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CAPITAL MARKETS

Debt capital markets in the United States: regulatory overview

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DEBT CAPITAL MARKETS LEGISLATION

1. What are the main restrictions on offering and selling debt securities in your jurisdiction?

Main restrictions on offering and selling debt securities

Offerings of debt securities must be either registered with the Securities and Exchange Commission (SEC) (*www.sec.gov*) under section 5 of the Securities Act of 1933, as amended (*15 U.S.C. § 77a et seq*) (Securities Act), or qualify for an applicable exemption from registration. Exemptions from registration include those under:

- Section 4(a)(2) of the Securities Act (section 4(a)(2)).
- Regulation D under the Securities Act (Regulation D).
- Rule 144A under the Securities Act (Rule 144A).
- Regulation S under the Securities Act (Regulation S).
- Section 3(a)(2) of the Securities Act (section 3(a)(2)) (*see Question 4*).

Each exemption from registration has its own particular requirements with respect to the number and type of eligible investors, offering size, issuer eligibility, advertising and communication restrictions and other conditions of exemption, which are discussed generally below. In addition, in the case of section 3(a)(2) offerings, registration of the offering with the Office of the Comptroller of the Currency (OCC) may be required unless an exemption from registration applies, which includes meeting the requirements of Rule 144A, Regulation S or Regulation D.

If debt securities are being registered with the SEC, a registration statement, which includes the prospectus for the offering, must be filed with, and reviewed by, the SEC (*see Question 4*). In addition, if the debt securities are being listed on an exchange (such as the New York Stock Exchange Euronext or the Nasdaq Stock Market), the offering must meet the applicable requirements of the relevant exchange (*see Question 6*). The NYSE operates the New York Stock Exchange (NYSE), the NYSE Arca and the NYSE American. The Nasdaq Stock Market operates the Nasdaq Global Select Market, the Nasdaq Global Market and the Nasdaq Capital Market (collectively, Nasdaq).

Restrictions for offers to the public or professional investors

Investors in a section 4(a)(2) offering or a Regulation D offering are typically accredited investors (as defined in Rule 501 under the Securities Act) (*see Question 4*). Investors in a Rule 144A offering must be qualified institutional investors (QIBs), or large institutional investors that generally have at least USD100 million of securities under management (*see Question 4*). Investors in a Regulation S offering must be non-US persons and there can be no "directed selling efforts" in the United States (*see Question 4*). Investors in a section 3(a)(2) offering are typically "institutional" accredited investors (as defined in Rule 501 under the Securities Act) (*see Question 4*).

2. What other legislation or guidelines do issuers and underwriters of debt securities need to be aware of in your jurisdiction?

In addition to the Securities Act provisions described above, the Securities Exchange Act of 1934, as amended (*15 U.S.C. § 78a et seq*) (Exchange Act), the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act) and the Investment Company Act of 1940, as amended (*15 U.S.C. § 80a et seq*) (Investment Company Act), are the primary US statutes regulating US public offerings, US public companies and US investment funds. Additionally, debt securities that are SEC-registered must be issued under an indenture qualified under the Trust Indenture Act of 1939, as amended (*15 U.S.C. § 77aaa to 15 U.S.C. § 77bbbb*) (Trust Indenture Act).

In the exercise of its delegated rulemaking authority, the SEC issues rules, regulations, schedules and forms under the Securities Act, Exchange Act and the Trust Indenture Act. These cover a wide array of subjects, including:

- Corporate disclosure and financial statements requirements.
- Oversight of securities firms, broker-dealers and investment advisers.
- The interpretation and enforcement of the federal securities laws.

The SEC's Division of Corporation Finance (CorpFin), in particular, provides interpretive guidance to reporting companies, including debt issuers, in the form of Compliance and Disclosure Interpretations, the Financial Reporting Manual, and no-action, interpretive and exemptive letters. Underwriters and issuers of debt securities must also be familiar with, and comply with, the relevant rules of the Financial Industry Regulatory Authority (FINRA), including rules regarding excessive or unfair compensation of underwriters, and dealing with conflicts of interest, among other things.

MARKET ACTIVITY, TRENDS AND DEALS

3. Outline the main market activity and deals in your jurisdiction in the past year. Have any trends emerged in the last year?

There were approximately USD1.376 trillion of debt securities issued by non-governmental borrowers in the US debt markets (both public and private) in the 12 months ended 31 December 2018. This is approximately an 18% decrease from the roughly USD1.679 trillion issued in the comparable 2017 period. (These amounts exclude mortgage-backed and asset-backed offerings and secured debt.) Of the USD1.376 trillion of debt securities issued by non-governmental borrowers in the US debt markets for the 12 months ended 31

December 2018, approximately USD1.165 trillion consisted of investment grade debt, approximately USD173 billion consisted of high yield debt and approximately USD38.6 billion consisted of convertible debt. The high yield debt market slowed down considerably in 2018 and the principal amount of high yield bonds issued decreased 39% from the comparable 2017 period (*source: Securities Industry and Financial Markets Association* (SIFMA)). Factors that contributed to the overall decline in corporate debt issuance and deal activity included, among others, a rising interest rate environment marked by four hikes by the Federal Reserve Board of its benchmark federal funds rate in 2018, the newly enacted Tax Cuts and Jobs Act which eased in the repatriation of overseas cash by US companies and thus alleviated their funding needs, the US Government shutdown in late December, and one of the weakest Decembers on record in terms of corporate bond issuance (*source: Dealogic; SIFMA*).

Some of the biggest debt deals in 2018 included CVS Health's USD40 billion issuance of investment grade bonds in March 2018 to fund its acquisition of Aetna Inc., Walmart's USD16 billion issuance of investment grade bonds in June 2018 to fund its investment in Flipkart, and Refinitiv US Holding's approximately USD4.25 billion in USD and Euro-denominated high yield bond issuance in September 2018, as part of a USD13.5 billion leveraged buy-out of the company led by the Blackstone Group.

In terms of updates with respect to deal terms or certain clauses in deal documents, in December 2018, SIFMA released its memo on the application of U.S. QFC Stay Rules to Underwriting and Similar Agreements, which included the recommended QFC stay language rider, regarding the recognition of the US Special Resolution Regimes. US globally systemically important banking organisations (GSIBs) and their subsidiaries worldwide, as well as the US subsidiaries, branches and agencies of foreign GSIBs (collectively, Covered Entities) were required to include, and have been including, effective 1 January 2019, in their underwriting agreements and dealer agreements, contractual stay language to mitigate the risk of destabilising closeouts of Covered Entities' qualified financial contracts (QFCs), which is a perceived impediment to the orderly resolution of a GSIB.

In terms of disclosure trends affecting debt issuers, in a December 2018 speech, SEC Chairman Jay Clayton identified three important market risks being monitored by the SEC and encouraged companies to provide more robust disclosure with respect to how they were addressing these risks, namely:

- The impact to reporting companies of the UK's exit from the European Union (or 'Brexit').
- The transition away from LIBOR as a reference rate for financial contracts.
- Cybersecurity.

These pronouncements echoed earlier reminders to registrants, including debt issuers, from CorpFin Chief Accountant Kyle Moffatt and other SEC senior staff members in November to enhance the level of disclosure surrounding risks posed by cybersecurity, Brexit and the planned LIBOR phase-out. Issuers have been updating their registration statements, prospectus, prospectus supplements, pricing supplements and related deal documents to enhance not only their Brexit and LIBOR phase-out risk factors and management discussion and analysis disclosures, but also to revisit, build-in or strengthen LIBOR fall-back or replacement provisions in the Description of Notes sections or indentures to describe how interest for floating rate notes linked to US-dollar LIBOR will be computed once LIBOR is permanently discontinued around July 2021. Also, on the LIBOR replacement front, in April 2019, the Alternative Reference Rate Committee (ARCC), constituted by the Federal Reserve Board and the Federal Reserve Bank of New York, recommended the use of the Secured Overnight Financing Rate (SOFR) as the alternative reference rate to replace LIBOR and released recommended language for inclusion in contracts for syndicated loans and US-dollar LIBOR floating rate bonds. Beginning late April 2019, a number of issuers, led by big banks such as JP Morgan Chase & Co., Citigroup and Wells Fargo, have launched new issuances of floating rate notes linked to US-dollar LIBOR, that have adopted the ARCC recommended LIBOR fall-back language. Beginning late May 2019, some issuers such as Goldman Sachs and Morgan Stanley have launched new issuances of floating rate notes that use SOFR as the reference rate.

STRUCTURING A DEBT SECURITIES ISSUE

4. Are different structures used for debt securities issues to the public (retail issues) and issues to professional investors (wholesale issues)?

Larger public companies routinely finance their operations through public offerings of debt securities, which may include senior or subordinated debt securities. These securities can be offered on a stand-alone basis or offered in syndicated takedowns from a continuous offering programme, such as a medium-term note programme or a bank note programme. Generally, only the largest and most frequent issuers find it economical to establish continuous issuance programmes. In addition:

- Debt securities typically are offered and sold to institutional investors. However, some issuers offer their securities through retail note programmes and offer "baby bonds" or bonds having USD25 or USD1,000 denominations.
- Larger issuers, especially financial institutions, also offer structured debt securities, including securities with embedded derivatives, or that otherwise reference the performance of an underlying asset, which can include a currency, an index, an equity security or a commodity.
- Financial institutions also offer covered bonds, which are debt obligations that have recourse either to the issuer or to an affiliated group to which the issuer belongs, or both. Upon default, covered bond holders have recourse to a pool of collateral separate from the issuer's other assets (cover pool), which usually consists of high quality assets such as residential mortgages or public debt.
- Smaller issuers or those whose debt securities are below investment grade may issue debt securities with more complex features, including secured debt or convertible debt. These securities may be offered in registered transactions or may be offered in exempt transactions to qualified institutional buyers (QIBs) in Rule 144A qualifying transactions.

The two main ways of issuing debt securities are:

- A registered offering.
- An unregistered offering (such as a section 4(a)(2), Rule 144A or section 3(a)(2) offering).

It is important to note that issuers very rarely register for the first time with the SEC in order to register debt securities. Typically, issuers registering debt securities are already reporting companies under the Exchange Act, with listed equity securities. However, this is not the case for:

- Foreign issuers registering Yankee bonds.
- Issuers relying on the section 3(a)(2) exemption.
- Certain high yield issuers that are voluntary filers under the Exchange Act.

Registered offerings

The methods of registration include:

- **Registration on Form S-1.** An issuer that does not currently file, or has only recently begun filing, Exchange Act reports must use Form S-1 (Form F-1 for foreign private issuers (FPIs)) to

register issuances of its debt securities. The contents of the prospectus are essentially the same as for a registration statement on Form S-1 for an offering of equity securities, plus a description of the terms of the debt securities, the indenture and the trustee.

- **Shelf registration.** An issuer may be eligible to use Form S-3 (or Form F-3 for an FPI) if it:
  - has filed periodic reports under the Exchange Act for at least 12 months;
  - has at least a USD75 million worldwide common equity float held by non-affiliates; and
  - has been timely in its periodic filings.
- Form S-3 is a short-form registration statement. A specific offering of a class or series of debt securities is made by means of a prospectus supplement to the basic prospectus. The prospectus supplement includes specific information about the terms of the offering and the debt securities. Issuers often also use term sheets filed with the SEC as free writing prospectuses (FWPs) to describe the terms of the offered securities.
- **Shelf registration for well-known seasoned issuers (WKSIs).** Issuers eligible to use Form S-3 and that meet various requirements (*see below*) are WKSIs and can use Form S-3ASR (or Form F-3ASR for an FPI). An issuer is a WKSI if, within 60 days of the issuer's eligibility determination date, it either:
  - has a worldwide market value of its outstanding equity held by non-affiliates of at least USD700 million; or
  - has issued in the last three years at least USD1 billion of non-convertible securities (other than common equity securities) in primary offerings for cash registered under the Securities Act.
- A shelf registration statement filed on Form S-3ASR is effective automatically and an issuer can offer securities immediately.

An issuer is also eligible to use Form S-3 (or Form F-3 for an FPI) to register non-convertible investment grade securities if it has a public float of at least USD75 million or if it satisfies any one of the following four criteria:

- The issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least USD1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years.
- The issuer has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least USD750 million of non-convertible securities, other than common equity, issued in primary offerings for cash registered under the Securities Act.
- The issuer is a wholly-owned subsidiary of a WKSI as defined in Rule 405 under the Securities Act.
- The issuer is a majority-owned operating partnership of a real estate investment trust (REIT) that qualifies as a WKSI.

Unregistered offerings

Debt securities can also be issued in reliance on an exemption from registration as follows:

- **Section 4(a)(2) offerings.** The issuer can issue the securities directly to investors in a private placement under section 4(a)(2). Section 4(a)(2) provides a registration exemption for "transactions by an issuer not involving any public offering". While neither the Securities Act nor the SEC has defined the term "public offering", case law and SEC guidance have outlined a number of key factors that are relevant to a finding that a particular transaction is not a public offering for the purposes of section 4(a)(2). In *SEC v Ralston Purina (346 U.S. 119 (1953))*, the Supreme Court focused on whether the particular class of persons affected needed the protection of the Securities Act and stated that "an offering to those who are shown to be able to fend for themselves is a transaction 'not involving any public offering'". Hence, if offerees were sophisticated investors who have knowledge and experience in business and financial matters to make an informed investment decision with respect to the securities, then that would be a key factor in finding that such transaction was not a public offering under section 4(a)(2). Aside from the characteristics of investors, other key factors to such a determination would include the limited number of offerees or investors involved in the transaction, the absence of general solicitation or advertising, and the investor's investment intent to buy securities for its own account, and not for resale or distribution. Most institutional debt private placements are made in reliance on section 4(a)(2). Securities sold under section 4(a)(2) are restricted securities that cannot be resold freely.
- **Regulation D offerings.** Regulation D provides three safe harbours with respect to non-public offerings (*Rules 504, 506(b) and 506(c), Regulation D*). Rule 504 allows an issuer to offer and sell up to USD5 million of securities in any 12-month period. The most popular safe harbour, Rule 506(b) of Regulation D, permits the sale of securities to an unlimited number of accredited investors and up to 35 non-accredited investors provided that there is no general solicitation or advertising to sell the securities. Rule 506(c) of Regulation D, however, permits the use of general solicitation or advertising to sell the securities provided that offers and sales are made solely to accredited investors, and the issuer takes reasonable steps to verify that the purchasers are accredited investors. Rule 506 of Regulation D also contains disqualification provisions prohibiting the use of the exemption under any of these three safe harbours, by certain bad actors and felons, and these disqualification events apply to the issuer, persons related to the issuer and anyone who will be paid (directly or indirectly) remuneration in connection with the offering (placement agents and others).
- **Rule 144A offerings.** Unlike section 4(a)(2) and Regulation D offerings which are private placement exemptions available to the issuer, Rule 144A and Regulation S offerings are resale safe harbours that are available to persons other than the issuer, such as broker-dealers or initial purchasers. Hence, the issuer can sell securities in a private placement under section 4(a)(2) with an intermediary, for subsequent resale under Rule 144A (Rule 144A offering). In a Rule 144A offering, securities can be offered and sold without registration to QIBs. Securities sold under Rule 144A are restricted securities that cannot be resold freely. Resales are limited to other QIBs and trades are generally made in the over-the-counter (OTC) market. Rule 144A also requires that the securities being offered are not of the same class as, or convertible into, securities listed on a national securities exchange.
- In addition, general solicitation and general advertising, and other forms of publicity in the United States, are now permitted under Rule 144A so long as the securities being offered are sold only to a QIB or to a purchaser that the seller and any person acting on the seller's behalf reasonably believes to be a QIB.
- **Regulation S offerings.** Offerings to US investors under section 4(a)(2) or Rule 144A are often part of larger global offerings that include sales outside the United States made in reliance on Regulation S. Regulation S is a safe harbour for offers and sales in offshore transactions with no "directed selling efforts" in the US. General solicitation and general advertising in connection with a section 4(a)(2) or Rule 144A offering also will not be viewed as "directed selling efforts" in connection with a concurrent Regulation S offering.
- **Section 3(a)(2) offerings.** A US bank issuer can issue securities exempt from registration under section 3(a)(2). A foreign bank also can use the section 3(a)(2) exemption if the foreign bank

has a US branch or agency (typically located in New York) that issues the securities directly or guarantees the securities issued by the foreign parent. Securities sold in section 3(a)(2) offerings are typically sold to institutional "accredited investors" and in high minimum denominations (typically USD250,000 or higher). Registration with the OCC may be required unless an exemption from registration applies, which includes meeting the requirements of Rule 144A, Regulation S or Regulation D.

- **Exchange offers.** Issuers using Rule 144A may undertake, at the time of issuance, to register the securities with the SEC after the offering is completed, so that the securities become freely tradable. Registration is often accomplished by an exchange offer (called an A/B or Exxon Capital exchange), in which the securities sold under Rule 144A are exchanged for securities with the same terms but registered on Form S-4 (or F-4 in the case of an FPI). FPIs in particular may prefer Rule 144A offerings without a subsequent exchange offer (Rule 144A for life). If an A/B or Exxon Capital exchange is not used, an issuer may instead register the securities for resale by the security holders on Form S-3 (or F-3 in the case of an FPI) if the issuer satisfies the requirements for use of Form S-3 (or F-3 in the case of an FPI).

Restricted securities and Rule 144

Debt securities that are issued in offerings exempt from registration are restricted securities, which means that they can only be sold or transferred under an exemption from registration. However, under Rule 144 of the Securities Act, restricted securities may be freely sold or transferred if the debt security holder has satisfied the applicable holding period under Rule 144:

- Six months if the holder is not an affiliate of the issuer and the issuer is a reporting company under the Exchange Act.
- One year if the holder is not an affiliate of the issuer but the issuer is not a reporting company under the Exchange Act.
- One year if the holder is an affiliate of the issuer (regardless of whether the issuer is a reporting company under the Exchange Act).

A selling debt security holder also may "tack", or include as part of his or her own holding period, the holding period of a prior holder unless the securities were purchased from an affiliate, in which case the holding period would start over.

In addition, restricted securities can be sold or transferred under the section 4(a)(1½) exemption and the exemption provided under section 4(a)(7) of the Securities Act. Section 4(a)(1½), although not specifically provided for in the Securities Act, has been recognised by the SEC and provides a hybrid exemption from registration for the private resale of restricted or control securities. Section 4(a)(7) became effective immediately after the Fixing America's Surface Transportation Act (FAST Act) was signed into law on 4 December 2015. Section 4(a)(7) provides a resale exemption for certain transactions involving unregistered resales and resembles the section 4(a)(1½) exemption for private resales of restricted securities, although it is more limited in scope.

5. Are trust structures used for issues of debt securities in your jurisdiction? If not, what are the main ways of structuring issues of debt securities in the debt capital markets/exchanges?

In the United States, larger, well-seasoned investment grade or high grade issuers generally offer straight senior or subordinated debt in registered public offerings. These securities can be fixed or floating rate obligations. Most floating rate obligations reference LIBOR. In recent years, fixed-to-floating and auto-callable type structures have been popular. These issuers may also offer senior debt obligations with interest and/or principal payments that are based on the performance of a reference asset. These are generally referred to as structured notes. The reference asset may be an index (like the S&P 500), an equity security or basket of equity securities or a commodity or basket of commodities. Most of these are issued in registered public offerings. Companies whose debt is not investment-grade-rated may offer senior or subordinated debt in private (*section 4(a)(2), Regulation D, Rule 144A or section 3(a)(2)*) offerings or registered public offerings. Usually, the debt securities will include some covenants. Most convertible notes are offered in Rule 144A offerings. High yield debt typically is offered in private placements or Rule 144A offerings, and the debt securities will contain numerous covenants. Historically, financial institutions and some utilities have offered hybrid securities using a trust structure, including trust preferred securities, REIT preferred securities or certain structured mandatory convertibles. Given regulatory changes, trust preferred securities are no longer permitted for banks. In addition, issuances using a trust structure can only be made under an exemption from registration under the Investment Company Act. Finally, issuers may establish debt repackaging programmes using a trust vehicle, where the trust vehicle will hold corporate bonds of multiple issuers or will hold bonds and swaps. However, this has become less common as a result of risk retention requirements and the possible applicability of the Volcker Rule. The Volcker Rule, which was promulgated under the Dodd-Frank Act, applies to certain banking entities regardless of size and prohibits or limits proprietary trading and sponsoring or holding an ownership interest in a hedge fund or a private equity fund.

MAIN DEBT CAPITAL MARKETS/EXCHANGES

6. What are the main debt securities markets/exchanges in your jurisdiction (including any exchange-regulated market or multi-lateral trading facility (MTF))?

Main debt markets/exchanges

Issuers typically offer investment grade debt securities in registered public offerings. FPIs can also market debt securities in registered offerings (Yankee bonds) or Rule 144A offerings. Offerings of high yield debt securities are typically conducted as private placements or Rule 144A offerings (*see Question 4*). Bank issuers, including foreign banks with US branches or agencies, may also issue debt securities exempt from registration under section 3(a)(2) of the Securities Act (*see Question 4*). Investment grade securities are usually not listed on an exchange. As at 31 December 2018, 8,674 debt securities (which include "exchange traded notes") were listed on the NYSE, NYSE Arca, NYSE American and Nasdaq (*source: Bloomberg*). NASDAQ began listing debt securities only recently and has an immaterial share of the listed debt market.

Approximate total issuance on each market

As at 31 December 2018, 8,600 debt securities (which include "exchange traded notes") were listed on the NYSE, six debt securities were listed on the NYSE Arca, 37 debt securities were listed on the NYSE American and 31 debt securities were listed on Nasdaq (*source: Bloomberg*). With respect to new issuances (which include "exchange traded notes"), for the 12 months ended 31 December 2018, 589 new debt issuances were listed on the NYSE, 11 new debt issuances were listed on the NYSE American, and one new debt issuance was listed on Nasdaq. No new issuances were listed on the NYSE Arca (*Source: Bloomberg*).

7. What legislation applies to the debt securities markets/exchanges in your jurisdiction? Who are the main regulators of the debt capital markets?

Regulatory bodies

The main securities regulator in the United States is the SEC. The SEC's three-fold mission is to protect investors, maintain fair and

efficient markets, and promote capital formation. The SEC is an independent US government agency that:

- Requires public companies to disclose financial and other information to the public.
- Oversees securities exchanges, securities brokers and dealers, investment advisers, and mutual funds.
- Has civil enforcement authority for violation of the securities laws.

The Financial Industry Regulatory Authority (FINRA) (*www.finra.org*) is the largest non-governmental regulator of securities firms in the United States, and is dedicated to investor protection and market integrity through effective and efficient regulation, particularly of the offering process.

Legislative framework

The SEC has rulemaking and enforcement authority, and administers the federal securities laws, including the primary statutes regulating public offerings:

- Securities Act.
- Exchange Act.
- Investment Company Act.

In addition, the following laws also affect the capital markets:

- Trust Indenture Act (*see Question 10*).
- Sarbanes-Oxley Act, parts of which are incorporated into the Exchange Act.
- Dodd-Frank Act (*see Question 5*).
- Jumpstart Our Business Startups Act (JOBS Act), signed into law on 5 April 2012 (*see Question 8, Question 10 and Question 16*).

LISTING DEBT SECURITIES

8. What are the main listing requirements for bonds and notes issued under programmes?

Main requirements

US securities offerings, including offerings of debt securities, must be registered under the Securities Act, unless a valid exemption from registration is available (*see Question 4*). Registered offerings of debt securities may not involve listing on an exchange, although the issuer may be required for at least some time to file periodic reports with the SEC. Investment grade debt securities typically are not listed.

To trade on a US exchange, a security must be both:

- Registered pursuant to, or exempt from registration under, the Securities Act.
- Accepted for listing on an exchange.

The NYSE has separate listing standards for listed companies and their affiliates and for non-listed or affiliated companies. Companies must meet specified financial criteria. For information regarding the NYSE quantitative and qualitative listing standards, see *Equity Capital Markets: United States*. In addition, an issuer cannot list debt securities with a total market value of less than USD5 million.

Trading record and accounts

For non-listed and affiliated companies, the debt securities must either:

- Have at least an S&P Corporation "B" rating (or equivalent rating by another nationally recognised securities rating organisation (NRSRO)).
- Be guaranteed by a listed company.

If not rated, a company's:

- Senior issue is rated investment grade.
- A *pari passu* or junior issue of the company is given an S&P Corporation "B" rating (or equivalent).

Minimum denomination

There are limited minimum denomination requirements depending on the nature of the debt instrument. Certain structured debt instruments that are registered and listed can be required to have denominations of USD10. A customary denomination is USD1,000 and the offering may require a minimum purchase. Private offerings typically have both higher minimum denominations (for example, USD250,000) and minimum purchase requirements (for example, USD1 million).

Procedure for a foreign company

The procedures for SEC registration and listing on an exchange are substantially the same for FPIs and US issuers, although the specific disclosure and corporate governance requirements differ and an FPI may be able to file its registration statement with the SEC initially on a confidential basis, either:

- As an emerging growth company (EGC) under the JOBS Act.
- Under the rules for FPIs.

An FPI bases its decision whether to list debt securities on a number of factors, including:

- A comparison of the pricing levels in its home jurisdiction to the typical pricing levels in the US markets.
- Investor demand.

9. Are there different/additional listing requirements for other types of securities?

Listing requirements differ slightly for convertible debt securities (that is, debt securities convertible into equity securities). For example, convertible debt securities may be listed on the NYSE only if both:

- The underlying equity securities are subject to real-time last sale reporting in the United States.
- The convertible debt issue has an aggregate market value or principal amount of no less than USD10 million.

Convertible debt securities may be listed on the Nasdaq Capital Market if:

- The convertible debt issue has an aggregate principal amount of at least USD10 million.
- The current last sale information is available in the United States with respect to the underlying equity securities.
- There are at least three registered and active market makers for the convertible debt securities.
- One of the following applies:
  - the issuer of the convertible debt securities has an equity security that is listed on Nasdaq, the NYSE American or the NYSE;
  - an issuer whose equity securities are listed on Nasdaq, the NYSE American or the NYSE, directly or indirectly owns a majority interest in, or is under common control with, the issuer of the convertible debt securities, or has guaranteed the convertible debt securities;

- an NRSRO has assigned a current rating to the convertible debt securities that is no lower than an S&P Corporation "B" rating or equivalent rating by another NRSRO;
- where no NRSRO has assigned a rating to the issue, an NRSRO has currently assigned an investment grade rating to an immediately senior issue, or a rating that is no lower than an S&P Corporation "B" rating, or an equivalent rating by another NRSRO, to a *pari passu* or junior issue.

CONTINUING OBLIGATIONS: DEBT SECURITIES

10. What are the main areas of continuing obligations applicable to companies with listed debt securities and the legislation that applies?

Continuing obligations vary depending on whether the issuer has:

- Securities registered under the Exchange Act.
- Listed its debt securities on the NYSE or Nasdaq.
- Offered debt securities under section 4(a)(2), Regulation D, Rule 144A or section 3(a)(2) and is not otherwise an SEC reporting company.

Debt securities registered under the Exchange Act

The key areas of continuing obligations are substantially similar to those for companies with equity securities registered under the Exchange Act.

The key areas of continuing obligations for public companies are:

- Periodic reporting.
- Compliance with the Sarbanes-Oxley Act and the Dodd-Frank Act.
- Share ownership and transaction reporting by the company's officers, directors and 10% shareholders (not applicable to FPIs).
- Beneficial ownership reporting for acquirers of 5% or more of the company's equity securities (also applicable to FPIs).
- Continued qualitative and quantitative listing requirements of the relevant exchange, including relating to corporate governance (FPIs may rely on certain home country corporate governance practices).
- Disclosure and timing requirements related to shareholder meetings (not applicable to FPIs).
- Rules relating to the conduct of tender offers and other securities-related transactions.

Periodic reporting

A US company must file with the SEC:

- An annual report on Form 10-K after the end of each fiscal year, with audited annual financial statements.
- Quarterly reports on Form 10-Q after the end of its first three fiscal quarters, with reviewed interim financial statements.
- Current reports on Form 8-K when certain specified events occur.
- A proxy statement for any shareholders' meeting, including the annual meeting.

The reporting requirements are less onerous for an FPI. They must:

- File an annual report on Form 20-F within four months of each fiscal year-end. The annual report on Form 20-F must also contain a summary of differences between US and home jurisdiction's corporate governance requirements. However, an FPI is not required to file quarterly reports on Form 10-Q or current reports on Form 8-K.
- Include on Form 6-K any material information that it either:
  - makes public under its home jurisdiction's laws or stock exchange requirements; or
  - is required to distribute to its shareholders, such as bi-annual or quarterly reports.

The Sarbanes-Oxley Act and related regulations impose numerous additional requirements on listed issuers, including:

- Certification of SEC periodic filings.
- Submission of reports on internal controls over financial reporting.
- Independence of the issuer's audit committee.

Each annual and, in the case of a US issuer, quarterly report filed with the SEC must be accompanied by certifications signed by the company's principal executive and financial officers and cover, among other things:

- Completeness and accuracy of the disclosure.
- Fairness of the presentation of the issuer's financial condition and results of operations in its financial statements.
- Effectiveness of the issuer's disclosure controls and procedures, and internal control over financial reporting.

In addition, each annual report must include a management report and auditor's report on the company's internal control over financial reporting. Newly public companies are not required to file either report until their second annual report after their initial public offering (IPO). Smaller public companies and EGCs, whether domestic or foreign, are not required to provide the auditor's report. The JOBS Act also provides relief from certain ongoing disclosure obligations for EGCs.

After it has filed its first annual report with the SEC, the debt issuer can cease to file periodic reports under the Exchange Act if it meets applicable de-registration requirements.

NYSE requirements

An issuer that has listed its debt securities on the NYSE must also have registered those securities under the Exchange Act. Issuers that have only debt securities listed on the NYSE are not subject to most of the NYSE's corporate governance standards (other than audit committee requirements and certifications to the NYSE).

The NYSE's quantitative continued listing requirements allow the exchange to de-list or suspend the trading of bonds if any of the following apply:

- The total market value or principal amount of publicly held bonds falls below USD1 million.
- The issuer is no longer able to meet its obligations on the listed debt securities.

Debt securities are not eligible for procedures that would allow the issuer time to conform to the exchange's continued listing requirements. In addition, in a number of circumstances (such as failure to comply with continued listing requirements), the NYSE can take discretionary enforcement action, including suspending trading and de-listing proceedings against a listed company.

Rule 144A ongoing information requirements

An issuer that is not a reporting company nor exempt from reporting under Exchange Act Rule 12g3-2(b) (which permits an FPI to terminate registration if its US average daily trading volume (ADTV) falls below a certain level or it has fewer than 300 US shareholders) must provide reasonably current information to security holders and prospective investors under Rule 144A, including:

- A brief description of its business, products and offered services.
- Its most recent balance sheet.
- Profit and loss, and retained earnings statements.
- Financial statements for that portion of the two preceding fiscal years during which the issuer has been in operation.

To facilitate the delivery of this information, indentures may contain covenants that require an issuer to become a voluntary filer or to prepare reports for bondholders as if it were subject to the Exchange Act.

Debt security holders' rights are contained in the operative debt documents, primarily the indenture.

Suspension of registration

All companies registered with the SEC, whether US or foreign, can suspend their obligation to file SEC reports and other public company obligations if either:

- There are fewer than 300 record holders of the common equity or 1,200 record holders in the case of banks, bank holding companies (BHCs) and savings and loan holding companies (SLHCs).
- The common equity is held by less than 500 non-accredited record holders or 2,000 record holders, and the company's total assets have been no more than USD10 million at the end of each of its last three fiscal years.

However, if the company ever exceeds these levels, the obligations are reinstated.

Termination of registration

An FPI can terminate (rather than merely suspend) its listing and de-register under Exchange Act Rule 12g3-2(b) (because, for example, the US market for its shares is thinner than anticipated, or declines over time, such that the additional compliance expenses associated with US registration are not justified), if either:

- The US ADTV of the securities has been no greater than 5% of the worldwide ADTV for a recent 12-month period.
- The securities are held by fewer than 300 persons worldwide or fewer than 300 persons resident in the United States and certain other conditions are met.

Voluntary filers

In some markets, particularly the high yield market, issuers that would otherwise be able to de-register under the Exchange Act are required by debt covenants to continue to make periodic filings as if they were still subject to the Exchange Act (although they may provide more limited information). These issuers are "voluntary filers".

Indenture qualification

Debt securities that are SEC-registered must be issued under an indenture qualified under the Trust Indenture Act. However, debt securities issued in unregistered offerings (*section 4(a)(2), Regulation D, Rule 144A and section 3(a)(2)*) do not have to be issued under an indenture qualified under the Trust Indenture Act.

Qualification includes appointing and registering the indenture trustee with the SEC. A qualified indenture contains mandatory provisions that apply automatically, including provisions related to the duties of the trustee. The registration statement, which will describe key provision of the indenture, must also include a Form T-1 prepared by the trustee, which sets forth information enabling the SEC to determine whether the trustee is eligible to act under the standards of the Trust Indenture Act. If the terms of the debt securities are not known at the time of the filing of the registration statement, the indenture that is filed pre-effectively may contain a generic, non-specific description of the debt securities, with details provided in a subsequent supplemental indenture at the time a series is offered. In the case of a shelf registration statement on Form S-3 (or Form F-3 for an FPI), section 305(b)(2) of the Trust Indenture Act permits the trustee to be designated on a delayed basis if the identity of the trustee is not known when the issuer files the registration statement.

11. Do the continuing obligations apply to foreign companies with listed debt securities?

Domestic and foreign issuers have the same obligations. The key issue is whether the issuer is subject to reporting under the Exchange Act.

12. What are the penalties for breaching the continuing obligations?

If the debt securities are registered under the Exchange Act and trade on an exchange, failure to file required Exchange Act reports can result in the SEC bringing an enforcement action against the issuer seeking injunctive relief. In addition, any officer of the company who knowingly makes a false certification in connection with an Exchange Act report can potentially be subject to both:

- Monetary fines and criminal sanctions for violating section 13(a) or 15(d) of the Exchange Act.
- SEC and private actions for violating section 10(b) of the Exchange Act and Rule 10b-5 under the Exchange Act.

Failure to comply with an exchange's continued listing requirements can result in a suspension of trading or de-listing.

ADVISERS AND DOCUMENTS: DEBT SECURITIES ISSUE

13. Outline the role of advisers used and main documents produced when issuing and listing debt securities.

Underwriters

The lead underwriters:

- Offer financial advice to the issuer, including valuation advice.
- Manage the marketing of the securities to prospective investors.

A broader syndicate of underwriters usually assists with marketing and distribution. Underwriters typically provide aftermarket support by repurchasing the debt securities in the secondary market to stabilise the price after the offering. Underwriters also seek to maintain a long-term relationship with the issuer so as to continue to underwrite future offerings.

Lawyers

The issuer's lawyers draft the registration statement and manage the legal aspects of the offering. The underwriters' lawyers participate in drafting the registration statement and lead the due diligence process. As part of the due diligence process, lawyers for the underwriters and the issuer usually prepare letters stating that, based on specific inquiries (and subject to exclusions for financial and other information provided by experts), they are unaware of anything that may indicate that the prospectus contains any material misstatement or omission. For companies in highly regulated industries or with non-US operations, the issuer and underwriters may retain lawyers that specialise in these matters.

The issuer's lawyers also will review the issuer's SEC filings on an ongoing basis. The lawyers will then be prepared when a subsequent offering is proposed.

Lawyers for the trustee (equivalent to a fiscal/paying agent) are also involved. The trustee's counsel negotiates provisions of the indenture relating to the trustee and represents the trustee's interests. The main documents are also substantially the same with the addition of an indenture or other instrument for the debt securities being offered.

Independent registered public accounting firm

The registration statement includes annual financial statements, which must be audited by an independent public accounting firm registered with the Public Company Accounting Oversight Board (PCAOB). The public accounting firm:

- Must consent to the use of its audit opinion in the registration statement.
- Reviews any unaudited interim financial statements included in the registration statement.
- Reviews the financial information in the registration statement as part of the due diligence process.
- Issues a "comfort" letter at the pricing of the offering and a "bring-down comfort" letter at the closing of the offering, each addressed to the underwriters and the issuer's board of directors, relating to:
  - financial statements; and
  - other financial information included in the registration statement.

The public accounting firm will continue to audit and review the issuer's financial statements included in the issuer's SEC reports and will have the same responsibilities for any financial statements filed in or incorporated by reference in registration statements for subsequent offerings.

Others

An issuer may also retain outside investor-relations firms and other professionals. For subsequent offerings, these advisers are already in place.

Documentation for unregistered offerings (section 4(a)(2), Regulation D, Rule 144A and section 3(a)(2))

As a general matter, the documentation for unregistered offerings is very similar to the documentation for registered offerings because although no registration statement is involved, issuers and underwriters will still be subject to sections 12 and 15 of the Securities Act and section 10(b) and Rule 10b-5 of the Exchange Act. However, the documentation for unregistered offerings (*section 4(a)(2), Regulation D, Rule 144A and section 3(a)(2)*) differs slightly from registered offerings in a few respects. First, rather than using a registration statement containing a prospectus, a private placement memorandum, offering circular or offering memorandum is used, which contains the same information as a registration statement, including a description of the issuer's business and financial statements, and typically incorporates by reference the issuer's Exchange Act reports or reports filed by the issuer under its home-country laws (if the issuer is not a reporting company under the Exchange Act). Second, the investment banks underwriting unregistered offerings sign a purchase agreement with the issuer, rather than an underwriting agreement. Third, issuers and underwriters often also use term sheets to describe the terms of the offered securities, but these term sheets are not filed with the SEC as FWPs.

DEBT PROSPECTUS/MAIN OFFERING DOCUMENT

14. When is a prospectus (or other main offering document) required? What are the main publication/delivery requirements?

Public securities offerings are accomplished using a registration statement, which is filed with, and declared effective by, the SEC. A registration statement contains two parts:

- A prospectus, which is the main marketing and disclosure document.
- Other information filed with the SEC but not distributed to investors, including exhibits to the registration statement.

In an SEC-registered public offering, the issuer must deliver (or, under certain circumstances, make available electronically) a written prospectus meeting the requirements of the Securities Act and related prospectus delivery obligations.

15. Are there any exemptions from the requirements for publication/delivery of a prospectus (or other main offering document)?

Section 4(a)(2), Regulation D, Rule 144A and section 3(a)(2) offerings (*see Question 4*) do not require a statutory prospectus as such offerings are exempt from the registration requirements under section 5 of the Securities Act. However, because section 4(a)(2), Regulation D, Rule 144A and section 3(a)(2) offerings are still subject to sections 12 and 15 of the Securities Act and section 10(b) and Rule 10b-5 of the Exchange Act, such offerings are usually made using a private placement memorandum, offering memorandum or offering circular that closely tracks a statutory prospectus in form and content.

Certain classes of debt securities are excluded from registration under the Securities Act. These include short-term notes (with maturities of 270 days or less), such as commercial paper (which is exempt from registration under section 3(a)(3) of the Securities Act).

16. What are the main content/disclosure requirements for a prospectus (or other main offering document)? What main categories of information are included?

Content/disclosure requirements

The prospectus (or private placement memorandum, offering circular or offering memorandum in the case of an unregistered offering) is the primary disclosure document for a debt offering. The contents of a prospectus depend on the applicable SEC registration statement form. The disclosure must include all material information (that is, matters that a reasonable investor would likely deem important in determining whether to purchase the security). The contents of an offering circular or offering memorandum (in the case of an unregistered offering) will be very similar to the prospectus for a registered offering.

Once the issuer has been a public company for at least 12 months and has filed its periodic reports on a timely basis, it may be eligible to use Form S-3 (or Form F-3 for an FPI) to make subsequent public offerings. Form S-3 is a short-form registration statement that allows the issuer to refer in the prospectus to information from its SEC reports filed under the Exchange Act that would otherwise be required to be stated in full.

A typical prospectus (or private placement memorandum, offering circular or offering memorandum in the case of an unregistered offering) contains the following sections:

- Summary of the prospectus (or private placement memorandum, offering circular or offering memorandum in the case of an unregistered offering), including business and financial information and key offering terms.
- Risk factors.
- Use of proceeds.
- Issuer capitalisation (not required but sometimes provided).
- Selected financial data.
- Management's discussion and analysis of financial condition and results of operations.
- Material aspects of the issuer's business.
- Management, providing a five-year employment history of directors and executive officers (not required for EGCs), and including disclosure about board committees, corporate governance guidelines and codes of ethics.
- Compensation discussion and analysis and executive compensation (FPIs may provide more limited information).
- Related party transactions.
- Description of the debt securities.
- Information regarding the trustee/fiscal agent.
- Tax issues.
- Underwriting.
- Legal matters.
- Identification of the independent public accounting firm and any other experts that may be required to give an opinion on the prospectus.
- Financial statements, typically three years of audited financial statements and unaudited financial statements for any required interim periods. Under the JOBS Act, an EGC may include in a registration statement only two years of audited financial statements and the unaudited financial statements for the related interim periods. In addition, an issuer that is filing a registration statement or submitting a registration statement for confidential review may omit financial information for historical periods that otherwise would be required at the time of filing or submission, provided that the omitted financial information will not be required to be included in the Form S-1 or F-1 at the time of the consummation of the offering, and that prior to distribution of a preliminary prospectus to investors, the registration statement includes all required financial statements. If an FPI prepares its financial statements according to the International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB), it need not reconcile its financial information to US Generally Accepted Accounting Principles (US GAAP).

An FPI must include certain additional information in the prospectus (or private placement memorandum, offering circular or offering memorandum in the case of an unregistered offering); for example, information on the enforcement of judgments against the issuer, and on any exchange controls and taxation of shareholders in the issuer's home jurisdiction.

The registration statement also contains additional information and required exhibits, including organisational documents, material contracts and consents of experts. The issuer can request confidential treatment of sensitive information. The offering circular or offering memorandum for an unregistered offering does not include such additional information or exhibits.

For a subsequent offering using a short-form registration statement, the issuer can include the information set out above, or incorporate such information by reference to its SEC reports.

Disclosure of issuer credit ratings

Issuer credit ratings cannot be disclosed in registration statements and prospectuses for registered offerings, unless the consent of the applicable credit rating agency is obtained. However, "issuer disclosure-related ratings information" is allowed to be included in a registration statement without the consent of a credit rating agency. "Issuer disclosure-related ratings information" is defined as ratings information that relates only to:

- Changes to a credit rating.
- The liquidity of the registrant.
- The cost of funds for the registrant.
- The terms of agreements that refer to credit ratings.

This would include, for example, risk factor disclosure about the consequences of failure to maintain a rating. For asset-backed issuers that must disclose ratings information under Regulation AB, the SEC has stated that it will not recommend enforcement action so long as the disclosure meets the requirements under Regulation AB.

The consent of a credit rating agency is not required for inclusion of ratings information in FWPs (compliant with Rule 433 under the Securities Act) and term sheets or press releases (compliant with Rule 134 under the Securities Act).

For unregistered offerings (*section 4(a)(2), Regulation D, Rule 144A and section 3(a)(2)*), issuer credit ratings may be disclosed in private placement memoranda, offering circulars or offering memoranda, as well as term sheets.

17. Who is responsible for the prospectus (or other main offering document) and/or who is liable for its contents?

Preparation

The issuer and its lawyers prepare the prospectus (or private placement memorandum, offering circular or offering memorandum in the case of an unregistered offering) working with the underwriters and their lawyers, and the auditors. The underwriters and their lawyers conduct due diligence on the issuer and verify the information in the prospectus (or private placement memorandum, offering circular or offering memorandum in the case of an unregistered offering). The diligence process includes:

- A review of organisational and corporate documents, shareholder lists, material contracts, litigation, intellectual property and other legal and business matters material to the issuer.
- Detailed discussions with management about the contents of the prospectus, business plan and road show presentation.
- Interviews with the issuer's auditors, main customers, suppliers and distributors.

The SEC comments on the prospectus as part of the registration process (unless the registration statement is for a WKSI). The comments are intended to clarify issuer disclosure as well as verify compliance with SEC requirements. The SEC does not independently verify any information contained in the registration statement.

For a subsequent offering, most of the disclosure is taken from the issuer's ongoing SEC filings (or home country filings if the issuer is an FPI), so the prospectus (or private placement memorandum, offering circular or offering memorandum in the case of an unregistered offering) drafting process is typically shorter. With respect to registered offerings, in most cases, the SEC does not comment on the prospectus for a subsequent offering, although it may have commented on the issuer's ongoing public filings.

Liability

Registered offerings. In the case of registered offerings, the issuer is strictly liable for the content of the prospectus. The issuer's directors and officers, and underwriters and accountants have potential defences to liability (*see below*). Liability arises primarily under sections 11, 12 and 15 of the Securities Act, and section 10(b) and Rule 10b-5 of the Exchange Act, as follows:

- **Section 11 liability.** If the registration statement contains an untrue statement of a material fact, or omits to state a material fact required to be stated in it (or that is necessary to make the statements not misleading), any buyer of a security under a registration statement can sue the issuer and the following persons:
  - anyone who signed the registration statement (a registration statement is signed by the issuer's chief executive, principal financial and accounting officers, and at least a majority of the issuer's directors);
  - any director (or person who consented to be named as a director) at the time the registration statement was filed;
  - every accountant, engineer, appraiser or other expert who consented to be named as having prepared or certified the accuracy of any part of the registration statement, or any report or valuation used in the registration statement (but liability is limited to that information);
  - every underwriter.
- **Section 12 liability.** A buyer of a security can sue any person who both:
  - offered or sold the security to that buyer in violation of section 5 of the Securities Act;
  - offered or sold the security to that buyer by means of a prospectus or oral communication that included an untrue statement of a material fact (or omitted to state a material fact necessary to make a statement, in light of the circumstances under which it was made, not misleading).
- **Section 15 liability.** Every person who controls (through share ownership, agreement or otherwise) any other person that is liable under sections 11 or 12 of the Securities Act is jointly and severally liable with the other person, unless the controlling person had no knowledge of, or reasonable grounds to believe in, the existence of the facts that resulted in the alleged liability.
- **Section 10(b) and Rule 10b-5 liability.** It is unlawful for any person to do any of the following in connection with the purchase or sale of any security:
  - employ any fraudulent scheme;
  - make any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading;
  - engage in fraud or deceit.
- Note that the US states also have similar laws governing liability that may also apply to registered offerings.

To succeed in a claim under Rule 10b-5 under the Securities Act, the claimant must show that the person selling the security intended to deceive or had a reckless disregard of the truth. This "scienter" requirement does not apply under sections 11 and 12 of the Securities Act. In addition, the US Supreme Court has limited the territorial application of Rule 10b-5 under the Securities Act by holding that section 10(b) of the Exchange Act covers only:

- Transactions in securities listed on domestic exchanges.
- Domestic transactions in other securities.

This test is often referred to as the "transactional test". As a result, it was thought that "foreign-cubed" cases (foreign issuers, foreign claimants and foreign transactions) could no longer be brought in US courts. In addition, one US federal appeals court held that to be liable for domestic transactions in other securities, a claimant must allege facts suggesting that irrevocable liability was incurred or title was transferred within the United States.

However, there have been cases exploring the limitations of the transactional test and whether section 929P(b) of the Dodd-Frank Act supersedes it. Section 929P(b) of the Dodd-Frank Act directly addresses the issue of transnational securities fraud brought by the SEC or the US Department of Justice by amending section 22 of the Securities Act and section 27 of the Exchange Act, and providing that US courts have jurisdiction over an action or proceeding brought or instituted by the SEC or the US Department of Justice alleging a violation of section 17 of the Securities Act or section 27 of the Exchange Act involving either:

- Conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors.
- Conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

This test is often referred to as the "conduct and effects test". In March 2017, a US district court held that section 929P(b) of the Dodd-Frank Act supersedes the transactional test, in a case involving a web traffic exchange that had 90% of its customers purchasing products over the internet while located outside the United States. The US district court found that the legal context in which section 929P(b) was drafted, the legislative history and the express purpose of section 929P(b) all point to a congressional intent that section 10(b) of the Exchange Act and section 17(a) of the Securities Act should be applied to extraterritorial transactions to the extent that the conduct and effects test can be satisfied. It remains to be seen, however, whether other US district courts will continue to follow the transactional test in light of this recent decision.

Unregistered offerings. In the case of unregistered offerings (*section 4(a)(2), Regulation D, Rule 144A and section 3(a)(2)*), where there is no registration statement and section 5 statutory prospectus, liability under section 11 of the Securities Act is not applicable. However, liability for issuers and underwriters may still arise under sections 12 and 15 of the Securities Act, and section 10(b) and Rule 10b-5 of the Exchange Act, as follows:

- **Section 12 liability.** A buyer of a security can sue any person who:
  - offered or sold the security to that buyer without establishing a valid exemption from registration (that is, failure to meet the requirements under section 4(a)(2), Rule 144A or section 3(a)(2));
  - offered or sold the security to that buyer by means of an offering circular or offering memorandum or oral communication that included an untrue statement of a material fact (or omitted to state a material fact necessary to make a statement, in light of the circumstances under which it was made, not misleading).
- **Section 15 liability.** This is the same as in the case of registered offerings (*see above, Liability: Registered offerings*).
- **Section 10(b) and Rule 10b-5 liability.** This is the same as in the case of registered offerings (*see above, Liability: Registered offerings*).
- Note that US states also have similar laws governing liability that may also apply to unregistered offerings.

Defences. A person other than the issuer (such as an underwriter) against whom a claim is made may have defences, including a due diligence defence.

TIMETABLE: DEBT SECURITIES ISSUE

18. What is a typical timetable for issuing and listing debt securities?

A US debt offering can take from between a few days to a few months to complete, depending on the structure of the offering, whether the issuer is already public, and the underwriters' ability to conduct due diligence and obtain a comfort letter. In addition, unregistered offerings typically are conducted on a more accelerated time frame, since a registration statement does not need to be filed with the SEC and SEC review of non-automatic shelf registration statements could be lengthy.

TAX: DEBT SECURITIES ISSUE

19. What are the main tax issues when issuing and listing debt securities?

Payment of interest

US federal withholding tax does not generally apply to a payment of interest (or original issue discount) to a non-US holder of a US issuer's debt security, if all of the following requirements are satisfied:

- The debt security is in "registered" form for US tax purposes (generally, the right to principal of, and interest on, the debt security can only be transferred through a book entry system meeting certain requirements).
- The payment is not effectively connected with the non-US holders' conduct of a US trade or business (or, if certain income tax treaties apply, the payment is not attributable to a US permanent establishment (PE) maintained by the non-US holder).
- The non-US holder does not actually or constructively own 10% or more of the total combined voting power of all classes of the debt issuer's stock entitled to vote.
- The non-US holder is not a controlled foreign corporation (CFC) that is related directly or constructively to the debt issuer through stock ownership.
- The non-US holder is not a bank that acquired the debt securities in consideration for an extension of credit made under a loan agreement entered into in the ordinary course of its trade or business.
- The non-US holder provides the withholding agent with a statement to the effect that the holder is not a US person.

If a non-US holder cannot satisfy the requirements described above, payments of interest are generally subject to a 30% US federal withholding tax, unless the non-US holder provides an Internal Revenue Service (IRS) Form W-8BEN or W-8BEN-E claiming an exemption from or reduction in withholding under the benefits of an applicable income tax treaty, or an IRS Form W-8ECI claiming that the interest is effectively connected with the non-US holder's trade or business in the United States.

If a non-US holder of a debt security is engaged in the conduct of a trade or business within the United States and if interest (including any original issue discount) on the debt security, or gain realised on the sale, exchange, or other disposition of the debt security, is effectively connected with the conduct of such trade or business (and, if certain tax treaties apply, is attributable to a permanent establishment (PE) maintained by the non-US holder in the United States), the non-US holder, although exempt from US federal withholding tax (provided that the certification requirements discussed above are satisfied), generally will be subject to US federal income tax on such interest (including any original issue discount) or gain on a net income basis in the same manner as if it were a US holder. In addition, if such non-US holder is a foreign corporation, it may also be subject to a branch profits tax equal to 30% (or such lower rate provided by an applicable US income tax treaty) of a portion of its earnings and profits for the taxable year that are effectively connected with its conduct of a trade or business in the United States, subject to certain adjustments.

A debt security is generally treated as issued with original issue discount if its stated redemption price at maturity exceeds its issue price by more than a *de minimis* amount (for example, if the debt security is issued at a discount). Special tax considerations must be taken into account in the case of a re-opening of debt securities issued with original issue discount.

Dispositions

A non-US holder is not generally subject to US federal income tax or withholding tax on gain realised on the sale or exchange of debt securities, if both:

- The gain is not effectively connected with a US trade or business of the non-US holder (or, if certain income tax treaties apply, the gain is not attributable to a US PE maintained by the non-US holder).
- The non-US holder is a non-resident foreign person that is not present in the United States for 183 or more days in the taxable year of the sale or disposition, and certain other conditions are met.

A gain that is effectively connected with a US trade or business of the non-US holder (or, of certain income tax treaties apply, attributable to a US PE maintained by the non-US holder) is generally subject to US federal income tax on a net income basis, as described above.

Other tax issues

The Foreign Account Tax Compliance Act (FATCA) imposes a 30% US withholding tax on interest payments (including original issue discount) to foreign financial institutions and certain other non-financial foreign entities. Withholding under FATCA will generally not apply if such payments are made to a foreign financial institution that agrees to identify accounts held by US persons (and it complies with additional reporting and withholding requirements) and foreign entities with substantial US owners or to a non-financial foreign entity that either certifies it does not have any substantial US owners, or furnishes identifying information regarding each substantial US owner.

The US Treasury has entered into several intergovernmental agreements with governments of various countries that allow a foreign financial institution to satisfy its reporting requirements if both:

- The foreign financial institution collects the information required and provides this information to the government of its country of residence.
- The government of its country of residence enters into an agreement to report such information annually to the IRS under an income tax treaty, tax information exchange agreement, or other agreement with the US.

CLEARING AND SETTLEMENT OF DEBT SECURITIES

20. How are debt securities cleared and settled and what currency are debt securities typically issued in? Are there

special considerations for holding, clearing and settling debt securities issued in foreign currencies?

Clearing and settlement

Debt securities issued in the United States are, more frequently than not, denominated in US dollars. However, debt securities can be denominated in any currency. For any debt security that is denominated in a foreign currency (currency other than US dollars), special care should be taken to discuss payment and settlement issues with the trustee or fiscal and paying agent and with the Depository Trust Company (DTC). DTC will not handle payments to security holders in any currency other than US dollars. However, the trustee/fiscal agent and DTC can make arrangements for payments in foreign currency to be made through Euroclear Bank S.A./N.V., as operator of the Euroclear System, or Clearstream Banking, *société anonyme*. Debt securities also are identified by individual CUSIP (Committee on Uniform Securities Identification Procedures) numbers provided by the CUSIP Bureau in order to facilitate the clearing and settlement process, and CUSIP numbers are typically obtained by the trustee/fiscal agent. In addition, debt securities issued in a section 4(a)(2) offering are not DTC-eligible.

Trade reporting secondary market transactions

OTC secondary market transactions in eligible fixed income securities must be reported to FINRA through FINRA's Trade Reporting and Compliance Engine (TRACE). TRACE disseminates real-time price information for the OTC bond market, thus providing transparency to the corporate and agency bond markets. Reporting is required for registered securities (except for securities issued under a non-shelf registration statement), and if the securities are unregistered and the trade does not qualify as a "distribution" under Regulation M (that is, no special selling efforts, small transaction size, handful of purchasers), then the trade generally must be reported. The reporting requirements for various types of transaction participants are as follows:

- In transactions between two market makers, only the member on the sell side must report.
- In transactions between a market maker and a non-market maker, only the market maker must report.
- In transactions between two non-market makers, only the member on the sell side must report.
- In transactions between a member and a customer, the member must report.
- In transactions between two members, the "executing party" must report.

In addition, FINRA requires the public dissemination through TRACE of information regarding Rule 144A offerings of corporate bonds. The information consists of investment/non-investment grade status and real time market data.

Stabilisation

The rules governing stabilisation, contained in Regulation M under the Exchange Act (Regulation M), are complex. It is generally unlawful for any person to stabilise, effect any syndicate covering transaction, or impose a penalty bid in connection with the offering of a security, unless certain conditions are met. Stabilising activities are permitted only to prevent or slow a decline in the market price of the security. The key conditions for stabilisation relate to:

- Notice.
- Pricing parameters.
- Timing.
- Priority for independent bids.

However, transactions in Rule 144A securities and investment grade non-convertible and asset-backed securities are exempt from Regulation M.

REFORM

21. Are there any proposals for reform of debt capital markets/exchanges? Are these proposals likely to come into force and, if so, when?

The publicly released SEC agenda provides some insight on what to expect from the SEC in 2019. In a December 2018 speech, SEC Chair Clayton characterised the SEC agenda for 2019 as "ambitious" but "pragmatic in the number of items" and said he hoped to replicate the success the SEC had in 2018, where it had advanced 23 out of the 26 initiatives on the 2018 agenda. Below, we highlight a few of the key proposals for reform for 2019.

In February 2019, the SEC proposed a rule extending the ability to engage in "test the waters" communications (currently available to EGCs only) to all issuers, whether or not EGCs, including investment company issuers. The "test-the-waters" accommodation would allow prospective issuers to gauge market interest in a possible initial public offering or other proposed securities offering by permitting discussions with QIBs and institutional accredited investors prior to the filing of a registration statement. These communications would be exempt from restrictions imposed by section 5 of the Securities Act on written and oral offers prior to, or after, filing a registration statement.

In May 2019, the SEC proposed revisions to financial statement disclosures with respect to business acquisitions and dispositions required by Regulation S-X, in particular, Rule 3-05 (financial statements of businesses acquired or to be acquired), Rule 3-14 (special instructions for real estate operations to be acquired), Article 11 on pro forma financial information, and other related rules and forms. The proposed amendments also include some changes to the investment and income tests used in measuring the significance of business acquisitions and dispositions. Also, in May 2019, the SEC also proposed revisions to the accelerated filer and large accelerated filer definitions in Rule 12b-2 that would reduce the number of issuers that qualify as accelerated filers and reduce compliance costs for smaller reporting companies (SRCs). In particular, the amendments would:

- Exclude from the accelerated and large accelerated filer definitions an issuer that is eligible to be an SRC and had no revenues, or annual revenues of less than USD100 million, in the most recent fiscal year for which audited financial statements are available.
- Increase the transition thresholds for accelerated and large accelerated filers becoming a non-accelerated filer from USD50 million to USD60 million, and for exiting large accelerated filer status from USD500 million to USD560 million.
- Add a revenue test to the transition thresholds for exiting both accelerated and large accelerated filer status.

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