Debt Capital Markets

In 19 jurisdictions worldwide

Contributing editors
David Lopez, Adam E Fleisher and Daseul Kim

2015

GETTING THE DEAL THROUGH

Debt Capital Markets 2015

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Published by
Law Business Research Ltd
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London, W11 1QQ, UK
Tel: +44 20 3708 4199
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First published 2014
Second edition
ISSN 2055-5059

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Debt Capital Markets 2015

Second edition

Getting the Deal Through is delighted to publish the second edition of *Debt Capital Markets*, which is available in print, as an e-book, via the GTDT iPad app, 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 19 jurisdictions featured. Our coverage this year includes new chapters on Croatia and Hong Kong.

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 David Lopez, Adam E Fleisher and Daseul Kim of Cleary Gottlieb Steen & Hamilton LLP, the contributing editors, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
April 2015

Global Overview

David Lopez, Adam E Fleisher and Daseul Kim

Cleary Gottlieb Steen & Hamilton LLP

2014 can be characterised as a year of continued global imbalances. In the United States, buoyed by stronger momentum in the growth and labour markets, the Federal Reserve announced that it will conclude its quantitative easing programme. Meanwhile, in Europe, sluggish growth and concerns of deflation culminated in the European Central Bank's announcement that it will embark on its own bond-buying programme. Growth in emerging markets has also diverged significantly in 2014, as exogenous geopolitical events and lower commodity prices had disparate effects across different economies. Overall, according to the World Bank's Global Economic Prospects, 2014 was a year of strengthened growth, albeit at a lower than expected pace.

This trend of positive yet divergent economic growth is expected to continue in 2015. The International Monetary Fund (IMF) projects a global growth of 3.5 per cent for 2015, but raises concerns that growth divergence will pose significant challenges to the global economy. In addition, the IMF cautions that declining commodity prices, fluctuating currency rates and an increasing discrepancy in interest rates and risk spreads across markets are key factors that are likely to shape the economic outlook for 2015–2016. For global capital markets, the World Bank projects tightening global financing conditions in 2015, which poses a significant risk that market participants will continue to monitor throughout the year.

Generally, 2014 was a very strong year for debt capital markets, bolstered by low interest rates throughout the year. As base rates are anticipated to increase as markets experience stronger economic growth, corporate issuers have been taking advantage of the opportunity to lock in attractive rates for the long term. On the demand side, investors have expressed a stronger appetite for risk, evidenced by lower credit spreads across currencies and asset classes.

The US investment-grade corporate debt market was particularly strong, and totalled a record high US$1.1 trillion during the full year, an increase of 9 per cent compared with 2013, according to Thomson Reuters. Medtronic's issuance of US$17 billion to finance its acquisition of Covidien was the largest deal of the year, and was tied for the second largest offering amount on record, after Verizon's issuance of US$49 billion in 2013. After the Medtronic issuance, the largest deals in this category for 2014 were the US$12 billion issuance by Apple in April, the US$10 billion issuance by Oracle in June and the US$9 billion issuance by Petrobas in March. Alibaba's US$8 billion bond issuance in November was also a notable transaction, as it surpassed Intel's issuance in 2005 to become the largest debut corporate debt issuance on record.

Asset backed securities offerings in the United States were also strong, as annual volume totalled US$312 billion, the highest since 2007 and an increase of 15 per cent compared with 2013. Thompson Reuters reports that overall annual issuances of debt in the United States have slightly decreased, largely due to the 6 per cent decrease of high-yield corporate debt issuances, but noted that 2014 was still a strong year for high-yield, with the third largest annual volume on record. Bolstered by the US$11 billion Numericable Group SA issuance in April (of which US$8 billion was denominated in US dollars), the largest high-yield financing to date, US$107 billion was raised in the second quarter of 2014, which is the largest quarterly volume on record for high-yield corporate issuances in the United States. The high-yield market in 2014 was also marked by the high percentage of 'high-yield lite' bonds, which are high-yield bonds with investment-grade covenant package. Moody's Covenant Quality Index, which measures bond covenant quality by the level of protection provided to the investors, reported a record low quality score in November 2014 partly due to the high percentage of 'high-yield lite' issuances.

Across the Atlantic, the European debt capital market had a robust year in 2014, as volume has increased in nearly all categories, partly due to the fact that acquisition-related offerings have more than doubled compared with the previous year. It appears that record low interest rates and an increasing appetite for riskier but higher return investments have continued to motivate significant activity in European high-yield markets, which reached a record high of US$158 billion.

In 2014, there has also been a growing trend of US companies crossing the Atlantic to raise funds in euros. As monetary policies of the Federal Reserve and the European Central Bank are expected to diverge significantly in the near future, the discrepancy in borrowing costs has been increasing. According to data published by Bank of America Merrill Lynch at the end of 2014, the average yield investors demand to hold investment-grade corporate bonds in euros is 2.11 percentage points less than comparable dollar-denominated bonds, the largest difference since data started to be compiled in 2004. US borrowers are increasingly seeking to capitalise on this difference, as they have raised US$83 billion in euros this year, which is the highest since 2007 and 45 per cent higher than in 2013, according to data compiled by Bloomberg. Apple, Verizon and Albemarle were the major players in this arena for 2014, while many other US borrowers are expected to follow in 2015.

Debt capital markets in 2015 have started positively, albeit at a slower pace than in 2014. High-yield issuances led the way in January, especially in Europe where high-yield bond issuances have more than doubled the amount sold in the same period in 2014. There was a flurry of large investment-grade issuances in the US market in the first couple of weeks of February, such as the US$11 billion bond sale by Microsoft and the US$7 billion sale by Apple. These deals seem to be driven by the issuer's desire to refinance and lock-in low interest rates before the anticipated rate increase by the Federal Reserve. Major acquisition-financing deals have also been significant, for example, the recent US$8 billion bond offering by Merck in connection with its acquisition of Cubist Pharmaceuticals. In addition, in March 2015, Actavis sold US$21 billion of bonds – the second largest corporate bond offering on record – to partially fund its acquisition of Allergan. Other big deals loom in the M&A pipeline. According to Dealogic, global M&A volume for January totalled US$287 billion, representing an increase of 53 per cent on the same 2014 period and the highest January volume since 2008. If strong M&A activity and favourable financing conditions in Europe continue, 2015 is well poised to be yet another solid year for the debt capital markets. However, it remains to be seen whether these positive effects might be dampened by the anticipated rate hike by the Federal Reserve and the continuing economic struggles in certain regions of the eurozone.

Argentina

Hugo Bruzone, José Bazán and Andrés Chester

Bruchou, Fernández Madero & Lombardi

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

Typical debt securities offerings include notes, short-term notes (which, together with notes, are 'private notes') and public notes (which, together with private notes, are 'debt securities'). Private notes are issued by private issuers (mainly corporations, although other private entities (private issuers) may also issue such debt securities), and public notes are issued by public entities such as provinces and municipalities (public issuers).

At present, all of these offerings are active. In October and November 2014, the Argentine market issued notes for U$444 million and US$267 million, respectively, and a total amount of US$2,679.47 million in the period January–November 2014, as indicated by the Instituto Argentino de Mercado de Capitales in its website www.iamc.sba.com.ar. Please note that this information only corresponds to public offerings of debt securities (see question 10). In this regard, please bear in mind that:

- given the beneficial tax treatment applicable to public offerings of debt securities vis-à-vis offerings that do not qualify as public offerings (as detailed below in 'Tax treatment'), the former is much more active than the latter; and
- there is no public information for offerings that do not qualify as 'public offerings'.

Tax treatment

The tables below summarise the tax treatment applicable to the debt securities under Argentine tax laws. Please note that since certain taxes are imposed at the level of the Argentine provinces and the City of Buenos Aires, we have only included details of the applicable tax treatment in the latter, although each jurisdiction should be checked to determine the applicable tax treatment.

Private notes (which qualify as public offerings)			
	Resident individuals	**Resident companies**	**Foreign residents**
Income tax	Interest: exempt Capital gains derived from sale: exempt	Interest: taxed (35 per cent). Capital gains derived from sale: taxed (35 per cent)	Interest: exempt Capital gains derived from sale: exempt
VAT	Exempt	Exempt	Exempt
Minimum presumed income tax (MPIT)	Not applicable	Taxed if taxable assets' value exceed 200,000 pesos (1 per cent). Private notes shall be included in the tax base. For Argentine financial entities, MPIT applies on a reduced tax base (20 per cent of the aggregate taxable assets)	Not applicable

Private notes (which qualify as public offerings)			
	Resident individuals	**Resident companies**	**Foreign residents**
Personal assets tax	Taxed if taxable assets exceed 305,000 pesos (rate may range between 0.5 per cent and 1.25 per cent)	The credit shall be added to assess the tax base	Individuals: taxed (1.25 per cent). Companies: exempt.
Tax on debits and credits on Argentine bank accounts	Taxed (0.6 per cent on each debit or credit in Argentine bank accounts)	Taxed (0.6 per cent on each debit or credit in Argentine bank accounts)	Taxed (0.6 per cent on each debit or credit in Argentine bank accounts)
Gross turnover tax (City of Buenos Aires)	Interest: exempt. Disposition: exempt	Interest: taxed[1] Disposition: taxed[2]	Not applicable
Stamp tax (City of Buenos Aires)	Exempt	Exempt	Exempt

[1] The Tax Code of the City of Buenos Aires states that this exemption would applicable to the extent the income tax exemption applies. The local tax authorities would be construing that the gross turnover tax exemption would not apply to Argentine companies.

[2] The Tax Code of the City of Buenos Aires states that this exemption would applicable to the extent the income tax exemption applies. The local tax authorities would be construing that the gross turnover tax exemption would not apply to Argentine companies.

Private notes (which do not qualify as public offerings)			
	Resident individuals	**Resident companies**	**Foreign residents**
Income tax	Interest: Taxed (rate may range from 9 per cent to 35 per cent). Capital gains derived from sale: Taxed (15 per cent)	Interest: taxed (35 per cent). Capital gains derived from sale: taxed (35 per cent)	Interest: taxed (15.05 per cent if the debtor is an Argentine financial entity or if the creditor is a financial entity located in certain jurisdictions and complies with certain parameters; 35 per cent; lower treaty rate). Capital gains derived from sale: taxed (15 per cent)[1]

Private notes (which do not qualify as public offerings)			
	Resident individuals	**Resident companies**	**Foreign residents**
VAT	Interest: taxed (21 per cent). Disposition: exempt	Interest: taxed (10.5 per cent if the creditor is an Argentine financial entity; or 21 per cent). Disposition: exempt	Interest: taxed (10.5 per cent if the creditor is a foreign financial entity that complies with certain parameters; or 21 per cent). Disposition: exempt
Minimum presumed income tax (MPIT)	Not applicable	Taxed if taxable assets' value exceeds 200,000 pesos (1 per cent). Private notes shall be included in tax base. For Argentine financial entities, MPIT applies on a reduced tax base (20 per cent of the aggregate taxable assets)	Not applicable
Personal assets tax	Personal assets tax Taxed if taxable assets exceed 305,000 pesos (rate may range between 0.5 per cent and 1.25 per cent)	The credit shall be added to assess the tax base	Individuals: taxed (1.25 per cent). Companies located in non-cooperative jurisdictions for tax transparency purposes: taxed Companies not located in tax havens: not applicable
Tax on debits and credits on Argentine bank accounts	Taxed (0.6 per cent on each debit or credit in Argentine bank accounts)	Taxed (0.6 per cent on each debit or credit in Argentine bank accounts)	Taxed (0.6 per cent on each debit or credit in Argentine bank accounts)
Gross turnover tax (City of Buenos Aires)	Interest: taxed. Disposition: taxed if the activity is conducted on a regular basis	Interest: taxed. Disposition: taxed	Not applicable
Stamp tax (City of Buenos Aires)	Exempt	Exempt	Exempt

[1] The effective tax rate would be of 13.5 per cent over the gross price or 15 per cent over the net income (sale price less acquisition cost).

Public notes			
	Resident individuals	**Resident companies**	**Foreign residents**
Income tax	Interest: exempt. Capital gains derived from sale: exempt	Interest: taxed (35 per cent). Capital gains derived from sale: taxed (35 per cent)	Interest: exempt. Capital gains derived from sale: exempt
VAT	Exempt	Exempt	Exempt

Public notes			
	Resident individuals	**Resident companies**	**Foreign residents**
Minimum presumed income tax (MPIT)	Not applicable	Taxed if taxable assets' value exceed 200,000 pesos (1 per cent). Public securities shall be included in tax base. For Argentine financial entities, MPIT applies on a reduced tax base (20 per cent of the aggregate taxable assets)	Not applicable
Personal assets tax	Exempt	Not applicable	Exempt
Tax on debits and credits on Argentine bank accounts	Taxed (0.6 per cent on each debit or credit in Argentine bank accounts)	Taxed (0.6 per cent on each debit or credit in Argentine bank accounts)	Taxed (0.6 per cent on each debit or credit in Argentine bank accounts)
Gross turnover tax (City of Buenos Aires)	Interest: exempt. Disposition: exempt	Interest: exempt. Disposition: exempt	Not applicable
Stamp tax (City of Buenos Aires)	Exempt	Exempt	Exempt

2 Describe the general regime for debt securities offerings.

Law No. 26,831 (Capital Markets Law), passed by the Argentine Congress on 2012, modified the public offering regime set forth by Law No. 17,811, as amended. The Capital Markets Law governs the public trading of securities in Argentina. Moreover, Law No. 23,576 (as amended) is the main regulatory framework applicable to private notes.

The Argentine Securities Exchange Commission (CNV) regulates markets dealing with the public offering of securities in Argentina. Issuances of private notes are subject to the CNV's prior approval and, after such issuances, the CNV's control. On 9 September 2013, the CNV issued a new set of regulations supplementing the Capital Markets Law (the CNV Rules).

Debt securities may be traded in a stock exchange or in an over-the-counter market. The main stock exchange markets are those located in the cities of Buenos Aires and Rosario. Most debt securities are traded in the Buenos Aires Stock Exchange (BASE).

From a regulatory viewpoint, the debt securities market is divided into a private market and a public market. This division is based on the concept of public offering (see question 10).

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.

Regulations in Argentina require that private issuers are registered in the public offering regime. Public issuers are not required to enter into such regime to issue public notes.

Registration in the public offering regime

Briefly, the registration of a private issuer in the public offering regime requires the filing with the CNV of a registration request letter signed by the private issuer's legal representative or attorney in-fact.

Below is a summary of the information and documentation required by the CNV for registration of a private issuer in the public offering regime. Please note that this summary does not intend to be a complete list of the information and documentation required by the CNV for such purposes.

General overview

Identification of the company:
- form of organisation;
- main activities and lines of business;
- registered office, registered corporate office, administrative office and place where the private issuer's corporate and accounting records will be kept; and
- telephone number, fax number and e-mail address.

Corporate information should also be included, such as details of registration of the private issuer's by-laws, as amended, as well as any amendment thereof pending registration with the Public Registry of Commerce (or any other appropriate control authority).

Ownership:
- number of shareholders and partners;
- names and addresses of shareholders holding over 5 per cent of the capital stock including, where applicable, their form of organisation and nationality;
- a list of the private issuer's directors and members of the supervisory committee;
- description of capital stock and assets, including a list of final beneficiaries;
- capital stock structure (subscribed, paid-in capital, classes of shares, etc); and
- description of the rights and privileges granted by shares.

Irrevocable contributions on account of future subscriptions:
- details of contributors, indicating the amount contributed by each of them in constant currency, relationship with the private issuer (shareholder, supplier, director, etc) and, for contributors other than shareholders, address and nationality; and
- features of the contributions, specifying any adjustment clauses, capitalisation terms, dates of corporate resolutions granting the required approval, and compliance with other requirements as agreed.

Additional information:
- description of the private issuer;
- fiscal year closing date; and
- business group: parent companies, subsidiaries and related companies in which there is significant influence on their decisions. Name, address, main activities and lines of business, equity interest, voting percentage and, for parent companies, major shareholders. The information regarding the relationship with the private issuer should include both direct interests and those held through third-party natural or legal persons.

Business, economic and financial overview
Private issuers must file their financial statements for the past three fiscal years (or all financial statements from the date of their organisation, if it is less than three years). These financial statements shall be prepared not later than five months prior to the filing of the registration request letter, except for comparative information, where filing is optional.

Additional documentation
The documentation should also include:
- a copy of the resolution of the corporate body resolving that the Private Issuer shall file a registration statement or, as the case may be, resolving the issuance, and the terms and conditions thereof;
- a copy of the private issuer's effective by-laws, indicating, where applicable, any amendments pending registration;
- private issuers must provide an opinion by an independent auditor that states that it is an existing concern and that its administrative organisation enables it to reasonably comply with the disclosure requirements inherent to the public offering of securities;
- individual details of each director, member of the supervisory committee and senior manager of the private issuer (forms are provided in the CNV Rules); and
- prospectus of the issuance.

Prior to obtaining the final approval for carrying out a public offering, the private issuer must obtain appropriate approvals for uploading information under the CNV's electronic information system.

Registration request letter for private notes
The registration request letter requesting authorisation to issue private notes shall be filed together with:
- the shareholders' meeting minutes and, if applicable, the board of directors' meeting minutes, which decide the issuance;
- the prospectus prepared in accordance with the corresponding chapter in the CNV Rules;
- the documents that evidence the issuance of special guarantees for the debt issuance;
- a description of the use of proceeds;
- an underwriting agreement, if applicable;
- an indenture (only for international issuances) pursuant to section 13 of Law No. 23,576, as amended;
- evidence of risk ratings awarded, if applicable;
- evidence – through the opinion of an independent auditor – of compliance with section 37 of Law No. 23,576, as amended; and
- evidence of publication of the notice of issuance referred to in section 10 of Law No. 23,576, as amended by Law No. 23,962, in the official gazette of the appropriate jurisdiction.

Procedure for individual authorisation or programme authorisation
Private issuers may either apply for authorisation by the CNV for:
- an individual issuance; or
- one or more issuances under a programme (in which the CNV authorises the private issuer to issue private notes for up to a certain outstanding amount, in which the issuer does not require an authorisation by CNV's board of directors for each issuance within such outstanding amount).

Companies applying for authorisation to issue a programme shall submit the documentation and information detailed in the previous item.

In addition, private issuers shall submit:
- an independent auditor's report, including an opinion stating, within the scope of its liability, whether the information supplied is consistent with that existing in the corporate books and other accounting records of the private issuer, including a statement on the reasonability of the data supplied;
- a lawyer's report, including an opinion, on whether:
  - the information filed complies with the CNV Rules;
  - the debt securities grant its holders the right to enforce them through executory processes in accordance with applicable laws;
  - the application meets the requirements of Law No. 23,576, as amended; and
- evidence of the risk rating awarded to the private notes, if applicable.

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

Public offerings of private notes in Argentina require the filing and publication of a prospectus and the approval of the offering and the prospectus by the CNV.

Prospectus and supplemental prospectus
Together with the registration request letter (see question 3), private issuers must file a copy of the prospectus. Prospectuses must correspond to individual issuances or to programmes, while supplemental prospectuses usually correspond to issuances under a programme.

The prospectus must include:
- information on directors, senior management, advisors and members of the private issuer's supervisory committee;
- information on the terms and conditions of the offer;
- financial information regarding the private issuer (including the private issuer's financial statements for the most recent three fiscal years, as well as its most recent quarterly financial statement);
- risk factors;
- description of the private issuer's background and business as well as the private issuer's and its subsidiaries' structure and organisation;
- highlights on operational and financial prospects of the private issuer for the most recent three fiscal years;
- information on controlling shareholders and operations with related parties; and
- information on the distribution and placement of the shares.

The filing and publication of a new prospectus shall be required if, during the time elapsed from the previous filing, the financial statements for a new fiscal year have been approved.

Private issuers must file a supplemental prospectus upon each issuance of successive partial series, or upon each issuance or re-issuance of a series or class under a programme. The supplemental prospectus must contain:

- a description of the terms and conditions of the relevant issuance;
- the price, and updated accounting, economic and financial information; and
- any other relevant information, fact or event subsequent to the approval of the last prospectus or supplemental prospectus, as the case may be.

Issuance of partial successive series or classes, issuances or reissuances

Additional documentation

Within five business days following the underwriting of each class or series, private issuers must file with the CNV the same documentation set forth above for previous issuances, which includes:

- a copy of the board of directors' meeting minutes deciding the issuance of the series or class and the relevant re-issuance, as well as the terms and conditions thereof, which shall in all events state the mechanisms contemplated for the placement of such issuance;
- statement of use of proceeds;
- a copy of the underwriting agreement, if applicable;
- the supplemental prospectus for the issuance. In the event that such supplemental prospectus contains accounting, economic, financial or information other than that contained in the last prospectus or supplemental prospectus, it shall be submitted for approval by the CNV in the manner indicated herein, prior to the placement; and
- if the relevant risk-rating agencies shall have changed the rating awarded to the issue, the company shall submit a report from such agency with the new rating awarded.

Public offerings of public notes in Argentina do not require the filing and publication of a prospectus nor approval of the CNV. Please note, however, that public offerings of public notes are usually carried out by publishing a prospectus, which contains:

- a thorough description of the public issuer's economic and financial information; and
- the terms and conditions of the public notes.

Offerings of debt securities that do not qualify as public offerings in Argentina do not require the filing and publication of a prospectus nor any approval by the CNV. Any offering that is not deemed a public offering is not regulated by the Capital Markets Law nor the CNV Rules.

5 Describe the drafting process for the offering document.

Issuers of offerings that do not qualify as public offerings are not required to draft offering documentation. Public offerings of public notes do not require the filing and publication of a prospectus nor approval of the CNV, although these offerings are usually carried out by publishing a prospectus.

Private issuers do not have legal thresholds to help determine whether to make certain disclosures or not. Private issuers and underwriters usually work on the drafting of the offering documentation jointly, together with their legal counsel and auditors, based on business due diligence meetings and documental due diligence carried out by each party's representatives and counsel. Thresholds used for determining levels of disclosure are usually agreed upon by the parties (together with their legal counsel and auditors) based on the private issuer's assets and the level of risk certain contingencies pose to such assets.

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 and supplemental prospectus govern the terms and conditions of debt securities, and these documents are published in a newsletter issued by the stock market in which such securities are listed, and in the CNV's electronic information system.

Local issuances of debt securities do not utilise a trustee, and therefore no indenture is executed. Indentures executed by and between issuers and trustees for issuances of debt securities in the international capital markets are not available for third parties.

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

Offering documentation of private issuers requires prior approval by the CNV. Private issuers must file with the CNV a draft of the prospectus or supplemental prospectus. Once the CNV has approved these documents, the private issuer must:

- sign the prospectus or supplemental prospectus by a legal representative or authorised person, in final and summarised versions;
- publish the prospectus or supplemental prospectus in the CNV's electronic information system; and
- publish the prospectus or supplemental prospectus in the markets in which the private notes will be listed (in most cases, the BASE daily newsletter).

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 private notes are subject to review and approval by the CNV. Private issuers who are registered in the public offering regime will usually take approximately 12 weeks for the CNV to approve an issuance. Private issuers who are not registered in the public offering regime will usually take approximately 14 weeks for the CNV to approve their entering into such regime and the issuance.

Public offerings of public notes are, in most cases, subject to authorisation by the Ministry of Economy and Public Finance. The time frame for such approval is not set out in the applicable regulations, although it may be obtained within a four-week time frame.

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

Regarding private issuers, we are not aware of any precedents in which regulators have refused authorisation to make public offerings of securities. In principle, the CNV could refuse to grant authorisations on the basis of the administrative principles of 'merit, time and convenience'. Further, although the Argentine Central Bank could refuse to authorise the entering into the public offering regime of certain financial entities under its supervision, we are not aware of any precedents in which it has refused to do so.

Regarding public issuers, we are only aware of certain precedents in which the Ministry of Economy and Public Finance has, in practice, delayed granting the corresponding authorisation to issue public notes.

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

Under Argentine law, the legal definition of 'public offering' is broad and includes any invitation made to the general public or specific groups of people by means of personal contracts, the media or any kind of publicity or advertising techniques for the distribution of information, in order to enter into any kind of transaction in securities. Public offerings can only be carried out with the prior approval of the CNV, which is also in charge of investigations and sanctions for breaches of the Capital Markets Law and the CNV Rules. Since there is no definition of 'private offering', nor specific safe harbours from 'public offerings', any general advertising or solicitation made in Argentina is considered a public offering, and therefore requires prior approval by the CNV. The concept of 'private offering' is understood as any offer that is not deemed a 'public offering'. Please note that there are no exemptions or safe harbours from registration available for public offerings. Any offering that is deemed to be a public offering in the terms of the CNV Rules shall be registered before the CNV.

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

As explained above, offerings of debt securities that do not qualify as public offerings in Argentina do not require the filing and publication of a prospectus nor any approval by the CNV, and these offerings are not regulated by the Capital Markets Law nor the CNV Rules.

Public offerings include the following documents:

- issuer's corporate approvals (shareholders' meeting minutes or board of directors' meeting minutes);
- dealer manager corporate approvals;
- engagement letter;

- prospectus or supplemental prospectus;
- dealer manager agreement or underwriting agreement;
- approvals by the CNV; and
- approvals by the stock exchange or over-the-counter market.

The CNV will usually take approximately 12 weeks to approve an issuance by a private issuer who is registered in the public offering regime. Once approved by the CNV, placement of private notes, in a public offering, consists of:

- a public notice period of at least four stock market business days in Argentina from the date; and
- an auction process of at least one stock exchange business day in Argentina.

Offerings that do not qualify as public offerings usually take less time than public offerings.

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?

Underwriters or initial purchasers in public offerings usually require law firm opinions. Auditors' comfort letters are required, mostly for 144A transactions.

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

CNV fees

Private issuers must pay the CNV an authorisation fee, as detailed below:

- for the issuance of the private notes on an 'individual' issuance, the fee is equal to 0.03 per cent of the issued amount; and
- for the issuance of notes under a programme:
  - for the aggregate amount of the programme, the fee shall be equal to 0.01 per cent of the authorised amount and shall be paid prior to obtaining the final authorisation; and
  - for the placement of a series or class under a programme, the fee shall be equal to 0.02 per cent of the amount actually placed. The fee shall be paid together with the filing of the additional documentation required by the CNV rules, within five business days from placement of each series or class.

Listing fees

The fees vary for each stock exchange or over-the-counter market. The BASE charges different rates for different ranges of issuances (although this has not been updated since 1998, and the highest category is for issuances that are higher than 17,653,950 pesos. Mercado Abierto Electrónico SA (the main over-the-counter market, the MAE) charges a 21,000 pesos flat rate.

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, such as equity-linked notes, exchangeable or convertible debt, or other derivative products, is practically non-existent in Argentina.

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 particular rules apply to offerings of special debt securities.

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

All debt securities are classed as debt; only financial institutions regulated by the Argentine Central Bank are authorised to issue certain private notes (that comply with specific criteria) and classify them as Tier 1 or Tier 2 capital.

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 on privately-offered debt securities. No public offering may be made without prior authorisation by the CNV in order to transfer such 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?

Where a foreign private issuer decides to list its debt securities in Argentina, the CNV Rules provide for two different types of registration:

- by means of a direct registration of the foreign company in Argentina; and
- by means of the creation and registration of a CEDEARs programme (Argentine securities with foreign securities as underlying asset).

For a foreign private issuer to be admitted in the public offering regime in Argentina and to list its private notes in a local market, an authorisation request must be filed with the CNV and the relevant market as part of the public offering and listing requests. The authorisation request must be submitted by a letter signed by the legal representative of the private issuer, accompanied by certain information and documentation. CNV Rules set forth that foreign private issuers must establish a permanent representation pursuant to section 118 of the Argentine Companies Law No. 19,550. In addition, private issuers must include the following documentation in their application, among others:

- a copy of the corporate resolution that decided filing for public offering admission, or as the case may be, the resolution that decided the issuance of the relevant securities and its terms and conditions;
- an independent accountant report;
- any other information or documentation required by the CNV and by the relevant market; and
- audited financial statements for the past three fiscal years.

To issue CEDEARs, foreign private issuers must:

- be authorised to make a public offering and list its securities in a market supervised by a governmental regulatory entity with which the CNV has signed a memorandum of understanding for reciprocal assistance; or
- be authorised to make public offering and list its securities in a market or stock exchange of Mercosur and Chile.

If either or both of the above points are not applicable, the securities of the company must be authorised as underlying asset by the CNV.

There are no special rules for domestic issuers offering debt securities only outside Argentina. However, the tax benefits described in question 1 would not be applicable.

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

The CNV has signed a memorandum of understanding for reciprocal assistance with the following jurisdictions: Bolivia, Brazil, Chile, China, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, France, Germany, India, Israel, Italy, Malaysia, Mexico, Panama, Paraguay, Peru, Poland, Portugal, Quebec, South Africa, Spain, Taipei, Thailand, the United Kingdom and the United States.

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

Most public offerings of debt securities in the local market are carried out without executing an underwriting agreement. Issuances of private notes, which are subject to the CNV Rules, are usually placed by dealer managers, who execute dealer manager agreements with the private issuer. Issuances of public notes are also placed by dealer managers who execute dealer manager agreements (in these cases, with the public issuer), although since public notes are not subject to the CNV Rules, these work in a similar way to underwriting agreements (ie, the dealer manager has already placed the issuance by the time the dealer manager agreement is executed).

Underwriting or purchase agreements are drafted according to international standards. Many underwriting or purchase agreements are subject to New York law, and it is also common to find a syndicate of underwriters or purchasers with one leading managing underwriter or purchaser.

Dealer manager agreements and underwriting or purchase agreements for private notes are filed with the CNV.

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

No specific regulations apply to underwriting agreements. The CNV Rules establish that private issuers must disclose underwriting agreements in the prospectus or supplemental prospectus for the offering.

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

Pursuant to the CNV Rules, private notes must be placed in Argentina by means of a bidding process or open auction, through an authorised system (eg, SIOPEL, which is owned and operated by the MAE).

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

Debt securities that have been publicly offered are typically held in book entry form. Also, debt securities that have been publicly offered are evidenced in a global note in fully registered form. After such offering, debt securities are traded in an authorised market (eg, BASE or MAE).

24 Describe how issuers manage their outstanding debt securities.

Typically, issuers manage their outstanding debt securities by means of open market purchases, consent solicitations, tender and exchange offers. Open market purchases are more frequent than other transactions.

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

Companies in the public offering regime must file the following documents with the CNV:

- on an annual basis, the board of directors' annual report, financial statements and a report based on the information contained in the consolidated financial statements. If required, the Supervisory Committee's annual report and external auditor's report on the financial statements;
- on a quarterly basis, a financial statements for interim periods, a report based on the information contained in the consolidated financial statements. If required, an external auditor's report on the financial statements for interim periods;
- material information. Any of the members of the board of directors or member of the Supervisory Committee of a public corporation shall report to the CNV any material event or condition that may materially affect any placement of the private issuer's shares or the trading in term of price or volume of such shares. The CNV regulations indicated a non-exhaustive list of material events, such as change of corporate purpose, resignation or removal of a director or member of the Supervisory Committee, change in the issuers' equity ownership structure involving the formation of controlling groups, any shareholders' syndication agreement, the decision on any extraordinary investment or any financial or trading transaction material thought to have an impact on the condition of the issuer; and
- other information. The CNV Rules also provide specific reporting systems for specific cases.

Identical information must be filed with the relevant markets.

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 Capital Markets Law, private issuers, jointly with the members of their board of directors and, with regard to those matters within their review, the Supervisory Committee and the signatories of the prospectus or supplemental prospectus, are responsible for all the information included in the prospectus or supplemental prospectus. Placement agents and brokers who participate in the offering as organisers or underwriters in public offerings must diligently review the information contained in the prospectus or supplemental prospectus. Experts or third parties who issued an opinion in connection with certain sections of the prospectus or supplemental prospectus will only be responsible for the information contained in such sections.

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

The basic remedy for liabilities arising from debt securities transactions is damages.

Buyers or purchasers of private notes in a public offering have legitimacy to sue, and must prove to that end the existence of an error or omission in an essential aspect of the information contained in the corresponding prospectus or supplemental prospectus. In this regard, essential information means any information that an ordinary investor could consider relevant for purposes of deciding to invest in the private notes offered. Upon determination of the essential error or omission, unless the private issuer or the offeror proves the contrary, a causal link is presumed between the error or omission and the damage generated, except that the defendant (private issuer or offeror) proves that the investor was aware of such error or omission.

The markets are required to have a permanent arbitration tribunal. Entities that have securities listed and brokers that are members of such markets must submit to the jurisdiction of these arbitration tribunals. Investors who have a dispute with listed entities or authorised brokers may chose to file a claim before the relevant arbitration of the market or before the competent judicial court.

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

The CNV may impose the following sanctions:

- a warning, which may be accompanied by the obligation to publish the corresponding punitive resolution in the Argentine official gazette, and in up to two national widespread newspapers at the sanctioned person's own expense;
- a fine, in an amount that ranges from five thousand to twenty million pesos, which could be raised to five times the profit gained or loss caused as a result of illegal actions, whichever is the greater;
- disqualification of up to five years to act as director, manager, administrator, trustee, member of the Supervisory Committee, expert accountant or external auditor or manager of authorised markets and of registered agents or of any other entity under control of the CNV;
- suspension of up to two years to make any kind of public offerings or, where appropriate, of the authority to act in the public offering environment; and
- prohibition to make public offerings of securities or, where appropriate, banning on the authority to act in the public offering environment of securities.

Penalties applied by the CNV may be appealed and are subject to judicial review.

The Capital Markets Law empowers the CNV to appoint an overseer who can veto decisions of the boards of directors of companies that are registered in the public offering regime. The overseer's decisions may only be appealed before the president of the CNV and to remove the boards of directors of public companies for periods of up to 180 days when, in the opinion of the CNV, the rights of minority shareholders or holders of company securities are being violated. This decision of the CNV is only appealable before the Minister of Economy and Public Finance.

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

As regards tax issues applicable to debt securities under Argentine regulations, see the tables under question 1.

In this regard, in order to obtain the tax exemption granted to securities placed by means of a public offering, certain requirements should be complied with. The main points stated under current regulations are:

- public offering efforts should be properly carried out (in accordance

with Law No. 26,831) and documentation of such efforts should be kept by the issuer. Securities will not be considered tax exempt only by virtue of the authorisation by the CNV of their public offering;
- public offering efforts may be made not only in Argentina but also outside Argentina;
- offerings may be made to the general public or to a specified group of investors (such as qualified institutional buyers);
- the offering may be underwritten pursuant to an underwriting agreement;
- the refinancing or repayment of bridge loans is an accepted use of proceeds from the offering; and
- it is not required that the notes be listed on a stock exchange or admitted to trading on a market in order to comply with the public offering requirement (although it is stated that such listing or admission to trading might constitute additional evidence of the public offering efforts).

Other taxes

In addition, at provincial level, the province of Buenos Aires and the province of Entre Ríos (each a taxing province) impose a gift tax (GT) with the following main characteristics.

In general terms, individuals and legal entities are subject to GT on any gratuitously transferred property (eg, inheritance, legacy, donation, etc). Taxpayers domiciled in a taxing province are subject to GT with respect to all their assets. Taxpayers domiciled outside a taxing province are subject to GT only in respect of the gratuitous transfer of assets located in a taxing province.

Securities will be deemed located in a taxing province when, among other things:
- securities are issued by entities domiciled in the province;
- securities are held by individuals domiciled in the taxing province at the moment the transfer takes place, even if the securities were issued by entities domiciled outside the taxing province; or
- securities are issued by entities domiciled in a non-taxing jurisdiction and the issuer has assets located in a taxing province and securities are held by individuals domiciled outside a taxing province at the moment of the transfer (in this case, GT would apply on the proportion of the issuers' assets located in the taxing province).

Transfers of assets are exempted from GT when the aggregate amount of assets involved is equal to or lower than 60,000 Argentine pesos (excluding exemptions, deductions, etc). This threshold is increased up to 250,000 Argentine pesos when the assets are transferred to parents, children or spouses. Hence, gratuitous transfers of securities might be subject to GT if the transfer exceeds 60,000 Argentine pesos (or 250,000 Argentine pesos when the said assets were transferred to parents, children or spouses).

In general terms, GT rates are assessed between 4 per cent and 21.925 per cent depending on the amounts involved and the existing degree of kinship.

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

Australia has a very active debt capital market, which has developed for the issuance of a wide variety of short-term and long-term debt securities to wholesale and retail investors. The market includes domestic issuance from government and semi-government issuers, financial institutions and domestic corporates and issuance into Australia by foreign governments (and their agencies and instrumentalities) and corporates in the 'Kangaroo' bond markets. Debt securities issued include short-term certificates of deposit, medium-term notes and asset-backed instruments.

2 Describe the general regime for debt securities offerings.

In Australia, the issuance of debt securities is regulated by the Corporations Act 2001 (Cth). The Corporations Act, as it applies to the issuance of debt securities, does not have extra-territorial application and only applies to the offers of debt securities in Australia.

Generally, under the fundraising provisions of Chapter 6D of the Corporations Act, a person must not offer or invite applications for the issue of bonds, notes, debentures or other debt securities in Australia unless a prospectus or other offering document that complies with the Corporations Act has been lodged with the Australian Securities and Investments Commission (ASIC), or an exempt category of issuance applies. This requirement applies to offers of debt securities received in Australia regardless of where any resulting issue, sale or transfer occurs.

The primary focus of Chapter 6D is on the issue of debt securities, however, there are limited circumstances where the offer for sale of debt securities also requires disclosure.

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.

Unless an exempt category of offer is available, a public offer of debt securities will require the issue of a disclosure document that meets the requirements of the Corporations Act. There are a number of different types of disclosure documents, but typically a prospectus is prepared for the issuance of debt securities.

The offering document must be lodged with ASIC and the consent of every director for that lodgment is required.

A person must not accept an application for, or issue or transfer, non-quoted debt securities offered under a disclosure document until seven days after lodgment of the disclosure document with ASIC (referred to as the exposure period). This period may be extended by ASIC to 14 days.

During this period, ASIC may review the disclosure for any defect that ASIC may require to be amended, however no formal approval is required from ASIC.

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

See question 3. The Corporations Act includes both a general disclosure requirement and specific requirements for the content of disclosure documents.

In respect of a prospectus, the Corporations Act provides that the prospectus must contain all the information that investors and their professional advisers would reasonably require to make an informed assessment of the rights and liabilities attaching to an offer and the assets, liabilities, financial position and performance, and profit and loss position of the issuer.

A prospectus:

- must contain the above information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the prospectus; and
- need only contain information if a 'person whose knowledge is relevant' actually knows the information or in the circumstances ought reasonably to have obtained the information by making inquiries.

For this purpose, a person's knowledge is relevant if they are the person offering the securities, a director or proposed director of the body offering the securities, a person named in the prospectus as an underwriter of the issue or sale of the securities, a person named in the prospectus as a financial services licensee involved in the issue or sale of the securities, a person named in the prospectus with their consent as having made a statement that is included in the prospectus or on which a statement in the prospectus is based and a person named in the prospectus with their consent as having performed a particular professional or advisory function.

The Corporations Act also requires a prospectus to contain certain specific information, including the terms and conditions of the offer, the details of the interests and fees of certain people involved in the offer, lodgment details and consents. The information in the prospectus must be worded and presented in a clear, concise and effective manner.

In addition to the above, the Corporations Act provides for a short form prospectus where a previous document has been lodged with ASIC. In this case, a prospectus may simply refer to that document. The short form prospectus must contain certain references to the other document in order to enable investors to assess whether to view the other document, which must be provided free of charge to any person who requests it.

ASIC has published a class order, which permits a listed body to offer 'vanilla bonds' under a simplified prospectus and a two-part prospectus, comprising a base prospectus that may be used for different offers and a second-part prospectus that relates to a particular offer of vanilla bonds. A base prospectus (with an appropriate second-part prospectus for individual offers) can be used for up to two years. Each two-part prospectus (being the base prospectus and the second-part prospectus read together) will have an expiry date as the lesser of two years from the date of the base prospectus and 13 months from the date of the second-part prospectus.

The class order sets outs the specific requirements for vanilla bonds, which include that the bond must:

- be denominated in Australian dollars, pay interest at a fixed or floating rate and provide for periodic interest payments on specified dates and repay principal and pay all accrued and unpaid interest at maturity;
- be for a fixed term of no more than 10 years;
- only be redeemable prior to maturity in limited circumstances (including at the option of the holder, following an issuer's offer to buy back, as a result of changes in law having an impact on the tax treatment of the bonds, following a change in control or to clean up de minimums holdings);
- not be subordinated to other unsecured debt or convertible into other securities; and
- have a minimum subscription amount of at least A$50 million.

The class order also requires a range of disclosures to be included in the prospectus including key financial disclosures (such as a gearing ratio, interest cover ratio and working capital ratio, as determined by the class order and updated on a half-yearly and annual basis), key features and terms and conditions of the bonds and of the offer including general tax implications, ranking (and a description of prior ranking debt), voting rights, material provisions relating to the bonds in the trust deed and the existence and implications for holders of security and guarantees in respect of the bonds.

5 Describe the drafting process for the offering document.

The offering document for a public offer of debt securities will typically be drafted by the issuer's counsel. Dealers, underwriters and their counsel will also provide input into the context and scope of the offering document. Issuers generally undertake a detailed verification and due diligence process involving management and external advisers in respect of the content of the offering document in order to minimise potential liability arising from a misstatement in, or omission from, an offering document.

Where a disclosure document is required for the offering of securities, the Corporations Act provides that a person must not offer securities under a disclosure document if there is:

- a misleading or deceptive statement in the disclosure document, an accompanying application or any document that contains the offer;
- an omission from the disclosure document of material required to be included under the Corporations Act; or
- a new circumstance that has arisen since the disclosure document was lodged with ASIC and would have been required to be included in the disclosure document.

In addition, a person is taken to have made a misleading statement about a future event if they do not have reasonable grounds for making the statement.

If an offer of debt securities under a disclosure document contravenes the above requirements and a person suffers loss or damage, that loss can be recovered from a number of persons, including the issuer, each director of the issuer, a person named in the disclosure document as a director and an underwriter to the issue named in the disclosure document. These persons are liable for a contravention even if the person did not commit, and was not involved in, the contravention.

There are a range of defences included in the Corporations Act in respect of liability for disclosure documents, including a specific due diligence defence.

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 issued in Australia typically take the form of uncertificated registered instruments.

The debt obligation of the issuer is constituted in a deed poll for the benefit of investors or under a trust deed where a trustee holds this obligation for the benefit of investors. The terms and conditions are also included in that document or are incorporated by reference from the relevant offering document. Under the Corporations Act, the issuer of certain offers of debentures that require disclosure must enter into a trust deed.

Where a deed poll is used, this document is only executed by the issuer. Where a trust deed is used, the issuer and the trustee will be a party.

The terms and conditions of the debt securities will typically provide how and when the documents are available for inspection by investors. In addition, where the Corporations Act requires the use of a trust deed, the issuer must provide a copy of the trust deed to investors on request.

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

See question 3.

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 3. If ASIC requires amendments to an offering document, it would ordinarily advise the issuer during the exposure period. If additional time is needed to ensure all changes are reflected, the exposure period may be extended by up to seven days. ASIC can also issue stop orders to ensure that no offers are made under the disclosure document while issues are being addressed.

If ASIC imposes a stop order, an offer or issuance of securities cannot proceed while that order is in force. If delay could be prejudicial to the public interest, an interim stop order may be made at short notice, without consulting the issuer and without a hearing for a period of up to 21 days, during which time a hearing must be held by an ASIC delegate. An interim stop order lasts until ASIC lifts the order (before or after the hearing), or places a final stop order on the disclosure document after the hearing.

The possibility of a review by ASIC during the exposure period generally means that most issuers defer the distribution of a prospectus until the exposure period has elapsed.

There are significant restrictions on advertising, or even referring to an offer, before the prospectus is lodged with ASIC. Once the prospectus is lodged, marketing to retail investors can begin. In smaller offers, this is generally limited to brokers calling private clients and very limited marketing. For larger offers, marketing activities may include television and newspaper advertisements.

However, if a draft prospectus is circulated to an investor who falls within an exempt category of persons to whom offers can be made (see question 2), this restriction would not be contravened.

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

ASIC may issue a stop order if it believes:

- the offering document contains a misleading or deceptive statement;
- the offering document contains an omission of information required to be provided under the legislation;
- there is a breach of the 'clear, concise and effective' requirements in relation to disclosure documents; or
- there is a misleading or deceptive statement in, or an omission from, any advertising or promotional material.

In making its assessment, ASIC will take into account factors such as whether a new circumstance has arisen since the disclosure document was lodged and whether any industry standards or codes have been adhered to.

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

Chapter 6D2 of the Corporations Act includes a number of categories of offering for issue that do not require disclosure to investors under the Corporations Act. A frequently-used category of offer is where the debt securities are issued for a consideration of a least A$500,000 per offer (disregarding amounts lent by an offeror and its associates).

Other categories of offer that do not require the preparation of a prospectus or offering document include offers to specific classes of sophisticated and professional investors that meet the requirements of the Corporations Act.

Additionally:

- the issuance of debentures by an Australian authorised deposit-taking institution and a government also do not require disclosure; and
- certain types of debt instrument that are excluded from the scope of debentures as defined by the Corporations Act are not securities for the purposes of Chapter 6D.

Where an issuer publishes an information memorandum or other offering document that is not required to comply with specific disclosure requirements of the Corporations Act nor be lodged with ASIC, then there are no mandatory disclosure requirements. However, issuers generally incorporate by reference their most recently published financial statements, other documents filed with a government regulator or provided to a stock exchange for public release.

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

The timeline and transaction documents can vary significantly depending on the complexity of the offering and whether or not the issuer is already listed.

The timeline for a public issue of debt securities in a retail offering is broadly similar to the process for issuing equity securities, and generally takes approximately four to six months, which includes conducting due diligence and preparing the prospectus, drafting and negotiating the related offer documents such as the terms of the securities, the trust deed and underwriting agreement and marketing the offer. The issuer will need to issue a prospectus to enable retail investors to participate in the offer, which must comply with applicable Corporations Act disclosure requirements as described in question 2.

There is also a requirement to appoint a debenture trustee and comply with regular reporting obligations. Additional considerations will apply for issuers listed on the Australian Securities Exchange (ASX) for securities that take the form of a preference share or are convertible into equity, including shareholder approval for the issue of ordinary shares if the conversion could result in a breach of the issuer's 15 per cent placement capacity under the ASX Listing Rules.

For wholesale issues to sophisticated and professional investors only, the offer process is simpler, typically conducted via a bookbuild, and does not require the issue of a prospectus. Wholesale market debt securities generally do not trade on ASX. ASX has created a separate 'bulletin board', where wholesale debt securities are listed and trades are conducted in the same manner as over-the-counter transactions.

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 specifics of the issue in question determine the scope of the closing documents to be provided, but generally speaking the following documents are common to public and private offerings of debt securities:

- legal opinions from the issuer's counsel covering capacity, authority and due execution and other customary opinions;
- copies of all constitutional documents, authorisations and powers of attorney. These can be provided as attachments to verification certificates;
- the current offering document and executed copies of all transaction documents; and
- if the issue is rated, ratings letters in respect of the ratings assigned to the programme or debt securities.

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

For listing on the Australian Stock Exchange:

- retail issues – fees are levied on the value of quoted debt securities (ie, the market capitalisation of the entity's debt securities for which they are seeking quotation) and not on the aggregate face value of debt securities. There is an initial listing fee and an annual fee. For example, for A$100–500 million, the initial fees are approximately $125,000 plus 0.03385 per cent on the excess over A$100 million, with annual fees of approximately A$38,000 plus 0.003612 per cent on the excess over A$100 million; and
- wholesale issues – there is an initial fee of A$10,000 and an annual or additional series fee of A$5,000.

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 an active market for the issuance of retail regulatory capital instruments (tier two debt) by Australian banks (which include conversion mechanics as per current prudential requirements), and to a lesser extent for the issuance of retail corporate subordinated debt.

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

Such special debt securities are complex and highly-structured products that have both debt-like and equity-like characteristics. Their form varies widely.

The way in which the security is structured will often be affected largely by commercial factors rather than legal ones, in particular:

- for regulated financial entities, capital adequacy requirements imposed by the Australian Prudential Regulation Authority;
- for entities with a credit rating, the level of equity credit that ratings agencies will attribute to the security (ie, the extent to which the ratings agency will treat the hybrid as equity rather than debt);
- the accounting treatment of the hybrid;
- the taxation treatment for both the issuer, including whether distributions are deductible or whether they can be franked, and the investor;
- the issuer's financial position and its existing capital structure and debt facilities; and
- investor demand for particular types of products (which in turn may reflect prevailing economic and market conditions).

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

Division 974 of the Income Tax Assessment Act 1997 dictates whether an interest is a debt or equity interest for tax purposes.

A security is classified as debt if, in broad terms, the security is a financing arrangement and the issuing entity has an effectively non-contingent obligation to return to the investor an amount at least equal to the invested amount, subject to certain rules that apply to loans with terms of more than 10 years.

Equity interests include:

- a share in the company;
- an interest that carries a right to a variable or fixed return from the company if either the return itself or the amount of the return is:
  - contingent on the economic performance of the company or connected entity; or
  - at the discretion of the company or a connected entity; or
- an option over an equity interest in the company or connected entity.

For all interests other than the first, the security must be a financing arrangement to be classified as equity.

An interest that could be characterised as both a debt interest and equity interest will be treated as a debt interest for tax purposes. For example, a redeemable preference share may be a debt interest because of a mandatory redemption feature in its terms.

Certain rules can also apply to aggregate related financing arrangements so that they are treated, together, as an equity or debt interest.

Returns on debt interests may be deductible but are not frankable, while returns on equity may be frankable but not deductible. Further, different rates of withholding apply to debt and equity interests if paid to a non-resident.

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?

Chapter 6D of the Corporations Act includes limited circumstances where the offer for sale of debt securities also requires disclosure, being:

- the sale of unquoted securities by a person who controls the issuer where the securities are not offered 'in the ordinary course of trading on a relevant securities market'; and
- sales that amount to an indirect issue of securities.

In these circumstances, the exempt categories of offer set out in question 10 above would be applicable.

For wholesale offers of debt securities, typically the conditions of the debt securities will require that transfers may only be made if:

- the offer or invitation giving rise to the transfer is for an aggregate consideration of at least A$500,000 (disregarding moneys lent by the transferor or its associates to the transferee) or does not otherwise require disclosure to investors under Parts 6D2 or 7.9 of the Corporations Act; and
- the transfer is not to a retail client for the purposes of the Corporations Act.

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?

'Kangaroo' issues are issues of debt securities in Australia by foreign companies, governments and their agencies and international organisations. Foreign issuers are not subject to direct government controls in issuing debt securities in Australia. Typically, the terms and conditions of the debt securities are governed by Australian law and the securities are in registered form.

Depending on the nature of the issuer and the programme of issuance, a foreign company may be carrying on business in Australia and be required to apply for registration as a foreign company. However, as long as an issuer is not involved in other business in Australia, a one-off issue of debt securities should not, of itself, constitute carrying on business in Australia. While multiple issuances under a debt programme are also unlikely to constitute carrying on a business, the facts should be considered in each case.

An issuer may also need to register with the Australian Prudential Regulation Authority as a financial corporation if the issuer's sole and principal activities in Australia are both the borrowing and lending of money. However, where the activity is the issue of debt securities and any funds raised are used for the issuer's own purposes outside Australia, registration should not be required.

There are also specific laws that regulate the conducting of banking business in Australia and, except in limited circumstances, the use of the words 'bank' and 'banking' (unless the relevant entity is licensed as an Australian bank). Certain exemptions apply in respect of the offering of debt securities and would need to be assessed at the time of issuance.

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

Double tax treaties with some of Australia's trading partners (including the United States, United Kingdom and Japan) contain exemptions from interest withholding tax (that would otherwise need to be withheld by an Australian borrower (at a rate of 10 per cent)), where the interest is derived by a financial institution resident in the country with which Australia has the relevant treaty, or by the government or central bank of that country.

A 'financial institution' generally means a bank or other enterprise substantially deriving its profits from raising debt finance in the finance markets or from taking deposits at interest and using those funds in carrying on the business of providing finance.

The precise requirements will vary from treaty to treaty, but generally the treaties require borrowers and lender to be unaffiliated. There are also rules that deny treaty exemptions for back-to-back loans (or similar arrangements).

If a relevant treaty exemption is not available, where the public offer exemption provided by section 128F of the Income Tax Assessment Act 1936 (Cth) applies, interest paid on certain securities (provided they are not equity for tax purposes) may be eligible for a complete exemption from interest withholding tax. Such exemption is typically sought on widely-offered debentures and requires that the issuer offer the securities by way of certain prescribed means. These means include, subject to satisfying certain other requirements, offering debentures to at least 10 entities carrying on a business of providing finance, or investing or dealing in securities, in the course of operating in financial markets (and where none of those offerees was known, or suspected, by Australian borrowers to be an associate of any other offeree). Further, integrity rules apply to deny the concession in circumstances where there is a knowledge or suspicion that certain associates of the borrower are or will be participating in the relevant debentures.

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

Underwritten offers are exceptionally rare in the Australian jurisdiction.

In respect of the wholesale issue of debt securities, dealers are generally appointed to a programme on an uncommitted basis.

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

In general terms, an Australian financial services licence is required if a dealer or underwriter carries on business in Australia of providing financial services, which includes dealing in debt securities. Dealing in debt securities includes issuing, acquiring, applying for and underwriting debt securities as well as arranging for a person to do any of these things.

The nature of the role to be undertaken by a dealer or underwriter should be assessed on any particular transaction, as ASIC has provided limited class order relief for foreign dealers and underwriters.

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

Debt securities are issued in registered form only in the Australian jurisdiction. Settlement is conducted by Austraclear (the local clearing system) on the delivery-versus-payment system.

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

See question 3. It is likely that debt securities issued in the Australian domestic market will be lodged with, and traded through, the domestic clearing system operated by Austraclear Limited.

Where registered debt securities are lodged in the Austraclear system, Austraclear Limited is the registered holder of the debt securities. Interests in the debt securities are then traded electronically within the Austraclear system in accordance with the rules and regulations of that system.

It is also possible for transactions relating to interests in debt securities to be carried out through other clearing and settlement systems, such as those operated by Euroclear Bank (Euroclear) and Clearstream Banking (Clearstream, Luxembourg). In these circumstances, entitlements in respect of holdings of interests in debt securities in the foreign clearing system would be held in the Austraclear System by a nominee for that clearing system.

24 Describe how issuers manage their outstanding debt securities.

An issuer may manage its debt securities by a range of measures including open market purchases, tenders and exchange offers. Typically, the terms and conditions of debt securities will provide that an issuer may at any time purchase debt securities in the open market or otherwise, and at any price.

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

The Corporations Act stipulates that listed disclosing entities are bound by disclosure requirements in market listing rules. In this regard, an entity with debt listed on the ASX is required to comply with certain obligations in relation to its debt securities under the ASX Listing Rules. The ongoing requirements for listed debt issuers include the following:

- compliance with continuous disclosure obligations in relation to quoted debt securities;
- providing ASX each year with a copy of the audited annual accounts;
- if the terms of issue of debt securities are changed, providing ASX with a copy of the updated terms; and
- complying with a standard timetable for interest payments. For instance, the standard requirement for books closing date (record date) is generally at the close of business eight calendar days before the interest payment date.

Depending on the terms of the debt securities, an issuer may be required to comply with all ASX Listing Rules or may only need to comply with the debt listing rules.

If the issuer is not an ASX listed entity, and the issuer is not a Chapter 2L trustee, there are no reporting obligations other than those imposed under the transaction documents. If the issuer is a trustee issuing the notes under Chapter 2L of the Corporations Act, there are statutory reporting requirements, including the provision of annual accounts.

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?

See question 5. Where an issuer publishes an information memorandum or other offering document that is not required to comply with specific disclosure requirements of the Corporations Act, and is, therefore, not subject to the liability regime described in question 5, the basic standard of liability in the case of a wholesale issue of debt securities is that the issuer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive.

The Corporations Act provides for proportionate liability for misleading and deceptive conduct. A person who suffers a loss or damage as a result of another person's false or misleading statements, inducement to deal, dishonest conduct or misleading and deceptive conduct may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.

Under section 12DA of the ASIC Act, a person must not engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

There are also a range of common law requirements and statutory provisions that may also impose civil and or criminal liability including, in respect of manipulating a market, spreading false or misleading information or making false or misleading representations.

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

Pursuant to the Corporations Act, a person who suffers loss or damage because of a misstatement in, or omission from, a disclosure document is entitled to recover the amount of the loss or damage from:

- the person making the offer of debt securities;
- each director of the body making the offer;
- a person named in the disclosure document with their consent as a proposed director of the body whose securities are being offered; or
- an underwriter to the issue or sale named in the disclosure document with their consent.

Damages are recoverable by any person who suffers loss or damage as a result of another person's false or misleading statements, inducement to deal, dishonest conduct or misleading and deceptive conduct. Any damages recoverable will be reduced to the extent that the claimant was responsible for any loss or damage suffered.

Similarly, a person who suffers loss or damage by conduct of another person that contravenes section 12DA of the ASIC Act may recover the amount of the loss or damage by action against that person or against any person involved in the contravention. Damages are to be reduced based on the claimant's share in the responsibility for the loss or damage.

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

See questions 8 and 9.

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

Bondholders who are not residents of Australia and are not lending through an Australian permanent establishment (offshore holders), are subject to a 10 per cent interest withholding tax (IWT) on any interest paid or credited to them.

While offshore holders may seek to obtain the benefit of a tax gross up in those circumstances, it is typical for issuers to structure a bond issuance so that it qualifies for the domestic law IWT exemption set out in section 128F of the Income Tax Assessment Act 1936 (the Public Offer Test). There are a number of methods available to issuers, with the most common being an offering of debentures to at least 10 persons (none of whom are associated with any other offeree in that group of 10), each of whom carries on a business of providing finance, or investing or dealing in securities in the ordinary course of operating in financial markets. A number of restrictions and conditions apply to the Public Offer Test, including a restriction, which, in broad terms, can deny the benefit of the IWT exemption where certain associates of the issuer (offshore associates) acquire bonds.

Customary treaty lender exemptions may provide IWT exemptions for certain offshore holders in certain treaty jurisdictions. However, the Public Offer Test is the preferred approach to obtaining an IWT exemption as, subject to certain exceptions (eg, where offshore associates become offshore holders), all future offshore holders obtain the benefit of the Public Offer Test IWT exemption.

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

Debt securities can take many different forms in Brazil, of which the most common are debentures and promissory notes, or commercial papers.

The main characteristics of debentures are:

- they can only be issued by Brazilian corporations and are not by limited partnerships;
- they entitle the owners to a credit against their issuers as a result of a loan contracted by them; and
- unlike equity securities, they have a fixed term (interest linked to floating rates, fixed rates, indexed to inflation or foreign exchange fluctuation) and the principal invested is repaid on a specific maturity date.

The main document of a debenture is its deed of issuance, in which all its terms and conditions are described. Moreover, it is possible for a debenture to be convertible into issuer shares. At present, debentures are the most used debt security in Brazil among companies seeking medium to long-term funding.

Promissory notes are another widely used debt instrument. They are credit instruments that may be issued by either corporations or limited partnerships seeking short-term financing. Promissory notes are called 'commercial papers' when they are subject to a public placement procedure, which is a type of offer commonly used in the local market. The regulation defines specific characteristics for commercial papers, such as their lifetime, which can vary according to the type of the issuer. Commercial papers issued by privately-held companies shall have a lifetime of between 30 and 180 days, while commercial papers issued by publicly held entities shall have a minimum term of 30 days and a maximum term of 360 days. It should be noted that the rules that regulate the public offering of promissory notes are currently under a public hearing submitted by the Brazilian Securities Commission (CVM). For more information about the public hearing and the amendments to the rules that may arise thereof, please refer to 'Update and trends'.

Further, the credit obtained from debentures and promissory notes may be enforced automatically in courts, without the need for the merits of existence procedure.

2 Describe the general regime for debt securities offerings.

Securities and their offerings are regulated primarily by the Brazilian Corporate Law (Law 6,404 of 15 December 1976), the Brazilian Capital Markets Law (Law 6,385 of 7 December 1976) and regulations issued by the CVM, particularly Regulation 400 of 29 December 2003 (Regulation 400) and Regulation 476 of 16 January 2009 (Regulation 476).

The characterisation of an offer as public or private is important to determine whether or not the registration with the CVM is required. According to the regulation, no public offering of securities may occur in Brazil without prior registration with the CVM, which has the competence to exempt registration in certain cases. It is important to notice that there are different types of public offerings: public offerings in the broad sense, regulated by Regulation 400 and restricted public offerings, controlled by Regulation 476. Private offerings are exempt from registration with the CVM.

Public offerings controlled by Regulation 400 can only be made by public companies registered with the CVM and require a prior registration with the CVM. As a general rule, public offerings regulated by Regulation 400 require a prospectus that must be drafted in accordance with the terms and conditions of the Regulation 400 and the Regulatory and Best Practices Code for Public Offerings of the Brazilian Financial and Capital Markets Association (ANBIMA and Regulatory Code, respectively). Additionally, offerings under Regulation 400 can be made to the general public through a variety of marketing methods, such as an advertisement in the broader news and business media, road-shows and one-on-one meetings, with the provision that any marketing material must be submitted for the CVM's approval.

Public offerings controlled by Regulation 476, on the other hand, can be made by companies that are not registered with the CVM (although communication of their characteristics is mandatory after the placement of the securities) and are exempted from prior registration with the CVM. It is worth noting that only certain securities may be offered pursuant to this regulation (including, but not limited, to debentures and promissory notes), provided that such offerings are made to a limited number of investors (up to 75 such investors may be approached in the selling efforts and no more than 50 investors may purchase securities). In addition, offerings under Regulation 476 may only be addressed to qualified investors (ie, investment funds, financial institutions, insurance companies, and investors that participate in the offering by purchasing securities worth more than 1 million reais). Please note that on 17 December 2014, the CVM issued Regulation 554, which will enter in force on 1 July 2015, modifying the concept of qualified investors. For more information about Regulation 554 and the new concept of qualified investors applicable as from 1 July 2015, see 'Update and trends'.

Although there is no legal definition of private placement under the CVM regulation, its concept can be understood by reference as any offer of securities that is not classified as a public offering pursuant to the Brazilian Capital Markets Law, Regulation 400 and Regulation 476. Private placements are exempted from registration with the CVM and are usually made severally and confidentially to a specific investor.

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.

Registering a public offering of debt or equity securities entails effort and expense. Pursuant to Regulation 400, public offerings of securities primarily require registration of the issuer as a public company with the CVM, as well as registration of the offering itself. Under Brazilian securities laws, the securities themselves are not subject to registration. Once a security is listed on a stock exchange or other qualified market, any holder may sell its securities on such markets, as long as no public distribution is made.

For an issuer to be registered with the CVM as a public company, it must submit an application for registration to the CVM in one of the two available classes of issuing corporations (A or B), accompanied by supporting documents. A class A registration authorises the trading of any company's security on regulated securities markets, while a class B registration authorises the trading of specific company's securities on regulated securities markets, provided that shares and share depositary receipts are expressly excluded.

The main supporting documents for public offerings include, but are not limited to, disclosure documents, a prospectus with the terms, conditions and risks factors of the offer and an annual report using the periodic reporting form applicable to public companies, similar to the 20-F form in the United States.

Regarding the applicable documents to debts offerings and equity offerings, there are not many differences, although documents used on debt offerings require less disclosure of information about the issuer than those used on equity offerings.

Offerings under Regulation 476 require no registration of the issuer or the offer itself with the CVM. However, the communication to the CVM of the offering´s characteristics is mandatory after such placement. The elaboration of disclosure material is not necessary, but can be done if it is of interest.

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

In public offerings under Regulation 400 of debt securities, a prospectus that meets content requirements laid out in detail by Regulation 400 and the Regulatory Code must be submitted for approval of the CVM by the offeror and the lead underwriter. It is important to note that restricted public offerings under Regulation 476 do not require a prospectus or any similar document.

Regulation 400 sets high standards of reliability by requiring 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'.

Additionally, the prospectus should also contain the main terms, conditions and risk factors of the offering, satisfactory information regarding the issuer's risk factors, business, litigation, management discussion and analysis and corporate and financial statements, which must be confirmed by the parties involved in the offering, such as auditors and counsels, and supported by back-up documents provided by the issuer.

5 Describe the drafting process for the offering document.

There is no standard process regarding the drafting of the offering documents. Usually, the issuers initiate the drafting process that will be further reviewed by the underwriters and the legal advisors. Afterwards, the parties shall decide which document each party is responsible for.

In addition, the offerings documents shall be drafted in accordance with the terms and conditions of Regulation 400 and the Regulatory Code. There are no legal thresholds to help determine what should be disclosed in the offering documents. Such information shall be settled between the parties.

In the case of registered offers, the CVM will be responsible for approving the offering documents prepared by the legal advisers, the issuer and the underwriters.

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 documents that govern the terms and conditions of the public offering of debt securities vary according to the type of security offered. For debentures, for example, the offering documents include, among others:

- a deed of issuance;
- a prospectus (for a regular public offering under Resolution 400);
- a board resolution or a shareholders' meeting approving the issuance; and
- an underwriting agreement.

The parties to the documents may also vary. On public offerings under Resolution 400, investors must receive a copy of the offering documents. The delivery can be made electronically and the prospectus should also be available through the website of the issuer, the underwritings and the CVM itself. The issuer and the lead underwriter may be liable for any material misstatement or omission in the offering documents.

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

Public offering documentation under Regulation 400 requires prior approval by the CVM and must provide the potential investors with all the necessary information that will enable them to evaluate the merits and risks of the proposed investment.

CVM regulations do not specifically prohibit underwriters from producing offering materials in addition to the prospectus. Such materials, including any roadshow presentation, must be consistent with the prospectus and must be filed with the CVM in order to preserve the documentary record.

In addition, marketing materials intended for broad dissemination must be approved by the CVM. Marketing materials must be consistent with the information contained in the prospectus and may only be used after the application for registration has been filed with the CVM and a preliminary prospectus has been made available to prospective investors. Marketing materials must include a statement referring the investors to the prospectus. An exception is available for investor education materials, which may be made available even prior to the submission of an application to the CVM.

The prospectus and marketing materials should be available on the websites of the issuer and the underwriters, and also in printed books distributed during roadshow presentations. In non-registered offers, there is no need of a prospectus and marketing materials, although, simple marketing material (without the prior consent of the CVM) may be distributed by underwriters to potential investors, without the need of the CVM's approval.

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 securities under Regulation 400 are subject to review and authorisation, primarily by the CVM. In 2008, Regulation 471 was issued to allow self-regulated entities, such as ANBIMA, to conduct an analysis of the simplified registration process for offerings of securities. The main condition for a simplified offering procedure to be filed with ANBIMA is that the issuer must be in compliance with its periodic reporting requirements. The basic outline of the registration process for a typical public offering regulated by Regulation 400 remains unchanged.

The review process usually takes eight to 10 weeks from initial filing to the granting of registration and six to eight weeks from initial filing to the granting of registration when submitted to the simplified offering procedure.

Issuers, selling holders and underwriters must treat any proposed offering as material and non-public information until an application for the registration of the offering is filed with the CVM. The use or disclosure of material or non-public information may constitute insider trading or a breach of fiduciary duties, depending on the circumstances, and may lead to civil, administrative or criminal penalties.

According to the CVM regulations, there is no restriction on the ability of the analysts who have an employment or contractual relationship with the underwriters or their affiliates, to issue research reports, provided that the underwriters and prospective underwriters submit to the CVM, and to their respective Brazilian accrediting entity, any research or other reports relating to the issuer or the offering that may be issued or distributed while the offering is ongoing. All parties involved in the proposed public offering must abstain from discussing or mentioning the proposed offering and the issuer in the broader news and business media until the completion of the public offering.

Additionally, issuers, selling holders and underwriters are barred from trading in securities of the issuer once they begin to prepare for a public offering. Exceptions are made in certain circumstances established by Regulation 400, including trades by order and on behalf of third parties. The CVM will monitor market activities under general mandates barring manipulative practices.

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

The CVM can deny the registration of an offering under Regulation 400, and also can take a position regarding the sufficiency and accuracy of any disclosure documents. In most cases, the CVM will demand that certain changes are made to the prospectus, reference form and other documents until it is satisfied that its concerns have been addressed.

In cases in which the issuers fail to meet the deadlines or repeatedly do not comply with the requirements associated with the registration of the public offering, the CVM has the prerogative to deny such registration. In extreme cases, the comments made by the CVM may be so onerous or critical that the offering can be impracticable for the parties and, therefore, cancelled.

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

Although there is no legal definition of private placement under the CVM Regulation, its concept can be understood by reference as any offer of securities that is not classified as a public offering pursuant to the Brazilian Capital Markets Law, Regulation 400 and Regulation 476. Over time, the CVM has provided guidance, on a case-by-case basis, on the kinds of offerings that fall outside registration and prospectus requirements. Specifically, a private placement is defined by the absence of general solicitation, as defined by applicable regulations, and previously identified offerees who are usually employees, shareholders or other affiliates of the issuer. As a practical matter, issuers and other parties will submit any offering that may trigger registration requirements to the CVM for confirmation that the proposed transaction does not constitute a public offering.

Although not strictly a private placement, Regulation 400 provides the possibility of exemption from registration and not having to observe certain prospectus requirements for specific offerings, upon prior solicitation to the CVM who will analyse on a case-by-case basis. Finally, there are no safe harbours regarding public offering registrations in Brazil.

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

The application for registration of a public offering under Regulation 400 must be jointly submitted to the CVM by the offeror (whether an issuer or a selling holder) and the lead underwriter and must be accompanied by supporting documents, including drafts of the offering documents and the transaction documents. A prospectus must meet content requirements laid out in detail by Regulation 400 and by the Regulatory Code.

Nearly all the qualified Brazilian investment banks have pledged to comply with the Regulatory Code and have agreed to sanctions in the event of its non-compliance. Accordingly, the underwriting agreement will typically require issuers to conform to the standards of the Regulatory Code.

Regulation 400 sets high standards of reliability by requiring a prospectus to contain 'complete, precise, truthful, clear, objective and necessary information' regarding the issuer and the offering, using non-technical and easily understood language.

Once the offeror has submitted an application for registration with the CVM, it may proceed to print a preliminary prospectus and initiate its bookbuilding activities and roadshow presentations. In practice, an offeror and the lead underwriter may prefer to wait to receive an indication from the CVM that no major issues are anticipated in relation to the proposed public offering. No sales may be completed until the CVM has granted registration for the public offering, certain statutory announcements are published in major newspapers, and a final prospectus is available. Upon granting of registration, the final prospectus must be made available on the websites of the issuer, the offeror and the underwriters.

The private offering process differs from the public offering process to the extent that there are no specific rules to be observed and no information requirements to be applied to a private placement of securities under CVM regulations. The CVM, however, recommends that the information to be provided to the investors for their investment decision should correspond to what is usually provided in a prospectus, including the reference form. Offerors and issuers may consider providing a disclosure document to prospective investors, if only to document the representations made at the time of the investment decision. Any offeror in a private placement will be liable for material misstatements or omissions under a general theory of liability for fraud. Moreover, no marketing methods can be used under a private placement of securities.

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?

There are a few closing documents required in public offerings of debt securities. The legal advisor hired to assist the underwriters or the issuer must give a legal opinion regarding the offer and its structure in which they declare that the offer was done in compliance with the Brazilian regulations. Independent auditors must provide a negative assurance letter to the underwriters and the potential investors establishing that the financial statements of the issuer that they reviewed are correct. Finally, if the issuer is a regulated entity in Brazil, a special authorisation of the regulated agency is required.

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

There are several fees for listing debt securities on the principal exchanges. The costs involved include:

- an underwriter's fee;
- taxes and other deductions of the exchanges, which depend on the total amount of the offering;
- the CVM's and the São Paulo Stock Exchange's (BM&FBOVESPA) registration fees;
- auditors' expenses
- legal advisers' and other advisers' expenses;
- marketing costs; and
- roadshow expenses.

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 (special derivative products) under private placements is very active in Brazil. However, such transactions are still based on bilateral negotiations. The most active derivative product in the current market is the certificate of structured finance.

It is important to notice that there is no regulation to public offerings of derivatives and, therefore, public offerings of such instruments may not be done. Thus, regulation and public offering of derivatives remain to be seen.

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 is no specific rule regarding offering of special debt securities and we are not aware of any relevant accounting implications of which the issuer of a special debt security should be informed.

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

Both types of securities (debt and equity) have typical characteristics. Equity securities are issued under an equity financing, while debt securities are issued in the context of a debt financing. In an equity financing, the company brings in investors who provide capital in exchange for a share of the ownership of the company. Equity securities usually have voting rights (in preferred shares, the voting right is contingent), and their cash flow rights and liquidation rights are residual, with a discretionary dividend (preferred shares can have a fixed or a discretionary dividend). Debt financing, on the other hand, involves a company borrowing money from investors without sharing its ownership. Debt securities usually have no voting rights, but have fixed and certain interest payment. The main implication for instruments categorised as equity and not debt from the offeror perspective is the accounting treatment. Debt securities are classified as instruments of liabilities in the issuer's balance sheet, while equity securities are classified as issuers' assets, according to the Brazilian accounting standards (Pronouncement 39 of the Brazilian Committee of Accounting Standards).

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, securities acquired in private placements may only be transferred in private transactions. However, if the same class of securities is traded on a stock exchange or other qualified market, any holder may sell its securities on the stock exchange or other market immediately.

There are no regulatory safe harbours that allow the investors to transfer privately-offered debt securities. Regions are free to establish the contractual arrangements regarding transfer restrictions.

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 special rules applicable to the offering of debt securities in Brazil by foreign issuers. As explained above, it is the characterisation of an offer as public or private and not the place of its issuance that determines whether an offering must be registered with the CVM or not.

Even though there are no special rules for domestic issuers offering debt securities only outside Brazil, international offerings trigger foreign investment and exchange control regulations enforced by the Brazilian Central Bank. Although requirements for the various kinds of offerings may differ, issuers will need to enable investors to register their investments with the Brazilian Central Bank in order to ensure the ability of the issuer to remit payments abroad, including any payments of interest, principal or other amounts due under the relevant securities.

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

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?

There are two typical underwriting arrangements for offerings of debt securities: best efforts or firm commitment. The best efforts regime consists of the obligation of the underwriters to make a fully-fledged attempt to sell as many securities as possible to the investors. The firm commitment regime, on the other hand, consists of the obligation of the underwriters to place all the securities offered or purchase themselves the ones that have not been placed. It is worth noting that there is no need for an underwriter in the context of a private placement.

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

No approval is required with respect to underwriting arrangements.

Financial institutions established in Brazil must be authorised and licensed by the Brazilian Central Bank, although the activity of underwriting itself is regulated by the CVM, which has the power to instigate disciplinary proceedings and impose sanctions regarding conduct that does not respect the regulation.

The lead underwriter in a public offering has primary responsibility for liaising with the CVM and must fulfil regulatory obligations in order to provide information to the CVM and to generally ensure that the offering is conducted in a manner that is fair and equitable to the investors. The lead underwriter also shoulders most of the exposure of the underwriters with respect to liability for material misstatements or omissions in the offering documents.

If a public offering is oversubscribed by more than 33 per cent of the offered securities, no securities may be placed with affiliates of the underwriters, the issuer or any other parties involved in the offering, except for the orders placed by non-institutional investors, provided that they comply with the recommendations of the CVM to mitigate the use of confidential information by investors to obtain improper advantage.

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

The key transaction execution issue in a public debt offering is the register of the securities, either for trading or solely for electronic custody and clearing at exchanges or over-the-counter markets, such as BM&FBOVESPA or CETIP SA Mercados Organizados (CETIP). Registration must observe procedures and time established by such entities to the securities to be admitted to trading. It is important to notice that, in some cases, a paying agent has to be engaged in order to carry out payments to the securities holders.

Public offerings may be settled by wire transfer of funds from the lead underwriter to the offeror. Most transactions are settled under ad hoc arrangements. In more complex public offerings, a significant number of intermediaries may participate in the distribution efforts, particularly if the offering has a retail tranche directed primarily at individuals.

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

Debt securities are held in different forms. Debentures are held in a book-entry form and usually electronically registered at exchanges or over-the-counter markets that also register transactions between investors.

On the other hand, commercial papers are held in a registered form in which certificates are printed. The investor endorses the certificate to CETIP, and transactions between investors are held electronically at exchanges or over-the-counter markets.

24 Describe how issuers manage their outstanding debt securities.

For managing their outstanding debt securities, issuers may either acquire own debt securities in the secondary market or propose changes to the material terms of the security agreement. In the second case, the terms and conditions set forth in each issuance must be observed. For instance, in order to change any aspects of debentures, issuers should convene a general holders' meeting respecting the applicable rules for call notice formalities, quorums and voting rights.

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

No reporting obligations will arise as a result of any private transactions or events outside the control of the issuer.

Offerings under Regulation 476 require communication of their characteristics after placement and the disclosure of the issuer's audited financial statements on the issuer's website, as well as any material fact that may have an impact on the investment decision of the holders of its securities.

Offerings under Regulation 400 do not generate reporting obligations, other than the ones that arrive as a result of registration as a public company. Brazilian corporate law mandates immediate disclosure of any material events involving a public company, including most corporate resolutions and shareholders' agreements. Public companies are also required to file annual and quarterly reports with the CVM, including annual audited and quarterly unaudited financial statements prepared in accordance with Brazilian accounting principles, which have been aligned with international financial reporting standards since 2011.

Pursuant to the CVM regulations, management, directors and members of the fiscal committee are required to disclose any investment in securities issued by the offeror and any transaction involving such securities within ten days of the end of the calendar month in which such transaction occurs.

It is also important to notice that under regulations applied to registered companies, the reporting company must file an updated reference form annually, except for Class A issuers who are also obliged to file it within seven days of any material event (in this case, any offering of debt securities).

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 bases of liability in securities transactions are set forth in Regulation 400, which establishes the liability of the issuer, the underwriters and their respective managers for material misstatements and omissions in the offering documents, regardless if it is a debt or equity securities offering. The issuer, the controlling sellers and the underwriters are fully liable for any material misstatements and omissions. The lead underwriter is primarily liable, among the underwriters, for any damage caused to investors as a result of material misstatements and omissions.

Issuers, sellers and underwriters may also suffer administrative sanctions. For more information about the administrative sanctions that can be imposed to the sellers and underwriters, see question 28.

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

There are two types of remedies available to the investors in debt securities: administrative and civil.

Liability for material misstatements and omissions must be determined by a court. Aggrieved investors must initiate legal action to seek damages for losses suffered as a result of a fraudulent public offering. Legal proceedings afford plaintiff investors and defendants a fair opportunity to produce evidence and build a compelling case, although a final resolution may take a significant period of time.

Also, investors often attempt to enhance their negotiating leverage with a recalcitrant issuer or underwriter by instigating a disciplinary

Update and trends

On 5 February 2015, the CVM submitted to a public hearing, a proposal for amendment and consolidation of the rules that regulate promissory notes. According to the CVM´s proposal, the main changes to the regulation are related to:

- the possibility of Brazilian limited liability companies and agribusiness cooperatives being able to issue promissory notes;
- the change of the minimum and maximum term of the promissory notes;
- the possibility of an automatic registration for certain offerings of promissory notes; and
- the exemption for issuers with a large exposure to the market from engaging an underwriter in a public offering of promissory notes.

The term to send suggestions and comments to the CVM in the context of the public hearing ends on 6 May 2015.

On 17 December 2014, the CVM issued Regulation 554, which modifies the concept of qualified investors, creates a category of professional investors and removes the minimum investment requirements from other rules issued by the CVM. According to Regulation 554, the following persons will be considered qualified investors:

- professional investors, as per the new concept described below;
- legal entities and individuals owning financial investments in an amount greater than 1 million reais;
- in relation to its own investments, individuals that have been approved in technical qualification examinations or have certifications approved by the CVM as requirements to be independent investment agents, portfolio administrators, securities analysts and consultants; and
- investment clubs, provided that their portfolios are managed by one or more investors that are qualified investors.

Moreover, Regulation 554 creates a category of professional investors, which will be comprised by the following:

- persons and entities that routinely act in the financial markets (ie, financial institutions and other institutions authorised to operate by the Central Bank of Brazil, insurance companies and savings companies, open and closed-ended pension entities, independent agents, portfolio administrators, securities analysts and consultants authorised by the CVM);
- investment funds;
- non-resident investors;
- investment clubs, provided that the portfolio is managed by a securities portfolio manager authorised by the CVM; and
- legal entities and individuals owning financial assets in an amount greater than 10 million reais.

In addition, Regulation 554 amended Regulation 476 to the extent that public distributions with restricted placement efforts shall be targeted solely at professional investors, while, negotiation in the secondary market will be allowed between qualified investors. Regulation 554 will enter into force on 1 July 2015.

proceeding at the CVM. In these proceedings, the CVM may encourage a settlement in lieu of a fine.

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

The CVM is empowered to initiate disciplinary proceedings and impose sanctions ranging from formal advertences to fines and permanent disqualification from public capital markets. The CVM enforces compliance with the Brazilian Corporate Law, the Brazilian Capital Markets Law and its own regulations. During the course of any offering, the CVM may also suspend the offering if it determines that the offering is being conducted in a manner inconsistent with the application, being fraudulent, violating its regulations or if it is illegal.

The CVM cannot impose indemnifications, which can only be granted by a court in Brazil after the determination of liability.

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

As a general rule, interest paid by a Brazilian source (Brazilian issuer) to a bondholder located abroad is subject to withholding income tax (WHT) in Brazil at a 15 per cent rate (or 25 per cent, where the bondholder is a resident of a country or jurisdiction deemed to qualify as a tax favourable jurisdiction (TFJ), and which is a country or location that does not impose income tax or where the maximum income tax rate is lower than 20 per cent or where the local legislation imposes restrictions on the disclosure of the shareholding composition, of the ownership of the investment or of the identity of the effective beneficiary of the income attributed to non-residents.

It should be noted that it is not uncommon for a Brazilian issuer to agree on grossing up the amount remitted, so that the latter receives the total amount of the income as if WHT was not levied. In those situations, the effective rate can reach a 17.6 per cent, or 33.33 per cent for beneficiaries that are resident of a TFJ.

Interest paid by the Brazilian issuer will be fully deductible for the purposes of Brazilian Corporate Income Taxes, which includes the Corporate Income Tax and the Social Contribution Tax on Net Profits (CIT), at the combined rate of 34 per cent.

As a general rule, Brazilian law does not confer any exemption related to bonds issuance abroad. There are certain beneficial tax treatments applicable to particular classes of securities issued by Brazilian resident legal entities in Brazil and regulated by the Brazilian law, such as the beneficial tax treatment applicable to investors in debentures issued to fund infrastructure projects in Brazil.

Another exception to the general rule can be found in 'Double Taxation Conventions' (DTC) entered into by Brazil with other states. Generally, a DTC entered into by Brazil provides that interest paid to the government or an agency (including a financial institution) wholly owned by that government of the other contracting state shall be exempt from income tax in Brazil.

The inbound (principal amount) and outbound (repayment of principal and payment of interests, as the case may be) flow of funds in connection with the bond issued or with the loan transaction will require foreign exchange transactions to be performed in order to convert the foreign currency into Brazilian reais and the other way around. Accordingly, such transactions are subject to tax on financial transactions levied upon currency exchange transactions (IOF/FX).

Inflow of funds raised by means of short-term foreign loan transactions is currently subject to IOF/FX at the rate of 6 per cent, while transactions with a longer term are subject to a zero per cent IOF/FX. In any case, the outflow of funds in connection to any of the structures is currently subject to the IOF/FX at the rate of zero per cent, regardless of the duration of the corresponding transactions.

Finally, it is important to bear in mind that IOF/FX rates may be reduced or increased up to 25 per cent at any time, with prospective effects, by the Ministry of Finance, without prior approval of the Congress.

A more common issuance structure during the past years considers the issuance of bonds through one wholly owned offshore subsidiary of the Brazilian entity (subsidiary), with the Brazilian entity acting as a guarantor of the transaction. Under this structure, the WHT is generally not applicable, given that the bond issuer does not reside in Brazil and the corresponding interest would be paid abroad. However, to the extent that the use of proceeds takes place in Brazil, the subsidiary and the Brazilian parent company would have to enter into some sort of intercompany contractual arrangement in order to make equivalent funds to those raised with the issuance of the bonds available in Brazil, such as an intragroup loan transaction. In this case, the subsidiary will be entitled to receive interest payments, to be agreed between the parties, calculated over the amount remitted in the loan transaction. As a general rule, interests paid under such transaction may be subject to WHT in accordance with the same rules discussed above. While there may be particular cases for which a WHT exemption may be available, as the subsidiary and the Brazilian parent company would qualify as related parties under Brazilian Law, interest deductibility will face certain limitations arising from Brazilian transfer pricing and thin capitalisation applicable rules.

In general, transfer pricing rules establish a minimum price for export transactions and a maximum price for importation of goods, services and rights, as well as for interest payments between the Brazilian entity and related parties resident abroad. As a consequence, deductibility of the interest expenses incurred by the Brazilian guarantor with the payments made to the subsidiary in connection with the loan is capped by applicable transfer pricing rules. Accordingly, as from January 2013, the interest expenses paid or credited to a related party are tax deductible upon the calculation of the CIT-taxable basis only when paid up to a maximum base rate (base rate) added by a spread to be determined in accordance with the market average by the Ministry of Finance, which is currently set as 3.5 per cent. In addition, Brazilian Law has established that such base rate will be the market rate of Brazilian sovereign bonds issued abroad, in Brazilian reais or in US dollars, when the transaction is denominated in such currencies. The base rate should be determined on a transaction-by-transaction basis, once Brazilian tax laws provide that the transfer pricing test should be made at the date on which the intercompany loan is entered.

Deductibility of interest expenses incurred in debt transactions entered into with related parties is also contingent on compliance with Brazilian thin capitalisation rules. Accordingly, a Brazilian resident borrower will have to review if there is any applicable restriction for deduction of interest payments for purposes of assessing its CIT-taxable basis – a general 2:1 debt-equity ratio should apply to those transactions. If the debt-equity ratio exceeds such threshold, the interest on the excess debt should not be deductible for Brazilian CIT purposes. Loans entered into with entities that are considered to be located in a TFJ or that are under a privileged tax regime, as defined by Brazilian tax legislation regardless of the qualification of that entity as a related party, are subject to a more restrictive thin capitalisation ratio of 30/100 debt-equity.

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

Canada has an active debt capital market, characterised by a wide range of offerings of convertible and non-convertible debt securities by both investment grade and sub-investment grade corporate issuers as well as by government issuers. Aggregate issuance activity in the Canadian bond market during 2014 was approximately C$200 billion, of which corporate issuance accounted for approximately C$90 billion.

2 Describe the general regime for debt securities offerings.

Canada has a federal system of government, with power divided between Canada's federal government and its 10 provincial and three territorial governments. Securities legislation is principally governed at the provincial and territorial level and each of the provinces and territories has its own securities legislation. The rules in many areas of securities regulation have been standardised among the provinces and territories and cooperative systems have been established among the regulators. For example, the filing of a prospectus may be done through a single lead jurisdiction, which coordinates the comments of the other regulators and provides a single point of contact.

The Investment Industry Regulatory Organization of Canada (IIROC) is the national self-regulatory organisation responsible for overseeing and regulating investment dealers in Canada. For more information about the IIROC, see question 21.

There are two principal stock exchanges in Canada: the Toronto Stock Exchange (TSX), for senior companies and the TSX Venture Exchange (TSXV) for companies that are at a junior stage of development. While these exchanges play a role in regulating the conduct of listed companies, including companies with listed debt securities, they do not vet prospectuses. Rather, this role is undertaken by the provincial and territorial securities regulatory authorities.

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.

A public offering of debt securities requires an issuer to file both a preliminary and a final prospectus and to obtain receipts for such prospectuses from the applicable securities regulatory authority. An issuer may prepare and file either a long-form prospectus, or, if it qualifies, a short-form prospectus (which may be in the form of a base shelf prospectus and one or more related prospectus supplements). For further information on each form of prospectus, as well as the disclosure that each is required to include, see question 4.

The applicable securities regulatory authority will review a long-form or short-form preliminary prospectus, which may contain bulleted information or draft disclosure and provide comments to the issuer on any revisions or additions required to be made. After such comments, if any, are resolved by the issuer and its advisers, the issuer will file a final prospectus with the applicable securities regulatory authority. Once a receipt for this final prospectus is provided to the issuer (or deemed to be provided to the issuer by the non-reviewing provinces or territories in cases of coordinated review), the securities are qualified to be sold to the public in the applicable provinces or territories, or both, in Canada.

The trust indenture prepared in connection with a public offering of debt securities, together with the preliminary and final prospectus and other related filing documents, will be filed on the System for Electronic Document Analysis and Retrieval (SEDAR), which is the electronic, internet-based filing system for the public disclosure of documents of reporting issuers in Canada. In general, after a document is filed on SEDAR, the public may access the document through the SEDAR website (www.sedar.com). As such, the filing requirements for public offerings of debt securities are similar to those in respect of public 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 public offering of securities requires an issuer to prepare and file a prospectus. An issuer may prepare either a long-form or a short-form prospectus depending on the qualifications of the issuer wishing to offer the securities and the type of offering. A short-form prospectus may also be prepared in the form of a base shelf prospectus and one related prospectus supplement (or more).

A prospectus must provide 'full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed. In addition to this general disclosure requirement, a long-form prospectus is required to include detailed information about the issuer and the securities being offered, including:

- a description of the business of the issuer;
- a description of how the issuer will use the proceeds of the offering as well as how the offering will affect the consolidated capitalisation of the issuer;
- management's discussion and analysis (MD&A) with respect to the financial statements of the issuer included in the prospectus;
- the issuer's earnings coverage ratios;
- a detailed description of the securities being offered as well as the plan of distribution; a description of the risk factors inherent in an investment in the securities; certain prescribed financial information such as annual, interim and in certain cases pro forma financial statements of the issuer; and
- certain other information.

A short-form prospectus may be used by issuers that are reporting issuers in Canada, have an annual information form (AIF) or recent long-form prospectus filed with the relevant securities regulatory authorities and are in compliance with their continuous disclosure obligations prescribed by the applicable Canadian securities regulatory authorities. A short-form prospectus permits an issuer to omit much of the information included in a long-form prospectus by incorporating, by reference, the issuer's ongoing public filings into the short-form prospectus.

A shelf prospectus, which is a form of short-form prospectus, consists of a base shelf prospectus, which includes non-offering specific disclosure that would otherwise be included in a short-form prospectus and a prospectus supplement, which describes the specific terms of the offering of securities, and which is filed in connection with a specific offering of securities. A base shelf prospectus may be unallocated, meaning that it may be used to offer the securities in any combination, up to an authorised dollar amount. Such authorised dollar amount is required to be not more than the amount that the issuer reasonably expects to distribute under the base shelf prospectus during its 25-month term. However, if the authorised dollar amount is exceeded, the base shelf prospectus may be amended to increase the amount of securities that may be offered under it, or a new base shelf prospectus may be filed, depending on the circumstances. A base shelf prospectus must be filed and cleared with the applicable securities regulatory authorities. A prospectus supplement used to market securities following an approved base shelf prospectus does not require any further regulatory review or clearance for its 25-month duration.

5 Describe the drafting process for the offering document.

The process of drafting an offering document, whether a long-form prospectus, short-form prospectus or offering memorandum, typically involves collaboration among the issuer, the underwriters or agents, their respective counsel and other outside advisors such as auditors and other experts.

Public offerings

A prospectus must provide 'full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed' and must follow the detailed disclosure rules set out in applicable securities legislation, including 'line-item' form disclosure requirements. For further information on such prospectus disclosure requirements, see question 4. The issuer, the underwriters or agents and their respective counsel will work cooperatively on the drafting of the prospectus to ensure that it provides full, true and plain disclosure, satisfies the other applicable form requirements and does not contain any misrepresentations.

A misrepresentation is defined in the Securities Act (Ontario) (the OSA) to mean an untrue statement of material fact or an omission to state a material fact that would be required to make a statement not misleading. As such, a 'misrepresentation' includes omissions as well as errors and incorrect statements. For further information on the liability regime under Canadian securities laws, see question 26.

Private offerings

A private offering does not require regulatory approval and generally does not require the use of any particular private offering documentation, as long as the offering satisfies the requirements of one of a number of prospectus exemptions. For further information regarding the differences between public and private offerings of debt securities, see question 10.

Private offering documentation, most often prepared in the form of an offering memorandum, is generally subject to few form requirements. Examples of the disclosure required to be included in an offering memorandum include references to applicable statutory rights of action for misrepresentation, disclosure of privacy rights in respect of reports of exempt distributions (discussed further in question 25) and disclosure of any relationship between the issuer and underwriters or agents that would lead a reasonable investor to believe the issuer is not independent of the underwriters or agents. Unlike a prospectus, which must contain full, true and plain disclosure of all material facts, the standard of disclosure for an offering memorandum is the less onerous requirement that it must not contain any misrepresentation. However, depending on the manner in which a transaction is to be marketed, the disclosure contained in an offering memorandum and the manner in which such disclosure is presented can be similar to that found in a long-form or short-form 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?

In Canada, debt securities are typically issued under a trust indenture to which the issuer and an indenture trustee are parties. In some instances, privately-placed debt securities may be issued under a note purchase agreement entered into directly between the issuer and the investors.

In a public offering, the trust indenture will be filed on SEDAR and thereby made available to the public. In a private placement of debt securities by a public company subject to continuous disclosure obligations under applicable Canadian securities laws, the indenture or note purchase agreement may be filed on SEDAR to the extent that the issuer determines that it constitutes a material agreement. An issuer will often agree to permit bondholders and, in some cases, potential investors to request and receive a copy of the trust indenture directly from the issuer.

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

Before a preliminary or final prospectus may be provided to a potential investor, the issuer must first file with, and obtain a receipt from (or be deemed to have obtained a receipt from the non-reviewing jurisdictions, in the case of cooperative review), the relevant securities regulatory authorities. A receipt for a preliminary prospectus is generally issued by the applicable securities regulatory authorities as a matter of course. Before providing a receipt in respect of a final prospectus, however, the applicable securities regulatory authority will review the prospectus to ensure that its comments on the preliminary prospectus, if any, have been addressed to its satisfaction. Once a receipt for the reviewed final prospectus is provided to the issuer, the securities are able to be sold to the public in the applicable provinces and territories of Canada. For further information on prospectus filing requirements, see question 3.

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 set out in questions 3 and 7, a receipt for a final prospectus will not be issued until the applicable securities regulatory authorities have completed a review of the prospectus and are satisfied that their comments on the preliminary prospectus, if any, have been addressed. For further information on prospectus filing and approval requirements, see questions 3 and 7.

The length of time required before a long-form prospectus will be cleared by the applicable securities regulatory authorities is typically four to six weeks. A short-form prospectus, including a base shelf prospectus, will typically be cleared much more quickly – in some cases in a matter of days, and almost always within two or three weeks. A prospectus supplement used to market securities following an approved base shelf prospectus does not require any further regulatory review or clearance for the 25-month duration of the base shelf prospectus.

During the prospectus review process, which begins at the time a receipt is provided to the issuer for the preliminary prospectus and ends at the time a receipt is provided to the issuer for the final prospectus, the preliminary prospectus, together with standard term sheets and marketing materials (which must comply with certain disclosure and filing requirements) may be used to market the offering to potential investors. However, until a final receipt is provided, no security may be sold, disposed of, traded, transferred, pledged or encumbranced, nor may an agent or issuer receive an order to buy or sell a security proposed to be issued under the offering.

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

Although securities regulatory authorities will generally qualify an offering of securities upon being satisfied that there is substantial compliance with the requirement that the prospectus contains full, true and plain disclosure and that the prospectus contains no misrepresentation, such compliance by itself will not guarantee that the public offering of securities will be approved. Securities legislation provides that the director of the applicable securities regulatory authority must not issue a receipt for a prospectus if it believes it is not in the public interest to do so, including on the basis of there being, among other things, unconscionable consideration under the offering, insufficient proceeds to be raised as part of the offering or concerns regarding the financial condition and past conduct of the issuer. This discretion of the director to refuse to issue a receipt for a final prospectus is not unlimited. The Canadian courts have interpreted this public interest jurisdiction as being restricted to ensuring the protection of investors from unfair, improper or fraudulent practices, as well as fostering fair and efficient capital markets and confidence in such markets.

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 of securities may only be undertaken pursuant to a prospectus that complies with the statutory requirements and that has been reviewed and approved, pursuant to the provision of a final receipt, by the relevant securities regulatory authorities. For further information regarding the prospectus approval process, see questions 3 and 7.

A private offering does not require regulatory approval and generally does not require the use of any particular form of disclosure document, as long as the offering satisfies the requirements of one of a number of prospectus exemptions. However, it is common practice for issuers to prepare a disclosure document, typically in the form of an offering memorandum, in connection with a sale of private debt securities. Where an offering memorandum is used, it must contain the required disclosure described in question 5.

The Canadian exemption regime is largely standardised among the provinces and territories. Exemptions include sales to accredited investors, as set out under National Instrument 45-106 – Prospectus and Registration Exemptions (NI 45-106). In order to qualify as an accredited investor, an investor must, alone or with a spouse, meet certain minimum asset thresholds or be an organisation that is a financial institution, government or other sophisticated entity. Securities laws do not impose a limit on the number of private placement purchasers in an offering under this exemption. A prospectus exemption is available whether the placement is part of an international offering or is an entirely Canadian placement.

While the accredited investor exemption is the one primarily used for private placements in Canada, NI 45-106 also contains a number of other prospectus exemptions. For example, if a potential investor is not an accredited investor, a 'minimum amount' prospectus exemption is available if:
- the security has an acquisition cost to the purchaser of not less than C$150,000;
- the investor purchases as principal; and
- the investor is not a person created or used solely to purchase or hold securities in reliance on this prospectus exemption.

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

Public offerings
See questions 3, 4, 5, 7, 8 and 9.

Private offerings
Private placements are subject to minimal formal requirements and can be effected very quickly in Canada due to the absence of any regulatory review process. There is no requirement to deliver a disclosure document to purchasers in connection with private placements, although if the issuer so chooses, an offering memorandum or other disclosure document may be used. Such an offering memorandum is subject to few formal requirements. For further information on the marketing process and disclosure requirements in an offering memorandum, see question 5.

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 required by underwriters are similar for most public and private offerings. Such closing documents generally include legal opinions, auditors' comfort letters, ratings confirmation letters, corporate and securities certificates of good standing, certified resolutions and officers' certificates.

Whether the underwriters will also require the delivery of one or more negative-assurance or '10b-5' letters will generally depend on whether the offering is part of a cross-border offering into the United States and, if so, the extent of offers and sales of the securities into the United States in connection with the offering.

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

There are three main fee categories related to listing securities on the principal exchanges in Canada:
- original listing fees;
- additional listing fees; and
- annual sustaining fees.

The original listing fee is a one-time fee payable for listing on an exchange. Such fee is based on the listing capitalisation of the securities and is calculated separately for each class of listed securities. The listing capitalisation is the value of the securities to be listed by the issuer, calculated as either the issue price per security, or the market price per security multiplied by the number of securities to be listed. Original listing fees will range from C$10,000 plus a variable fee of 0.142 per cent of the listing capitalisation in excess of base listing capitalisation to C$200,000 plus a 0.122 per cent variable fee, respectively. Additional listing fees are required if, after an original listing, additional securities are to be listed, range from C$5,000 plus a 0.169 per cent variable fee to C$170,000 and a 0.147 per cent variable fee, respectively. An annual sustaining fee, payable annually for each calendar year by all listed issuers for maintaining a listing on the TSX, is based on the market capitalisation of the issuer as at the last trading day of the preceding calendar year. Sustaining fees range from C$12,500 plus a 0.0080 per cent variable fee to C$95,000 and a 0.0070 per cent variable fee, depending on the market capitalisation of the issuer.

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

Most of Canada's large banks and several non-Canadian banks with Canadian branches or material operations in Canada have established active platforms for issuing and trading tranches of both 'principal-at-risk' and 'principal protected' linked notes. Individual issuances are typically small in size (eg, less than C$25 million), but the frequency of issuance is high. These products are typically most actively marketed through the issuing bank's wholly-owned securities dealer network, or, in the case of principal protected notes permitted to be sold without a prospectus, such as linked Guaranteed Investment Certificates, its deposit-taking branches.

Principal-at-risk notes are most often distributed under a bank's Canadian shelf prospectus for medium-term notes. Private placements to Canadians by foreign issuers of similar linked notes also occur from time to time in reliance on prospectus exemptions. A related shelf prospectus supplement will include extensive product-level disclosure and risk factors.

Novel products of a type that have not been previously distributed to the public by the issuer are required to be pre-cleared by securities regulators, meaning that the first offering of any new type of product will be reviewed by securities regulators before the shelf system will be available for their sale. Guidance from Canada's securities regulators indicates that a derivative-based security is not to be considered novel merely because a new underlying interest, such as a new market-based equity index, is referenced. However, linked notes that derive returns from underlying investment fund values receive particular attention from securities regulators, who have expressed concern that such derivatives-based products should be reviewed with regard to investment fund-related conflicts issues and related disclosure concerns. Derivative warrants have not been issued in Canada recently, but are permitted to be issued under a shelf prospectus by qualified issuers, subject to the pre-clearance regime for novel offerings.

Linked notes are not typically listed for trading over a recognised securities exchange. Instead, they most often trade over-the-counter (OTC) by dealers and often settle through the book-entry system or through the mechanisms established to facilitate redemptions and sales of mutual funds in Canada.

New issuances of hybrid debt instruments occur occasionally in Canada. Several of Canada's large financial institutions have established programmes for the issuance of mandatorily convertible debt securities, which are structured to allow for regulatory capital treatment equivalent to equity. The changing landscape of Basel III has meant that these instruments are being revisited and adapted to address new regulatory capital standards. Private market parallels, allowing for equity treatment for balance sheet and ratings purposes while permitting tax deductibility of interest payments, are another potential application of hybrid structures in Canada. Exchangeables have been used in the past, although not recently, in Canada to allow large stock holdings to be monetised without triggering an immediate tax disposition of the underlying shares.

Canada's securitisation market has recently come back to life, with new issues in many traditional asset classes, after a prolonged dormancy brought on by the global financial crisis. Public auto loans and leases and credit cards are the most prevalent asset classes backing recent public issuances of asset-backed securities in Canada. Private placements of other asset classes, including a few commercial mortgage-backed offerings, show signs of a potential resurgence of traditional asset-backed securities sales in Canada.

Canadian banks have been large issuers of covered bonds, mostly for sale into the United States, Europe and Australia. Recent legislative developments create a registration regime for covered bonds, providing greater legal certainty that the cover pool (typically comprised of uninsured residential mortgages) will not be wound into an insolvency proceeding affecting the issuing bank.

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

Linked notes and derivative warrants are currently regulated as securities under the provincial securities legislation of each Canadian province or territory. When issued by a Canadian bank, an argument can be made that some of these instruments are deposits, and as such should not be regulated as securities. Despite this, Canadian banks have generally approached the distribution of principal at risk products as securities subject to prospectus requirements. Disclosure for these products is described in detail in compliance with the form requirements applicable under the securities legislation that governs prospectus distributions in Canada. A detailed guideline has also been issued by Canada's securities regulatory authorities outlining the items that an issuer should consider disclosing in order to achieve prospectus-level disclosure for linked notes offerings, including hypothetical examples and disclosure of risks, conflicts of interest, fees and expenses, benefits to the issuer or its affiliates, any limits on investment return and details concerning the underlying interests.

By contrast, principal protected linked notes are typically issued outside of the securities regime based on regulations enforced by the Financial Consumer Agency of Canada, which set out the disclosure and other requirements applicable to their distribution. Canada's securities regulatory authorities have issued guidelines noting that, with exceptions for certain federally insured products, the regulators expect principal protected notes to be distributed only through registered dealers in order to ensure the application of ordinary know-your-client and suitability obligations overseen by IIROC. IIROC guidelines require dealer members to proactively review new products from a regulatory, risk management and business perspective and to monitor those products that are not new but that have unique and complex features. Like other G20 countries, Canada is in the process of adopting a new trading, clearing and reporting regime for OTC derivatives. It is currently unclear how that ongoing process may affect broad distributions of linked notes and warrants in the future.

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

Canadian jurisprudence includes commercial law relating to the determination of whether securities constitute debt or equity for various purposes. Whether securities constitute debt or equity can have ratings, insolvency, regulatory, tax and accounting consequences, among others. Securities that constitute debt or equity for one or more of these purposes will not necessarily constitute debt or equity for all of these 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?

Non-reporting issuers

Restrictions on the resale of privately placed securities of an issuer that is not a reporting issuer in Canada will last indefinitely. The effect of these restrictions is that any resale of privately placed securities will be subject to the same qualification regime that applies to an initial distribution of securities. As such, privately-placed securities may not be resold by purchasers to third parties in Canada unless either a prospectus is used to qualify the distribution or a prospectus exemption applies. For further information regarding prospectus exemptions, see question 10.

With respect to sales outside of Canada, National Instrument 45-102 – Resale of Securities provides that holders of securities of non-reporting issuers may resell their securities over a foreign stock exchange to a person or company outside Canada without a prospectus provided that certain conditions are satisfied. The principal conditions are that as at the date of acquisition, holders of the securities in Canada represent 10 per cent or less of the holders of the same class or series of securities worldwide, Canadian residents hold 10 per cent or less of the same class or series of securities and the trade is made through an exchange or market outside Canada or to a person or company outside Canada.

Reporting issuers

Restrictions on the resale of privately-placed securities of an issuer that is a reporting issuer in Canada, which would require any resale to be made in reliance on a prospectus exemption or pursuant to a prospectus, will not apply if the securities have been held for the applicable hold period (which is generally four months) and if:

- no unusual effort is made to prepare the market or create a demand for the securities;
- no extraordinary commission or consideration is paid to anyone other than the seller of the securities;
- the trade is not a sale by a control person;
- if the selling security holder is an insider or officer of the issuer, he or she has no reason to believe that the issuer is in default of securities legislation;
- in the case of certain trades, the security certificate contains a legend (or an electronic alternative is provided) setting forth the hold period applicable to trading of the securities; and
- the issuer has been a reporting issuer in a jurisdiction of Canada for the four months immediately preceding the trade.

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?

Except to the extent described in question 19, there are no special rules applicable to offerings of debt securities by foreign issuers in Canada, although any material facts about an issuer or about the securities being offered that result from the jurisdiction of incorporation of the issuer or its subsidiaries (such as, for example, any limitations on subsidiary guarantees arising from the local corporate law of a guarantor) would require appropriate disclosure in the relevant prospectus or offering memorandum.

An offering to investors outside Canada made by an issuer with a connection to a Canadian province or territory will, depending on the province or territory, in certain cases be subject to the securities laws of that province or territory such that the offering will require the use of a prospectus or reliance on an exemption from such requirement. Certain Canadian jurisdictions have issued guidelines or adopted rules clarifying the circumstances in which the risk that securities issued outside of the relevant Canadian jurisdiction might flow back into such jurisdiction is low enough that the use of a Canadian prospectus or reliance on an exemption from such requirement will not be required.

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

In certain circumstances, Canadian securities laws permit certain foreign issuers that offer securities to the public in Canada to satisfy their resulting Canadian continuous disclosure obligations by filing in Canada the same continuous disclosure documents that they file in their home jurisdictions. As a result, the ongoing compliance burden of having effected a public offering in Canada will not be as significant for these foreign issuers as it otherwise would have been.

In addition, certain US issuers may utilise the Canada–US Multijurisdictional Disclosure System (MJDS), which was implemented by Canadian securities regulators and the US Securities and Exchange Commission (SEC) in 1991 in order to reduce the costs involved in issuers undertaking cross border offerings and takeover bids and fulfilling continuous disclosure obligations. Under MJDS, an eligible issuer in the United States may use a prospectus prepared in respect of an offering in the United States that has been reviewed by the SEC in Canada to access the Canadian debt capital markets in a public offering, without further review by Canadian regulators. MJDS also provides ongoing relief from Canadian continuous disclosure requirements after the MJDS public offering in Canada has been completed.

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

Debt securities are generally sold on a best-efforts agency basis or on an underwritten basis. An underwritten offering may be conducted either as a marketed underwritten offering, where pricing occurs and the underwriters enter into an underwriting agreement with the issuer only after a period of marketing has been completed, or as a bought deal, where the underwriters agree to purchase all of the securities offered in the offering as principals before marketing activity begins.

Each of the foregoing underwriting or agency arrangements may be utilised for both public offerings and private placements.

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

In general, firms acting as underwriters in Canada must be registered with the relevant provincial or territorial securities regulatory authority. There are different categories of registration that may limit what activities a dealer may conduct. Firms that are registered as a dealer or an underwriter in respect of any type of security (investment dealers) are regulated by IIROC. Securities legislation requires investment dealers to apply and be accepted for membership with IIROC. IIROC carries out its regulatory responsibilities through setting and enforcing rules regarding the proficiency, business and financial conduct of dealer firms and their registered employees and through setting and enforcing market integrity rules regarding trading activity on Canadian equity marketplaces. Certain international dealers may be exempt from the registration requirement.

There is no requirement for the approval of underwriting arrangements by IIROC or any other Canadian regulator.

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

Canadian dollar denominated debt securities generally clear through the facilities of CDS Clearing and Depository Services Inc (CDS), Canada's national securities depository. Settlement most typically occurs on a T+3 basis, although other settlement cycles such as T+5 may also be used. In public debt offerings, either global notes or uncertificated notes in electronic form will be used.

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

Typically, public debt securities are held in registered form in the name of CDS or its nominee, in the form of one or more global certificates or, as is increasingly the case, in electronic uncertificated form.

Bearer-form public debt securities are not typical in Canada.

24 Describe how issuers manage their outstanding debt securities.

Canadian issuers regularly engage in liability management transactions such as open market purchases, repurchases effected pursuant to privately negotiated transactions, consent solicitations, tender offers and exchange offers.

Under the rules of the TSX, issuers whose debt securities are listed on the TSX and that wish to undertake a debt substantial issuer bid (which involves the repurchase through the TSX of more than a de minimis amount of an issuer's listed non-convertible debt securities) must comply with a number of rules and requirements, including the requirement to leave the bid open for 35 days, proportional over-tendered issuer bid take-up rules, filing and having the TSX accept a debt substantial issuer bid notice, disclosing the debt substantial issuer bid to the media and through advertising in a form approved by the TSX, disclosing the book of receipt of tenders to the TSX and disclosing amendments to the debt substantial issuer bid.

Other than the aforementioned rules of the TSX applicable to listed debt securities, there are no rules in Canada that explicitly govern liability management transactions in respect of non-convertible debt securities.

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

Under Canadian securities legislation, ongoing reporting obligations are only imposed on issuers that undertake an offering of securities distributed under a prospectus. As such, a company that issues securities in a private placement will not be subject to ongoing statutory reporting obligations, other than the requirement to file a report of exempt distribution discussed below, although it may covenant in its trust indenture to provide annual and quarterly financial information, as well as certain other information, to its debt security holders as a matter of contract law.

Issuers subject to statutory ongoing reporting obligations must regularly disclose financial statements, accompanying MD&A, AIFs, material change reports, business acquisition reports, insider trading reports, and proxy solicitation and other shareholder communications.

The issuance of privately-placed securities under one of the prospectus exemptions will require the issuer to file in each jurisdiction where the distribution took place a report of exempt distribution within 10 days following such distribution. Reports of exempt distribution generally require the issuer to provide the name and contact information of the purchaser of the securities, the number of securities purchased by the purchaser, certain details of the offering and certain details of the underwriting or agency agreement.

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 liability regime in Canada is the same for debt securities as it is for other types of securities.

Statutory liability in connection with a prospectus offering

The statutory provisions imposing liability of securities law are similar in each of the provinces and territories of Canada. The following discussion is based on the provisions of the OSA.

A prospectus is required to contain full, true, and plain disclosure of all material facts relating to the offered securities and must not contain any misrepresentation. For further information, see question 5.

The OSA defines a 'material fact' as a fact that would reasonably be expected to have a significant effect on the market price or value of the securities. As set out in question 5, a 'misrepresentation' includes omissions as well as errors and incorrect statements.

A prospectus must contain certificates that are signed by the chief executive officer, chief financial officer and any two directors of the issuer, as well as by the underwriters, stating that the prospectus meets the statutory disclosure requirements. Rather than having to prove reliance, a purchaser is statutorily deemed to have relied on a misrepresentation identified in a prospectus. Liability for a misrepresentation in a prospectus extends to the issuer, every director of the issuer at the time the prospectus was filed, the officers who signed the prospectus and the underwriters in respect of the offering. Experts that are named in the prospectus may be liable for any misrepresentation contained in the parts of the prospectus 'expertised' by them. A purchaser of a security offered by a prospectus that contains a misrepresentation has a right of damages or rescission against the issuer and each of those persons.

Liability for misrepresentation in a prospectus is joint and several such that, although each defendant is liable for the full loss incurred by a purchaser, each defendant will, in turn, have a right to contribution from any other who, if sued separately, would have been liable for the same loss.

The OSA also provides that a director or officer who 'authorises, permits or acquiesces in' the preparation of a prospectus that contains any statement that, at the time and in light of the circumstances in which it was made, was a misrepresentation, commits an offence and on conviction is liable to a fine of not more than C$5 million or to imprisonment for five years, or to both.

Any party liable under a prospectus may successfully defend against a claim that the prospectus contained a misrepresentation, if they can show that the purchaser had knowledge of the misrepresentation when the securities were purchased.

All parties liable under a prospectus, other than the issuer or any selling security holder, may defend against a claim of misrepresentation if:

- the prospectus was filed without the individual's knowledge or consent, and on becoming aware of the filing, that individual gave reasonable general notice that it was so filed;
- after the issue of a receipt for the prospectus and before the purchase of the securities by the purchaser, on becoming aware of the misrepresentation, the individual withdrew his or her consent and gave reasonable general notice of such withdrawal and the reason therefore;
- with respect to any 'expertised' portion of the prospectus (ie, a part of the prospectus purporting to be made on the authority of an expert such as an accountant or lawyer), there were no reasonable grounds to believe, and the director or officer did not in fact believe that there had been a misrepresentation; or
- it can be shown that a reasonable investigation was conducted to provide reasonable grounds for the belief that there were no misrepresentations, nor did the individuals believe there was a misrepresentation (the 'due diligence defence').

The due diligence defence provides defendants with the ability to absolve themselves from liability by proving that they conducted a certain level of investigation and had no knowledge that the information contained in the prospectus was false or misleading. The diligence required in order to be able to successfully rely on the due diligence defence varies depending on whether the defendant is an expert as well as whether the defendant relied on a part of the registration statement that was compiled by an expert.

Statutory liability in connection with a private placement

Liability and rights of action in connection with a private placement differ among jurisdictions. In most provinces and territories of Canada, if an offering memorandum is delivered to investors, the investor has a statutory right of action for rescission or damages against the issuer or selling security holder (and in certain provinces and territories, against the directors of the issuer and in Saskatchewan against certain other offering participants) for any misrepresentation that is contained in the offering memorandum, similar to an investor's rights under a prospectus.

However, there are no statutory rights of action, nor any requirement to provide a contractual right of action in an offering memorandum, in the provinces of Alberta, British Columbia or Québec. In some instances, an issuer will elect to contractually grant purchasers in these provinces the same rights of rescission or damages for misrepresentations made in an offering memorandum as are available in the other provinces and territories.

Common law liability

Even in the absence of a statutory right of action, the issuer, the underwriters and other offering participants could be liable for a misrepresentation in a prospectus or offering memorandum as a matter of common-law negligent misrepresentation.

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

As noted in question 26, investors' remedies include damages or rescission, whether pursuant to statutory, contractual or common-law negligence rights of action.

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

Securities regulators have three main ways of enforcing securities law:

- administrative hearings;
- quasi-criminal proceedings; and
- civil proceedings.

In Ontario, the Ontario Securities Commission (OSC) may make orders in the public interest pursuant to administrative hearings. If the OSC believes that it is in the public interest to do so, it can issue orders to suspend, restrict or terminate registration, cease-trade any securities, deny the availability of an exemption, require a market participant to submit to a practices and procedures review, issue a reprimand, prohibit a person from being a director or officer of an issuer, impose an administrative penalty or disgorge amounts received as a result of non-compliance with securities law.

The OSC may also institute quasi-criminal enforcement proceedings, which could result in a significant fine or imprisonment, or both. A quasi-criminal enforcement proceeding is available if a person or corporation makes a statement in any document submitted to the OSC that contains a misrepresentation or is materially misleading or untrue, or contravenes Ontario securities law.

The OSC may also apply to a court in Canada for a civil enforcement order, such as an enforcement order to rescind securities trades, pay damages or compensation, prohibit the voting of securities or appoint replacement officers and directors.

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

Canadian taxation issues depend on whether the bondholder or the issuer is a resident of Canada, or is otherwise taxable in Canada.

Regardless of whether the issuer is resident in Canada, a Canadian resident bondholder is generally required to include in his or her income any interest on the debt securities, as well as 50 per cent (if the debt securities are capital property of the bondholder) or, otherwise, 100 per cent of any gains on the sale of the debt security. Debt securities will generally be capital property for a bondholder if they are neither held as part of a business of buying and selling securities nor otherwise held for speculative purposes. Additional considerations apply if the debt securities are offered at an initial discount, have irregular coupon payments or are not denominated in Canadian dollars.

A significant portion of debt securities are held by Canadian retail bondholders in tax-deferred registered savings plans. Issuers frequently want their debt securities to be qualified investments for such registered plans. Debt securities can be qualified in various ways, including by being listed on a designated stock exchange (which includes the TSX, the NYSE, and other exchanges) or being issued by a corporation whose shares are listed on a designated stock exchange.

Canadian withholding tax will generally not apply to typical interest payments on debt securities issued by a corporation resident in Canada to unrelated bondholders not resident in Canada. In the limited circumstances where Canadian withholding tax applies, a full or partial reduction may be available under a relevant tax treaty. Additional withholding and income tax issues can arise for convertible debt securities.

Issuers subject to Canadian income tax normally prefer that interest paid on debt securities be deductible from the issuer's income. Interest will generally be deductible if the borrowed money is used for income earning purposes or to repay debt previously incurred for income earning purposes. Because there is no automatic group consolidation for Canadian income tax purposes, it is generally preferable for interest expense to be incurred by an entity with enough income to use the interest deduction.

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China

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

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

Regulations issued by the Peoples' Bank of China:
- 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 file 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 enterprise, 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 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.

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

Debt securities offered in Croatia may take many forms but the most common type of debt securities listed on the capital markets are senior and unsubordinated bonds issued by the governments, municipalities and cities with a fixed or a floating rate. Financial institutions and corporate issuers tend to issue subordinated bonds. Zero coupon bonds, equity linked notes (convertible or exchangeable debt securities) and structured notes, including commercial papers, are common.

Debt securities can be placed either through an offer to the public, in which case, apart from certain exemptions, an offering prospectus must be filed with the Croatian financial markets regulator (HANFA), and be made available to investors or through a private placement, in which case, the preparation of an offering prospectus is not required unless the securities are to be admitted to trading on a regulated market.

The Croatian debt securities market may be considered undeveloped. The issuers of debt securities in Croatia are predominantly the government, financial institutions and large corporate institutions. According to the information announced by the Zagreb Stock Exchange in January 2015, bonds turnover in 2014 amounted to €94 million or 18.4 per cent of the total trading turnover. Commercial papers turnover amounted to €9 million. According to the official information issued by the HANFA, the interest rate for bonds listed on the regulated market in 2013 ranged from 4.8 per cent to 12 per cent, (average interest rate amounted 7.6593 per cent).

The Croatian debt securities market has a tendency to grow primarily in respect to government bonds but it has still not reached the level of trading prior to the financial crisis of 2008–2009. Croatian accession to the EU in July 2013 contributed to an increased interest in buying government debt securities. Due to low risk and a high demand for obtaining fresh capital for financing the state budget, government bonds currently dominate the domestic debt securities market. In contrast to government bonds, municipal bonds issued by cities, municipalities or counties carry a higher risk and are scarce.

The issuance of unsecured subordinated bonds is rare by large corporate institutions wishing to attract fresh capital without a need of intervention into the shareholder structure. Bond emissions range between €75 and €230 million, with a maturity time between two and 10 years and mostly fixed interest rates. Issuance of corporate bonds (commercial papers) dominates in the financial, telecommunications, transport, construction, energy and pharmaceutical sectors. The most significant investors in debt securities are commercial banks, investment funds, compulsory and voluntary pension funds, insurance companies and large corporate institutions.

2 Describe the general regime for debt securities offerings.

Offering of debt securities is subject to the following statutes, rules and regulations:

- the Capital Market Act (Official Gazette 88/08, 146/08, 74/09, 54/13 and 159/13) implementing Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC and Directive 2010/73/EC;
- the Croatian Financial Services Supervisory Agency Act (Official Gazette 140/05 and 12/12);
- the Civil Obligations Act (Official Gazette 35/05, 41/08 and 125/11);
- the Companies Act (Official Gazette 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12 and 68/13);
- the General Administrative Procedure Act (Official Gazette 47/09);
- the Prevention of Money Laundering and Terrorist Financing Act (Official Gazette 87/08 and 25/12);
- Commission Regulation (EC) 809/2004, as amended (Prospectus Regulation);
- Commission-delegated Regulation (EU) No. 382/2014 of 7 March 2014 supplementing Directive 2003/71/EC of the European Parliament and of the Council;
- Decision on the Minimum Information Contained in the Prospectus, Format of Prospectus and Manner of Publishing the Prospectus and Advertisements Regarding the Prospectus (Official Gazette 5/2009, 34/12);
- Decision on Obligations of Reporting on Executed Transactions (Official Gazette 5/09);
- Decision on the Structure and Content of Periodic Financial Reports for Issuers (Official Gazette 47/11);
- By-law on Information that the Issuers of Securities Listed on the Regulated Market in Croatia are Obligated to deliver to the Croatian Financial Services Supervisory Agency (Official Gazette 66/14); and
- the Zagreb Stock Exchange Rules (version of 16 September 2013, as amended).

The HANFA is the regulator and supervises debt offerings. It is vested with authority in regard to both the primary and the secondary market. The responsibilities of the HANFA on the primary market include reviewing and approving the prospectus. On the secondary market, the HANFA supervises financial market, monitors trade activities and enforces rules on insider trading, market manipulation and transparency. The main regulated market for debt securities in Croatia is the Zagreb Stock Exchange. Debt securities of an issuer with their registered seat in Croatia can be issued or offered in a public offer or listed and admitted to trading in the regulated market only if issued in a dematerialised form. Dematerialised securities are registered with the Croatian Central Depository Agency, which conducts the register of dematerialised 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.

Public offering, as defined in the Capital Market Act, implies any notification given in any form and by any means that contains sufficient information on the conditions of the offer and securities that are offered, enabling an investor to decide whether to purchase and subscribe these securities.

Apart from exemptions provided for in the Prospectus Directive and the Capital Market Act, no public offer of debt securities is allowed unless a valid prospectus has been published with regard to the public offer prior to publishing the offer. Debt securities may be offered to the public only after a prospectus has been approved by the HANFA and published in the prescribed manner, or after a prospectus approved by a competent authority of another EU member state has been notified to the HANFA.

The general rule is that debt securities may be admitted to a regulated market only after a valid prospectus has been published with regard to the admission prior to the admission. An issuer may not publish the prospectus prior to it having been approved by the HANFA.

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

The Prospectus Directive sets out the benchmark for disclosure standards based on the denomination of the debt security. An offering to the public in Croatia requires approval of a prospectus, unless an exemption applies. Even if the requirements for exemption from preparing a prospectus in connection with the offer are met, a prospectus may still be required if the securities are to be admitted to trading on a regulated market and no exemptions for preparing and publishing the prospectus concerning listing on the regulated market have been met. The Prospectus Directive Regulation has annexes attached to it, which set out the detailed content requirements for Prospectus Directive compliant prospectuses that have been implemented into the Croatian legal system and further elaborated in the Capital Market Act and the pertaining Decision on the Minimum Information contained in the Prospectus, Format of Prospectus and the Manner of Publishing the Prospectus and Ads Regarding Prospectus.

The Croatian Capital Market Act including the pertaining Decision and the Prospectus Regulation include specific requirements regarding the information to be included in a prospectus that vary depending on the type of debt instrument issued. In general, the prospectus must contain all the necessary information for investors to make an informed assessment of the issuer's assets and liabilities, profits and losses, financial position, results and future prospects and the securities offered (the rights attached, the way they are being issued, etc). The information in the prospectus must be presented in an easily analysable and comprehensible form. It includes, in particular:

- risk factors relating to the issuer and the securities to be offered;
- information about the issuer (its activities and organisational structure, trends and profit forecasts, governance, major shareholders, audited financial statements for the past two financial years and auditors' reports, legal proceedings, significant changes in financial or trading positions since the end of the last audited or interim financial period) and about any guarantor;
- terms and conditions of the debt securities offered (form, denomination and title, status and guarantee, negative pledge, interest provision, redemption, taxation, events of default, meetings, governing law);
- applicable selling restrictions;
- use of proceeds; and
- information relating to corporate authorisation and admission to trading.

The prospectus may be drawn up as a single document, separate documents or a base prospectus. A prospectus made as separate documents consists of a registration document containing the information on the issuer, a securities note containing information on securities to be offered to the public or admitted to trading on a regulated market and a summary providing, in a brief manner, the essential characteristics and risks associated with the issuer, guarantor and the securities offered. The summary of the prospectus is only required in the case of admission to trading of debt securities having a denomination of less than €100,000 per unit on a regulated market.

The summary of the prospectus must contain warning that:

- it should be considered an introduction into the prospectus;
- each decision on an investment must be based on an investor's assessment of the prospectus as a whole;
- an investor shall, in the case of a claim and judicial proceedings with regard to the information contained in the prospectus, provide and bear the cost of the translation of the prospectus into the official language of the court before which the procedure is brought; and
- the persons who drew up the summary, including the translation thereof, as well as the persons who applied for its notification are jointly, severally and unlimitedly liable for the damages caused by the summary if it is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.

5 Describe the drafting process for the offering document.

The Securities Market Act lists the persons responsible for the accuracy and completeness of the information contained in the prospectus, such as the issuer and its members of the board and the supervisory board, the guarantor with regard to the issuing, where applicable, and persons who assumed liability for the accuracy and completeness of the information contained in the prospectus, or parts thereof.

Usually, the issuer and its counsel are responsible for drafting the disclosure part of the prospectus, while lead underwriters and their counsel prepare the terms and conditions, the risk factors that relate to the offered debt securities and the sections that relate to the selling restrictions and the listing process. In addition to sessions and conference calls that are expected to be attended, the conduct of due diligence procedure is common.

Although the Prospectus Regulation provides for detailed lists of the minimum information to be included in the prospectus, in some instances the scope of disclosure in practice remains vague (eg, despite the requirement that the risk factors refer to a particular issuer and securities offered related risks, it is common that the issuers still use the generic 'standard form' risk factors that do not punctually depict the risks pertinent to specific issuer and the security offered).

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, in which case, the prospectus does not have to include a summary) or retail (ie, with a denomination per unit of less than €100,000). If the debt securities offering is structured as a private offering, no prospectus compliant with the Securities Market Act and the Prospectus Regulation is required for purposes of the offering itself but will be required for listing purposes, as investors generally require such a listing. It is common that in such cases the issuer draws up a term sheet or information memorandum, which does not need to be approved by the HANFA or published in accordance with the Capital Market Act.

In public offerings, the advisers are generally expected to advise on whether to list offered securities on the regulated market or not, which often depends on numerous factors such as investors' preferences, the tax regime, the listing costs and the annual listings fees, preparation costs for the prospectus or listing particulars, compliance of the issuer with obligations such as the Market Abuse Directive in relation to disclosure of inside information, the Transparency Directive, periodic filing obligation, etc.

Upon the request of the issuer, the HANFA may approve omission of mandatory data, if disclosure of such information would be contrary to the public interest or may cause material damages to the issuer, under the condition that the omission of such information would not mislead the public in respect to material information of the public offering or if the information is of minor importance for a specific 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?

If the debt securities are offered to the public, investors may find the terms and conditions in the prospectus and if prospectus is not obligatory it is usual that such terms and conditions are found in the information memorandum or in a separate document prepared by the issuer.

If between the time of the approval of the prospectus and the final closing of the offer to the public, or the time when trading on a regulated market begins, a new fact arises or the existence of an inaccuracy or incompleteness is established relating to the information contained in the prospectus that may affect the assessment of securities, the issuer has the obligation to supplement the prospectus with new, accurate and complete information. The investors who agreed to purchase or to subscribe for the securities in a public offer prior to the publishing of the supplement to the prospectus shall have the right to withdraw their acceptances to purchase or to subscribe for the securities within the time limit, which shall not be shorter than two working days after the publication of the supplement to the prospectus.

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

The prospectus (and any supplement thereto) must be approved by the HANFA prior to publication. Once approved the prospectus shall be published not later than before commencement of the public offering of securities or listing of the securities on the regulated market.

The prospectus may be published in one or more newspapers circulated throughout, or widely circulated within, the territory of the Republic of Croatia or another EU member state in which the securities shall be offered to the public. Further, the prospectus may be made available to the public in a printed form, free of charge, at the premises in which the regulated market to which the securities shall be admitted operates or at the premises of the head office of the issuer and all the offices of the financial intermediaries who perform tasks related to placing or selling the securities, including paying agents. Publication may also be made electronically on the official website of the issuer, on the web sites of financial intermediaries or the official website of the HANFA.

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 public offering of debt securities can only be made on the basis of a prospectus that has been previously approved by the HANFA. Generally, it is not worth submitting a draft base prospectus to the HANFA unless it is in virtually final form. Changes can be made to the prospectus after it has been admitted for approval at any time up until formal approval of the prospectus. Once the documentation is complete, the HANFA must approve the prospectus within 10 working days, or 20 working days in the case of a first offer to the public or first admission to trading on a regulated market. If the HANFA finds the prospectus to be incomplete or that supplementary information is required, this time limit will only start running if the submission deficiencies have been dealt with. So the original 10 or 20-working-day limit can, in practice, extend for a rather longer period of time. All information publicly disseminated relating to the public offering must be fully consistent with the information to be contained in the final prospectus.

The HANFA is vested with a wide range of responsibilities, which it may exercise over the issuer where it finds the public offering to be contrary to the provisions of the Capital Market Act, such as requiring additional information or documents, suspending or prohibiting advertisements for a maximum of 10 working days, suspending public offer or admission to trading for a maximum 10 working days, etc.

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

When deciding on the eligibility of the prospectus, the HANFA will determine whether the prospectus was submitted by an authorised person and whether its contents have been drawn up in compliance with the provisions of the Capital Market Act and pertaining regulations. If these conditions are not met, the HANFA shall reject the application for the approval of the prospectus as well as in the case where the applicant fails to adequately amend the prospectus within the time limit set by the HANFA. The HANFA shall also refuse to approve a public offering of securities if the decision of the issuer's corporate body on issuance and public offering of securities is invalid or no longer effective, or if the issuer failed to comply with measures imposed by the HANFA due to the infringement of the regulations pertaining to the rules of transparency.

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

A prospectus is required in respect of an offering of debt securities to the public or in respect of debt securities to be admitted to trading on a regulated market. Certain offerings are exempt from the requirement to draw up a prospectus. The most significant exemptions include:
- offers made solely to qualified investors;
- offers addressed to fewer than 150 natural or legal persons (other than qualified investors) per European Economic Area (EEA) member state;
- offers where the minimum denomination amount of debt securities is at least €100,000;
- offers where the minimum investment amount per investor and per offering is at least €100,000; and
- offers with 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?

The debt securities offering process depends on whether the securities are offered to the public or in a private placement, complexity of a particular offer and the debt instruments, thoroughness of previously performed due diligence and the experience of the persons included. Depending on whether the securities will be issued under a programme or on a stand-alone basis, the time required for the preparation of a public offering in Croatia, will vary between a couple of days and several months (eg, in the case of a first-time issuer). The procedure may be additionally prolonged if supplements or amendments to the documentation are required.

Securities that are offered to the public or admitted to trading on a regulated market require the prospectus to be approved by the HANFA and published, at the latest, at the beginning of the offer or the admission of securities to a regulated market. Where the prospectus relates to the initial public offering of debt securities that were previously not admitted to trading on a regulated market, and the admission of which is applied for the first time, the publication of the prospectus shall be made at least six working days before the expiry of the time for the acceptance of the offer. The conditions set out in the prospectus are valid for 12 months after its publication for the purposes of offering of securities to the public or the admission to a regulated market. In the case of an offering programme, the previously filed base prospectus is valid for 12 months after its publication or until no securities concerned are issued in a continuous or repeated manner.

Only in exceptional circumstances, such as when the information on the final price and the number of debt securities may for certain reasons not be included in the prospectus, the issuer is obligated to subsequently inform the HANFA of the final price and the amount of securities offered.

The key parties in the debt securities offering procedure are typically:
- the issuer (and guarantor if any);
- the syndicate of the underwriter (lead managers) in the case of an underwritten offering;
- the fiscal agent;
- the legal counsellors; and
- the auditors.

In the first phase, the lead managers are appointed and the mandate agreement is negotiated and executed. Once mandated, the lead managers will discuss commercial terms and the timetable with the issuer. The timetable may depend on various factors such as the nature of the transaction, favourableness of market conditions, etc. After the commercial terms and the timetable have been decided, the lead managers, legal advisers and other relevant parties will finalise documents that are necessary for transaction and disclosure to the public. Once the prospectus has reached a reasonably final form it may be submitted to the HANFA for review.

The second step is the launch date on which the debt issuance is announced publicly. During the period from the launch to signing the managers will market the securities to potential investors either on the basis of a term sheet or a preliminary offering document setting out the information relating to the securities being offered. The Prospectus Rules allow for the prospectus to be approved without the final offer price and amount of securities offered.

In the next phase the price is agreed upon, the corporate decision to issue the bonds is taken, the approval on the prospectus is obtained and the subscription agreement is executed. The Central Depository Agency is instructed to create the securities in book-entry form. At the closing transaction, documents are executed, the securities are issued and credited to investors' accounts in the books of the clearing system or financial intermediaries and proceeds are paid to the issuer.

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?

Closing conditions are usually contained in the subscription agreement, which generally implicates the following:
- the prospectus has been approved by the competent regulatory authority and published by the issuer;
- additional agreements that are necessary for the execution of the public offering have been duly executed;
- the actions necessary for creation of book-entry securities have been executed and the securities are admitted for clearance in the relevant system;
- legal opinions from the issuer's legal counsel and the managers' legal counsel have been delivered;
- the issuance of a comfort letter by the issuer's (and the guarantor's) auditors;
- all authorisations and approvals have been obtained; and
- additional documents, if any, have been delivered (payment instructions and receipt letters).

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

On the Zagreb Stock Exchange, the following listing fees shall be paid:

- listing application processing fee;
- listing fee;
- listing maintenance fee; and
- modification fee.

The amount of fees is calculated based on the nominal (face) value of the respective security and depends on whether debts securities are to be listed in the prime market (the listing fee for bonds amounts 0.03 per cent and varies between €2,300 and €5,200), the official market (the listing fee for bonds amounts 0.025 per cent and varies between €1,900 and €4,600) or a regular market (the listing fee for bonds amounts to €1,600).

The annual listing maintenance fee is payable in advance for each year of listing with the exception of the first year, and is due a year after the listing day. The annual listing maintenance fee amounts to €1,300. A modification fee is payable upon modifying the characteristics of already listed bonds (eg, in the case of an increase or reduction of the nominal value of the bond) and amounts to €1,300.

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 debt instruments in Croatia may be considered undeveloped. In general, most equity-linked notes are not actively traded on the secondary market and are designed to be kept to maturity.

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 varieties of debt securities that can be issued into the market that have some kind of additional structuring feature and, therefore, a detailed discussion of the structured products is beyond the scope of this question. In general, the rules applicable to the offering of special debt securities are the same as for other debt securities except that, additional restrictions in respect to the issuance of exchangeable and convertible debt securities and their admittance to trading on the regulated market must be observed.

An offering of special debt securities to the public requires approval and publication of a prospectus, unless an exemption is available. Under the Croatian Companies Act convertible bonds may only be issued on the basis of the shareholders' meeting resolution, which must be passed by a majority of at least three-quarters of the share capital represented at the shareholders meeting when passing the resolution, unless the statute provides otherwise. Moreover, in many scenarios, contingent capital is required for the issuance of the shares upon conversion. In order to be in a position to conduct a private placement and to sell the convertible bonds to institutional buyers, shareholders' pre-emptive rights must be excluded.

Additional restrictions apply when such convertible or exchangeable debentures are to be admitted on the official market, in which case, a stock exchange may approve the admission to trading on the official market of such debt securities only when it is satisfied that their holders have at their disposal all the data necessary for the assessment of the value of the shares to which these debt securities are related and provided that their related shares have already been admitted to trading on the same regulated market, that their related shares have already been admitted to trading on an another regulated market or are admitted to trading simultaneously with their related shares.

Special debt securities may raise accounting issues that the issuer should be aware of and that are dependent on the specific characteristics of the relevant securities (eg, hybrid securities having characteristics of both debt and equity may present difficulties as to the appropriate classification of the instrument (whether 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 classification of a security as debt or equity is determined based on the definition of the security as provided for in the Capital Market Act. The term 'securities' includes all types of negotiable securities with the exception of money market trading instruments with a maturity of less than 12 months.

Equity securities are shares and other securities equivalent to shares. The definition also includes other types of transferable securities that give the holder the right to acquire shares or their equivalents as a result of conversion or the exercise of a conversion right. In order to qualify as equity securities, the securities in question must have been issued by the issuer of the underlying shares or by an entity belonging to the group of that issuer. Debt securities are defined as all securities that do not qualify as equity securities.

This categorisation determines what type of authorisation is needed for the issuance of such securities and what annexes of the Prospectus Regulation apply for the purposes of preparing the offering. Another implication is if the security instrument has been categorised as debt rather than equity, the issuer of debt securities with a minimum denomination of €1,000 or more may choose its home member state (the state where it has its corporate office or the state where the securities will be offered to public or admitted to trading) and, consequently, the authority deciding on the approval of the prospectus. Investors in debt securities have a higher priority level than the investors in equity securities in respect to recovery of receivables in the case the company goes bankrupt or where it is decided to be wound up.

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?

Croatian law does not provide for any transfer restrictions or other limitations in respect to debt securities that are privately offered. Any subsequent sale of debt securities that were previously acquired in a private placement is considered a new offer and in the absence of exemptions may be subject to publishing the prospectus regarding a public offer.

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 Directive has introduced a European notification system for prospectuses, which has been implemented into the Croatian Capital Market Act (passporting) and which aims at facilitating cross-border offerings and admission to trading of securities in the EEA.

A prospectus approved by the competent authority of another EEA member state may be used for a public offering in Croatia without the need to obtain any additional approval from HANFA provided that the competent authority of another EEA member state has delivered to the European Securities and Markets Authority (ESMA) and HANFA notification of approval of the prospectus, including required documents (the certificate of approval of prospectus confirming that the prospectus was drawn up in accordance with the rules as set out in the Prospectus Directive, a copy of the approved prospectus and the translation of the summary of the prospectus).

With respect to issuers domiciled outside the EEA, the HANFA may approve a prospectus drafted in accordance with the applicable rules and regulations of a non-EEA state if the prospectus complies with international standards determined by an international securities commission organisation, including the International Organization of Securities Commissions.

With respect to domestic issuers offering debt securities only outside Croatia, the prospectus may be filed for an approval with the HANFA. Once approved the HANFA will notify the ESMA and the relevant authority of the respective EEA member state of the approved prospectus. The prospectus is required to be drafted in a language approved by the competent authority in the host state or in the language customary in the sphere of international finance. Accordingly, if the prospectus is prepared in English, the company will not be required to translate it into another language as long as the summary of the prospectus is translated into a language approved by the competent authority of the respective host country.

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

No special arrangements exist (see question 18).

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 usual that the company engages one or more investment banks, whose key roles will be to advise the issuer in connection with the transaction, to market the transaction and, if necessary, to underwrite the deal in the event of failure in order to place the issuer's debt securities on the market. Both public and private offerings may be underwritten by a syndicate led by one or more underwriters, especially when it comes to larger deals. Before the signing of the underwriting agreement, the company will often sign the engagement letter. The willingness to accept the underwriting of the offering will depend on the attractiveness of the securities offered, the issuer's financial conditions and its future operations, market conditions and the fee offered to underwriters for a subscription and purchase of the securities. Where there are a number of managers, it is usual that the underwriting is done on a joint and several basis.

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

Underwriting services constitute investment services. Only licensed investment companies or licensed credit institutions may perform investment services. The HANFA issues a licence for the provision of investment services to investment companies and the Croatian National Bank issues a licence to credit institutions. The European passporting system for banking and financial services allows financial services operators from EEA countries to provide investment services in Croatia if a proper notification procedure is followed. The HANFA maintains an updated, publicly available register of authorised investment service providers.

There are no approval requirements with respect to underwriting agreements in Croatia.

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

The Central Depository and Clearing Company (CDCC) manages the clearing and settlement system of securities transactions. The Croatian securities market operates in a dematerialised environment and debt securities are issued in a book-entry form. The CDCC uses the standard settlement period t+2 (transaction date plus two days).

After the subscription and the payment of the subscribed securities, the issuer (lead manager) informs and delivers to the clearing system the names of the initial subscribers and the number of securities allotted to them. If the securities are subscribed by underwriters, each underwriter instructs the clearing system to debit its cash account with the relevant subscription amount and to credit that amount to the account of the lead manager in charge of settlement, after which the lead manager authorises the release of the issue proceeds to the issuer. If the admission of securities to trading on the official market is preceded by a public offer, securities may be admitted to trading on the official market after completion of the subscription period and effected payment.

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

Investors hold their securities either directly in accounts at the clearing system or indirectly through agents, custodians or trustees. Debt securities issued in Croatia are book-entry securities. The securities registered in the CDCC may be admitted to trading on the regular market. Clearing and settlement of transactions executed on a regulated market is performed through the clearing and settlement system operated by the CDCC.

24 Describe how issuers manage their outstanding debt securities.

Generally, the issuer is entitled to acquire the securities in the market or otherwise, directly or through a third party or an agent. If a third party participates in the transaction (eg, an agent or a broker), the issuer usually enters into a purchase agreement setting forth the terms and conditions of the purchases and any applicable fees or commissions. If the issuer is entitled to a premature repurchase, a dematerialised security registered with the CDCC shall contain data on the repurchase value of the security or the method for its determination and information as to the manner of exercise of that right, including other conditions for the exercise of the repurchase right.

In practice, it is quite difficult for the issuers to enter into direct discussion or negotiations with the bondholders regarding the amendments of the terms and conditions of the debt security. However, the terms and conditions of the security might provide for powers of amendment on the basis of the written approval of the bondholders. It is usual that the issuers in the prospectus retain the right to premature repurchase and annulment of the debt securities by offering the bondholders the opportunity to purchase all or a part of their debt securities for cash, in which case the issuer of the debt securities is required to ensure that all the holders of debt securities have equal ranking and equal treatment in respect to the tender offer.

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

Croatian law imposes ongoing and periodic disclosure and reporting obligations on issuers whose debt securities are admitted to trading on a regulated market. The issuers of debt securities in Croatia are generally obliged to regularly prepare and make publicly available annual and half-yearly financial and business reports (certain exceptions may apply, such as in respect to the issuers of debt securities with denomination per unit of at least €100,000, provided that these are the only securities of the issuer admitted to trading on a regulated market) including reports relating to insider price-sensitive information.

The issuer's annual financial report shall include audited annual financial statements, a management report, a statement of responsible persons and an audit report. The issuer's half-yearly financial report includes the condensed set of half-yearly financial statements, the interim management report and, if applicable, an audit report. The corresponding statements of the persons competent for composing the reports are required.

The issuer of debt securities shall inform the public without delay of new securities issues and any changes having regard to the rights of holders of the issued securities, including changes in the terms and conditions that could indirectly affect the rights resulting from such securities (in particular changes in respect to loan terms or the interest rate). Changes in terms and conditions that may be objectively determined (eg, changes in the London Interbank Offered Rate or Euro Interbank Offered Rate) that occur regardless of the issuer's will are exempted.

The issuer shall ensure that all the mechanisms and information necessary to enable debt securities holders to exercise their rights attaching to those debt securities are publicly available and that the integrity of the data is preserved.

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?

Persons responsible for the accuracy and completeness of the information contained in the prospectus are the issuer (the offeror or the person submitting the application for admission), members of the management and the supervisory board, the guarantor and persons assuming liability for the accuracy and completeness of the information contained in the prospectus.

Apart from civil liability resulting in the compensation of damages, the Capital Market Act provides for sanctions in a number of cases when the issuer or responsible persons act contrary to its provisions (eg, failing to make a prospectus public within set time limits, offering debt securities to the public without publication of the prospectus or publicising the prospectus without the HANFA's approval). Penalties that can be imposed upon a legal person may amount up to €130,000 and responsible physical persons may be fined up to €6,500.

Besides civil liability and liability for committed misdemeanours, certain acts such as the misuse of privileged information or the misuse of the capital markets may result in criminal liability and prosecution.

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

Investors in debt securities may claim damages for the losses suffered due to material incorrectness or omission of the information contained in the prospectus. Further, in the case of certain supervisory measures imposed by the HANFA, such as suspension of a public offer, admission to trading or a prohibition of a public offer, holders of the debt securities who subscribed securities in the public offer proceedings may withdraw the acceptance of the offer and cancel the purchase of securities within five days upon publication of the adopted supervisory measure.

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

The HANFA is the supervising authority and is vested with inspection powers in order to verify compliance of the capital market players with the Capital Market Act. Inspection duties typically include receipt, collection and verification of the published information, inspection of the issuers' operations and issuance of the supervisory measures, such as suspension of a public offer or admission to trading for a maximum of 10 working days, prohibition or suspension of advertisements for a maximum of 10 working days, prohibition of a public offer, etc. In the case of a reasonable doubt regarding the perpetration of a criminal act or a misdemeanour, the HANFA shall, accordingly, notify the competent authority.

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

Interest from bonds accrued and earned by a physical person are exempted from income tax. Profit from the interest earned by legal persons is included in the tax base for the calculation of the profit tax. The currently applicable tax rate is 20 per cent. At present, Croatia does not have capital gains tax, but this is to be introduced from 1 January 2016 with a tax rate of 12 per cent.

Update and trends

Since Croatia's accession to the EU, the debt securities market is showing signs of growth. Government bonds and bonds with government guarantee dominate the domestic market, whereas, in the corporate sector, the issuance of commercial papers prevails. Exemption from taxation of the interests from bonds earned by physical persons means that bonds in Croatia enjoy a privileged regime compared with other types of investments and savings. Threatened illiquidity of the corporate sector encourages caution when deciding whether to invest in commercial bonds or commercial papers, and this may have an impact on the attraction and the volume of the debt securities market in Croatia. This is one of the reasons why debt securities in Croatia are still characterised by a low level of liquidity compared with more developed markets.

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

Debt securities are typically offered in the Cypriot market in the form of corporate bonds, and usually take the form of fixed rate securities, guaranteed securities or convertible bonds. A large number of Cypriot issuers may offer and admit bonds to trading on a regulated market other than in Cyprus, and in such cases the debt securities take a number of different forms including high-yield bonds.

2 Describe the general regime for debt securities offerings.

The principal laws governing the regime for debt securities offerings are:
- the Public Offer and Prospectus Law, 114(I) of 2005 as amended (Prospectus Law), implementing Directive 2003/71/EC as amended on the prospectus to be published when securities are offered to the public or admitted to trading (Prospectus Directive);
- the Insider Dealing and Market Manipulation (Market Abuse) Law, No. 116(I) of 2005 as amended (Insider Dealing and Market Manipulation Law), implementing the EU Market Abuse Directive (2003/6/EU);
- the Cyprus Securities and Stock Exchange Law, 14(I) of 1993 as amended; and
- the Cyprus Securities and Exchange Commission (Establishment and Responsibilities) Law, 64(I) of 2001.

Regulations made under the Cyprus Securities and Stock Exchange Law, and, in particular, the 1995 Regulations as amended together with regulations issued by the Cyprus Stock Exchange (CSE) are also relevant.

The Cyprus Securities Exchange Commission (CySec) is the relevant supervisory authority.

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.

A corporate issuer will be required to produce a prospectus whenever there is either an offer of transferable securities to the public or a request for the admission to trading of transferable securities on a regulated market in Cyprus. In relation to filing of the prospectus and publication requirements, please refer to question 4. If the issuer also intends to admit the bonds to trading on the Cyprus Stock Exchange its must also submit a listing application in accordance with the relevant regulatory requirements.

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

The Prospectus Law regulates the conditions under which an issuer is allowed to conduct a public offer of securities in Cyprus. It also regulates the conditions for drawing up, approval and distribution as well as the content of the prospectus to be published when securities are offered to the public or admitted to trading on the Cyprus Stock Exchange or in another regulated market operating in Cyprus, and in every other regulated market outside Cyprus, provided that the home member state is Cyprus.

Cyprus is the home member state for:

(i) all issuers of securities registered in a member state that are not included in (ii), where the issuer has its registered office in Cyprus;

(ii) any issue of non-equity securities whose denomination per unit amounts to at least €1,000, and for any issues of non-equity securities giving the right to acquire transferable securities or to receive a cash amount, as a consequence of their being converted or the rights conferred by them being exercised. This is provided that the issuer of the non-equity securities is not the issuer of the underlying securities or an entity belonging to the group of the latter issuer, where the issuer has its registered office in Cyprus, or, where the securities were or are to be admitted to trading on a regulated market in Cyprus, or, where the securities are offered to the public in Cyprus, at the choice of the issuer, the offeror or the person asking for the admission, as the case may be. The same regime shall be applicable to non-equity securities in a currency other than the euro, provided that the value of such minimum denomination is equivalent to €1,000; and

(iii) all issuers of securities incorporated in a third country, which does not fall under (ii), intending to offer to the public in Cyprus securities for the first time after 31 December 2003, or intending to make the first application for admission to trading on a regulated market in Cyprus, at the choice of the issuer, the offeror or the person asking for the admission, as the case may be, subject to a subsequent election by issuers incorporated in a third country if the home member state was not determined by their choice.

There are exemptions to the obligation to publish a prospectus for certain types of offers (see question 10).

The degree of disclosure in a Cyprus-registered prospectus depends on the type of issuer and the type of security.

The issuer, offeror or person asking for the admission of securities to trading on a regulated market can choose to have a prospectus, which may consist of a base prospectus if it relates to one of the following types of securities:
- non-equity securities, including warrants in any form issued under an offering programme;
- non-equity securities issued in a continuous or repeated manner by credit institutions where:
  - the sums obtained by the credit institution from the issue of the said securities are placed in assets that provide sufficient coverage for the liability deriving from securities until their maturity date; and
  - in the event of liquidation of the credit institution issuing these non-equity securities, the sums due by the credit institution in relation to the said non-equity securities are disposed, as a priority, to repay the capital and the interest falling due (subject to any laws governing the credit institution).

The base prospectus contains all the relevant information concerning the issuer and the securities offered to the public or to be admitted to trading on a regulated market and may, at the choice of the issuer, offeror or person asking for the admission of securities to trading on a regulated market, contain the final terms of the offer. If necessary, information contained in the base prospectus may be supplemented with up-to-date information about the issuer and the securities as a supplement to the prospectus.

The prospectus may also be drawn up as a single document or as separate documents.

If drawn up as a single document, it must consist of the main body, which encompasses the information concerning the issuer and the securities to be offered, and a summary note, including the identity of directors, senior management, advisers and auditors of the issuer, the offer statistics and expected timetable, key information regarding the issuer including selected financial data, capitalisation, indebtedness, reasons for the offer, the use of proceeds drawn from the offer and the risk factors, operating and financial prospects, major shareholders and related party transactions.

If a prospectus is drawn up as separate documents it must include:

- a registration document containing information relating to the issuer;
- a securities note, containing information concerning the securities offered to the public or to be admitted to trading on a regulated market; and
- a summary note, with minimum information required to be included as set out in Annex Three C of the Prospectus Law and which must be brief and in non-technical language.

Importantly, there is no requirement to provide a summary note where the prospectus relates to the admission to trading on a regulated market of non-equity securities having a denomination of at least €100,000 per unit.

Other than the Prospectus Law, the Companies Law, Cap 113 contains certain prospectus requirements, which apply where a company allots or agrees to allot any shares in or debentures of the company with a view to all or any of the same being offered for sale to the public. Debenture includes debenture stock and bonds. The definition of 'public offer' is very wide and includes 'any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner'. Similarly, the term 'prospectus' means 'any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase of any shares or debentures of a company'. Therefore, if the Prospectus Law does not apply, the provisions of the Companies Law may require a prospectus to be drawn up and filed with the Cyprus Registrar of Companies prior to the issue of the debt securities. The requirements of such a prospectus are contained in the Fourth Schedule to the Companies Law.

5 Describe the drafting process for the offering document.

The disclosure requirements for an offer document are prescribed in the Prospectus Law and the Companies Law, Cap 113 (where applicable). The broad guideline is that the offer document must contain all information that is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses and prospectus of the issuer and of any guarantor and of the rights attaching to the securities. The drafting process is undertaken by the issuer in coordination with the legal teams involved in the transaction and the underwriters and their respective team. Question 4 refers to details on the content of the offering document or 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?

The terms and conditions of the bonds are usually set out in the terms and conditions document, which is set out in a trust deed and the parties to the same are the issuer, the guarantors (if any) and the relevant agents.

Where there is a public offering of the debt securities, the terms and conditions of the bonds are usually set out in the offering document or prospectus and made available to the public.

An announcement must be published, which states the form the prospectus has been made available to the public and from where the public may obtain it. Where the prospectus is made available solely by publication in electronic form, a paper copy must be delivered to an investor on his or her request and free of charge.

The prospectus is also available on the internet site of the Cyprus Securities and Exchange Commission (CySec) for a period of at least 12 months from the date of first publication, or is included in the list of prospectuses with an explicit reference to the internet site of the Cyprus Stock Exchange, or other website (such as that of another regulated market or the issuer's website) where it is available. Where securities are admitted to trading on the CSE or another regulated market in Cyprus, a full text of the prospectus is published on its website for at least 12 months after the securities have been admitted to trading.

The trust deed is usually also available at the registered office of the issuer for inspection.

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

CySec is responsible for the approval of a prospectus. If the issuer is a Cypriot company that proposes to offer debt securities on a regulated market outside Cyprus, it may apply to CySec to transfer its authority to approve the prospectus to the regulatory authority of the other member state provided and subject to the agreement of the other regulatory authority. Once the prospectus is approved by the relevant regulatory authority, it must also be filed to CySec.

In relation to the form of the offering documentation, see question 4.

In relation to the publication of the offering document, this is filed with CySec in its final approved form and is then published by the offeror, the person asking for admission to trading on a regulated market or the underwriter responsible for drawing up the prospectus at a reasonable time in advance of, or at the latest at the beginning of, the offer to the public of the securities involved; or prior to their admission to trading or, at the latest, on their admission to trading, as the case may be.

Where the prospectus is issued in relation to a public offer taking place in Cyprus, or for the admission of securities to trading on a regulated market in Cyprus, the prospectus should be published in at least one of the following forms:

(i) in one or more national Cypriot newspapers;
(ii) in a printed form to be made available, free of charge, to the public:
(iii) at the offices of the Cyprus Stock Exchange or of the other regulated market on which the securities are being admitted to trading; or
(iv) at the registered office of the issuer and any financial intermediaries (such as the underwriters and the investment firms placing the securities);
(v) in electronic form, on the internet site of the issuer and any financial intermediaries;
(vi) subject to the prior consent of CySec, in an electronic form, on the internet site of the Cyprus Stock Exchange or other regulated market where their admission to trading is asked for; or
(vii) subject to the prior consent of CySec, in an electronic form, at the internet site of the Cyprus Securities and Exchange Commission:

Issuers who publish their prospectus according to (i) and (ii) are also obliged to publish their prospectus in electronic form as set out in (iii).

The choice as to the form of publication must be notified to CySec.

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?

Where the publication of a prospectus is a prerequisite requirement for the offer of securities to the public or for the admission of securities on a regulated market in Cyprus, the offer or admission to trading is not allowed until such publication. Publication cannot take place until the prospectus is approved.

The decision of CySec is notified to the issuer or offeror within 10 working days of the submission of the prospectus. However, CySec may request reasonable adjustments or corrections to the prospectus that it considers necessary to secure the transparency in the market, and time stops running until submission of such updated documents. The time limit of 10 working days may also be extended to 20 working days if the public offer involves securities issued by an issuer that does not have any securities admitted to trading on a regulated market and who has not previously offered securities to the public.

In relation to the transfer of authority to approve a prospectus from CySec to the regulatory authority of another member state (see question 7), the approval of the transfer process varies according to the specific regulatory authorities dealt with, but usually takes approximately four weeks.

Any type of advertisement relating to an offer of securities to the public or an admission to trading on the CSE, or on another regulated market that takes place in Cyprus where there is an obligation to draw up a prospectus, is subject to certain restrictions as follows:

- the advertisement or announcement relating either to an offer of securities to the public or to an admission to trading on the CSE or on another regulated market shall state that a prospectus has been or will be published and indicate where investors can obtain it;
- the advertisements must be clearly identifiable as such;

- the information contained in the advertisement must not be inaccurate or misleading and must be consistent with information to be included in the prospectus; and
- all information, announcements or advertisements concerning the offer to the public or the admission to trading on the CSE or other regulated market must be disclosed in an oral or written form, even if the information, announcement or advertisements is not made for advertising purposes and shall be consistent with that contained in the prospectus.

The advertisements or announcements must be filed with CySec who will examine whether the advertising activity or announcement is in compliance with the relevant legislative provisions.

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

The regulators will refuse to approve a public offering of securities if the content of the prospectus or offering document does not comply with the necessary legislative provisions or the eligibility requirements for the admission to trading and listing requirements 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?

Private placements are exempt from the obligation to publish an offer prospectus. Specifically, where the Prospectus Law is applicable, the obligation to publish a prospectus does not apply to the following types of offer:
- an offer of securities addressed solely to qualified investors;
- an offer of securities addressed to fewer than 150 natural or legal persons per member state, other than qualified investors;
- an offer of securities addressed to investors who acquire securities for a consideration of at least €100,000 per investor, for each separate offer;
- an offer of securities whose denomination per unit amounts to at least €100,000; or
- an offer of securities with a total consideration in the Union of less than €100,000, which limit shall be calculated over a period of 12 months.

In situations where the Prospectus Law is not applicable, consideration must be given to the provisions of the Companies Law, Cap 113, which may require a prospectus (see question 4).

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

The issuance and offering process commences with the mandating of the managers, legal, financial and tax advisers. Setting of a timetable will be done and the relevant teams will commence the due diligence exercises and draft the relevant transaction documents. Once the prospectus is at an advanced stage, it will be submitted to CySec for review. The issuer will then launch the deal by announcing the debt issuance publicly. After the launch date, the managers will market the securities to potential investors. The prospectus will then be approved. The next steps involve signing of the subscription agreement, satisfaction of condition precedent documents and closing the transaction pursuant to which the transaction documents are signed and securities issued.

There are no special procedures that must be followed to implement a valid private placement where there will be no offer of the debt securities to the public and where the debt securities will not be admitted to trading on a regulated 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?

As regards the liability of underwriters (see question 26), there is a rebuttable presumption as to the lack of liability of the underwriter, provided that the content of the prospectus was the subject of legal and financial due diligence examination exercised at the request of the underwriter through independent legal advisors and auditor. Due to this, underwriters typically request the following as closing documents by way of example:
- legal opinions from their legal counsel and counsel of the issuer;
- auditors' comfort letters regarding the financial information in the prospectus;
- taxation opinions;
- issuers officers' certificate confirming (among others) that representations and warranties in the underwriting agreement are true and accurate and as to the information in the prospectus and taking of all necessary corporate action for the offering; and
- disclosure letters.

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

The initial fixed fees for listing publicly issued debt securities on the CSE are as follows:
- upon submitting the application for pre-approval of listing the debt securities there is a fee of €2,221;
- a fee of €1,709 for the examination of the final corporate profile; and
- a fee of €3,417 for the official announcement for listing.

There is also an initial listing of new issuer fee per title of €3,417 fixed and €256.29 per €1,708,601.44, calculated on a pro-rata basis on the market value of the securities. These fees are capped at a maximum fee of €170,860 and minimum of €3,417.

Thereafter, there are annual listing fees per transaction for the maintenance of the debt securities register. For corporate bonds it is €0.09 per transaction; for government bonds it is €0.10 per transaction. There is also an annual fixed fee per depositary account for the maintenance of registers. For the corporate bonds register it is €854; for municipal bonds register it is €1.71 per holder, with a minimum fee of €170,000 per register; and for the government bonds register it is €4 per holder with a minimum fee of €400 per register.

The annual fee for the maintenance of corporate bonds register, undertaken by the Central Securities Depository and the Central Registry, will be payable on the date the register was undertaken and, subsequently, on the first working day of each successive year. The payable fee will be the same as above if a register is maintained by the Central Securities Depository and the Central Registry for a period of less than 12 months.

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

The main form of debt instruments is guaranteed bonds or fixed-term bonds and bonds convertible to securities represent about only 30 per cent of the debt capital market. Other special debt instruments are rarely issued in the Cypriot market, but Cypriot issuers may issue such instruments for offering to the public and admit them for trading outside Cyprus.

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

An offering of instruments convertible or exchangeable to shares for consideration in cash triggers statutory pre-emption rights, contained in section 60B of the Companies Law, Cap 113. The pre-emption rights apply to the issuance of all securities that are convertible into shares or are accompanied by the right to subscribe for shares, but not to the conversion of such securities or to the exercise of the right to subscribe.

It is also noted that the pre-emption rights may be disapplied by resolution of the general meeting, which is passed by a specified majority, being a majority in favour of over one half of all the votes cast if the attendance represents not less than half the issued share capital and a majority in favour of not less than two-thirds of the votes cast in all other cases. In connection with such a disapplication, the directors have an obligation to present to the relevant general meeting a written report explaining the reasons for the proposal.

Securities that possess characteristics of both debt and equity may present difficulties in classification from an International Financial Reporting Standards perspective.

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

Non-equity securities mean all securities that are not equity 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. This is 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.

The European Securities and Markets Authority has clarified that the key element to distinguish between 'equity' convertible bonds and 'non-equity' convertible bonds is whether the issuer of the convertible bond is the issuer of the underlying shares or an entity belonging to its group (rendering it an 'equity' convertible bond) or not (in which case it would be a 'non-equity' convertible bond). Whether the conversion right is solely at the investor's discretion is not a relevant consideration.

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.

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 respect of a foreign issuer whose home member state is not Cyprus, the prospectus that is approved by the competent regulatory authority of the home member state is valid for the making of an offer to the public, or admitting securities to trading on the CSE, or another regulated market operating in Cyprus. This is provided that CySec is notified by receiving a certificate from the competent authority confirming that the prospectus has been approved by it, and a copy of the same. Passporting of the prospectus is therefore possible.

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

Other than the ability to passport a prospectus referred to in question 18, there are no arrangements with other jurisdictions to assist foreign issuers to access debt capital markets in Cyprus.

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 every public offer that takes place in Cyprus, a participating underwriter is responsible for the collection of the purchase value of the securities offered. In an initial public offering, an underwriter also participates in drawing up the prospectus. Although previously both book building and fixed price underwriting arrangements were common, soft underwriting (ie, on a ' best efforts' basis) is the most usual form. The underwriting agreement will typically include indemnity provisions, force majeure clauses and may also include overallotment provisions if the underwriter undertakes price stabilisation.

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

Underwriting of financial instruments, or placing of financial instruments on a firm commitment basis and placing of financial instruments without a firm commitment basis, is a regulated investment service activity pursuant to the Investment Services Law, No. 144(I)/2007, as amended. Underwriting services may only be undertaken by a Cyprus investment firm licensed by CySec, or an investment firm regulated in another member state or otherwise licensed to provide the same. The underwriting agreement is not subject to CySec approval, but an underwriter should observe the code of conduct issued by CySec, in particular Annex 11, which specifies the duties of the underwriter in the course of carrying out the investment services of underwriting and disposal of financial instruments.

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

The transaction issues will ultimately depend on each particular deal, the results of due diligence (both legal and financial), content of disclosure letters and comfort letters to be issued by auditors and cross jurisdictional issues relating to the security package (if any). Settlement is usually made on a 'delivery versus payment' basis on the same day and involves, among others, the Central Securities Depository of the Cyprus Stock Exchange.

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

Public debt securities are typically held and traded in dematerialised form in Cyprus.

24 Describe how issuers manage their outstanding debt securities.

Issuers with outstanding debt securities do not generally conduct open market purchases, consent solicitations or tender or exchange offers. Corporate debt is usually held until maturity and rolled over into new issues, although recently restructuring of bonds has become more common in Cyprus.

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

The listing rules impose ongoing disclosure obligations on the issuer once their securities are admitted to trading, and the issuer is required to publish periodic financial information. An issuer must also, on its own initiative, publish as soon as possible 'inside information' that directly concerns the company, in order to avoid market manipulation and insider trading as well as to disclose significant transactions. Issuers are also subject to the disclosure obligations of Law No. 190(I)/2007 as amended (Transparency Obligations Law), implementing the Transparency Directive (Directive 2004/109EC) requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

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 in relation to debt securities offerings applies (among others) to persons signing the prospectus (being the issuer, the offeror or the person asking for the admission to trading on a regulated market), persons submitting summaries of the prospectus or any of its translations for publication or filing, the underwriters and persons issuing statements for the preparation of the prospectus.

The persons signing the prospectus are responsible for the accuracy, completeness and clarity of the prospectus and for its updating. In any claim for damages against persons signing a prospectus, the burden of proof lies with such for:

- its accuracy, completeness, and clarity that it was kept up to date; or
- lack of liability for any errors in the prospectus.

Other than where there has been malicious intent by such person, there is a statutory bar of two years from the date the securities are made available or from their admission to trading on a regulated market, as the case may be, to make a claim for damages against such persons signing the prospectus. Persons submitting a summary of the prospectus or any of its translations for publication or filing, bear civil liability only if the summary is misleading, inaccurate or inconsistent when read together with the prospectus as a whole, but no liability arises solely on the basis of the summary itself.

The underwriter is responsible against investors who acquired securities based on erroneous, deficient or insufficient information contained in the prospectus in respect of every damage that those investors sustained as a result of the falling of the price of the securities after the deficiencies in the prospectus were revealed. The underwriter is not liable if he or she was not responsible for the deficiencies in the prospectus, and there is a rebuttable presumption as to lack of liability of the underwriter if the content of the prospectus was the subject of legal and financial due diligence examination exercised at the request of the underwriter through independent legal advisors and auditors.

Other than where there has been malicious intent by the underwriter, an action against the underwriter pursuant to the above bears a statutory bar of one year from the date the securities are made available, or from their admission to trading on a regulated market, as the case may be.

Any person who, within the scope of his or her professional duties issues any type of statement that constitutes a basis for the preparation of the prospectus and the reports contained therein or is prepared in order to be taken into account for the preparation of the prospectus, must exercise due care in order to ensure the accuracy, completeness and clarity of such statements. Where such statements are expressed in the prospectus, their author is responsible to investors for every loss they may sustain if the prospectus contained inaccuracies or material omissions due to deficiencies in such statements. Other than where there has been malicious intent by such author of the statement, the limitation period to make a claim for damages against such person is one year from the date the securities are made available or from their admission to trading on a regulated market, as the case may be.

An administrative fine of up to €170,860.14 or, in the case of a repeated breach of the law, a fine of €341,720.29, may be imposed by the Cyprus Securities Exchange Commission for breaches relating to the above. The Prospectus Law does not provide for criminal sanctions for the liabilities set out above, but criminal liability may be incurred where an offer has been made to the public without the publication of a prospectus approved in accordance with the Prospectus Law.

Where a prospectus invites persons to subscribe for debentures of a company, the Companies Law, which may apply where the Prospectus Law does not apply, also imposes liability on directors, promotors of the company and every person who has authorised the issue of the prospectus to all persons who subscribe for debentures on the faith of the prospects of the company, and are liable to compensate them for the loss or damage they may have sustained by reason of any untrue statement included therein.

The Companies Law also provides criminal liability on the person that authorised the issue of the prospectus, for any untrue statement included in the prospectus, unless (among others) it is proven that either the untrue statement was immaterial or that there were reasonable grounds to believe that such statement was believed to be true at the time the prospectus was issued.

There may be additional liability on the basis of breaches of other laws, such as the Transparency Obligations Law and the Insider Dealing and Market Manipulation Law.

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

As referred to in question 26, investors may bring civil actions against specific persons for damages or loss sustained in connection with breaches relating to the prospectus issuance.

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

CySec is the competent authority for the exercise of administrative supervision and the imposition of administrative sanctions pursuant to the Prospectus Law. CySec deals with administrative breaches either ex officio or on submission of a complaint, and has the power to impose administrative fines to legal persons or directors, managers, officials if it is proven that the violation was as result of their own fault, wilful omission or negligence. The level of the fine typically ranges between €42,715.04 and €341,720.29, depending on the infringement. The outcome of the regulatory inquiry or investigation depends on the circumstances of each case, whether there are any mitigating factors or factors going to the severity of the infringement or whether there is a repeated infringement in which case higher fines may be imposed. CySec also has powers to impose administrative penalties for breaches of other laws such as, by way of example, the Transparency Obligations Law and the Insider Dealing and Market Manipulation Law.

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

Cyprus imposes corporate income tax at the rate of 12.5 per cent and personal income tax at progressive rates from zero per cent to 35 per cent.

Cyprus does not levy any withholding taxes on interest or coupon yield paid to non-Cypriot tax residents.

Individuals who are tax residents of Cyprus (present in Cyprus for periods exceeding 183 days during a tax year) are subject to defence tax at the rate of 30 per cent (other than on the coupon yield from government bonds or interest earned by a provident funds, which is subject to 3 per cent defence tax) on interest or coupon yield received or accrued, whichever is earlier, if that interest or coupon yield is not derived from the ordinary carrying on of a business, including interest not closely connected with the ordinary carrying on of a business. If the interest or coupon yield income is derived from the ordinary carrying on of a business, including interest closely connected with the ordinary carrying on of a business, then it is exempt from 30 per cent defence tax, and it is subject to personal income tax at progressive rates from zero per cent to 35 per cent.

Companies that are tax residents of Cyprus (ie, their management and control is exercised in Cyprus) are subject to defence tax at the rate of 30 per cent on interest or coupon yield received or accrued, whichever is earlier, if that interest or coupon yield income is not derived from the ordinary carrying on of a business, including interest not closely connected with the ordinary carrying on of a business. If the interest or coupon yield income is derived from the ordinary carrying on of a business, including interest closely connected with the ordinary carrying on of a business, then it is exempt from 30 per cent defence tax and it is subject to corporate income tax at the rate of 12.5 per cent.

There is no corporate or personal income tax payable on profits realised from the disposal of securities irrespective of the holding period, number of securities held or trading nature of the gain. The definition of securities for Cyprus tax purposes includes bonds. Profits from disposal of bonds are also exempt from 20 per cent capital gains tax.

Finally, the bond documents may be subject to stamp duty payment in Cyprus.

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

Debt securities offered in France are typically unsecured and unsubordinated bonds, which are issued either on a stand-alone basis or under a programme (MTN programmes). The largest segment of the French market consists of investment-grade debt securities of regular issuers, many of which also have listed equity securities and publish regular financial reports. The high yield debt segment is smaller but has seen significant growth in recent years, although most high yield bonds of French issuers tend to be listed and traded outside of France. There are also substantial volumes of convertible and other equity-linked securities issued in France. This article focuses on straight debt securities, namely, debt securities other than equity-linked securities.

Debt securities can be placed either through an offer to the public, in which case an offering prospectus must be filed with the AMF, the French financial markets regulator, and be made available to investors, or through a private placement, in which case the preparation of an offering prospectus is not required unless the securities are to be admitted to trading on a regulated market in France or the European Union.

Debt securities are defined as negotiable instruments that, within the same issuance, provide the same creditors' rights for a given nominal value. Debt securities (excluding equity-linked securities) are issued pursuant to a decision by the board of directors, unless the issuer's by-laws require a resolution of the shareholders' meeting or unless shareholders decide to exercise that competence.

The issuers of debt securities in France are predominantly financial institutions and large corporate issuers. Corporate issuers increasingly issue debt securities as a means of obtaining less expensive and covenant-light financing in a context where European regulatory legislation (such as CRD IV) has raised capital requirements for banks. In recent years, small and medium-sized French entities have begun to tap capital markets as well.

French issuers of debt securities are very active. According to data released by the French Central Bank, the nominal value of debt securities issued by French issuers and admitted to trading exceeded €3.31 trillion as at the end of 2014. In 2014, French issuers of all types represented about 40 per cent of the value of gross issues carried out in the Eurozone. According to statistics released by Euronext, at the end of 2014, 2,254 bonds representing a nominal value of approximately €92 billion were admitted to trading on Euronext Paris against 2,033 bonds representing a nominal value of approximately €98 billion at the end of 2013. In 2014, there were 1,534 newly listed debt securities on Euronext Paris, accounting for an issued amount of approximately €247 billion against 2,012 newly listed debt securities on Euronext Paris, accounting for an issued amount of approximately €212 billion.

French issuers are also active in the international bond markets. Many large financial institutions and industrial issuers, in particular, regularly issue bonds in the European, US and Asian markets. In many cases, those bonds are listed on Euronext Paris, and thus are subject to the listing and prospectus requirements described in this note. In some cases, particularly for bonds issued in the US market, there is no French or European listing. In those cases, the requirements in this note relating to the authorisation of issuances are applicable, but the French rules applicable to the preparation of a prospectus and listing generally are not.

2 Describe the general regime for debt securities offerings.

The core of French regulation for debt securities offerings consists of:

- from a corporate law perspective:
  - articles L.211-1–L.211-41 and articles L.213-1 A–L.213-35 of the French Financial and Monetary Code governing financial instruments and debt securities;
  - articles L.228-38 et sequens of the French Commercial Code governing bonds (obligations) and articles L.228-91 et sequens of the French Commercial Code governing equity-linked securities;
- from a securities law perspective:
  - AMF General Regulations;
  - Commission Regulation (EC) 809/2004 as amended (Prospectus Regulation) implementing Directive 2003/71/EC (Prospectus Directive);
  - European Securities Market Authority (ESMA) recommendations and guidelines, for consistent application of the Prospectus Directive and the Prospectus Regulation; and
  - Euronext listing rules on the French regulated market, Euronext Paris.

The AMF is France's competent authority within the context of the Prospectus Directive. It is an independent French public authority entrusted with the following powers and responsibilities:

- adopting regulations pursuant to the legislative rules set forth in the French Financial and Monetary Code (AMF General Regulation) and interpreting such regulations;
- overseeing disclosure of issuers in respect of which it acts as the competent authority, approving prospectus registrations and ensuring compliance with ongoing disclosure obligations;
- conducting inspections and taking enforcement actions for violations of its General Regulations;
- regulating financial intermediaries authorised to provide investment services and financial investment advice engaged in asset-management activities and supervising such entities with sanctioning powers; and
- establishing rules applicable to stock exchanges.

The Paris Stock Exchange is operated by Euronext Paris, which runs the Euronext Paris market, the main regulated French stock exchange and the sole French market for bonds. Accordingly, all companies whose securities are admitted to trading on Euronext must comply with its admission and market rules.

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 article 212-1 of the General Regulations of the AMF, an issuer must file a prospectus with the AMF or any other competent authority of the European Union (EU) or the European Economic Area (EEA) for approval before undertaking an offer of securities to the public or an admission to trading on a regulated market, or both, subject to applicable exemptions (see question 10). Debt securities may be offered to the public in France only after a prospectus has been approved by the AMF and published in the manner set forth in the AMF's General Regulations; or after a prospectus approved by a competent authority of another EU member state has been notified to the AMF.

The issuer must file a listing application with the relevant stock exchange if the debt securities are to be admitted to trading. Euronext Paris is the French regulated market for bonds. The issuer must also file an application with Euroclear France as central depositary.

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

As explained in question 3, an offering to the public in France requires AMF approval of a prospectus, unless an exemption applies. French law defines an offer to the public as:

- a communication addressed to persons in any form or by any means providing sufficient information on the terms of the offer and the securities offered to enable an investor to decide whether to purchase or to subscribe to these securities; or
- a placement of securities by financial intermediaries.

While an exemption from the requirement to prepare a prospectus in connection with an offer may be available, a prospectus may nonetheless still be required if the securities are to be admitted to trading on a regulated market. Therefore, exemptions from both the offer to the public and the admission to trading on regulated market rules are needed to avoid having to publish a prospectus.

When a prospectus must be drawn up, it can take two forms:

- a stand-alone document prepared for an issuance or in connection with a listing application; or
- a base prospectus valid for 12 months, registered with the AMF and supplemented with a document setting out the final terms of the issuance, which must be filed with the AMF whenever a series of securities is issued. The base prospectus format is mainly used for MTN programmes. Final terms may only contain information that can only be determined at the time of issuance of the considered securities (eg, issue price, maturity, coupon, exercise price, redemption price and other terms not known at the time of the prospectus) and may not serve as a supplement of information to the base prospectus.

The prospectus must contain all necessary information in order to allow investors to make an informed assessment of the issuer's assets and liabilities, profits and losses, financial position, results and future prospects and the securities offered (the rights attached, the way they are being issued, etc.). The information in the prospectus must be presented in an easily analysable and comprehensible form.

The minimum information to be included in a prospectus derives from the Prospectus Regulation and its schedules. The information required in a prospectus for debt securities varies depending on the debt instrument (wholesale or retail debt securities), the format of the prospectus and the issuer. It includes, in particular:

- a description of the risk factors relating to the issuer and the securities to be offered;
- information about the issuer (its activities and organisational structure, trends and profit forecasts, governance, major shareholders, audited financial statements for the past two financial years and auditors' reports, legal proceedings, significant changes in financial or trading positions since the end of the last audited or interim financial period) and about any guarantor;
- the terms and conditions of the debt securities offered;
- applicable selling restrictions;
- the contemplated use of proceeds; and
- information relating to corporate authorisation and admission to trading.

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). For example, in a wholesale prospectus, there is no requirement to include a summary (standardised presentation of key data), selected financial information (including key figures summarising the financial condition of the issuer) or auditor report on profit forecasts.

Information contained in a registration document that has already been filed or registered with the AMF (in French, or a free translation thereof in English) can be incorporated by reference without the need to reproduce such information in the prospectus.

If a significant new factor, material mistake or inaccuracy capable of affecting the assessment of securities arises between the AMF's approval of the prospectus and the closing of the offer to the public or the date when trading on a regulated market begins, a supplement to the prospectus must be submitted to the AMF for approval, and the summary (if a retail prospectus) must also be supplemented, if necessary.

5 Describe the drafting process for the offering document.

The issuer takes responsibility for the whole content of the prospectus. In practice, the issuer and its counsel are responsible for drafting the disclosure part of the prospectus (issuer's risk factors and description of its business and activities, financial statements, etc) and the information that relates to the use of proceeds and to corporate authorisations necessary for the issuance. Lead underwriters and their counsel usually prepare a first draft of the terms and conditions, the risk factors that relate to the offered debt securities and the sections that relate to the selling restrictions and the listing process. In order to draft the prospectus and verify the information contained therein, drafting sessions and conference calls are held and attended by, among others, the issuer and its legal counsel, the guarantor (if any), the underwriters and their legal counsel and the issuer's independent auditors for the issuance of their comfort letter. In addition, certain due diligence procedures are conducted.

The issuer's experience has a significant impact on the drafting process, which can be facilitated through the incorporation of information by reference (see question 4).

The key sections of the prospectus are the risk factors, the description of the issuer, its business, its results and its financial condition, and the terms and conditions of the debt securities. Although the Prospectus Regulation provides for detailed lists of the minimum information to be included in the prospectus, in some instances the scope of disclosure remains vague. ESMA has published recommendations as well as questions and answers relating to prospectuses that serve as important sources for consistent interpretation.

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) (see question 4).

If the debt securities offering is structured as a private offering, no prospectus compliant with the AMF General Regulations and the Prospectus Regulation is required for purposes of the offering itself but will be required for listing purposes as investors generally require such a listing. Although a private placement can be conducted on the basis of a term sheet, it is the practice prior to the launch of the placement to prepare a listing prospectus in order to have it unofficially approved by the AMF.

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 a listing of debt securities, the prospectus is the key public document containing the terms and conditions of the debt securities. The terms and conditions of the debt securities are also part of the issuer's corporate issue decision. Once approved by the AMF, the prospectus must be published by the issuer as soon as possible and at a reasonable time in advance of, or at the latest at the beginning of, the offer to the public or the admission to trading on the regulated market, both on the website of the issuer and on the website of the AMF.

As a general rule, consent of an investor to the terms and conditions of the debt securities is governed by French civil law. When a prospectus has been made public, the investor's subscription is sufficient by itself to formalise its consent. In practice, a subscription agreement is entered into between the issuer and the lead managers (or sometimes in a purely private issuance between the issuer and the final investors).

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

As explained in question 3, all prospectuses (and any supplement thereto) drawn up in compliance with the Prospectus Directive must be approved by the relevant competent authority prior to their publication. In France, this competent authority is the AMF.

Final terms referred to in question 4 are not subject to approval by the AMF prior to their publication.

Subscription agreements and agency agreements entered into in connection with the offering are not subject to any regulatory approval.

Marketing materials to be used to conduct offerings to the public must be provided to the AMF prior to their distribution.

See question 6 for prospectuses' availability.

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 3 for documentation approval.

The AMF review starts when a complete application, together with all the required documentation, has been filed. Once the documentation is complete, the AMF must approve the prospectus within 10 trading days, or 20 trading days in the case of a first offer to the public or first admission to trading on a regulated market. The process is iterative; drafts of the document are reviewed until the AMF has no further comments. In addition, this timeframe can be shortened to five trading days for issuers that have already registered or filed their registration document with the AMF.

In practice, provided the issuer makes contact ahead of time with the AMF, review times can be further shortened for routine issues (for example, issuance or admission of 'plain vanilla' bonds) by regular issuers that have filed up-to-date information with the AMF through a registration document or a recent prospectus.

During the review process and prior to a prospectus' approval by the AMF (or notification of a prospectus to the AMF) and publication of the prospectus, no public offering of the debt securities can be made in France. In addition, until approval and publication of the prospectus, the issuer, the underwriters and other parties must comply with restrictions set forth in the AMF General Regulations. Such restrictions relate to publicity activities and release of information in connection with the proposed offering, or any other material information that can affect the placement of securities.

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

Following its examination of the application, the AMF can decide not to grant its approval of the draft prospectus when it has reasonable grounds to believe that the contemplated offer to the public or admission to trading on the regulated market would violate applicable laws and regulations. It must notify the issuer and its representative in France of its refusal and give explanations by ordinary letter. The issuer can appeal this decision before the Paris Court of Appeals.

In addition, if the information requested by the AMF in the course of its review process is not provided by the issuer, the AMF may declare the review process closed and thus not grant its approval.

The AMF may also prohibit a public offering or an admission to trading on a regulated market when it has reasonable grounds to suspect that such offering to the public would contravene with applicable laws and regulations. This would be the case if the contemplated transaction involved risks inconsistent with investors' interest and market integrity, if financial statements presented serious deficiencies, or if due diligence conducted by statutory auditors were insufficient or their lack of independence were obvious.

It can also suspend an offering to the public or an admission to trading on a regulated market for a maximum of ten consecutive trading days when it has reasonable grounds to suspect that the transaction would contravene applicable laws and regulations.

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

Under French regulations, a prospectus is only required in respect of an offering of debt securities to the public or in respect of debt securities to be admitted to trading on a regulated market. Certain offerings are exempt from the requirement to draw up a prospectus. In the context of debt securities offerings, the most significant exemptions are as follows:

- offers made solely to qualified investors;
- offers addressed to fewer than 150 natural or legal persons (other than qualified investors) per EEA member state;
- offers where the minimum denomination amount of debt securities is at least €100,000;
- offers where the minimum investment amount per investor and per offering is at least €100,000; and
- offers with 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?

The typical timing of a deal may range from a few days (eg, a drawdown under a programme) to more than three months (eg, a first-time issuer with a complicated risk profile).

The offering process for debt securities (whether public or private) can be divided into the following four key steps:

- preparatory phase: appointment of the lead manager(s) and execution of a mandate letter, drafting of the disclosure document and other transaction documentation by the issuer, the lead manager and their respective legal advisers, with the first filing with the AMF once the prospectus is in stable form (see question 8 for timing);
- launch: the debt issuance is announced publicly, once the prospectus is stabilised with the AMF. This is the start of the marketing period (typically up to one week) by the managers, either on the basis of a term sheet or a preliminary offering document containing all information relating to the debt securities being offered, other than final pricing details;
- signing (typically two business days before closing, or three to five business days if there is a US placement): the price is agreed upon; the corporate decision to issue the bonds is taken; the AMF's approval is obtained on the prospectus (finalised with pricing data), and the subscription agreement is executed. Euroclear France (the French central clearing system) is instructed to create the securities in book-entry form and a Euronext notice is published announcing the listing; and
- closing: at closing, transaction documents (see question 12) are executed, the securities are issued and credited to investors' accounts in the books of the clearing system or financial intermediaries and proceeds are paid to the issuer.

If a prospectus is prepared only for purposes of listing, the AMF's approval is sometimes delayed until the day after signing (but always before closing). If the offering is private and does not require the drawing up of a prospectus, the AMF's approval is not required, which reduces the schedule of the transaction.

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 conditions are contained in the subscription agreement that the issuer enters into with the underwriters shortly before launch or upon pricing of the transaction.

Generally, the subscription agreement imposes the following conditions precedents for the underwriters or initial purchasers, or both, to purchase, pay for and take delivery of the debt securities:

- a prospectus has been approved by the competent regulatory authority and published by the issuer;
- additional agreements (such as an agency agreement) have been duly executed;
- the accounting letter has been delivered to Euroclear for creation of book-entry securities (for securities governed by French law);
- one or more global notes have been delivered to a depositary or custodian for the relevant clearing systems (for securities governed by English of New York law);
- the securities are admitted for clearance in the relevant system (Euroclear France, Euroclear, Clearstream Luxembourg or DTC);
- legal opinions from the issuer's legal counsel and managers' legal counsel have been delivered;
- a comfort letter by the issuer's auditors has been provided at signing, with a bringdown at closing;
- officers' certificates from the issuer have been delivered (including a 'no material change' certificate);
- all authorisations and approvals have been obtained; and
- additional documents, if any, have been delivered (payment instructions and receipt letters, rating confirmation).

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

Listing fees for admission to trading of debt securities on Euronext Paris are composed of a fixed listing fee and a variable fee depending on maturity and listed amounts (see NYSE Euronext European fee book 2014). A 50 per cent reduction applies for issuances of debt securities fungible with securities already listed. No annual fees apply.

Fees are also due to the AMF in connection with its approval process.

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 equity-linked notes in France, in particular convertible debt securities.

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

Offerings of special debt securities to the public or their admission to trading on a regulated market requires approval and publication of a prospectus, unless an exemption applies.

Annex I and Annex III of the Prospectus Regulation apply to the drawing up of prospectuses for equity-linked securities, requiring in particular a more detailed description of the issuer and its financial results. In France, the AMAFI (the French association of capital markets) has published a prospectus template for the issuance of convertible bonds into new or existing shares to accelerate the approval process with the AMF.

Annexes IV, IX and XII of the Prospectus Regulation apply to the drawing up of prospectuses for derivative securities, requiring a specific description of the underlying instruments.

Although derivative instruments can be issued pursuant to a decision of the issuer's board of directors, the issuance of equity-linked securities (giving access to the share capital) and the issuance of complex securities (giving access to debt securities), must be authorised by a resolution of the issuer's extraordinary shareholders' meeting, requiring at least a two-third majority vote.

Under IFRS, an equity-linked security is typically split into two components, one a straight debt instrument that is deemed to accrete discount (in addition to the accrual of any coupon on the instrument), and the other a call option sold to investors. The shares that may be issued upon conversion are typically taken into account in determining diluted net income per share. Some structures (known as ORNANEs) involving partial cash settlement and contingent conversion have been used occasionally in France to mitigate the impact on diluted net income per share.

Some instruments, such as hybrid capital instruments mostly issued by banks (subordinated or super subordinated notes), are considered debt securities from a corporate law standpoint but may be characterised as equity for accounting purposes depending, in particular, on whether or not the issuer has control over the redemption of the notes and over the interest payments. The more 'control' the issuer has to decide whether or not to defer interest payments and to redeem the notes, the closer it is to classification as equity and not as debt for accounting purposes and for the attribution of 'equity-content' by rating agencies. French accounting rules (used for unconsolidated accounts and tax accounting) applicable to such types of instruments may differ from IFRS (used for consolidated accounts).

The classification of a security instrument as debt or equity will determine what type of corporate authorisation is needed for the issuance of such security instrument and the level and detail of information to be disclosed in the prospectus. The Prospectus Regulation determines the minimum information required to be included in a prospectus and contains a 'building block' in its Annex XVIII, setting forth the mandatory minimum information to be included in a prospectus for the types of debt and equity securities listed therein.

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

From a French corporate and securities law perspective, the classification of a security as debt or equity is determined by articles L.211-1 et sequens of the French Financial and Monetary Code, which do not really define equity and debt securities, but rather give a limitative list of categories of instruments constituting them. Securities are negotiable securities that are either equity securities issued by stock companies, debt securities, with certain exceptions, or units or shares in collective investment funds. Equity securities issued by stock companies are constituted by shares and other securities giving access or incorporating an option to give access to share capital or voting rights. Debt securities represent a creditor's claim against the legal entity or securitisation fund that issues it.

This categorisation determines what type of authorisation is needed for the issuance of such securities and what annexes of the Prospectus Regulation apply for purposes of preparing the offering (see questions 1 and 15 with respect to issuance of debt securities and complex securities, respectively).

The characterisation of a security as debt or equity for tax purposes depends on a number of factors, including the treatment of the instrument under French accounting principles, and the enforceability of the claim of the holder in the case of liquidation 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?

French law does not provide for any transfer restrictions or other limitations imposed on privately-offered debt securities. However, under European regulations, an offer in a 'retail cascade' would be considered an offer to the public. A retail cascade is a transaction in which securities are initially sold to qualified investors (often private banks and wealth management specialists), and then allocated or transferred by the qualified investors to retail accounts. There is no particular timing requirement for determining whether an offering to qualified investors is transformed into a retail cascade, but the closer the initial offering is in timing to the subsequent transfer, the more likely that the transaction will constitute a retail cascade.

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?

Pursuant to the Prospectus Directive, specific rules apply within the EU and the EEA to facilitate cross-border transactions. Specifically, a prospectus approved by the competent authority of the issuer's home member state can be passported in any other member state to conduct a public offering or an admission to trading without any further approval process, subject to:

- notifying the authority of the host member state with a certificate of approval issued by the home member state stating that the prospectus has been drawn up in compliance with the Prospectus Directive; and
- if applicable, providing a translation of the summary.

Accordingly, a prospectus passported to France can be drawn up either in French or in English, except that:

- summaries must be translated in French; and
- with respect to a public offering of debt securities with a denomination of less than €1,000, the prospectus must be drawn up in French.

In addition, an issuer whose registered office is located outside the EEA can file a prospectus in France meeting the standards of IOSCO and containing information equivalent to that required by the AMF for French issuers. Additional information is required in the case of first admission to trading on a regulated market in France. The requirements set out for passporting in the EU and EEA will then apply.

French issuers issuing debt securities outside of France, whether or not governed by French law, may opt out of certain rules governing the bondholders' representation, provided by the French Commercial Code. This allows a French issuer to avoid certain provisions relating to quorum and majority rules governing bondholders' meetings. In addition, debt securities issued under such circumstances are not required to be issued as book-entry securities and may be materialised, provided the certificates only circulate outside of France, or be represented by a global certificate, with underlying notes held by each subscriber being recorded in book-entry systems.

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

See question 18. In addition, the AMF recognises as equivalent for purposes of prospectus requirements prospectuses registered with the Israeli Securities Authority (ISA) and documents registered during the past 12 months by an issuer that is, or is about to be, listed on the New York Stock Exchange (only to apply for admission to trading in the latter case).

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

After completion of the book-building process, the typical subscription arrangement in an offering of debt securities (whether public or private) is for a syndicate of underwriters to procure subscriptions and payment of the debt securities for the issuer on a joint and several basis, failing which the underwriters will subscribe to and pay for the debt securities themselves on the closing date.

Under certain circumstances, the managers may not agree to underwrite the offering; they may instead agree to use only 'best efforts' or 'reasonable endeavours' to find investors for the debt securities offered. In such cases, they are typically referred to as 'placement agents' instead of managers.

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

Under French law, underwriting services constitute investment services, and persons providing investment services must be licensed investment services providers or licensed credit institutions. Underwriting arrangements are not subject to specific approvals.

The licence for the provision of underwriting arrangements is issued by the Resolution and Prudential Supervisory Authority (ACPR, the French banking regulatory authority), which maintains an updated, publicly available list of authorised investment service providers.

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

Transactions typically settle two business days after pricing (for domestic issues), or three to five days after pricing (for international issues, particularly where there is a US placement). Settlement takes place through the facilities of the relevant clearing system.

Securities governed by French law and issued in France are issued only in book-entry form and are created in the system of Euroclear France. Settlement of new issues takes place through the credit of the securities to the accounts of participants in the Euroclear France system, which include Euroclear SA/NV and Clearstream, Luxembourg. The issuer receives the proceeds of the issuance by wire transfer from one of the managers, acting on behalf of the underwriting syndicate, against confirmation that the securities have been credited by Euroclear France to the designated securities accounts.

Securities governed by English law or New York law are represented by global notes, which are deposited with a depositary or custodian for the relevant clearing system or systems (Euroclear SA/NV, Clearstream, Luxembourg or DTC). The global notes are delivered to the fiscal agent or trustee (depending on the documentation structure used), which typically acts as depositary or custodian. The issuer receives the proceeds of the issuance by wire transfer from one of the managers, acting on behalf of the underwriting syndicate, against confirmation that the securities have been authenticated by the fiscal agent or trustee and credited by the clearing systems to the designated securities accounts.

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

As explained in question 22, debt securities issued in France and governed by French law must be book-entry securities; they are traded through Euroclear France. Debt securities governed by English or New York law are represented by global notes and held in book-entry form.

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 and tender and exchange offers, which were recently reformed to facilitate debt management:

- open market purchases: French law allows issuers to repurchase and hold their 'straight' bonds, up to a maximum amount of 15 per cent of a given issuance and for a maximum duration of one year, at the expiration of which such bonds must be cancelled;
- tender offer: a simplified ordered repurchase procedure with respect to 'straight' bonds can be launched following publication of a press release filed with the AMF; prospectus and independent expert report are no longer required; and
- exchange offer: this offer may require the drawing up of a prospectus to be approved by the AMF.

In addition, the issuer may request an amendment to the terms and conditions of the bonds by having a resolution passed at a bondholders' meeting, which requires a two-third majority if the issuance is governed by French law.

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

French law imposes ongoing and periodic disclosure obligations on issuers whose debt securities are admitted to trading on a regulated market. Most issuers will already be subject to post-listing requirements, as they will often have their shares listed on a regulated market. The key reporting obligations relate to insider price-sensitive information and periodic financial reporting.

Under French law, such issuers are obliged to promptly disclose inside information, unless circumstances allow, in accordance with applicable rules, a delay of such disclosure. Inside information is defined as any precise non-public information, relating to an issuer of securities, which, if made public, would be likely to have a significant impact on the market price of the relevant or related securities. The rule specifies that such information is information that a reasonable investor would be likely to rely on for its investment decisions. It is the issuer's responsibility to determine what it considers material information to be disclosed.

Such issuers are also subject to financial reporting obligations, including the publication of annual financial reports, half-yearly reports and quarterly management statements within specific timeframes.

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?

AMF General Regulations provide for a general obligation for issuers to disclose information that is exact, precise and fair. Accordingly, the disclosure of inaccurate or misleading information (or the omission of requisite information) may be the source of potential liability for the issuer and the various participants involved in the offer:

- civil liability against the issuer, directors and officers identified in the prospectus as persons responsible for a material loss suffered by investors who relied on misleading or false information. Civil liability can also be incurred on the basis of a summary that does not provide, when read together with the other parts of the prospectus, key information to aid investors in their investment decisions. Statutory auditors may also be held liable in respect of their audit of the financial statements; and
- criminal sanctions are applicable in the case of willful disclosure of erroneous or misleading information relating to the condition or prospects of an issuer or of securities admitted to trading on a regulated market, that is intended to have an impact on the market price.

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

See question 26. In addition, debt securities typically include 'events of default' that allow investors (or a certain percentage of investors acting together) to require the early repayment of the bonds, plus accrued interest. Holders of debt securities may also institute legal actions in the case of non-payment.

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

Articles L.621-15 et sequens of the French Monetary and Financial Code enable the AMF to impose sanctions against any person who commits an infringement, including breach of disclosure requirements, dissemination of false information, or any other breach that could impair investor's protection or interfere with the orderly functioning of the market. Persons who can be sanctioned include the issuer but also directors, officers or statutory auditors, provided that these individuals knew, or should have known, that the disclosed information was false or misleading.

Sanctions take the form of a fine of up to €100 million or 10 times the amount of any profit made. Licensed financial institutions in particular may also be subject to disciplinary sanctions, including a temporary or definitive prohibition to exercise activities.

The amount of the fine must be proportionate to the seriousness of the violations and any advantages or profits gained from said violations. The AMF will also take into account various circumstances, potentially aggravating or mitigating the fine, such as multiple and repeated breaches by the issuer or efforts made by the respondent to comply with the AMF provisions.

Administrative sanctions of the AMF can be cumulative with criminal penalties.

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

As indicated in question 16, the characterisation of a security as debt or equity for tax purposes depends on a number of factors. The description below assumes that the debt securities are treated as debt instruments for French tax purposes.

Please note that the description set forth below only addresses the tax treatment of bondholders (not of issuers) that are not concurrently shareholders of the issuer.

The direct tax regime of bondholders depends on their state of residence.

As far as French residents are concerned:

- for entities subject to corporate income tax, interest income is subject to corporate tax at the standard rate; and
- for individuals, interest income is subject to personal individual income tax at progressive rates, though it should be noted that it is first subject to a 2 per cent withholding tax (assuming payment is not received in a non-cooperative state or territory within the meaning of article 238-0 A of the French General Tax Code (non-cooperative jurisdiction)) upon payment, which is subsequently creditable against personal income tax. Social levies (withheld at source at an aggregate rate of 15.5 per cent) will also apply.

Payments of interest to non-French residents are not subject to a withholding tax unless such payments are made in a non-cooperative jurisdiction, in which case a 75 per cent withholding tax is applicable, irrespective of the tax residence of the bondholder, subject to exceptions and to more favourable provisions of applicable double tax treaties. Further, interest and other revenues are not deductible from the issuer's taxable income, inter alia, if they are paid or accrued to persons domiciled or established in a non-cooperative jurisdiction or paid to a bank account opened in a financial institution located in such a non-cooperative jurisdiction. Under certain conditions, any such non-deductible interest or other revenues may be recharacterised as deemed distribution, in which case, such non-deductible interest or other revenues may be subject to a withholding tax, at a rate of 30 per cent or 75 per cent (subject to the more favourable provisions of any applicable double tax treaty). Notwithstanding the foregoing, neither the 75 per cent withholding tax on interest, nor to the extent the relevant interest or other revenues relate to genuine transactions and are not in an abnormal or exaggerated amount, the withholding tax that may be levied as a result of such non-deductibility will apply provided that the issuer can prove that the main purpose and effect of the debt issue is not that of allowing the payments of interest or other revenues to be made in a non-cooperative jurisdiction. Under the administrative guidelines, the issuer does not need to provide any evidence supporting the main purpose and effect of a debt issue, if the debt securities are:

- offered by means of a public offer within the meaning of article L. 411-1 of the French Monetary and Financial Code or pursuant to an equivalent offer in a state other than a non-cooperative jurisdiction;
- admitted to trading on a regulated market or on a French or foreign multilateral securities trading system provided that neither such market or system, nor its operators are located in a non-cooperative jurisdiction; or
- admitted, at the time of their issue, to the operations of a central depositary or of a securities clearing and delivery and payments systems operator within the meaning of article L.561-2 of the French Monetary and Financial Code, or of one or more similar foreign depositaries or operators provided that such depositaries or operators are not located in a non-cooperative jurisdiction.

Debt securities offerings in France are generally structured in a way that they benefit from such safe harbour.

No French registration, capital, stamp duties, transfer taxes, customs or other similar taxes are applicable to the issue and offering of debt securities, the subscription or the transfer thereof, to the extent that such transfer is not recorded or referred to in any manner whatsoever in a deed registered with the tax authorities in France. On 14 February 2013, the European Commission published a proposal for a Directive for a common financial transactions tax (the EU FTT), which has a very broad scope and could, if introduced in its current form, apply to certain dealings in debt instruments (including secondary market transactions), at generally not less than 0.1 per cent of the sale price on such transactions.

Update and trends

In recent years, the AMF has taken the initiative to attract and reattract issuers to French stock exchanges by:

- facilitating the filing of English language documentation for both French and foreign issuers, reducing regulatory deadlines for prospectus approval to less than five business days for 'plain vanilla' issuances by regular issuers; and
- reducing the level of auditor due diligence for bond issuances.

Corporate bond issuances have developed in recent years to become a credible financing alternative to traditional bank lending whose associated costs have risen due to increased capital requirements for banks. Euronext took recent initiatives to attract small and medium-sized companies to the bond market, reducing the minimum size of issuances to €5 million, simplifying price fixing and offering marketing services in order to facilitate their access to public offerings whose associated costs can be high.

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

In Germany, the two most common types of debt securities offered are:
- straight bonds ('plain vanilla' senior bonds) issued by governments or other public sector entities, financial institutions and corporates; and
- covered bonds, issued by financial institutions.

There is also a market for:
- subordinated notes, which are most commonly issued by financial institutions;
- equity-linked bonds, such as convertible bonds, bonds with warrants and exchangeable bonds;
- other types of structured bonds, the coupon or principal repayment claim of which are linked to an interest rate, cash flow or the price of some other asset or index; and
- high-yield bonds.

According to statistical information published by the German Central Bank (February 2015), debt securities issuances (excluding commercial paper) in Germany totalled €1,362 billion in principal amount in 2014. The vast majority (measured by total principal amount) of debt securities were issued by financial institutions (€830 billion) and sovereigns (€452 billion). Corporate bonds accounted for only €80 billion of total debt issuances in Germany, with volumes generally expected to increase, not the least due to tightened capital requirements for traditional bank lending.

This chapter focuses on debt securities issued by corporate issuers.

2 Describe the general regime for debt securities offerings.

The general regime for debt securities offerings in Germany includes the following statutes, rules and regulations:
- the German Securities Prospectus Act, implementing Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading, as amended (Prospectus Directive);
- the Commission Regulation (EC) 809/2004, as amended (Prospectus Regulation);
- the German Act on Debt Securities;
- the German Securities Trading Act;
- the German Civil Code;
- the German Stock Corporation Act;
- the German Exchange Act;
- the German Safe Custody Act;
- the Exchange Rules of the Frankfurt Stock Exchange; and
- the General Terms and Conditions of Deutsche Börse AG for the Open Market.

The principal regulator for debt offerings in Germany is the German Federal Financial Supervisory Authority (BaFin). BaFin has responsibilities for both primary and secondary market activities. With respect to the primary market, BaFin is in charge of reviewing and approving prospectuses. With respect to the secondary market, BaFin is in charge of monitoring trading activities and enforcing the rules pertaining to insider trading, market manipulation and transparency. The European Securities Market Authority (ESMA) is charged with the supervision of the functioning of the internal market by ensuring a consistent level of regulation and supervision across the EU.

The admissions offices of the German securities exchanges are in charge of granting admission of debt securities to trading and approving the commencement of trading. The most important German exchange is the Frankfurt Stock Exchange (FSE). The FSE is subject to supervision by the Ministry of Economic Affairs of the State of Hesse. Trading on the FSE is monitored by the trading surveillance unit of the FSE and BaFin.

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.

A public offering in Germany of debt securities (or any other type of securities) requires the filing of a securities prospectus with BaFin compliant with the German Securities Prospectus Act. This act implements the European Prospectus Directive 2003/71/EC, as amended, into German law. An 'offer of securities to the public' is defined in the German Securities Prospectus Act, and includes a communication to the public in any form or by any means that provides information regarding the terms of the offer and the securities concerned sufficient to enable an investor to make an investment decision. The public offering may only commence after BaFin has approved the prospectus (and, if so required, any supplements thereto), and the prospectus has been published on the issuer's website or in any other manner provided by the German Securities Prospectus Act. Should the competent authority of another EU member state rather than BaFin be responsible for approving the prospectus, a public offering in Germany may be commenced only after the competent authority has approved the prospectus and has notified BaFin of such approval (see question 18). In addition, if the issuer seeks to list the debt securities on a regulated market in Germany, it must file an application to that effect with the exchange admissions office. Inclusion in trading on the open market (an unregulated market organised by the operator of the exchanges) may also trigger a prospectus requirement (eg, in the case that the securities are to be included in trading on the FSE's Entry Standard segment of the Open Market).

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

See question 3 regarding the requirement to produce a prospectus.

The German Securities Prospectus Act and the Prospectus Regulation contain the requirements for the format of, and the information required to be included in, a prospectus. The German Securities Prospectus Act provides for three different formats in which a prospectus may be prepared. These include a single document, three separate documents or a base prospectus. A three-part prospectus consists of a registration document containing information on the issuer; a securities note containing information on the securities to be offered or admitted to trading and a summary note. A base prospectus (commonly used in connection with debt issuance programmes (DIPs) or medium-term note (MTN) programmes) sets out the information on the issuer and the general terms and conditions of the notes, and is valid for 12 months. The final terms of each particular issuance of notes supplement the base prospectus.

The German Securities Prospectus Act and the Prospectus Regulation include specific requirements regarding the information to be included in a prospectus. These requirements vary depending on the type of debt instrument issued. Generally, a prospectus is required to contain all information necessary to enable an investor to make an informed assessment of the rights represented by the securities and of the assets and liabilities, financial condition, profits and losses, and prospects of the issuer (and the guarantor, if any). Such information is required to be easy to analyse and understand. The information required to be included in a prospectus for debt securities varies depending on the type of debt instrument, the type of offering (wholesale or retail), the format of the prospectus and the nature of the issuer. Broadly speaking, the major sections of a prospectus are comprised of the following:

- a summary;
- risk factors relating to the issuer, the debt securities and the offering;
- information on the issuer and its business activities, the guarantor (if any), and the issuer's organisational structure;
- audited financial information covering the past two financial years and the respective audit reports for each financial year, prepared according to International Financial Reporting Standards (IFRS); and
- information relating to the debt securities being offered (including the terms and conditions), the general terms of the offer, and the details regarding the admission of the securities to trading.

5 Describe the drafting process for the offering document.

For the key sections of the prospectus, see question 4. To the extent available, the description of the issuer and its business, as well as the issuer-related risk factors, will be based on the issuer's annual report or other publicly available disclosure. It is also permissible to incorporate by reference certain publicly-available information, such as information included in approved prospectuses, ad-hoc notices or published interim reports or annual financial statements. The Prospectus Regulation includes detailed lists of minimum information required to be included in the prospectus. These lists should be read in conjunction with guidance published by ESMA in the form of recommendations and regularly updated questions and answers relating to prospectuses.

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). For example, in a prospectus for a wholesale offering, there is no requirement to include a summary of the offering or selected financial information (ie, key figures summarising the financial condition of the issuer).

The principal test for determining whether certain disclosure is required is 'materiality'. This means that a prospectus must include all information that is material to an investor's assessment of the securities. Such information is also required to be correct.

Under German law, no prospectus is required in private placements relying on an exemption under the German Securities Prospectus Act. It is not unusual in the German market to conduct private placements of debt securities on the basis of only a term sheet. However, investors may nevertheless request to be provided with a disclosure document (often referred to as an offering memorandum or offering circular). In most cases, these disclosure documents are similar to a prospectus as to format and substance, although they may not contain all the information required under the Prospectus Regulation. In addition, a private placement offering memorandum will neither be approved by BaFin nor published in accordance with the German Securities Prospectus Act.

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 the case of debt securities underwritten by a syndicate, the terms and conditions are part of the underwriting agreement among the issuer, the guarantor, if any, and the underwriters. Regardless of whether the securities are underwritten or issued directly to investors, the terms and conditions are attached to, and form an integral part of, the rights and obligations represented by the (global) note issued with respect to the debt securities.

If the debt securities are offered to the public, investors will find the terms and conditions in the prospectus, which usually is available on the issuer's website (see question 7). In private placements, the terms and conditions governing the debt securities are made available to the investors as part of the private placement offering memorandum or as a separate document. Some issuers make these terms and conditions available on their websites.

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

Publication of the prospectus (and any supplements thereto) for a public offering is permissible only after it has been approved by BaFin. Other offering documentation, such as the underwriting agreement, is not subject to BaFin approval. It is market practice to make the prospectus available online on the issuer's website, although there are additional means of publication, such as through publication in a newspaper with national circulation, by printing physical copies (as long as they are made available to the public free of charge), by newspaper notice stating where the printed prospectus is available, or by electronic publication on the website of the underwriters or the exchange. No BaFin approval is required or possible for offering memoranda or similar documents prepared in connection with private placements conducted pursuant to an exemption from the requirement to publish a prospectus. Private placement documents are generally made available only to those investors to whom securities may be offered on a private placement basis.

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 public offering of debt securities in Germany can only be made on the basis of a prospectus that has been approved by BaFin or by a competent authority in another EEC member state that has notified BaFin of the approval in accordance with the Prospectus Directive. BaFin decides whether to approve a prospectus on the basis of a review of its completeness and its coherence and comprehensibility. BaFin is required to notify the issuer of its decision within ten working days (20 working days if the public offer involves securities of an issuer whose securities have not yet been admitted to trading on a regulated market) following receipt of the prospectus. If BaFin determines that the prospectus is incomplete or that supplementary information is required, the applicable review period begins to run starting on the day on which BaFin receives the updated prospectus or the required information. As a practical matter, representatives of the issuer and the syndicate banks discuss the timetable for the prospectus review prior to the first submission of the prospectus draft.

During the review process, and prior to approval and publication of a prospectus, no public offering may be made in Germany. In addition, the issuer, the underwriters and other parties must comply with certain publicity restrictions. In particular, all information publicly disseminated relating to the offer, regardless of whether such information is made available for marketing purposes, must be fully consistent with the information to be contained in the final prospectus. Any advertisement regarding the offering is required to state that a prospectus will be or has been published and how it can be obtained. Any advertisements are required to be clearly identified as such, and information contained therein may not be incorrect, misleading or inconsistent with the information contained in the prospectus.

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

If the prospectus is incomplete, incoherent or incomprehensible, or supplementary information requested by BaFin is missing, BaFin will not approve the prospectus until a revised version of the prospectus addressing all of BaFin's concerns has been submitted (see question 8). In addition, BaFin may prohibit an offer of securities to the public in Germany if no prospectus has been approved or published. If, following the approval of a prospectus, BaFin learns of circumstances that lead it to reasonably believe that a material omission or incorrectness may be contained in the prospectus, it has the power to request that the issuer suspend the offer until the issue has been resolved. Should the prospectus be found incorrect or incomplete in any material respect, BaFin may revoke the approval of the prospectus and prohibit the offer of such securities to the public.

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

According to the German Securities Prospectus Act, a prospectus is only required for an offering of debt securities to the public or in cases in which debt securities are to be admitted to trading on a regulated marked. Certain placements are exempt from the requirement to publish an approved prospectus. In practice, the most important exemptions from the prospectus requirement for debt securities are the following:

- the offer is made solely to, or directed at, qualified investors;
- the offer is made to, or directed at, fewer than 150 persons who are not qualified investors in each EEA member state in which securities are offered;
- the minimum consideration to be paid by any investor in the offering amounts to at least €100,000; or
- the denomination of the debt securities offered is at least €100,000.

However, regardless of whether any of these exemptions is available, a prospectus may, nevertheless, be required if the issuer seeks admission of the securities to trading on a regulated market or in the case that the securities are to be included in trading on the FSE's Entry Standard segment.

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

The offering process for debt securities varies significantly depending on whether the securities are offered to the public or in a private placement. For securities that are offered to the public or admitted to trading on a regulated market, a securities prospectus is required. The prospectus must be approved by BaFin and published at least one business day before the commencement of the public offering or, alternatively, one business day before admission of the securities to trading on a regulated market.

For straight debt instruments, depending on whether they will be issued under a DIP or MTN programme or on a stand-alone basis, the time required for the preparation of a public offering in Germany, will typically be between a couple of days and one to two months. The structuring of complex structured debt instruments or the negotiation of covenants for high yield bonds will require more time. For a typical public offering of investment grade straight debt in Germany, potentially together with private placements outside Germany, but excluding the United States, due diligence will generally be limited to appropriate business and financial due diligence by the underwriting syndicate, and no disclosure letters will be delivered.

For a private offering of debt securities in Germany qualifying for an exemption from the prospectus requirement, no prospectus needs to be filed with, and approved by, BaFin. However, depending on the targeted investor base, a private placement offering memorandum may be prepared for marketing purposes. The amount of lead time required for an offering will largely depend on whether a private placement offering memorandum will be prepared and on whether the information to be included in the offering memorandum is readily available.

In the case of a public offering of debt securities, the issuer will announce the transaction on the launch date, generally via a press release. Only in exceptional circumstances, when the issuance of the debt instruments may significantly affect either the price of other outstanding listed debt instruments of the issuer or, in the case of a listed issuer, the share price of the issuer, will publication of an ad-hoc notice be required. An ad-hoc notice will generally be required in connection with the launch of an issuance of convertible bonds or bonds with warrants due to their potentially dilutive effect on the shares of the issuer.

During the period from launch to pricing, the managers will market the securities to potential investors. In private placements, the order book is often only open for a couple of hours with pricing occurring on the launch date. In a public offering, the order book is usually open for a longer period of time. At closing, the securities will be issued, book-entries of the securities issued will be made in the clearing system and on the securities accounts of the investors who bought in the offering and the issue proceeds will be transferred to the issuer.

The key parties in an offering of debt securities are:

- the issuer and the guarantor (if any);
- in an underwritten offering, the syndicate of underwriters, in particular the lead managers appointed by the issuer. The role of the lead managers is to advise the issuer on the structure and timing of the offering, the managing and marketing of the transaction and the coordination of the syndicate of underwriters;
- a paying agent appointed by the issuer that is responsible for making payments of principal and interest to the holders of the debt securities;
- depending on the types of debt instruments offered, a calculation agent that makes calculations of required payments of interest and principal;
- legal counsel to the issuer and legal counsel to the underwriters. Depending on the circumstances of the offering, a single firm may be appointed as transaction counsel. Where separate counsel for the issuer and the underwriters are appointed, issuer's counsel is typically principally responsible for the preparation of the prospectus, review and negotiation of the transaction agreements (underwriting agreement, terms and conditions of the debt instruments and agency agreement on behalf of the issuer) and the preparation of ancillary closing documents. Underwriters' counsel is typically principally responsible for drafting the transaction agreements and negotiating them on behalf of the underwriters. Both legal counsel are typically asked to issue legal opinions; and
- the issuer's auditors review the financial information contained in the prospectus (or in the offering circular) and verify financial figures included therein. The auditors are typically asked to issue a comfort letter.

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 conditions are contained in the underwriting agreement, purchase agreement, subscription agreement or dealer agreement. These agreements, which the issuer enters into with the underwriters (or the initial purchasers, managers or dealers, as the case may be) usually include a number of conditions precedent, subject to which the underwriters are obligated to purchase, pay for and take delivery of the debt securities. These generally include:

- approval of the prospectus by the competent authority and its publication (generally not required in private placements);
- execution of additional agreements (such as an agency agreement or book-entry registration agreement);
- delivery of legal opinions from both the issuer's and underwriters' counsel;
- delivery of the global note;
- issuance of a comfort letter by the issuer's (and the guarantor's) auditors;
- delivery of officers' certificates from the issuer and the guarantor (if any);
- in the case of rated debt instruments, confirmation by the rating agencies that they have assigned a rating to the debt securities;
- receipt of all corporate authorisations and other approvals, if any; and
- delivery of additional documents, if any (such as payment instructions).

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

Listing fees vary depending on the issuer, the frequency of issuances, the type of debt instruments and the market segment. For instance, the fee on the FSE for a listing of bonds on the regulated market (General Standard) amounts to €3,000 plus €500 for commencement of trading. There is a fee cap for frequent issuers according to which annual listing fees may not exceed €80,000, and annual fees relating to commencement of trading may not exceed €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 an active market for equity-linked debt instruments in Germany and, depending on general market conditions, as reflected by interest rate levels and stock market prices, listed German corporate issuers frequently issue equity-linked instruments such as convertible bonds or bonds with warrants. Exchangeable bonds are sometimes issued as a means to monetise participations in other companies. Their issuance is typically linked to special situations, such as shareholdings in listed companies and, thus, occurs less frequently than issuances of convertible 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?

The rules applicable to the offering of special debt securities are generally the same as for other debt securities. In particular, an offering of special debt securities to the public requires approval and publication of a prospectus, unless an exemption is available. However, special debt securities may require additional corporate approvals and actions under German law. For instance, under the German Stock Corporation Act convertible bonds may only be issued on the basis of a resolution of a shareholders' meeting. Such resolution requires a majority of at least three-quarters of the share capital represented at the general meeting when passing the resolution, unless the articles of association provide otherwise. Moreover, in many scenarios contingent capital is required to issue the shares upon conversion. In order to be in a position to conduct a private placement and to sell the convertible bonds to institutional buyers, shareholders' pre-emptive rights must be excluded. This generally requires a resolution of a shareholders' meeting.

The Prospectus Regulation includes the minimum information required to be included in a prospectus for different types of debt and equity securities (see question 4). For securities not expressly covered by the Prospectus Regulation, disclosure requirements should be discussed with BaFin in advance of the offering to determine the exact scope of the disclosure document.

As a practical matter, offerings of equity-linked securities in the German market are typically conducted as private placements based on an exemption from the prospectus requirement.

The terms of special debt securities may also trigger certain accounting issues under IFRS and German generally accepted accounting principles that should be considered by issuers. For example, hybrid securities that have the characteristics of both debt and equity may present difficulties regarding the appropriate classification of the instrument (eg, IAS 32, IAS 39).

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

The criteria for the classification of securities as debt or equity will often depend on the purpose of such classification, particularly if it is conducted for securities law, listing, accounting or tax purposes.

Focusing on a securities law perspective, the classification of a security as debt or equity is determined pursuant to the German Securities Prospectus Act and the Prospectus Regulation. The German Securities Prospectus Act contains a definition of equity securities. According to this definition, equity securities are shares and other securities equivalent to shares. The definition also includes other types of transferable securities that give the holder the right to acquire shares or their equivalents as a result of conversion or the exercise of a conversion right. In order to qualify as equity securities, the securities in question must have been issued by the issuer of the underlying shares or by an entity belonging to the group of that issuer. Non-equity securities are defined as all securities that do not qualify as equity securities.

One of the implications of classifying securities as equity or debt securities under the German Securities Prospectus Act is the need to determine the issuer's home state and, accordingly, identify the competent regulator for prospectus approval. Generally, for issuers of equity securities, the home state is the member state where the issuer (or the issuer of the underlying shares) has its registered office.

However, the most important implication of categorising a security as debt or equity for securities law purposes is to determine the level and detail of information to be disclosed in the prospectus. The Prospectus Regulation requires different information to be included in a prospectus, depending on whether the instrument is categorised as debt or equity.

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?

Any sale of debt securities, which were previously acquired in a private placement, is viewed as a new offer. Absent a BaFin-approved prospectus, such an offer may only be made in compliance with the general requirements for an exempt offer (see question 10). There are no special safe harbours for a further sale of securities acquired in a private placement. Typically, selling restrictions to this effect will be agreed between the initial offeror and the underwriters or investors, as the case may be.

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 German Securities Prospectus Act provides for special rules applicable to public offerings by foreign issuers in Germany, and for domestic issuers publicly offering debt securities outside Germany.

The Prospectus Directive has introduced a European notification system for prospectuses. This system is meant to facilitate cross-border offerings and admission to trading of securities in the EEA.

According to the German Securities Prospectus Act, a prospectus approved by the competent authority of another EEA member state may be used for a public offering in Germany without any additional approval by BaFin, provided that BaFin has received notification in accordance with the laws of that EEA member state. With respect to issuers domiciled outside the EEA, BaFin may approve a prospectus drafted in accordance with the applicable rules and regulations of a non-EEA state, if the prospectus complies with international standards determined by an international securities commission organisation, including the International Organization of Securities Commissions. The prospectus and the issuer's financial information must also be viewed as equivalent to the standard required under the German Securities Prospectus Act by BaFin. The prospectus may be drafted in English but must contain a German translation of the prospectus summary.

With respect to domestic issuers offering debt securities solely outside of Germany, the German Securities Prospectus Act states that, where securities are to be offered to the public, or admitted to trading on a regulated market, in one or more EEA member states, the prospectus approved by BaFin will be valid in each such EEA member state outside of Germany without further approval by a non-German regulator. In such a scenario, the competent authority of the relevant EEA member state and ESMA is required to be notified. The prospectus is required to be drafted in a language approved by the competent authority in the host state. In this case, an English-language prospectus is generally permissible for offerings in most EEA member states so long as the summary of the prospectus is translated into a language approved by the competent authority.

If an offer of securities is made outside Germany, the German issuer must comply with the securities laws of such other jurisdictions.

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

See question 18.

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 typical underwriting arrangement in an offering of debt securities (whether public or private) is for the managers to purchase the securities on the closing date, severally and not jointly, in amounts corresponding to each underwriter's underwriting commitment, subject to fulfilment of the closing conditions. The underwriting agreement usually sets forth the distribution of commissions among the underwriters. Investment grade issues are often pre-priced, meaning that the pricing terms of the securities are fixed before launch. Other issuances are open priced, meaning that the pricing is determined after the bookbuilding process has been concluded.

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

There are no approval requirements with respect to underwriting or subscription agreements in Germany. However, the underwriting of securities qualifies as banking business under the German Banking Act. Therefore, engaging in the underwriting of securities in Germany requires a banking licence. Such licence must be issued by BaFin under the German Banking Act or by another EU banking regulator. In the latter case, the underwriter would rely on the so-called European passport for banking and financial services.

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

Transaction execution issues in a public debt offering may vary depending on the type of debt instrument, the complexity of the transaction and other factors. Usually, a debt offering is settled in the following manner:

- prior to closing, the issuer provides the debt securities in permanent global form to the paying agent for authentication, then deposits them with the German central securities depository (Clearstream Banking). The issuer or the lead manager informs the clearing system of the names of the initial underwriters and the number of securities allotted to them;
- each underwriter then instructs the clearing system to debit its cash account with the relevant subscription amount and to credit that amount to the account of the lead manager in charge of settlement; and
- the lead manager authorises the release of the issue proceeds (net of underwriters' fees and expenses due and payable on the closing date) to the issuer. Settlement in the primary market is usually made five days after the trade date (pricing). Typically, debt securities are admitted to trading after the closing.

For complex transactions, a pre-closing meeting may be held on the day before the settlement.

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

Debt securities governed by German law are typically represented by a global certificate in bearer form. The global securities are deposited with the central securities depository (usually Clearstream Banking). To make the bearer securities registered for certain purposes (eg, tax), the issuer may enter into a book-entry registration agreement with Clearstream Banking. The book-entry registrar appointed by the issuer maintains book-entry records of the securities credited to the accounts of the accountholders of Clearstream Banking. Listed debt securities can be traded over the exchange. Typically, even listed debt securities are traded via telephone trading by professional market participants. Transfers of debt securities held through Clearstream Banking are made by book-entry transfer.

24 Describe how issuers manage their outstanding debt securities.

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

Open market repurchases

The issuer, directly or through certain affiliates, is usually entitled under the terms and conditions of the debt securities to acquire the securities in the market or otherwise. The terms and conditions often provide that bonds so acquired may either be cancelled or held and resold.

Consent solicitations

German law-governed bonds issued after 2009 often contain a collective action clause providing that the issuer may amend the terms and conditions with the consent of a majority resolution of the bondholders pursuant to sections 5 et seq of the German Act on Debt Securities. In particular, with a majority of 75 per cent of the voting rights represented at the bondholder vote, bondholders may resolve material amendments to the terms and conditions of the bonds. Such amendments will have a binding effect on all bondholders.

Tender offers

The issuer or a third party may offer to the holders to purchase all or part of their debt securities for cash pursuant to a tender offer. In the case of a tender offer for less than all of the outstanding debt securities listed on a regulated market, the tender offer must comply with the principle of equal treatment of all bondholders if Germany is the issuer's home jurisdiction. It is not uncommon to pay an early tender premium to incentivise early participation in a tender offer.

Exchange offers

The issuer or a third party (such as an affiliate to the issuer) may offer to the holders to acquire their bonds in exchange for newly issued bonds. Offering new bonds as consideration for outstanding bonds may qualify as a public offering and, thus, require the preparation of a prospectus.

Other than the equal treatment obligation of issuers of debt securities listed on a regulated market for which Germany is the home jurisdiction, there are no statutory rules for exchange or tender offers for listed debt securities, even if they are listed on a regulated market. In particular, the German takeover law does not apply to tender offers and exchange offers for debt securities, although depending on the structure it may apply to convertible bonds or bonds with warrants listed on a regulated market.

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

The German Securities Trading Act imposes reporting obligations on domestic issuers that have outstanding debt or equity securities admitted to trading on a regulated market. The key reporting obligations are those relating to insider information and financial information.

Under the German Securities Trading Act, issuers are obliged to inform the market by means of an ad-hoc notice of any insider information that directly concerns the issuer. Insider information is material non-public information, which, if made publicly available, would be likely to materially affect the price of the issuer's outstanding securities that are listed on a regulated market or for which a listing application has been made. To determine whether information meets this standard, it must be assessed if a reasonable investor would use such information for his or her investment decision. An issuer is responsible for determining whether the issuance of debt securities will qualify as insider information, in particular whether it has the potential to materially affect the price of the issuer's outstanding securities and triggers the requirement to publish an ad-hoc notice.

The German Securities Trading Act also requires a domestic issuer of debt securities admitted to trading on a regulated market to publish periodic financial information. This requirement includes the publication of annual financial reports and half-yearly financial reports. Only domestic issuers with shares admitted to trading on a regulated market are required to publish interim financial reports and shareholder notifications relating to voting rights in the issuer and certain directors' dealings (ie, transactions undertaken by executives of an issuer relating to the issuer's shares or financial instruments based on such shares).

Other information, such as the issuance of convertible bonds or changes in the rights of the holders of debt securities, will also be required to be disclosed as part of the issuer's continuing obligations. Issuers that do not qualify as domestic issuers under the German Securities Trading Act may also have to comply with applicable rules in their home country. In the case of a listing on a regulated market or open market segment in Germany, issuers will also have to comply with the reporting requirements of the respective exchanges.

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, offerors and any other persons responsible for the issuance of a prospectus within the meaning of the German Securities Prospectus Act bear joint and several statutory prospectus liability in the case of any material incorrectness or omission in the prospectus. In the case of a listing prospectus, the same liability will be borne by the issuer and the underwriting syndicate filing the listing application. Statutory prospectus liability applies if, in the case of securities acquired within six months after the commencement of trading or after the end of the public offering, the exchange price of the securities falls below the lower of the acquisition price and the offer price or the first listing price (as the case may be). Among other things, the person liable has a defence against prospectus liability if it demonstrates that it did not know the material incorrectness or omission and that the lack of knowledge was not based on gross negligence.

In addition, issuers and offerors may become liable for private placement memoranda or other offering materials that do not qualify as a prospectus under the German Securities Prospectus Act based on general or quasi-contractual prospectus liability. Section 264a of the German Criminal Code provides for criminal liability for false or misleading statements in prospectuses or other offering documents. The liability analysis for debt securities is similar to that for equity securities.

Update and trends

Corporate bond issues in Germany have emerged as an alternative method of financing for corporate issuers in a debt market that has traditionally been dominated by financial institutions and sovereigns. Increasingly over the past few years, small and medium-sized entities have accessed the German debt capital market. This trend was driven by the relatively deep liquidity of German bond markets as well as German exchanges having introduced new market segments for corporate bonds. In addition, this trend has also been supported by new regulatory requirements for loan financing and the rise in the cost of capital for banks. Not unexpectedly, several small and medium-sized bond issuers defaulted on their bonds in recent years, thereby significantly slowing down new issuances of small and medium-sized bond issuers in 2014. In reaction to the increasing number of defaults, the Stuttgart stock exchange announced in December 2014 that it would close its bond segment for new small and medium-sized corporate bonds, thereby commencing a phase-out period for this market segment. It is unlikely that these defaults will materially affect the development of the corporate bond market for investment grade issuers in the long term.

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

If the requirements for statutory prospectus liability or quasi-contractual prospectus liability are met, investors may claim damages for losses resulting from the material incorrectness or omission of the prospectus or other offer document.

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

BaFin's sanctioning powers with respect to securities offerings are set forth in the German Securities Prospectus Act. BaFin has the power to prohibit an offer to the public if such offer is made in violation of statutory provisions, for example, without publication of a BaFin-approved prospectus. In addition, BaFin may impose administrative fines in the amount of up to €500,000. According to BaFin's annual report 2013, BaFin denied approval of only one prospectus in 2013, and initiated administrative proceedings for the imposition of administrative fines in one case. BaFin also has the power to request additional information or documents from the issuer, the underwriters and the issuer's auditors and may require that supplementary information is added to the prospectus if deemed necessary for the protection of the public. See question 9.

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

The following description summarises certain income taxation principles generally applicable to debt instruments without purporting to be complete. The tax treatment of special debt instruments may differ depending on the individual structure. Applicable tax laws, regulations and official guidance may change, possibly with retroactive or retrospective effect.

Issuer

Deduction of interest payments as business expense by the issuer is subject to general interest deduction limitations (the interest ceiling rule). As a general rule, interest expenses can be deducted up to the amount of the interest income derived by the issuer and, in excess thereof, up to an additional amount of €3 million in interest expenses. Interest expenses in excess thereof may only be deducted up to an amount of 30 per cent of the issuer's earnings before interest, taxes, depreciation and amortisation (EBITDA) as calculated for tax purposes. EBITDA that is not used for purposes of the application of the 30 per cent EBITDA rule is generally carried forward for a maximum of five years (EBITDA carry-forward). Non-deductible interest expenses can generally be carried forward to future tax years (interest carry-forward). Both EBITDA carry-forward and interest carry-forward forfeit under certain circumstances. Further exemptions from the interest ceiling rule apply.

German tax residents

German tax residents (determined upon residence, habitual abode, legal domicile or place of effective management) are subject to income tax, solidarity surcharge and, potentially, church tax (in the case of individuals) or corporate income tax and solidarity surcharge (in the case of corporations) on interest received (which also includes the proceeds from the separate disposal of interest claims or coupons) and capital gains arising when disposing of or redeeming debt securities. If debt securities form part of a German trade or business, trade tax applies in addition thereto at a 7 to 17 per cent rate set by the competent municipalities. Individuals holding debt instruments as private assets are subject to the flat tax regime at a 26.375 per cent tax rate, except when their individual progressive income tax rate (and solidarity surcharge thereon) is lower and certain prerequisites are met. Individuals holding debt instruments as business assets are subject to their individual progressive income tax rate (and solidarity surcharge thereon as well as potentially church tax). The corporate income tax rate is 15.825 per cent (including solidarity surcharge).

Generally, for individuals holding the debt instruments as private assets, the tax is levied by way of withholding at a tax rate of 26.375 per cent by the paying agent (being a German branch of a German or non-German bank or financial services institution or securities trading business or securities trading bank in Germany). In the case of corporations and individuals holding debt instruments as business assets, withholding tax is not always levied, provided certain prerequisites are met. Amounts withheld in excess of the actual amounts owed are generally offset against the actual tax assessed in the tax assessment procedure and any excess will be refunded. Individuals holding debt instruments as private assets benefit from a lump sum deduction when calculating their investment income, which may also be taken into account by exemption from withholding under certain prerequisites. Generally, implications for filing tax returns of all German tax residents differ depending on the withholding tax treatment in their specific case.

Non-German tax residents

Non-German tax residents are generally not subject to German tax on interest and capital gains derived from debt instruments. However, they are subject to German tax on interest and capital gains in certain cases,

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including that the debt securities form part of the business property of a permanent establishment maintained in Germany. In addition, interest may be subject to German tax if it constitutes taxable income for other reasons, such as from letting and leasing of certain German real estate or income from certain capital investments directly or indirectly secured by German situs real estate.

Inheritance and gift tax

Inheritance and gift tax with respect to debt instruments will generally not arise under German law if, in the case of inheritance tax, neither the deceased nor the beneficiary, or, in the case of gift tax, neither the donor nor the donee, is a resident of Germany and the debt instrument is not attributable to a German trade or business for which a permanent establishment is maintained, or a permanent representative has been appointed in Germany. Exceptions from this rule apply to certain German citizens who previously maintained a residence in Germany.

Greece

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

Greek debt securities are typically offered in the form of corporate bonds issued in accordance with the provisions of Law 3156/2003 on 'bond loans and securitisations of claims' (Bond Loan Law and Corporate Bonds). Corporate bonds are issued by public limited companies, mostly for the purposes of sourcing working capital, refinancing existing debt and funding material acquisitions or projects in general. The vast majority of corporate bonds issuances are taken up by Greek banks on a stand-alone or syndicated basis. Corporate bonds are also usually deployed as an instrument for sourcing intragroup funds, in which case notes are subscribed by affiliates of the issuer. Corporate bonds issuances are also common in the context of Greek securitisation structures being set up under article 10 of Law 3156/2003. Thanks to a combination of structural, implementation and tax benefits, Greek securitisation rules seem to be the most preferable route for the transfer and acquisition of loan portfolios or selected business receivables. The Greek corporate bonds market has been significantly active in 2014, mainly through refinancing of previous issuances.

2 Describe the general regime for debt securities offerings.

The issuance of bond loans by public limited companies is governed by a series of provisions of Law 2190/1920 on public limited companies (Companies Act) and the Bond Loan Law. While the Companies Act provides generally for the ability of Greek companies to issue corporate bonds, the Bond Loan Law introduces a detailed framework addressing the various requirements for issuance, subscription and transfer of Corporate Bonds and available forms and types of the same (common, convertible, exchangeable, secured, etc). As mentioned above, Corporate Bonds are also issued in the context of securitisation structures under article 10 of Law 3156/2003. More specifically, under the said rules, securitisation is defined as any transfer of business receivables by way of sale and pursuant to a written agreement between a party (the transferor or originator) and another party (the transferee) in combination with the issue and offer, by private placement only, of Corporate Bonds loans, the repayment of which is funded by the proceeds from transferred business receivables, loans or financial derivative instruments. The transferor (or originator) has to be a Greek tax-resident business entity or at least have a permanent establishment in Greece. The transferee must be an entity established solely for the purposes of acquiring the business receivables (ie, an SPV) and must be the issuer of the Corporate Bonds. The sale and the transfer of receivables, does not alter the substantial, procedural and tax treatment of the transferred receivables and the relevant rights, as these were valid before the transfer according to the relevant applicable provisions.

In the event that the issuer intends to proceed to a non-exempted public offering of corporate bonds, the issuer will have to draw up and publish a detailed prospectus in accordance with the provisions of Law 3401/2005 'on the prospectus to be published when securities are offered to the public or admitted to trading' (Prospectus Law), transposing into Greek law the EU Prospectus Directive, as amended by Directive 2010/73/EU and EC Regulation 809/2004 as amended and in force (Prospectus Regulation). Prior to its publication, the prospectus has to be approved by the Hellenic Capital Markets Commission (HCMC) as the competent capital and securities markets regulator.

When the issuer intends to admit the bonds to trading on the Athens Exchange (ATHEX), a listing application must be submitted to the ATHEX in accordance with the requirements and procedure for admission to trading set out in the ATHEX Rulebook and Law 3371/2005 on capital markets and other provisions (see question 3).

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.

As mentioned above, a non-exempted public offering of debt securities in Greece has to take place on the basis of a prospectus, which will have to be filed with and approved by the HCMC before it is made available to the public. In order for the approval to be granted, the prospectus will have to be compliant with the minimum content and form requirements set out in the Prospectus Law and the Prospectus Regulation. With regard to the listing of corporate bonds in the ATHEX, Law 3371/2007 provides that the relevant bonds must have a minimum aggregate principal amount of €200,000 (with the exception of bonds issued on a revolving basis with no pre-defined principal amount). Moreover, the bonds shall be freely transferable and negotiable according to their terms and conditions and the issuer shall not be able to apply for only a part of the notes issued under the same tranche. Further, in the case of convertible or exchangeable bonds, an application for listing cannot be approved unless the underlying securities are already or simultaneously admitted to trading on the same or another regulated market.

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

The minimum content requirements and the form of the prospectus are set out in the Prospectus Law in conjunction with the Prospectus Regulation and the Committee of European Securities Regulators (CESR) guidelines, depending on the type of securities offered. As a general rule the prospectus must contain all the necessary information to enable investors to make an informed assessment of the financial standing, profitability and prospects of the issuer, and those of the investment.

The prospectus can be drafted either as a single document or as a set of documents. If composed as a set of documents, the prospectus should comprise the summary note, the registration document and the securities note. The summary note shall give a brief overview on the key information contained in the prospectus. The registration document includes the statutory general disclaimers and legends, the risk factors linked to the issuer and the type of security covered by the issue, information on the issuer's specific business activity and the relevant market, financial and corporate information for such issuer. On the other hand, the securities note provides a fully detailed description of the securities to be offered or admitted to trading on a regulated market, and the terms and procedure of the offer.

In addition, under certain conditions, the Prospectus Law allows for specific information to be incorporated by reference to one or more documents that have been previously or simultaneously published or submitted for approval by the HCMC.

5 Describe the drafting process for the offering document.

The offering document is commonly drafted by either the issuer or the financial adviser to the issuer, in cooperation with the internal and external legal teams assigned to the project. The drafting process is closely monitored by and subject to the comments and input of the credit institution or securities firm acting as responsible underwriter to the issuance of the debt securities and who, together with the issuer, is jointly liable for the accuracy and adequacy of the information included in the prospectus. For this purpose, the drafting process is combined with a financial and legal due diligence exercise, performed on behalf of the underwriters' prospectus (such exercise usually having a limited scope and based on pre-agreed materiality thresholds).

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 main terms and conditions of a bond loan issued pursuant to the provisions of the Bond Loan Law are set out in the bond loan programme and are further specified in the bond subscription (purchase) agreement.

The parties to the bond loan programme are the issuer, the bondholder or the bondholder's agent (if any), the guarantor (if any) and the paying agent. The parties to the subscription agreement are commonly the issuer, the guarantor (if any), the subscriber and the bondholder's agent (if any).

In the event of a public offering of the bond loan, the terms and conditions of the offering are also part of the information contained in the prospectus, and are made available to the public as described in question 7.

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

In the case of a public offering or admission to trading of debt securities on the ATHEX, the prospectus must be approved by the HCMC prior to its publication. Once approved, the issuer shall make the prospectus available to the public as soon as possible:

- in one or more widely-circulated or nationwide daily newspapers;
- as hard copy available at the premises of the issuer, the underwriters and the advisors or at the ATHEX; or
- on the website of the issuer or the underwriters or the advisors, as long as there is an explicit reference on the issuer's website regarding the publication of the prospectus on the website of the underwriters or the advisors; and
- in electronic form at the website of the ATHEX or of the HCMC.

Notwithstanding the above, the issuer shall also have to publish in one or more widely-circulated or nationwide daily newspapers as well as on the ATHEX Daily Official List an announcement informing the investors on how and where the prospectus will be available.

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 debt securities are subject to the review and authorisation of the HCMC. The HCMC shall approve the prospectus within ten days from the submission of the final draft prospectus. Such deadline may be extended to 20 days in cases of initial public offering. The HCMC may request that additional information be included in the prospectus, which shall be provided to the HCMC within 30 days from the relevant request.

During the review process, certain advertisement and marketing restrictions have to be observed. More specifically, all advertising material should be filed with the HCMC at least two business days prior to its publication. Potential investors should not receive or otherwise be the target of any direct communication without their prior consent (such as cold calling or below-the-line communications), and any advertisements and communications should not contain any assessment or statement with respect to the success of the public offering. During the period beginning three days before the launch date of the public offer and ending on the last date of the public offer, no advertisement or public announcement relating to the public offer is allowed, with the exception of any publications necessary in order to make the public aware of the offering and the applicable terms and conditions thereof.

Further, the issuance of debt securities by listed issuers constitutes privileged information within the meaning of Law 3340/2005 on the protection of capital markets from insider trading and manipulating transactions implementing Directive 2003/6/EC (Market Abuse Law; transposing into Greek law the EU Market Abuse Directive) and the relevant implementing decisions of the HCMC. Therefore, for as long as the market has not been informed about the expected issuance of debt securities, the insider trading prohibitions of the Market Abuse Law shall apply, based on which any person who possesses this information in its capacity as a shareholder, director, manager or an employee of the issuer is prohibited from using that information in order to acquire or dispose of, for its own account or for the account of a third party, either directly or indirectly, shares of the relevant listed issuer.

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

The HCMC may refuse to approve a public offering of securities on the grounds of non-compliance with the mandatory requirements under the Prospectus Law and the Prospectus Regulation (see questions 2, 4 and 8), and on the grounds of misrepresentation or inaccuracies of the information included therein. Commonly, during the ongoing application and review process, the HCMC asks the issuer to provide more information or to revisit the information already provided so that all HCMC comments are incorporated and the application is complete.

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

The Prospectus Law provides that the prospectus filing, approval and publication requirements are not triggered where:

- the offering is addressed only to qualified investors;
- the offering is addressed to fewer than 150 non-qualified natural or legal persons;
- the offering is addressed to investors acquiring securities for a total consideration of at least €100,000 per investor, for each separate offer;
- the offering has a denomination that amounts to at least €100,000 per unit; or
- the offering has a total consideration of less than €100,000; such threshold calculated in a period of 12 months.

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

In the first stage, the issuance and offering process involves the drafting of the terms and conditions of the corporate bonds, as well as the drafting of all other key transaction documents. This includes, in particular, the subscription and purchase agreement and the prospectus relating to the public offering of the notes. At the same time, the necessary corporate approvals are sought and received and the underwriters to the issuance of the notes perform, through their advisors, the appropriate business, financial and legal due diligence on the issuer. More specifically, the process of the public offering can be summarised as follows:

- drafting of key transaction documentation and the prospectus;
- commencement of the due diligence exercise;
- receipt of corporate approvals regarding the issuance of the notes and board approval regarding the final draft of the prospectus;
- completion of the due diligence exercise;
- issuance and delivery of necessary legal opinions and execution of key transaction documents;
- submission of the prospectus to the HCMC for review and approval;
- request of additional information by the HCMC;
- approval of the prospectus by the HCMC's board of directors (see question 8 for the timing details);
- publication by the issuer of an announcement as to the availability of the prospectus to investors;
- publication of the prospectus;
- commencement of the public offering period;
- end of the public offering period; and
- announcement of the issuer regarding the outcome of the public offering.

Notably, depending on the specific features of each issuance and the type of corporate bonds to be issued (eg, common or convertible), the above indicative sequence of events may be modified accordingly.

In the case of private placement of debt securities, the offering process is significantly simplified and involves the following steps:

- negotiation and agreement of the structure and the key transaction documents with the initial purchasers;
- receipt of corporate approvals and authorisations;
- issuance and delivery of necessary legal opinions and execution of key transaction documents;
- creation of securities (in the case of secured notes); and
- drawdown and issuance of notes.

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 public offerings, the underwriters or the initial purchasers usually require the delivery of one or more of the following documents upon closing (and sometimes even at earlier stages, such as upon issuance of the prospectus or upon subscription):

- legal opinions from their own legal counsel and the legal counsel of the issuer regarding typically matters of authority, capacity and enforceability;
- comfort letters from the issuer's statutory auditors regarding financial information contained in the prospectus;
- officers' certificates provided by the issuer, certifying that the issuer has taken all necessary corporate approvals for the offering, that the representations and warranties of the issuer in the underwriting agreement are true and accurate and that the information disclosed in the prospectus is true, accurate and not misleading; and
- disclosure letters of the issuer on pending court or administrative proceedings, social security and tax clearance certificates, compliance with specific licensing requirements (in particular in cases of project financing related issuances).

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

For the listing of bonds a listing fee of €3,000 is paid to the ATHEX regardless of the issue amount and a registration fee of 0.025 per cent on the issue value is paid to the ATHEX Central Securities Depository (ATHEXCSD) (a minimum fee of €3,000 and a maximum fee of €10,000). For the listing of bond warrants a listing fee calculated on the basis of the issue value is paid to the ATHEX (the percentages range from zero per cent for an amount of over €3 million to 0.02 per cent for an amount of up to €30 million and the minimum listing fee is €1,000) and a registration fee of 0.025 per cent on the issue value is paid to the ATHEXCSD (a minimum fee of €3,000 and a maximum fee of €10,000).

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

The prevailing form of Greek debt issuances is the one of common (secured or unsecured) corporate bond loans, while special debt instruments such as convertible and exchangeable bonds represent a very small portion of the Greek debt capital market. At the same time, structured debt instruments (embedding various derivative products) are rarely issued in the Greek 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?

The public offering of special debt securities must comply equally with the provisions of the Prospectus Law and the Prospectus Regulation. Where such securities are to be admitted to trading on the ATHEX, the provisions of Law 3371/2007 and the ATHEX Rulebook must also be observed.

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

The classification of securities as debt or equity at the level of the issuer depends on the provisions of law applicable to their issuance and the corporate approvals received for the purposes of issuing such securities. In particular, with respect to equity securities, these can be issued in the form of newly issued shares (common or preferred) based on the provisions of Greek corporate law and the articles of association of the issuer. At the level of the securities holder, the classification of the securities as equity or debt will also depend on the accounting standards applicable by the respective entity (ie, Greek generally accepted accounting principles or international financial reporting standards). Typically, securities embedding a repayment obligation of the issuer at maturity without such payment being conditional or linked to the performance of the issuer, and without the same securities to embed voting rights in the general meeting of shareholders of the issuer, are classified as debt securities and satisfied preferentially in relation to shareholders (common and preferred) in the case of issuer insolvency or liquidation.

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 statutory transfer restrictions or other limitations imposed on privately-offered debt securities, other than those provided under the terms and conditions of the notes and potentially agreed between the issuer and the initial subscribers in the relevant purchase agreement (and which vary depending on the commercial characteristics and objectives of each transaction).

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 offering of debt securities by foreign EU issuers is subject to the provisions of the Prospectus Law, transposing into Greek law the single passport regime provided under the Prospectus Directive. In particular, a prospectus issued by an EU-incorporated issuer of securities and approved by the competent authority of the home member state is valid for the purposes of public offering or admission to trading of the relevant debt securities in Greece, provided that a certificate of approval and a copy of the said prospectus are provided to the HCMC and the European Securities and Markets Authority by the competent authority of the home member state.

Similarly, if a Greek issuer wishes to offer debt securities in another member state, the HCMC shall, at the request of such issuer, provide the competent authority of the host member state with a certificate of approval and a copy of the approved prospectus. These documents are also provided to the European Securities and Markets Authority, the issuer and the persons responsible for the drawing up of the prospectus within three business days following the date of the relevant request, or if the request is submitted along with the draft prospectus, within one business day following the approval of the prospectus.

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

There are no special arrangements.

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

Newly-issued securities cannot be offered to the public without the involvement of an underwriter, unless they are admitted to trading in a regulated market in the context of a follow-up offering. The most common form of underwriting is the best-efforts underwriting in the context of which the underwriter assumes the obligation to enable the placement of the securities to the public through its own sales network, acting as an agent of the issuer and without guaranteeing the success of the placement.

In a private offering of debt securities, there is no legal requirement for the involvement of an underwriter, and the debt securities are subscribed for by the initial purchasers, which may further transfer such debt securities subject to the terms and conditions of the debt securities and the provisions of the relevant subscription agreement.

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

Underwriting of financial instruments is a regulated investment service in Greece, pursuant to the provisions of Law 3606/2007, which transposed into Greek law the EU Directive 2005/39/EC on 'markets in financial instruments' (MiFID). Underwriting services may only be performed by investment firms or credit institutions that are licensed to provide the service of underwriting of financial instruments, placing of financial instruments on a firm commitment basis or placing of financial instruments without a firm commitment basis.

The authority that is competent for the monitoring of the implementation of the provisions of Law 3606/2007 is the HCMC. The underwriting arrangements are not subject to the HCMC's approval. However, the services provided by the underwriters in the context of a public offering are subject to the provisions of HCMC Decision No. 3/460/10.1.2008 (the Underwriters Code of Conduct), which sets out a series of rules to be

Update and trends

The 2015 Greek debt market outlook is strongly correlated to the current developments in the country's macroeconomic and fiscal crisis-driven environment. More specifically, following the Greek parliamentary elections on 25 January 2015, the country risk seems to have again attracted the attention of investors and, thus, has had a negative bearing on their appetite for Greek debt risk. In terms of product types, most Greek corporate issuers are still expected to source funds predominantly through corporate bonds, issued either directly out of Greece or through foreign finance subsidiaries. Again, depending on the macroeconomic developments, Greek banks, whose main focus has been, so far, to tackle the high level of non-performing loans (NPLs) on their books, may be willing to engage more strongly in selling NPL positions, possibly through Greek securitisation structures, funded, among others, through the issuance of corporate bonds.

observed by domestic or foreign credit institutions and investment firms acting as advisors or underwriters in the context of a public offering of securities.

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

According to applicable rules, every listed issuer holds an issuer account in the dematerialised securities system (DSS) of the ATHEXCSD. Also, every investor wishing to participate in a public offering of dematerialised securities in Greece should hold an investor account in the DSS, which comprises a securities account and a special account. Each securities account includes one or more sub-accounts that are administered by DSS operators (operator accounts). A special account records securities for which the investor has not designated an operator and for which the Hellenic Exchanges SA (HCSD) is considered as the operator. In order for the newly-issued securities to be credited to the investor account of each investor upon completion of the public offer, the issuer must fill in the number of its investor account and the securities account in the relevant registration form. In addition, the investors should also designate the operator account in which the securities will be credited by filling in the relevant operator code. Otherwise, the securities are credited to the special account of each investor.

The transfer of the securities from the issuer account to the securities account of each beneficiary shall be processed by the HCSD two days prior to the commencement of the trading of such securities in the ATHEX. Such securities shall be finally and irrevocably registered in the beneficiaries' accounts, and shall be made available to them on the date of the commencement of trading of such securities on the ATHEX.

With respect to the admission to trading of newly-issued debt securities on the ATHEX, the issuer must submit to the ATHEX the necessary documentation for the approval of the admission to trading of the newly-issued notes within five business days from the end of the subscription period. Following the ATHEX's approval, the timing for admission to trading of the relevant debt securities depends on the nature of the offering and the debt securities that are offered, and varies from five to 15 business days.

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

Public debt securities are typically held in book-entry (registered) form in the central depository and clearing systems operated by the Bank of Greece and known as BOGS (the system for monitoring transactions in book-entry securities) and HDAT (the electronic secondary securities market).

24 Describe how issuers manage their outstanding debt securities.

The most common liability management exercise takes place in the form of buy-back offers where issuers offer to repurchase outstanding debt at below par. In cases where an issuer is subject to pre-insolvency proceedings, different liability management measures can be elected, including the imposition of haircut (either directly or through an exchange offer), upon approval of majority creditors pursuant to the conditions and procedures of Greek insolvency law.

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

Specifically in relation to issuers of listed debt securities, pursuant to the ATHEX Rulebook, such issuers are obliged to disclose any amendments on the terms of the bond loan, the appointment or replacement of a bondholders representative, any decisions taken by the general assembly of bondholders and the payment of interest amounts. In the event of floating-rate bonds, the issuer is obliged to disclose the applicable interest rate for every interest-bearing period. Finally, issuers of bonds listed on the regulated market have to submit to the ATHEX, prior to the publication of the annual financial report, the 'financial calendar', in which the issuer shall specify the scheduled date of publication of the report and other relevant information.

Moreover, issuers of listed debt have generally to comply with the ad hoc and ongoing disclosure requirements set out under Law 3556/2007 on transparency in relation to issuers of securities that are admitted to trading on a regulated market, which transposed into Greek law Directive 2004/109/EC (Transparency Law) and the Market Abuse Law.

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 Prospectus Law establishes a special joint liability regime concerning all persons responsible for or contributing to the issuance of the prospectus, where the published prospectus contains false, incomplete or inaccurate information as a result of the negligence or the wilful misconduct of the responsible persons. The persons liable for the information provided in a prospectus are the issuer and the members of its board of directors, the underwriters, the persons who are referred to in the prospectus as the arrangers or advisors and every other person who has explicitly assumed responsibility for one or more parts of the prospectus.

The liability of the above persons is limited to the actual loss suffered by the investor, while any loss of profit can be recovered solely on the basis of the general provisions of the Greek Civil Code. Claims in relation to such special joint liability are subject to a statute of limitation of three years after the date of publication of the prospectus.

In the case of private placement of debt securities, the issuer and the guarantor (if any) can be held liable for any false, inaccurate or misleading representation made in relation to the bondholders or the bondholder agent, or the breach of the undertakings or other material terms of the bond loan programme or the bond subscription agreement.

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

Investors who proceeded to an investment on the basis of false or misleading information included in the prospectus can claim their actual loss pursuant to the provisions for the special joint liability of the persons responsible for drafting the prospectus (see question 26). Moreover, investors who wish to claim their loss of profits (ie, profits that they would have earned if they had invested in other more profitable securities), can proceed to a civil lawsuit on the basis of the provisions for tort under the Greek Civil Code.

The Prospectus Law provides further for a 'withdrawal right' of investors in cases of issuance of a prospectus supplement. Pursuant to such withdrawal right, investors who have already subscribed for shares prior to the issuance of the prospectus supplement, are entitled to withdraw their subscription within two business days from publication of the prospectus supplement, provided that the new material information or the inaccuracies in the prospectus occurred before the end of the public offer period and the subscription of the notes.

In the event of a private placement of debt securities, the investors can seek remedies by exercising their rights under the terms of the bond loan programme (eg, termination right, acceleration of the bonds) or by enforcing the security documents (if any) or by filing a civil lawsuit against the issuer and the guarantor (if any) in order to claim restitution of damages.

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

In the case of any infringement of the provisions of the Prospectus Law or the Prospectus Regulation, or any administrative decisions or guidelines of the HCMC, the HCMC is entitled to impose an administrative fine ranging from €3,000 to €1 million. If the HCMC has reasonable grounds for believing that the provisions of the Prospectus Law have been infringed, the HCMC has, inter alia, the following additional sanctioning powers:

- prohibition or suspension of advertisements of the public offer for a maximum of 10 consecutive business days;
- suspension of the public offer or admission to trading for a maximum of 10 consecutive business days;
- prohibition of the public offering;
- suspension of trading of the listed debt securities for a maximum of ten consecutive business days on any single occasion; and
- prohibition of trading of the issuer's securities.

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

The main tax issue for issuers and bondholders seems to be the application of Greek withholding tax on the interest payments made under corporate bonds. Under the provisions of the Greek Income Tax Code (Law 4172/2013), as amended and in force) when the holders of corporate bonds are Greek tax resident individuals, a flat rate of 15 per cent tax will be withheld at source, which will exhaust the recipients' tax liability. In the case of legal entities that are Greek tax residents or maintain a permanent establishment in Greece for tax purposes, a 15 per cent tax will be withheld, which will not exhaust the recipients' tax liability, as the relevant income will be taxed at the applicable corporate income tax rates (eg, a 26 per cent flat tax rate applies in respect of legal entities with double entry books, whereas in respect of companies that keep single entry books, the applicable tax rates are progressive) as part of their annual gross income and the tax withheld at source will be able to be offset against their annual tax liability or refunded if no such income tax liability exists.

In respect of individuals who are not tax residents in Greece, 15 per cent tax will be withheld, which exhausts their tax liability (subject to the more favourable provisions of any applicable bilateral treaty for the avoidance of double taxation). When legal entities are not Greek tax residents or have a permanent establishment in Greece, a flat rate of 15 per cent tax is expected to be withheld at source, which will exhaust their tax liability, subject to the more favourable provisions of any applicable bilateral treaty for the avoidance of double taxation.

It is finally noted that the above summary is based on the Greek taxation framework as well as practice and interpretation available at the date hereof, which is subject to change at any time, possible with retroactive effect.

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

Hong Kong has emerged as 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 (including on a 'payment-in-kind' basis), 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. Issues of securities to retail investors are vetted by the Securities and Futures Commission (SFC).

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 renminbi-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 renminbi, as demonstrated by the HKMA's elucidation of supervisory principles and operational arrangements regarding renminbi in 2010, which opened the offshore renminbi bond market in Hong Kong (the '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$180 billion outstanding as of 30 September 2014, and approximately US$9 billion of new issuances (excluding exchange fund notes) in the first nine months of 2014, with dim sum bonds recently emerging 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, dim sum bonds from 70 issuers amounted to 117 billion renminbi in 2013, which surpassed the total amount of dim sum bonds issued between 2007 and 2012. In addition, as of 30 May 2014, the outstanding principal amount of dim sum bonds issued in Hong Kong amounted to 389 billion renminbi. Indeed, the growth of the debt capital market, with a rapidly increasing volume of offshore debt being raised by mainland Chinese companies, mainly via Hong Kong, has at times recently outpaced the amount of capital raised through equity in Hong Kong.

2 Describe the general regime for debt securities offerings.

The general regime governing debt securities offerings in Hong Kong comprises the Listing Rules of the Stock Exchange of Hong Kong Limited (SEHK), the Companies (Winding Up and Miscellaneous Provisions) Ordinance (CO) and the Securities and Futures Ordinance (SFO). These major laws and regulations regulate listing applications, prospectus disclosure and post-listing securities market activities.

Broadly, listing applications in Hong Kong are regulated under a two-tier structure, with Hong Kong Exchanges and Clearing Limited (HKEx) and the SEHK being responsible for regulating all listing-related matters. The SFC supervises HKEx and the SEHK and takes the lead role in securities market regulation.

All listing applications must be filed with the SEHK for vetting. Under a dual-filing system, the SFC also vets listing applications, but the SEHK is responsible for granting listing approvals. The SEHK is also responsible for regulating listed issuers' post-listing compliance with the Listing Rules, which specify listing requirements and ongoing obligations for listed issuers.

The SFC takes the lead role in market regulation, administering the CO (eg, on issuance of securities and prospectuses by companies) and the SFO (eg, on market misconduct, such as insider dealing and other securities-related offences).

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 Hong Kong's dual-filing regime, both the SFC and the SEHK require listing applicants to submit copies of their listing applications to them separately for vetting. However, to simplify the process, listing applicants typically authorise the SEHK to file their listing applications with the SFC on their behalf.

Once filed, the SFC then reviews the listing application to confirm compliance with the CO and SFO, which is a process that typically involves one or more rounds of comments, which must be cleared before the SFC will approve the listing application (see question 8).

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

Under both the CO and the SFO, a public offer of debt securities in Hong Kong triggers certain prospectus requirements in the absence of an applicable exemption. Such requirements include providing:

> *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.*

In addition to this general requirement, the CO enumerates the items required to be included in a statutory prospectus.

The Listing Rules require a prospectus to:

> *contain such particulars and information which, according to the particular nature of the issuer and the securities for which listing is sought, is necessary to enable an investor to make an informed assessment of the activities, assets, and liabilities, financial position, management and prospects of the issuer and of its profits and losses and of the right attaching to such securities.*

The Listing Rules:

> *are designed to ensure that* [...] *the issue and marketing of securities is conducted in a fair and orderly manner and that potential investors are given sufficient information to enable them to make a properly informed assessment of an issuer and of the securities for which listing is sought* [...] *The information contained in the document must be accurate and complete in all material respects and not be misleading or deceptive.*

A particularly burdensome aspect of the prospectus requirements is the requirement to produce both English and Chinese versions of the document, unless an exemption is granted by the SFC.

Practically, there are ways to avoid the onerous disclosure and translation and disclosure requirements of the CO and, by extension, the SFO. These include structuring the issue as an offer to 'professional investors' as defined in the SFO (described in more detail in question 10, in which case documents can be in English or Chinese only), structuring the issue as a private placement, structuring the offer with a high minimum denomination or subscription amount, or otherwise seeking a certificate of exemption from the SFC. The most commonly utilised approach out of these options is to limit the debt offering in Hong Kong to professional investors, thereby avoiding the prospectus requirements under the CO and SFO. The focus in such case is to prepare an offering document that satisfies the requirements under the applicable Listing Rules, which are more flexible in the case of offers to professionals only. The listing process for debt securities offered only to professionals is relatively straightforward and expedient, with draft listing application documents including the preliminary offering circular being submitted to the stock exchange one to two weeks prior to pricing. An application to the SFC for the waiver of certain disclosure requirements is typically made for issuers that do not already have securities listed on the SEHK (as is the case with most foreign issuers).

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?

The prospectus for a public offering of debt in Hong Kong must be registered with the Hong Kong Registrar of Companies on or before the date of its publication. Before registration the prospectus will have been vetted, and approval for the registration granted, by the SFC (in the case of securities other than securities listed on the SEHK), or the SEHK (in the case of securities listed on the SEHK).

An electronic copy of the prospectus will be published on the relevant regulator's web site upon approval being granted.

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 debt securities in Hong Kong are more involved than offerings to professionals only, as they are subject to the approval of a prospectus by either the SFC or the SEHK as discussed in question 7. For offerings of debt securities that are exempt from the prospectus requirement but 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.

The regulatory framework in Hong Kong places limitations on publicity before the prospectus or offering document has been approved. Consequently, issuers and underwriters typically restrict publicity and the release of information pertaining to an offer in accordance with publicity guidelines set forth by counsel.

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

The SEHK or SFC may not approve of a prospectus or offering document unless satisfied that the relevant provisions of the CO, the SFO or the Listing Rules, as the case may be, are satisfied.

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

The prospectus requirements of the CO are considered unduly onerous in the context of most international debt offerings and, accordingly, it is market practice to avoid them. The CO provides certain exemptions from the prospectus requirements, including for private placements which, under Hong Kong law, generally require that an offer be limited to a very small number of investors. However, the CO also provides a number of safe harbours, which include, importantly, offers to 'professional investors'. 'Professional investors' under the SFO include certain authorised financial institutions, banks regulated under overseas laws, corporations or institutions licensed or registered under the SFO, certain pension schemes, certain governments, central banks, and certain high net worth individuals and trusts.

However, even if a prospectus is not required under Hong Kong law for a proposed offering of debt securities, the SEHK imposes certain requirements for listing debt securities in Hong Kong, including the requirement that the issuer have net assets of at least HK$100 million, provide audited accounts for two years and issue the debt securities in minimum denominations of at least HK$500,000 or the equivalent in a foreign currency.

The SEHK also requires that the offering document include information that professional investors would customarily expect to see.

In addition, the definition of 'professional investors' under the Listing Rules differs from the definition set forth in the SFO, in that the Listing Rules specifically carve out certain categories of professional investors, including high net worth investors. However, the SEHK has (at least for the time being and until further notice) decided to relax this limitation after strong resistance from market participants. Therefore, issuers typically obtain a special waiver from the SEHK for offers of debt securities to professional investors that will be listed on the SEHK, to allow high net worth investors to participate.

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

Due to the onerous statutory prospectus requirements, offers of debt securities in Hong Kong tend to be made by way of an exemption from the prospectus requirements. The 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.

An advanced draft of the prospectus or offering document is submitted to the SEHK or SFC for review. However, if the offering is private in the sense that the issuer has made use of an exemption from the prospectus requirements of the CO, then the prospectus vetting process of the SFC is not required and there is no need to factor the review process with the SFC into the timetable. Any substantive issues with the contents of the offering circular are vetted with the SEHK or, as the case may be, the SFC, before launch. Where the offering circular is required to be vetted by the SFC in the case of public offers, during the vetting process the SFC may request that the issuer provide copies of the contractual documents relating to the offer for reference, such as the distribution agreement between the issuer and the distributors of the offering circular. The offering circular must be authorised and registered by the Registrar of Companies before the offering circular is issued (in the case of a public offering in Hong Kong).

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 CO 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. If the securities are to be listed on the SEHK, obtaining the eligibility for listing the securities from the SEHK is usually a condition precedent to closing, and the securities are usually listed as of the business day following the closing date.

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 standalone 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 standalone issue.

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

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?

Historically, Hong Kong had a vibrant market for retail structured products, of which 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. On the other hand, Hong Kong is the world's sixth largest market for over-the-counter derivatives, with an average daily turnover of US$27.9 billion during 2013, according to the HKMA.

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 special debt instruments generally follows the rules that apply to the offer and admission to trading of debt instruments. For public offerings in Hong Kong, the relevant offering documentation will need to comply with the disclosure requirements set out in the CO, the SFO and the Listing Rules. As a general rule, convertible bonds or equity-linked notes will only be listed on the SEHK if the underlying shares are also listed on the SEHK or on another regulated, regularly operating open stock market recognised by the SEHK.

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

The CO distinguishes between 'shares' and 'debentures', where shares generally mean shares in a company's share capital, while debentures include bonds and other debt securities. The Listing Rules take the distinction further by classifying equity securities as shares (including preference shares and depositary receipts), convertible equity securities and options, warrants or similar rights to subscribe or purchase shares or convertible equity securities, while debt securities include debenture or loan stock, debentures, bonds, notes and other securities or instruments acknowledging, evidencing or creating indebtedness, whether secured or unsecured.

The prospectus requirements under the CO for equity securities are largely similar to those for debt securities, although the listing requirements for public offerings of equity are considerably more rigorous, both in terms of the suitability for listing requirements as well as for the listing process itself.

Corporate hybrid securities and bank regulatory capital that are issued in the form of debt securities are generally treated by the SEHK as debt securities for the purposes of listing.

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 CO (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?

For issuers incorporated outside Hong Kong, the CO provides that offers 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. Accordingly, foreign issuers may make offers to 'persons whose ordinary business is to buy or sell shares or debentures' as well as to 'professional investors'.

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 renminbi 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 renminbi RTGS system to cater for the clearing and settlement of renminbi 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?

The key transaction issues in a public debt offering typically include issues raised by the SEHK or the SFC, or both, as well as 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

Update and trends

The Hong Kong government has been reviewing the possibility of reforming the prospectus regime in Hong Kong for a number of years. One likely outcome would be moving the provisions of the CO relating to prospectus requirements into the SFO. However, as of January 2015, the SFC has not yet issued a consultation paper and it the scope of reforms the Hong Kong government might undertake in its prospectus regime is currently unclear.

of exchange offers, the new securities offered may need to be issued in accordance with the CO, the SFO and the Listing Rules, and approval from the SFC or SEHK may be required.

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?

The Listing Rules require issuers to keep the holders of their debt securities (and the public) fully informed of all factors that might affect their interests and treat the holders of their debt securities in a proper manner. These requirements 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.

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?

Both issuers and underwriters have potential statutory criminal and civil liability under the CO for untrue statements (including material omissions) in prospectuses. The SFC is empowered to take action under the CO as appropriate.

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

The SFO imposes liability on a person who makes any fraudulent, reckless or negligent misrepresentation that induces another person to deal in securities (including the acquisition, disposal, subscription or underwriting of securities) to pay compensation for any pecuniary loss sustained by the other person as a result of reliance on the misrepresentation. Any director of a company making any such misrepresentation is also presumed to have made the misrepresentation unless such director can prove that it did not authorise the making of the misrepresentation. The SFO further imposes civil liability in Hong Kong or elsewhere for material misstatements and omissions in offering materials.

Investors may also seek to bring actions under Hong Kong statutes relating to misrepresentation and theft, as well as under common law tort claims.

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 CO. 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.

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

There are three kinds of debt securities offerings that are typical for the Indian market:

- issuance of foreign currency-denominated debt securities by overseas companies that are part of Indian corporate groups. For instance, in June 2013, Vedanta Resources plc issued US$1.7 billion bonds, listed in Singapore. This is the largest offering of foreign currency bonds by an Indian corporate group so far. Further, in May 2013, Rolta India Limited issued US$200 million high-yield bonds through a subsidiary incorporated in the United States, backed by a two-tier guarantee structure. There is growing interest in the high yield bond market, although the market remains in the nascent stage;
- issuance of foreign currency-denominated debt securities by Indian companies in the form of non-convertible debt securities (NCDs) or foreign currency convertible bonds (FCCBs) or foreign currency exchangeable bonds (FCEBs). This market remains in the nascent stage, primarily due to regulatory constraints, although India's external commercial borrowings (ECB) policy has been progressively liberalised in recent years by India's central bank, the Reserve Bank of India (RBI). The Securities and Exchange Board of India (SEBI) Handbook of Statistics on the Indian Securities Market reports that from April 2012 to December 2012, Indian companies raised US$4.3 billion though ECB; and
- domestic listings of Indian rupee-denominated, publicly issued or privately placed NCDs. The market for privately placed NCDs is relatively more active than the market for public offers, driven primarily by institutional demand and the difference in regulatory and procedural requirements applicable in private placements in relation to public offers (discussed in more detail below). The SEBI annual report for the fiscal year ending 31 March 2014 states that Indian companies raised 2,760.54 billion rupees through 1,924 private placements of NCDs listed on the two largest Indian stock exchanges, BSE Ltd (BSE) and the National Stock Exchange of India Ltd (NSE), and 423.83 billion rupees through 35 public offers of NCDs, in 2013–2014.

The NCD market in India has displayed a trend of slowly growing liquidity, transparency and depth, in recent years. The SEBI Handbook of Statistics on the Indian Securities Market reports that between April and December 2013, the traded value of corporate debt securities on the BSE and the NSE, aggregated to 2,971.93 billion rupees, compared with a traded value of 2,029.99 billion rupees between April and December 2012. A significant part of the investment in the domestic NCD market has come from foreign institutional investors (FIIs) in recent years, although FII investment remains relatively more concentrated in the Indian equity markets. Net FII investments in the debt segment aggregated to a negative figure of 280.60 billion rupees in 2014–2013, compared with 283.34 billion rupees in 2012–13, and an all-time high of 499.88 billion rupees in 2011–12. Monthly trends of net FII investments in the debt segment show that the highest fund inflows in the debt segment are in the last fiscal quarter of each year. However, there still remains significant headroom for growth, as the SEBI annual report for the year ended 31 March 2014 states that utilisation of corporate debt limits allocated towards FIIs was only 34.4 per cent as on 31 March 2014, while the sub-limit for credit enhanced rupee corporate bonds was entirely unutilised as on that date. In addition, it can be seen that, due in large part to the Indian regulatory requirement for listed and to be listed NCDs to be rated by an SEBI-registered credit rating agency, as well as a minimum AA+ rating being a precondition for delivery versus payment (DVP) settlement over the Indian stock exchanges, the majority of rupee-denominated NCDs are rated investment grade. The SEBI Handbook of Statistics on the Indian Securities Market reports that between April and December 2013, of the total 8,924.42 billion rupees worth rated corporate debt securities in India of maturity equal to or greater than one year, across listed and unlisted NCDs, close to 98 per cent were assigned investment-grade ratings, ranging from BBB (moderate safety) to AAA (highest safety).

2 Describe the general regime for debt securities offerings.

Issuance of debt securities in India is primarily governed by the Ministry of Corporate Affairs (MCA), under the Companies Act, 2013 (Companies Act), while the SEBI, BSE and the NSE impose additional requirements applicable for public offers and listings of privately placed NCDs. Issues pertaining to the Indian financial markets and direct tax implications of investments in Indian debt securities are primarily governed by the Ministry of Finance.

The RBI prescribes additional requirements, including prudential norms and reporting obligations, for issuance of debt securities by an Indian issuer registered with the RBI as a banking company or non-banking finance company (NBFC). Remittance of funds by a non-resident investing in rupee-denominated debt is also subject to reporting obligations to the RBI. The RBI has recently issued directions to scheduled commercial banks in India to permit and encourage partial credit enhancement of corporate bonds, by way of either a funded subordinated loan or a non-funded contingent line of credit facility, offered to issuers of corporate bonds in India.

Issuance of foreign currency bonds, including FCCBs and FCEBs, is primarily regulated by the RBI. Issuance of FCCBs and FCEBs is regulated under India's ECB Policy, read with the Issue of FCCBs and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993 (1993 Scheme) and the Issue of Foreign Currency Exchangeable Bonds Scheme, 2008, together with India's foreign direct investment (FDI) policy. While both FCCBs and FCEBs are foreign currency bonds issued by an Indian company to non-residents (generally listed on an overseas exchange), and convertible into equity in an Indian company, an FCCB is convertible into equity of the Indian issuer, while an FCEB is convertible into equity of another Indian company, which is eligible to raise ECB and receive FDI. The MCA has recently clarified that foreign currency bonds, including FCCBs, issued exclusively to persons outside India, are not governed under provisions pertaining to a public offer or a private placement under the Companies Act.

Broadly, ECB may be permitted either under the automatic route (where no prior regulatory approval is required) or approval route (where prior RBI approval is required), depending on the sector in which the issuer operates and other specified criteria. ECB is also subject to restrictions on the coupon rate of the bonds and use of proceeds, including a restriction on proceeds being used in the real estate sector or for investment in the stock market and stipulations as to interim use of proceeds. The RBI has notified other operational and reporting obligations for drawdown and utilisation of ECB by an Indian borrower.

Due to Indian law restrictions on foreign currency borrowings by Indian companies, several Indian corporate groups have organisational structures pursuant to which they can borrow through an overseas holding company or subsidiary.

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.

A public offer of any securities, including debt securities, requires the filing of a prospectus with the Registrar of Companies in India (RoC), the Indian stock exchanges where such securities are intended to be listed, and the SEBI.

The SEBI (Issue and Listing of Debt Securities) Regulations, 2008 (SEBI Debt Regulations), read with the Securities Contracts (Regulation) Rules, 1957, and standard debt listing agreement required to be entered into by issuers with the Indian stock exchanges, require the issuer to file (through an SEBI-registered merchant banker) the draft prospectus with the Indian stock exchanges on which the debt securities are intended to be listed, along with a listing application. A copy of this draft prospectus must be filed with the SEBI for its records. While the draft prospectus is subject to public review for seven working days, and any comments from the public must be addressed in the prospectus, the draft prospectus is not reviewed by any Indian regulator (unlike a draft red herring prospectus in a public offer of equity, which is subject to review by the SEBI and public review for at least 21 calendar days).

In public offers (as well as private placements) by certain eligible issuers (including public financial institutions notified under the Companies Act, RBI-registered scheduled banks and NBFCs, housing finance companies registered with the National Housing Bank, and Indian listed companies satisfying specified criteria), if an issuer wishes to issue debt securities in multiple tranches in the course of a single offering, the issuer is permitted to file a shelf prospectus (which remains valid for 180 days as per the SEBI Debt Regulations). This is followed by tranche disclosure documents containing terms and conditions specific to each tranche, as well as details of any material developments since the filing of the shelf prospectus. Tranche offer documents are not subject to regulatory review or public comments.

When an Indian company issues foreign currency-denominated instruments outside India, the offer document need not be filed with any Indian regulator. However, the issuer is subject to reporting obligations to the RBI, with respect to drawdown and utilisation of ECB. Remittance of funds towards investment in rupee-denominated debt instruments is also subject to reporting to the RBI.

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

Both the Companies Act and the SEBI Debt Regulations stipulate detailed disclosures to be provided in the prospectus for a public offer of debt securities in India. The disclosure requirements for an equity offering under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, need not be followed in an offering of NCDs in India.

An advisory committee formed by the SEBI has recently made recommendations to amend the SEBI Debt Regulations to incorporate the additional disclosures required under the Companies Act, as well as to bring the end-use related disclosure requirements applicable to a public offer of NCDs more in line with corresponding disclosure requirements applicable to a public offer of equity. These recommendations have not yet been brought into effect by the SEBI.

When an Indian company issues foreign currency-denominated instruments outside India, the offer document is not subject to disclosure requirements prescribed under Indian law. Legal and customary requirements in the foreign jurisdictions in which such securities are being offered and listed would apply.

5 Describe the drafting process for the offering document.

The disclosure requirements for both a public offer and a private placement are prescribed under the Companies Act, read with the SEBI Debt Regulations in the case of a listing of privately placed NCDs. The broad guideline is that the offer document must contain all material disclosures necessary for subscribers to make an informed investment decision.

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?

Other than the draft and final prospectus, the documentation for a public offer of NCDs in India includes the following:

- a debenture trust deed (and, where appropriate, separate debenture trustee agreement for appointment of debenture trustee) between the issuer and an SEBI-registered debenture trustee, including the terms and conditions of settling the trust upon the trustee, and defining rights and responsibilities of the trustee;
- a placing agreement, between the issuer and SEBI-registered lead managers appointed by it to manage the offering (not mandatory in a private placement). This is not typically drafted or known as a subscription or underwriting agreement, as the lead managers in an offering of debt securities in India typically act as arrangers or placement agents and not as initial subscribers or underwriters;
- a syndicate or consortium agreement, between the issuer and members of the syndicate (entities registered with one or more Indian stock exchanges to carry out brokerage services in India) appointed by it to market the offering. While the appointment of a syndicate or consortium of brokers is not mandatory under Indian law, it is customary in public offers for marketing reasons;
- an escrow agreement, between the issuer and escrow banks (which must be registered with the RBI as scheduled commercial banks licensed to operate in India) appointed by the issuer to receive and verify application monies;
- tripartite agreements between the issuer, the registrar and transfer agent, and the central depositories in India, namely, Central Depository Services Limited and National Securities Depository Limited, for dematerialised issuance of the debt securities; and
- security documents.

Debt securities listed on Indian stock exchanges must have at least 100 per cent asset cover. Depending on the nature of security offered, the security documents may include, for instance, a registered mortgage deed (where the security includes a registered mortgage of immoveable property), a memorandum of entry and declaration recording an equitable mortgage (where the security includes an equitable mortgage of immoveable property), a hypothecation agreement (where the security includes a hypothecation of moveable property), a pledge agreement (where the security includes a pledge of securities), or a guarantee agreement (where the securities are backed by a guarantee). While India's ECB Policy has been recently liberalised to permit general delegation of powers to banks registered with the RBI as category-I authorised dealers to allow creation of a charge on immoveable assets, moveable assets, financial securities and issue of corporate or personal guarantees in favour of overseas lenders and security trustees, to secure an ECB (subject to specified criteria being satisfied and invocation of such security interests being subject to certain conditions), security creation in an NCD issuance in favour of non-residents may entail analysis of whether the RBI restrictions against transfer or disposal of certain types of assets by Indian residents to non-residents would apply.

In an Indian listing or public offer of NCDs, copies of the above-mentioned documents must be made available for free public access during the subscription period, and must be filed with the RoC as exhibits, accessible by the public on payment of a nominal fee. A copy of the debenture trust deed must also be filed with the Indian stock exchanges on which the debt securities are intended to be listed, and is available for public access on the websites of the Indian stock exchanges.

While the appointment of at least one SEBI-registered credit rating agency is mandatory in a public offer or a listing of privately placed NCDs in India, and an SEBI-registered registrar and transfer agent is typically appointed by the issuer for logistical convenience, the issuer need not enter into agreements with the rating agency or registrar and transfer agent, nor need an issuer file copies of such agreements with any Indian regulator.

The key transaction parties in an Indian listing of privately placed NCDs typically include the issuer, debenture trustee, registrar and transfer agent, depositary participants and credit rating agency. Additional parties involved in a public offer (which are not mandatory in a listing of privately placed NCDs) in India include the arrangers, marketing syndicate and escrow banks.

Where an Indian company issues foreign currency-denominated instruments outside India, the transaction parties and documents are those that are customary in the jurisdictions in which such offering and listing is being conducted and, in general, include an offering memorandum or circular, a debenture trust deed and placing agreement.

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

While the offer documents and transaction agreements in an Indian offering of debt securities do not require regulatory approval before publication, the draft offer document must be filed with the Indian stock exchanges on which such securities are intended to be listed, to seek in-principle listing approval.

In a public offer, once comments received from the public are incorporated and the draft prospectus is updated to include all details to be set out in the prospectus, the prospectus is filed with the Indian stock exchanges, to seek final listing and trading approvals. Further, while copies of the draft and final prospectus must be filed with the SEBI for record purposes, the SEBI does not issue an approval.

In a private placement, the draft offer document is not subject to public or regulatory review, and the updated offer document that includes the final terms and conditions is filed with the Indian stock exchanges to seek final listing and trading approvals.

While it is mandatory to file a copy of the prospectus (in a public offer) or the private placement offer letter (in a private placement) with the RoC, as well as filing a record of private placement (in a private placement) and returns of allotment (in both a public offer as well as a private placement), the RoC does not issue an approval.

Where an Indian company issues foreign currency-denominated instruments outside India, the offering documentation does not require the approval of any Indian regulator before publication. The legal and customary requirements in the foreign jurisdictions in which such securities are being offered and listed would apply.

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?

While the draft prospectus in a public offer of debt securities is subject to public review for seven working days and any comments received from the public must be addressed in the prospectus, the draft prospectus is not reviewed by any Indian regulator.

Where an Indian company issues foreign currency-denominated instruments outside India, the offering or offer document are not subject to review and authorisation by any Indian regulator. The legal and customary requirements in the foreign jurisdictions in which such securities are being offered and listed would accordingly apply.

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

Indian stock exchanges may refuse to grant listing and trading approvals in a public offer of securities if any of the disclosure or operational requirements under applicable law are not complied with. For instance, the general eligibility criteria prescribed by the SEBI include a requirement that the issuer, and persons in control of the issuer or its promoters, should not be under any restraint, prohibition or debarment by the SEBI from accessing the securities market or dealing in securities. Further, debt securities may be issued only in dematerialised form (instead of being evidenced by physical debenture certificates) and the issuer is required, among other things, to have obtained credit rating for the debt securities proposed to be issued, from at least one SEBI-registered credit rating agency.

Where an Indian company issues foreign currency-denominated instruments outside India, the offering or offer document are not subject to review and authorisation by any Indian regulator. However, there are eligibility and operational requirements for Indian companies intending to raise foreign currency bonds, including with respect to issuance of FCCBs and FCEBs and compliance with India's FDI policy (which includes sectoral foreign investment caps).

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

Under the Companies Act, the private placement exemption (in other words, the safe harbour from the registration requirement and other disclosure and operational requirements applicable in the case of a public offer of securities) is presently available to any offer or invitation to subscribe to securities, made to up to 50 persons (excluding qualified institutional buyers). As indicated above as well as below, the disclosure as well as procedure related requirements for a public offer in India are more comprehensive compared with the relatively streamlined disclosure and procedural requirements for an India listing of privately placed NCDs.

The MCA has recently clarified that foreign currency bonds including FCCBs issued exclusively to persons outside India are not governed under the provisions pertaining to a public offer or a private placement under the Companies Act.

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

The public offer process for debt securities typically takes approximately a month from the filing of the draft offer document and in-principle listing application with the Indian stock exchanges to commencement of exchange trading, whereas this process typically takes approximately a week in an Indian listing of privately-placed debt securities. The difference in the timeline is primarily due to the following reasons:

- the mandatory seven-day period for public comments on the prospectus, which is not required in a private placement;
- the additional period for which subscription remains open in a public offer, which is not required in a private placement (where subscription generally opens and closes within one working day); and
- the additional period required to verify valid applications and settlement in a public offer, necessitated by a higher number of subscribers (generally including several retail bidders instead of being largely limited to qualified institutional bidders, as in private placements), which is not required in a private placement (where verification and settlement are generally concluded within one or two working days).

In addition, the preparation of the prospectus in a public offer generally requires a longer time due to the comprehensive disclosure requirements prescribed for a public offer (in relation to the relatively streamlined disclosure requirements for a private placement), including a due diligence certificate to be filed by the merchant banker with the SEBI in a public offer.

Rupee NCDs offered to registered foreign portfolio investors (FPIs) must be listed with 15 days of allotment, regardless of whether NCDs are publicly issued or privately placed. However, registered FPIs are also permitted to invest in unlisted rupee-denominated NCDs issued by infrastructure companies on a private placement basis. The same requirements apply in respect of long-term foreign investors like sovereign wealth funds, multilateral agencies, endowment funds, insurance funds and pension funds registered with the SEBI as eligible non-resident investors in infrastructure debt funds and foreign central banks.

While the transaction agreements and key parties are largely the same, the issuer must appoint at least one SEBI-registered merchant banker in an Indian public offer, who must submit a due diligence certificate to the SEBI in relation to the transaction. For marketing reasons, the issuer generally also appoints a number of syndicate members, which are registered brokers in India. In view of these additions to the list of key parties in a public offer, the transaction agreements in a public offer typically include an issue or placement agreement (between the issuer and the lead managers appointed by it to manage the offering) and a syndicate or consortium agreement (between the issuer and members of the syndicate appointed to market the offering).

It is compulsory to provide an option for applications supported by blocked amount (ASBA) in an Indian public offer. This refers to a payment method where the application amount is blocked in a designated bank account from the date of application until allotment (unless unblocked earlier on rejection of the application on technical grounds, the issue being withdrawn, or listing or trading approvals being denied by the stock exchanges), such that no escrow and refund mechanism need be created. The regulatory rationale is to reduce settlement risk and delay or default in processing of refunds. The ASBA facility is not applicable in a private placement of debt securities in India.

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?

While the appointment of legal counsel is not mandatory in an offering of debt securities in India, it is customary (due to the appointment of merchant bankers and the filing of a due diligence certificate by them to the SEBI in relation to the transaction being mandatory in public offers). Accordingly, closing documents generally include a closing opinion from one or more law firms (depending on whether the issuer and the merchant bankers have separate legal counsel or a single law firm is acting as transaction counsel). Some merchant banks may also require legal counsel to provide legal opinions before filing the draft or final prospectus.

The closing documents also typically include auditors' comfort letters obtained before filing the draft prospectus and prospectus, and a bring-down comfort letter obtained before closing.

As the appointment of a merchant banker is not mandatory in a private placement of debt securities in India, there is no standard list of closing documents for such offerings. If merchant bankers or legal counsel are involved in such an offering (generally, where the issuer enjoys a certain stature or the offering is of a large size), the set of closing documents and processes are typically negotiated and generally do not include auditors' comfort letters, as the offer documents do not include any financial statements that are audited, reviewed or restated specifically for inclusion in the offer documents (ie, offer documents merely reproduce financial statements published earlier, pursuant to the issuer's existing disclosure obligations under Indian law).

Where foreign currency-denominated debt securities are issued by an Indian company outside India, the closing documents are the same as generally required in the jurisdiction in which such offering or listing is being conducted.

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

For privately placed NCDs listed on BSE, annual listing fees of up to 30,000 rupees per instrument, depending on the value of the listed NCDs, currently apply. This is subject to a cap of up to 500,000 rupees per issuer. For public offers, the listing fee is leviable at 75 per cent of the listing fee applicable to equity listings, which is, depending on the value of listed securities, capped at up to 620,000 rupees plus 2,750 rupees for every increase of 50 million rupees or part thereof above 10 billion rupees.

For NCDs listed on the wholesale debt market segment of the NSE, initial listing fees of 7,500 rupees and annual listing fees of up to 550 thousand rupees, depending on the value of listed NCDs, currently apply.

For foreign currency debt instruments issued by Indian companies, listing fees would be as prescribed in the relevant foreign jurisdiction. The RBI has notified an all-in-cost ceiling on the interest rate taken together with other fees and expenses in foreign currency (except commitment fee, pre-payment fee, fees payable in rupees and withholding tax payable in rupees). The current all-in-cost ceilings for ECB are as follows (LIBOR, for the respective currency of borrowing):

- an average maturity period of three years and up to five years has an all-in-cost ceiling of 350 basis points over a six-month LIBOR; and
- an average maturity period of more than five years has an all-in-cost ceiling of 500 basis points over a six-month LIBOR.

For fixed-rate debt, the swap cost plus margin should be the equivalent of the floating rate plus the applicable margin.

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 convertible and equity-linked instruments issued (particularly FCCBs) by Indian companies has historically been fairly active, especially in the 2004–2008 period, although it has become somewhat subdued due to the global economic slowdown and is only gradually recovering. The market for rupee-denominated convertible debt instruments is not very active at present.

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 FCCBs is primarily governed under India's ECB Policy, the 1993 Scheme and the FDI policy. There are no accounting implications under Indian law for an offering of such special debt securities.

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

India's FDI policy clarifies that instruments convertible into, or exchangeable for, equity of Indian companies are treated as equity. Therefore, FCCBs and FCEBs are treated as FDI and subject to sectoral foreign investment limits specified under India's FDI policy. For instance, up to 74 per cent FDI is permitted in existing airport projects without prior approval of the Foreign Investment Promotion Board, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry (FIPB), and up to 100 per cent with prior FIPB approval.

NCDs are not treated as equity under Indian law and, therefore, are not subject to foreign investment limits under India's FDI policy. However, the SEBI and the RBI have notified limits (generally revised annually) for investment by registered FPIs in debt instruments issued by Indian companies. At present, FPI investment in rupee-denominated non-convertible corporate bonds is capped at US$51 billion. FPIs have also been permitted to invest in credit-enhanced rupee-denominated non-convertible corporate bonds up to an equivalent of US$5 billion within the overall corporate bond limit of US$51 billion. FPIs have been permitted to invest in corporate debt 'on tap' or 'on demand', namely, without purchasing debt limits, until overall FPI investment in corporate debt reaches 90 per cent of the cap, after which the auction mechanism would be initiated for allocation of the remaining corporate debt limits available for FPI investment. For sub-limits of credit-enhanced bonds, approval of the central depositories is required for allocation of remaining limits after overall FPI investment reaches 95 per cent of the sub-limit. These FPI investment limits are monitored and disseminated on a daily basis by the central depositories in India.

The RBI and the SEBI have recently announced that all future FPI investments within this corporate debt limit must be made in corporate bonds with a minimum residual maturity of three years. It has been clarified by the RBI that optionality clauses in such corporate bonds would not be exercisable by FPIs within the prescribed minimum maturity period of three years, although FPIs are permitted to invest in amortised debt instruments, provided that the stated average maturity of such corporate bonds is three years and above.

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?

While FPI investments (both primary and secondary) in corporate bonds may now only be made in corporate bonds with a minimum residual maturity of three years, there are presently no lock-in requirements or transfer restrictions under Indian law for FPI investment in corporate debt (with respect to down-selling to domestic investors).

With a view to encouraging liquidity in the corporate bond market in India and permitting flexibility in redemption of corporate bonds, the SEBI has recently approved amendments, yet to be notified, to the SEBI Debt Regulations to enable consolidation and re-issuance of, and call and put options with respect to, India-listed NCDs.

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 presently no precedents of Indian public offers by foreign issuers or Indian listings of foreign debt securities. See above regarding the issuance of foreign currency bonds by Indian companies.

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

While Indian regulators are progressively liberalising foreign investment laws and policies, including those in relation to investment in Indian debt securities, there are presently no formal arrangements with other jurisdictions to help foreign issuers to access Indian debt 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?

Public offers and private placements of rupee-denominated debt securities in India are not customarily underwritten. In either case, the role of the lead manager (mandatory in a public offer and discretionary in a private placement) is to act as an arranger on a best efforts basis, instead of being the initial purchaser of the debt securities. As there is no prescribed form for a placement agreement for NCDs, the form and drafting of such agreements typically vary widely, depending on the issuers, arrangers and legal counsel involved.

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

While public offers and private placements of rupee-denominated debt securities in India are not customarily underwritten, the lead manager (whose appointment is mandatory in a public offer and discretionary in a private placement) appointed by the issuer must be registered with the SEBI to act as such. If underwriting arrangements are entered into in any offering of debt securities in India, the details of such arrangements must be disclosed in the offer document. No regulatory approval is required for such arrangements to be entered into or enforced in India.

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

Detailed disclosure requirements are notified for a public offer in India, and the merchant banker for a public debt offering must submit a due diligence certificate with the SEBI. This generally translates to execution of the private placement process being more streamlined, compared with a public offer. In either case, whether in a public offer or a private placement of NCDs, the disclosure requirements applicable under the Companies Act have recently been significantly revised and it is generally advisable to engage legal counsel to ensure that such requirements are being complied with, in form as well as substance.

Under Indian law, application money must be brought in before allotment of securities being issued. Indian stock exchanges typically issue trading approvals within two working days of credit of the securities to the allottees' beneficiary accounts, with the depositary participants in India.

Clearing and settlement of corporate bond trades over the Indian stock exchanges has been centralised. The SEBI has also recently prescribed guidelines for providing a dedicated debt segment on the Indian stock exchanges, subsequent to which a risk management framework has been implemented for settlement on a DVP basis, generally with a settlement cycle of trade date plus one day.

Public offers of debt securities in India must be in dematerialised form. As such, physical debenture certificates may not be issued to depositories or investors at the time of allotment, although holders of securities in dematerialised form are permitted to apply for rematerialisation. In such cases, typically, where the offering includes multiple series of debt securities, one consolidated debenture certificate is issued for each separate series of debentures allotted to each individual holder. In the past, issuers have obtained specific permissions from the SEBI to allow investors to apply for and hold debt securities in physical form (generally, the rationale is to widen the investor base to include small retail investors who do not have beneficiary accounts with depository participants). In such cases, physical debenture certificates are issued. Typically, where the offering includes multiple series of debt securities, one consolidated debenture certificate is issued for each separate series of debentures allotted to each individual holder.

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

Publicly issued debt securities are typically held and traded in dematerialised form in India.

Update and trends

As mentioned in this chapter, the RBI and the SEBI have recently announced that all future FPI investments within permitted corporate debt limits must be made in corporate bonds with a minimum residual maturity of three years. It has been clarified by the RBI that optionality clauses in such corporate bonds would not be exercisable by FPIs within the prescribed minimum maturity period of three years, although FPIs are permitted to invest in amortised debt instruments, provided that the stated average maturity of such corporate bonds is three years and above.

While these recent announcements require further commercial as well as legal analysis, it is expected that investment activity as well as liquidity in the corporate debt market in India may be, at least, temporarily adversely affected, due to FPIs no longer being able to invest by way of primary or secondary purchase of (or to sell to other FPIs their existing investments in) corporate bonds with a residual maturity of less than three years. However, this adverse effect may be mitigated, at least in part, by the flexibility expected to be offered in terms of consolidation and reissuance, and optionality being permitted by the SEBI in respect of investments in corporate bonds. However, FPIs' ability to sell down their corporate bond investments to domestic purchasers will remain unaffected, regardless of the residual maturity of the corporate bonds in question.

24 Describe how issuers manage their outstanding debt securities.

Indian issuers do not generally conduct open market purchases, consent solicitations or tender or exchange offers for publicly-issued debt securities. Buyback or premature redemption of FCCBs or FCEBs is subject to RBI approval.

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

The debt listing agreement with the Indian stock exchanges imposes continuing disclosure requirements on issuers of India-listed NCDs (whether publicly issued or privately placed), subject to exceptions for regulated financial sector issuers such as banking companies and NBFCs. This includes the requirement for filing the following:

- half-yearly financial results;
- a half-yearly certificate by a practicing chartered accountant or company secretary, confirming maintenance of 100 per cent asset cover for the NCDs; and
- a half-yearly communication countersigned by the debenture trustee confirming credit rating, asset cover, debt-equity ratio, confirmation of payment of the last due interest or principal and next due date for payment of interest or principal.

The reporting obligations applicable to companies whose equity is not listed on any Indian stock exchange are relatively less onerous (for instance, there are no corporate governance requirements imposed by Indian stock exchanges on a company that has only listed its debt securities), while companies that have both equity and debt securities listed on an Indian stock exchange follow a simplified debt listing agreement from which duplicative reporting obligations and compliance procedures for both debt and equity listing have been removed.

For foreign currency bonds, such as FCCBs, a monthly return must be filed by the issuer (through an RBI-registered authorised dealer) with the RBI, which includes disclosure on monthly debt-servicing.

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 Companies Act, civil or criminal liability may arise for any person making a misstatement in a prospectus (including through inclusion or omission of any matter likely to mislead) and any person fraudulently inducing other persons to invest money (whether through a prospectus or in a private placement). A class action suit may also be filed by any person or group or association of persons for any misleading statement or inclusion or omission of any matter in a prospectus. The liability analysis for debt securities issued in India is the same as for securities of other types.

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

Under the Companies Act, contravention may result in penalty or imprisonment on adjudication for directors and officers of the issuer company, promoters and other persons authorising issuance of a prospectus (including pursuant to a class action suit initiated by any person or group or association of persons). However, the law does not prescribe payments or remedies to be made or provided by the defaulter directly to the investors or aggrieved persons. It is not customary for Indian courts or adjudicatory bodies to direct persons guilty of contravention of securities laws to pay liquidated damages. However, depending on the nature of the contravention and facts of the case, compensatory payment or specific performance may be directed.

See below for more detail on the sanctioning powers of the SEBI, the RBI and Indian stock exchanges.

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

The SEBI has broad powers to impose penalties for contravention of any laws, regulations or directions issued by or under the SEBI's jurisdiction, in relation to the issue and transfer of listed and to-be-listed securities. The SEBI also has power to take actions including the following:

- suspending trading of any security on any recognised stock exchanges in India;
- restraining persons from accessing the Indian securities market or prohibiting any person associated with the Indian securities market to buy, sell or deal in securities; and
- prohibiting any company from issuing any prospectus, offer document or advertisement soliciting money from the public in India for issue of securities, or to specify conditions subject to which such prospectus, offer document or advertisement, if not prohibited, may be issued.

The SEBI may also cancel or suspend registration of, or issue prohibitive directions or warnings to, any SEBI-regulated securities market intermediaries (merchant banks, brokers, debenture trustees, rating agencies, registrars and transfer agents, etc) determined to have been in default or to have acted negligently. With a view to making the penalty structure commensurate with the seriousness or repetitive nature of listing violations, the penalty structure implemented through the Indian stock exchanges has been strengthened recently.

In matters under the RBI's jurisdiction, the RBI may, on adjudication, impose penalty of up to three times the sum involved in the contravention where such amount is quantifiable, or up to 200,000 rupees where the amount is not quantifiable and, for a continuing offence, up to 5,000 rupees for each day for which contravention continues. If penalty imposed is not paid and the amount due exceeds 10 million rupees, the RBI may order civil imprisonment of up to three years.

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

Unfortunately, we cannot provide general advice on tax-related matters.

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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 Italian capital markets are bonds or notes. The issuers of debt securities are typically sovereigns, large corporate issuers and banks. This publication focuses on debt securities of Italian corporate issuers.

Debt securities offered to the public are often 'plain vanilla', unsecured and unsubordinated. Such offerings are usually structured as stand-alone offerings, made on the basis of a prospectus approved by the Italian Securities and Exchange Commission (CONSOB), and listed on the Mercato Telematico delle Obbligazioni (MOT).

The MOT is the market managed by Borsa Italiana SpA (Borsa Italiana), the Italian Stock Exchange, dedicated (via its two segments, DomesticMOT and EuroMOT) to the trading of debt securities.

At the end of 2014, 1,107 securities were listed on the MOT, consisting of:

- 113 Italian government bonds;
- 456 bonds issued by corporate issuers and banks; and
- 538 eurobonds and asset-backed securities.

In addition, at the end of January 2015, no new issues were listed on the DomesticMOT and 18 new issues of eurobonds, sovereign debt and bonds offered by public organisations were listed on the EuroMOT. In 2014, trading on the MOT resulted in approximately 4.8 million contracts, equal to approximately €323.1 billion.

Debt securities offered in private placement to qualified investors are not subject to the duty to publish a prospectus and include, in addition to plain vanilla bonds, medium-term debt instruments, convertible bonds, structured bonds and equity-linked debt securities. Wholesale issues offered continuously, in the framework of an issuance programme (EMTN, GMTN), are usually based on trust structures or fiscal agent structures governed by English law, and are listed mainly in Luxembourg and Ireland.

2 Describe the general regime for debt securities offerings.

The core of the Italian regulations for debt securities offerings consists of the Consolidated Financial Act (Legislative Decree No. 58 of 24 February 1998) and regulations adopted by CONSOB that implement the provisions of the Consolidated Financial Act.

The three primary regulations adopted by CONSOB are:

- the Issuers' Regulation (Regulation No. 11971 of 14 May 1999, as amended) regulating a wide range of matters, including listed issuers and public offerings;
- the Intermediaries' Regulation (Regulation No. 16190 of 29 October 2007, as amended) regulating financial intermediaries; and
- the Markets' Regulation (Regulation No. 16191 of 29 October 2007, as amended) regulating the operation, organisation and functioning of securities exchanges.

The Consolidated Financial Act and the CONSOB regulations have undergone major amendments, particularly in the context of the implementation of European directives (including Directive 2003/71/EC, as amended (the Prospectus Directive)) and in connection with an attempt to stimulate the competitiveness of Italian capital markets and reduce ongoing onerous obligations on issuers. In addition to the above, Commission Regulation (EC) 809/2004, as amended (the Prospectus Regulation), sets forth the information and disclosure requirements and format of prospectuses.

Other regulatory measures applicable to debt securities' offerings are those issued by Borsa Italiana, which manages the Italian Stock Exchange, and the Bank of Italy, Italy's central bank.

CONSOB is the primary authority responsible for regulating the Italian securities markets. The focus of CONSOB's activity is to protect investors and the transparent and correct conduct of capital market participants. To ensure the organisation and efficiency of financial markets, CONSOB cooperates with various regulatory authorities and market bodies, including the Ministry for Economy and Finance (MEF), Borsa Italiana, the Bank of Italy, the pension fund supervisory authority and the insurance industry supervisory authority.

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.

See question 4 with regard to filing requirements for public offerings of debt securities.

The issuance of bonds by Italian corporate issuers is subject to compliance with certain requirements set forth in the Italian Civil Code. In particular:

- an Italian non-listed company may not have outstanding notes whose aggregate amount exceeds twice the aggregate of its share capital, its legal reserve and its available reserves as shown in its most recent annual financial statements. This restriction does not apply with respect to securities that are placed only with professional investors subject to prudential supervision. In addition, pursuant to a recent reform aimed at opening up debt capital markets to Italian non-listed companies, the above restriction does not apply with respect to notes issued by a non-listed company that are listed on a regulated exchange or on a multilateral trading facility, or notes that include a right to subscribe to or purchase the issuer's stock, subject to certain conditions (see 'Update and trends' for further information); and
- certain matters (including amendments to the terms and conditions of the securities) are subject to the resolutions of a noteholders' meeting, which are to be taken in accordance with the quorums applicable to the extraordinary shareholders' meeting. The by-laws may provide for higher quorums but, according to the prevailing reading of the provisions, not for a unanimous vote, which would be inconsistent with the majority principle set forth in such provisions.

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

Italian rules essentially mirror the Prospectus Directive provisions. The publication of a prospectus approved by CONSOB is required for both issuing and listing debt securities. A prospectus for debt securities can either be drawn up as a single document, as three separate documents or as a base prospectus. A three-part prospectus consists of a registration document containing information about the issuer, a securities note containing information relating to the securities to be offered or admitted to trading and a summary note. A base prospectus contains the general terms and conditions of the securities to be offered (final terms issued at the time of each issuance will contain the specific terms of each particular issue), and is valid for 12 months.

A prospectus must contain all the information necessary for investors to make an informed assessment on the issuer's assets and liabilities, profits and losses, financial position and prospects, and of the securities being offered. The information in the prospectus must be presented in an easily analysable and comprehensible form.

A typical debt prospectus contains, among other things:

- a description of the risk factors relating to the issuer, the securities and the offer;
- information relating to the issuer's business activities and organisational structure;
- audited financial information covering the past two financial years and the respective audit reports for each financial year, prepared according to International Financial Reporting Standards (IFRS); and
- information relating to the securities being offered and the offer.

Certain information, such as audit reports and financial statements, can be incorporated by reference in the prospectus, provided that such documents have been approved or filed with CONSOB (or the relevant member state authority).

5 Describe the drafting process for the offering document.

Most sections of the prospectus are primarily drafted by the issuer with the assistance of its legal counsel. Although the underwriters and their counsel generally provide comments on the prospectus, in most circumstances they draft only a few parts of the prospectus, including those sections relating to the offering, the listing and terms of the debt securities. In order to draft the disclosure document and verify the information contained therein, drafting sessions and conference calls are held and attended by, among others, the issuer, the underwriters and their respective legal counsel, and the issuer's independent auditors.

The key sections of the prospectus are the risk factors, the description of the issuer and its business, and the description of the securities. The Prospectus Regulation provides for a detailed list of the information to be included in the prospectus, but does not offer a precise indication on the content of the risk factors section. CONSOB has issued guidelines containing detailed information on the content and graphic layout of the risk factors section.

If the debt securities' offering is structured as a private placement to qualified investors, thereby relying on an exemption under the Consolidated Financial Act, no prospectus is required. However, qualified investors may expect to be provided with a private placement document (often referred to as an offering memorandum or offering circular). Private placement memoranda are not approved by CONSOB, and may not be distributed to the public.

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 applicable to the debt securities are provided in a set of provisions commonly referred to as the 'terms and conditions'. If the debt securities are offered to the public, the terms and conditions of the debt securities are contained in the prospectus, which usually is available on the issuer's website, (as discussed in question 7). In private placements, the terms and conditions governing the debt securities are made available to the investors as part of the private placement offering memorandum, or as a separate document not subject to publication requirements, provided that the securities are not listed on a regulated market.

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

A prospectus (and supplements thereto) relating to the offer of debt securities to the public or for admission to trading must be approved by CONSOB prior to its publication.

The approved prospectus must be filed with CONSOB and must be made available on the website of the issuer. In addition to the website, the prospectus may be made available, free of charge, at the registered office of the issuer and the offices of the underwriters or published in a newspaper. If Italy is the home member state, it is required to publish a notice in a newspaper describing how the prospectus has been made available and where it may be obtained.

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 indicated in question 7, prospectuses relating to the offering of debt securities to the public are subject to CONSOB's review and authorisation.

CONSOB must approve the prospectus within 10 business days if the public offer involves securities issued by a listed issuer (or one that has previously offered securities to the public), or 20 business days with respect to other issuers.

CONSOB's review period starts when a complete application, together with all the required documentation, is filed with CONSOB. If the application filed by the issuer is not complete, CONSOB may request the missing documentation within 10 days from the date of filing of the application. In addition, CONSOB may request – on reasonable grounds – supplementary information throughout the entire review process. Such supplementary information is to be provided by the issuer or offeror within 10 or 20 business days of CONSOB's request (for listed and unlisted issuers, respectively). In the event of a request for supplementary information, the time limits for the review by CONSOB are tolled and start running again from the date the information is provided to CONSOB. The entire review process may not last more than 40 or 70 business days (for listed and unlisted issuers, respectively). In exceptional circumstances, these terms may be extended for a maximum of five business days.

During the review process and until approval and publication of the prospectus, the issuer, the underwriters, and the other parties involved in the offer must comply with certain restrictions with respect to advertisements and release of information in connection with the proposed offering under the Consolidated Financial Act. Advertisement of the issuer's business (known as 'institutional publicity') is allowed before the publication of a prospectus. Institutional publicity must not contain any reference to the offer or listing. However, an advertisement campaign departing from the issuer's prior ordinary practice should be avoided as it may be deemed to aim at soliciting the investment in securities. The issuer or offeror, as well as the underwriters, must ensure correctness, transparency and equal treatment of potential investors, and must refrain from releasing information inconsistent with that included in the prospectus published in Italy. All advertisement relating to the offer must state that the prospectus will be or has been published and where it can be obtained.

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

At the end of its review period, CONSOB may reject the issuer's application, if the information provided is incomplete.

Despite the fact that CONSOB's review does not entail any due diligence on the information contained in a prospectus, CONSOB's review on the completeness of a prospectus is not limited to a mere tick-the-box exercise, verifying that the prospectus includes all the items required by the Prospectus Regulation. CONSOB's review of the 'consistency of the information given and its comprehensibility' entails a review of the information:

- contained in the prospectus, which must be coherent throughout the document;
- contained in the documentation filed together with the prospectus; and
- acquired by CONSOB in the course of other proceedings regarding the issuer.

CONSOB may not deny approval because a prospectus describes transactions that present irregularities and possible elements of illegality. In such situations, it will require that the prospectus disclose the information necessary 'to enable investors to make an informed assessment'. CONSOB will, instead, deny approval in the case the offer itself or the admission to trading poses issues of illegality.

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

In general, there are no specific rules for private placements, and the key difference between a public and a private offering of debt securities is that the disclosure requirement of a private offering is generally less onerous.

There are several exemptions from the obligation to publish a prospectus in connection with the offer of debt securities to the public and the admission to trading of the securities.

In particular, the obligation to publish an offering prospectus does not apply, among other things, to offers:

- addressed to fewer than 150 investors;
- only to qualified investors;
- amounting to less than €5 million, calculated over a 12-month period; or
- where the minimum denomination per unit is at least €100,000.

In certain cases, offers to existing or former directors or employees or to financial brokers of the issuer are also exempt from the prospectus requirement; nevertheless, a document containing information about the number and nature of the securities and the reasons for and details of the offer must be made available by the issuer.

However, regardless of whether one of these exemptions may exempt an issuer from the requirement to produce a prospectus in connection with an offering of debt securities, a prospectus may, nevertheless, be required if the issuer wants the debt securities to be admitted to trading on a regulated market, unless one of the exemptions is available.

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

The timing of a debt securities offering may range from a few days (eg, in the event of a drawdown under a programme) to several months (eg, in the event of a first-time issuer with a complicated risk profile). The timetable is driven by various factors, such as whether the issuer is a seasoned or a debut issuer, whether the transaction is a stand-alone issuance or a programme drawdown, and when the market conditions are most favourable.

The key parties in an offering of debt securities are:

- the issuer of the securities and the guarantor (if any);
- one or more investment banks or financial institutions appointed by the issuer as the lead managers of the offering and advising the issuer on the structure, timing and marketing of the securities;
- one or more paying agents responsible for making payments of interests and principal to the debtholders;
- the issuer's auditors auditing and reviewing the financial information contained in the offering documents; and
- legal counsel to the issuer and the guarantor (if any) and legal counsel to the managers.

At the beginning of the process, the lead managers are appointed and the mandate agreement is negotiated and executed. The issuer and the lead managers appoint their respective legal advisors. The structure and the timing of the offer, as well as the content of the prospectus, are discussed with Borsa Italiana and CONSOB. The issuer, the lead managers and their respective legal advisors draft the prospectus and other transaction documents. Once the prospectus is in stable form, it is filed with CONSOB for review (see questions 8 and 9).

During the period from launch to pricing, the managers market the securities to potential investors. The order book is usually open for a longer period of time in a public offering than in a private placement. At closing, the securities are issued, book-entries of the securities issued are made in the clearing system and on the securities accounts of the investors who bought in the offering, and the issue proceeds are transferred to the issuer.

In the context of a private placement, a prospectus is neither filed nor approved by CONSOB. As a result, the timing of the transaction is usually reduced compared with an offer to the public.

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 that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties are:

- the underwriting or subscription agreement;
- legal opinions from the issuer's legal counsel and the underwriters' legal counsel;
- comfort letters from the issuer's and the guarantor's (if any) auditors;
- closing certificates from the issuer and the guarantor (if any); and payment instructions and receipt letters.

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 the MOT are:

- a one-off fee, to be paid at the time of the placement, depending on the size of the issuance; and
- a minimum of €7,500 to be paid in the event the placement is not successfully completed or if the securities are not admitted to trading.

The one-off fee mentioned above is equal to 0.0100 per cent of the nominal amount of the offer, if the size of the issuance is between €0 and €500 million, 0.00500 per cent for issuances between €500 million and €1 billion, and 0.0025 per cent for issuances over €1 billion.

Different fee scales are applied for admission fees, depending on whether: an issuer has debt securities outstanding, which were listed prior to, or after, 1 July 1999; or the debt securities have been admitted to trading without an application by the issuer.

VAT, currently set at 22 per cent, must be added to the above-mentioned fees.

Fees are also due to CONSOB in connection with its approval process.

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 certain special debt instruments in Italy. Special debt instruments issued by Italian issuers in Italy can be classified, depending on their characteristics, as follows:

- asset-backed securities (or ABSs) issued in the context of securitisation transactions and backed by a pool of assets (ranging from real estate to credit card receivables);
- hybrid securities or equity-linked securities whose redemption or remuneration is tied to the performance of other financial assets (mainly including interest rates, indices, shares, funds and commodities);
- convertible bonds (ie, debt securities convertible into a predetermined amount of equity of the same issuer at certain times during their life);
- exchangeable bonds (ie, debt securities convertible into the equity of a third party); and
- warrants (ie, securities giving the holders the option to purchase the equity of the issuer or a related company).

Special debt instruments in Italy are usually issued by banks in the context of debt issuance programmes rather than by corporate issuers. Further, special debt instruments are usually issued in the context of private placements addressed to qualified 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?

The rules applying to the offering of special debt securities are generally the same as those for other debt securities. In particular, an offering of special debt securities to the public requires approval and publication of a prospectus, unless an exemption applies. In terms of disclosure, the Prospectus Regulation sets forth specific requirements for derivatives and asset-backed securities.

Special corporate law rules apply to the issuance of convertible bonds. In particular, the issuance of convertible bonds must be approved by an extraordinary shareholders' meeting of the issuer, and resolved upon by a majority of two-thirds of the share capital represented at the shareholders' meeting. Such resolution cannot be passed if the company's capital has not been fully paid. The issuer must concurrently resolve upon the share capital increase corresponding to the number of share to be allocated as a result of the conversion.

If the by-laws so provide, the board of directors may be granted the authority to issue convertible bonds up to a specified amount and for a maximum period of five years from either the date of filing by the company with the Companies' Registry or from the date of the resolution at the shareholders' meeting, which amended the by-laws.

Special debt securities may raise accounting issues that the issuer should be aware of. This would depend on the specific characteristics of the securities. The issuers should discuss these questions with accountants when structuring these types of security.

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

The Consolidated Financial Act defines 'equity securities' as shares and securities equivalent to shares, as well as any other type of security incorporating the right to acquire shares or securities equivalent to shares issued by the same issuer or another entity of the same group, while 'non-equity securities' are all securities which do not qualify as equity securities.

One of the main implications of an instrument's being categorised as debt, rather than equity, is that the issuer of debt securities with a minimum denomination of €1,000 or more may choose its home member state – and, therefore, the authority for approval of the prospectus – where it has its corporate office, or the member state where the securities are, or will be, admitted to trading or offered to the public.

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 resale of debt securities is subject to the same restrictions that would apply to the resale of equity securities. Typically, the private placement memorandum indicates that the resale of the securities must be made only to qualified investors or in reliance on another exemption of the prospectus requirement and in compliance with applicable Italian laws.

In addition to the restrictions on offers of securities deriving from the Prospectus Directive, if securities that have been offered in the context of a private placement solely to qualified investors are resold to retail investors without a prospectus (and absent an exemption from the prospectus requirement) in the 12 months following the placement, under Italian law the retail investor may request that the resale be deemed void and that the qualified investor who resold the securities be liable for damages.

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?

From an Italian securities law perspective, there are no special rules applicable to the offer by a foreign issuer in Italy or by an Italian issuer in a foreign jurisdiction in addition to the European notification system introduced by the Prospectus Directive, which is aimed at facilitating the use of a 'passported' prospectus across the EEA.

From a tax perspective, different rules would apply to foreign investors with respect to certain debt securities offered by domestic issuers, depending on the investors' place of residence. For further information see question 29.

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

There are no specific arrangements with other jurisdictions to help foreign issuers access Italian debt capital markets other than the passporting mechanics discussed in question 18.

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 led by one or more underwriters. Usually underwriters undertake to purchase any unsold securities at the end of the offer or book-building process (thereby providing a guarantee to the issuer). In the context of an Italian public offer, the underwriting agreement is entered into before the beginning of the offering period, while in a private placement the underwriting agreement is entered into at the end of the offering period.

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

Underwriting services may be provided only by financial intermediaries permitted to conduct such activities in Italy in accordance with applicable Italian laws.

No specific approval is required with respect to underwriting arrangements.

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

The key transaction execution issues in a public debt offering vary from deal to deal and affect the timing of the transaction. These may include whether there are any issues arising from the due diligence activity, whether the level of disclosure on particular issues is satisfactory, whether the relevant financial statements are available and the auditors are able to provide comfort on the relevant figures, and whether the level of comfort provided by auditors, the company and legal advisers is satisfactory to the underwriters.

Italian debt securities are issued (in book-entry form) and settlement of the offer occurs through Monte Titoli (the authorised central securities depository for centralised administration, settlement and ancillary services in the Italian market). Most Italian banks and certain Italian securities dealers have securities accounts with Monte Titoli and act as depositaries for investors. Beneficial owners of debt securities may hold their interests through specific custody accounts with any depositary having an account with Monte Titoli, and may transfer their securities, collect interest, create liens and exercise other bondholders' rights in respect thereof through such institutions. The securities are admitted to trading upon closing of the offer.

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

Debt securities to be traded on regulated markets must be issued in registered form and will be, at all times, evidenced by (and title thereto will be transferrable by means of) book entries through the Monte Titoli centralised clearing system.

24 Describe how issuers manage their outstanding debt securities.

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

Open market purchases may be performed directly by the issuer or through a third party. If done through a third party (such as an intermediary or broker), the issuer will usually enter into a purchase agreement with the other party setting forth the terms and conditions of the purchases and any applicable fees or commissions.

The issuer or a third party may offer to purchase the debt securities from the debtholders either for cash pursuant to a tender offer, or in exchange for new bonds pursuant to an exchange offer.

In 2012, CONSOB relaxed its rules regarding liability management transactions for Italian investors by introducing certain exemptions from the application of tender or exchange offers rules (including the requirement to publish a prospectus with CONSOB). Such exemptions apply, among other things, to debt offers limited to qualified investors and 'self tenders', in other words tender or exchange offers made by the issuer (or one of its affiliates) on its own 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 of listed debt securities are subject to certain disclosure and reporting obligations. In particular, an issuer of debt securities admitted to trading on a regulated market in Italy must disclose all information that, if made public, might have a significant effect on the price of the securities and that a reasonable investor would likely use as one of the bases for its investment decisions (ie, inside or price-sensitive information).

Issuers of listed debt securities (for which Italy is the home member state) must publish annual and semi-annual financial reports. Both sets of financial reports must be accompanied by a statement of the executive officer responsible for the preparation of financial statements (usually the CFO) certifying that the reports give a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer, and that the reports were prepared in accordance with applicable administrative procedures and accounting principles.

Moreover, the Bank of Italy may request information about debt securities placed in Italy (through a public offering or a private placement).

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 Consolidated Financial Act, the issuer, the offeror and the guarantor (if any), as well as the persons responsible for the specific information contained in the prospectus, may be subject to liability in respect of false, misleading or incomplete information in the prospectus. In particular, such parties (each with respect to the information it is responsible for) are jointly liable for damages suffered by any investor who has reasonably relied on the truthfulness and completeness of the information contained in the prospectus. In addition, the lead underwriter is liable with respect to any false information or omissions in the prospectus that are capable of influencing the decisions of a reasonable investor. Liability may be avoided by the party that proves that it exercised due diligence to ensure that the relevant information was true and that there were no omissions capable of distorting its meaning.

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

The main remedy available to investors in debt securities is a damage claim for prospectus liability. The claim may be brought within five years of publication of the prospectus, unless the investor can prove his or her discovery of the false nature of the information or omissions in the two years prior to the claim.

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

CONSOB has the power to suspend or prohibit an offer to the public if there are reasonable grounds to believe that applicable statutory or regulatory provisions have been or would be violated.

CONSOB may also apply fines up to €500,000 or, in the case of offers made in breach of the requirement to publish a prospectus with CONSOB, in an amount between one quarter and twice the total value of the offer. In 2014, CONSOB adopted approximately seven resolutions applying sanctions in connection with the violation of rules applicable to offers of securities.

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

The following summarises certain income tax rules generally applicable to debt instruments, however, it should be noted that categories of possible investors may be subject to special rules.

Issuers

As a general rule, for purposes of corporate income tax, Italian companies are allowed to deduct interest payable within the limit of interest receivables. Any interest payable exceeding interest receivables is deductible up to 30 per cent of earnings before interest, taxes, depreciation, and amortisation (EBITDA) of the company. The portion of EBITDA not offset in any tax period can be carried forward to increase the relevant EBITDA of the following fiscal years. The amount of interest that would not be deductible in a fiscal year (ie, the excess of the net interest over 30 per cent of EBITDA) can be carried forward and deducted in the following fiscal years to the extent that in these years the relevant net interest does not entirely absorb the 30 per cent of EBITDA.

A different regime applies to banks, financial institutions (excluding holding companies) and insurance companies, which are generally entitled to deduct interest expenses up to 96 per cent of such expenses.

Italian tax resident bondholders

In the case an Italian resident holder is an individual not engaged in a business activity to which the bonds are connected, any bond income accrued by such holder during the relevant holding period is subject to a final withholding tax levied at the rate of 26 per cent, when the bond income is cashed or deemed to be cashed upon the disposal for a consideration of the notes.

Where the holders are engaged in a business activity to which the bonds are connected, as well as in the case of companies or similar commercial entities (including the Italian permanent establishment of foreign entities to which the bonds are connected), the bond income is generally included in the holder's overall year-end taxable income on an accrual basis and subject to personal income tax (IRPEF) or corporate income taxes (IRES and IRAP), as the case may be, at ordinary rates (currently, the marginal rate of IRPEF equals 43 per cent; local additional surcharges would also apply, as well as a 3 per cent extraordinary surcharge on any income in excess of €300,000; IRES is currently levied at a rate of 27.5 per cent; and the regional quasi-income tax (IRAP) is levied at a rate that may vary between 3.95 per cent and 6.9022 per cent, depending on the holder's 'status' and region of residence).

Update and trends

In recent years, the Italian government has amended certain rules applicable to the issuance of corporate bonds, with the aim of rendering the corporate bond market an effective source of financing, an alternative to traditional bank funding for non-listed companies and removing certain unfavourable features of civil and tax law rules, which have made the issuance of bonds by non-listed companies impractical.

In particular, in order to provide non-listed companies with a further opportunity to access credit and reducing their dependence on the banking system, certain restrictions to the issuance of bonds have been removed (for further information see question 3). These reforms have resulted in an opening-up of the bond market to a number of first-time issuers, some of which were able to place issues of a significant size (up to €700 million).

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Capital gains arising from the sale or redemption of bonds realised by an Italian resident holder who is an individual not engaged in a business activity to which the bonds are connected, are subject to a capital gains tax, currently levied at the rate of 26 per cent.

Such capital gains are included in the overall taxable income of a holder that is an Italian company or a similar commercial entity (including the Italian permanent establishment of foreign entities to which the bonds are connected) or Italian resident individuals engaged in a business activity to which the bonds are connected. As such, they are subject to corporate or personal income tax, as the case may be, at the rates mentioned above. In addition, in certain circumstances, depending on the 'status' of the holder, they may also be subject to IRAP.

Non-Italian tax resident bondholders

If the holder of the bonds is a non-Italian tax resident that does not have a permanent establishment in Italy to which the bonds are effectively connected, an exemption from the 26 per cent withholding tax may apply on interests accruing on bonds issued by banks or listed corporations, on listed bonds issued by any other entities and non-listed bonds held by certain qualified investors. This exemption is subject to the holder: being resident, for tax purposes, in a country included in the list of states and territories allowing an adequate exchange of information with the Italian tax authorities; and complying with certain deposit and certificate procedures.

The 26 per cent withholding tax will apply on the bond income paid to holders not eligible for the exemption mentioned above. Investors eligible for a lower rate of taxation under a tax treaty, where applicable, may seek relief pursuant to the ordinary refund procedure.

Capital gains realised by non-Italian resident holders that do not have a permanent establishment in Italy to which the bonds are effectively connected, are exempt from taxation, provided that the bonds are held outside Italy and, in any event, if at the time of the disposal, sale or redemption, the bonds are listed on a regulated market. Capital gains realised by non-Italian resident holders from the sale or redemption of bonds not traded on regulated markets or held in Italy are exempt from the capital gains tax, provided that the beneficial owner is, among others, resident in a country that allows for an adequate exchange of information with Italy.

If the conditions above are not met, such capital gains are subject to the 26 per cent capital gains tax mentioned above, unless a convention against double taxation with Italy applies. In that case, such capital gains are generally exempt from Italian taxation.

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 2014 was 204,967 billion Japanese yen of which the sum of 175,857 billion Japanese yen was Japanese government bonds, the sum of 6,881 billion Japanese yen was municipal bonds, the sum of 4,601 billion Japanese yen was government-guaranteed bonds, the sum of 8,397 billion Japanese yen was corporate straight bonds issued by Japanese issuers and the sum of 2,510 billion Japanese yen 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. The secondary market for debt securities is not very active in Japan.

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 Japanese yen 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 Japanese yen 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 Japanese yen 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 subscription agreements, agreements with commissioned company for bondholders and fiscal agency agreements.

As to the shelf registration statement (SRS) 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.

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 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 written on the bond certificates and such bond certificate must be handed to the investor, written on the offering documents that are to be handed to the investor or 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 are 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 written on the bond certificates and such bond certificate must be handed to the investor, written on the offering documents that are to be handed to the investor or 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 Japanese yen. 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 2014 was 44 billion Japanese yen, 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.

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 that the offering is made, and the law and regulation that regulates 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 (SESC), 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, DVP 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 its 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 they can prove that there was no fault on their 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 their directors, officers and corporate auditors, CPAs, underwrites, 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 ten years or a fine of up to 10 million Japanese yen,

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, were expanded. Before this amendment, English-language disclosure was available under certain conditions for continuous disclosure documents, but 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 security. The TSE created a new market named the Tokyo Pro-Bond Market for trading of bonds using this legal framework. As at August 2014, there are four issuers listed on the Tokyo Pro-Bond Market.

or both, together with a fine up to 700 million Japanese yen 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 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, Germany, Hong Kong, Ireland, Italy, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Switzerland and the United States. Japan has signed protocols with Sweden and the United Kingdom amending the tax treaties between the respective governments, whereby interest paid to qualified Swedish and United Kingdom residents is generally exempt from Japanese withholding tax, which will apply to interest to be payable on or after 1 January 2015. Japan and the United States have also signed an amending protocol generally exempting interest from Japanese withholding tax; however, this amending protocol has not yet been 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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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. At present, two markets are operated by the LuxSE. The first is a regulated market within the meaning of the Directive 2004/39/EC on markets in financial instruments (MiFID), offering simplified access to other European regulated markets thanks to the European passport for prospectus (Regulated Market). The second is a multilateral trading facility (Euro MTF), seen as a market for sophisticated investors.

According to publicly available information and recent figures provided by the LuxSE, in 2014, the markets operated by the LuxSE had around 40,000 quotation lines of securities in 54 currencies from over 3,000 issuers in more than 100 countries. About 80 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;
- 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 renminbi 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 68 different countries;
- sukuk: the LuxSE was the first European stock exchange to list sukuk in 2002. Twenty 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 2012, there were more than 4,000 asset-backed securities from over 800 issuers;
- convertible bonds: the LuxSE admitted the first ever contingent convertible bond for trading in 2011;
- debt issuance programmes: there were about 600 debt issuance programmes in operation on the LuxSE in 2014; 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 to both markets operated by the LuxSE is subject to the internal rules and regulations of the LuxSE (edition 2015/01, which entered into force on 1 January 2015 (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 not encompassed by the Prospectus Directive

No offer to the public of debt securities or admission to trading on a regulated market in situations falling outside the scope of the Prospectus Directive 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

Part IV of 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.

The requirements in connection with an application for approval of a prospectus are set out in the Prospectus Law and CSSF Circular 12/539. To the extent public offerings do not benefit from the exemptions to the obligation to draw up a Prospectus Directive compliant prospectus as laid down in the Prospectus Law (as defined below), 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, composed of a registration document that contains the information relating in 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 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 underwriters and underwriters' counsel. 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, even if for admission to trading on the Euro MTF, 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.

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. These may be governed by Luxembourg law, but it is also common to have debt instruments offered in Luxembourg and governed by English 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 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 bondholder, 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 approved 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 (unless one of the exemptions described in question 10 applies or in the case of a Prospectus Directive compliant prospectus duly approved by the competent authority of another member state is passported in Luxembourg). 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 or listing, nor the quality and solvency of the issuer. The authorities 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, but will need to be approved by the LuxSE for admission to trading on the Euro MTF.

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 (for example, 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.

Moreover, Luxembourg has implemented Directive 2003/6/EC on market abuse, which deals with the ability of underwriters to issue research reports. According to the law of 9 May 2006 on market abuse, as amended (Market Abuse Law), underwriters that produce or disseminate investment recommendations intended to be made public must ensure that such information is fairly presented and transparent. This is achieved by disclosing the person responsible for its publication, by distinguishing facts from other non-factual information and by ensuring that all sources are reliable. Additional obligations in relation to the fair presentation of recommendations include the indication of all important sources, the methods for the assessment of the financial instrument, the meaning of the recommendation, its time frame and the date of the latest amendment of the recommendation. The investment recommendation must also contain an indication as to the internal codes of conduct, and 'Chinese walls' applicable to the person producing or disseminating such recommendation. Underwriters must also disclose conflicts of interest, such as any significant financial interest in the relevant financial instruments or any business relation with the issuer of such financial instruments.

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, primary focus is on drafting such document for 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 ten weeks (see question 8). Both the CSSF and (where applicable) the LuxSE 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 will start, usually for a period ranging between 10 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 (for example, 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 €2,000 for the first listing. A separate fee of €600 will be due for the listing and an annual maintenance fee, varying on the issuance size, from €440 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.

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 follow 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 that the holders of the debt instruments are provided with all the information required to make a prudent investment decision.

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 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 Prospectus Law (see question 10). In addition, it should be noted that certain restrictions may also apply under Luxembourg corporate law if the debt instruments 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 supplements 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 (unless duly licensed in other member states) and will, thereafter, be subject to the supervision of this regulator. 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, 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, even when a global certificate representing the (registered or bearer) notes is issued and deposited with a custodian, the debt instruments are subsequently created 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 more commonly used form of representation for debt instruments in Luxembourg is the registered form or bearer form. In both cases, the issuance is generally 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). 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. Moreover, in specific circumstances, Luxembourg corporate law may require a Luxembourg-based issuer to maintain a register of holders of the instruments.

The law of 6 April 2013 has introduced in Luxembourg the concept of dematerialised securities. Although it is a recent development, there have already been issues of debt securities under this framework, and the market expectation is that more will follow. 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 accounted 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. It is anticipated that this may boost to the structuring of debt issuances through Luxembourg-based issuers.

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 the LuxSE, follows the prevailing market practices in the international capital markets. It 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 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 (Transparency Law) and the LuxSE Rules. Debt securities admitted to the Euro MTF market are not subject to the Transparency Law, and will be subject only to the reporting and disclosure obligations set out in 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 other price sensitive information, as defined under the Market Abuse Directive. 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 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

Update and trends

Directive 2013/50/EU amending Directive 2004/109/CE on transparency requirements for issuers of securities admitted to trading on a regulated market entered into force on 26 November 2013 and Luxembourg will have two years from this date to implement the changes and amend the Transparency Law accordingly. At the present date, no draft bill in relation to those amendments is publicly available.

The continuing need for diversification of investment sources is likely to continue to provide demand for the high yield segment. It is likely that the LuxSE will remain a leading market for listing and trading of these types of debt instruments. In May 2014, the largest high yield debt issuance to date on a European market (equivalent to €12 billion) issued by Numéricable and Altice was admitted to trading on the Euro MTF.

Thanks to the strong economic ties between Luxembourg and China and its long experience in listing international securities, the following years will probably continue to see the LuxSE as the stock exchange of choice in the European markets for Dim Sum Bonds listings. In May 2014, the Bank of China listed its first offshore renminbi bonds on the Euro MTF, making it the first mainland China issuer to issue offshore renminbi bonds in the Eurozone.

The LuxSE was the first European stock exchange to enter the sukuk market. On 9 July 2014, the Luxembourg parliament approved a draft bill relating to a sale and buy-back transaction of real estate assets for the purposes of the issuance of sukuk by the Luxembourg state. The Luxembourg sovereign sukuk was issued and admitted to trading on the Euro MTF in October 2014. This issuance is considered by many as a milestone in the continuous development of Islamic finance in Luxembourg.

The LuxSE has recently accepted, as a recognised system for settling transactions in securities listed on the Regulated Market and the Euro MTF, the Brussels-based central securities depository, BNY Mellon CSD SA/NV. It is expected that this recognition will considerably extend the range of securities eligible for listing and trading on the LuxSE.

The LuxSE Rules have been recently updated (as of 1 January 2015) with the view to aligning the settlement of trades with the Target2 environment.

of securities or a change of the name of the issuer (these communication requirements apply irrespective of whether the debt securities are listed on the Regulated Market or the Euro MTF) or, as the case may be, disclose certain information to the public, such as notices for early redemption, major developments within the sphere of activities of the issuer that are not of public knowledge and that may affect in a significant manner its ability to meet its commitments, etc (these disclosure obligations will only apply in the case of debt securities listed on the Euro MTF).

Directive 2013/50/EU amending Directive 2004/109/CE on transparency requirements for issuers of securities admitted to trading on a regulated market entered into force on 26 November 2013 and member states will have two years from this date to implement the changes.

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 persons responsible shall 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 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;
- suspend a public offer or an admission to trading to the Regulated Market for a period of up to ten 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 Law. Regulation No. 596/2014 on market abuse (Market Abuse Regulation) and Directive 2014/57/EU on criminal sanctions for market abuse (Market Abuse Directive II) have been published in the EU Official Journal. The Market Abuse Regulation shall enter into force in July 2016. Luxembourg has two years to transpose the Market Abuse Directive II on criminal sanctions for market abuse into national law (ie, by 3 July 2016). The Market Abuse Directive II complements the Market Abuse Regulation by requiring all member states to provide for harmonised criminal offences of insider dealing and market manipulation. For those respective market abuses, the maximum criminal penalties muse be of not less than four and, respectively, two years' imprisonment for the most serious market abuse offences.

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. As of 1 January 2015, the previous default 35 per cent withholding tax imposed under the Luxembourg implementation of Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments has been repealed so that, currently, only the automatic exchange of information applies. A 10 per cent withholding tax may apply, 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 10 per cent withholding (as referred to above) applies.

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.

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

Debt securities in the Netherlands are issued under a debt issuance programme or as stand-alone securities.

Medium-term debt issuance programmes are commonly used by Dutch banks and large corporate issuers that have continuing financing needs. Dutch banks have returned to the debt capital markets to satisfy their financing needs. The outstanding amount of debt securities issued by Dutch banks reached a high of €426 billion at the end of 2014, partly caused by relatively low refinancing needs for Dutch banks in 2014. The size of the market for corporate bonds has more than doubled since 2007. For several reasons, corporates have reduced the level of bank debt, which has traditionally been high in the Netherlands, and instead issued more debt securities, including those by way of US private placements and sometimes in combination with credit facilities. On the one hand, banks have tightened credit standards as a result of, among other things, the financial crisis and Basel III requirements, so that less bank debt is available. On the other hand, persistently low interest rates on corporate bonds have made issuing debt securities attractive. In particular, high yield bonds were in keen demand in the first half of 2014, but this seems to have slackened later in the year.

A typical example of a stand-alone issuance in the Netherlands is the issuance of debt securities by Dutch special purpose companies that are the financing vehicle of globally active firms. Special purpose companies issued over €36 billion in debt securities in the fourth quarter of 2014 alone, thereby accounting for about one third of all debt securities in the Netherlands. The issuance of 'covered bonds' has recently gained traction in the Netherlands. These are asset-backed securities that are not issued by a special purpose vehicle, but by the bank itself.

2 Describe the general regime for debt securities offerings.

The offering of debt securities in the Netherlands is primarily regulated under the Prospectus Directive (2003/71/EC), as amended (Prospectus Directive), as implemented for the Netherlands in Chapter 5.1 of the Dutch Act on Financial Supervision (DFSA). Any public offering or listing of debt securities on a regulated market is prohibited without prior publication of a prospectus that has been approved by the competent Dutch securities regulator (the Netherlands Authority for the Financial Markets (AFM)), or a competent authority of another member state of the European Economic Area (EEA), unless a private placement exemption is available. This prohibition does not apply to the offering of debt instruments with a term of less than a year, which are, however, regulated under the Dutch banking laws (please see below).

A private placement exemption is, inter alia, available for offerings of debt securities:

- addressed solely to qualified investors;
- addressed to fewer than 150 persons in the Netherlands;
- that have a denomination per unit of at least €100,000; or
- for a total consideration of at least €100,000 per investor.

Any offer with a total consideration of less than €2.5 million per year within the EEA is also exempt from the obligation to publish a prospectus. It is highly recommended that a selling restriction is included in all offering documentation when debt securities are to be offered to qualified investors only. In other cases, the exemptions are only available if a cautionary legend in a form prescribed by the AFM is included in all offering documentation and advertisements referring to the prospective offer.

In addition to the regulation of securities offerings as set forth above, certain banking regulations may apply to the issue of debt securities. Article 3.5 of the DFSA prohibits anyone from obtaining or holding repayable funds from the public without a banking licence, unless an exemption applies. The most important exemptions are the following:

- the issuer is a licensed bank;
- the investors are professional market parties or deemed to be professional market parties on the basis of the denomination of the debt securities (the denomination should be at least €100,000); or
- the debt securities have been offered in accordance with the Dutch securities laws described above.

The main regulated market for debt securities in the Netherlands is Euronext Amsterdam. Listing requirements for debt securities at Euronext Amsterdam are set out in the Euronext Rule Books, and generally include certain minimum size requirements. Euronext Amsterdam may require a rating by a credit rating agency for debt securities issued by corporates. Euronext Amsterdam is not involved in approving the prospectus.

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.

A prospectus needs to be approved by the AFM (or another competent regulator in the EEA) for a public offering of debt securities in the Netherlands. The prospectus will have to meet the requirements set out by Regulation (EC) No. 809/2004, implementing Directive 2003/71/EC, regarding prospectuses and dissemination of advertisements, as amended (Prospectus Regulation), and by the DFSA. In practice, the draft prospectus and certain completed annexes to the Prospectus Regulation are submitted to the AFM for review and comments. This process may result in the AFM formally approving the prospectus. The prospectus may be used for publication for a period of 12 months following approval. In addition, a prospectus supplement must be prepared and submitted for approval to the AFM in case significant new developments occur in the period between the approval of the prospectus and the closing of the offering of the debt securities. If the offering takes place by way of a base prospectus (for debt issuance programmes) and corresponding final terms, only the base prospectus and not the final terms must be approved by the AFM. However, the final terms of the particular offering must be filed with the AFM.

If the debt securities are to be admitted to trading on Euronext Amsterdam, certified copies of the prospectus, corporate resolutions and constitutive documents of the debt issuer, and certain other documents, need to be submitted to Euronext Amsterdam.

The filing requirements described above are generally the same for the 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?

Yes. See questions 2 and 3.

A prospectus must contain all information that 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, where

applicable, any guarantor. This includes the following information that must be included in the prospectus under the Prospectus Regulation:
- the persons responsible for the information included in the prospectus;
- risk factors;
- certain information with respect to the issuer, including financial information;
- information on the issuer's main shareholders and executives and non-executives;
- terms and conditions of the notes;
- the use of proceeds of the offering of securities; and
- summary of main terms.

The requirements for the contents of a prospectus vary and depend on the type of security and the nature and circumstances of the issuer.

5 Describe the drafting process for the offering document.

In most cases the prospectus is prepared by the issuer and its legal advisors. The lead manager and other advisers, such as auditors, also provide input for the prospectus.

Key documentation issues include the risk factors and an accurate description of the debt issuer.

The AFM will determine if a prospectus contains all information required, in the order as set out under the Prospectus Regulation, or that further clarification is required, for example, regarding risk factors, whether the prospectus is at all times consistent and contains information that is readily understandable by an investor.

A prospectus that is used for an exempt private offering of debt securities does not need to comply with the requirements set out by the Prospectus Regulation. However, in practice, a prospectus that is used for a private offering generally follows the same format and contains similar disclosures as included in a prospectus that is used for a public offering. Also, in cases of private offerings, all material information relating to the financial position, results or prospects of the debt issuer and that has been disclosed by the issuer or offeror of the debt securities to any potential investor (including at road shows) must be disclosed to all investors. As discussed in question 2, it is highly recommended that a selling restriction be included in all offering documents when debt securities are to be offered to qualified investors only. If another exemption is used, Dutch securities law mandates that a cautionary legend in a form prescribed by the AFM is included in all offering documentation and advertisements referring to the prospective offer.

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 governing the issuance of debt securities include the following:
- prospectus: a prospectus must comply with the relevant provisions of the Prospectus Directive, as implemented in the DFSA, and the Prospectus Regulation. The issuer will generally take responsibility for the information included in the prospectus. A prospectus for a public offering in the Netherlands is included in a publicly available register administered by the AFM, and can be accessed through its website (www.afm.nl);
- underwriting agreement: the underwriting agreement is entered into by the debt issuer and the underwriters and sets out the terms under which the underwriters agree to underwrite the offering of debt securities (see question 20). The underwriting agreement is generally not publicly available;
- trust deed: the trust deed is entered into by the debt issuer and the trustee, and sets out the terms and conditions of the debt securities, including the rights of the holders of the debt securities and the responsibilities of the trustee. The trust deed is generally not publicly available, but the terms and conditions thereof will be included in the prospectus;
- paying agency agreement: the paying agency agreement is entered into by the debt issuer, the trustee and the paying agent and sets out the terms and conditions under which the paying agent pays interest and the redemption amount to the noteholders. The paying agency agreement is generally not publicly available; and
- security documents: if the debt securities are secured, security documents will be prepared.

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

A prospectus needs to be approved by the AFM or another competent regulator in the EEA for a public offering or listing of debt securities in the Netherlands. Final terms and the other documents listed in question 6 do not require approval by the AFM, but the final terms must be filed with the AFM.

The prospectus must be made publicly available by either the debt issuer, the offeror of the debt securities or the listing agent in one of the following forms:
- publication in electronic form at the issuer's website, the website of Euronext Amsterdam or the website of the AFM; or
- publication in printed form to be made available, free of charge, at the offices of Euronext Amsterdam.

The above rules do not apply if a private placement exception is available (see questions 2 and 3).

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, the AFM must approve the prospectus for a public offering of debt securities. See questions 2, 3 and 7.

The time frame for approval of the prospectus is ten business days if the issuer has previously publicly offered debt securities in the Netherlands or listed securities on a regulated market in the EEA. Otherwise, it is 20 business days. Please note, however, that the AFM frequently requires amendments or clarifications to be made to the draft prospectus, and, if so, the time period starts anew. The approval process will, in practice, usually take longer than ten or 20 business days, respectively, depending on the quality of the draft prospectus submitted to the AFM, and the issues that are raised by the AFM during the review process. The AFM will review the prospectus more thoroughly in the case of a new issuer of debt securities. In a typical offering, a draft of the prospectus is submitted to the AFM approximately two months before the targeted closing date of the offering.

As long as the prospectus is under review by the AFM, the debt securities may not yet be offered to the public. The issuer and underwriters must ensure that any advertisement relating to the upcoming offering of debt securities states that a prospectus will be made available and that any advertisement will only contain information that is correct and not misleading and in accordance with the prospectus. The issuer or underwriters may generate interest for the securities by circulating a preliminary prospectus to potential investors or by organising road shows, as long as these activities do not rise to the level of offering debt securities within the meaning of the DFSA. An available safe harbour that is commonly used in this respect is restricting access to this information to qualified investors only.

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

The AFM may only refuse to approve a prospectus if it does not meet the requirements set out by the relevant provisions of the Prospectus Regulation, the DFSA and the Regulation on Credit Rating Agencies. Generally speaking, this means that the AFM verifies that the requirements under said laws have been complied with and that the prospectus contains all the information needed for an investor to make an informed decision on the debt securities.

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

See question 2.

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

The timetable for a public offering of debt securities varies depending on the specifics of the debt securities offering. For example, a new offering of securities under an existing note programme may take little time since the final terms do not require approval by the AFM, while a first-time offering by a new issuer will usually take a few months. In many private offerings, debt securities are only offered to qualified investors so that no prospectus needs to be made available to investors and the offering process can be as short as a few business days.

Below is an indicative timetable for a public offering:

- time of trading – three months. Advisors and agents are appointed, due diligence starts and the prospectus and other transaction documents are prepared;
- time of trading – two months. Advisors consult with Euronext Amsterdam and the AFM. The draft prospectus is submitted to the AFM. Admission to listing of the debt securities on Euronext Amsterdam is requested;
- time of trading – 30 days. The underwriting agreement is finalised. The underwriting agreement can be signed before the launch and start of the bookbuilding (front end underwriting) or, more commonly, after the end of bookbuilding (back end underwriting);
- time of trading – 20 days. Launch of the offering and start of the bookbuilding. A copy of a preliminary prospectus will usually be made available to investors;
- time of trading – 18 days. End of bookbuilding. The subscription period for debt securities is generally short;
- time of trading – two days. The AFM approves the prospectus and the prospectus is submitted to Euronext Amsterdam for completion of the request for admission to trading of the debt securities on Euronext Amsterdam; and
- time of trading and closing. Listing is approved. The trust deed, listing agreement and paying agency agreement are executed. The debt securities are issued to the investors and proceeds are transferred by the paying agent to the issuer. Trading in the debt securities starts.

The following marketing methods are typically used:

- pre-marketing. The sales team of the investment bank contact a number of institutional investors to inform them of the issuer, to generate investor interest and to identify issues that may need to be addressed at the road show;
- road shows. The management of the issuer and the investment banks present the issuer and its business to institutional investors. Road shows are not always held;
- one-on-ones with key investors. The lead manager may organise one-on-one meetings with key investors to give them the opportunity to meet with management; and
- advertising and other publicity. Advertising is mostly done when the issuer also offers debt securities to retail investors, which is the exception as debt securities are mostly offered to institutional investors. Any advertisements must state that a prospectus will be made available and should only contain information that is correct, not misleading and in accordance with the prospectus.

See question 6 for a description of the transaction documents commonly used in a public offering. Key parties involved in the public offering of debt securities are the issuer, the investment banks, lawyers to the various parties and auditors.

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?

Closing documents that the underwriters usually require in public and private offerings include legal opinions from the law firms advising the various parties, confirmations by or on behalf of the issuer as to the issuer's business and the correctness of the representations included in the underwriting agreement, and comfort letters issued by auditors with respect to the financial information included in the prospectus.

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

The listing fees for a stand-alone debt issue at Euronext Amsterdam will typically not exceed €17,500. The listing fee is the aggregate of €125 per tranche of €25 million, with a cap of €2,500; and €500 per year until maturity, with a cap of €15,000.

These fees do not include dealer or underwriter fees that are negotiated separately by or on behalf of the issuer, nor do they include fees payable to other services providers, including auditors and attorneys, or to the AFM for approval of the prospectus.

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

Turbos, speeders and sprinters are quite popular in the Netherlands. These instruments are, in essence, retail derivative instruments using leverage on an underlying asset. These instruments are issued by various banks on the basis of a base prospectus. In addition, various large international investment banks use Dutch issuers to issue all kinds of structured products to retail investors with a view to the favourable Dutch tax regime.

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

See question 2 for the rules that generally apply to the offering of special debt instruments. Please note that additional rules may apply, depending on the specifics of the financial instruments, including notification and other requirements under the EU Short Selling Regulation and the European Market Infrastructure Regulation.

With respect to the accounting implications of special debt instruments, the issuer should be aware that under IFRS derivates are accounted for market-to-market, while under Dutch GAAP derivates can generally be accounted for their historical value.

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

The DFSA defines equity securities as shares and other transferable securities equivalent to shares in companies or partnerships, as well as any other transferable securities that are issued by the issuer of the underlying shares or by an entity belonging to the same group and that can be converted into shares or securities equivalent to shares. All other transferable securities are non-equity securities, which include debt securities and securities that, when exercised, give the holder the right to a cash settlement.

The classification of securities as debt or equity is important because Dutch banking laws solely apply to the offering of debt securities and not to the offering of equity securities. (Dutch securities laws do apply to the offering of equity securities.) This classification is also an important factor in determining whether the AFM or a competent authority of another EEA member state is authorised to approve a prospectus. The classification of instruments as debt or equity securities also determines the availability of certain exemptions from the prohibition to publicly offer securities or admit securities to trading on a regulated market in the Netherlands without an approved prospectus (see question 2).

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?

Any subsequent offering of debt securities that were previously privately offered is prohibited without publication of an approved prospectus, unless an exemption applies. Please refer to question 2.

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 the case of a foreign issuer with its corporate seat within the EEA, the Prospectus Directive (as implemented by each separate EEA member state) provides for a passporting regime for issuers wishing to publicly offer or list debt securities on a regulated market in another EEA member state than their home EEA member state. A prospectus that has been approved by the competent authority from the home EEA member state shall be valid for the public offer or listing of debt securities on a regulated market in the Netherlands, provided that the competent authority of the home EEA member state has notified the AFM of its approval and sent the AFM a copy of the approved prospectus. An English translation of the prospectus is generally required if the prospectus was drawn up in a language other than Dutch or English.

In the case of a foreign issuer with its corporate seat outside the EEA, the AFM may approve a prospectus if, among other things:

- the original prospectus has been drawn up in accordance with international standards and the law of the foreign issuer's home state; and
- the continuing disclosure requirements applicable to the foreign issuer are equivalent to the requirements under the Prospectus Directive. In most circumstances a wrapper to the original prospectus needs to be added, containing certain missing information.

The Dutch securities laws do not apply to the offering of debt securities by Dutch issuers solely outside the Netherlands. However, the Dutch banking laws do apply to the offering of debt securities solely outside the Netherlands. Domestic issuers are prohibited from obtaining or holding repayable funds from the public without a banking licence, unless an exemption applies (see question 2).

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

See question 18.

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 agreement sets out the terms under which the members of a syndicate agree to underwrite the offering of debt securities. In a public offering, the underwriting agreement is typically executed at the end of the bookbuilding procedure (back-end underwriting). The risk that the offering fails is borne by the issuer until execution of the underwriting agreement, but, once the underwriting agreement has been signed, the underwriters bear the risk of not being able to sell the securities to investors at the agreed price (firm commitment underwriting).

Key terms included in the underwriting agreement are:

- the obligations of the underwriters to procure subscribers for all or part of the securities to be sold in the offering of debt securities;
- customary closing conditions, including the absence of an event that has a material adverse effect and the delivery of comfort letters and legal opinions;
- the terms of an over-allotment option granted to the underwriters to cover over-allotment or for stabilisation purposes;
- the indemnification of the underwriters by the issuer for any claims resulting from a misleading or false prospectus; and
- fees to be paid by the underwriters (usually a percentage of the total issue price).

In the case of private placements, an underwriting agreement is not typically entered into as the debt issuer enters directly into purchase agreements with the investors, although it is common that banks procure subscribers for these securities.

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

Providing investment services as a professional activity in the Netherlands is prohibited without a licence from the AFM, unless an exemption applies. An underwriter or placement agent will typically provide investment services in connection with the offering of debt securities. However, this prohibition does not apply to, among others, licensed European banks or institutions from the United States, Switzerland or Australia that are subject to supervision in their home country and that have, with only limited exceptions, followed a certain notification procedure. Underwriters are also prohibited from acting as an intermediary in order to obtain or hold funds from the public, without a banking licence, unless an exemption applies; for example, where the underwriter is a licensed bank in the EEA and has followed a certain notification procedure.

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

The Dutch Act on the Book-Entry of Securities regulates the clearing and settlement of securities that are admitted to trading on a regulated market in the Netherlands. Euroclear Netherlands is the designated central depositary within the meaning of the Dutch Act on the Book-Entry of Securities. Settlement usually takes place two days following the trade. The debt securities are represented in a global note, and individual notes are no longer used. The underwriters usually deliver the global note to the central depositary (Euroclear Netherlands). The issuer receives the net proceeds from the notes from the paying agent. The securities are admitted to trading on a regulated market in the Netherlands once the approved prospectus, together with certain other documents, has been submitted to Euronext Amsterdam. Please note that applicability of the Dutch Act on the Book-Entry of Securities is the exception because many debt securities issued by Dutch issuers are listed on regulated markets, primarily in Luxembourg and Ireland.

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

The debt securities are represented in a global note, typically in bearer form although registered form is also possible. To the extent that public debt securities are held and traded in the Netherlands, the Dutch Act on the Book-Entry of Securities provides that investors have claims under securities accounts that are being held with financial institutions. In turn, these financial institutions hold securities accounts with Euroclear Netherlands, which accounts are held for the benefit of the investors. Transfers relating to the notes take place by way of book entry, and are reflected in book entry records with respect to the securities account held by the investor at the financial institutions and those held by the financial institutions held at Euroclear Netherlands.

24 Describe how issuers manage their outstanding debt securities.

It is hard to make general statements as to how issuers manage their outstanding debt securities as no comprehensive information is available in this respect. However, Dutch issuers frequently purchase securities on the open market and make tender offers to purchase for cash all or part of their outstanding notes or exchange notes for newly issued notes. Recent examples include Ziggo BV's tender offer in January 2014 for its outstanding €750 million 3.625 per cent secured notes and Dutch Lion BV (Hema) issuances of various types of notes with an aggregate value of €800 million, including the issuance of €85 million payment in kind notes in June 2014.

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

The reporting requirements that are imposed under the DFSA after the offering of debt securities include, but are not limited to:

- most issuers of debt securities that are admitted to trading in the Netherlands must publish their annual and semi-annual financial statements within four and two months, respectively, after the end of the relevant period. This reporting obligation does not apply if the debt securities have a denomination of at least €100,000;
- issuers of debt securities that are admitted to trading must forthwith publish information on changes to the rights attaching to such debt securities. This obligation also applies to a public offering of debt securities, unless this information is already included in an approved prospectus or supplement thereto;
- the debt issuer whose securities are admitted to trading in the Netherlands must publish price-sensitive information without delay; and
- certain insiders must immediately inform the AFM of transactions in listed debt securities that can be converted into shares.

If debt securities are admitted to trading on Euronext Amsterdam, the debt issuer must also comply with certain reporting obligations that are included in the Euronext Rules.

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?

An investor can invoke multiple grounds under Dutch law to hold an issuer or lead manager liable for losses incurred by the investor as a result of purchasing debt securities. Such grounds include those listed below.

Update and trends

A recent trend in the Dutch market is the issuance of contingent convertible capital instruments (CoCos). CoCos are bonds issued by banks that, depending on the terms and conditions, can be converted into stock if the capital of the bank falls below a certain threshold. The first CoCo was issued in 2009 by Lloyds Banking Group, and the European market for CoCos has, since then, exploded, reaching a high of €78 billion in 2014. In 2010, Rabobank was the first bank that issued CoCo bonds under which it will not have any further payment obligation where the capital of the bank falls below a certain threshold. The Dutch government recently announced that interest paid on CoCos will generally be tax deductible and the expectation is that CoCos will now become a popular instrument in the Netherlands.

Misleading advertisement

Article 6, paragraph 2 of the Prospectus Directive provides that each EEA member state shall ensure that their laws on civil liability apply to those persons responsible for the information given in the prospectus. For the Netherlands, article 6:194 of the Dutch Civil Code provides that the issuer could be held liable for losses suffered by professional investors for 'misleading statements' made public in connection with the offering of debt securities, including but not limited to misleading statements in a prospectus. Importantly, if an investor brings a claim against a party that participated in preparing the prospectus, the burden of proof shifts to that party, who must then proof the accuracy or completeness of the statements. If a prospectus is misleading, the person that bears responsibility for the misleading prospectus is liable for the losses incurred by investors, unless that person establishes that he or she was not at fault and should also not for another reason bear responsibility for the misleading statement. Article 6:193a and further of the Dutch Civil Code contain similar, somewhat more stringent rules that apply to incorrect statements in a prospectus relating to securities that are offered to retail investors. Although, in practice, the issuer (and not the underwriters) generally takes responsibility for drawing up the prospectus, there is case law indicating that the lead manager can be held liable for misleading statements in a prospectus. The same may hold true for other transaction participants.

Breach of a duty of care

An issuer of debt securities involved with the sale of the securities to investors will be deemed to owe a special duty of care to investors. If the investor establishes that an issuer has seriously failed to fulfil its duty of care towards the investor, and that such failure is sufficiently significant because the investor has incurred losses as a result of that failure, the issuer could be held liable for his or her losses. A lead manager is also said to owe a special duty of care towards certain parties whose interests the lead manager should take into account.

The liability analysis described above for debt securities is substantially the same for other securities.

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

The investor can hold the issuer or underwriter liable for losses that the investor has incurred on the basis of the grounds described in question 26.

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

Dutch regulators have a broad range of sanctioning powers that, depending on the particular violation of the DFSA, include the issuance of fines, the giving of orders to take certain actions, public warnings against the debt issuer and the revocation of licences. In the case of minor violations, the Dutch regulators will generally first issue an informal warning to the alleged perpetrators to immediately discontinue the violations, before actually imposing sanctions. The trend, however, is that tougher sanctions are being imposed by the Dutch regulators.

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

The Netherlands, generally, does not levy withholding tax (at arm's-length) on interest on bonds.

Transfer taxes

The Netherlands does not levy registration tax, stamp duty or any other similar tax or duty on bonds.

Corporate income tax

In general, the Dutch taxation of corporate bondholders may be limited under applicable double tax treaties. Below is a description of local law only.

If a bondholder is a Dutch resident it is generally subject to corporate income tax on income on bonds at a rate of 25 per cent (20 per cent for the first €200,000 profit) (2015). The bondholder may, in certain circumstances, take into account changes in the value of the bonds when determining the taxable profit for corporate income tax purposes.

If a bondholder is not a Dutch resident, it will only be subject to corporate income tax if:

- the bonds are attributable to an enterprise or permanent representative of the bondholder in the Netherlands; or
- a bondholder holds a substantial interest in the entity issuing the bond. A bondholder generally has a substantial interest if it directly or indirectly holds 5 per cent of (any class of) the shares or profit participating certificates in the bond issuer or the right to acquire these and the substantial interest cannot be allocated to its business and is held with the main purpose of avoiding Dutch income tax or dividend withholding tax.

Personal income tax

In general, the Dutch taxation of individual bondholders may be limited under applicable double tax treaties. Below is a description of local law only.

If an individual bondholder is a Dutch resident, the income tax treatment of the bonds is as follows:

- if the bonds are attributable to an enterprise of the individual or qualify as income from miscellaneous activities, income on the bonds is taxed at progressive income tax rates of up to 52 per cent (2015). Income on bonds can also qualify as income from miscellaneous activities if the bondholder has a substantial interest (5 per cent of any class of shares or profit participating certificates or the right to acquire these) in the entity issuing the bonds; and
- in all other cases, the bonds are taxed as income from savings and investment on a deemed return basis of 4 per cent over the value of the bonds (above a certain threshold) at a rate of 30 per cent.

If an individual bondholder is not a Dutch resident, no Dutch income tax will be due on income on the bonds unless:

- the bonds are attributable to an enterprise or permanent representative in the Netherlands; or
- the bonds qualify as income from miscellaneous activities in the Netherlands (including a substantial interest, as described above).

Inheritance and gift tax

No Dutch gift or inheritance tax is due on the transfer of a bond unless:

- the bondholder is a Dutch resident or deemed to be a Dutch resident. An individual is deemed to be a Dutch resident for a period of 12 months following a period of Dutch residency, or for a period of 10 years following a period of Dutch residency if the individual is a Dutch national; or
- a non-resident bondholder dies in the Netherlands while being deemed a Dutch resident within 180 days after gifting bonds.

The applicable tax rate depends on the recipient of the gift or inheritance and the amount gifted or inherited and is up to 40 per cent.

Exchange of information

Generally, based on the EC Council Directive 2003/48/EC, the paying agent must provide the Netherlands with payment details of interest paid on bonds if the bondholder (the beneficial owner) is not a Dutch resident but a resident in an EEA member state or another state specified in the said Directive. The Netherlands must then provide the resident state of the bondholder with this information.

The Netherlands and the United States have concluded an intergovernmental agreement (IGA) to implement the tax reporting and withholding procedures associated with the Foreign Account Tax Compliance Act. Under the IGA, financial institutions (FIs) that are resident of the Netherlands (and their FI affiliates) will be required to comply with the US/Netherlands IGA's account documentation and reporting requirements and provide the Dutch tax authorities with this information. The Dutch tax authorities will share this information with the Internal Revenue Service.

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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 Directive and other EU or EEA capital markets 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.

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. Consequently, the overall SIX turnover (of all listed securities) increased to 1,148,152 million Swiss francs in the past year (whereas the turnover of bonds was 178,937 million 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, a 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 30 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 have 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 are 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, 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	Application for provisional admission to trading	Financial reporting
Due diligence	Listing application	Ad hoc publicity
Verification of listing requirements		Other reporting requirements
Listing structure setup		
Pre-verification application		
Preparation of listing prospectus / listing documentation		

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 21 January 2015), a total of 1,756 bonds (of which 821 were Swiss bonds denominated in Swiss francs, 882 were foreign bonds denominated in Swiss francs, and 54 bonds were not denominated in Swiss francs) were listed on SIX. In addition, over 3,600 bonds were admitted to trading in the international bonds segment. Of the total bonds listed or admitted to trading on SIX, there were 24 convertible bonds, 27 CoCos and 11 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.

Pursuant to the Quarterly Market Report of the Swiss Structured Products Association dated December 2014, 201.78 billion Swiss francs were invested in structured products in Swiss bank deposits (assets under management) as at the end of October 2014. Compared with other types of securities, this represents 3.69 per cent of all Swiss deposits. Private investors account for 27.23 per cent share in deposits, institutional investors for 67.82 per cent and commercial clients for 4.95 per cent. With 31,989 products issued by the end of 2014, there was a 6.75 per cent drop in issuances compared with the previous year; roughly 2,316 products less. In 2014, leveraged products decreased by 9.19 per cent.

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 2 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 plain-vanilla 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.

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.

Update and trends

The regulatory developments that have been (and continue to be) introduced in the EU by the Markets in Financial Instruments Directive and the European Market Infrastructure Regulation in the aftermath of the financial crisis are in the process of being adopted in Switzerland. It is expected that three new pillars of Switzerland's new financial markets regulation will be implemented over the next few years. First, the Swiss Federal Financial Services Act aims to regulate the creation of financial instruments and related services (including distribution). Second, the Financial Market Infrastructure Act will, presumably, contain rules on trading venues, OTC-derivatives clearing and settlement, and the general transparency of derivative markets. Third, the Swiss Federal Financial Institutions Act aims to regulate supervision and licensing requirements for banks, securities dealers, fund management companies, asset managers of collective investment schemes and external asset managers. All three laws have the purpose to implement consistent rules (ie, a level playing field) for all financial instruments and services providers and to enhance investor protection. Further guidance on the proposed new rules and their effects on financial instruments and services providers is available in the publication *Switzerland's New Financial Market Architecture of the NKF Banking, Finance & Regulatory Team* (see www.nkf.ch/en/publikationen_suche/fachgebiete.php).

Recent trends regarding product types in the areas of debt capital markets comprise the issuance of regulatory capital debt instruments, securitisation transactions (asset or mortgage-backed securities), convertible bonds, credit linked notes and actively managed certificates. It should be noted that the deal flow has been continuously increasing in the past four years.

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 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. 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. Further, bonds, like any other taxable securities, are subject 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; however, this will change if the updated legislation project from the Swiss Federal Council is enacted.

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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 UK capital markets are typically bonds or notes, which are issued on a stand-alone basis or under a programme. There is no legal distinction between the terms 'bonds' and 'notes'; the term 'notes' is customarily used to describe debt securities with a maturity of up to five years carrying interest at a floating rate, whereas 'bonds' is customarily used to describe longer-term fixed rate debt securities.

Debt securities offered in the UK capital markets can take many forms (and may be a combination of two or more of the following):
- debt securities described by the type of interest or payments such as fixed rate securities, floating rate securities, variable rate securities, zero-coupon securities and high-yield bonds;
- guaranteed securities; subordinated securities; perpetual debt securities (ie, debt securities that have no specified redemption date);
- asset-backed securities (ranging from real estate to credit card receivables);
- derivative securities (eg, securities linked to the value of one or more reference asset such as shares, commodities, interest rate, currency rate or index, and credit-linked notes); and
- hybrid securities or equity-linked securities such as convertible bonds (debt securities convertible into the equity of the issuer), exchangeable bonds (debt securities convertible into the equity of a third party), depositary receipts (a security issued by a depositary conferring on the holders beneficial ownership of certain underlying assets held by the depositary for the holders) and warrants (securities giving the holders the option to purchase the equity of the issuer or a related company).

The issuers of debt securities in the UK are predominantly sovereigns (including municipal and regional authorities), supranational entities, banks and large corporates. It should be noted that the distinction between the UK domestic capital markets and the international capital markets are increasingly blurred as most new issues of debt securities in the UK domestic market are now documented in the same form as international issues. There is, therefore, little difference between the issuance of debt securities in the UK domestic capital markets and the international capital markets in London, as the type of documents, techniques and structures utilised are similar in both cases.

The debt securities market in London is very active as the investor pool in the UK for debt securities is among the deepest in the world. According to data released by the London Stock Exchange, the value of debt securities admitted to its main market exceeds £1.65 trillion, and over 15,000 debt securities were listed on the London Stock Exchange as of January 2015.

2 Describe the general regime for debt securities offerings.

The UK Financial Services and Markets Act 2000 (FSMA) is the principal piece of legislation governing offers of securities in the UK. The general regime is complemented by three key pieces of subordinated legislation:
- the Listing Rules – these cover the processes and conditions for listing in the UK (ie, admission to the Official List);
- the Prospectus Rules – together with the FSMA, these implement the EU Prospectus Directive and related regulations in the UK; and
- the Disclosure and Transparency Rules – these implement sections of the EU Market Abuse Directive and the EU Transparency Directive and constitute the continuing obligations (eg, obligations relating to inside information) to which issuers must adhere as long as they are listed and trading on a regulated market in the UK.

The Financial Conduct Authority (FCA) is the UK's 'competent authority' for the purposes of the FSMA. It discharges its role as the UK's competent authority regarding admission of listed securities through its division, the UK Listing Authority (UKLA).

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.

A prospectus relating to a public offering of debt securities must first be submitted to the UKLA for approval, along with the relevant fee and certain other information prescribed by the Prospectus Rules, and filed with the UKLA before the prospectus is distributed. See question 8 for further information.

The Listing Rules set out the filings to be made with the UKLA by an issuer applying for admission of its securities to listing. An issuer must submit, among other things, a completed Application for Admission of Securities to the Official List, written confirmation of the number of securities to be issued and either the prospectus, or listing particulars that have been approved by the FCA or a copy of the prospectus, a certificate of approval and (if applicable) a translation of the summary of the prospectus, if another EEA state is the home member state for the securities.

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

The cornerstone of the Prospectus Directive is a requirement to publish a prospectus where either an offer of securities is made to the public or the securities are admitted to trading on a regulated market, in each case unless an exemption applies. An example of a regulated market in the UK is the main market of the London Stock Exchange. Even if the market is not a regulated market, a document very similar to a prospectus will be required for admission to trading.

There are situations where the offer will be deemed not to be made to the public. These include, among others, offers made solely to qualified investors, offers addressed to fewer than 150 natural or legal persons (other than qualified investors) per EEA state, or offers where the minimum denomination per unit is at least €100,000. Even if the offer is deemed not to be made to the public, a Prospectus Directive-compliant prospectus may still be required if an application is made for the securities to be admitted to trading on a regulated market. Therefore, an exemption from both the offer to the public and the admission to trading on a regulated market is needed to avoid having to publish a prospectus.

Where a prospectus is required, the FSMA and the Prospectus Rules implementing the Prospectus Directive and related regulations specify the information it must contain. The overriding requirement is that the prospectus must contain all the information 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 the securities. In terms of the specific content required for each type of debt securities, the Prospectus Rules adopts a 'building block' approach, under which separate schedules provide for different minimum disclosure requirements for different types of securities. The Prospectus Rules include a road map designed to help issuers combine the schedules for the relevant type of debt securities being offered.

An issuer issuing non-equity transferable securities under an offering programme or in a continuous or repeated manner may publish the prospectus in the form of a base prospectus. The base prospectus must contain all relevant information concerning the issuer and securities to be offered. If necessary, this information must be supplemented in a supplementary prospectus. If the final terms of the offer are not included in the base prospectus or supplementary prospectus, they must be provided to investors and filed with the FCA, as well as being made available to the public as soon as practicable after each offer is made and, if possible, before the offer begins.

It should be noted that any communication that is an invitation or an inducement to engage in investment activity may be caught by the financial promotion regime (see question 8). Certain marketing materials and communications relating to the offering may be caught by this regime and may require either separate exemption or approval by an authorised person.

5 Describe the drafting process for the offering document.

The issuer takes responsibility for the whole content of the prospectus. In practice, the disclosure portion of the offering document (which sets out, among others, the risk factors and the description of the issuer and its business) is typically drafted by the issuer with the assistance of its legal counsel while the manager's legal counsel may provide the 'front and back' of the offering document (ie, the more technical sections such as legal disclaimers and selling restrictions) and also the terms and conditions of the securities.

In order to draft the offering document and verify the information therein, drafting sessions or conference calls are customarily held and attended by, among others: the issuer or other member(s) of the group where the main credit for the securities lies, the managers and their respective legal counsels and the issuer's independent auditors. The lead managers would also conduct certain investigatory procedures generally referred to as 'due diligence' to mitigate their potential liability. The extent of the procedures undertaken is dependent on various factors including market practice, the relevant jurisdictions involved (certain jurisdictions may impose a higher standard or have case law guiding how the due diligence process should be conducted) and the identity of the issuer (eg, whether it is a sovereign or a corporate, whether it is investment grade or has a greater credit risk, and other relevant considerations).

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 principal terms applicable to the debt securities are set out in a set of provisions commonly referred to as the 'terms and conditions'. Under English law bond issuances, the terms and conditions are set out in the trust deed (if there is a trustee) or the agency agreement (if there is no trustee).

The parties to the trust deed are the issuer, the guarantors (if any) and the trustee. The parties to the agency agreement are the issuer, the guarantors (if any) and the relevant agents such as the fiscal agent, the paying agent and the agent bank.

The terms and conditions are usually set out in full in the offering document. The trust deed and the agency agreement are usually also available for inspection at the offices of the trustee or the relevant agent pursuant to the terms and conditions.

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

As explained in question 3, all Prospectus Directive-compliant prospectuses must be approved by the relevant competent authority. In the UK, this is the UKLA.

Once approved, the prospectus must be published 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. A prospectus will be deemed available to the public where it is published in one of the following ways:

(i) by insertion in one or more relevant newspapers;
(ii) in printed form, free of charge at the office of the relevant market or at the registered office of the issuer and any financial intermediaries to the offer;
(iii) in electronic form on the websites of the issuer or any financial intermediaries to the offer; or
(iv) in electronic form on the website of the regulated market where admission to trading is sought.

If the prospectus is published via method (i) or (ii) above, it must also be published electronically in accordance with method (iii).

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 indicated in question 7, before a prospectus can be published it must be submitted to and approved by the UKLA. The issuer must submit the draft prospectus to the UKLA at least 10 working days before the intended approval date of the prospectus or at least 20 working days before the intended approval date of the prospectus if the applicant does not have transferable securities admission to trading and has not previously made a public offer. The process is iterative; drafts of the document are reviewed until the UKLA has no further comments.

The Prospectus Directive dictates that a prospectus must not be published until it has been approved. In addition, in the period prior to the launch of the transaction, it is customary for the issuer and the underwriters to observe certain publicity guidelines, that is, restrictions with respect to publicity activities and release of information in connection with the proposed offering. In the UK, the key regimes regulating the conduct of pre-launch publicity of a debt securities offering are the financial promotion rules set out in the FSMA and the advertising rules under the Prospectus Directive.

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

The UKLA will not approve the prospectus unless it is satisfied that the United Kingdom is the home state in relation to the issuer of the transferable securities to which it relates, the prospectus contains the necessary information, and all the other requirements imposed by or in accordance with the Prospectus Rules or the Prospectus Directive have been complied with.

Under the FSMA, the FCA may not grant an application for admission of securities to the Official List unless it is satisfied that the requirements of the listing rules (including any special requirements it considers appropriate to protect investors) are complied with. The FCA may also refuse an application for admission if it considers that admission of the securities would be detrimental to investors' interests or, for securities already listed in another EEA state, the issuer has failed to comply with any obligations under that listing.

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

The key difference between a public and a private offering of debt securities is that the disclosure requirements of a private offering are generally less onerous. As mentioned above, the FSMA and the Prospectus Rules exempt certain private placements from being an offer to the public. This includes, among others, offers made solely to qualified investors, offers addressed to fewer than 150 natural or legal persons (other than qualified investors) per EEA state or offers where the minimum denomination per unit is at least €100,000.

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

The offering process for debt securities can be divided into four key steps: mandate, launch, signing and closing.

Mandate

The first step is the appointment of the lead manager(s). This may be through a discussion between the issuer and its relationship bank or through a competitive tender. This is documented in a mandate letter.

Once mandated, the lead manager will discuss the key commercial terms and the timetable with the issuer. The timetable is driven by factors such as whether the issuer is a seasoned or a debut issuer, whether the transaction is a standalone issuance or a programme drawdown and when the market conditions are most favourable. The typical timing of a deal ranges from a few days (eg, a drawdown under a programme) to over six months (eg, a first-time issuer with a complicated risk profile). During the period from mandate to launch, the issuer and the lead manager with their legal advisers and other relevant parties such as the auditors will work together to finalise the disclosure document and other transaction documentation. Once the prospectus is in a stable form, the legal advisers may begin the review process with the UKLA.

Launch

The second step is the launch date on which the debt issuance is announced publicly. During the period from launch to signing (typically up to two weeks), the managers will market the securities to potential investors either on the basis of a term sheet or a preliminary offering document setting out the information relating to the securities being offered other than the final pricing details. The Prospectus Rules allow for the prospectus to be approved without the final offer price and amount of securities offered.

Signing

This is the execution of the subscription agreement, where the price is agreed and the underwriters will be on the hook to purchase the securities subject to satisfaction of certain conditions precedent set out in the subscription agreement. The period from signing to closing is typically up to one week, depending on the complexities of the closing mechanics.

Closing

At closing, the transaction documents are executed and the securities issued, and the proceeds paid to the issuer. See question 12.

If the offering is private in the sense that the debt securities will not be offered for sale to the public or admitted to trading on a regulated market, then a Prospectus Directive-compliant offer document would not be required and the approval of the UKLA is not needed. This would generally have a positive impact on the timing of the transaction as there is no need to factor in the review process with the UKLA in the timetable.

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 are the fiscal agency agreement and deed of covenant (in the case of a fiscal agency structure) or the trust deed and paying agency agreement (in the case of a trustee structure), global notes, legal opinions, auditors' comfort letters, closing certificates, payment instructions and receipt letters.

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

The charges associated with a London listing consist of three components: the application for listing fee, the UKLA vetting fee and the admission to trading fee.

The application for listing fee is currently set by the UKLA at £225 plus £100 for each additional issue of securities with its own International Securities Identification Number.

The UKLA vetting fees vary depending on document type, and range from £550–£6,270.

The admission fee structure for the London Stock Exchange is based on the type and size of the issue. For example, the admission fees for eurobonds and international issuers range from £2,500–£4,200, for issues under debt issuance programmes they range from £300–£3,650 and for stand-alone domestic issues from UK issuers they range from £5,000–£20,000, in each case depending on the deal size.

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 the UK. Various types of structured products (ranging from trackers to capital protected products) are also issued by financial institutions and listed as full tradeable securities on the London Stock Exchange.

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 4, the Prospectus Rules adopt a building block approach in terms of the specific content required for each type of debt securities. There are specific building blocks and guidelines for special debt securities. For example, where the debt securities are exchangeable or convertible into shares already admitted to trading on a regulated market, it is sufficient to add a statement setting out the type of underlying securities and details of where information on the underlying securities can be obtained in the combinations used for drawing up the securities note of the prospectus. However, where the debt securities are exchangeable or convertible into shares not admitted to trading on a regulated market, an additional building block describing the underlying share needs to be added to the combinations used for drawing up the securities note of the prospectus.

Depending on the nature of the securities, other considerations may be applicable. For example, in the case of a convertible bond issue by a UK company, the directors must be properly authorised in accordance with the UK Companies Act 2006 prior to allotting any convertible bonds, and existing shareholders' right of pre-emption must be taken into account to the extent such rights of pre-emption have not been disapplied.

Special debt securities may raise accounting issues that the issuer should be aware of. This would depend on the specific characteristics of the relevant securities. For example, the issue of consolidation may need to be considered if the issuance involves a trust or a special purpose vehicle. Also, hybrid securities that possess characteristics of both debt and equity may present difficulties as to the appropriate classification of the instrument (whether as debt or equity). From an IFRS perspective, IAS 32 (Financial Instruments: Presentation) establishes the principles for presenting financial instruments as liabilities 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?

Because the Prospectus Rules adopt a building block approach to the specific content required for each type of securities being offered, there is limited practical implication in terms of disclosure requirements, whether an instrument is categorised as equity or debt. There are specific building blocks and disclosure guidelines in connection with hybrid security such as convertible bonds and exchangeable bonds. For example, there is an EU regulation dealing with the disclosure requirements for convertible and exchangeable 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?

There are no transfer restrictions or other limitations customarily imposed on privately offered debt securities in the UK.

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.

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

The UK has implemented the Prospectus Directive and the related Prospectus Regulation, which together provide for a single regime throughout the EEA governing the content, format, approval and publication of prospectuses, so that a prospectus that has been vetted and approved in one member state will be valid in any other member state including the UK.

Specifically, a prospectus approved by the competent authority of one member state will be valid for the public offer or admission to trading of securities in any other member state, provided only that the host member state's competent authority is notified of the approval of the prospectus (a translation of the summary may be required). The host competent authority is expressly prohibited from undertaking any approval or administrative procedures relating to the use of the prospectus in its own jurisdiction, so may not require additional information to be included.

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 an offering of debt securities in the UK, the usual practice is for the managers to underwrite the offering on a joint and several basis. This means that if one manager defaults, the other managers are obliged to take up the defaulting manager's commitment. The agreement among managers will specify the principal amount that each manager agrees to subscribe and the distribution of commissions. Typically, the International Capital Market Association form of agreement among managers is used. However, if the deal has a United States element (eg, a Rule 144A tranche offered to certain United States institutional investors), the practice is for the managers to underwrite on a several basis only.

Under certain circumstances, the managers may not agree to underwrite the offering; they may instead agree to use only 'best efforts' or 'reasonable endeavours' to find investors for the debt securities offered. In such cases, they are typically referred to as 'placement agents'.

The time of pricing is another key aspect of an underwriting arrangement. Most investment grade issues are pre-priced (ie, the mandate awarded by the issuer sets out all the pricing terms at the outset). Other issuances (such as issues by first-time issuers, equity-linked securities and asset-backed securities) are generally open priced (ie, the pricing is determined on the feedback from potential investors during the bookbuilding process).

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

Under the regime established by the Markets in Financial Instruments Directive (MiFID), 'underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis' and 'placing of financial instruments without a firm commitment basis' are regulated activities and services. In the UK, the implementation of the MiFID within the FSMA does not reproduce these two categories of activity. Instead, the FCA is of the opinion that these activities constitute the regulated activities of dealing in investments as principal, dealing in investments as agent and arranging deals in investments. A firm that has these activities within the scope of its 'permission' (ie, its licence) will be permitted to passport the MiFID activities related to underwriting into other EU jurisdictions. Underwriters will be licensed as credit institutions or investment firms.

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

The transaction execution issues in a public debt offering vary between deals. These may include whether there are any issues that are uncovered by due diligence, whether the level of disclosure on particular issues is satisfactory, whether the relevant financial statements are available, whether the auditors are able to provide comfort on the relevant figures, whether there are issues with the taking of security and so on.

A debt offering is usually settled as follows:

- the lead manager informs the clearing systems of the names of the allottees and the number of securities allotted to them;
- each allottee then instructs the clearing system to debit its cash account with the subscription amount and to credit that amount to the account of the lead manager;
- the lead manager then instructs the clearing system to debit the total subscription amount from its account and to credit that amount to the cash account of the common depositary (or, as the case may be, the common service provider in the case of a New Global Note Structure or a New Safekeeping Structure);
- the issuer delivers the global securities to the common depositary or the common service provider, as the case may be;
- the lead manager authorises the common depositary or the common service provider, as the case may be, to release the subscription proceeds to the issuer; and
- the subscription proceeds are transferred to the issuer and the securities are credited to the allottees' securities accounts in the clearing system.

Settlement is usually made on a 'delivery versus payment' basis on the same day. This means that the transfer of money and of the securities are made simultaneously.

For complex transactions, a closing meeting may be held on the day before settlement. This is known as pre-closing. In such a case, the lawyers will hold the documents in escrow to be released at a specified time on the closing date. Pre-closings are more commonly seen in structured issuances, transactions with complicated security-taking procedures and transactions involving multiple jurisdictions or currencies.

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). This is to save the time and cost involved in printing definitive securities. 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 relevant international clearing systems (eg, 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 offers and exchange offers.

Open market purchases
This may be done directly by the issuer or through a third party or agent. If done through a third party (such as a broker), the issuer will usually enter into a purchase agreement, with the mandated agent setting out the price and commission.

Consent solicitations
Under an English law-governed bond, the issuer may amend the terms of the bonds by having a resolution passed at a meeting of holders. The process for bondholder meetings are set out in the trust deed or the agency agreement.

Tender offer
The issuer or a third party may offer to the holders to purchase the debt securities for cash pursuant to a tender offer. The offer price may be structured as a fixed price or a margin over a benchmark bond or a swap rate. The offer price may also be set pursuant to a reverse tender (a Dutch auction). The offer might be for 'any and all' bonds tendered or up to a specified amount only. It is also common for the offeror to pay an early tender premium (an 'early bird fee') to incentivise holders to participate early.

Exchange offer
The issuer or a third party (such as an affiliate to the issuer) may offer to the holders to purchase their bonds in exchange for new bonds. The new bonds offered as part of the consideration may need to be issued in accordance with the Prospectus Directive and approval of the UKLA may be required.

Both a tender offer and an exchange offer may be coupled with a consent solicitation using the 'exit consent' technique. However, care should be taken that the terms of the exit consent do not constitute an abuse of the minority holders.

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

Both the Listing Rules and the Disclosure Rules and Transparency Rules (DTR) impose obligations on issuers once their securities are admitted to trading. The two key reporting obligations relate to inside information and to financial information.

Under the DTR, issuers are obliged to announce inside information that directly concerns the issuer. Inside information is information of a precise nature that is not generally available but that, if made generally available, would be likely to have a significant effect on the price of the issuer's securities. Information is considered only to have a significant effect on price if it is the kind of information that a reasonable investor would use as part of the basis for an investment decision. This includes information

Update and trends

The rise of European private placements

In the aftermath of the financial crisis, banks have been subject to increased capital costs and, as a result, this has led to a reduction in bank lending. For borrowers (and in particular small and medium-sized enterprises) who are unable or unwilling to enter the public debt capital markets, an alternative source of capital is the private placement market where non-bank entities are filling the lending gap. It is expected that the use of funding sourced from non-bank entities such as insurance companies and pension funds will rise in 2015. In addition, the Loan Market Association published on 6 January 2015 the template documents for use in pan-European private placement transactions. Private placements across Europe currently take varying forms, some of which are loan facilities and some of which are note issuances. It is hoped that standardisation of documentation will assist in creating a more unified and efficient private placement market.

Changes to the UKLA Listing Rules

The UK Financial Conduct Authority's changes to the Listing Rules to 'enhance' the London listing regime came into effect on 6 June 2014. Emphasis is placed on steps to establish and maintain reasonable procedures, systems and controls to comply with its obligations and to deal with the FCA in an open manner. These changes focus on enhancing the independence of premium London-listed companies that have a controlling shareholder, but also introduce new rules for other companies with premium listings as well as for companies with standard listings in London. The changes applicable to all standard-listed companies, such as companies listing debt securities, include a requirement that the company take reasonable steps to establish and maintain adequate procedures, systems and controls to enable it to comply with its obligations as a standard-listed company and a requirement to deal with the FCA in an open and cooperative manner.

affecting the assets and liabilities of the issuer, the performance or the expectation of the performance of its business, the financial condition of the issuer, major new developments in the business of the issuer and any information previously disclosed to the market.

The DTR also requires a listed company to publish periodic financial information. These include the publication of annual reports within four months after the end of each financial year, half-yearly reports within two months after the end of the period to which the report relates and interim management statements during the first six month period of the financial year and another during the second six month period of the financial year. Certain exemptions may be available.

Other information, such as changes to an issuer's constitution or changes in the rights of the holders, will also have to be disclosed. The FCA can exempt non-UK issuers from some of the reporting requirements if it considers the law in the issuer's home country to be equivalent to UK law and its requirements.

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?

Misleading statements in, or omissions from, the offering memorandum and any other applicable offering document can give rise to both civil and criminal liability under English law, and such liability may arise under statute or common law.

There are various UK statutory provisions relevant to liability for an inaccurate offering memorandum. These include specific investor protection statutes such as section 89 of the Financial Services Act 2012 for criminal liability for false or misleading statements, section 90 of the FSMA for civil liability to pay compensation for misleading statements or omissions, section 91 of the FSMA covering penalties for contravention of the prospectus requirement and Part VIII of the FSMA, which lists the penalties for market abuse. There are also general fraud statutes such as section 2 of the Fraud Act 2006, which covers fraud by false representation, and section 3 of the Fraud Act 2006, covering fraud by failing to disclose information. Liability may also attach under common law through, for example, a civil action in deceit and negligent misstatement. Depending on the particular circumstances, an investor may be able to pursue a claim for misrepresentation.

Given the broad range of potential causes of action, it is possible that other transaction participants such as the managers may be subject to potential liability for any inaccuracy or incompleteness of the offering document.

The liability analysis is similar for all types of securities.

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

Of the provisions covered in question 26, the one most directly relevant to an aggrieved investor is often section 90 of the FSMA. Section 90 creates the civil liability for false or misleading prospectuses and listing particulars. Each person who had responsibility for a prospectus is liable to pay compensation to a person who has acquired securities to which the particulars apply and suffered loss in respect of them as a result of any untrue or misleading statement in the particulars, or an omission of any matter required to be included.

If the investor is able to prove a case in misrepresentation, the remedy of rescission may be available. The purpose of rescission is to put the parties to a contract back to their original state before the contract.

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

Under section 91 of the FSMA, if the FCA considers that an issuer has contravened any provision of the listing rules, disclosure rules, prospectus rules or FSMA, it may impose on him or her a penalty of such amount as it considers appropriate. The FCA may also impose an appropriate penalty on the director of the issuer who at the material time was knowingly concerned in the relevant contravention. If the FCA is entitled to impose a penalty upon a person, it may instead publish a statement censuring him or her.

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Given the broad range of powers available to the FCA and the discretion inherent in exercising such powers, we are unable to comment on the typical results of a regulatory inquiry or investigation by the FCA.

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

Withholding tax

UK income tax (20 per cent) must be withheld from payments of yearly 'UK source' interest. Payments by UK resident issuers or the UK permanent establishment of a non-UK resident issuer will generally have a UK source; nonetheless, payments outside these categories may still have a UK source depending on the facts (eg, significant UK security). Various exemptions may be available. Perhaps the most common exemption for corporate issuers is the 'quoted Eurobond' exemption, which requires the securities to be issued by a company, to carry a right to interest, and to be listed on a 'recognised stock exchange' (which includes most major stock exchanges, a list of which is available on the HMRC website). Other exemptions may apply, such as the exemption for issuers that are banks paying interest in the ordinary course of their business or an exemption under an applicable double taxation treaty. Nonetheless, bond documents typically contain a gross-up provision for withholding tax, so any withholding tax risk is borne by the issuer.

Stamp taxes – stamp duty and stamp duty reserve tax (SDRT)

Most plain vanilla debt securities (eg, standard fixed and floating rate debt securities) should be exempt from stamp duty and SDRT as they are likely to satisfy the 'exempt loan capital' exemption. More structured securities that incorporate more 'equity-like' features (such as convertible securities or profit-participating securities) may not benefit from this exemption (although other exemptions may be available) and should be analysed on a case-by-case basis.

Tax treatment of bondholders

Even if no UK withholding tax applies, interest income may be subject to UK tax by way of assessment, where the bondholder is UK tax resident or the interest is attributable to a bondholder's UK permanent establishment, branch or agency. There are exemptions for interest received by certain categories of agent (such as some brokers and investment managers) and the provisions of any applicable double taxation treaty may also be relevant. With respect to UK taxation of capital gains, most bondholders would expect the securities to be exempt from capital gains tax (or corporation tax on chargeable gains) on the basis that the securities would be a qualifying corporate bond (although this is not always the case).

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 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 and the category of investors the issuer wants to target.

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, and how much reporting history it has, 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. Depending on the form of registration statement available to the issuer, 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 generally 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 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 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 and any free writing prospectuses, 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 health-care, 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.

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. 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.

Update and trends

US debt capital markets remain active, buoyed by investment-grade corporate issuers trying to lock in favourable interest rates before the anticipated rise as the year progresses. The continuing boom in global M&A activities has resulted in very large debt financing transactions in the United States, demonstrating the depth of US investor base, and has also contributed to the high volume of US high-yield bond issuances. As investors seek higher returns, a greater proportion of the overall high-yield issuance consisted of 'high-yield lite' bonds, which are high-yield bonds with an investment-grade style covenant package that is more issuer-friendly.

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. 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. Similarly 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 2017, 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.

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 holders would be subject to US withholding tax.

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Debt Capital Markets
ISSN 2055-5059