisation products, followed by leverage products (16 per cent) and participation products (13 per cent). Currencies (46 per cent) and equities (42 per cent) remain the most frequently used underlying assets. Unlisted products accounted for 71 per cent, representing a large majority of Swiss structured products. Around two-thirds of sales (65 per cent) are generated in the primary market, while transactions are almost exclusively executed on the secondary market (nearly 96 per cent). Euros (35 per cent), US dollars (35 per cent) and Swiss francs (16 per cent) serve as the main currencies for Swiss structured products, comprising 86 per cent of sales.

**15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?**

As a basic rule, the ARB apply to all bonds (including convertible bonds, bonds with warrants, ABSs and loan participation notes) that are issued by Swiss and foreign issuers and that are eligible for listing on SIX.

Convertible bonds may be listed on SIX if the equity securities to which they relate have already been listed on SIX or on other regulated markets, or if they are being listed at the same time. The regulatory board of SIX, however, may allow exceptions if it is ensured that investors have sufficient information in order to determine the value of the underlying equity securities.

Special provisions apply to bonds that are issued by a foreign issuer, denominated in a foreign currency, and already listed on another foreign exchange (international bonds). The LR do not apply to international bonds.

For debt securities that qualify as structured products according to article 5 paragraph 1 of the Federal Act on Collective Investment Schemes (CISA), the Additional Rules for the Listing of Derivatives and the respective SIX-Scheme F (Derivatives) apply. Further, special regulatory provisions such as the duty to publish a simplified prospectus may apply for the distribution of structured products to non-qualified investors (article 5 paragraph 1 lit. b CISA). According to article 5 paragraph 4 CISA, the prospectus duty of article 1156 CO is not directly applicable for structured products. However, it is a SIX requirement for listed products and market standard for unlisted products that an issuance programme is published for structured products. Legal scholars have controversially tried to extend the prospectus liability according to article 752 CO or article 1156 CO to structured products. For unlisted structured products, a foreign issuer is required to have a Swiss branch if distribution to non-qualified investors is targeted. A Swiss branch of a foreign institution pursuant to article 4 paragraph 1 lit. b of the Ordinance on Collective Investment Schemes may be a representative office, a branch office, a subsidiary, a sister company or a group company provided that it stands under consolidated supervision at group level. Further, products for distribution to non-qualified investors must be issued or guaranteed (respectively, secured in equivalent manner) by a supervised financial intermediary according to article 5 paragraph 1 lit. a point 1-4 CISA (ie, a Swiss bank, insurance, or securities dealer, or a foreign institute with equivalent prudential supervision).

Issuers of debt securities are required to use IFRS, in certain cases US GAAP, or Swiss GAAP FER, or the accounting standards stipulated in the Swiss Banking Act (article 6 et sequens SIX-Directive on Financial Reporting (DFR)). Foreign issuers may also apply their home country standard (if recognised by SIX) (article 8 paragraph 1 DFR). Details in this respect are set out in Annex 1 of the DFR. Further implications regarding accounting, if any, depend on the applicable accounting rules and regulations.

**16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?**

**Debt securities**
Debt securities are securitised claims of a creditor against a debtor. In contrast to equity securities, there are no voting or participation rights

concerning the issuing company attached to debt securities. Subject to contrary contractual arrangements, the beneficiary cannot contribute to the decision-making of the debtor or affect the way assets and revenues are used. The creditor's claim is independent of the debtor's success. Convertible bonds are qualified as debt securities (but may be subject to specific regulatory rules due to the inherent option to convert the debt securities into equity securities).

**Equity securities**

Equity securities embody rights in a company or an association. They are held by virtue of their owner's capacity as a member of the company or association. These rights may be purely proprietary in nature. However, they may also confer a right to participation. As a general rule, equity securities entitle the holder to a share in the profit generated by the company and in any surplus in the case of a liquidation of the company.

**Implications with regard to listings on SIX**

With regard to listing or admission to trading on SIX, the distinction between debt and equity securities is important, as different listing requirements (eg, with regard to the content of the listing prospectus) and procedures apply. The listing of equity securities on SIX is governed by the LR, while the listing of bonds is governed by the general provisions of the LR, and the ARB. The ARB are applicable to all bonds (including convertible bonds, bonds with warrants, ABSs and loan participation notes) that are issued by Swiss and foreign issuers and that are eligible for listing on SIX. Special provisions may apply for structured notes.

Further, separate listing procedures are applicable for debt securities (which are governed by the DPDS), and equity securities (which are governed by the Directive on the Procedures for Equity Securities).

### 17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?

The offering of debt instruments by way of a private placement in Switzerland is generally accompanied with appropriate selling restrictions in the issue documentation. Absent any transfer restrictions imposed by the terms and conditions of the debt securities and subject to any subsequent behaviour by investors constituting a bypassing of the Swiss private placement rules, the transfer of privately offered debt securities in the secondary market, as a general rule, is not restricted.

### 18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?

**Public offerings**

According to article 156 of the Federal Law on International Private Law, claims based on the public offering of bonds may be derived from the law applicable to the issuer or the law of the location of the offering. Consequently, the Swiss rules must be considered by foreign and by Swiss issuers. Therefore, as a basic principle, the same rules apply to the listing of debt securities by domestic and foreign issuers. The same principle applies for offerings exclusively within Switzerland. Nevertheless, in the case of international offerings, the rules and regulations of countries other than Switzerland may be applicable.

Further, specific SIX regulations may apply to bonds issued by foreign issuers denominated in a currency other than Swiss francs, which may be admitted to trading on SIX in a separate segment called 'international bonds'. Listing in this segment has the advantage of a substantially simplified and abridged listing procedure governed by the Rules for the Admission of International Bonds to Trading on SIX Swiss Exchange (RIB). A bond issue may be admitted to trading in the international bonds segment if it is already listed on an exchange recognised by the SIX Regulatory Board, or if it fulfils one of the following requirements:

- the bond issue originates from an issuer that already has bonds of an equal or longer duration listed on an exchange recognised by the SIX regulatory board;
- the bond issue originates from an issuer that has equity securities listed on an exchange recognised by the SIX regulatory board; and
- the issuer is an OECD member state or a political subdivision of an OECD member state.

The admission to trading of international bonds on SIX is governed by the RIB and the respective implementing provisions. International bonds admitted to trading in the international bonds segment are not deemed to be listed on SIX and the LR is not applicable. Alternatively, a regular listing of bonds denominated in foreign currencies is also possible.

For further guidance, see also the above referred position paper on cross-border offerings by foreign issuers into Switzerland issued by Credit Suisse, UBS and Zürcher Kantonalbank together with Niederer Kraft & Frey Ltd and other major Swiss law firms. The position paper has been published in Caplaw 3/2011: www.caplaw.ch/wp-content/uploads/2013/03/CapLaw_03_11.pdf.

**Private placements**

With respect to private placements, very few rules exist that are determined by market standard. In the case of international offerings, the rules of regulations of countries other than Switzerland may be applicable.

See question 11 with regard to the prospectus requirement for debt securities of non-Swiss issuers denominated in Swiss francs and governed by Swiss law, which are placed directly with the clients of Swiss banks involved in the issuance.

### 19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

No.

### 20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

Fixed-price underwriting is a common form of an underwriting arrangement in Switzerland, in particular with regard to straight debt offerings, and means that the whole issue is bought by the underwriter (or underwriters, in the case of a syndicate) at a fixed price.

Underwriting agreements are very much in standardised form and relatively short if compared with foreign standards. Nevertheless, they typically contain a robust indemnity clause under which the issuer agrees to indemnify the underwriter against any losses, claims, damages or liabilities to which the underwriter may become subject, insofar as such losses, claims, damages or liabilities arise out of untrue statements or omissions in the prospectus or other materials prepared in connection with the issue, or the breach of representations, warranties and undertakings under the underwriting agreement.

The underwriting agreement also typically contains a clause allowing the underwriter to terminate the agreement in the case of force majeure (which may take the form of a suspension of trading, a moratorium on commercial banking activities, material adverse change to the financial condition of the issuer, material adverse change in international financial conditions, calamity, crisis and others).

### 21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

The regulation of underwriters in Switzerland is governed by a variety of rather fragmented rules and regulations. Of most relevance are various provisions set forth in the Swiss Federal Stock Exchange Act (SESTA), the Stock Exchange Ordinance (SESTO), the Banking Act (BA) and the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA). In particular, underwriters who commercially underwrite securities issued by third parties (on a firm basis or against commission) and offer them to the public on the primary market are deemed to be issuing houses pursuant to article 3 paragraph 2 SESTO, which, in turn, qualify as securities dealers pursuant to article 2 paragraph 1 SESTO. Whoever intends to carry out the activities of a securities dealer may be subject to authorisation by FINMA (article 10 paragraph 1 SESTA). The underwriting agreements per se do not require any additional approvals.

**Update and trends**

Please note that, following the regulatory developments in the EU, Switzerland is reforming its financial market architecture.

Of particular importance with regard to the offering of debt securities is the proposed introduction of a new law, the Federal Financial Services Act (FIDLEG), which aims to regulate the creation of financial instruments and related services in a consistent manner in order to ensure client protection. The FIDLEG will apply to financial services providers, client advisers, securities providers and issuers of financial instruments. As one of its main features, the FIDLEG will introduce a regulatory prospectus duty that will, in principle, be applicable to all types of financial instruments. Moreover, an obligation to produce and publish a basic information sheet for most publicly offered financial instruments will be introduced. Furthermore, as one of its key points, the FIDLEG will introduce certain organisational and point of sale duties (including client segmentation and the obligation to perform appropriateness or suitability checks), registration obligations for client advisers (ie, the natural persons) of certain 'unregulated' financial services providers and a tighter regulation of cross-border activities into Switzerland. The FIDLEG's new prospectus duty, the introduction of the basic information sheet and the requirement to have prospectuses approved by an approval authority (Prüfstelle) are important changes in the area of debt capital markets and will have a strong impact on banks, securities dealers, issuers and distributors of financial products, fund management companies, (external) asset managers and client advisers.

Another proposed new law, the Federal Financial Institutions Act (FINIG), is intended to regulate the activities of financial institutions in Switzerland. In particular, it will contain new rules on the approval process for fund management companies, asset managers of collective assets, and (regular) asset managers. The bill means a change of paradigm for external asset managers in Switzerland, as they would become subject to a regulatory approval duty and a prudential supervision for the first time. Pure investment advisers will not be subject to prudential supervision under the FINIG. However, as already mentioned, client advisers of 'unregulated' financial services providers will need to be registered in the client advisers register introduced by the FIDLEG.

Neither FIDLEG nor FINIG are expected to enter into force before 2018.

In order to complete the picture of the new Swiss financial markets regulations the Federal Financial Infrastructure Act (FINFRAG) must be mentioned. The new law regulates primarily financial markets infrastructure (and trading venues) as well as derivatives trading. The FINFRAG has already become effective on 1 January 2016.

Further guidance on the proposed new financial market laws (and their effects on market participants) is available in the publication Switzerland's New Financial Market Architecture of the NKF Banking, Finance & Regulatory Team which can be downloaded from the NKF website: www.nkf.ch/en/publikationen_suche/fachgebiete.php.

**22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?**

Debt securities are usually issued in bearer form. The issuance of physical global certificates is still customary for debt securities (typically as global certificates). However, debt securities may also be issued as uncertificated securities and certain banks increasingly expect this standard when they act as underwriter. For equity securities, uncertificated securities have become market standard. Listed securities typically qualify as book-entry securities according to the Federal Act on Intermediated Securities (FISA).

Normally, trades in debt securities executed via SIX are cleared by SIX x-clear and settled at SIX SIS Ltd (SIS). SIS acts as a central depository and effects the settlement of stock exchange and off-market transactions in Switzerland. SIX uses an integrated settlement solution (a facility based on the cooperation of recognised central securities). Exceptions are possible in certain cases.

**23 How are public debt securities typically held and traded after an offering?**

Debt securities are normally issued in bearer form and certificated in a permanent global note, which is then deposited with SIS or another depository recognised by SIX. Under the FISA, once the securities are registered in the main register of the depository and entered into the accounts of one or more participants of the depository, the securities will constitute book-entry securities. With respect to bonds that are initially certificated in a permanent global note, book-entry securities are hence created in a two-step process, namely:

- a permanent global note is issued and deposited with SIS or another depository (such as Euroclear or Clearstream). Should the bond issue be represented by non-certificated securities, this first step is substituted by registering the bond issue in a register of non-certificated securities held by the issuer or its agent and an additional registration in the main register held by SIS or another depository; then
- the bonds deposited or registered are credited to securities accounts. As a result of the creation of book-entry securities, the rights in the underlying (certificated or non-certificated) securities are suspended and any sale of book-entry securities may only be carried out through electronic bookings following a corresponding instruction or, as regards securities, in the same manner or by way of a control agreement.

Alternatively, debt securities can also be issued directly in uncertificated form, which avoids the necessity of first creating and depositing a global note with SIS.

**24 Describe how issuers manage their outstanding debt securities.**

Issuers are allowed to buy back their outstanding debt securities, and the buy-back of debt securities does not fall within the scope of the public tender rules applicable to buy-backs of equity securities. Given the recent market conditions with low interest rates, many debt security issuers considered repurchasing outstanding bonds and replacing them with bonds at lower yield. Sometimes issuers are also able to repurchase their bonds at a discount. In addition, many banks have made tender and exchange offers in order to issue bonds or notes that comply with their regulatory capital requirements (ie, Tier 2 CoCos or write-off bonds).

**25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?**

Generally, no reporting requirements apply for unlisted debt securities (other than stipulated in the terms and conditions).

For listed debt securities, there exist a number of regular reporting obligations for the maintenance of listing. The reportable facts include general information on the issuer as well as information regarding the securities. Standardised forms and entry screens are available to issuers to enable them to fulfil their regular reporting obligations.

In addition, issuers must comply with the ad hoc disclosure rules of SIX. This applies to all issuers whose securities are listed on SIX and whose registered offices are in Switzerland, as well as to issuers whose registered offices are not in Switzerland, but whose securities are listed on SIX and not in their home country.

**26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?**

A person is liable under civil law for the wilful or negligent provision or dissemination of information on an issue of debt securities that is inaccurate, misleading or in breach of statutory requirements (article 752 CO). The prerequisites of a prospectus liability are:

- false, misleading or incomplete statements in the prospectus (or marketing material);
- damages occurred by the investors;
- the damages were caused by such false, misleading or incomplete statements; and
- fault for such statements (intentionally or negligently).

The claimant (investor) must prove that false, missing or misleading statements caused the damage. Prospectus liability targets not only the issuer and its directors but, in principle, also all other persons (including the underwriters, lead managers, auditors, and advisers) involved in the drafting of the prospectus. The liability analysis is equivalent to other types of securities.

Importantly, prospectus liability not only attaches to the formal prospectus but may also extend to similar communications.

Further provisions may apply in cases of inappropriate or illegal market behaviour. In particular, the rules on insider dealing and market manipulation set out in the SESTA may be relevant.

**27 What types of remedies are available to the investors in debt securities?**

While prospectus liability may lead to a civil liability and related litigation proceedings, insider dealing and market manipulation are considered violations of administrative provisions (see question 28). Further, they could also be qualified as criminal offences (which may result in criminal proceedings against the persons involved in such behaviour). Moreover, SIX has disciplinary powers in cases of improper activities in relation to securities listed on SIX and may decide to implement various sanctions (see question 28).

**28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?**

**Sanctioning powers of FINMA**

FINMA's enforcement actions are primarily taken against companies under its supervision or carrying on business without the necessary licence or authorisation. However, where a serious supervisory breach is suspected, FINMA may initiate administrative proceedings against individuals, for example, executive officers, proprietors or employees of supervised companies. In addition, more strict market behaviour rules have been adopted recently, including stricter rules on insider dealing and market abuse. These rules apply to all market participants and are supervised by FINMA. Cases of criminal behaviour insider dealing and market manipulation are enforced by the Swiss federal prosecutor.

In administrative proceedings for the purpose of financial market enforcement versus supervised companies, FINMA may apply measures it deems most appropriate and proportionate to enforce compliance with the law. The available sanctions include reprimands (declaratory ruling), specific orders to restore compliance with the law, prohibition of individuals or dealers from practicing their profession or carrying on business, as applicable, and the revocation of licences. The revocation of a licence may result in liquidation or bankruptcy proceedings. FINMA may also confiscate any illegal gains or losses avoided or order publication of a final and binding ruling. Sanctions are more restricted in administrative proceedings against other persons.

The public offering of debt securities in Switzerland without the use of an offering prospectus may qualify as banking activity for which the issuer would require a banking licence. Non-compliance with that rule can lead to severe sanctions by FINMA.

**Sanctioning powers of SIX**

In the event of non-compliance with the LR and its implementing provisions, SER and the Sanctions Commission may impose sanctions against the issuer in question.

In particular, sanctions may be imposed in the following areas:

- ad hoc publicity;
- financial reporting;
- regular reporting obligations;
- corporate governance; and
- management transactions.

The following sanctions may be imposed on issuers, guarantors and recognised representatives:

- complaint;
- fine of up to 1 million Swiss francs (for negligence) or 10 million Swiss francs (if deliberate);
- suspension of trading;
- delisting or reallocation to a different regulatory standard;
- exclusion from further listings; and
- withdrawal of recognition.

**29 What are the main tax issues for issuers and bondholders?**

For Swiss issuers, the Swiss withholding tax at the current rate of 35 per cent on interest payments under domestic bond issues is the main tax issue. Temporary exemptions (for bonds issued prior to 1 January 2022) are available only in the case of CoCos issued by systemic relevant banks (commonly called 'too big to fail' banks) as well as in the case of certain write-off bonds qualifying for regulatory capital. An additional temporary exemption applies to certain bail-in-bonds. In particular, for access to the international capital market, the Swiss withholding tax on interest payments represents a competitive disadvantage. In this context, the Swiss Federal Council proposed on 17 December 2014 an updated legislation project regarding a change from the issuer principle to the paying agent principle for Swiss withholding tax on interest payments: only interest payments under, inter alia, bonds to Swiss-resident individual bondholders would be subject to the Swiss withholding tax. Swiss resident bondholders, however, would be entitled to a full refund of such Swiss withholding tax if, inter alia, the income subject to such Swiss withholding tax is properly declared in the income tax return of the Swiss resident bondholder. This legislation project has been put on hold and shall be re-discussed only before the end of the year 2021. Further, bonds, like any other taxable securities, are subject

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to a 0.15 per cent Swiss transfer stamp duty for domestic bonds and 0.3 per cent for foreign bonds if a transfer of title occurs for consideration and a Swiss securities dealer is involved as a party or as an intermediary to the transaction.

For direct tax purposes of Swiss resident individual bondholders, most of the return of bonds is subject to Swiss income tax. Upon sale and redemption of structured products the theoretical bond component is subject to pro rata Swiss income taxation. Until now, accrued interest is tax- free income upon sale of a bond.

# Thailand

**Veeranuch Thammavaranucupt and Jongtip Tangsripairoje**
**Weerawong, Chinnavat & Peangpanor Ltd**

### 1 What types of debt securities offerings are typical, and how active is the market?

The Thai debt market is small when compared with the market for bank loans and equity. However, it is active and developing with various types of debt instruments.

Debt securities in Thailand mainly comprise bonds (which normally refer to government, state agency or state-owned enterprise debt securities) or debentures (which normally refer to debt securities issued by private companies). Corporate debentures are issued by both public limited companies and limited companies. Other varieties include convertible debentures, exchangeable debentures, Basel III subordinated debentures, securitised debentures, perpetual debentures and foreign debentures.

While a wide range of issue types is possible, typical corporate domestic issues are fixed-rate with bullet repayment at maturity.

According to information from the Thailand Financial Instruments Information Center, as of 31 December 2016, the amount of outstanding debt securities of Thai issuers in the domestic market was approximately 10,832 billion Thai baht, and of Thai issuers in overseas markets approximately 663 billion Thai baht.

The information provided in this chapter focuses mainly on the general requirements for an offer of debt securities for sale in Thailand, and not other types of offering.

### 2 Describe the general regime for debt securities offerings.

The general regime for debt securities offerings in Thailand is contained in the Securities and Exchange Act (1992), as amended (SEC Act), the Public Limited Company Act (1992), as amended, the Civil and Commercial Code, as amended, and, more importantly, Regulation No. 9/2552 on the application and approval on offer for sale of newly issued debt instruments (as amended) issued under the SEC Act.

The main authorities that have key roles in formulating policy and regulating the Thai bond markets are the Ministry of Finance (MOF) and the Office of the Securities Exchange Commission (SEC Office). The MOF is responsible for the country's fiscal policy and the management of the public debt: this involves the formulation of a policy framework and the structuring of government bond issuance. The MOF is the key authority to push for reform and implementation of laws to influence the bond market such as tax laws. The SEC Office is the regulator of the capital markets, supervising the offering of securities and regulating those carrying on securities businesses, such as underwriters and financial advisers. The most significant industry group in Thailand in this area is the Thai Bond Market Association (ThaiBMA), previously the Bond Dealers Club, established with the objective to establish a basic system of trading debt securities among traders in the secondary market and encourage the development of the market. The ThaiBMA focuses on being an information centre for debt securities for investors and other functions such as surveillance and establishing market standards.

### 3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.

An offer of debentures on a public offering basis requires approval from the SEC Office, and the filing of a registration statement and draft prospectus with the SEC Office, which must become effective before an offer can be made. In practice, the SEC Office reviews and checks the accuracy of the registration statement and draft prospectus before they become effective.

The application for approval and the filing can be made to the SEC Office at the same time but the registration statement and draft prospectus will become effective only after the approval from the SEC Office is obtained.

The SEC Office has the power to require disclosure of additional documentation and to have the registration statement and prospectus amended if it considers that they are incomplete or misleading. In practice, the SEC Office carries out a detailed review of the registration statement and prospectus for a public offering in order to protect the interests of investors.

### 4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?

As outlined in question 3, the issuer is required to produce and file a prospectus in the case of a public offering of debt securities.

The draft prospectus must be in the form specified by the relevant notification of the SEC Office: the draft prospectus for public offerings requires more detailed information than that for private placements. The information in the draft prospectus is very similar to that required in the registration statement, which includes the following:

- objectives of the offer for sale;
- name of issuer;
- capital of the issuer;
- amount and type of debentures offered for sale;
- expected selling price per unit;
- nature of business;
- financial condition, business operations and material information on business;
- management and major shareholders of the issuer;
- auditors, regularly contacted financial institutions and legal advisers of the issuer;
- procedure for subscription, underwriting and allocation of debentures;
- rights and restrictions related to the transfer of debentures (if any);
- return (interest) on the debentures;
- property or other collateral as security (if any);
- debenture holders' representative (if any);
- encumbrances on the property of the issuer (in the case of unsecured debentures);
- outstanding amount of previous debt securities;
- procedure, time and place of repayment;
- procedure for conversion of rights (if any); and
- other information as required.

### 5 Describe the drafting process for the offering document.

The drafting process for the registration statement and draft prospectus on domestic offerings principally involves the issuer and the underwriter. In most cases, the issuer is already a public company whose shares are traded on the Stock Exchange of Thailand. Therefore, the issuer already has a yearly registration statement (called Form 56-1) updated and filed with the SEC Office and the Stock Exchange of Thailand each year. The contents of the registration statement and draft prospectus would largely contain the same information as that contained in the Form 56-1 with updated information and additional information such as management discussion and analysis. Lawyers are generally not involved with the business description and would mainly focus on legal matters, such as the terms and conditions of the debentures governing the rights and obligations of the issuer and debenture holders (terms and conditions) and certain risk factors. The normal timeline for the drafting process is one to two months (excluding any due diligence process).

There are no particular documentation issues and no legal thresholds to help with disclosure. Form 56-1 requires disclosure of disputes that involve an amount of not less than 5 per cent of shareholder equity. In practice, although the registration statement and draft prospectus for institutional investors and high net worth investors (II&HNW) placements require less information than those for public offerings, they are materially in the same form as those prepared for a public offering (see question 10).

### 6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

The terms and conditions comprise the terms and conditions of the debt securities. The issuer is required to sign the terms and conditions in order for them to become effective on the issue date of the debentures. Copies are kept with the issuer, the registrar, the debenture holders' representative and the SEC Office and are open to inspection by debenture holders.

The terms and conditions themselves are provided in the registration statement and draft prospectus. Key terms of the terms and conditions consist of the commercial terms (eg, interest rate, interest payment dates, maturity date), the covenants of the issuer (eg, financial ratios, negative pledge, restrictions on disposals of assets), the time, procedure and place for payment, events of default (eg, payment default, technical default, cross default, insolvency event), consequences of default (eg, immediate payment), procedure for debenture holders' meetings, appointment of debenture holders' representative (if any) and the form of debenture certificate (if any).

### 7 Does offering documentation require approval before publication? In what forms should it be available?

As outlined in question 3, an offer of debentures on a public offering basis requires approval from the SEC Office and the filing of a registration statement and draft prospectus with the SEC Office, which must become effective before an offer can be made. The SEC Office requires a file to be submitted electronically, which is then made public through being posted on the SEC Office's website with a printed version delivered to the SEC Office.

### 8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?

As mentioned in question 7, a public offer of debentures requires approval from the SEC Office.

Under the manual for the approval process issued by the SEC Office pursuant to the Facilitation Process Act (2015), the SEC Office has fixed 75 days as the maximum time for the approval process for unsubordinated debentures and up to 165 days for convertible debentures.

Once approval from the SEC Office is obtained, the SEC will issue a letter confirming its receipt of a complete registration statement and draft prospectus. In practice, if the registration statement and draft prospectus is not complete or omits certain information, the SEC Office will not issue the letter.

The registration statement and draft prospectus will become effective after the lapse of one, five or 10 business days (normally called a cooling-off period) after the date on which the SEC Office has issued the letter to start the cooling-off period.

The issuer and the underwriter can offer the debentures (including through advertisements and sending invitations) only after the registration statement and draft prospectus become effective.

The one-business-day period applies in the case of an offer of debentures on the basis of the standard terms and conditions prescribed by the SEC Office or the same terms and conditions as previous issues within one year. The five-business-day period applies to an offer of debentures not on the basis of the standard terms and conditions prescribed by the SEC Office. The 10-business-day period applies where the SEC Office requires the issuer to disclose additional information in the registration statement and draft prospectus.

Further, the offer for sale of debentures on a public offer basis can be made only when the prospectus is distributed to investors, or in the case of an II&HNW placement (see question 10), at least with a factsheet. In practice, the prospectus is in print or CD-ROM form and is delivered to investors with the subscription form attached.

### 9 On what grounds may the regulators refuse to approve a public offering of securities?

Generally, the SEC Office can withhold approval until it is satisfied with the information provided. It is also empowered to suspend the effectiveness of a registration statement and draft prospectus if the information in the registration statement and draft prospectus is inaccurate or misleading or new relevant information has come to light.

### 10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?

A private offering of debentures does not require approval from the SEC Office. A private offering in this regard means: an II&HNW placement; an offer to not more than 10 investors in any four-month period (a PP10 placement); an offer to creditors in a debt restructuring; and an offer made with a waiver from the SEC Office (collectively the private placement basis).

The offer is deemed approved by the SEC Office when the issuer registers the transfer restriction with the SEC Office.

Except for an II&HNW offering, an offering on a private placement basis does not require a filing. Nor does an offer where the entire issue is to foreign investors.

An offer of debentures to II&HNW needs the filing of a specific registration statement (Form 69-DEBT-II&HNW) and draft prospectus.

An offer of debentures to the public needs the filing of a specific registration statement (Form 69-DEBT-PO) and draft prospectus.

As mentioned in questions 4 and 5, the registration statement and draft prospectus for public offerings require more detailed information than those for private placements and the SEC Office will review them much more carefully.

### 11 Describe the public offering process for debt securities. How does the private offering process differ?

The public offering process for debentures starts with the internal approval procedures of the issuer: for a Thai public limited company, a shareholders' resolution for the issuance and offer for sale of debentures is required. The following is a typical process which can be adjusted on a case-by-case basis to suit the requirements of the issuer and structure of the debentures.

#### Mandate for underwriter, legal adviser and financial adviser (if any)

A financial adviser is generally not required, particularly if the debentures are issued by a listed company or made to II&HNW or made on a private placement basis.

An underwriter would generally be engaged to assist on document preparation with respect to corporate and financial matters, due diligence and with applying for a credit rating and marketing the debentures. The mandate letter or proposal with the indicative terms and structure of debentures will be submitted to the issuer to kick off the transaction.

A legal adviser as deal counsel (for the issuer, underwriter, registrar and debenture holders' representative) in the case of a domestic offering will need to be engaged at the very beginning of the transaction. The legal adviser will help with the issuer's corporate approval process and the preparation of the terms and conditions, and advise on the mandate letter and other related agreements (eg, underwriting agreement, registrar appointment agreement, debenture holders' representative appointment agreement) and the filing of documents. The legal adviser would normally perform due diligence to ensure that there are no impediments to the issue (negative pledges, etc).

**Filing preparation**
For domestic offerings, lawyers are not much involved in the due diligence process. This is normally conducted by the underwriters concurrently with the preparation of the filings, to ensure the accuracy of the registration statement and draft prospectus. In addition, as outlined in question 5, in most cases, the issuer is a public company whose shares are traded on the Stock Exchange of Thailand. Therefore, the issuer already has a yearly registration statement (Form 56-1) updated and filed with the SEC Office each year. The contents of the registration statement and draft prospectus for the offering of the debentures requires similar information to that contained in Form 56-1, with updated information and certain additional information such as management discussion and analysis.

Once the structure of the debentures is finalised and the application and filing documents (including the terms and conditions) are available for submission to the SEC Office, a credit rating agency will be involved.

**Marketing and pricing**
After applying for approval and submission of the filing documents, the underwriting agreement will be signed after a period for marketing and book building, which is conducted on the basis of a draft prospectus.

When the application has been approved and the filing documents have become effective, the prospectus together with subscription form will be distributed to investors. The allocation and subscription process will be described in the prospectus.

**Settlement and closing**
On the issue date of the debentures, the subscription monies received by the underwriters will be transferred to the issuer against the issue of debentures to the subscribers who have received allotments. The terms and conditions, registrar appointment agreement and debenture holders' representative appointment agreement are executed to be effective from the issue date.

The underwriter will assist the issuer to submit details of debenture holders to the registrar to prepare the register and to issue debenture certificates or inform the Thailand Securities Depository Co (TSD) (a subsidiary of the Stock Exchange of Thailand (SET) providing securities depository services) of the identity and holdings of the debenture holders in the case of debentures issued in scripless form (see further question 23).

A sales report will be made to the SEC Office and the debentures will be registered with the ThaiBMA (see question 2).

**12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?**

For a domestic offering, a legal opinion on the corporate authority of the issuer is required and in some cases covers the validity and legal and binding nature of the documentation. However, closing certificates and auditors' comfort letters are not required in a domestic offering.

**13 What are the typical fees for listing debt securities on the principal exchanges?**

The fees to be paid to the SEC Office include a first-time application fee and a fee for each issue. The fees are currently as follows:
- first-time application: 30,000 Thai baht; and
- filing (each issuance):
  - for private placements (PP): 50,000 Thai baht per tranche; and
  - for public offerings (PO): a percentage varying according to issue size, from 30,000 Thai baht to 500,000 Thai baht per tranche.

The exact fees will vary depending on the nature of the debt securities.

**14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?**

In recent years, apart from the securitised debentures of the Secondary Mortgage Corporation (a state enterprise that has issued securitised debentures every year for more than nine years), special debt instruments are rarely issued in the market. Perpetual debentures were issued increasingly last year (2016). Subordinated debentures have been issued while convertible debentures and exchangeable debentures have been issued outside Thailand. Convertible debentures are mostly issued domestically in private placements to strategic investors only.

**15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?**

Additional rules may apply to the issue of special debt securities prescribed by the relevant authorities (eg, MOF, BOT and the SEC Office). There are no particular accounting issues.

**16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?**

If the securities in question are bonds or debentures, even though perpetual in nature, they will be considered debt under Thai law. They may be considered equity from an accounting perspective (because investors cannot demand repayment except on a liquidation, etc) but will remain debt from a legal perspective.

**17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?**

There is no approval requirement from the SEC Office for a secondary offer even on a public offering basis.

A secondary offer on a public offering basis will require a filing except where: a primary offer has been made on the private placement basis described in question 10 and the offer is made to the investors falling within the private placement category described in question 10; or the primary offer was not made on a private placement basis and the issuer made a filing during the primary offer, the issuer has disclosed information on a consistent basis, and the debentures are rated by an approved credit rating agency.

As outlined in question 10, the SEC Office requires the issuer to register the transfer restriction for debt securities issued on a private placement basis with the SEC Office and the transfer restriction must be clearly shown in the filing and on the debenture certificates.

**18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?**

There are particular rules applicable to an offer of debt securities by foreign issuers in Thailand. The following are the key criteria.

**Thai baht-denominated debentures issued by foreign entities**
***Approval***
A foreign entity can issue Thai baht-denominated debentures (whether on a private or public offer basis) provided that the offer is approved by the Ministry of Finance and is made in accordance with the conditions of the approval; the offer will then be deemed approved by the SEC Office.

***Filing***
A foreign entity is required to submit a filing (unless the offer is made on a private placement basis (see question 10)) and the terms and conditions to the SEC Office and in the case of a public offer a credit rating must be obtained for the debentures. A local debenture holder's representative and a local contact person in Thailand must also be appointed. The filings and documents submitted to the SEC Office (eg, financial statements) can be in English.

**Foreign currency-denominated debentures issued by Thai or foreign entities**
***Approval***
Approval from the SEC Office is required for a public offer of foreign currency-denominated debentures in Thailand. Approval from the SEC Office will be deemed granted if the offer is made to II&HNW and

the issuer registers the transfer restriction with the SEC Office. For a foreign issuer, a local contact person in Thailand must be appointed and investors must be those approved by the Bank of Thailand to invest in foreign currency-denominated debentures or otherwise the offer must be made through an underwriter.

*Filing*

A filing is required to be submitted to the SEC Office. If made to II&HNW, the filing will be in the Form 69-DEBT-II&HNW; if made to the public, the Form 69-DEBT-PO. The filings and documents submitted to the SEC Office (eg, financial statements) can be made in English.

**Domestic issuers offering debt securities outside Thailand**

There are special rules for domestic issuers offering debt securities (debentures) only outside Thailand. Generally, payments of principal and interest on the debentures must be made outside Thailand. An approval from SEC is required.

### 19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

Thailand is open for foreign issuers to access the debt capital markets in Thailand (see question 18). The debentures can be offered in a private placement or public offering.

### 20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

Underwriting may be on a firm commitment basis or a best efforts basis. If there is more than one underwriter it is normal for the underwriters' liability to be on a several basis.

The arrangements for private offerings of debt securities are basically the same as for public offerings.

### 21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

A licence to undertake securities business is required to be an underwriter of debt securities.

The underwriters are regulated by the SEC Office.

Previously, an underwriter was prohibited (except to fulfill its underwriting commitment if it fails to procure investors) from subscribing for the debt securities which it underwrites and may not allot the debt securities which it underwrites to, for example, itself or co-underwriters and their connected persons, connected mutual funds, or certain connected persons of the issuer. The SEC has removed this prohibition (subject to some criteria for allocations) under the Notification of the Capital Market Supervisory Board which became effective in August 2016.

### 22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?

On the issue date of the debentures, in practice, the issuer will receive the proceeds from the offer. Further, on the issue date (or within the period specified in the prospectus, but within 15 days), named debenture certificates will be issued to the debenture holders by the registrar of the debentures, or the registrar will arrange for the deposit of debentures with the TSD (see question 23), within seven days, if the investors or subscribers requested debentures in scripless form in their subscription forms. The registrar will record the names of the debenture holders in the register and then the debenture holders will be entitled to trade their debentures. There is currently an official secondary market, Bond Electronic Exchange, established by the SET: however, most investors deal through banks or the underwriters.

### 23 How are public debt securities typically held and traded after an offering?

Bonds and debentures are typically held in registered form and are either certificated or scripless. If certificated the name of the holder will be entered in the register and specified on the certificate delivered to the holder, while if in scripless form, no certificate is issued to the holder and the TSD will act as a central securities depository for investors who, or whose custodians, have an account with it. The TSD will record the name and other information with respect to the holder and notify the registrar upon request for any interest or principal payment, closure of the register for bondholders' meetings and any other purposes.

Generally, both certificated and scripless debentures issued to the public can be freely transferred or traded after an offering, provided that the procedures for the transfer required by the SEC Act, and specified in the relevant terms and conditions, and the restriction on a secondary offer on a public offering basis (as outlined in question 17) are complied with.

**Update and trends**

The SEC issued notifications at the beginning of 2017 in order to boost the debt capital market as well as other securities markets. For example, effective from 16 February 2017, the SEC has issued a notification for the adjustment of definitions of institutional investors and high net worth investors and adding a new definition of ultra high net worth investors (UHNW) for investors having the capacity to take care of themselves in diversifying their various investment portfolios in the market. In addition, with respect to the return of subscription money, the SEC with the cooperation of the Association of Thai Securities Companies (ASCO), has issued a notification effective from 1 March 2017 to speed up the period of returning subscription money (from 14 business days to five business days, in case the subscriber is the customer of the underwriter) or not more than 10 business days from the close of the subscription period. The market expects more new notifications this year.

### 24 Describe how issuers manage their outstanding debt securities.

The issuers may manage their outstanding debt securities in various ways.

Generally, most debentures have a fixed maturity date for one bullet redemption payment and early redemption is not permitted. However, issuers may reduce their outstanding debentures by purchasing in the open market at any time after offering. If the issuer makes a general tender offer to buy back the debentures, the issuer must make a tender offer to each debenture holder and buy back the debentures pro rata from the debenture holders who wish to sell their debentures.

If the issuer wishes to redeem the debentures in a different way from the methods for redemption specified in the terms and conditions, the issuer may call a bondholders' meeting to amend the terms and conditions.

### 25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?

The issuer must report the result of a public offer of debentures to the SEC Office within 15 days from the end of the month in which the offer is made, and within 15 days from the closing of the offer if the offer is made as a private placement. Details to be provided include the identity of the debenture holders classified by type of investor and nationality, the results of the allotment and the amount of debentures that have been purchased by the investors.

In addition, under the SEC Act, the issuer must submit to the SEC Office financial statements, financial reports and business operation reports for the relevant periods as prescribed by SEC Office while the debentures are outstanding. The issuer must also submit a report to the SEC when certain incidents occur, for example, the issuer suffers serious losses, the issuer ceases operating all or part of its business, etc. The SEC has the power to instruct the issuer to, among other things, submit additional reports or documents, provide additional explanation, arrange an audit by an auditor and report the result to the SEC Office and disclose the information to the public. The SEC Office is empowered to disclose the information to the public itself.

### 26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?

The issuer, the issuer's directors who have power to bind the issuer and signed the registration statement and prospectus, the underwriters, auditors, financial advisers or appraisers (if any) who intentionally or with gross negligence certified the information in the registration statement and prospectus, may be liable together with the issuer if the registration statement and prospectus contain material false statements or fail to disclose material facts that should have been stated as specified in the SEC Act.

In principle, there is the same liability for participants in issues of debt securities as in issues of securities of other types, for example, stocks and warrants.

### 27 What types of remedies are available to the investors in debt securities?

The SEC Act provides a remedy to an investor who purchased debt securities and suffers damage arising from the registration statement and prospectus containing material false statements or failing to disclose material facts that should have been stated in them. The investor who has purchased the debt securities before the fact became apparent has the right to claim compensation from the issuer within a specified period.

In addition, as mentioned in question 26, the transaction participants are also liable jointly with the issuer for any material false statement and failure to disclose material facts unless they can prove that they were not aware of the facts or by their position they could not have been aware of the inaccuracy of the information or the failure to disclose the facts required to be stated.

### 28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?

The SEC Office has broad power to control the contents of the documentation furnished by an issuer of debt securities and to instruct the issuer to, among other things, submit additional reports or documents, provide additional explanation, arrange an audit by an auditor and report the result to the SEC Office and disclose the information to the public. The SEC Office is itself empowered to disclose that information to the public. Failure of the issuer to comply with the instruction of the SEC Office could give rise to a one-off fine and a further fine for every day the contravention continues. In addition, a person who makes a material false statement or conceals a material fact that should have been stated in a registration statement or draft prospectus may be liable to imprisonment or a fine as prescribed by the SEC Act.

### 29 What are the main tax issues for issuers and bondholders?

The issuer must deduct withholding tax on interest payments under the debentures as described below.

Tax implications for bond investors depend on various factors, including but not limited to the nature of the income, the type of investor, the type of issuer, the investor's permanent address and the investor's business.

Major relevant taxes are personal income tax, corporate income tax, special business tax and stamp duty under the Thai Revenue Code. Withholding tax is part of personal income tax and corporate income tax. However, foreign investors may be exempt from or benefit from lower rates of withholding tax pursuant to double tax treaties between Thailand and relevant countries.

A summary of current relevant taxes follows. Investors should consult tax advisers with respect to their tax obligations in connection with investment in Thai bonds and debentures.

**Thai investors**

***Ordinary persons***

- interest – withholding tax at 15 per cent; and
- other income from the transfer of debentures – withholding tax at 15 per cent for any profit above the acquisition cost.

Investors have the right not to include income that has already been subject to the withholding tax deduction in their annual tax return.

***Juristic persons***

- interest – withholding tax at 1 per cent for financial institutions (except where the issuer is also a financial institution in which case the withholding tax rate will be zero per cent) and corporates and 10 per cent for certain types of foundations and associations; and
- other income from the transfer of debentures – no withholding tax but the investor needs to include the income in its annual income tax computation.

**Non-Thai investors**

***Natural persons (any natural person who stays in Thailand for less than 180 days in the same calendar year)***

- interest – withholding tax at 15 per cent except as provided under a relevant double taxation treaty; and
- other income from the transfer of debentures – withholding tax at 15 per cent for any profit above acquisition cost except as provided under a relevant double taxation treaty.

***Juristic persons (incorporated in any foreign country without operations or deemed operations or a permanent establishment in Thailand)***

- interest – withholding tax at 15 per cent except as provided under a relevant double taxation treaty; and
- other income from transfer of debentures – withholding tax at 15 per cent for any profit above acquisition cost except as provided under a relevant double taxation treaty.

Transfer of debentures is currently exempt from Thai stamp duty.

A holder of the debentures who is a financial institution and receives interest payable on the debentures will be required to pay specific business tax at the rate of 3.3 per cent.

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# Turkey

**Kerem Turunç and Esin Çamlıbel**

**Turunç**

### 1 What types of debt securities offerings are typical, and how active is the market?

While government and bank bonds make up the great majority of Turkish debt capital markets issuances, many other forms of debt securities are available for issuance. Enterprises (private and state-owned) can issue various types of bonds including straight bonds, convertible bonds, exchangeable bonds, covered bonds, as well as asset-backed securities, bills and precious metal bills.

Debt securities issued by non-enterprise public entities include: government debt securities (note that government debt securities with maturity terms of one year and more are called 'government bonds' and government debt securities with maturity terms of less than one year are called 'treasury bills'); and Central Bank of the Republic of Turkey liquidity bills.

In 2016, total domestic debt security offerings were approximately 88.6 billion Turkish liras (approximately €23.2 billion), of which approximately 53.8 billion Turkish liras (approximately €14 billion) were issued by banks, approximately 31.2 billion Turkish liras (approximately €8.2 billion) by other financial institutions and approximately 3.6 billion Turkish liras (approximately €0.9 billion) billion by other issuers. Approximately one-third of issuances by banks were public and approximately two-thirds were private offerings, while issuances by non-bank financial instructions and corporates were virtually all private.

### 2 Describe the general regime for debt securities offerings.

While Turkey is not a member of the European Union, as a candidate country it has modelled its securities regulation primarily on EU legislation.

The main principles regarding the issuance of capital market instruments including debt securities are governed by the Turkish Capital Markets Law, Law No. 6362.

As the chief regulator of Turkish capital markets, the Capital Markets Board (the Board) is authorised to promulgate 'secondary legislation' (ie, rules and regulations) under the Capital Markets Law. Secondary legislation is normally in the form of communiqués, and the Board also issues interpretive resolutions on the implementation of the Capital Markets Law and secondary legislation. The Board also has enforcement powers, as discussed in more detail below.

Specific rules applicable to debt issuances are set forth under the Communiqué on Debt Securities (Serial II, No. 31.1) promulgated under the Capital Markets Law. Pursuant to that Communiqué, debt securities may be issued to be sold through or without a public offering. Sales without a public offering may be in the form of private placements (with a minimum nominal value of 100,000 Turkish liras (approximately €26,000)) or sales to qualified investors.

The resolution of the authorised body of the issuer is required for the issuance of debt securities, and the Board's approval is also compulsory for any public offering of debts securities or their trading on a regulated exchange (currently, the only such exchange is Borsa Istanbul, formerly known as the Istanbul Stock Exchange). Application to the Board must be made within a year of the date of the resolution of the authorised body of the issuer and include the issuance prospectus (if applicable) as well as certain other documents required by the Communiqué. The prospectus is published following the approval of the Board. The offering period for the securities to be issued must also comply with relevant Board regulations.

There are 'issue limits' (ie, the maximum permitted face value of the securities) applicable to debt issuances. These limits change depending on the type of issuer, whether the issuance will be public and the financial situation (usually as it relates to the equity capital) of the issuer.

The Communiqué on Asset-Backed and Mortgage-Backed Securities (Serial III, No. 58.1), the Communiqué on Covered Bonds (Serial III, No. 59.1), the Communiqué on Lease Certificates (Serial III, No. 61.1), and the Act on Public Finance and Arrangement of Debt Management, Law No. 4749 (known as the Public Debt Act) include further specific provisions on the issuance of such securities.

Borsa Istanbul also has listing and other rules that issuers of listed securities must observe.

Other pieces of general and specific legislation (eg, the Turkish Commercial Code, the Turkish Banking Law), and rules and practices of different regulators (eg, the Banking Regulation and Supervision Agency, tax authorities) may also have direct and indirect effects on issuers and offerings of debt securities.

### 3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.

The primary documentation required for a public offering of debt securities is as follows:

- an offering prospectus;
- an issue document;
- financial statements;
- the current, consolidated version of the articles of association of the issuer;
- notarised resolution of the general assembly of shareholders (or the board of directors, if the board is authorised by the articles of association to resolve on the issuance);
- opinion letter or approval, as applicable, of any regulatory or other public entities with power over the issuer (or the issuer's declaration that no such approval needed);
- financial advisor's report on the paid-in capital and a copy of the Turkish Trade Registry Gazette on the registration of the existing share capital;
- undertaking letter of the guarantor (if any) and a notarised copy of the resolution of the relevant authorised body of any legal entity guarantors;
- underwriting or intermediary agreement;
- declarations of the members of board of directors and executives of the issuer, stating as to whether they are subject to any ongoing criminal prosecution relating to, or have been convicted of, certain offences such as embezzlement, bribery, certain banking law violations, fraud and tax evasion;
- rating agency report (if any); and
- for convertible and exchangeable bonds, an expert report on the conversion or exchange rate to be used.

Certain other documents are also required depending on the issuer and the type of issuance, and the Board always maintains the authority to request any additional documents it deems necessary.

Issuers may also prepare a base prospectus in connection with a public offering programme. Once approved, the base prospectus is valid for 12 months. Each offering during the validity period must be done by way of final terms approved by the Board.

### 4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?

The preparation of a prospectus and its approval by the Board are compulsory for the public offering of capital market instruments or their trading on a regulated exchange. The information included in the prospectus must be complete and presented in a manner that is easily comprehensible and analysable by potential investors. The information that must be included in the prospectus is generally consistent with customary international practices. However, a prospectus for debt securities must be prepared as three separate documents:

- a registration document containing information about the issuer and any guarantors relating to, among other things, financial statements, independent auditors, risk factors, business operations, affiliates, corporate governance, shareholders and important agreements;
- a securities note containing information about the securities to be offered such as the terms and conditions, trading, risk factors and taxation; and
- a summary using brief, clear and easy to understand language, and covering basic information relating to the issuer, any guarantors, the nature of any guarantees, as well as the fundamental characteristics and the rights and risks associated with the securities to be issued.

The prospectus must also identify all such persons (individuals and legal entities) who are responsible for its contents.

Certain information can be incorporated by reference into the prospectus. This includes prospectuses previously approved by the Board, the articles of association of the issuer, annual reports and material event disclosures, among other things.

Certain public entities are subject to different disclosure rules.

### 5 Describe the drafting process for the offering document.

In domestic issuances, the offering document is typically drafted by the intermediary institution with the support of the issuer. International offerings, on the other hand, follow customary practices under which issuer's counsel drafts the document, and underwriters and their counsel provide their input. Having said that, the disclosure contained in domestic and international prospectuses are similar in scope.

While there are no bright-line tests to determine whether to make certain disclosures or not, as a general rule, the information contained in the prospectus must be complete, easily comprehensible and analysable by potential investors, and allow them to make an informed decision on whether to invest in the securities being offered. The Board may, upon request of the issuer, permit the omission of certain information in the prospectus if:

- the disclosure of such information would be contradictory to public benefit;
- the disclosure to the public of the information would cause a substantial loss to the issuer, provided that the omission must not prevent potential investors from making an informed decision; or
- the information sought to be omitted is immaterial for the public offering or trading of the relevant securities, accessing the information is costly and difficult, and the information does not affect the assessment of the financial situation and future prospects of the issuer or any guarantor.

A prospectus is not required for private offerings or offerings taking place outside of Turkey; only an issue document (see question 10) is necessary for such offerings. In practice, virtually all domestic offerings by non-bank financial institutions and corporates are private (and placed with qualified investors), and will typically not include a prospectus. However, for international private offerings, customary offering documents that closely track the requirements of public offerings are used in practice.

### 6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

The prospectus is the principal document governing the terms and conditions of debt securities. Specifically, the securities note part of the prospectus will include the full terms and conditions of the securities being offered. The issuer is the primary party to the prospectus and responsible for its contents. The intermediary institution also signs and takes responsibility for certain sections of the prospectus.

The prospectus will be available on the issuer's and the intermediary institution's websites, as well as on the Public Disclosure Platform (PDP) if the issuer is a member of the PDP. The issuer may also publish the prospectus through the printed press and other media outlets.

### 7 Does offering documentation require approval before publication? In what forms should it be available?

In principle, Board approval is required before publication (except for certain public entity issuers exempt from prospectus publishing requirements). However, the Board is authorised to set forth principles pursuant to which the prospectus can be published prior to its approval.

After the prospectus is approved, it must be published on the issuer's website, as well as on the PDP if the issuer is a member, and on the intermediary institution's website. Furthermore, the place(s) where the prospectus has been published must be registered with the trade registry where the issuer maintains its corporate registration, and announced via the Turkish Trade Registry Gazette.

Where the prospectus is published electronically, a printed copy thereof is required to be delivered free of charge to the investor upon its demand.

### 8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?

Public offerings of debts securities are subject to review and authorisation of the Board through the approval of the related prospectus (which approval includes a thorough review of the other required documents, as described under question 3). The Board will deliver its decision within 10 business days of the filing of the prospectus and the supporting documents. If any required information or documents are missing, the Board will notify the issuer within 10 business days to complete the filing, and the 10-business-day review period commences upon receipt of all outstanding information (ie, completion of the review file). Non-approvals by the Board must specify the reasons behind the non-approval.

There are no specific restrictions imposed on the issuer or the underwriters during the review process other than the prohibition on commencement of the offering. But because part of the review process of the Board relates to the financial status of the issuer (and any guarantors) and risk factors relating to the business of the issuer (and any guarantor), the issuer and the guarantor (if any) must not undertake actions or obligations which will materially alter their financial status, their operations or the information contained in the review file submitted to the Board. Any such changes must be notified to the Board and may reset the clock on the review process.

Once approved, the prospectus is valid for 12 months, provided that any supplements and amendments to it must also be approved by the Board (the approval period is seven business days). Following the 12-month period, a new complete prospectus must be approved for further issuances.

### 9 On what grounds may the regulators refuse to approve a public offering of securities?

The Board will cancel an application if the draft prospectus is determined to be so deficient that the Board is unable to undertake an adequate review, or if the issuer fails to submit all of the required information and documents (either initially or upon request by the Board).

Furthermore, the Board may refuse to approve a public offering of securities if:

- the draft prospectus or the supporting documents do not contain the information required by relevant regulations;

- the information contained in the prospectus is inconsistent or incomprehensible;
- the information contained in the prospectus is misleading or insufficient;
- the application does not fulfil the legal requirements needed for issuers or debt securities; or
- the application lacks the necessary supporting documents.

### 10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?

There are two safe harbours for issuers from the prospectus requirement: private placements (up to 150 investors); and sales to qualified investors (no maximum number of investors – also, such investors do not count towards the 150-person limit for private placements).

Furthermore, no prospectus is required if: the public offering is intended for investors who each subscribe to a minimum of 290,000 Turkish liras (approximately €75,000) worth of securities; or the securities being offered have a minimum denomination of 290,000 liras (approximately €75,000) or above.

Additionally, the Board may grant an exemption from the prospectus requirement if the total sale price of the capital markets instruments to be publicly offered is less than 5.8 million Turkish liras (approximately €1.5 million). When granting this exemption, the Board will require the issuer to prepare a public announcement with certain information about the offering.

Where the issuer is exempt from the prospectus publishing requirement, it must instead prepare an 'issue document'. This is a short document containing a basic description of the securities to be issued and the terms and conditions of the issuance. An issue document must also be prepared for issuances taking place outside Turkey. The issue document must be approved by the Board.

### 11 Describe the public offering process for debt securities. How does the private offering process differ?

The preparation of the prospectus and the related documents typically takes a few months. Once filed, the Board will approve the prospectus within 10 business days (see question 8 for more detail). The approved prospectus must be published within 15 business days of the approval and the public offering may commence on the third day following the publication date of the prospectus (and the related price determination report). The offering period will be determined by the issuer and must be a minimum of two and a maximum of 20 business days.

In private offerings, a prospectus does not need to be drafted or published. It is sufficient for the issuer to prepare a Board-approved issuance document, and the offering can commence on the business day following the publication of the issuance document. Private offerings can be done as private placements or sales to qualified investors, or a combination of the two (see question 10).

The Board is authorised to make changes to these timings upon request of the issuer based on reasonable grounds.

Issuers are permitted to release announcements, advertisements and other statements regarding the contemplated issuance, but these must not contain any inaccurate, exaggerated or misleading information.

### 12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?

If the offering is international, customary international practices (including, as applicable, for Rule 144A and Regulation S purposes) are followed. For domestic public offerings, a law firm opinion is required by Borsa Istanbul. This opinion, however, is longer than is customary in international offerings and reads more like a (limited scope) due diligence report on the issuer.

Also see question 3.

### 13 What are the typical fees for listing debt securities on the principal exchanges?

Banks (deposit, participation, development and investment banks), financial institutions, Turkish leasing companies, factoring and financing companies, capital markets institutions defined under the Capital Markets Law, and issuers residing abroad must pay to the Board the following fees as calculated over the issuance value of the debt securities to be sold: 0.5 per mille if the maturity term is up to 179 days; 0.7 per mille if the maturity term is between 180 days and 364 days; 1 per mille if the maturity term is between 365 days and 730 days; and 1.5 per mille if the maturity term is longer than 730 days.

Issuers other than those referenced above pay a discounted rate of 75 per cent of the fees listed above. If the issue price is lower than the nominal value of the securities, the nominal value is used as a basis for the calculation of the fees.

### 14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?

The market for such special debt instruments in Turkey is extremely limited.

### 15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?

The main special rules applicable to convertible bonds (CBs) and exchangeable bonds (EBs) are as follows:
- the maturity of CBs and EBs may not be less than 365 days;
- at least 365 days must pass from the issue date before the bonds may be converted or exchanged;
- conversion of the CBs into or exchange of EBs with shares is done over the nominal value of the relevant bonds, with any interest accrued until the conversion or exchange day paid to the holders in cash;
- a report on the conversion or exchange rate in respect of the CBs or EBs to be offered to the public must be prepared by an authorised institution at the stage of submitting the prospectus to the Board for approval; and
- all conversion and exchange expenses are borne by the issuer.

The Board has the right to apply different rules (ie, rules deviating from the default provisions of the Communiqué on Debt Securities) to issuances of exchangeable and convertible bonds made via private placement or abroad upon the request of the issuer if the Board deems such request acceptable.

### 16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?

Debt instruments are assets that require a determinable periodic payment (ie, interest) to the holder. Examples of debt instruments include bonds (government or corporate) and mortgages. Equities are securities that provide a claim on the earnings and assets of the issuer. Having said that, a capital markets instrument that is classified as debt for purposes of the Capital Markets Law (and disclosure requirements thereunder), may be classified as debt or equity for accounting, credit rating, regulatory or other purposes (for example, Tier 2 bank capital).

Capital markets instruments not specifically covered by applicable legislation but which are, by their nature, debt instruments can also be issued upon authorisation by the Board.

### 17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?

As a general rule, there are no transfer restrictions or other limitations imposed on privately offered debt securities. Having said that, subject to certain exceptions, privately placed securities may be held by no more than 150 persons at any given time. Furthermore, the Board may (i) require the issuer to ensure that its payment obligations relating to debt securities are secured by a bank or another third-party legal entity, (ii) require that certain restrictions be made on the qualifications of the purchasers or placement conditions and (iii) shorten the validity period of the issue document. Transfer of securities traded on a regulated exchange are subject to the regulations of the exchange and must be intermediated by an authorised intermediary institution.

### 18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?

Public offerings of debt securities in Turkey by foreign private issuers are subject to certain heightened standards and conditions, such as a long-term investment grade rating to have been obtained in the last year and the offering or listing of the securities not having been denied by any regulator or regulated market. Certain additional disclosures are also required in the prospectus, such as information on foreign listings. The securities to be offered can be denominated in Turkish liras or foreign currency but financial statements must be presented in liras. Furthermore, the issuer must subject itself to Turkish law and the jurisdiction of Turkish courts for any disputes.

International organisations of which Turkish state entities are members or shareholders are subject to certain exemptions from prospectus publishing requirements with regard to their debt security offerings.

If a domestic issuer is issuing debt securities outside of Turkey only, it is not required to publish a prospectus in Turkey; it must still prepare, however, an issue document approved by the Board. An electronic application must be made to the Board for each new tranche of securities to be offered outside Turkey. Furthermore, while the issue limit (amount) must be determined in Turkish liras in domestic issuances, either Turkish lira or foreign currency limits can be used for issuances taking place outside Turkey.

### 19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

There are no specific arrangements to help foreign issuers access debt capital markets in Turkey. Having said that, certain broader arrangements such as the Board's ongoing activities for the harmonisation of the Turkish securities regulation with the EU Acquis, double taxation treaties and bilateral memoranda of understanding signed between the Board and its counterparties in other jurisdictions regarding cooperation, exchange of information and technical cooperation, are helpful in providing easier access for foreign issuers to Turkish capital markets.

### 20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

There are two primary ways that investment firms can intermediate a public offering of debt securities: underwriting (ie, on a commitment-basis); and best efforts (ie, no commitment).

Where there is underwriting, the underwriting arrangements for the public offering will be done pursuant to one of the following models:
- offered for sale through a public offering, and the unsold part purchased in cash at the end of the offering period ('standby');
- offered for sale through a public offering, and a portion of the unsold part purchased in cash at the end of the offering period ('partial standby');
- fully purchased in cash before the offering starts, and subsequently offered to the public ('full commitment'); or
- partially purchased in cash before the offering starts, and subsequently offered to the public ('partial commitment').

While international offerings will normally include customary commitment-based underwriting, most domestic issuances are undertaken without an underwriting commitment on a best-efforts, intermediation-only basis where the intermediary is not obliged to purchase for its own account any portion of the securities prior to or following the offering, and any unsold portion is returned to the issuer.

Whichever method is used, placements will be done through book-building, without book-building or directly on the exchange under the rules of the exchange.

### 21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

The activity of underwriting and best-efforts intermediation may only be carried out by intermediary institutions, investment banks and development banks specifically authorised by the Board. Authorisation is subject to stringent application and ongoing compliance requirements, and the Board constantly monitors the activities of intermediaries. The Board is responsible for regulating and supervising all transactions regarding the underwriting and intermediating of the sale of debt securities, and the underwriting or intermediation agreement must be submitted to the Board as part of the issuer's application for the public offering.

### 22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?

Settlement and custody operations are realised by Istanbul Clearing, Settlement and Custody Bank (Takasbank), which is majority-owned by Borsa Istanbul (with various banks and intermediary institutions holding minority interests). Takasbank uses a 'delivery versus payment' system in its settlement, thereby eliminating the default risk of the principal.

The settlement of the transactions on the debt instruments market of Borsa Istanbul is performed on the same day, and foreign currency-denominated securities are performed on the trade date plus at least one day.

Normally, all debt securities must be issued on a dematerialised basis via the Central Registry Agency (CRA), and no printed global or individual certificates are used. Holders of securities issued domestically must also maintain an account with the CRA while holders of securities issued abroad do not need to open CRA accounts. However, the issuer must file with the CRA certain information relating to the issuance including the amount of the issuance, date of issue, ISIN code, maturity period, applicable interest rate, information about the custodian, currency of the issue and country of issuance.

CRA accounts are used in the settlement of private bonds; accounts maintained at the Turkish Central Bank are used for the settlement of public sector bonds.

### 23 How are public debt securities typically held and traded after an offering?

While debt securities issued by state entities can be held in bearer or registered form, they are typically held as bearer bonds and can be received from branches of Central Bank or investment companies. Public debt securities can also be bought or sold by secondary institutions or persons at the prevailing price from branches of the Turkish Central Bank or investment companies.

### 24 Describe how issuers manage their outstanding debt securities.

While not very active practice, issuers can manage their outstanding debt securities, subject to certain conditions and exceptions (depending, in part, on the type of issuer), through open market or private purchases, exchange offers, tender offers and cash redemption (if permitted under the terms and conditions of the debt securities).

### 25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?

Issuers are subject to ongoing material events disclosure requirements during the time that their publicly offered debt securities are outstanding. These disclosures must be made on the PDP and include, among other events, certain material non-public information, corporate decisions and reorganisations, issuances of other securities and changes in the capital structure of the issuer.

The ongoing disclosure obligations do not apply to non-publicly traded issuers that have issued the debt securities through a private placement domestically or issued them abroad. Non-publicly traded issuers that issued their debt securities domestically to qualified investors only are also exempt from some of these requirements.

Issuers of covered bonds have additional reporting obligations such as a quarterly report on collections made on the collateral assets and payments made to holders of the covered bonds, and disclosure of payment defaults.

Certain additional ongoing disclosure obligations also apply to asset-backed and mortgage-backed securities. Investors in such securities must be notified of, among other things, any amendments to the related fund structure, and must be provided with a quarterly report on payments made to investors.

**26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?**

Issuers are primarily liable for losses arising out of any inaccurate, misleading or incomplete information included in the prospectus. In cases where the losses cannot be compensated by the issuer the lead intermediary institution (underwriter), any guarantors, and the members of the board of directors of the issuer are liable to the extent of their fault and to the extent the losses can be attributed to them based on the specifics of the situation.

Furthermore, experts such as independent auditors, rating agencies and appraisal firms whose reports have been included in the prospectus are also liable for any inaccurate, misleading or incomplete information included in their reports.

Potential liability also attaches to issuers, experts and signatories for other public disclosure documents (eg, issue document, financial statements) in relation to, and losses arising out of inaccurate, misleading or incomplete information contained in, such documents.

The liability analysis is not different for debt securities compared with securities of other types.

**27 What types of remedies are available to the investors in debt securities?**

Investors may be able to obtain monetary damages through the Investor Compensation Centre, a public entity established for the purpose of implementing the compensation decisions of the Board pursuant to the Capital Markets Law in cases where intermediaries or other capital markets institutions fail to fulfil their cash payment or securities delivery obligations.

Investors also always have the right to sue for alleged violations of securities laws under general principles of law.

**28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?**

The Board has several tools available to it to sanction issuers and other market participants for violations of the Capital Markets Law and secondary legislation thereunder.

For less serious violations (eg, contravention of certain disclosure rules), the Board has the right to impose administrative fines ranging from several thousand to several hundred thousand Turkish liras. In cases where a benefit has been gained due to the violation of an obligation, the amount of the administrative fine to be imposed must be at least twice the amount of the benefit. For more serious offences, the Board can also temporarily or permanently prohibit the violators from trading on regulated exchanges.

For unlawful or unauthorised issuances of debt securities, the Board can seek injunctive relief. Such issuances can also result in judicial (punitive) fines or imprisonment (through a court trial).

In cases of suspected insider trading or manipulation, the Board has broad rights including imposing limited or total trading restrictions on the alleged violators, requiring the use of different clearing and settlement methods, and imposing guarantee obligations.

Insider trading and market manipulation can also result in the disgorgement of profits, judicial (punitive) fines and imprisonment (through a court trial).

The Board also possesses extensive general powers to take various kinds of measures to ensure the effective and robust functioning of capital markets. However, for offences subject to punitive fines and imprisonment (ie, 'capital markets crimes'), the Board must file a criminal complaint with the public prosecutor's office and may not impose such sanctions on its own.

**29 What are the main tax issues for issuers and bondholders?**

The primary taxes potentially applicable to interest, principal or redemption payments on debt securities, and capital gains from their sale are withholding tax and corporate income tax. Whether one of these will be applicable and the percentage of the applicable withholding tax (maximum of 10 per cent) depend on several factors, including: the type of issuer (private or public); the tax status of the bondholder (individual or corporate, resident taxpayer or non-resident taxpayer); the date of issue (different treatment for issuances before and starting with 2006); and the maturity period.

As an example, interest payments on private bonds placed outside of Turkey in or after 2006 with a minimum maturity of five years will be subject to zero per cent withholding tax for all holders, while those with a maturity of less than one year will be subject to 10 per cent withholding tax for all holders. For a similar issuance placed in Turkey, however, there will be 10 per cent withholding tax applicable to interest payments to individual holders and non-capital stock legal entity holders, but no withholding tax to holders that are capital stock companies (eg, Turkish joint stock or companies and their counterparts in other jurisdictions), investment funds or trusts.

Documents related to the issuance of debt securities are exempt from stamp tax.

TURUNÇ


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# United Kingdom

**Matthew Tobin and Eric Phillips**

**Slaughter and May**

### 1 What types of debt securities offerings are typical, and how active is the market?

In the UK there has been a very active market for debt securities offerings for several decades. The particular features of this market are as follows.

**Internationalism**

Offerings of debt securities in the UK involve issuers and investors incorporated or established anywhere in the globe using London as a global financial centre to access the international debt capital markets. The success of the international debt capital markets within the UK has resulted in there being no meaningful domestic only market.

**Size**

The investor pool in the UK for debt securities is among the deepest in the world. As of 31 January 2017, according to data released by the London Stock Exchange, the value of debt securities admitted exceeds £3.37 trillion, and the number of debt securities on the exchange equals 16,171.

**Sophistication**

The full spectrum of debt capital markets products are offered in the UK. This spectrum ranges from plain vanilla senior fixed or floating eurobonds, issued either under a programme or on a stand-alone basis; to complex structured products such as asset-backed debt, covered bonds and derivative securities; to subordinated debt such as regulatory capital for banks or insurers and hybrid debt for corporates; to equity-linked debt such as exchangeable bonds, convertible bonds and warrants. There is also an active UK market in high-yield bonds, short-term money market instruments, loan participation notes, green bonds and other socially responsible investments and private placements.

**Wholesale rather than retail**

While retail debt markets in the UK continue to develop, the wholesale debt markets in the UK make up the vast majority of debt issued.

**Range of issuers**

Issuers that access the UK's debt capital markets include corporates, financial institutions and other regulated entities, sovereigns and municipalities and charities.

### 2 Describe the general regime for debt securities offerings.

The underlying principles of English law governing the debt capital markets in the UK remain the largely uncodified common law principles of contract law, trusts law and the law of negotiable instruments. The common law is overlaid by a UK statutory regime and in particular the Financial Services and Markets Act 2000 (FSMA) and related statutory instruments such as the Financial Promotions Order. This statute law is underpinned by regulation, in particular that contained within the Financial Conduct Authority (FCA) handbook (including the Listing Rules, the Prospectus Rules and the Disclosure and Transparency Rules) and binding guidance on these rules from the FCA.

Much of the UK's regulatory framework for debt capital markets is derived from EU financial services law that applies across the European Economic Area (EEA) in the same way in which it applies to the UK. EU directives are required to be implemented into UK law and EU regulations are directly applicable in the UK. The UK's regulatory architecture is integrated into the EU regulatory architecture: in particular the Court of Justice of the European Union, whose judgments are binding in the UK and the European Securities and Markets Authority (ESMA), the European supervisory agency responsible for providing guidance on questions related to EU regulation, coordinating the supervision of securities markets by national competent authorities and drafting technical standards that make up the EU's single rulebook in financial services.

Issuers with securities listed on the London Stock Exchange are also obliged to follow the rules and regulations of LSE. Many market participants voluntarily follow the recommendations of trade associations and in particular those contained within the International Capital Markets Association's Primary Market Handbook.

### 3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.

The EU prospectus regime requires an issuer to publish a prospectus in the case of either (i) a non-exempt public offering of debt securities in the UK or (ii) an admission of debt securities to a regulated market in the UK. Further detail on exemptions is given in question 10. The UK Listing Authority, which is part of the FCA, is the UK competent authority for the purposes of approving prospectuses, though prospectuses approved elsewhere in the EEA may be passported into the UK without requiring further approval by the UKLA. An issuer will typically publish a prospectus either on its own website or on the London Stock Exchange's website, using the LSE's Regulatory News Service. An issuer is also required to file a prospectus with the UK's National Storage Mechanism.

An issuer that is exempt from the requirement to publish a prospectus may be required to publish listing particulars if the debt securities are admitted to the London Stock Exchange's Professional Securities Market, which is a multilateral trading facility for the purposes of EU regulation.

In the case of a prospectus or listing particulars the issuer is required to prepare other administrative documents in connection with the UKLA approval process, including checklists, confirmation letters in relation to sanctions compliance, contact details and publication announcements. There are no specific filing requirements for debt securities that are different from those of other securities.

### 4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?

An issuer making a non-exempt public offering of debt securities in the UK is required to publish a prospectus. The contents of a prospectus are governed by the prospectus regime, but issuers also consider the expectations of the market.

The starting point for the contents of prospectus is the general duty of disclosure contained within the Prospectus Directive, which states: 'The prospectus shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities.' In addition to complying with the general duty of disclosure, an issuer must also consider the specific detailed contents requirements set out in annexes to the Prospectus Regulation. These annexes function as building blocks and the relevant annexes that an issuer must consider depend on the denomination of the debt securities and the nature of the securities. The annexes contain disclosure items relating both to the issuer's business and also the debt securities themselves. As a general rule, the contents requirements for more complex debt securities or for those aimed at retail investors are more onerous than those for plain vanilla debt securities aimed at wholesale investors. The prospectus regime not only regulates the contents of a prospectus but also its style, requiring that it be 'easily analysable and comprehensible'.

In addition to regulation, an issuer must also be mindful to ensure its prospectus is prepared in accordance with guidance from relevant regulators, including technical and procedural notes contained within the UKLA's knowledge base and ESMA's questions and answers on prospectuses.

The contents of prospectus are also subject to market expectations, the requirements of investors and the recommendations of industry bodies such as ICMA. When an issuer comes to prepare its prospectus, it will therefore be well-advised to consider the prospectuses of similar issuers or securities to ensure its disclosure is consistent with market practice.

### 5 Describe the drafting process for the offering document.

The prospectus regime requires an issuer to take responsibility for the contents of its prospectus and it will also have statutory and common law liability for its prospectus. While the managers are not required to take responsibility for the contents of the prospectus, they typically have their names on it and therefore have reputational reasons for being concerned with its contents. The managers may also have liability in certain circumstances. This means that the prospectus drafting process is in practice highly collaborative, drawing both on the issuer's greater knowledge of its business and also the managers' greater technical knowledge and market experience. Both sides will also lean heavily on their legal counsel for the drafting, in particular the more technical disclosure such as legends, selling restrictions and other rubrics designed to comply with regulatory requirements.

In practice the issuer will focus on the risk factors and the business description, drawing from its other public disclosure (such as annual reports and previously published prospectuses) in order to minimise the risk of inconsistent public disclosure and related liability. The managers will verify the disclosure in a series of procedures known as 'due diligence', including drafting sessions and written comments and questions on the disclosure. The intensity of the due diligence process varies in accordance with the relevant risk: a lower-rated issuer, or an issuer established in a non-OECD jurisdiction, or an issuer of junior securities will typically encounter a more onerous due diligence exercise than a higher-rated issuer that is familiar to the markets.

### 6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

The terms and conditions of the debt securities are set out within the trust deed (assuming a trust structure) or the fiscal agency agreement (assuming a fiscal agency structure). The parties to a trust deed are the issuer and the trustee, who has a fiduciary responsibility towards the bondholders under the trust. The parties to the fiscal agency agreement are the issuer, the fiscal agent and the paying agent. In the case of a fiscal agency structure, there will also be a deed of covenant in which the issuer makes certain undertakings directly to the bondholders. It is also market practice for the terms and conditions to be disclosed in full in the published prospectus (see question 3 above) and the relevant documents are usually available at the offices of the agent or trustee.

### 7 Does offering documentation require approval before publication? In what forms should it be available?

A regulated offering or listing document such as a prospectus or listing particulars must be approved by the UKLA before it is published. At a minimum a prospectus or listing particulars must be published electronically.

### 8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?

The prospectus requires approval, which occurs after an iterative review process in which the UKLA raises questions on drafts of the prospectus, typically related to the specific contents requirements of the prospectus regime. Once the issuer has addressed all the UKLA's questions the prospectus is approved. The UKLA commits to reviewing the first draft of the prospectus within four clear working days and subsequent submissions within two clear working days.

Before the prospectus is approved it is customary for the issuer and the managers to observe certain publicity restrictions ensuring that any information released in connection with the offering meets regulatory requirements. In the UK the advertisement rules contained within the EEA prospectus regime and the UK's domestic financial promotions regime regulate the way in which publicity materials related to an offering may be distributed. These ensure that the contents of publicity materials must be consistent with the prospectus and distributed to appropriate investors.

### 9 On what grounds may the regulators refuse to approve a public offering of securities?

If an issuer is unable to produce a prospectus that complies with the prospectus regime, the UKLA may refuse to approve the prospectus. The UKLA is also obliged not to admit the debt securities to the UK's official list unless it is satisfied that the listing rules are complied with. The FCA also has a statutory strategic objective to ensure markets function well, by protecting consumers, promoting competition and protecting financial markets. The FCA has the power to prevent a public offering of securities if the offering contravened the FCA's statutory objectives.

### 10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?

The prospectus regime contains certain exemptions from the requirement to produce a prospectus in the case of a public offers. The most common exemptions are: (i) where the offer is addressed to fewer than 150 persons per EEA member state, (ii) where the offer is only addressed to qualified investors and (iii) where the minimum denomination per unit of the debt securities is at least €100,000 or equivalent in another currency. Offers of debt securities that fall within one of these exemptions that are not admitted to trading on a regulated market may be considered private offerings.

### 11 Describe the public offering process for debt securities. How does the private offering process differ?

The public offering process, timetable and documentation will depend on whether the offering is a stand-alone transaction or a drawdown under a debt issuance programme. The complexity of the transaction, market conditions and extent to which the issuer has a track record of securities offerings will all also impact the timetable.

A stand-alone offering will typically require approximately two months from mandate to closing. During the period from mandate to launch, the issuer and the managers together with their legal advisers will agree the transaction structure, negotiate the transaction documentation and progress the drafting and approval of the prospectus with the UKLA. The transaction is launched when it is announced publicly and the issuer and the managers market the transaction to investors on the basis of either a preliminary prospectus or a roadshow presentation. Once sufficient interest has been generated in the transaction, the documentation has been agreed and the prospectus approved, the transaction can be priced and the subscription agreement signed. Typically four or five days are required between signing and closing. At closing the conditions precedent are provided to the managers, the remaining transaction documents are signed, the notes are issued and the proceeds of the issuance are transferred to the issuer.

A drawdown under a debt issuance programme will involve a much shorter timetable since it will typically only require agreement of the terms of the issuance. In the case of a private offering in which no prospectus or listing particulars is required the transaction timetable would typically be shorter and less complex because there would be no need to factor in the UKLA approval process.

### 12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?

The usual closing documents are the trust deed and paying agency agreement (in the case of a trustee structure), fiscal agency agreement and deed of covenant (in the case of a fiscal agency structure), the global notes, legal opinions, auditors' comfort letters, closing certificates and payment and settlement instructions.

### 13 What are the typical fees for listing debt securities on the principal exchanges?

Issuers are required to pay fees both to the UKLA and the LSE. UKLA vetting fees for prospectuses for debt securities are £5,000. The LSE's admission fee depends on the face value of the securities and the type of issuer: the fees for Eurobonds and international issuers range from £2,500 to £4,200; the fees for issuances under a programme range from £300 to £3,650; and the fees for stand-alone domestic issues for UK issuers range from £5,000 to £20,000.

### 14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?

There is a very active market for special debt instruments in the UK, including equity-linked notes and derivative products.

### 15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?

As described in question four, the contents requirements for a prospectus depend upon the nature of the securities. In the case of special debt securities, specific additional disclosure will be required. Prospectuses for most equity-linked debt transactions, which are typically structured to convert into new shares, are required to include equity-level disclosure in relation to the issuer, including an operating and financial review, a working capital statement and a capitalisation and indebtedness table. In addition to disclosure issues, equity-linked debt transactions also need to consider whether or not statutory pre-emption rights need to be disapplied. Prospectuses for derivative products will also need to include additional disclosure relating to the underlying.

Special debt securities may also raise accounting issues that the issuer must consider. Hybrid securities that possess both debt and equity characteristics may present difficulties as to the appropriate classification (whether debt or equity). From an IFRS perspective, IAS 32 provides guidance for the classification of securities as debt or equity.

### 16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?

The prospectus regime defines 'equity securities' to include shares, other transferable securities equivalent to shares and equity-linked securities. All those securities that are not equity securities are defined as 'non-equity securities'. Under the prospectus regime the disclosure requirements for equity are more onerous than the disclosure requirements for debt, reflecting the level of risk associated with each kind of security. For example both equity and debt prospectuses are required to contain risk factors, but risk factors for an equity prospectus relate to the profitability of the issuer and thus tend to be more detailed than risk factors for a debt prospectus that relate to the solvency of the issuer.

### 17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?

There are no regulatory requirements that impose a transfer restriction on privately offered debt securities in the UK. Other than in the case of some private placements, which are commercially similar to bank loans and designed as 'buy to hold' investments, there are no typical contractual limitations on the ability of investors to transfer privately offered debt securities.

### 18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?

No, the UK allows offers of debt securities by foreign issuers into the UK on the same basis as it allows offers of debt securities by UK issuers. There are no special rules for UK issuers that offer securities outside the UK.

### 19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

The prospectus regime provides a single harmonized framework for the content, format, approval and publication of prospectuses throughout the European Economic Area and allows a prospectus approved in in one EEA member state (the host country) to be passported into another EEA member state with few formalities other than the translation of the prospectus summary in certain circumstances. In practice, this regime is primarily used by retail issuers because wholesale issuers are already exempt from the requirement to produce a prospectus in the UK because of the €100,000 denomination exemption.

### 20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

In a public offering of debt securities in the UK it is usual practice for the managers to underwrite the bonds on a joint and several basis. This means that if any of the managers defaults, each other manager is liable to underwrite the defaulting manager's commitment. The subscription agreement specifies the principal amount to which each manager commits and how commissions and fees are to be distributed. Usually commissions and fees are distributed pro rata to each manager's commitment.

In certain circumstances the managers will not underwrite the issuance but will agree to use best efforts or reasonable efforts to place the notes.

### 21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

In the UK underwriting debt offerings falls within the concepts of 'dealing in investments as principal', 'dealing in investments as agent' and 'arranging deals in investments', which are regulated activities under FSMA. No person may carry on a regulated activity in the UK unless they are an authorised person. Credit institutions and investment firms that are authorised by the FCA that intend to underwrite debt offerings require that these specific regulated activities are included within their permissions.

### 22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?

Transaction execution issues vary considerably from deal to deal. Issues can be commercial or market related (for example if the due diligence process reveals that the issuer's disclosure is unsatisfactory) or regulatory or technical (if the issuer is unable to comply with a requirement of the UKLA). Transaction execution issues are more likely to arise in complex and innovative transactions or for debut issuers.

Transactions are usually settled on a delivery versus payment basis, a process under which the transfer of the proceeds and of the securities are made simultaneously on the basis of instructions given by the lead manager and the issuer.

### 23 How are public debt securities typically held and traded after an offering?

Public debt securities are usually represented by a global note, whether the note is in bearer form or registered form, in order to save the time and cost of printing definitive notes. For debt offerings where the notes are not offered to US persons, both bearer form and registered form are common. If there is a US offering, the notes will be in registered form to comply with US taxation requirements.

## Update and trends

**Brexit**

On 23 June 2016 the UK held a referendum to decide on its membership of the European Union. The resulting vote was to leave the European Union. There are a number of uncertainties in connection with the future of the UK and its relationship with the European Union, including the terms of the agreement it reaches in relation to its withdrawal from the European Union. The negotiation of the UK's exit terms is likely to take a number of years. Until the terms and timing of the UK's exit from the European Union are clearer, it is not possible to determine the impact that the referendum on the UK's departure from the European Union has had on the UK's regulatory framework for debt issuances and the extent to which the market has been impacted.

The current position of the UK government is for the UK to leave the EU single market and the jurisdiction of the Court of Justice of the European Union but to negotiate a new bespoke agreement between the UK and the EU aiming for the freest possible trade in financial services between the UK and the EU. In order to avoid any disruptive cliff-edge effects, the UK intends that there should be transitional arrangements in place between the date that the UK leaves the EU and the new arrangement between the UK and the EU becomes effective.

The UK government plans to incorporate the current body of EU law directly into UK law to minimise any legal uncertainty and to avoid legal vacuums. While the referendum result might in due course have a profound impact on the UK's regulatory framework, to date market participants have not made radical changes to their debt issuance documentation or even shown a pattern of issuance behaviour that differs from that which existed prior to the referendum. A majority of issuers are now including a Brexit-related risk factor in their prospectuses, describing both the geopolitical, macroeconomic and financial uncertainty associated with Brexit and also the specific impact that Brexit might have on the issuer's business.

**Capital markets union and prospectus regime reform**

As part of a wider project called 'capital markets union' aimed at making the capital markets in the EU work more efficiently by breaking down barriers between member states and reforming regulation that constrains the capital markets in the EU, the prospectus regime is currently being reformed, with the existing Prospectus Directive due to be replaced by a new Prospectus Regulation. In December 2016, a political agreement was reached between the EU's co-legislators as to the text of the new prospectus regulation and it is widely expected that the new prospectus regulation will come into force during 2017 and apply two years thereafter. The fundamental principles underlying the prospectus regime have not altered but a number of changes have been made that will impact prospectuses for debt securities. In particular, issuers will be required to present risk factors in a limited number of categories depending on their nature with the most material risk factors being mentioned first in each category. The content requirements for prospectus summaries will be simplified, though the length of summaries and the number of risk factors that may be included in summaries will be more tightly limited. The necessary information test, described in question 4, will also be reformulated to confirm that necessary information may vary depending on the nature of the securities, the issuer and the investors.

It may be that the UK is no longer in the EU by the time the new prospectus regime applies. However, it is widely expected that the UK, which has supported reform of the prospectus regime, will implement the new prospectus regime directly into UK domestic regulation.

**FCA and LSE developments**

In February 2017 the FCA published a discussion paper reviewing the effectiveness of the UK's primary markets, in which it discussed two issues that specifically impact debt issuers: the extent to which the UK has a multilateral trading facility that serves the interests of debt issuers, and whether or not the UK's guidance on contents and style requirements for prospectuses for retail debt securities are appropriate considering the needs of retail debt investors. To the extent that the UK creates a new market for debt securities that allows issuers to list securities in the UK with the same ease that they can list in Ireland or Luxembourg and under an appropriate regulatory framework, this would be widely welcomed by issuers.

In March 2017 the London Stock Exchange announced the launch of its International Securities Market, a new multilateral trading facility aimed at professional investors for the full spectrum of debt capital markets products issued by UK and international issuers.

In certain limited circumstances, for example if the issuer defaults or the clearing systems close down, the global note can be exchanged into definitive notes. The global notes are held on behalf of the clearing systems by an agent bank acting as common depository or common safekeeper. Investors hold their entitlement via a chain of intermediaries leading to a direct account holder at a clearing system, with trading effected via electronic account transfers.

### 24 Describe how issuers manage their outstanding debt securities.

Issuers manage their outstanding debt securities via a number of liability management techniques, including open market purchases, consent solicitations and tender and exchange offers:

Open market purchases involve the issuer using a broker to buy the debt securities from market participants. Depending on the terms and conditions of the debt securities, after purchase, the issuer may either hold the debt securities in treasury for subsequent re-issuance into the market or cancel them.

Consent solicitations involve the issuer seeking to amend the terms of existing bonds by having a resolution passed at a meeting of bondholders. The process for bondholder meetings, including voting mechanics, notice periods and quorums is set out in the trust deed or the fiscal agency agreement. Typically trustees also have the power to amend the terms of existing bonds without bondholder consent to correct a manifest error.

Tender offers involve the issuer purchasing some or all of the existing debt securities for cash pursuant to a tender offer. The terms of the tender offer are set out in a tender offer memorandum sent to the bondholders. Typically the issuer seeks to incentivise participation in the offer by means of a participation fee or by a structure known as a Dutch auction wherein each bondholder specifies the price at which it is willing to participate and the issuer selects bondholders on that basis.

Exchange offers involve the issuer purchasing some or all of the existing bonds in exchange for new bonds with different commercial terms. The terms of the exchange are set out both in an exchange offer memorandum and typically also a new prospectus in respect of the offer and admission of the new bonds. Exchange offers tend to be extremely bespoke and reflect specific commercial considerations. For example, a distressed issuer that is restructuring its debt may seek to issue new bonds which amortise over a longer period. If a resolution is required, care should be taken to ensure that the interests of the minority bondholders that vote against the resolution are not abused.

### 25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?

The EEA's transparency regime (derived from the Transparency Directive) and market abuse regime (derived from the Market Abuse Regulation) impose reporting ongoing reporting obligations on the issuer during the life of the bonds. The issuer must also comply with the rules and regulations of the LSE and any additional contractual reporting obligations set out within the terms of the bonds and the transaction documentation.

The UK has implemented the Transparency Directive into UK domestic regulation via the Disclosure and Transparency Rules in the FCA handbook. The transparency regime requires all issuers to publish periodic financial information including annual reports and issuers of low denomination debt also to publish half-yearly reports. Issuers are also required to publish information related to changes to the issuer's constitution and changes to the rights of holders.

As an EU Regulation, the Market Abuse Regulation is directly applicable in the UK. The market abuse regime requires issuers to announce inside information that directly concerns the issuer and comply with a number of related record-keeping and procedural requirements. Inside information is information that is precise, not generally available, that would likely have a significant effect on the price of the issuer's securities if it were made generally available. Inside information is further defined to mean information a reasonable investor would be likely to use as part of the basis of his or her investment decision.

**26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?**

A prospectus may give rise to liability under a number of different civil and criminal liability causes of action under statute or common law.

There may be common law tortious liability for negligent misstatement where a person making a statement breaches the implicit duty of care owed by him or her. There may be statutory contractual liability for negligent misstatement under the Misrepresentation Act where an investor acted on an incorrect or misleading statement. Liability may also arise under the tort of deceit. FSMA also contains specific liability regimes for untrue or misleading statements in a prospectus and omissions from a prospectus.

The Fraud Act and FSMA set out a number of criminal offences related to market abuse and false representation with the intent of making a gain or causing a loss.

Given the broad range of potential causes of action it is possible that in addition to the issuer the managers may be subject to liability for misleading prospectuses in certain circumstances. The liability analysis is similar for all types of securities.

**27 What types of remedies are available to the investors in debt securities?**

The remedy available to the investor depends on the relevant head of liability. FSMA sets out a specific compensation regime payable to any person who suffers loss as a result of an untrue statement in a prospectus or the omission of information required to be included in a prospectus. If the investor is able to prove misrepresentation, he or she may be entitled to damages, the measure of damages will depend on the head of liability, typically damages in tort seek to put the claimant back in his or her original state before the tort whereas damages in contract seek to put the claimant in the position he or she would have been in had the contract been performed on its terms.

**28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?**

Under FSMA the FCA has a statutory power to impose a penalty on an issuer who has contravened any provision of the FCA handbook or FSMA. The FCA may also censure any person instead of imposing a penalty upon him or her. The nature of any penalty or censure tends to be extremely fact specific and tailored to the particular circumstances at hand.

**29 What are the main tax issues for issuers and bondholders?**

Payments of interest on bonds may be made without deduction of or withholding for or on account of United Kingdom income tax provided that bonds carry a right to interest and the bonds are and continue to be listed on a 'recognised stock exchange'. The London Stock Exchange is a recognised stock exchange for the purposes of UK legislation.

Interest on money market instruments that have a maturity of fewer than 365 days may also be paid without withholding or deduction on account of United Kingdom income tax.

In other cases, and subject to the availability of another exemption, an amount must generally be withheld on account of United Kingdom income tax at the basic rate (currently 20 per cent) from any payments of interest on bonds that has a United Kingdom source. However, where an applicable double tax treaty provides for a lower rate of withholding tax (or for no tax to be withheld) in relation to a holder, HMRC can issue a direction to the issuer to pay interest to the holder without deduction of tax (or for interest to be paid with tax deducted at the rate provided for in the relevant double tax treaty).

Where interest has been paid under deduction for or on account of United Kingdom income tax, holders who are not resident in the United Kingdom may be able to recover all or part of the tax deducted under an appropriate provision in any applicable double taxation treaty.

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# United States

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**1 What types of debt securities offerings are typical, and how active is the market?**

The US debt capital market is one of the most active markets in the world. Debt securities commonly offered in the United States include straight, high-yield, convertible, asset-backed and structured notes. Although not as common, active markets also exist for debt securities with special features, such as covered, remarketed, callable and auction-rate bonds. The type of security an issuer chooses to offer depends, among other things, on the nature and needs of the issuer, the issuer's credit profile, the interest rate environment, the category of investors the issuer wants to target and the regulatory requirements applicable to the issuer (eg, regulatory capital rules).

Regardless of type, debt securities can be offered either in a registered public offering or in a private offering exempt from the registration requirements of the US federal securities laws. Whether a debt security is offered publicly or privately will have an impact on the overall offering process, the extent of documentation required, and investor base to which the securities may be offered and sold.

**2 Describe the general regime for debt securities offerings.**

Offerings of securities in the United States are primarily governed by the US Securities Act of 1933 (Securities Act) at the federal level, with various other statutes and regulations applying at the state level (Blue Sky laws). The Securities Act requires that every offer or sale of securities in the United States be registered with the US Securities and Exchange Commission (SEC) unless an exemption from registration is available (either because the securities or the transaction are exempted). Securities that are publicly offered must be registered with the SEC by filing a registration statement on an appropriate form, which must become effective prior to the sale. Depending on the nature of offering and the issuer, the SEC may review the registration statement extensively before declaring it effective. In other cases (ie, for certain large SEC-reporting issuers known as 'well-known seasoned issuers' (WKSIs)), the registration statement becomes effective immediately upon filing without SEC review.

Private offerings, on the other hand, are exempt from SEC registration, and generally can be completed in a shorter time than public offerings. There also may be more flexibility regarding required disclosure in the offering documents. Certain issuers (eg, certain banking institutions and government bodies) are exempt from registration requirements as well. However, privately offered debt securities are restricted in the hands of the purchasers, meaning that they cannot be freely resold publicly, which may result in a liquidity discount in their offer price.

If an issuer issues debt securities in a public offering, it will become subject to the reporting requirements under the US Securities Exchange Act of 1934 (Exchange Act) if it is not already. The Exchange Act requires the issuer to file annual reports, quarterly reports (in the case of US issuers) and current reports when a material event occurs. Even in a private offering, the issuer sometimes will agree to voluntarily file these reports to facilitate high-quality information flow to investors.

The SEC is the main securities regulator in respect of the federal securities laws. Also relevant for the offering of securities are the rules imposed by the Financial Regulatory Authority (FINRA), an independent, self-regulatory organisation that oversees its member financial institutions, including broker-dealers that act as underwriters. FINRA rules regulate excessive underwriting fees and conflicts of interest, among other things.

**3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.**

In a public offering, to ensure that all material information is available to potential investors, the Securities Act generally requires that a registration statement be filed with the SEC before any offers or sales are made. The registration statement contains the prospectus that will be used to market the offering, along with exhibits containing material agreements and other key documents.

In a public offering of debt securities, the US Trust Indenture Act of 1939 (TIA) requires the filing of a qualified indenture with the registration statement, prior to offering any securities. The indenture is the contract that embeds the terms of the securities and is entered into among the issuer, any guarantors and a trustee, which acts on behalf of the security holders. The TIA aims to protect debt investors by requiring certain provisions in the indenture for the securities. It is also customary, although not required, for an indenture used in a private offering of debt securities to contain certain provisions that are required under the TIA.

**4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?**

The SEC has adopted various forms of registration statement. The applicable form turns on whether the issuer is a US issuer or foreign private issuer, how much reporting history it has and what type of offering it is planning, among other things. These forms specify the qualitative and quantitative information required in a prospectus, which generally includes, among other items:

- a description of the issuer's business and properties;
- a description of the securities offered;
- risk factors related to the issuer's business and industry and the offering;
- officers' and directors' biographies and description of the board committees, corporate governance policies and executive compensation programmes;
- a description of the planned use of proceeds from the offering;
- information about the underwriters and the plan of distribution;
- tax treatment of the securities;
- financial statements and related information for the issuer and any guarantors prepared in accordance with US Generally Accepted Accounting Principles (US GAAP) (or reconciled to it) or International Financial Reporting Standards (IFRS), as well as for any significant investee or company being acquired (including pro forma financial statements relating to such an acquisition); and
- management's discussion and analysis of financial condition and results of operations (MD&A).

Most disclosure requirements apply to US issuers and non-US issuers, but non-US issuers may be subject to special disclosure requirements not applicable to US issuers, such as description of home country regulation.

The disclosure rules under the US federal securities laws use an integrated disclosure framework, meaning that the disclosures required in filings under the Securities Act and the Exchange Act are based on the same set of rules. A significant benefit to this approach is the issuer's ability to include the required information in the prospectus by incorporating by reference to its other filings with the SEC. If the issuer already is an Exchange Act-reporting company, then a significant portion of the information required in the prospectus can be incorporated by reference to its Exchange Act filings (eg, a description of the issuer's business and the historical financial statements).

### 5 Describe the drafting process for the offering document.

The offering document is called a prospectus in a public offering and an offering circular or an offering memorandum in a private offering. However, no significant differences generally exist in the drafting process or the offering documents themselves. For private offerings, market practice is to track the disclosure requirements for a comparable public offering. This approach helps ensure the accuracy and completeness of the disclosure and protect the issuer and other offering participants from liability. Nonetheless, because there is no SEC review and the disclosure items for a public offering technically are not applicable, there is scope for some marginal flexibility in a private offering. For example, if preparing or reconciling certain financial information would be overly burdensome for the issuer, the working group may determine that its omission is not material.

Drafting an offering document is a joint effort by all parties involved in the offering. The issuer and its counsel take the lead in drafting the disclosure and preparing the required information, and the underwriters and their counsel, as well as the issuer's auditors will be heavily involved in the comment and revision process. As part of the due diligence process, the underwriters and their counsel request back-up materials that support the disclosure. The SEC also occasionally requests some of these materials as part of its review process.

It is important for the issuer to start the drafting process early, especially if the issuer does not have Exchange Act filings upon which to draw. Particular attention should be paid to ensure that the issuer has all the required financial information, because its preparation can require substantial time if it is not ready. As a closing condition to a public or private offering, the underwriters will require that the issuer's auditors deliver a customary comfort letter, which speaks to the audit and review work done by the auditors and the absence of material adverse changes relating to certain key line items.

The underwriters and their counsel often lead the drafting efforts for certain sections of the offering document, including the prospectus summary (commonly called the 'box', which gives highlights of the transaction and helps convey the marketing 'story'); the description of the notes (and the corresponding indenture); and the underwriting section, which details how the transaction will be marketed.

Although the trustee and its counsel play a limited role in the drafting process, they generally review the offering documents for consistency with the terms of the indenture, especially those portions relating to the rights and obligations of the trustee.

In a public offering, it is critical to factor in time for SEC review (for issuers other than WKSIs). Depending on the scope of SEC comments and the issuer's reporting and review history (or lack thereof), the review process can require two months or more, particularly for companies that are not SEC-reporting companies. In addition, documentary due diligence by the banks and their counsel can be time-consuming, particularly if the issuer is not pre-prepared with a data room containing its material documents.

In addition to addressing specific SEC line item requirements, it is critical to consider whether the disclosure contains any material misstatements or omissions. Such misstatements or omissions can give rise to SEC enforcement actions, as well as private claims (including class actions), under the US federal securities laws. Materiality is not a bright-line concept. Rather, information is material if it would be 'viewed by the reasonable investor as having significantly altered the 'total mix' of information made available' (*Basic Inc v Levinson*, US Sup Ct (1988)). Other US courts have defined it similarly and the SEC has emphasised that materiality is both a quantitative and qualitative determination based on all facts and circumstances.

### 6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

The terms and conditions of debt securities are typically governed by the indenture. Even though the underwriters are not parties to the indenture, their input on what investors will expect and accept is critical. This is particularly true for high-yield notes, which feature a complex array of covenants.

Although the offering document has a section that describes the terms and conditions of the notes, usually under the heading 'Description of the Notes', this section does not, strictly speaking, govern the terms and conditions of the notes. Instead, it describes those terms and conditions, but must do so accurately, because investors will make their investment decision on the basis of the description, rather than the indenture itself, and the issuer and offering participants will have potential liability for any material misstatements or omissions in the description.

The indenture will be accessible on the SEC website, as an exhibit to the registration statement in the case of a registered offering, or as an exhibit to the issuer's Exchange Act reports (assuming it is an SEC-reporting issuer).

### 7 Does offering documentation require approval before publication? In what forms should it be available?

In a public offering, a registration statement containing a prospectus must be filed with the SEC before any offers can be made, and declared effective by the SEC before any sales can be made (with certain exceptions for WKSIs). With the exception of an automatic shelf registration statement for a WKSI, the SEC may review the registration statement before declaring it effective. Before commencing marketing efforts (or 'launching') the offering, the issuer generally clears all SEC comments to avoid any risk of having to amend the preliminary prospectus (or 'red herring') after it has been sent to potential investors. Also in the context of a public offering, unless an exemption applies (eg, for offerings of certain investment grade non-convertible debt), FINRA approval may be required. FINRA review generally focuses on excessive and unfair underwriting compensation and potential conflicts of interest involving the underwriters. The SEC will not declare the registration statement effective until FINRA issues a no objection letter.

Prospectuses related to the public offering of debt securities are filed with the SEC and are publicly available on the SEC website. The issuer and the underwriters generally also send investors PDF versions of the preliminary and the final prospectuses, along with hard copies of the final prospectus.

Unlike the case of the public offering, in private offerings the offering memorandum is confidential and not required to be publicly filed. Also, there is no requirement to get FINRA approval prior to commencing a sale. The working group will often use PDF versions of the offering documents and generally deliver a hard copy of the final offering memorandum.

### 8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?

As discussed above, SEC and FINRA review may apply, and, depending on the issuer's business, additional regulatory agencies also may be involved (eg, banking authorities). The SEC will typically take about 30 days to review the initial filing, then less time to review subsequent amendments. The working group responds to the comments directly and also revises the registration statement in response. The comments and responses ultimately become part of the public record on the SEC's website.

Depending on the category of the issuer and the type of offering, SEC review may not be necessary. For shelf registration statements, once the registration statement is declared effective, prospectus supplements used in 'takedown' offerings will not be subject to SEC review (for a WKSI, the shelf registration statement on Form S-3 (or, for a foreign private issuer, Form F-3) also becomes automatically effective without any SEC review). However, the SEC will, from time to time, review the periodic and current reports that the issuer files under the Exchange Act, which are incorporated by reference into the shelf registration statement.

In a public offering, no sales can be made unless the issuer has an effective registration statement on file with the SEC. Before the issuer files the registration statement with the SEC (the 'quiet period'), unless an exception or a safe harbour (eg, allowing a limited notice of an upcoming registered offering) applies, neither the issuer nor the underwriters will be allowed to make any offers, including any press release, reports, advertisements or interviews that could condition the market or generate public interest in the issuer or its securities. Once the registration statement has been filed but before it becomes effective (the 'waiting period'), the issuer and the underwriters may make oral offers and written offers using the preliminary prospectus filed with the SEC or any free writing prospectuses and certain other statements within prescribed safe harbours, but no sales can be made. The issuer and the underwriters typically will wait until all SEC comments are cleared before launching the offering.

### 9 On what grounds may the regulators refuse to approve a public offering of securities?

The scope of the SEC review may be light or heavy, and may cover qualitative disclosure as well as the issuer's financial statements. Until all SEC comments are resolved and the review process is complete, the SEC will not declare the registration statement effective.

### 10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?

As discussed above, a public offering of debt securities in the United States is required to be registered with the SEC, and subject to a host of requirements relating to the content of disclosure and the offering process.

Section 4(a)(2) of the Securities Act exempts 'transactions by an issuer not involving any public offering', and the SEC has adopted safe harbours under this exemption. An offering memorandum used in a private offering is not subject to SEC filing and review process, giving the working group more control over the timing of the offering. In addition, there is more leeway regarding the scope of disclosure.

One safe harbour is Rule 506 of Regulation D. The rule generally allows the issuer to offer an unlimited amount of securities without having to register under the Securities Act if, among other conditions, the issuer does not use general solicitation or general advertising (GSGA) to sell the securities (unless all purchasers are accredited investors and the issuer takes reasonable steps to verify their accredited investor status, in which case GSGA is permitted) and files a Form D with the SEC. The other two rules – Rules 504 and 505 – under Regulation D relate to offerings of securities in amounts less than $1 million and $5 million, and may be useful to small businesses.

Rule 144A is a resale safe harbour that issuers commonly use to issue securities to qualified institutional buyers (QIBs) without registering with the SEC. Subject to certain conditions, Rule 144A exempts from registration any resale of securities to QIBs by a person that is not the issuer. In a typical Rule 144A transaction, the underwriters purchase the securities from the issuer in an exempt private offering, and resell these securities to QIBs (the banks therefore are typically referred to as 'initial purchasers' in a Rule 144A offering, though they perform the same role as they do in a public offering and, for ease of reference, are otherwise referred to in this chapter as 'underwriters'). One notable limitation to Rule 144A is that the securities subject to a Rule 144A resale must not be the same class of securities listed on a US national securities exchange (the 'no fungibility' requirement). Debt securities sold pursuant to Regulation D or Rule 144A will be restricted securities, meaning that they cannot be publicly resold in the United States until a holding period has passed.

Another safe harbour from registration is Regulation S, which is based on extraterritoriality, and not on being a private offering under section 4(a)(2). Regulation S allows securities to be offered and sold outside the United States in an offshore transaction without having to register with the SEC. Depending on the category of issuer, as defined in Regulation S, there are various restrictions and conditions that apply, but, in any case, the offering generally must not be made to a person in the United States and there can be no directed selling efforts in the United States. Securities sold pursuant to Regulation S generally will not be restricted securities, but may be subject to restrictions on their distribution in the United States during the 40-day period following the offering.

Although private offerings are exempt from Securities Act registration, they are subject to the general anti-fraud provisions, section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

### 11 Describe the public offering process for debt securities. How does the private offering process differ?

For a public offering of debt securities other than shelf takedown offerings, the offering process generally involves the following stages:

- before launch, the issuer engages one or more underwriters and counsel, and the parties begin preparing the offering documentation. The underwriters, their counsel and the issuer's counsel begin the due diligence process by conducting documentary due diligence and holding due diligence calls with the issuer's management and the auditors. Once the registration statement is filed, the issuer waits for SEC comments and, together with its counsel, prepares response letters and amendments to the registration statement. At the same time, the parties continue to negotiate the underwriting agreement and other transaction documents (eg, comfort letter and legal opinions) and conduct due diligence. Once SEC comments are cleared, the offering launches if market conditions are right, and management and the underwriters market the offering. They use the preliminary prospectus and a slide deck for the road show. This process helps to gauge investor interest to facilitate pricing the securities (not all deals require a full-blown roadshow; some may be successfully executed with less intensive marketing efforts);
- when ready, the issuer requests that the SEC declare the registration statement effective and a pricing call is held with the underwriters to determine the final offer price, the interest rate and other terms. The issuer and the underwriters then prepare a term sheet reflecting the pricing terms and file it with the SEC as a free-writing prospectus. At the same time, the underwriters confirm sales with the investors. The issuer, any guarantors and the underwriters execute the underwriting agreement and the auditors deliver the executed comfort letter to the underwriters. Within two business days, the issuer files the final prospectus reflecting the pricing information with the SEC; and
- settlement typically takes place three to five business days from the pricing date. At settlement, the underwriters wire the net proceeds to the issuer and receive the debt securities, usually through The Depository Trust Company (DTC), the US clearing system. The indenture is executed and all closing documents, including legal opinions, negative assurance letters (10b-5 letters), certificates and bring-down comfort letter, are delivered to the respective parties.

For an offering of debt securities pursuant to an effective shelf registration statement, the offering process is largely the same, except that there is no need to file a registration statement and wait for SEC comments, as that already has been done. The issuer and the underwriters use a preliminary prospectus supplement, combined with the base prospectus contained in the already effective shelf registration statement, to launch the offering. A final prospectus supplement reflecting the pricing terms is filed within two business days of pricing. The shelf takedown process saves a significant amount of time and is commonly used by eligible established SEC-reporting companies.

In the case of a private offering of debt securities, no SEC filing is needed, but the overall offering process is similar. The main offering document is a confidential offering memorandum, which generally is prepared using public offering-style disclosure. The marketing, pricing and settlement processes are essentially the same as in a public offering, except that the target investors may differ (eg, only QIBs can purchase in a Rule 144A offering).

### 12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?

In both public and private offerings, a number of documents are delivered as a condition to the closing of a transaction. These documents are required by the underwriting agreement and indenture.

The main closing documents include:

- legal opinions and negative assurance letters (10b-5 letters) from issuer's and underwriters' counsel, both addressed to the banks;
- comfort letters from the issuer's auditors addressed to the banks, related to the audit and review work done by the auditors and the absence of material adverse changes relating to certain key line items;
- certificates from the issuer's officers addressed to the banks addressing various matters, including the absence of a material adverse change and the correctness of the representations and warranties in the underwriting agreement; and
- opinions and certificates addressed to the trustee, as required under the indenture.

### 13 What are the typical fees for listing debt securities on the principal exchanges?

The decision to list debt securities on an exchange is influenced by the types of securities and the target investors. In contrast to common stock, it is not uncommon for debt securities to trade readily without being listed. For listed debt securities, both NYSE and Nasdaq have an initial listing fee and an ongoing annual fee, but they are de minimis, and vary depending on the type of debt securities, the size of the principal amount and whether other securities of the issuer are already listed on the exchange.

### 14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?

Depending on prevailing market conditions, including interest rates, there is generally a wide appetite in the United States for various types of specialised instruments, ranging from convertible bonds, which are particularly popular in the healthcare, pharmaceuticals and technology sectors, to equity-linked instruments structured by financial institutions and sold to retail investors. Debt instruments sometimes are coupled with derivatives to enhance their features for market participants. For example, an issuer sometimes will issue convertible bonds while also entering into a 'call spread' with affiliates of the underwriters. In a call spread transaction, the issuer buys a call option the exercise price of which is matched to the conversion price of the convertible bonds, while financing the cost of that call by selling a put option exercisable at a higher price. This enables the issuer to protect against conversion by effectively raising the conversion price for the bonds from its perspective, while helping defray the cost of that protection.

### 15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?

The framework established by the Securities Act generally does not distinguish among the types of securities offered, though certain types of issuers (eg, resources companies and financial institutions) are subject to supplemental disclosure requirements. Specialised regimes also apply to investment companies and asset-backed issuers.

FINRA also imposes suitability requirements on underwriters, meaning that they must determine whether the instrument being offered to a particular investor is suitable for that investor. It may not be appropriate, for example, for underwriters to facilitate an offering of highly novel or complex securities to certain retail investors – even if the offering is registered with the SEC.

In addition, NYSE and Nasdaq apply shareholder approval requirements to certain offerings by issuers with listed equity. The exchanges apply these rules to convertible bonds, requiring careful analysis in advance of such an offering.

Convertible bonds and structured securities can carry complex accounting implications for the issuer, often turning on the settlement mechanism (eg, cash, physical or net share settlement) and other features. The issuer's auditors should be closely consulted in advance of issuing these types of instruments.

### 16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?

Despite a security's legal form and its treatment as debt or equity for purposes of complying with the Securities Act requirements (eg, using a qualified indenture and satisfying trustee requirements in the case of debt), a security may be categorised as debt or equity for other purposes depending on its features. For example, mandatorily redeemable preferred stock may be treated as debt under accounting rules. Conversely, highly subordinated debt or mandatorily convertible debt may be treated as equity instead of debt for rating and regulatory purposes.

### 17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?

Privately offered debt securities are restricted securities under the Securities Act. Restricted securities cannot be publicly resold in the United States until a holding period has passed. In the interim, they may be sold only pursuant to an available exemption from SEC registration (eg, in compliance with Rule 144A in sales to QIBs, or offshore in accordance with Regulation S).

Rule 144 under the Securities Act is a safe harbour from SEC registration that generally allows the free resale of restricted securities once they have been held by a non-affiliate of the issuer for at least six months after being acquired from the issuer or an affiliate if the issuer is an SEC-reporting company or otherwise after one year. If the investor is an affiliate of the issuer (and therefore holds 'control' securities), there are additional conditions that must be satisfied before a sale can be made under Rule 144, including, in particular, restrictions on the amount that can be publicly resold. Securities sold under Rule 144 become unrestricted in the hands of the purchaser (unless the purchaser is an affiliate of the issuer, in which case the securities will remain control securities).

In a private offering, an issuer sometimes will grant registration rights to the debt investors. The holders then can require the issuer in certain circumstances to file a registration statement with the SEC to facilitate the public resale of the securities by the holders.

### 18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?

The SEC has adopted special rules for foreign private issuers, including:
- the ability to provide financial statements prepared in accordance with IFRS or home country accounting standards with a reconciliation to US GAAP;
- an exemption from US proxy rules;
- an exemption from certain ownership reporting requirements and short-swing profit disgorgement rules;
- special SEC registration and reporting forms, which require less onerous disclosure in certain respects than applies to US issuers; and
- the ability to confidentially submit draft registration statements for SEC review under certain circumstances.

NYSE and Nasdaq also exempt foreign private issuers from most of their corporate governance requirements.

As discussed above, both US and foreign private issuers can use Regulation S to offer debt securities outside the United States.

### 19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

The Multijurisdictional Disclosure System facilitates the public offering of securities in the United States by Canadian issuers by allowing the use of a Canadian offering document. Similarly, reporting obligations under the Exchange Act can be satisfied by filing Canadian reporting documents with the SEC.

The SEC also allows foreign private issuers to use financial statements prepared in accordance with IFRS, without having to be reconciled to US GAAP, and for certain first-time registrants, two years, rather than three, of historical financial statements.

### Update and trends

**Non-GAAP financial measures**

Non-GAAP financial measures (NGFMs) refer to numerical measures of historical or future financial performance, financial position or cash flow that include or exclude amounts that would otherwise be excluded or included, respectively, in the most directly comparable measures calculated and presented in accordance with the US GAAP. NGFMs are often used by issuers in an offering document for debt securities and in the Exchange Act filings (in the case of SEC-reporting companies) to provide additional financial information about the company to investors. These measures, if used in a document filed with the SEC or publicly disclosed by an SEC-reporting company, are subject to regulations that require, among others, reconciliation of NGFMs to the most directly comparable US GAAP measures, and in the case of NGFMs used in documents filed with the SEC or earnings releases furnished to the SEC, 'equal or greater prominence' of US GAAP measures over related NGFMs.

In May 2016, the SEC's Division of Corporation Finance released new and updated Compliance & Disclosure Interpretations (C&DIs) on the use of NGFMs that signaled a tightened policy toward NGFMs. The C&DIs focus on ensuring that US GAAP measures are presented and discussed with equal or greater prominence compared to the related NGFMs and express the staff's view that certain NGFMs can be inherently misleading (eg, non-GAAP performance measures that exclude 'normal, recurring, cash operating expenses necessary to conduct the company's business' or non-GAAP revenue measures that back out the effect of US GAAP revenue recognition and measurement principles applicable to the company's business). The C&DIs have led to an increased level of comments and questions by the SEC on registration statements and periodic reports regarding NGFMs, which has resulted in a number of companies revising the NGFM practices accordingly.

**TLAC rule**

In December 2016, the US Federal Reserve issued the final total loss absorbing capital (TLAC) rule that, among other things, requires bank holding companies (covered BHCs) for US global systematically important banks (GSIBs) to maintain significant amounts of external long-term debt having specific terms (eLTD). Specifically, eLTD is debt that: (i) is issued by the covered BHC and fully paid-in; (ii) is unsecured, is not guaranteed by the covered BHC or any of its subsidiaries and is not subject to any other arrangement that legally or economically enhances its seniority; (iii) has a maturity of one year or more from the issuance date; (iv) is governed by US law; and (v) is 'plain vanilla' (as described in detail in the rule and which generally excludes instruments with exotic features that could 'create complexity' in an orderly resolution of covered BHCs, such as structured notes or convertible notes).

**Anti-negative interest rate**

Unlike Europe and Japan, negative interest rates do not exist in the US debt capital market. However, debt securities offered in the United States with a floating interest rate could potentially carry a negative interest rate, because the interest rates on these securities are often calculated based on London Interbank Offered Rate (LIBOR). To ease the perception that the interest rate on these securities could fall below zero, some recent debt offerings have included a provision that explicitly limits the interest rate floor to zero.

**20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?**

Both public and private offerings are typically underwritten by a syndicate of banks, with the formal commitment of the banks being reflected in the underwriting agreement.

The syndicate is formed and led by one or more lead underwriters, which manage the offering process and provide the marketing and pricing advice to the issuer. Most investment banks have a master agreement among underwriters (MAAU) in place to govern the relationship among the lead underwriter(s) and the syndicate members. Underwritten offerings are nearly always on a firm commitment basis (ie, the underwriters take the full risk of the offering by committing to purchase from the issuer all the securities being offered to the public). The underwriters are compensated by purchasing the debt securities from the issuer at a discount to the offering price to investors.

**21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?**

Underwriters and their activities are regulated by FINRA. FINRA makes and enforces its rules by imposing sanctions – fines, restitution, disgorgement and, in egregious cases, suspension – on member firms and their employees. In a public offering, FINRA's primary focus is on regulating excessive and unfair compensation and conflicts of interest. FINRA also requires notice filings in certain private offerings, generally where the investors are natural persons.

**22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?**

In the United States, the issuer normally creates global certificates at DTC, so that investors can hold interests in them and trade in book-entry form. Settlement usually takes place three to five business days after the pricing date for an offering. The securities typically are delivered against payment of the net proceeds, making timely execution of the wire transfer a key component for a successful closing.

**23 How are public debt securities typically held and traded after an offering?**

Debt securities in the United States are almost always held in a registered form, because debt securities held in bearer form are subject to adverse US tax consequences.

Global certificates are commonly used for publicly offered debt securities, through which the investors indirectly hold interests in book-entry form through DTC. Most investors in turn hold the securities through brokers and dealers that participate in the DTC system.

**24 Describe how issuers manage their outstanding debt securities.**

Issuers frequently engage in transactions geared toward managing outstanding liabilities. Common techniques include:

- exchange offers, in which new debt securities are offered in exchange for outstanding debt securities;
- cash redemption, if permitted under the terms of the securities;
- open-market or privately negotiated offers to repurchase outstanding securities;
- public tender offers to repurchase outstanding securities; and
- consent solicitations to amend the terms of outstanding securities.

Section 3(a)(9) of the Securities Act provides an exemption from SEC registration for offers to exchange securities of the same issuer for new securities, subject to certain conditions.

Transactions involving a tender offer (including exchange offers) for debt securities require compliance with the Exchange Act's tender offer rules. Most notably, Regulation 14E requires that the tender offer be kept open for at least 20 business days from the commencement and 10 business days from any notice of change to certain terms of the tender offer, although under certain circumstances, the SEC allows a shortened five business day tender offer for non-convertible debt securities. Unlike equity tender offers (including tender offers for convertible bonds), for cash tender offers for debt securities, there is no SEC filing requirement or specific form requirement for the offering document.

**25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?**

If the issuer sells debt securities in a public offering, it will become subject to the reporting requirements under the Exchange Act. Ongoing reporting obligations under the Exchange Act require filing of annual reports, quarterly reports (for US issuers) and current reports. The annual report is the most comprehensive filing. Among other items, it includes audited financial statements, MD&A, a business overview, risk factors, and a discussion of management and compensation. Quarterly reports are shorter quarterly updates that include, among other things, quarterly financial statements and related MD&A.

Finally, current reports require that the issuers disclose certain material events when they occur.

**26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?**

There are a number of sources of liability under the US federal securities laws, which generally focus on the material accuracy and completeness of disclosure when offering securities, whether debt or equity. Some of the key provisions are described below.

In the case of public offerings, section 11 of the Securities Act creates potential liability for the issuer, the directors and officers who sign the registration statement, the auditor and any underwriters of the securities for any material misstatements or omissions in the registration statement and related prospectus. The issuer is strictly liable under section 11, while others have the benefit of a due diligence defence, which generally protects them from liability if they can demonstrate that, after reasonable investigation, they had reasonable grounds to believe, and did believe, in the accuracy of the challenged disclosure.

In a public offering, section 12(a)(2) of the Securities Act imposes liability on any person who offers or sells a security by means of offering material or an oral communication that contains a material misstatement or omission. Similar to section 11, liability may be avoided under section 12(a)(2) if a defendant can show that it did not know, and with the exercise of reasonable care could not have known, of the untruth or omission.

Issuers and others may also face liability under section 10(b) of the Exchange Act and Rule 10b-5 thereunder in connection with purchases and sales of securities, whether publicly or privately offered. It is more difficult to recover under these provisions than under sections 11 or 12(a)(2) of the Securities Act, among other things, because it is necessary to prove that the defendant acted recklessly or wilfully. Unlike section 11 or section 12(a)(2) liability, Rule 10b-5 applies not only to documents filed with the SEC, but also to any information released to the public by the issuer.

**27 What types of remedies are available to the investors in debt securities?**

Investors may be able to obtain rescission of their purchase or monetary damages, depending on the circumstances.

**28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?**

The SEC may impose civil fines and penalties, including barring violators from the securities industry. The US Department of Justice may pursue criminal enforcement in connection with fraudulent activity, resulting in fines and imprisonment, among other things. FINRA may impose fines, restitution, disgorgement and, in egregious cases, suspension on member firms and their employees for violation of its rules.

**29 What are the main tax issues for issuers and bondholders?**

US taxable investors in debt securities are taxable on interest income and gain on sale, which is typically treated as capital gain and which is eligible for preferential rates for a non-corporate investor that holds the security for more than one year. Investors in debt that is issued with original issue discount (OID) in excess of a de minimis amount must accrue the OID over the life of the debt, on a constant-yield basis. Secondary market investors may be required to treat a portion of the gain on a debt security as ordinary income, if they acquired the security at a discount to its issue price (or, in the case of a security issued with OID, at a discount to its adjusted issue price). Investors may be required to accrue phantom income if they invest in indexed securities or securities with other types of contingencies, and to treat gain as ordinary rather than capital. There are no US transfer taxes on the purchase, sale or other transactions in debt instruments. Punitive tax rules may apply if US investors invest in debt securities in bearer form.

Non-US investors are generally exempt from US withholding tax on interest payments on debt securities issued by US issuers if the investor is not related to the issuer and provides standard US tax forms or other acceptable information to a withholding agent. Under current law, capital gains of non-US investors are generally not subject to US taxation. Under the Foreign Account Tax Compliance Act rules, commonly known as FATCA, some non-US investors may be required to provide information about their owners in order to avoid US withholding tax on payments on, or, starting in 2019, the proceeds of sale from, US securities.

Generally, the issuance of debt securities is not a significant tax event for the issuer. Payments of interest are generally deductible and repayment of principal at maturity does not have any material tax consequences. Issuers also generally may deduct OID. Issuers may recognise income from a number of liability management transactions, including tender offers or redemption at a discount; exchange offers; and amendments to the payment terms or maturity of a debt instrument. US tax rules limit the ability to 'reopen' an existing series of debt securities by issuing additional securities with the same terms and maturity, particularly where the new securities would be issued with a greater discount than the original securities.

Investors in convertible bonds of US issuers are treated as deriving deemed income if there is a conversion rate adjustment on the bond. That income is subject to US withholding tax if the convertible bond is held by a non-US investor, including a fund organised outside the United States. Structured notes, other debt instruments that are not principal-protected and perpetual or hybrid debt securities may not qualify as debt for US tax purposes, in which case different rules would apply. In the case of a US issuer, an important question will usually be whether the instrument is characterised as equity for US tax purposes, in which case the issuer would not be entitled to deductions and the payment of interest to non-US investors would be subject to US withholding tax. In some cases, structured notes issued on or after 1 January 2017 that have payments linked to US equities will be subject to US withholding tax on actual or deemed dividend-equivalent amounts if they are held by a non-US investor.

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