

Contributing editor
Andrew Pitts



GETTING THE DEAL THROUGH

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DEAL THROUGH 

Securities Finance 2015

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Preface

Securities Finance 2015

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Securities Finance*, 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 15 jurisdictions featured. Our coverage this year includes new chapters on Denmark and Austria.

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 would like to extend special thanks to Mark Greene, the previous contributing editor, who devised the original questionnaire, and who helped to shape the publication to date. We would like to welcome Andrew Pitts as the new contributing editor of the title and we look forward to continuing our close work with Cravath Swaine & Moore LLP.

GETTING THE
DEAL THROUGH

London
April 2015

Global Overview

Mark Greene, Andrew Pitts and George Stephanakis

Cravath, Swaine & Moore LLP

Global capital markets were robust in 2014, despite uneven and lackluster growth of the global economy. Persistent low interest rates continued to fuel investment growth in the global equity capital markets, while the global debt capital markets maintained high levels of activity consistent with the prior year. All-time records were set for total issuance of investment-grade corporate debt in the United States and for total debt issuance denominated in G3 currencies (the US dollar, the euro and the Yen) in Asia. 2014 also saw the largest initial public offering in history.

The United States outperformed expectations, leading to stark disparities in growth as many other major economies, including the eurozone and Japan, faltered. Oil prices declined substantially over the second half of the year, impacting exchange rates and reshaping the global economic landscape. Global markets continued to benefit from the accommodative monetary policies of central banks, but 2015 may bring the first tightening of financial conditions in years as the United States contemplates raising benchmark rates. Nevertheless, the outlook for the global capital markets remains largely positive for the coming year.

Equity capital markets

The global equity capital markets experienced their strongest year since 2007, with a flood of initial public offerings (IPOs) entering the market. According to Thomson Reuters, global equity issuances totalled US\$890.4 billion during 2014, an 11 per cent increase over 2013. Issuers in the financial sector led the way, accounting for approximately 20 per cent of all equity capital markets activity during the year, followed by issuers in the energy and power, technology and industrials and real estate sectors at 14 per cent, 12 per cent and 11 per cent, respectively. Follow-on offerings totalled US\$537.8 billion for the year, an increase of 1 per cent over 2013, and the highest level since 2009. Meanwhile, IPOs totaled US\$249.0 billion worldwide, an increase of 51 per cent over 2013. The strong year for IPOs was highlighted by Alibaba Group's record-breaking US\$25 billion IPO in September.

In the United States, equity offerings failed to match overall proceeds from 2013, but the strong performance of the IPO market continued. According to Thomson Reuters, issuers raised a total of US\$258.5 billion in the global equity capital markets, a 9 per cent decline since 2013. While equity deal volume also decreased 9 per cent, 2014 saw the highest volume of IPOs in the United States since 2004, with 230 such offerings. Total IPO proceeds amounted to US\$56.1 billion, a 2 per cent decrease from the prior year.

In Europe, the Middle East and Africa, market volatility led to a slow fourth quarter in 2014, but year-end numbers still show substantial growth. According to Thomson Reuters, proceeds to issuers totaled US\$287.1 billion, a 24 per cent increase from 2013. IPOs across these regions in 2014 grew 99 per cent over the prior year. The financial sector remained the strongest industry among issuers, as seven of the top 10 largest deals were bank offerings. IPOs in the United Kingdom totaled US\$28.1 billion, an increase of 74 per cent from the prior year, and accounted for 29 per cent of all European IPO proceeds.

In Asia (excluding Japan) and Australia, the financial and tech sectors carried the region's equity capital markets to strong results. According to Thomson Reuters, proceeds to issuers totaled US\$220.4 billion and US\$40.2 billion, respectively, representing growth over year-end 2013 of 41 per cent and 62 per cent, respectively. Again, these regions featured surging IPO markets, with first time issuers in Asia garnering US\$83.5 billion in proceeds, more than double the figures from the prior year. Meanwhile, the

Australian IPO market finished the year on a high note, with US\$8.7 billion in proceeds from 28 deals, representing the highest quarterly volume since 1997.

In Japan, market results were mixed. While it followed the global trend with a healthy IPO market, Japan saw much weaker secondary market activity. According to Thomson Reuters, IPO proceeds in 2014 increased by 17 per cent to US\$11.4 billion. Nevertheless, issuers across all offering categories raised a total of US\$39.4 billion as a result of 248 deals in the fourth quarter, a 20 per cent decline in proceeds from 2013 levels.

Debt capital markets

The global debt capital markets experienced their strongest year since 2009, rebounding after the modest decline experienced during 2013. According to Thomson Reuters, global debt issuances totalled US\$5.7 trillion during 2014, a 2 per cent increase over the prior year. Issuers from the financial sector led the way, accounting for more than half of the global proceeds of the year. Also of note was the health-care sector, where the average issuance size of US\$1.1 billion led all sectors. The market for investment-grade corporate debt totalled US\$2.8 trillion globally in 2014, increasing by 7 per cent over the prior year. The market for high-yield corporate debt nearly matched the all-time record set in 2013, falling by less than 1 per cent to US\$441.5 billion on the year. The high-yield market had been on pace to surpass the previous year, but a sluggish fourth quarter, which saw only US\$54.8 billion in proceeds, left the year-end figure just short.

In the United States, overall static levels of activity in the debt capital markets were buoyed by unprecedented activity from investment grade issuers. According to Thomson Reuters, issuers raised a total of US\$2.6 trillion in the global debt capital markets, a modest 1 per cent drop-off since 2013. Of this total, investment grade issuers raised US\$1.1 trillion, representing a 9 per cent increase over 2013, and the highest total in over 30 years of record-keeping. Medtronic's US\$16.9 billion investment-grade issuance in December led the way, with Apple a distant second at US\$12 billion. The asset-backed securities market also had a strong year in the United States, with 585 transactions, marking the highest volume since the financial crisis. The US high-yield market was down notably from a year ago, roughly 6 per cent, but April's US\$10.9 billion offering by Numericable Group SA was the largest high-yield issuance on record.

In Europe, the Middle East and Africa, the ability to court foreign issuers with low borrowing costs led to growth in debt capital markets despite the harsh economic environment in the region. According to Thomson Reuters, proceeds from debt offerings totaled US\$4 trillion, a 15 per cent increase over 2013. This marked an all-time high for issuances among these regions, beating the previous mark set in 2007. Highlighting the strong year were the health-care, retail, and media and entertainment sectors, which grew relative to their 2013 totals by 117 per cent, 51 per cent and 32 per cent, respectively. Europe's high-yield corporate debt market showed notable growth, with high-yield proceeds up 21 per cent from 2013.

In Asia, debt capital markets had a strong year, highlighted by bond issuances from Alibaba Group and Bank of China, which raised US\$8.5 billion and US\$6.5 billion, respectively. According to Thomson Reuters, Asian issuances denominated in G3 currencies totalled US\$210.1 billion, an increase of 147 per cent, easily surpassing the previous record mark, which was set the prior year. Asian issuances denominated in local currencies totaled US\$457.0 billion, down a modest 3 per cent from 2013's record figure. Debt denominated in Chinese yuan totalled US\$245.6 billion, amounting to 54 per cent of the aggregate number for the region. The debt

markets in Australia bounced back slightly from a sharp decline in 2013, growing 5 per cent to US\$89.4 billion.

In Japan, European issuers helped drive the substantial increases in the Samurai bond markets. According to Thomson Reuters, issuances of Samurai bonds raised ¥2.5 trillion in proceeds in 2014, an increase of approximately 53 per cent from the prior year and the best year-end figure on record. Overall, the debt capital markets in Japan saw ¥18.3 trillion of yen-denominated issuances from 1,107 deals, a modest increase of 3 per cent compared with 2013.

Economic outlook – fiscal and monetary developments

The global economy remains mired in the fallout of the financial crisis of 2008–2009. While 2014 brought marked improvements in some developed economies, most notably the United States, others such as Japan and the eurozone continued to post underwhelming results. According to International Monetary Fund (IMF) figures, the net effect was a worldwide growth rate of 3.3 per cent, essentially flat compared with the rate for 2013. As we move through the rest of 2015, economies will face the continued impact of declines in oil prices and continued uncertainty surrounding the policy decisions of central banks. The IMF currently projects global growth at 3.5 to 3.7 per cent, while the World Bank projects a more modest 3 per cent.

After surpassing expectations in 2014, the outlook for the United States is positive for the coming year. As a major importer of oil, the US is expected to enjoy increased consumer activity and increased purchasing power, though these positive effects may be offset to some degree by the appreciation of the dollar relevant to other currencies and the corresponding headwind to exports. For the first time since 2008, benchmark borrowing rates are expected to increase in the United States in 2015, which would have the effect of attracting increased investment to American corporate issuers, but will raise borrowing costs for those companies. According to the *Financial Times*, the widely anticipated interest rate hike has created volatility in the debt markets in the first quarter of 2015, as investors are thought to be holding out for the higher rates. The IMF projects a growth rate of 3.6 per cent for the US economy in 2015, while the Federal Reserve's more conservative estimates project a range of 2.6 to 3.2 per cent.

In Europe, tepid growth is expected throughout the region through 2016, with continuing worries about deflation casting doubt on the prospect of speedy economic recovery. According to Bloomberg, gains in the UK owing to rising home prices and employment have not been shared by the eurozone. The unified euro structure will continue to prevent struggling nations in the eurozone from devaluing their currency and boosting their economies through increased exports. The IMF projects a growth rate of 2.7 per cent for the United Kingdom in 2015, while eurozone projections lag behind at 1.2 per cent.

Japan continues to pursue a variety of aggressive central bank policies to ward off deflation, but after raising consumption taxes in the second quarter of 2014, Japan's economy lost prior gains and fell into a technical recession the next quarter. Quantitative and qualitative easing policies are expected to continue into 2015, in hopes of generating inflation. The IMF currently projects a meagre growth rate of 0.6 per cent for Japan in 2015.

In emerging markets and developing economies, the decline in oil prices will have both a dramatic and disparate impact, as income effectively shifts from oil exporting nations to oil importing ones. The strength of the US economy may lead to increased exports and growth for many emerging markets, but outlooks have weakened in Russia, due to oil prices and geopolitical concerns, as well as in China, due to a decline in investment growth in the later part of 2014. The IMF currently projects growth to slow marginally among all emerging markets to 4.3 per cent in 2015 and then to rebound to 4.7 per cent in 2016.

Globally, the persistent wave of IPO activity that defined 2013 and 2014 is poised to continue through this year, as risk appetites should continue to lead investors towards the equity capital markets. Activity in the debt capital markets also should remain strong, but uncertainty regarding interest rate increases may result in some decline from the highs of the past few years. 2015 already has seen substantial capital raises associated with merger and acquisition activity, including Actavis' US\$4.1 billion common stock offering, US\$4.9 billion mandatorily convertible preferred stock offering (believed to be the biggest mandatory offering on record) and US\$21 billion debt offering, all in connection with its acquisition of Allergan. Regardless of the contemplated rate changes in the United States, issuers will still have the option of friendly, low-rate market environments in Europe and Japan, and 2015 has already seen several US issuers access the euro-denominated debt market, including Priceline's recent €1 billion notes offering and Flowserve's €500 million senior notes offering.

Overall, optimism abounds among market participants that global capital markets will continue on their upward trajectory through 2015, but the outlook for a broad-based and sustained global economic recovery remains uncertain. Worldwide, the road to recovery has been much longer and much more challenging than economists originally projected and, as a result, growth projections continue to be tempered by a healthy dose of scepticism.

Given these factors, as well as the global diversity of issuers seeking access to the capital markets, it remains important for issuers, underwriters and securities law practitioners alike to keep abreast of basic securities law issues and any developments in the world's major jurisdictions. In that respect, we believe that the information provided in this publication will serve as a valuable tool throughout the coming year.

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Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The key laws applicable to securities offerings in Austria are:

- the Capital Markets Act (KMG);
- the Stock Exchange Act (BörseG); and
- the Securities Supervision Act 2007 (WAG 2007).

The KMG implements Directive 2003/71/EC, the Prospectus Directive (PD), as amended, and is the primary source governing the offering of securities and 'investments' in Austria, including in particular the prospectus obligation (publication of an approved prospectus for public offers of securities or investments) as well as exemptions from the prospectus obligation. The BörseG constitutes the primary framework for the admission of securities to a regulated market in Austria as well as for ongoing obligations of issuers of listed equity and debt instruments.

In addition to the provisions of the KMG, BörseG and the WAG 2007, parts of other relevant laws and regulations have to be considered, including the Austrian Stock Corporation Act (AktG) as well as the Austrian Takeover Code in relation to takeover bids for listed companies.

The KMG, BörseG and WAG 2007 are primarily administered and enforced by the Austrian Financial Market Authority (FMA). If a listing of securities is sought, the prospectus, along with other documents, has to be filed with Wiener Börse AG (Vienna Stock Exchange – VSE) which operates the only two regulated markets in Austria: the Official Market and the Second Regulated Market. In addition, any prospectus for an offer of securities in Austria has to be submitted to Oesterreichische Kontrollbank AG (OeKB).

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

Unless a prospectus exemption applies, an issuer will be required to publish an approved prospectus whenever conducting a public offer of securities in Austria or filing a request for the admission to trading of securities on a regulated market in Austria, namely, on the Official Market or the Second Regulated Market.

Public offer

Public offering within the meaning of the KMG is considered as any communication to the general public in any form whatsoever that: contains adequate information on the terms and conditions of an offering (or an invitation to subscribe) for securities or an investment, and on the securities or investment themselves; and gives potential investors a basis on which to reach an informed decision on the purchase or subscription to securities or the investment. The Austrian definition also applies to the placement of securities or investments by financial intermediaries. The definition of a public offer in section 1, paragraph 1 No. 1 KMG covers the scope of the definition of the term 'offer of securities to the public' as provided by the PD. In addition, the Austrian definition of public offer extends

the scope of the PD definition not only to legally binding offerings but also to any invitations to subscribe.

According to the FMA, 'general public' means more than one person. Therefore, even an offer to two persons may be seen as a public offer which would, however, be exempt from the obligation to publish a prospectus (public offer to less than 150 persons – private placement exemption). In contrast, an offer to a well-defined and not general group of persons could be seen as non-public. By way of example, an offer to existing customers according to the address files, to members of a certain wealth class or shareholders in a company would usually constitute a public offer. Communication in the form of an offer or an invitation to subscribe covers not only legally binding offers but, in case of invitations to subscribe, also intentions to sell securities (or investments) by means of an invitation to subscribe.

If sufficient and adequate information about the offer or invitation is included in the communication or determinable on the basis of the communication this would usually enable an informed investment decision by the addressee. Communications imposed by law, activities in connection with market making or information in banking-specific news channels not open for the public (Reuters, Bloomberg, etc) would not qualify as public offers. Mere acts of stock trading, for example, the inclusion for trading on a stock exchange, usually also do not qualify as public offerings as long as no accompanying distribution measures (advertising, information on the website of the issuer, investor presentations, etc) are taken. Further, if no acts of marketing are taken and information is presented in a neutral way upon a request by a customer (without any prior marketing efforts), this may also not qualify as an offer or invitation.

In contrast, if information about offered securities was available free of charge over the internet, a public offer would usually be made. Further, all means of communications may constitute communication leading to a public offer (eg, an oral presentation of the management of an issuer, e-mails, website advertising or information, press releases, etc). Clear, precise and binding disclaimers on a website may prevent qualification as a public offer, but only provided their text does not differ from the factual possibility that the addressee of the information may accept the offer or subscribe for the securities.

Regulatory filings

A public offer of securities or investments in Austria triggers the obligation to publish a prospectus approved by the FMA or a respective competent authority of an EU member state, unless a prospectus exemption pursuant to the KMG applies. The prospectus has to be published at least one banking day prior to commencement of the offer or, if the securities shall be listed on a regulated market for the first time, six banking days before the offering commences. The issuer may decide between different ways to publish the prospectus, including on its website or by making it available at the issuer's seat. Usually, the prospectus is additionally provided to investors at the financial intermediaries' offices.

The approved prospectus has to be submitted to the OeKB as registration office. In addition, prior to commencement of the offer in Austria, the offeror is obliged to submit a notification to the New Issue Calendar maintained by the OeKB for statistical reasons.

Stock exchange filings

Applications for admission to listing of securities or of an issue programme on the Official Market or on the Second Regulated Market must be made

in writing by the issuer and must be signed by an exchange member of the VSE. The issuer must state, among other things, the type and denomination of the securities as well as the total amount of the issue to be admitted by stating the nominal value or in the case of no-par value securities, the expected market value and the number of securities. In case of an application for admission to listing of an issue programme, the total amount of the maximum issue volume stated in the prospectus shall refer to all potential non-dividend paying securities. The filing with the VSE must be accompanied by, inter alia, the approved prospectus, an excerpt from the companies' register relating to the issuer not older than four weeks and proof of any other legal requirements for the issue of securities (eg, corporate resolutions).

The VSE also operates the Third Market, an MTF (Multilateral Trading Facility), which is not a regulated market within the meaning of Directive 2004/39/EC (MiFID). Securities are usually admitted to trading on the Third Market if securities need to be listed but the extensive governance and disclosure framework applicable to the Official Market and Second Regulated Market should be avoided. The Third Market is governed by the Rules for the Operation of the Third Market of the VSE. Most of the provisions and requirements set forth in the BörseG do not apply to financial instruments traded on the Third Market.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

In order to commence a public offer, a prospectus must be drawn up in accordance with the KMG and Commission Regulation (EC) No. 809/2004, as amended (Prospectus Regulation), and filed with the FMA for approval. Pursuant to section 8a KMG, the FMA is responsible for the examination of the prospectus in respect of its completeness, coherence and comprehensibility. The accuracy of the information contained in a prospectus, however, is not subject to the FMA's review.

The FMA must notify the issuer, the offeror or the entity asking for admission to trading on a regulated market, as the case may be, of its decision regarding the approval of the prospectus within 10 banking days of the filing of the prospectus. An extended review period of 20 banking days applies if the issuer's securities have not yet been admitted to trading on a regulated market. Usually, the first version submitted to the FMA is not complete and still includes placeholders for missing parts and information. The FMA provides comments on the submitted prospectus at the end of the review period. In such case, the issuer adds further missing information, addresses the FMA's comments and re-submits an amended prospectus version to the FMA. After that, the FMA again reverts within the respective review period. The review period of 10 or 20 banking days applies to each prospectus version submitted. Accordingly, it is common practice to have several review rounds for debt prospectuses and even more for prospectuses for equity offerings.

Once approved, the prospectus must be published as soon as practicable and at least one or six banking days prior to the commencement of the offering (see above). The publication may, inter alia, be undertaken on the issuer's website, in the Official Gazette (*Amtsblatt*) of *Wiener Zeitung* or by providing prospective investors with copies free of charge at the issuer's registered office or at the offices of financial intermediaries.

Subsequent to the approval, the prospectus must also be provided to OeKB as registration office (*Meldestelle*). The issuer must notify the New Issue Calendar maintained by OeKB for statistical purposes prior to commencement of the offering.

Any offering of securities or investments to the public without approval by the FMA or any other competent authority of an EU member state (including the passporting of the approved prospectus into Austria) or without publication of the prospectus in accordance with the KMG is subject to criminal penalties under Austrian criminal law of up to two years of imprisonment; moreover it may give rise to civil liability.

Each important new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the end of the public offer or, as the case may be, the time when trading of the securities on a regulated market begins, must be published in a supplement to the prospectus. The supplement must also be approved by the FMA or the respective EU member state authority having approved the prospectus and needs to be published in the same way as the original prospectus.

An application to list the securities to the Official Market, the Second Official Market or to include the securities in trading on the Third Market has to be filed with VSE and include in particular the approved prospectus and ancillary documents (see question 2). The issuer and the VSE usually agree on the date of the public listing. Where the securities are offered publicly prior to their listing, the listing may only commence one day after expiration of the underwriting period for the securities at the earliest. The VSE is obliged to reach a decision on applications for admission of securities within 10 weeks after submission.

In practice, issuers usually file a preliminary prospectus without the final price and the final volume of securities offered as this information can be provided only after completion of the book-building process. The book-building process starts with investors submitting bids for purchasing the securities at prices that must be within a pre-defined offer price range or maximum limit. At the same time, marketing activities are usually undertaken by the issuer and the underwriters (eg, press conferences, road shows or advertising). The offer price is usually determined after the book-building phase. Finally, the issuer is obliged to file and publish a supplement to the preliminary prospectus including the final offer price, the gross proceeds as well as the net proceeds of the issues.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Commencement of public offering

Advertising measures that refer to a public offering of securities or investments or to the admission to trading on a regulated market must not be approved by the FMA or any other Austrian regulatory body; however, marketing must comply with the principles set forth in section 4 KMG. Any pre-marketing of a public offering or any advertising during the offering period must thus be monitored carefully and assessed on a case-by-case basis. In practice, extensive publicity guidelines are particularly agreed upon by the issuer and the underwriters of equity transactions. Such publicity guidelines are intended to ensure that each communication by the issuer is previously approved by the transaction parties, including all marketing communications as well as mandatorily published information (ad hoc announcements, financial reporting, etc).

All advertising must in any case indicate that a prospectus including any amended or supplemented information has been published in line with Austrian law or will be published. It must also indicate where prospective investors are able to obtain the prospectus and any supplements thereto. Information stated in the marketing material must be consistent with the information contained in the prospectus or in the supplements or with the information mandatorily required to be published in the prospectus, if the prospectus is published afterwards. Advertisements must be clearly recognisable as such and the information contained in an advertisement must not be inaccurate or misleading. Advertisements only emphasising the merits of securities without adequately reflecting the associated risks are likely to be considered as misleading.

It is common practice that, prior to a public offering, research reports on the issuer are published by the underwriters' research analysts. The publication of such research reports is only permissible if the reports are not targeted at influencing investors to invest in the securities of the issuer, as any such influence could already constitute a public offering triggering the prospectus requirements.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

Secondary public offerings are subject to prospectus requirements according to the KMG like primary offerings. Therefore, it has to be assessed whether a public offer takes place and whether any prospectus exemption applies, especially in the case of a later resale of securities by financial intermediaries. No further prospectus publication is required if a valid listing prospectus exists that is up to date and the issuer or the person responsible for the preparation of the listing prospectus has agreed to its use in a written agreement. Any subsequent resale of securities or investments, which were previously the subject of exemptions from the obligation to publish a prospectus, shall be regarded as a separate offer. The placement of securities or investments through financial intermediaries shall be subject to the publication of a prospectus, if none of the conditions are met for the final placement and a public offering exists. The issue of securities is only privileged if a prospectus has been filed within the preceding

12 months regarding the same issuer. The original prospectus can be used for any later offering of the same issuer. Any changes to the material information must be included in a supplement to the original prospectus (see question 3). Liability of sellers in secondary offerings may occur if the seller trades on information not available to the public or has relied on a private placement exemption applicable to institutional investors and resells the securities to the public without publishing a prospectus in respect of such securities. The scope of the selling shareholder's liability follows the general civil law liability rules.

6 What is the typical settlement process for sales of securities in a public offering?

Sales of securities in a public offering are usually settled through a clearing system. The settlement process, whereby securities are delivered, usually against payment, is subject to the rules and procedures of the respective clearing system. In most issues, individual certification of the security is excluded. Therefore, global certificates are deposited with a securities clearing bank (eg, OeKB). In certain cases, temporary and permanent global notes are used.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

Private placements may be exempt from the obligation to publish a prospectus. Pursuant to section 3, paragraph 1 No. 9 KMG, an offer addressed to fewer than 150 natural or legal persons per EEA member state not being qualified investors is considered as a prospectus exempt 'private placement'.

In addition, there are several other prospectus exemptions excluding certain types of offers from the obligation to publish a prospectus. Pursuant to section 3 para 1 no 11 KMG, the publication of a prospectus is not required if the securities are offered exclusively to qualified investors which includes credit institutions, investment firms, insurance companies, investment funds, pension funds, the government, certain small and medium-sized enterprises and also certain natural persons applying for a classification as qualified investors. Other relevant prospectus exemptions include security offerings addressed to investors subject to a minimum investment amount of €100,000 per investor as well as offerings of securities with a minimum denomination of €100,000, offerings in a total amount of less than €250,000 during a period of 12 months, and certain offerings by preferred issuers or security offerings to employees.

To rely upon one or more prospectus exemptions, no specific formalities must be followed. However, anyone having the intention of offering securities for the first time is obliged to notify the New Issue Calendar which provides an insight into the extent and manner of the expected capital market utilisation. The New Issue Calendar is maintained by OeKB for statistical purposes (see question 2). The issuer must refer to a specific exemption from the obligation to publish a prospectus and expressly indicate the facts pertaining to this exemption.

Private placement memoranda or promotional material on the offering that are circulated to potential investors usually include appropriate disclaimers stating that investors are exclusively targeted on a private placement basis and that the document is not a securities prospectus approved according to the PD or Austrian law. Nevertheless, information provided shall not be inaccurate or misleading and shall not deviate from other information provided to potential investors in order to avoid civil law liability.

8 What information must be made available to potential investors in connection with a private placing of securities?

Austrian law does not impose any mandatory requirements for information to be made available to potential investors in a private placement as long as no listing of securities on a regulated market in Austria (ie, on the Official Market or Second Regulated Market of the VSE) takes place. In the absence of a mandatory requirement, potential investors will, nevertheless, require certain information about the issuer and the offered securities to decide on an investment in the securities. Such information is commonly provided in a voluntarily supplied information memorandum providing information and certain standard disclaimers. If the offeror provides potential investors with such information, the information should in any case be understandable, accurate, true and not misleading in order to avoid any claims

by potential investors resulting from culpa in contrahendo. Further, care should be taken that no material information is missing in the information memorandum and that potential investors are treated equally.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

There are no statutory restrictions on the transferability of debt or equity securities acquired in a private placement. Such securities can be transferred pursuant to the rules on transferability of the relevant security.

If the securities shall be listed on a regulated market in Austria, a prospectus exemption provided for in the BörseG has to be relied upon. As soon as the securities are admitted to the regulated market they can be traded in accordance with applicable laws and regulations. If no listing is sought, any transfer restrictions provided for in the issuer's articles of association (registered shares) have to be assessed.

As a re-sale of securities acquired under the private placement exemption by way of a public offering may trigger a prospectus obligation pursuant to the KMG, unless a prospectus exemption can be relied upon, respective selling and transfer restrictions and corresponding investor representations for re-sales of such securities are typically included in the information or private placement memorandum.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

Prospectus law is harmonised throughout the EU and securities offerings thus are subject to and governed by rather similar provisions. A prospectus approved by a competent authority in one member state of the EU may be used for an offering in another by means of notification of the approving authority. Only minor dissimilarities in securities offerings may exist due to different procedural approaches of different competent authorities. Based on our experience, the prospectus obligation not only for securities but also for 'investments' pursuant to the KMG is different from concepts in some other EU member states. When offering securities in non-EU jurisdictions, foreign securities law must in any case be taken into account and applied.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings fall under the scope of application of the KMG and BörseG. Issuers and offerors intending a public offer or an admission to trading of such securities must therefore assess whether a prospectus has to be published or whether they may rely upon a prospectus exemption. Issuers and offerors must evaluate to the same extent if the securities used for the substitution or originated as a result of the conversion require a prospectus. In relation to the said securities, several prospectus exemptions set forth in section 3, paragraph 1 KMG and section 75 paragraph 1 BörseG should be considered. In this regard, issuers and offerors have to check whether the prospectus exemptions of the KMG for public offerings and those set forth in the BörseG in relation to listing prospectus exemptions deviate. If a transaction involves both a public offer and the admission of securities to a regulated market, both exemptions are required in order to avoid the obligation to publish an approved prospectus. This has to be assessed on a case-by-case basis.

Shares issued in substitution for shares of the same class already issued, if the issuance of such new shares does not involve any increase in the issued capital, as well as securities offered in connection with a takeover by means of an exchange offer, or – under certain circumstances – offered or allocated on the occasion of a merger or split up, are exempted from the obligation to publish a prospectus. Further, the obligation to publish a listing prospectus does not apply to shares that account for, over a period of 12 months, less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated market (section 75 paragraph 1 No. 1 BörseG). Therefore, most minor capital increases that are privately placed do not require the drawing up, approval and publication of a prospectus. A listing prospectus is also not required for shares

issued within the scope of a conversion or exchange for other securities or as a consequence of the exercise of rights attached to other securities, as long as the shares belong to the same category as the shares already admitted to trading on the same regulated market (section 75 paragraph 1 No. 7 BörseG).

In addition to the KMG and BörseG, Austrian corporate law provisions may be relevant as well. By way of example, pursuant to the AktG, the issue of convertible bonds requires a resolution of the shareholders' meeting adopted by at least 75 per cent of the share capital represented, unless a different majority is set in the articles of association.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

Underwriting agreements for Austrian transactions usually follow international capital market practice and include the (joint) lead managers acting also for the other underwriters, the issuer and the selling shareholders, if any. Most underwritings are best effort underwritings including book-building procedures (in most cases for about two weeks). In a book-building the price for and the final amount of securities offered is determined on the basis of investors' bids before the underwriting takes place. After the book-building process, the final amount of securities and their price is agreed between the underwriters and the issuer, leading to an underwriting commitment of the underwriters.

In contrast, in a few recent Austrian transactions so-called 'hard underwritings' were applied. In this scenario, the underwriters – subject to certain requirements – provide a firm commitment for a portion of securities offered, even if the hard-underwritten amount of shares eventually cannot be sold to investors in the offering. In general, nevertheless, best effort underwritings are still market practice and frequently used for most transactions.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

Indemnities are typically provided for losses, claims, damages or liabilities which arise out of or in connection with any breach of the issuer's representations and warranties. Further, the issuer (or a selling shareholder, if applicable) frequently indemnifies the underwriters against claims in relation to any untrue statement of material facts contained in the prospectus or any omission of a fact required to be stated therein.

Underwriting agreements usually include contractual rights of termination, if one or more of the conditions set out in the agreement is not satisfied or cannot be satisfied as well as in the event of a material adverse change (such term is frequently defined and constitutes a nomenclature). Material adverse change events include events of force majeure, significant market disruptions and serious deteriorations in the issuer's financial condition or operations. Underwriters usually receive a portion of the respective gross proceeds from the offering as aggregate commission. Success fees are negotiable and in most cases are paid by the issuer (or the selling shareholder, if applicable) at their full discretion.

Over-allotment options are typically agreed upon where the underwriters undertake stabilisation activities in accordance with EU regulation No. 2003/2273/EC.

14 What additional regulations apply to underwriting arrangements?

Usually, equity offerings require the overall amount of the underwriting commission and the placing commission to be disclosed in the prospectus.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

Upon listing on the Official Market or the Second Regulated Market of the VSE, which are both regulated markets under Directive 2004/39/EC (MiFID), issuers become subject to ongoing reporting requirements set forth in the BörseG. Provisions on the reporting obligations are harmonised as a result of the implementation of Directive 2004/109/EC (Transparency Directive), including major shareholding disclosure, ad hoc disclosure and mandatory publications of financial information (see question 16).

16 What information is a reporting company required to make available to the public?

Issuers whose debt or equity instruments are admitted to trading on a regulated market are essentially subject to ad hoc disclosure requirements, financial reporting and the notification of any substantial changes in the shareholding of the issuers. With minor modifications, these requirements also apply to foreign companies listed on the VSE if Austria is the home member state (as defined in the Transparency Directive). Austria is the home member state if the issuer has its corporate seat in Austria (and the denomination of the debt securities is less than €1,000) or has chosen Austria as its home member state from among the member states in which the issuer has its registered office and those member states that have admitted its securities to trading on a regulated market on their territory or, in certain cases, if the issuer has its corporate seat in a non-EU country.

Ad hoc disclosure

Pursuant to section 48d paragraph 1 BörseG, issuers of financial instruments possessing inside information relating directly to them shall make such information immediately available to the public. Inside information is any information of a precise nature which has not been made public and relates directly or indirectly to one or more issuers of financial instruments or to one or more financial instruments, which, if disclosed to the public, could have a significant effect on the price of those financial instruments or their derivatives because said information would serve an informed investor as a basis on which to reach investment decisions (see question 17 below for additional information). Inside information has to be disclosed ad hoc with the intention of an EU-wide distribution via certain channels, including Reuters, Bloomberg and Dow Jones Newswire. Any major changes with respect to inside information, which has already been disclosed, must be disseminated immediately after any such change takes place.

In certain cases, an issuer possessing inside information is entitled to postpone the ad-hoc disclosure in order to protect its justified interests. In such case, the issuer is obliged to ensure confidentiality and to inform the FMA about the fact that inside information is available and currently not disclosed, the text of the postponed ad-hoc announcement as well as the reasons and the ways to ensure confidentiality. The Austrian procedure differs from practice in other EU member states (eg, Germany) where the regulator is not notified at first that inside information is available to the issuer and its publication is postponed. The Austrian procedure will, nevertheless, change owing to the MAR (see 'Update and trends').

Financial reporting

Issuers of debt and equity securities must disclose annual financial statements no later than four months after the close of the financial year and half-year reports no later than two months after the close of the reporting period. Moreover, issuers whose shares are admitted to trading on a regulated market must additionally publish quarterly financial statements for the first and third quarters.

Disclosure of major shareholdings

In terms of major shareholding disclosure, such obligation applies to all shares carrying voting rights and to financial instruments provided that they may result in an acquisition of shares carrying voting rights (eg, options, ADRs, exchangeable bonds, etc). Any acquisition or disposal of shares carrying voting rights of an issuer with Austria being the home member state, whose shares are admitted to trading on a regulated market, triggers disclosure obligations if certain thresholds for major holdings are affected. The reporting obligation arises as soon as the proportion of voting rights reaches, exceeds or falls below a threshold of 4, 5, 10, 15, 20, 25, 30, 35, 40, 45, 50, 75 or 90 per cent in the course of acquisition or disposal transactions. Issuers may also provide for a lower first threshold of 3 per cent of voting rights in their articles of association.

Pursuant to section 92 BörseG, the disclosure obligation also extends to persons who are authorised to exercise voting rights under a shareholders agreement or a similar arrangement, under shares which have been given to them as collateral if they may exercise the voting rights without express instructions, under other arrangements where the person may exercise the voting rights without being the owner of such shares or in case such voting rights attach to shares of other parties acting in concert with the addressee of the disclosure obligation.

The disclosure obligation is based on a dual-stage mechanism. The shareholder must inform the FMA, the VSE and the issuer about the voting

rights held within two trading days after the trigger event. As soon as the issuer receives the notification of the shareholder pursuant to section 92a paragraph 1 BörseG, it must publish all information contained therein no later than after two trading days.

In addition to the disclosure requirements set forth in the BörseG, issuers whose financial instruments are listed in particular market segments of the VSE are subject to disclosure requirements under private law. These disclosure requirements are based on a contractual relationship between the issuer and the VSE (eg, the agreement on the inclusion in the Prime Market, the highest market segment of the VSE, with reference to the VSE's Prime Market Rules). The Prime Market Rules go beyond reporting requirements of the BörseG and set additional standards.

Additional obligations

According to the Prime Market Rules, issuers must commit to comply with the rules of the Austrian Code of Corporate Governance. Issuers that are subject to the company law of another EU member state or EEA member state and are admitted to the Prime Market must comply with a Code of Corporate Governance recognised in the respective economic area. Issuers must include a declaration of commitment in the annual financial report or in a corporate governance statement which shall be published on the company's website.

English language listing prospectuses used for admission to the prime market require a German language translation of the summary for listing purposes. The issuer must make the German language summary available together with the listing prospectus on its website and ensure it stays available to the public for at least one year after the end of the offer period.

Moreover, issuers must prepare a corporate action timetable two months before the beginning of the respective business year in German and English and keep it up to date and available to the public on their website. The timetable must contain at least the following dates:

- publication of the financial results for the year;
- annual general meeting;
- dividend ex day;
- dividend pay-out day; and
- publication of the half-yearly financial information and the quarterly results, if published.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The BörseG aims to prevent insider dealing and market manipulations as a result of the implementation of EU Directive 2003/6/EC (Market Abuse Directive). The FMA has extensive investigative and supervisory powers in order to protect the financial markets and to prevent the abuse of inside information and market manipulations.

Misuse of inside information

Inside information is defined as any information of a precise nature which has not been made public and relates directly or indirectly to one or more issuers of financial instruments or to one or more financial instruments, which, if disclosed to the public, could have a significant effect on the price of those financial instruments or their derivatives because said information would serve an informed investor as a basis to reach investment decisions. Information is deemed to be precise if it covers a number of existing facts and events that could occur in the future with a sufficient degree of likelihood. In particular the question whether future events constitute inside information is difficult to assess and subject to several cases where the FMA took a rather strict view on the question of when the inside information emerged. This, in particular, also applies to cases consisting of several interim events which may already constitute inside information. By way of example, in an M&A scenario the decision of the core shareholders to divest their shareholding may already constitute an interim event to be disclosed by means of an ad hoc announcement (see question 16) as it qualifies as inside information. Eventually, the agreement with a purchaser would also constitute inside information. In such case, not only the sale but also the interim event would be subject to the prohibition to misuse inside information as well as the issuer's ad hoc obligation.

According to section 48b para 1 BörseG, the use of inside information by an insider with the intention to gain a pecuniary benefit is a criminal offence. An insider can be any person who has access to inside information as member of administrative, managing or supervisory bodies of the issuer

or owing to his or her profession, occupation, responsibilities or shareholding. The use of the inside information for the insider him or herself or a third party by buying, selling, offering or recommending financial instruments affected by inside information to third parties or submitting, modifying, withdrawing or offering a bid to third parties or providing access to such information to third parties without a respective requirement is subject to a criminal penalty of up to three years of imprisonment. If the financial advantage achieved by such insider transaction exceeds €50,000 the criminal penalty ranges between six months and five years of imprisonment. Anyone who is not an insider but uses inside information received or otherwise obtained is subject to a criminal penalty of up to one year of imprisonment; if the financial advantage achieved in such a case exceeds €50,000 the penalty is up to three years of imprisonment. Even the use of inside information without the intention to gain a pecuniary benefit is subject to a penalty of up to six months of imprisonment.

Market manipulation

Market manipulation is defined as transactions or trade orders which may give false or misleading signals for supply of or demand for the quoted value of financial instruments or which may influence the price of one or more financial instruments by one or more parties collaborating with the intent to drive prices of said financial instruments to an abnormal or artificial price value. Market manipulation also includes transactions or trade orders which make use of fictitious devices or any other form of deception as well as dissemination of information that gives false or misleading signals in relation to financial instruments. This particularly includes distribution of information through the media and the internet (eg, spreading of rumours or of false or misleading news). Issuers publishing information should therefore carefully assess whether information to be published may have a misleading meaning. Among others, transactions known as 'marking the close', matched orders of financial instruments, wash sales or scalping practices are considered to be prohibited acts of market manipulation.

Suspected transactions may be justified if the trader has legitimate reasons for his or her acts and the transactions or orders comply with the accepted market practice. Acts of market manipulation are subject to administrative fines by the FMA of up to €150,000 per incident, unless the market manipulation constitutes a criminal offence pursuant to the Austrian Penal Act, for example, fraud. In this case, the offence falls under the jurisdiction of Austrian criminal courts.

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

Price stabilisation in connection with an offering of securities, for example, by means of over-allotment or the exercise of 'greenshoe' options, may contravene the restrictions on market manipulation set forth in the BörseG. Nevertheless, pursuant to section 48d paragraph 6 BörseG, price stabilisation is permitted provided that such stabilisation measures are carried out in accordance with Commission Regulation (EC) No. 2273/2003 (Safe Harbour Regulation). To benefit from the exemption under the Safe Harbour Regulation, the following key obligations have to be complied with:

- Stabilisation measures are only permitted during a stabilisation period of 30 days from the commencement of trading of shares after an IPO or the date of allotment of shares.
- Stabilisation transactions related to an equity offering must not be executed above the offering price of the shares.
- The greenshoe option may not amount to more than 15 per cent of the original offer volume. Further, a position resulting from the exercise of an over-allotment facility by an investment firm or credit institution which is not covered by the greenshoe option may not exceed 5 per cent of the original offer volume.
- Certain ex-ante and ex-post disclosure and reporting conditions have to be fulfilled. Before the opening of the offer period of the relevant securities, issuers, offerors or entities undertaking stabilisation have to adequately publicly disclose:
 - the fact that stabilisation may be undertaken;
 - the fact that stabilisation transactions are aimed to support the market price of the relevant securities;
 - the beginning and end of the period during which stabilisation may occur;

Update and trends

MAR & CSMAD

On 12 June 2014, Regulation No. 596/2014 on market abuse (MAR) and Directive 2014/57/EU on criminal sanctions for market abuse (CSMAD, and together with MAR, MAD II) were published in the Official Journal of the EU. Most provisions of MAD II shall apply from 3 July 2016.

MAR provides for a significantly extended scope of application, being applicable also to market abuse occurring across both commodity and related derivative markets. MAR provides for updated harmonised prohibition of insider trading, improper disclosure of inside information and market manipulation. Further, suspicious unexecuted orders and suspicious OTC transactions are subject to reporting obligations and market participants must have a system for detecting suspicious transactions. In reaction to the LIBOR-rigging scandal, MAR also prohibits the manipulation of benchmarks. Subject to adequate and effective safeguards, regulators are equipped with supervisory powers to investigate possible cases of market abuse and an EU member state must procure that whistle-blowing of actual or potential breaches to competent authorities is possible. Finally, any attempted market abuse will lead to sanctions. Notably, MAR will be fully extra-territorial.

Following the financial crisis in 2008, the European Commission identified various problems in the Market Abuse Directive, making a review necessary; in particular, the Commission considers minimum rules on criminal offences and on criminal sanctions for market abuse essential for ensuring the effectiveness of the EU policy on market integrity. CSMAD defines the specific offences: insider dealing, recommending or inducing another person to engage in insider dealing (article 3), unlawful disclosure of inside information (article 4) and market manipulation (article 5). Those offences constitute criminal offences, at least in serious cases and when committed intentionally, and EU member states are required to put in place effective, proportionate and dissuasive criminal penalties. In Austria, this will lead to an amendment of the market manipulation prohibition. Any offence will then constitute a criminal offence and not just an administrative offence being subject to fines. Also, inciting, aiding and abetting an offence, as well as attempting insider dealing or market manipulation

will be punished. Finally, legal persons can also be held liable, if the offence was committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, or if the lack of supervision or control by such person made an offence for the benefit of the legal person by a person under its authority possible.

Capital Markets Union

After announcing an investment offensive for Europe in November 2014, the Commission published its Green Paper on Building a Capital Markets Union (COM(2015) 63) on 18 February 2015, accompanied by consultation documents on the review of the PD and on an EU framework for simple, transparent and standardised securitisation.

The main objectives of the Capital Markets Union (CMU) include: providing more diverse sources of capital to business, causing markets to work more efficiently, and creating additional investment opportunities for investors and savers, resulting in enhanced growth and creation of jobs. The CMU is intended to provide an environment where small and medium-sized enterprises (SMEs) can easily raise financing under aligned legal and supervisory rules and converged costs among EU member states.

The CMU is based on various key principles, for example, creating a real single market for capital for all EU member states, building on the firm foundations of financial stability and helping to attract investment from all over the world. In the first step, certain short-term priority actions are addressed, in particular reviewing the current prospectus regime to improve its effectiveness and lower burdens to accessing capital markets, encouraging high-quality securitisation, improving the credit information on SMEs to widen their investor base, supporting the market-led approach of developing a European private placement market, and facilitating long-term financing by way of long-term investment funds. The Commission will adopt an action plan later in 2015 and aims to put in place a regulated and fully functioning CMU by 2019.

- the existence and maximum size of any over-allotment facility or greenshoe option; and
- the exercise period and any conditions for the use of such options.

Issuers, offerors or entities undertaking stabilisation have to notify details of all stabilisation transactions to the competent authority of the relevant market no later than the end of the seventh daily market session following the date of execution of such transaction. Within one week of the end of the stabilisation period, issuers, offerors or entities undertaking stabilisation have to adequately publicly disclose: whether or not stabilisation was undertaken; the date at which stabilisation started; the date at which stabilisation last occurred; and the price range within which stabilisation was carried out, for each of the dates during which stabilisation transactions were carried out.

When conducting stabilisation measures and exercising an over-allotment facility or green shoe option outside the permitted frame of the

Safe Harbour Regulation, although the European Securities and Markets Authority has indicated that stabilisation will not necessarily be regarded as abusive solely because it falls outside the safe harbour, a risk remains that the FMA considers such measures as market manipulation, which may lead to criminal sanctions or administrative fines of up to €150,000.

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

Section 11 KMG imposes liability upon the issuer and other entities associated with an offering of securities, including the prospectus-reviewing entity, if any, the VSE, brokers and the auditor for the damages that result from the lack of accuracy and completeness of the prospectus, and for any misstatement or material omission of information that should be included in the prospectus. This specific provision does not affect the general civil liability rules, for example, if no prospectus has been published. In this

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respect, investors may also be entitled to claim damages caused by any other person involved in securities transactions if such person is responsible for the investors' damages due to any wilful or negligent behaviour in connection with the transaction. This may particularly include the issuer's board members. These two options are the most important instruments for seeking remedies in connection with securities transactions.

A distinction has to be made in respect of the range of liability. Brokers may only be liable for wrongful intent or gross negligence; the auditor only in an unlikely case of having knowledge that the financial statement would serve as a basis for a prospectus and of any misstatement of the prospectus. Investor damage claims under section 11, paragraph 7 KMG have a limitation period of 10 years from expiry of the public offer, whereas general civil law provides for a limitation period of three years from the date of investor's knowledge of the damage and the person responsible for such damage.

Section 5 KMG with reference to section 1, paragraph 1 No. 2 Austrian Consumer Protection Act states that consumer investors are entitled to withdraw from contracts regarding securities purchased if no prospectus or, if applicable, no supplement for a prospectus has been duly published as required in case of a public offering of securities.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

The KMG and the BörseG each contain provisions in respect of criminal relevance for securities violations. Conducting a public offering of securities without publishing an approved prospectus is considered a criminal offence just as is trading on, recommending on or providing access to inside information. After the effectiveness of MAR, market manipulation enforcement actions by the FMA and civil litigation are the main mechanisms for seeking remedies and sanctions for improper securities activities. FMA is empowered to initiate administrative proceedings in a wide range of matters, in particular the following types of legal actions:

- imposing administrative fines up to € 150,000;
- investigation rights in respect of suspicious trading in financial instruments;
- examination order of a revocation of admission to the VSE according to BörseG; and
- the publication of violations.

Bermuda

Brian Holdipp and Jeremy Leese

MJM Limited

Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

Given the size and nature of the Bermuda securities market, Bermuda does not have an overarching statutory framework governing this area as do other jurisdictions. The statutes and regulations most relevant to securities offerings in Bermuda are the Companies Act 1981 (the Companies Act) and the Listing Regulations of the Bermuda Stock Exchange (the Listing Regulations).

The Listing Regulations, which reflect accepted international standards, apply to all proposed issuers (local and international) and prescribe the requirements for obtaining and maintaining a listing of securities on the Bermuda Stock Exchange (the BSX). The BSX is the world's largest offshore, fully electronic securities market offering a full range of listing and trading opportunities for international and domestic issuers of equity, debt, depository receipts, insurance securitisation and derivative warrants. The Listing Regulations have been made by the BSX pursuant to the authority vested in it under The Bermuda Stock Exchange Company Act 1992 and are interpreted, administered and enforced by the BSX.

The principal regulatory body in Bermuda is the Bermuda Monetary Authority (the BMA). The BMA has supervisory jurisdiction over the BSX. However, the BMA does not have a general supervisory jurisdiction over the conduct of securities offerings.

Where a Bermuda company applies for its shares to be listed on a stock exchange outside of Bermuda, such a company must abide by the rules and regulations of that stock exchange.

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

The offering of shares to the public is regulated by the Companies Act 1981, specifically, in Part III and section 25 thereof. For the purposes of the prospectus provisions, the term 'shares' includes:

- debentures, debenture stock, bonds and any other securities of a company whether or not secured;
- units or sub-units of a unit trust; and
- warrants to be issued by the company conferring an option to acquire shares of such company.

There is a general prohibition contained in section 26 (1) of the Companies Act on a company offering shares to the public unless prior to such an offer it publishes in writing a prospectus, and prior to, or as soon as reasonably practicable after the publication of such a prospectus, it is filed with the Registrar of Companies.

Exceptions to this requirement arise where:

- the shares are listed on an appointed stock exchange, or an application has been made for the shares to be so listed, and the rules of the exchange do not require the company to publish and file a prospectus at such time or in such circumstances;
- the company is subject to the regulations of a competent regulatory authority and such rules or regulations do not require the company to publish and file a prospectus at such time (except where such

exemption is given by reason of the offer being made only to persons who are resident outside the jurisdiction of the authority); or

- an appointed stock exchange or any competent regulatory authority has received or otherwise accepted a prospectus or other document in connection with the offer of shares to the public.

The information required to be in or attached to the prospectus is as follows:

- the names, descriptions and addresses of the promoters, officers or proposed officers;
- the business or proposed business of the company;
- the minimum subscription, which, in the opinion of the promoters, directors or provisional directors, must be raised by the issue;
- the rights or restrictions attaching the shares that are being offered;
- all commissions payable on the sale of shares referred to in the prospectus and the net amount receivable by the company in respect of these sales;
- the name and address of any person who owns five per cent or more of the shares of the company (applicable in the case of local companies only);
- any shareholding in the company of an officer of the company;
- a report by the auditors of the company prepared in such a manner and containing such information and copies of such documents as shall be required by rules made under the Companies Act; and
- the date and time of the opening and closing of subscription lists.

Where a company is not required by the Companies Act to publish and file a prospectus, the prospectus contents requirements do not apply.

At present, there are over 40 'appointed stock exchanges' for the purposes of the Companies Act. Examples are the ASX Limited, the BSX, the Stock Exchange of Hong Kong Ltd, the London Stock Exchange, the New York Stock Exchange Inc and the Sao Paulo Stock Exchange. Competent regulatory authorities include, for example, the Australian Securities and Investment Commission, the BMA, the Securities and Exchange Commission of Brazil, the Financial Services Authority, the Hong Kong Securities and Futures Commission and the United States Securities and Exchange Commission.

In addition, it is possible to apply to the Minister of Economic Development to seek direction that part III (or any provision of part III) and section 25 of the Companies Act shall not apply to a proposed offer of shares. The direction would typically be issued if the applicant provides substantial justification for receiving such, for example, in circumstances where the offer is being made exclusively to sophisticated investors such as qualified institutional buyers as defined in rule 144A under the United States Securities Act of 1933 (the Securities Act) or institutional accredited investors within the meaning of rule 501 (a) (1), (2) or (7) of the Securities Act or any person who is an authorised person within the meaning of the United Kingdom Financial Services and Markets Act 2000.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

A company that is offering its shares to the public must publish a prospectus prior to such an offer and prior to, or as soon as reasonably practicable after the publication of such a prospectus, file it with the Registrar of

Companies, unless otherwise exempt under the Companies Act from the requirement to do so. There is no approval process involved in connection with the filing of a prospectus.

Where an issuer (local and international) seeks to obtain a listing of its equity or debt securities on the BSX, it must comply with the application procedures in the relevant Listing Regulations. New applicants must be sponsored by a BSX-approved trading member or listing sponsor. In addition to ensuring that the issuer receives fair and impartial guidance and advice and acting as the primary channel of communication with the BSX during the application process, the listing sponsor must ensure that the formal application letter, various supporting documents, prospectus and appropriate fees are duly lodged with the BSX.

The nature and extent of the supporting documents differs, based on the type of issuer and security that is being sought to be listed and includes, among other things, certified copies of the issuer's incorporation certificate and constitutional documents, audited annual report and accounts for each year up to three years preceding the application (depending on the type of security that is being sought to be listed), all board resolutions and shareholder resolutions (if necessary) authorising the securities, a copy of the document of title to be used in respect of the securities to be listed or a copy of the trust deed or other document securing or constituting the debt securities. In the case of a secondary listing, one of the supporting documents must be evidence that the issuer is listed on another stock exchange recognised for this purpose by the BSX.

A draft prospectus, including the required financial information and containing such particulars and information as is necessary to enable an investor to make an informed assessment of the issuer and the rights attaching to the securities, must be submitted in sufficient time for the BSX to review it before the proposed publication date. The prospectus may not be dated and issued in final form until the BSX has confirmed that it has no further comments and it must then be distributed to the public. The BSX undertakes to provide a response within seven days from the date of submission of the complete listing application. Usually, it takes about three weeks to complete the entire approval process from the date of submission of the complete listing application.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Other than the requirement that a company (that is not otherwise exempt therefrom) publish in writing a prospectus before offering shares to the public (such an offer being one that is capable of acceptance), there are no publicity restrictions contained in the Companies Act applicable to the public offering of securities.

There are no restrictions on the ability of the underwriter to issue research reports contained in the Companies Act.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

The Companies Act does not categorise primary and secondary offerings of equity securities. See question 2 for the prospectus filing requirements relating to a public offer of shares.

The Listing Regulations provide that securities may be brought to listing on the BSX by way of an offer for subscription to the public by an issuer (an offer for subscription) and by an offer for sale by or on behalf of the holder of securities already in issue (an offer for sale). An offer for subscription would be akin to a primary offering and an offer for sale, to a secondary offering. In principle, both are subject to the same requirements. The Listing Regulations do not differentiate between them.

6 What is the typical settlement process for sales of securities in a public offering?

The BSX employs a fully automated electronic trading system (Bermuda Electronic Securities Trading or BEST) based on a central limit order book, which allows trading members to trade both equity and fixed income securities on an equal, real-time 'first come, first served' basis, making trading efficient, time sensitive and cost effective. Through the Bermuda Securities Depository, the rules of operation for which are set out in the Bermuda Securities Depository Regulations, shares can be dematerialised, eliminating the need for physical settlement. Once a trade is executed, trade information is disseminated electronically to key financial information providers, including Bloomberg and Reuters, for worldwide distribution.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

The Listing Regulations make provision for the sale of securities by an issuer to persons selected by the issuer otherwise than by way of an offer to the public (ie, placing). In the case of an application made by a listed issuer for a further issue of equity securities of a class that is already listed, and that are to be brought to listing by way of a placing of 20 per cent or less of the existing issued share capital of the issuer, a prospectus is not required.

See question 3 for the rules and procedures applicable to bringing securities to listing on the BSX by way of placing.

There are no specific rules or procedures delineated in the Companies Act to effect a valid private placement of securities.

8 What information must be made available to potential investors in connection with a private placing of securities?

See question 7.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

Aside from restrictions on transfer to a shareholder who is not Bermudian under the Companies Act, in the case of the securities of a local issuer, the Listing Regulations do not impose any restrictions specifically related to the transferability of securities acquired in a private placing. Commonly, any additional restrictions on transfer would be set out in the bye-laws. The Companies Act contains no restrictions on transfer of specific application to securities acquired in a private placing.

In terms of exchange control, permission is required from the BMA pursuant to the provisions of the Exchange Control Act 1972 for the issue and transfer of securities by Bermuda companies, other than in cases where the BMA has granted a general permission. On 1 June 2005, the BMA granted a general permission for the issue and subsequent transfer of any equity securities of a Bermuda company listed on an 'appointed stock exchange' (as defined in the Companies Act) from or to a non-resident of Bermuda, for so long as any equity securities of such company remain so listed. The BSX is an appointed stock exchange. See question 2 for examples of other appointed stock exchanges.

There are no liquidity enhancing mechanisms contained in the Companies Act.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

There are no specific domestic rules that apply in these circumstances. The Companies Act makes no distinction between offerings of securities within or outside of Bermuda by an issuer domiciled in Bermuda.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

No special considerations apply to offerings of exchangeable or convertible securities, warrants or rights offerings. Such offerings are subject to the relevant provisions of the Companies Act and, where such securities or depositary receipts of an international issuer are to be listed on the BSX, the Listing Regulations relevant thereto.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

As most of the larger public offerings by Bermuda companies are in relation to offerings on overseas exchanges, such as New York or London, underwriting agreements tend to follow the practices adopted in such countries. In a London Stock Exchange offering, one may see a book-building underwriting (book building is a process for offering shares under which potential investors are given the opportunity to bid for shares before the

size and price of the offer are set and before the offer is underwritten and the underwriter's commitment does not occur until after completion of the book-building period, often two to three weeks), and NYSE offerings generally comprise a syndicate of underwriters led by one or more managing underwriters, who typically agree (on a several, not joint and several basis) to purchase the securities three business days after the pricing date. Even if an underwritten offer is to be undertaken on the BSX, the underwriters themselves are likely to be based overseas and a foreign law governed underwriting agreement, following the norms of their domestic market, would most probably be adopted, subject to Bermuda law compliance.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

As mentioned above, as most underwriting agreements will be governed by foreign law, their contents will be dictated by the norms of their market practice, subject to Bermuda law compliance. There is very little in Bermuda law that should prevent the usual provisions of, for example, an underwriting agreement governed by English or New York law being in compliance with, and enforceable under, Bermuda law.

14 What additional regulations apply to underwriting arrangements?

When the Companies Act contained the common law concept of 'financial assistance', it often caused problems with regard to the payment of underwriter's fees by the listing entity (being, as it was, settling a liability in connection with the acquisition of its shares), and necessitated a 'white-wash' of such fees as permitted by such statute. However, this provision was deleted from the Companies Act in 2011, thus removing concerns in this regard. Otherwise, as mentioned above, Bermuda has 'light touch' regulation with regard to underwriting arrangements, most of which are governed by foreign law.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

Where there is a continuous offer of shares to the public and where the particulars in a prospectus cease in a material respect to be accurate, the Companies Act stipulates that the company must publish and file supplementary particulars. This requirement can be satisfied by issuing and filing a new prospectus. A supplement, amended pages or enclosures to be included with the original prospectus are usually acceptable as well.

Once the securities of a company have been listed on the BSX, the issuer must comply with the continuing reporting obligations contained in the Listing Regulations. These generally, and separately from compliance with all the specific requirements set out therein for particular types of issuer, require the issuer to keep the BSX, members of the issuer and other holders of its listed securities informed of any information relating to the issuer or its group that:

- is necessary to enable them and the public to appraise the financial position of the issuer and the group;
- is necessary to avoid the establishment of a false market in its securities; and
- might reasonably be expected materially to affect market activity in and the price of its securities.

16 What information is a reporting company required to make available to the public?

The nature and extent of the information a reporting company is required to make available to the public differs based on the type of issuer and security that is listed. Such requirements are set out in the relevant Listing Regulations.

The BSX does not require that significant shareholders be disclosed.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

For a Bermuda company whose securities are listed on the BSX and that does not have a primary listing of its securities elsewhere (and so is not subject to the rules of another stock exchange in this regard), such an issuer must adopt by board resolution and enforce an internal code of dealing for

directors and executive officers, which proscribes their ability to trade on the basis of unpublished price sensitive information. The code must, as a minimum, prohibit the directors and executive officers from dealing in the issuer's listed securities for the period from when they become aware of the interim and full year results until those results are announced (see also question 20).

Otherwise, Bermuda companies whose securities are listed on exchanges overseas, and their directors, officers and shareholders, need to be mindful of the offences (such as market abuse, misleading statements, market manipulation and insider dealing in the UK) applicable under statute and stock exchange rules in such jurisdictions.

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

Stabilising activities in connection with a securities offering are often employed with regard to Bermuda companies (always subject to the rules of the stock exchange on which its securities are listed, which is often overseas), provided that persons initiating stabilising bids do so with reference to the market price for the security and such bids do not exceed either the independent bid or the offering price of the securities in question, thereby artificially inflating the price of such securities by creating a false market. Another method sometimes seen that helps to reduce price volatility is to limit or even prevent the sale of securities by the management and key employees of the issuer participating in the offer for a defined period, so as to stop the 'dumping' of securities, which could cause prices to plummet.

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

Care must be taken to avoid committing the offences discussed in question 17 when engaging in securities transactions. In addition, any person who makes or authorises the making of an untrue statement in a prospectus in respect of an offering of securities in a Bermuda company faces criminal liability, unless he or she proves either that the statement was immaterial or that at the time he or she made the statement he or she had reasonable grounds to believe it was true. Criminal penalties including imprisonment and fines can be imposed.

The Companies Act provides that certain persons are liable to pay compensation to all persons who subscribe for any shares on the faith of the prospectus for any loss or damage they may have sustained by reason of any untrue statement included therein. Those persons are:

- every person who is an officer of the company at the time of the issue of the prospectus;
- every person who has authorised him or herself to be named and is named in the prospectus as an officer or as having agreed to become an officer of the company either immediately or after an interval of time;
- every person being a promoter of the company; and
- every person who has authorised the issue to the public of the prospectus.

No person is liable under this provision of the Companies Act if he or she proves:

- that having consented to become an officer, he or she withdrew his or her consent before the issue of the prospectus and that it was issued without his or her authority or consent;
- that the prospectus was issued without the officer's knowledge or consent, and that on becoming aware of the issue he or she forthwith gave reasonable public notice that it was issued without his or her knowledge or consent;
- that, after the issue of the prospectus and before the allotment thereunder, he or she, on becoming aware of any untrue statement therein, withdrew his or her consent and gave reasonable public notice of the withdrawal and the reason; or
- that, as regards every untrue statement, he or she reasonably relied on the authority of an expert or public official (or an extract of a report or valuation of an expert or copy of or extract from a public official document).

A person referred to as an expert in a prospectus is not liable for any untrue statement if it was not made by him or her or that as regards any untrue statement made by him or her, he or she had reasonable grounds to believe

and did believe it was true. An expert will also not be liable for an untrue statement if, upon becoming aware that it was untrue before the issue of the prospectus he or she had given reasonable public notice of his or her disassociation from the prospectus and the reasons.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

It is possible for a person who purchased securities to pursue civil litigation on the grounds of breach of contract against any person whose misrepresentation induced the purchase.

The BSX can suspend trading in a company's securities where it fails, in a manner that the BSX considers material, to comply with its obligations under the Listing Regulations. The Listing Regulations require that all shares are issued in a fair and open manner and that all shareholders must be treated equally. Further, instead of, or as well as, a suspension of trading, the BSX can censure an issuer or its directors, or both, and publish the fact that it has done so.

In addition to the criminal sanctions arising under the Companies Act (see question 19), the Criminal Code Act 1907 contains measures to regulate insider trading and market manipulation. The offence of 'misleading statements or practices' carries a maximum penalty on conviction on indictment of a fine of B\$100,000 or five years' imprisonment, or both. The offence can only be committed in Bermuda.

The offence of 'market manipulation' can be committed without any requirement that the relevant 'course of conduct' involves the use of non-market information and there is no requirement that the course of conduct would give a regular user of the market a false or misleading impression. The offence can only be committed in Bermuda and has identical penalties as for 'misleading statements or practices'.

The offence of 'insider trading' may only take place in the course of a transaction on a recognised stock exchange and does not extend to transactions where one of the parties is dealing through a professional intermediary or in 'over the counter markets'. The maximum penalty on conviction on indictment is a fine of B\$175,000 or seven years' imprisonment, or both.



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Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

Securities 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 Brazilian Securities Commission (CVM), particularly Regulation No. 400 of 29 December 2003, as amended (Regulation 400), Regulation No. 476 of 16 January 2009, as amended (Regulation 476) and Regulation No. 480 of 7 December 2009 (Regulation 480).

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

A public offering of securities distributed under the terms of Regulation 400 primarily requires registration with the CVM of the issuer as a public company and 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 the respective stock exchange or other market, as long as no public distribution is made.

In relation to public offering distributed with restricted selling efforts, under the terms of Regulation 476, the offering registration before the CVM is not required, as set forth in Regulation 400. The issuer registration, on the other hand, is not required for an offering of debt securities, as provided for in Regulation 480, but it is necessary for a public offering of equity securities.

For an issuer to be registered as a public company, it must file with the CVM for registration in one of the two classes of issuing corporations, A or B, accompanied by supporting documents. A class A registration authorises the trading of any of the company's securities on regulated securities markets, while a class B registration also authorises the trading of the company's securities on regulated securities markets, but with certain exceptions as, for example, shares and share depositary receipts. The main supporting documents include, but are not limited to:

- the constitutive documents of the company;
- the record data form;
- minutes of shareholders' meetings held over the preceding 12 months;
- copy of the shareholder agreements filed at the headquarters of the company;
- a board resolution or a shareholders' meeting appointing an investor relations officer;
- audited financial statements for the preceding three fiscal years;
- audited financial statements specially prepared for registration as a public company where the company was constituted in the same fiscal year as that of the registration application to the CVM or if there was any material change in the company's equity structure after the end of the latest fiscal year;
- the annual financial report prepared for the latest fiscal year;
- the quarterly financial reports, as applicable;

- statements relating to the issuer's securities held by the senior managers, members of the audit committee, and members of any technical or advisory committees created under the by-laws, in accordance with the applicable rules governing this issue;
- the reference form, an annual report on the periodic reporting applicable to public companies;
- the disclosure policy; and
- the approval for listing on a stock exchange, conditioned only on the granting of registration of the issuer as a public company.

Registering a public offering of debt or equity securities under the terms of Regulation 400 entails greater effort and expense. Regulation 400 governs most equity and debt public offerings other than offerings of specified securities. According with Regulation 471, self-regulatory entities are allowed to conduct the analysis of the simplified registration process for follow-on offerings of stock exchange-listed equity securities distributed under the terms of Regulation 400. The main condition of a simplified offering procedure under the terms of Regulation 400 is that the issuer must be in compliance with its periodic reporting requirements. The Brazilian Association of Financial and Capital Markets (ANBIMA) is currently the only self-regulatory agency that has executed a cooperation agreement with the CVM in order to conduct such simplified offering procedure. When the documents of a public offering to be distributed under the terms of Regulation 400 are previously analysed by ANBIMA, the main participants (eg, bookrunners and company/offeree) of such offering must comply with the Regulatory and Best Practices Code for ANBIMA, as well as Regulations 400 and 480.

Additionally, the CVM shall waive registration requirements in the case of securities issued by small and micro-sized companies, as defined by the Brazilian regulations.

With regards to issuers with wide market exposure, as defined under the terms of Regulation 480, CVM may give automatic offering registration.

Pursuant to the amendment of Regulation 476 during 2014, the CVM expanded the types of securities that may be offered to qualified investors in a distribution with restricted selling efforts, which now include:

- commercial papers;
- letters of credit that are not held by a financial institution;
- debentures that are not convertible into or exchangeable for shares;
- quotas of private investment funds;
- certificates of real estate receivables or certificate of agribusiness receivables;
- shares, provided that the issuer is a corporation registered under class A;
- debentures convertible into shares, provided that the issuer is a corporation registered under class A;
- structured notes; and
- depositary receipts.

As previously mentioned, the offerings of the securities mentioned above are exempt from registration with the CVM, but in case the securities being offered are shares or a security convertible into shares, the issuer must be registered with the CVM under class A, as required by Regulations 476 and 480.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

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

Nearly all qualified Brazilian investment banks have pledged to comply with ANBIMA's Regulatory Code and have agreed to sanctions in the event of non-compliance of its terms and conditions. Accordingly, the underwriting agreement will typically require issuers to conform to the standards of such 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 to the CVM an application for registration of the public offering distributed under the terms of Regulation 400, it may proceed to print a preliminary prospectus and initiate its book-building activities and roadshow presentations. In practice, the offeror and the lead underwriter may prefer to wait for 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 distributed under the terms of Regulation 400, certain statutory announcements are published in major newspapers or made available on the websites of the offer participants, the relevant stock exchange and the CVM and a final prospectus is available. Upon granting of registration of the public offering distributed under the terms of Regulation 400, the final prospectus must be made available on websites of the issuer, the offeror, the underwriters, the CVM, the relevant stock exchange and ANBIMA, in the case of follow-on offers.

The review process of a public offering distributed under the terms of Regulation 400 usually takes eight to 10 weeks from initial filing to the granting of registration and six to eight weeks if submitted through the simplified offering procedure set forth in Regulation 471.

Public offerings of debt securities with restricted selling efforts in accordance with the terms provided for in Regulation 476 are exempt from any registration with the CVM, as stated above. Nevertheless, if the securities being offered are shares or securities convertible into shares, the issuer must be registered as a class A issuer with the CVM, as required by Regulation 476 and Regulation 480. The process of registration of a company as a class A issuer usually takes approximately 60 days from initial filing to the granting of registration.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Issuers, selling shareholders and underwriters must treat any proposed offering under the terms of Regulation 400 as a material, non-public information until an application for the registration of the public offering is filed with the CVM. Use or disclosure of material, 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.

CVM's Regulation 400 does not specifically prohibit underwriters from producing offering materials in addition to the prospectus, which includes the Reference Form. Such materials, including any roadshow presentations, 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 if the offering is being distributed under the terms of Regulation 400. 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 legend referring the investors to the prospectus and to the risk factors provided for in the company's Reference Form. An exception is available for investor education materials, which may be made available even prior to the submission of an application to the CVM.

Investors in a public offering distributed under the terms of Regulation 400 must receive a prospectus. The delivery may be made electronically. If any other materials or information are used in connection with a sale of securities in the public offering, the issuer will be, and the offeror and the lead underwriter may be, liable for any material misstatement or omission in the offering documents.

In any public offering of securities distributed with restricted selling efforts, as set forth in Regulation 476, no solicitation of orders from investors through stores, offices or establishments open to the public may be made, and no public means of communication, such as press, radio, television and pages opened to the general public on the web, may be used.

According to CVM regulations, there is no restriction on the ability of 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 under the terms of Regulation 400 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.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

Primary and secondary offerings are generally regulated on the same terms. Additional disclosure requirements apply to primary offerings, as the issuer will be required to discuss the use of proceeds and, in the case of equity offerings, the dilution of existing shareholders. Although holders of shares of a Brazilian issuer are entitled to statutory preemptive rights to subscribe for new issuances of shares, such preemptive rights may be withheld in the context of a public offering if the by-laws permit such restrictions. Almost all Brazilian issuers limit preemptive rights in public offerings. In follow-on offerings under the terms of Regulation 400, often issuers will withhold statutory preemptive rights and make alternative, ad hoc arrangements for existing shareholders to enjoy a measure of priority in the allocation of newly issued shares.

In any primary public offerings of shares distributed with restricted selling efforts, the pre-emptive rights of the existing shareholders may not be granted only if shareholders are granted with priority allocation on the purchase of the total amount of securities being offered, or the non-granting of such priority allocation is approved by the shareholders representing the totality of the company capital stock.

A seller in a secondary offering is liable to investors for material misstatements or omissions to the same extent as an issuer in a primary offering. Accordingly, a seller has a compelling incentive to ensure that the disclosure is complete and reliable or, more likely, to secure an agreement of the issuer to indemnify the seller for any material misstatements.

Pursuant to Regulation 400, Brazilian issuers have a duty to cooperate with any selling shareholder that intends to conduct a secondary offering, subject only to the condition that any additional expenses incurred by the issuer solely due to the offering are reimbursed by the seller.

By establishing a duty to cooperate, the CVM has effectively preempted any claim that the issuer has diverted scarce management time for the benefit of a shareholder. However, the duty to cooperate may not require an issuer to agree to any indemnification provisions for the benefit of the selling shareholder. As a result, any indemnification provisions will once more give rise to the issue of the corporate benefit to the issuer of assisting the seller in a secondary offering.

The managers of the issuer and the offeror are liable, within their legal and statutory powers, for performing the duties imposed on the issuer and offeror by the CVM.

6 What is the typical settlement process for sales of securities in a public offering?

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. In such cases, the lead underwriter and the offeror have often hired the clearing house for the São Paulo Stock Exchange (BM&FBOVESPA) to settle the public offering on a primarily delivery against payment basis.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

No specific rules define a private placement, although the Capital Markets Law and Regulation 400 define public offerings by reference to a list of factors that suggest a public offering of securities. 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 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 a confirmation that the proposed transaction does not constitute a public offering.

Although not strictly a private placement, Regulation 400 provides the possibility of an exemption from registration and prospectus requirements available for offerings aimed at qualified investors. The only guidance provided by Regulation 400 is that the qualified investors must represent to the offeror that they are knowledgeable and experienced investors have had access to information regarding the issuer that they deem sufficient for their investment decision and are aware of the exemption from registration requirements.

It is worth noting that offerings made to a limited number of investors, and not to the general public, are regulated by Regulation 476. Such offerings have limitations on the categories and number of investors that may be approached and the number of investors that may participate in the offering and purchase securities. Only qualified investors may be approached (eg, investment funds, financial institutions, insurance companies, private welfare opened or closed capital organisations, natural or legal persons that hold financial investments in an amount superior to 300,000 reais, provided that such investors shall underwrite or purchase, with regard to the offerings with restricted selling efforts, securities in a minimum amount of 1 million reais, investment funds directed exclusively to qualified investors, portfolio administrators and securities consultants authorised by CVM, in relation to their own monies and own social security regimes instated by the federal government, by the states, by the federal district or by municipalities). Up to 75 qualified investors may be approached in the selling efforts, and no more than 50 investors may purchase securities in such an offering. However, issuer's shareholders exercising their priority or preference rights and foreign investors shall not be considered for the purposes of determining the maximum number of investors to be approached or that may acquire securities in the offering.

At the end of 2014, the CVM issued CVM Regulation No. 554, dated 17 December 2014 (Regulation 554), which, among other things, amended the concept of qualified investors and created the professional investor, which shall enter into force on 1 July 2015. Through such amendment, the new concept of qualified investor will be:

- professional investors, as per the new concept described in Regulation 554;
- legal entities and individuals owning financial investments in an amount greater than 1 million reais (replacing the 300,000 reais established in the current regulation);
- 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
- investments clubs, provided that its portfolio is managed by one or more investors that are qualified investors.

8 What information must be made available to potential investors in connection with a private placing of securities?

No information requirements apply to a private placement of securities under CVM regulations. The CVM, however, suggests that the information to be provided to investors for their investment decision should correspond to what is usually provided in a prospectus that includes 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.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

Generally, securities acquired in a private placement may only be transferred in private transactions and through qualified investors; 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.

It is worth mentioning that public offerings distributed with restricted selling efforts also have certain trading restrictions. Securities acquired in such public offerings may not be transferred during a 90-day period from the date of their initial sale. As set forth in Regulation 476, such lock-up rule does not apply to public offerings of shares, warrants and depositary receipts.

In addition, securities acquired by qualified investors in a public offerings distributed with restricted selling efforts can only be traded among qualified investors. Such restriction will be exempt in case the issuer is registered as an issuer of public securities or, in relation to shares, warrants, convertible or exchangeable debentures or deposit certificates, there has been a previous public offering of securities of the same type and class registered with the CVM or after 18 months from the date of the listing of securities of the same type and class with the stock exchange.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

Recent practice indicates that any public offering outside Brazil of equity securities of a Brazilian company is likely to be deemed an offering subject to registration in Brazil. Accordingly, all recent global equity offerings of Brazilian companies have been registered as public offerings with the CVM. American Depositary Receipt (ADR) programmes must also be approved by the CVM and the Central Bank of Brazil.

International offerings trigger foreign investment and exchange control regulations enforced by the Central Bank of Brazil. Although requirements for the various kinds of offerings may differ, issuers will need to enable investors to register their investments with the Central Bank of Brazil in order to ensure the ability of the issuer to remit payments abroad, including any payments of distributions to shareholders, interest, principal or other amounts due under the relevant securities.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Exchangeable or convertible securities and warrants require that special attention be paid to registration of the foreign investment with the Central Bank of Brazil. Exchange control regulations may impair the ability of a holder to effectively exercise its rights if the registration does not accurately reflect the terms of the security, including any conversion, exchange or other features. American and global depositary receipt programmes require the approval of the CVM and the Central Bank of Brazil.

Additionally, in 2014 the CVM issued Regulation 551 which amended Regulation 476 in order to allow the public offering distributed with restricted selling efforts of shares, convertible securities and warrants only to qualified investors.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

Underwriters usually give a firm commitment to purchase the securities offered in a public offering and not effectively settled by the investors in the settlement of the offering. A qualified underwriter must mediate in any public offering of securities.

In equity offerings, the lead underwriter, the bookrunners and any co-managers will typically enter into a firm commitment underwriting agreement with the issuer or selling shareholder. The group of bookrunners will enter into separate agreements with members of the selling group, by which the members of the selling group accede to the underwriting agreement and provide their own firm commitment to place or purchase the shares on offer.

Despite being a common practice in debt offerings, in special circumstances the underwriters also give a firm commitment to place the securities offered in public equity offerings.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

An underwriting agreement for a Brazilian public equity offering will typically provide for broad indemnification rights, a limited number of termination events and a flat commission. Regulation 400 allows the underwriter to receive and exercise over-allotment options, which are still most frequently used in offerings with an international tranche. Any and all compensation payable to the underwriters must be set out in the underwriting agreement.

Regulation 476, as amended to include shares and securities convertible to shares among the types of securities that may be sold through a public offering distributed with restricted selling efforts, has not clearly stated that issuer may grant an over-allotment option to the underwriters, as currently regulated by Regulation 400. The matter is subject to further clarification by the CVM, which is expected to reply to a formal consultation made by some market participants.

14 What additional regulations apply to underwriting arrangements?

The lead underwriter in a public offering under the terms of Regulation 400 has primary responsibility for liaising with the CVM and must fulfil regulatory obligations to provide information to the CVM and to generally ensure that the offering is conducted in a manner that is fair to investors. The lead underwriter also shoulders most of the exposure of the underwriters to liability for material misstatements or omissions in the offering documents.

The lead underwriter must devise a plan of distribution and assure fair treatment of investors by other underwriters. Brazilian issuers will generally be required to seek to disperse their shares widely among investors in the market. Typically, issuers meet this requirement by affecting a retail offering primarily targeting individual investors. This requirement is ultimately imposed by the Self-Regulatory Code, which directs underwriters to demand that all issuers must agree to accede to the Differentiated Corporate Governance Practices of BM&FBOVESPA, which, in turn, set out a list of conditions on access to a special listing segment of BM&FBOVESPA, such as Novo Mercado, Nível 1 or Nível 2.

However, in relation to a public offering of shares distributed with restricted selling efforts of an issuer listed in a special listing segment of BM&FBOVESPA, a retail offering would not be feasible owing to the limitation of selling the securities only to qualified investors, as previously explained. To address this point, BM&FBOVESPA issued a circular specifying:

- (i) that an initial public offering (IPO) distributed with restricted selling efforts would necessarily require the shares to be listed in BM&FBOVESPA's special listing segment for low and mid-caps (BOVESPA Mais and BOVESPA Mais - Level 2), as such offerings do not provide for the liquidity levels required from an issuer to be entitled to list its shares in other special listing segment; and
- (ii) how the issuer would comply with the best practice obligation in reaching dispersed shareholding in an offering with restricted sales, which are:
 - (a) where individual investors or investment clubs hold at least 10 per cent of the issuer's capital stock prior to the offering and the offering provides for priority allocation to shareholders;
 - (b) where individual investors or investment clubs that may exercise preemptive or priority rights, when considered together with individual investors (eg, those holding managed investment portfolios) and investment clubs approached in the offering distributed with restricted sales, represent at least 10 per cent of the investors at which the offering is aimed; or
 - (c) where the average daily trading volume (ADTV) of the issuer's shares is equal to or higher than at least 4 million reais, considering the trades executed in the three-month period prior to the offering distributed with restricted selling efforts. If the issuer does not meet any of the conditions mentioned in (ii) above, BM&FBOVESPA will automatically grant an 18-month time frame, from the offering with restricted selling efforts, for compliance with the dispersion rules, which can be achieved by either: concluding public offering

registered with the CVM, pursuant to CVM Regulation 400; or reaching an ADTV of 4 million reais, considering the trades executed in the last three months of the above-mentioned 18-month period.

The retail offering may assure retail investors some degree of priority in the allocation of shares. Underwriters will usually receive deposits from retail investors in individual, segregated accounts in anticipation of the pricing of a public offering. Deposits are permissible as long as a preliminary prospectus is available. Once the public offering has been registered and commences, each retail investor will receive such a number of shares as the amounts on deposit can purchase at the offering price. If the final prospectus including the reference form contains materially different disclosure as compared to the preliminary prospectus including the Reference Form, any investor may withdraw its deposits.

The lead underwriters must publish announcements in major newspapers, or make available on the websites of the offer participants, the relevant stock exchange and the CVM to notify the investing public of the filing of an application for registration of a public offering and the intention to use a preliminary prospectus; the granting of registration and commencement of the public offering; and the completion of offering.

If a public offering under the terms of Regulation 400 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 they comply with the recommendations of the CVM considered sufficient to mitigate the use of confidential information by investors to obtain improper advantage. With regard to public offerings distributed with restricted selling efforts, Regulation 476 does not provide for any kind of similar restriction.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

Reporting obligations arise solely as a result of registration as a public company. No reporting obligations will arise as a result of any private transactions or events outside the control of the issuer, even if the shares of the issuer are ultimately held by a significant number of investors.

16 What information is a reporting company required to make available to the public?

Brazilian corporate law mandates 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 IFRS since 2011.

Under the CVM and BM&FBOVESPA regulations, management, directors, members of the fiscal committee, controlling shareholders and related parties are required to disclose their holdings of securities issued by the public company and any transaction involving such securities within 10 days of the end of the calendar month in which such transaction occurs. Under Regulation 480, the reporting company must file annually with the CVM the record data form and the reference form, and must update the reference form within seven business days from the date of certain material events set out in the rules. It must also file with the CVM corporate documents in preparation for shareholders' meetings and an updated reference form annually except when any material event, as described in the above-mentioned regulation, occurs that obligates the issuer to update the form accordingly within seven days.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

Issuers, selling shareholders and underwriters are barred from trading in the securities of an issuer once they begin to prepare for a public offering except in certain circumstances established by Regulation 400, including trades by order and on behalf of third parties and stabilisation activities that allow underwriters to engage in certain limited price-supporting trades during the course of a public offering. In addition, the CVM will

monitor market activities under general mandates barring manipulative practices.

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

The Brazilian Corporate Law provides that in the case of capital increases by issuance of new shares, the issue price of shares shall be set taking into account alternatively or jointly the company's income forecast (economic value criterion); the net equity value of the shares (book value criterion); the trade price of its shares on the stock exchange or organised over-the-counter market, with a premium or a discount allowed in accordance with market conditions (market value criterion). This legal provision aims to avoid an unjustified dilution of shareholders, even if they are granted pre-emptive rights to subscribe for the shares.

Setting the share price based on economic value is generally acknowledged as the best way of protecting the interests of all shareholders, including those who do not subscribe for the new shares. Specifically with respect to publicly held companies whose shares have a significant level of liquidity, the CVM has stated that the trade price in the stock market prevails over other parameters for setting the share price.

In IPOs of Brazilian issuers, in line with the practice in international markets, the book-building process is the most appropriate measure to determine the stock price. Book-building is acknowledged by the CVM as a viable manner to set the share price based on the market value criterion, specifically for companies that still do not have their shares traded, but are going public in the context of an initial offering. The issue price is set after the book is 'closed' based on the demands from investors at various prices.

In addition, for the purpose of preventing fluctuation in the market price of shares distributed under the terms of Regulation 400 during the first days of trading, a member of the syndicate of underwriters may undertake some actions as a counterparty on the secondary market. One of the underwriters is allowed to engage in stabilisation activities for a period of up to 30 days counted from the first trading day of the new shares. In this sense, the stabilisation agent may over-allot in connection with the offering, creating a syndicate short position and may bid for, and purchase, shares in the open market to stabilise the price of shares. The stabilisation agent is not required to perform these activities every day, and they may be discontinued at any time.

A price-stabilisation agreement must be in compliance with CVM Regulation 387 and BM&FBOVESPA regulations and must be in a form approved by the CVM and BM&FBOVESPA. The CVM requires the parties to take actions that are sufficient to eliminate the possibilities of market manipulation and to ensure transparency of the negotiations. Reports of stabilisation activity must be provided to the CVM.

It is currently uncertain whether price stabilisation activities are admissible in public offering of shares distributed with restricted selling efforts, as is customary in public offerings conducted under the terms of Regulation 400, particularly because such activities are closely linked to

Update and trends

The last major change regarding equity regulation was Regulation 551, which amended Regulation 476 in order to expand the types of securities that could be issued by companies and offered in public offerings distributed with restricted selling efforts to qualified investors. As explained above, there are still a few uncertainties regarding the applicability of Regulation 476 to share offerings, such as the possibility of granting over-allotment options and the conducting of price stabilisation activities.

In addition, market participants associated with ANBIMA are debating the issuance of a Regulatory and Best Practices Code for Public Offerings specifically to offerings of shares distributed with restricted selling efforts, in order to self-regulate the minimum compliance requirements in the course of such offerings.

the granting of the over-allotment option, which is also uncertain, as previously mentioned.

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

The primary bases of liability in a securities transaction are the provisions of Regulation 400 and Regulation 476 that set out the liability of the issuer, the selling shareholders, the underwriters and their respective managers for material misstatements and omissions in the offering documents. The lead underwriter is primarily liable, among the underwriters, for any damage caused to investors as a result of material misstatements and omissions. A lead underwriter may only be held accountable by an investor for lack of diligence in performing its obligation to ensure that the offering documents are free of material misstatements and omissions. The issuer and any selling shareholders that are controlling persons, however, are fully liable for any material misstatements and omissions. Any non-controlling selling shareholder is only liable if it fails to act diligently to ensure that the offering documents are free of material misstatements and omissions.

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

The CVM usually does not deny registration to an offering and will not take a position regarding the accuracy of any disclosure documents. In most cases, the CVM will demand that changes be made to the prospectus, the reference form and other documents until it is satisfied that its concerns have been addressed.

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20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

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.

Investors often attempt to enhance their negotiating leverage with a recalcitrant issuer or underwriter by instigating a disciplinary proceeding at the CVM. In these proceedings, the CVM may encourage a settlement in lieu of a fine.

Chile

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Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The main statute applicable to securities offerings is Law 18,045 Securities Act (LMV), which covers issuers, public offerings, publicly offered and traded securities and their secondary markets (on the floor or over the counter), stock exchanges, brokers, etc. In addition, the Organic Law of the Superintendency of Securities and Insurance (SVS) covers stock corporations, third party fund management (investment funds, mutual funds, pension funds, housing funds and other similar), banks and financial institutions, insurance and reinsurance companies and the deposit and custody of securities, completes the basic regulatory framework related to the securities market.

The Pension Funds Act also plays a significant role due to the importance of pension funds as institutional investors in the Chilean market, adding requirements to allow pension funds to invest in certain securities.

The SVS is the regulatory authority responsible for overseeing capital markets' rules in Chile. In fact, the SVS is the entity that approves the public offer of securities and oversees the obligations of companies registered in the Securities Registry in issues such as financial information, accounting principles, information to the market and supervision of secondary markets.

Lastly, the stock exchanges and the securities depositories also play a role in the securities market, since they issue, supervise and enforce their rules upon companies offering their stock in the market places.

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

A public offering of securities in Chile requires the filing and publication of a prospectus and the approval of the offering by the SVS. The prospectus should be drafted in accordance with the forms of SVS General Rule 30 and 118 (both as amended) for stocks, SVS General Rule 30 (as amended) for bonds and commercial papers, SVS General Rule 303 for securitisations, SVS General Rules 352 for stocks of foreign issuers and SVS General Rule 304 for bonds issued by foreign companies or governments. There are no major differences between equity and debt offerings in this regard.

As soon as the offering obtains the SVS approval, the issuers must file an application before the stock exchange with information about the issuer and the security (same information delivered to the SVS for the filing plus the SVS certificate). If approved, the issuer then has to comply with several requirements for information, such as information about financial statements and conditions, operations, shareholders' meetings, investment in other entities, insolvency risks and in general, any other material information.

Depending on the nature of the offering and the market on which the securities will be listed, issuers are usually requested to provide risk ratings issued by two risk-rating agencies registered with the SVS and audited financial statements. Only one risk-rating is required in the case of a short-term debt offering.

There are SVS regulations that exempt issuers and their securities from registration. General Rule 345 exempts the following public offerings of securities representative of capital:

- an offer that represents at least 10 per cent of the issuer capital if each investor acquires at least 2 per cent of the issuer capital;
- an offer directed towards employees of the company and its affiliates; and
- an offer to acquire securities that are required to use facilities of charity, educational or sports companies.

Regarding foreign issuers, General Rule 352 exempts them when the SVS has subscribed to an agreement with the authorities of a foreign market in order to have access to true, sufficient and timely information about the issuer and its securities.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

Steps of the registration and filing process

The application has to include the following information:

- general information about the issuer;
- economic and financial information about the issuer, including balance sheets, reasoned analysis of financial statements and risk analysis;
- economic and financial information of subsidiaries and other companies in which the issuer has invested (associated);
- any material information;
- other information, such as by-laws and articles of incorporation, shareholders registry, etc; and
- a responsibility statement, signed by the CEO and the board of the issuer.

The SVS may require additional information. Once received, the SVS has 30 days to register the issuer and the security, as the case may be. Once registered, the SVS has to issue the certificate of the filing within three working days.

According to the LMV, the offering cannot commence until both the issuer and the security have been registered with the SVS.

The SVS has 30 days to register the offering. However, during this term, the SVS can require additional information, either legal, financial or economic, depending upon the issuer, the security or the offering.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Any prospectus and informational brochures or any other information used in connection with the offering of securities may not be disclosed if it has not been previously filed with the SVS. As mentioned above, the SVS must ensure that such information complies with the applicable regulations and contains the information that depending on the characteristics and the nature of the offering is required by the SVS before allowing its communication to the public.

Pursuant to article 65 of the LMV, the publicity, advertising and dissemination carried out by any means by issuers, stockbrokers, securities dealers, stock exchanges and any other persons or entities that participate

in the issuance or sale of securities, may not contain statements, references or representations of any kind that may lead to error, mistake or confusion among the public about the nature, price, profitability, redemption, liquidity, guarantees or any other characteristics of the publicly offered securities or their issuers.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

Under the LMV, any shares that have to be registered in the Securities Registry must also be registered with a stock exchange. Stock exchanges cannot refuse the registration if the request complies with the formal requirements. In order to be registered in a stock exchange, a formal submission has to be filed. It is sufficient to submit a formal submission, together with the certificate of registration issued by the Securities Registry and a certificate indicating the legal status.

As indicated, shares of companies that are not registered with the Securities Registry may not be listed or traded in stock exchanges. Shares registered in the Securities Registry may only be traded by stockbrokers and these transactions must be carried out in the session of the exchange of which the brokers are members. No over-the-counter trading of non-registered shares is permitted in Chilean securities markets, except in specific cases related to the public offering of securities. However, non-registered shares may be sold in a public auction in the exchanges twice a month.

Securities other than shares registered in the Securities Registry may be traded by any stockbroker or securities agent registered with the SVS or by banks and finance companies. The trading of such securities may be carried out at the exchanges only when they have been accepted for quotation by the exchange involved. However, they may also be traded over the counter.

As established by General Rules 366, foreign securities approved by the SVS or exempted of such approval could be traded in any stock exchange that contemplates those kinds of operations. The stock exchanges shall regulate the trading and stockbrokers' activities.

Moreover, General Rule 377 authorises over-the-counter trading of foreign securities approved by the SVS or exempted of such approval when it has been previously approved by the Central Bank and in compliance with the conditions established by said rule.

According to Law 18,046 (Corporations Act), any offer made by any issuer to subscribe new shares is subject to preferred subscription rights of the existing shareholders in proportion to their stock holding. This is a shareholder right, thus any shareholder may resign, exercise or transfer it within 30 days as from the date of the notice published by the issuer or at the shareholders meeting. The company may offer them to third parties, but only if one or more shareholders resigns or notifies their intention not to exercise such preferred option. It is common practice to have the controlling shareholder resigning to the preferred option to allow the company to offer them to the market.

Liabilities for the issuer are those mentioned in question 20.

6 What is the typical settlement process for sales of securities in a public offering?

Securities clearing and settlement is carried out through different procedures depending on the transaction settlement conditions and the type of securities. In transactions carried out off-exchange, which are significant in terms of amounts traded, the clearing and settlement is made bilaterally, both on the side of the delivery of securities (physical or electronic) as well as on the payment side.

In the case of stock exchange transactions, clearing and settlement may be carried out bilaterally, directly between the contracting parties, or in a centralised manner. In centralised settlements, bilateral netting is made through the physical transfer (at the stock exchange) or electronic transfer (in accounts registered with the Central Securities Depository (DCV)).

Payments are always made in the stock exchange clearing system through multilateral netting. Multilateral netting is only used for the settlement of trades that are undertaken on a T+2 basis and does not represent the general application.

Centralised settlement is the usual practice for equity securities traded at the exchanges.

In Chile, the institutions that clear and settle securities market transactions are the following:

- the stock exchanges: they participate through their departments engaging in the centralised and cleared settlement of transactions, when this is established and permitted in their operating regulations or manuals. Within each exchange there is a specific department in charge of the centralised clearing of securities called a 'Clearing System'. Although stock exchanges participate actively in the process, under no circumstances are they responsible for the payment of the price of the securities or the delivery of them if the intermediaries do not provide the funds and the securities that are the subject of the transaction in full and on time;
- DCV: its exclusive purpose is to receive publicly offered securities in deposit for specific participants in the market (the depositors) and facilitate transfer of ownership transactions with such securities;
- securities brokers and other market agents: entities for which stock exchanges and the DCV carry out clearing and settlement processes. Additionally, these agents directly carry out the bilateral settlement of some of their transactions;
- the Securities Clearinghouse: this is an institution entrusted with administering, controlling and settling the transactions and open positions of clients and brokers in the futures and options market;
- securities intermediaries may participate in the clearing and settlement institutions as members of the exchange (only for stockbrokers) or as depositors in the DCV, where they can open accounts; and
- the rule also allows stockbrokers and securities agents to settle their transactions directly.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

Private placements are not regulated by the LMV but by the SVS, which issued General Rule No. 336 (NCG 336) in June 2012.

NCG 336 states that to be considered as a private placement the issuance has to comply with all of the following:

- (i) the issuance has to comply with the following information requirements:
 - (a) the date when the placement starts and the fact that the offer is a private placement;
 - (b) that the offer covers securities not registered with the SVS;
 - (c) that being non-registered securities there is no obligation to deliver public information about it; and
 - (d) the securities will have to be registered with the SVS to make a public offer;
- (ii) those who offer securities under private placements, must:
 - (a) verify the identity and capacity as qualified investors of the investors, as mentioned in (iii)(a); and
 - (b) comply with the conditions, thresholds and amounts mentioned in (iii)(a) and (b); and
- (iii) the placement shall be aimed at:
 - (a) qualified investors (as defined in the SVS General Rule 216 Nos. 1 to 6, which includes institutional investors and those persons or entities with investments in securities worth more than 10,000 Unidades de Fomento); or
 - (b) fewer than 250 qualified investors as defined in the SVS General Rule 216, Nos. 7 and 8 (persons or entities with investments in securities worth more than 2,000 Unidades de Fomento) in one or more offers with 12 months between the first offer and subsequent offers. For these purposes, 50 non-qualified investors can be included within these 250 investors.

However, placements of securities individually valued at more than 5,000 Unidades de Fomento shall be exempted from point (iii).

If the placement is announced via mass media, it will be considered as a public offer. E-mails, private meetings, phone calls will not be considered as public if the intention is to place securities as mentioned above.

8 What information must be made available to potential investors in connection with a private placing of securities?

As mentioned above, no specific information requirements apply to the private placement of securities. Notwithstanding this, the LMV states that the publicity, advertising and dissemination carried out by any means by issuers, stockbrokers, securities dealers, stock exchanges and any other

persons or entities that participate in the issue or sale of securities, may not contain statements, references or representations that may lead to error, mistakes or confusion among the public about the nature, prices, profitability, redemption, liquidity, guarantees or any other characteristics of the publicly offered securities or their issuers.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

There are no statutory or regulatory provisions regarding the transferability of securities acquired in a private placing. However, in certain cases, the issuer's articles of incorporation (in the case of non-listed companies) or shareholders' agreements, may include provisions limiting the sale or assignment of securities.

There are no standard mechanisms used to enhance the liquidity of securities sold in private placements.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

The LMV authorises offerings of securities of a Chilean issuer abroad. However, it requires delivering the same information to the SVS and local exchanges and, within the same terms, must be delivered to the foreign regulatory authorities or exchanges where the offering has been made.

Likewise, the security holders will have the same rights of any other local security holder, to be exercised directly or through the depositary according to the terms and conditions of the deposit agreement.

Regarding voting rights, the depositary will vote first according to the provisions of the deposit agreement, or, if nothing was indicated in this regard, according to the instructions given by the security holder. If the depositary votes against the deposit agreement or the instructions, the vote will be valid but the depositary will be liable for damages.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

According to the Corporations Act, the issuance of convertible bonds has to be approved by more than 50 per cent of the shareholders entitled to vote at an extraordinary shareholders' meeting of the issuer summoned to decide about the issuance of convertible securities.

It is common practice that such approval is given in general terms regarding the issuance of convertible bonds up to a specified amount or within certain conditions, delegating the specifics to the board of directors.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

Underwriting agreements are drafted according to international standards and they regulate the relationship between the issuer and the underwriters. Depending on the offering, it is not uncommon to find underwriting agreements subject to New York law.

It is also common to find book-building arrangements entered into with the underwriters and to find a syndicate of underwriters with one leading managing underwriter.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

Indemnity

Indemnity provisions are used in underwriting agreements almost without exception. These provisions cover the rights of the underwriters suffering losses or damages arising from the offering, due to statements that were false or made by the issuer in bad faith, or misrepresentations in the offering documentation.

Force majeure

As force majeure is defined in the Chilean Civil Code, its inclusion depends on whether the underwriting agreement is subject to Chilean or foreign

law. If the former is the case, then no specific definition is included and general rules about force majeure under the Civil Code apply. If foreign law applies, then the agreement will follow international standards in allowing the underwriter to terminate the agreement if any case of force majeure occurs.

However, it is also common to include in such agreements, besides force majeure provisions, further provisions dealing with material adverse changes, internal or international financial or political risks, etc.

Success fees

It is not common practice to include success fees.

Over-allotment option

Over-allotment options depend upon the type of security offering. They are more common in equity offerings because the managing underwriter is allowed to purchase more securities to cover over-allotments from the issuer.

14 What additional regulations apply to underwriting arrangements?

No specific regulations apply to underwriting agreements, other than those arising from any contractual relationship agreed upon by the parties.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

Once the issuers are registered with the SVS, they immediately become subject to reporting obligations to the SVS, the exchanges and the market in the form, periodicity and publicity mentioned in the LMV and regulated by the SVS.

Additionally, the issuers have to report any material information about themselves and their operations and businesses, about the securities and about the offering as soon as they have knowledge of such information. The report delivered has to be truthful, sufficient and the information contained therein has to be released in a timely way. The LMV defines material information as the information that a judicious person considers important for his or her investment decisions.

Likewise, once the issuer applies for registration, the SVS may request additional information about the issuer or the securities.

16 What information is a reporting company required to make available to the public?

A company registered in the Securities Registry has regular as well as continuous reporting obligations regarding material information, as mentioned above.

Continuous reporting obligations

A company registered in the Securities Registry must immediately disclose any material event or information regarding the issuer, its businesses and securities. Such information must be disclosed through a 'material event' notice sent to the exchanges and to the SVS (which makes it public immediately through its website) as soon as the event occurs or the issuer learns about such event or information.

However, with the approval of three-quarters of the acting directors of the company's board, certain facts or information related to pending negotiations that might damage the company's interests if disclosed may be considered 'reserved information'. Nonetheless, for qualification as reserved information, such event or information must be confidentially communicated in writing to the head of the SVS on the business day following the decision of the board.

Regular disclosure obligations

Quarterly, half-yearly and yearly financial statements

All companies registered with the SVS must file with the SVS and deliver to the stock exchanges a copy of their annual financial statements, which have to be audited, within 60 days following 31 December of each year and no less than 20 days before the date of the annual shareholders' meeting. These annual financial statements must be accompanied by the annual memory and the management and the auditors' reports. In addition, companies registered with the SVS are required to publish their annual financial statements in a newspaper and on their websites.

Update and trends

Since July, 2013, the Chilean Congress has been debating a bill of law to replace the SVS by a Securities and Insurance Commission. Currently, the SVS is chaired by a Superintendent, but the proposed commission will be composed of five members, changing its nature to a collective body. These five members will compose the board of the commission, in charge of its superior administration. The main purposes of this bill are to improve transparency, to provide the commission with more autonomy and to strengthen due process in sanctions applications, among others.

Integration is one of the most important trends in the Chilean stock market, and during 2014 relevant agreements were set up to this purpose.

Fostering integration of Pacific Alliance countries, Mexico become member of the Integrated Latin America Market (MILA) originally composed by Colombia, Chile and Peru. The incorporation of Mexico will boost the volume of the stock markets of the MILA's member countries.

With the same purpose of integration, the Santiago Stock Exchange and TSX Venture Exchange signed an agreement allowing double listing of small and medium-sized companies in those exchanges. With the agreement a new section named Bolsa de Santiago, Venture, was created and initially is intended to be used by mining companies. During 2014 two Canadian companies were listed in this exchange.

The first and third quarter financial statements must be filed with the SVS and delivered to the stock exchange within 30 days following the last day of March and September of each year, respectively.

The half-year financial statements, which have to be audited, should be filed and delivered within 45 days following the 30 June of each year.

The management report usually contains information about the company's strategy and business, a management discussion and analysis of the financial condition of the company and the results of operations, risk factors, corporate governance disclosures such as directors' and managers' compensation, the directors' committee report, reports about subsidiary companies, a list of material contracts the company has entered into and contracts with related parties, the auditors' report, etc. There is no special regulation as to forward-looking information in the annual report.

The annual report must be published on the company's website and made available for any shareholder that requires it.

Capital variations

The above-mentioned companies have to report any dividend distribution, share distribution and share exchange at least 20 days before the date of such distribution or exchange. Likewise, these companies have to report any capital increase within five days.

Other economic and financial information

At least 15 days before any shareholders' meeting, the company will disclose any specific expert report requested to decide about any issue presented at such meeting.

Other disclosure obligations

In addition to the foregoing, companies registered in the Securities Registry must inform the SVS and the exchange about shareholders' meetings, amendments to the articles of incorporation, the identities of their shareholders on a quarterly basis, the appointments of board members and managers and regarding any other documents delivered to shareholders or information published in the press by the issuer as to its securities or business.

There are other disclosure obligations related to insider trading, both for the company and the directors, officers and certain managers and other persons related to them.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The LMV prohibits market manipulation and stabilisation. Further, the LMV declares as illegal any fictitious transaction of any security in offerings or in secondary markets, whether made through an exchange or directly between the parties.

In fact, no person can deal or attempt to deal with securities by means of any act, practice or mechanism in any misleading or deceiving way.

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

The only measures permitted by the LMV are in cases of public offerings of new or old securities already issued but not publicly offered to the market, made according to the general rule approved by the SVS.

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

The basic remedy for liabilities arising from securities transactions is damages. However, the person who acted in breach of the LMV or the regulations of the SVS is also subject to administrative and criminal sanctions.

In the cases of corporate entities, the directors, officers, executives and auditors who breach the LMV or the regulations issued by the SVS will be jointly and severally liable for damages. Likewise, if the directors or managers of an exchange do not control the issuers and the observance of its internal regulations, they will be liable before the SVS. In this case, they will also be liable for damages unless they prove they acted with due diligence.

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If the security is cancelled from the Registry of Securities, the security holders will be entitled to damages. This remedy holds directors and managers liable, unless they prove they acted with due diligence, and likewise brokers, unless they prove they had no knowledge of the facts that caused the cancellation.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

There are several mechanisms at different levels:

- administrative: this is not a mechanism for seeking remedies, but the SVS has the authority to impose fines or other sanctions on any person

breaching the LMV or the regulations issued by the SVS. In this regard, different departments of the SVS prosecute and decide the case, but the decision is subject to appeal before the Santiago Court of Appeals;

- criminal: if the SVS considers that the activity may be considered to be a crime, it must notify the Prosecutors Office, which, in turn, shall open an investigation. Defendants subject to criminal action may face different levels of imprisonment; and
- civil: as mentioned above, any person affected by securities offerings may ask for damages in the cases and against the person previously specified.

Denmark

Søren Fogh and Michael Steen Jensen

Gorrissen Federspiel

Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The principal statute governing securities offerings in Denmark is the Securities Trading, etc. Act (Consolidated Act No. 831 of 12 June 2014, as amended; the Act) and various executive orders issued pursuant to the Act. In addition, EU regulations such as the Prospectus Regulation (Regulation (EC) No. 809/2004) are directly applicable in Denmark.

The Danish Financial Supervisory Authority (DFSA) is the main regulatory body and the supervisory authority responsible for administration of the Act. The supervision carried out by the DFSA covers both financial undertakings (including regulated markets, alternative market places, banks, securities traders, clearing undertakings and registration undertakings) and the securities market. The DFSA is responsible for reviewing and approving prospectuses on public offerings.

In addition to the DFSA, the Governing Board of the DFSA monitors listed companies' compliance with the Danish Financial Statements Act and makes decisions in matters of a fundamental nature or of far-reaching significance for stakeholders in the securities market. The Council also advises the DFSA on matters regarding best securities trading practices and in connection with issuing regulations. Finally, the Council assists the DFSA in its information activities.

Finally, the Nasdaq OMX Copenhagen A/S (CSE) (www.nasdaqomxnordic.com), the alternative market place First North (which, like the CSE, is part of the OMX group, but focuses solely on growth companies) and GXG Markets (which focuses on small and medium-sized Danish business enterprises) (www.gxgmarkets.com) have issued listing rules as well as rules stipulating ongoing obligations for listed companies. For the purpose of this article, listing will primarily focus on a listing on the CSE.

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

When a public offer of securities is made in Denmark, it is generally required that a prospectus is prepared. This prospectus requirement applies to public offerings of debt and equity as well as primary and secondary offerings.

Generally speaking, the Act provides that a prospectus must contain all information which investors and their professional advisers would reasonably need for the purpose of making an informed assessment of the securities being offered and the issuer.

More detailed requirements for prospectuses are stipulated in Executive Order No. 1104 of 9 October 2014 on prospectuses for securities admitted to trading on a regulated market and in connection with the public offering of securities over €5 million implementing the Prospectus Directive and Executive Order No. 845 of 1 July 2014 on prospectuses in connection with public offerings of certain securities between €1 million and €5 million (the Orders).

The Orders set out that a prospectus must be prepared in a three-part form. The first part must contain a summary of the prospectus, the second part information relating to the issuer and the third part information in relation to the securities being offered. A prospectus relating to an offering of debt that is to be listed on a regulated market and that has a denomination

of at least €100,000 may exclude the summary. Furthermore, for certain debt issues effected pursuant to an offering programme or in a continuous or repeated manner by a credit institution where the proceeds of the issue of the securities are placed in assets which provide sufficient coverage for the liability deriving from the securities until their maturity date and where, in the event of bankruptcy of the related credit institution, the relevant amounts shall, as a priority, be utilised to repay the capital and interest falling due, a base prospectus rather than a full prospectus may, at the choice of the issuer, be prepared.

The detailed rules relating to the specific requirements for the contents of a prospectus are contained in the Prospectus Regulation, which is directly applicable in Denmark and sets out the information that must be included in a prospectus.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

For securities to be listed on the CSE, First North or GXG Markets, an application for admission must be submitted with the respective market. All three markets have prepared listing rules that must be complied with to obtain a listing. In addition, with respect to regulated markets (presently CSE and GXG Markets), the Executive Order on Admission to Official Listing (Executive Order No. 1069 of 4 September 2007) stipulates certain requirements for listing (eg, the distribution of shares on a minimum number of shareholders). Generally speaking, it is a simpler process to obtain a listing on GXG Markets or First North than on the CSE.

With respect to securities to be listed on the CSE, the prospectus must be submitted for approval with the DFSA and the CSE. The DFSA is required to revert within 10 or 20 business days depending on whether the issuer previously has had securities listed for trading. Although the DFSA and the CSE may be involved early on in the listing process, it is the norm that the final draft is submitted for approval. Nevertheless, the DFSA or the CSE, or both, will often revert with comments or suggestions for the prospectus. In 2013 the DFSA introduced a fast-track procedure for approval of prospectuses. Subject to certain conditions, prospectuses for issue of corporate bonds or shares may be approved by the DFSA through the fast-track procedure which can be completed within seven days.

When approved the prospectus is published by the CSE and on the DFSA website (www.ftnet.dk). The offering may not commence until after the publication of the prospectus.

With respect to securities that are not to be listed, the prospectus (if required) must be filed with the DFSA for approval. The approved prospectus is then published by the Danish Business Authority (formerly known as the Danish Commerce and Companies Agency). Usually, offers of securities in Denmark that are not to be listed on the CSE are structured in a way as to rely on one or more of the private placement exemptions. See question 7.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

An issuer of securities is generally free to publish marketing material, etc, provided that the material complies with general Danish marketing rules, including Executive Order No. 1583 of 18 December 2013 on Investor Protection in connection with Securities Trading. Marketing materials

that are used in connection with an offering must include a reference to the prospectus and information on where the prospectus may be obtained. Where an offering of securities triggers a prospectus requirement all information made available to the general public in connection with the offering is required to be in accordance with the prospectus.

There are no specific regulations under Danish law concerning the content and scope of research reports or blackout periods. However, under the Executive Order on the Preparation and Dissemination to the Public of Certain Investment Analyses (Executive Order No. 1234 of 22 October 2007), a person presenting an investment analysis shall ensure that all relationships and circumstances that may reasonably be expected to impair the objectivity of the recommendation are disclosed in the analysis. The analysis must also disclose if the person presenting the analysis is party to any other agreement with the issuer relating to the provision of investment banking services, provided that this would not entail the disclosure of any confidential commercial information and that the agreement has been in effect within the previous 12 months or has given rise during the same period to the payment of compensation or a promise of compensation.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

Secondary offerings of securities to be listed on a regulated market are generally subject to the same rules, and may rely on the same exemptions, as primary (first) offerings. This also applies to public offerings of securities that are not listed on a regulated market.

A sale of shares by a selling shareholder (which does not entail a simultaneous listing of such securities) would not usually trigger a prospectus requirement unless such sale is deemed to be in contravention of a private placement exemption previously relied upon. A secondary sale of shares will be subject to the general rules of Danish contract law and liability may thus be invoked due to, for example, misrepresentations or omissions made on the seller's behalf.

6 What is the typical settlement process for sales of securities in a public offering?

For offerings of securities to be listed on the stock exchange, the settlement process will commence after finalisation of the offering period, upon which the distribution of shares and (if applicable) the price of the shares will be settled. Following the announcement of the result of the offer and confirmation that the offer will be completed, the securities will be issued by the company and registered in the VP Securities Services, which is the Danish central securities depository. The financial intermediaries will settle the individual transactions in accordance with the T+2 principle (trading day plus two days) as laid down in the CSD Regulation (Regulation (EU) No. 909/2014 of 23 July 2014). Payment for the shares may be settled via clearing centres, which maintain custody accounts with the VP Securities Services. Upon settlement, the account-holding institution would send a statement to the shareholder evidencing the transaction and the number of shares involved.

It should be noted that some companies opt to register their securities with the VP Securities Services, even if the securities are not listed.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

The Prospectus Directive (Directive 2003/71/EC) has been implemented into Danish law. Accordingly, the private placement exemptions contained in the Prospectus Directive may generally be relied upon although the Danish implementation rules may vary from those of other jurisdictions within the EU.

The most relevant private placement exemptions pertaining to public offerings of securities that are not to be listed on a regulated market are:

- offers, which are only made to qualified investors as defined in the Orders. This definition includes: entities subject to financial supervision (banks, insurance companies, pension funds, etc); legal entities not subject to financial supervision or regulation, but whose sole purpose is to make investments in securities; and other legal persons that do not fulfil two of the SME criteria (on average employing less than 250 full-time employees in an accounting year; having a total balance sheet not exceeding €43 million; and a net turnover not exceeding

€50 million). This exemption would not cover high-net-worth private individuals;

- the offer is restricted to less than 150 natural or legal persons in Denmark, who are not qualified investors. This exemption may be combined with the one above;
- the offer is subject to a minimum denomination or a minimum investment requirement equal to at least the counter value of €100,000, regardless of the type of investor in question; and
- an offer of securities with a total consideration of less than €100,000 within Denmark, which shall be calculated over a period of 12 months.

The most relevant private placement exemptions pertaining to public offerings of securities that are to be listed on a regulated market are:

- shares representing, over a period of 12 months, less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated market; and
- securities offered to existing or former directors or employees by their employer or an affiliated undertaking, provided that the issuer has a listing on a regulated market, that the securities offered are in the same class as those already listed and that a document is made available containing information on the number and nature of the securities and the reasons for and detail of the offer.

The private placement regime applies if the public offering of securities qualifies for at least one of the private placement exceptions. The availability of the above private placement exemptions does not require that any filings are made with the DFSA or any other regulatory body in Denmark, although a stock exchange release regarding an increase in share capital as a result of the issue must be released on the CSE.

8 What information must be made available to potential investors in connection with a private placing of securities?

There are no statutory requirements on information to be provided to investors in connection with an offer under the private placement exemptions. It is generally recommendable to include a selling legend in any offering material distributed to Danish investors stating that the material is not approved by DFSA or CSE and that the offer is exempted from the prospectus requirement. Furthermore, any material provided must be in accordance with the Danish Marketing Rules and may not be untruthful or misleading.

For listed companies' secondary offerings under the special exemptions stated above, details on the issue will often have to be published as part of the company's stock exchange announcement regarding share capital increase.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

Generally speaking, there are no restrictions on the transferability of securities acquired in a private placing. However, if the securities are transferred to a third party following the subscription, such transfer may be deemed to be in contravention of the private placement exemptions.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

The Act does not apply to offers of securities made by a Danish issuer solely outside of Denmark. A listed Danish issuer is, however, under an obligation to publish information on any increase in share capital on the CSE, also if such shares are offered outside Denmark.

If a foreign prospectus is drawn up and approved in accordance with the Prospectus Directive, it will be possible to passport the prospectus into Denmark in accordance with the passporting procedure set out in the Prospectus Directive. To rely on the passport procedure, the applicant must file the following documents with the DFSA:

- the prospectus, which has been certified by the relevant foreign authority as having been drawn up in accordance with the Prospectus Directive or national law transposing the Prospectus Directive;
- a certificate of approval of the prospectus from the relevant foreign authority; and
- a Danish translation of the summary of the prospectus.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

The general prospectus requirement covers an offer of warrants, convertible bonds, stock options, debt and share and debt equivalents. Other securities are generally not subject to prospectus requirements, while special rules apply to collective investment undertakings, etc.

The prospectus requirements applicable for other securities to be listed on the CSE will depend on the particular nature of the individual instruments.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

In relation to the listing of debt and equity securities, Danish practice has, in the last 10 to 15 years, gradually moved towards Anglo-American-style underwriting arrangements with extensive regulation of the parties' rights and obligations under an underwriting arrangement.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

Underwriting agreements in connection with the listing of securities typically contain extensive indemnities covering the managers' losses, etc, arising out of breach of representations and warranties or any untrue statements or omission of information in the final prospectus, etc.

The underwriting agreement will typically be signed upon publication of the prospectus thus covering the period until completion of the initial public offering. Standard force majeure clauses will typically apply for this period but elaborate provisions hereon are not too common. Over-allotment options and success fees are often part of equity offerings.

14 What additional regulations apply to underwriting arrangements?

Pursuant to the Prospectus Regulation, the prospectus must contain information regarding any underwriting agreement entered into in connection with the issue as well as any information relating to stabilisation, 'green-shoe' options or over-allotment.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

Issuers of securities admitted to trading on the CSE and GXX Markets are subject to comprehensive reporting requirements set out in the Act, administrative orders and the applicable listing rules. Issuers of securities traded on First North are not by law subject to reporting requirements due to the issue, but will be subject to rules laid down by First North. Other issuers of unlisted securities are not subject to ongoing reporting requirements merely due to a public offering by that company, etc.

16 What information is a reporting company required to make available to the public?

Financial information

The company shall publish periodical financial information, namely, the annual report and an interim report regarding its activities and results for the first three, six and nine months of each financial year.

Continuous disclosure obligations

The company is under an obligation to immediately publish information of a precise nature about significant matters concerning the company, which may be assumed to be of significance to the price formation of the company's securities admitted to trading. Examples of such significant matters could be major investments, significant results in relation to development of the company's products, legal proceedings taken by or against the company if the outcome of such proceedings is considered to be of major importance, etc.

If the company publishes such information and subsequently significant changes are made compared to the information published, the DFSA should be notified immediately of such changes.

Insider registers

The company must draw up and regularly update a list of the persons working for the company who have access to inside information about the company (insiders), and the company must ensure that its internal rules comprise provisions on when insiders may trade in the company's securities. Senior employees of companies issuing shares admitted to trading on a regulated market in Denmark must notify the issuing company of transactions with shares or other securities linked to such shares conducted at their own account. Senior employees comprise any member of the board of directors and the management board of the issuing company as well as any senior employee within the issuing company who has regular access to inside information relating, directly or indirectly, to the issuer, if the relevant senior employee is authorised to make management decisions of material importance for the issuer's future business development. Related parties to such senior employees are also subject to a reporting obligation. The notification obligation only becomes effective when the senior employee and his or her close relatives in aggregate have traded an amount of €5,000 or more in one calendar year. The company has an obligation to disclose any information it has received to the DFSA.

Treasury shares

According to the Danish disclosure rules, a company with shares admitted to trading on a regulated market in Denmark must immediately publish a notification to the market regarding the percentage of treasury shares if the voting rights of the shareholding exceed or fall to less than 5, 10, 15, 20, 25, 50, or 90 per cent, or one-third or two-thirds of the share capital's voting rights or nominal value are reached or no longer reached.

Public Register of Major Shareholders

Information on Danish private and public limited companies' major shareholders must now be registered in a public register. The Public Register of Major Shareholders should not be confused with the company's register of shareholders, which is a register of all owners and pledgees. The registers are two separate systems and only the Public Register of Major Shareholders will be publicly available.

The Public Register of Major Shareholders was opened for registrations as from 15 December 2014. For companies incorporated before 15 December 2014, a transition period applies under which registrations of major shareholders must be made no later than 15 June 2015. Any changes in the company's major shareholdings after 15 December 2014 must, however, be registered as soon as possible after the company has received notice from shareholders etc. The following registrations must be made when the company receives notice from shareholders, pledgees or persons who in other ways have influence:

- shareholders whose shareholding represents 5 per cent or more of the total share capital or of the voting rights in the company;
- changes in a shareholding to the effect that the 5, 10, 15, 20, 25, 50, 90 or 100 per cent thresholds or the thresholds of one-third or two-thirds of the voting rights or the share capital are reached or no longer reached;
- persons who hold a pledge over a company's shares, provided that the pledgee holds the voting rights attached to the shares (5 per cent or more) and intend to exercise such right; or
- persons who in other ways have an influence in the company corresponding to 5 per cent or more of the voting rights.

The company must register information on major shareholders in the Public Register of Major Shareholders as soon as possible after reception of notice of the above-mentioned circumstances.

Owners of bearer shares who hold less than 5 per cent of the total share capital or the total voting rights in a Danish private or public limited company must register themselves in a separate part of the Public Register of Major Shareholders called the Bearer Shares Register.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

Price manipulation or attempts at such manipulation are not permitted under Danish law. Price manipulation is defined as acts likely to influence the price of securities in a direction deviating from their value on the market through:

- dissemination of information through the media or by any other means that gives, or is likely to give, false or misleading signals as to

financial instruments, including the dissemination of rumours and false or misleading news;

- transactions or orders to trade that give, or are likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments;
- transactions or orders to trade that employ fictitious devices or any other form of deception or contrivance; or
- transactions or orders to trade that secure, by a person, or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level.

The prohibition against price manipulation is supplemented by a prohibition against the purchase, sale or recommendation to buy or sell securities by any person with inside information that could be of importance to the transaction in question.

Any person with inside information is further prohibited from disclosing such information to any other party unless such disclosure is made within the normal course of the exercise of his employment, profession or duties and the person to whom the information is procured is subject to a duty of confidentiality.

The prohibited activities relate to all types of securities admitted to trading on a regulated market or alternative marketplace. Other securities not admitted to trading are only covered if they are linked in some way to a security admitted to trading. For securities not admitted to trading, statutory provisions on fraud, etc, may in some cases be applicable.

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

Price stabilisation is permitted within the safe harbour provisions of Regulation (EC) No. 2273/2003 of 22 December 2003 as regards exemptions for buy-back programmes and stabilisation of financial instruments and referenced in the Act.

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

Civil liability in relation to public offers is typically based on negligence on the part of the management, the company, advisers or accountants either due to misrepresentations or omissions in the prospectus or due to the completion of an offering despite financial difficulty. In some cases, attempts have also been made to void subscriptions or purchase agreements on the basis of fraud or frustration. To mitigate the risk of liability in connection with an offering, a verification process is typically completed prior to the offering.

Civil liability based on negligence may also arise on the basis of clearly incorrect stock exchange notification, for example, a manager's notice regarding the completion of an offer and the performance of this offer.

As far as we are aware, no case law has formed with respect to civil liability (as opposed to criminal liability) in connection with trading on the basis of insider knowledge or manipulative activities.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

Minor violations of reporting obligations are typically addressed administratively by the DFSA or CSE without triggering any sanctions. In serious cases, fines may be imposed on the issuer. The CSE or the DFSA may suspend or withdraw the securities in question from listing. Decisions by the CSE and the DFSA are made public, and the DFSA may publish the name of the non-compliant entity.

Criminal liability may arise for violation of the Act and, in aggravating cases, under the Danish Penal Code. Any infringement or attempted infringement of the insider dealing rules or the prohibition against manipulative practices may be sanctioned by either a fine or imprisonment.



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Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

Securities (debt and equity) offerings and trading in Germany are governed by several relevant statutes, rules and regulations, in particular:

- the Act on the Strengthening of Investor Protection and Improved Functioning of the Capital Markets;
- the Act on the Strengthening of German Financial Supervision;
- the Bond Act (SchVG);
- the Commission Regulation (EC) No. 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC as regards exemptions for buy-back programmes and stabilisation of financial instruments;
- the Commission Regulation (EC) No. 809/2004 of 29 April 2004 implementing Directive 2003/71/EC as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements;
- the Commission Regulation (EC) No. 211/2007 of 27 February 2007 amending Regulation (EC) No. 809/2004 implementing Directive 2003/71/EC as regards financial information in prospectuses where the issuer has a complex financial history or has made a significant financial commitment, amended by the Commission Delegated Regulation (EU) No. 486/2012 as regards disclosure requirements;
- the Commission Regulation (EU) No. 1092/2010 of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board;
- the Commission Regulation (EU) No. 1093/2010 of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/78/EC;
- the Commission Regulation (EU) No. 1095/2010 of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/77/EC;
- the Commission Delegated Regulation (EU) No. 862/2012 of 4 June 2012 amending Regulation (EC) No. 809/2004 as regards information on the consent to use of the prospectus, information on underlying indexes and the requirement for a report prepared by independent accountants or auditors;
- the Commission Delegated Regulation (EU) No. 486/2012 of 30 March 2012 amending Regulation (EC) No. 809/2004 as regards the format and the content of the prospectus, the base prospectus, the summary and the final terms and as regarding the disclosure requirements;
- the Commission Delegated Regulation (EU) No. 285/2014 of 13 February 2014 supplementing Regulation (EU) No. 648/2012 with regard to regulatory technical standards on direct, substantial and foreseeable effect of contracts within the Union and to prevent the evasion of rules and obligations;
- the Commission Delegated Regulation (EU) No. 382/2014 of 7 March 2014 supplementing Directive 2003/71/EC of the European Parliament and of the Council with regard to regulatory technical standards for publication of supplements to the prospectus;
- the Commission Regulation (EU) No. 596/2014 of 16 April 2014 on market abuse;
- the Commission Regulation (EU) No. 909/2014 of 23 July 2014 on securities settlement and the Central Securities Depositories;
- the Exchange Rules of the Frankfurt Stock Exchange;
- the Financial Stability Act (FinStabG);
- the General Terms and Conditions (Open Market) of Deutsche Börse AG for the Regulated Unofficial Market on the FWB Frankfurt Stock Exchange;
- the German Banking Act (KWG);
- the Investment in Assets Act (VermAnlG);
- the Investment Services Rules of Conduct and Organisation regulation;
- the Ordinance for the Ascertainment of the Prohibition of Manipulation Practices (MaKonV);
- the Ordinance concerning the Admission of Securities to Official Listing on a Stock Exchange (BörsZulV);
- the Ordinance of Securities Trading Reporting and Insider List (WpAIV);
- the Safe Custody Act (DepotG);
- the Securities Prospectus Act (WpPG);
- the Securities Trading Act (WpHG);
- the Stock Corporation Act (AktG);
- the Stock Exchange Act (BörsG);
- the Trading Regulations for the Regulated Unofficial Market on the Frankfurt Stock Exchange; and
- the Act Adapting Legislation in the Financial Market Area (KAGB-Anpassungsgesetz).

In addition, various EU Directives have been implemented in the aforementioned German rules and regulations, particularly including:

- Directive 2001/34/EC of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities;
- Directive 2004/39/EC of 21 April 2004 on markets in financial instruments (amending Council Directives 85/611/EEC and 93/6 EEC and Directive 2000/12/EC and repealing Council Directive 93/22/ EEC – MiFID);
- Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC;
- Directive 2010/73/EU of 24 November 2010 amending Directive 2003/71/EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading;
- Directive 2011/61/EC of 8 June 2011 on Alternative Investment Fund Managers, and amending Directives 2003/41/EC and 2009/65/ EC (AIFMD);
- Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups; and
- Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse.

Further, on 20 October 2011, the European Commission (EC) adopted a legislative proposal for the revision of MiFID. The proposals took the form of a revised Directive and a new Regulation, which together are commonly referred to as MiFID II and are expected to take effect on 3 January 2017.

The European Securities and Markets Authority (ESMA) in Paris (see Commission Regulation (EC) No. 1095/2010) will ensure the functioning of the internal market by ensuring a high, effective and consistent level of regulation and supervision. ESMA's tasks include promoting supervisory convergence and providing advice to the EU institutions in the areas of securities and markets regulation and supervision, as well as related corporate governance and financial reporting issues.

In Europe, the European banking supervision has started and since 4 November 2014 the Single Supervisory Mechanism (SSM) has been implemented. The SSM comprises of the European Central Bank (ECB) and the certain national competent authorities (NCAs) of eurozone countries and other participating countries (participating member states). The three main aims of the SSM are, according to the 'Guide to banking supervision' issued by the ECB in November 2014, to:

- ensure the safety and soundness of the European banking system;
- increase financial integration and stability; and
- ensure consistent supervision.

The ECB is responsible for the supervision of around 4,700 supervised entities within participating member states. The main role of ECB is the supervision of the classified 'significant' entities, while the NCAs supervise the 'less significant' entities (whereby ECB is also entitled to supervise these entities to ensure the consistent application of high-quality supervision standards). The Federal Financial Services Supervisory Authority (BaFin), as NCA, is assisting the ECB with the supervision of the 'significant' entities in Germany. The SSM conducts a regular review to determine whether or not a supervised entity fulfils specific conditions and qualifies as being 'significant'. Notwithstanding the fulfilment of these conditions, the SSM may declare a supervised entity as 'significant' to ensure the consistent application of high-quality supervision standards. In addition, the ECB is also involved in the supervision of cross-border entities and conglomerates.

BaFin exercises the supervision of all institutions in cooperation with the Bundesbank. The Bundesbank, without having an NCA status, is involved in the ongoing monitoring of the institutions under German national law, so that it has the status of a central bank with supervisory duties which is not an NCA. The banking supervision activities involve evaluating notifications and reports submitted by the institutions, conducting supervisory discussions with bank management and performing on-site inspections, particularly in the areas of risk management and approval of internal models. BaFin is responsible for sovereign decisions in the form of supervisory measures, which it implements, inter alia, on the basis of the Bundesbank's work. Additionally, BaFin has responsibility for supervising financial services institutions and payment services providers, and for consumer protection. Its responsibilities for the latter areas are not affected by the SSM Regulation, however. This division of duties between BaFin and the Bundesbank should continue with regard to the SSM as well – directly in relation to less significant banks and via Joint Supervisory Teams in the case of significant institutions.

Other responsibilities of BaFin regarding securities supervision are:

- combating insider dealing;
- tracking down market manipulations;
- enforcing transparency rules such as obligations relating to ad hoc announcements;
- making voting rights announcements;
- making notifications on directors' dealings and financial reporting; and
- reviewing securities prospectuses.

In addition, the exchange supervisory authorities of the federal German states are responsible for the supervision of the respective stock exchanges established in such states and work in this regard together with BaFin.

Finally, the management of the respective domestic stock exchange is responsible for admission for the trading of securities at such a stock exchange.

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

The WpPG requires every public offering of securities (debt and equity) in Germany to be based on a prospectus, if no exemption for this requirement

as stated in the WpPG applies. According to the WpPG, the content of the prospectus should, inter alia, contain the following:

- a summary in a concise manner and in non-technical wording regarding the issuer and securities that is comprehensible to the general public, also containing key features of the offering and a warning notice. The length of the summary has to reflect the complexity of the issue but must not exceed 7 per cent of the length of the prospectus or 15 pages overall:
 - presentation of the risk factors;
 - information about the issuer (eg, name, seat, business overview and executive bodies);
 - financial information, including annual financial statements (containing the auditor's report) and financial quarterly, semi-annual or annual reports (if applicable or available);
 - explanation of the financial results;
 - explicit working capital statement; and
 - information on the securities to be offered and the terms and conditions of the offer.

Further, where an issuer has a complex financial history, the entire business aspects of the issuer may not be covered by the historical financial information relating to the issuer, but will be covered instead by financial information drawn up by another entity. In such cases, the corporate structure or the financial situation of the issuer has to be disclosed in more detail if such fundamental changes in the corporate or financial structure during the relevant financial period have occurred. Commission Regulation (EC) No. 211/2007 amended Directive 2003/71/EC regarding the financial information that must be included in a prospectus where the issuer has such a 'complex financial history' or has made a significant financial commitment.

The prospectus must be published at least one working day before the start of the offering to enable investors to evaluate the securities offered. Such a publication may be made in any nationwide newspaper, in a printed format, by newspaper notice stating where the printed prospectus is available, or electronically on the website of the issuer and the underwriter or the stock exchange. The public offering of securities without a prospectus is an offence subject to administrative fines (see question 20). In the case of debt securities and other non-equity securities including warrants, which are issued under an offering programme, a 'base' prospectus may be used. Such a prospectus will be valid for 12 months after its publication for public offerings or admissions to trading, provided appropriate supplements are prepared and approved thereafter.

Further, Commission Delegated Regulation (EU) No 382/2014 supplemented Directive 2003/71/EC and sets forth a non-exhaustive list of when an issuer is required to publish a supplement to a prospectus. According to the new regulation, an issuer of equity securities or underlying shares in the case of depository receipts must publish a supplement to its prospectus:

- if new annual audited financial statements are finalised after the approval of the prospectus;
- in the event that the issuer publishes an amendment to a profit forecast or estimate previously included in the prospectus;
- in the event of a change of control; and
- in the event of a new public takeover bid.

Additionally, an issuer must publish a prospectus supplement:

- when there's a change in the working capital statement;
- when the issuer is seeking admission to regulated markets or intends to make a public offer in member states other than those previously listed in the prospectus;
- when the issuer makes a new significant financial commitment that is likely to produce significant gross change; and
- when the issuer increases the aggregate nominal amount of the offering.

The WpPG governs both the offering of securities to be admitted to trading on a stock exchange and public offerings without such a simultaneous admission to trading. Where admission to trading on a stock exchange has been applied for, the content of the prospectus and other required documents must further comply with requirements of the BörsZuIV. Nevertheless, only one prospectus needs to be prepared for the purpose of the public offering and the stock exchange listing. Further, if an application for admission to trading on the regulated domestic market has been filed, the admission office or, as the case may be, the admissions committee of the relevant stock exchange decides about the admission. According

to the BörsZulV, the admission to trading may not be granted prior to one trading day after the filing of the admission application. The securities are allowed to be traded one trading day after the publication of the prospectus. If a prospectus does not have to be published, trading can start one working day after the admission decision has been published. The admission decision will be published at the cost of the issuer in the electronic Official Gazette.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

For issuers incorporated and seated in Germany the prospectus will be approved by the BaFin. Alternatively, for issuers incorporated in other EU member states or in states of the European Economic Area (EEA), the prospectus must be approved by the issuers' home state authority and, thereafter, the home member state authority will notify the BaFin of the approval accordingly. For issuers who are incorporated outside the EU and the EEA, the competent regulatory authority is the authority of the EU or EEA state where the securities are offered to the public for the first time, or where the admission for trading on a regulated market is filed for the first time.

Under German law, the filing of a prospectus relating to a public offering is governed by the WpPG. BaFin reviews the content of the prospectus to ensure its compliance with the applicable regulations (see question 2). In addition to the filing with BaFin, if the securities are to be admitted to trading on a stock exchange, an application must be filed with the relevant stock exchange. There are various stock exchanges in Germany (Berlin, Düsseldorf, Frankfurt am Main (including Xetra), Hamburg, Hannover, Munich, Stuttgart and Tradegate) on which securities are traded but Germany's main stock exchange is the Frankfurt Stock Exchange operated by Deutsche Börse AG. The equity capital market trading segment at the Frankfurt Stock Exchange is divided into the regulated market (prime standard and general standard segments) and the regulated unofficial market (the Open Market segment). Most securities trading takes place on the Frankfurt Stock Exchange through the electronic trading system Xetra. The trading on the Frankfurt Stock Exchange is supported by a specialist for each security.

In general, the issuer has to file the application for admission to the exchange together with a bank, a financial service institution or a designated listing partner that is approved for trading on the Frankfurt Stock Exchange. The following documents must generally be submitted:

- a listing application (signed by the issuer and the credit institution, financial institution or a listing partner);
- a prospectus that has been approved by BaFin and published (a preliminary prospectus is sufficient for filing an application);
- the certified articles of association;
- the certified excerpt from the commercial register;
- a report on the company's formation (if it has not yet existed for three financial years);
- evidence of resolution in relation to the initial public offering (IPO), namely, minutes of the annual general meeting and resolution of the executive board and the supervisory board;
- proof of sufficient working capital for at least 12 months; and
- proof of a free float of at least 25 per cent, whereby exceptions exist for shares in large volumes.

The regulated unofficial market, named the Open Market by the Frankfurt Stock Exchange, provides an alternative to the EU-regulated segment, the organised market, as a point of access to the capital market. Small and medium-sized companies, in particular, benefit from easy, fast and cost-effective admission to exchange trading. The Open Market (divided into Entry Standard and Quotation Board) represents the second domestic market segment regulated by law after the regulated market. However, in contrast to the regulated market, the Open Market is not a recognised market and, as such, is governed by domestic as opposed to EU regulation. For example, the inclusion of securities on the Open Market is governed by the General Terms and Conditions of Deutsche Börse AG for the Regulated Unofficial Market on the Frankfurt Stock Exchange, last modified on 26 July 2013. Besides German shares, mainly international shares, bonds of German and international issuers, certificates and warrants are traded on the Open Market. In principle, a registered trading member of the Frankfurt Stock Exchange files the application for inclusion in the

exchange trading in the Quotation Board. The inclusion of securities in the Entry Standard takes place upon application of the issuer of the securities in connection with a bank institution, a financial services institution or a company that operates according to section 53, clause 1 of the KWG, or according to section 53b, clause 1 of the KWG. The organising body of the Open Market, Deutsche Börse AG, makes the decision about inclusion. Issuers must fulfil several formal inclusion requirements. The inclusion of securities in the Quotation Board requires that such securities are admitted to trading on a similar domestic or foreign exchange market recognised by Frankfurt Stock Exchange. Further, the right to terminate without notice shall remain unaffected. Frankfurt Stock Exchange shall, in particular, be entitled to terminate the inclusion without notice if the included shares cease to be admitted for trading at a domestic or international exchange-like trading market recognised by Frankfurt Stock Exchange or if an orderly trading or settlement is not possible or if the public is in danger of fraud.

In the Open Market segment the Entry Standard is the platform for a cost-effective admission to exchange listing and trading. An issuer applying for the Entry Standard must provide detailed information in the form of a prospectus that is valid and approved or certified according to the regulations of the WpPG, and any supplements to such securities prospectus, which allows for a better assessment of the issuer. The prospectus requirement does not apply to issuers that were included in the Entry Standard before 1 July 2012 and for securities previously traded on the regulated market segment. The issuer must also inform Deutsche Börse AG immediately and in writing about essential circumstances concerning the included securities and itself.

Further, on 12 November 2013, the BGH published an important judgment concerning the requirements for the delisting of a public company from the regulated market in Germany. In its decision the BGH overturned its own guidelines in the earlier Macrotron case by ruling that a company is not required to obtain shareholder approval prior to filing for an application for delisting, nor is such a company required to offer to purchase (*Abfindungsangebot*) all of the shares of outstanding shareholders prior to delisting.

The main German trading market for debt securities is also the Frankfurt Stock Exchange. The sub-segment prime standard of the regulated market, which provides additional obligations for issuers, applies to equity securities being admitted to trade. Therefore, debt securities are governed only by the general standard rules implemented by law.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

As mentioned in question 2, every public offering of securities requires the publication of a prospectus. The basic terms 'public offering' and 'securities' are defined in the WpPG. Essential to the concept of a security by the standards of the WpPG is fungibility, namely, the marketability of the securities in the capital market. Registered bonds, promissory notes and fixed-term deposits are therefore excluded, as are non-transferable share options. Share certificates of a company with limited liability (GmbH), limited partnership or partnership organised under the German Civil Code (BGB) are treated likewise. Falling within the definition of a security in accordance with the WpPG are all tradable securities, in particular, shares, certificates in place of shares (eg, ADRs), participation certificates and warrants and bonds from industrial undertakings or corporations are also covered. In this respect, it is irrelevant whether the securities are in certified form or not.

The term 'public offering' is defined in section 2, No. 4 of the WpPG as a notice to the public in whatever form and by whatever means, which contains sufficient information about the conditions of the offering and the securities to be offered to place an investor in a position to be able to decide whether to purchase or subscribe to these securities.

Accordingly, advertising measures in advance of going public, or 'roadshows', fall short of an offer within the meaning of the WpPG since the actual opportunity to purchase or subscribe is lacking. The (public) invitation to make an application to conclude the subscription contract, for instance, is sufficient. This issue is important in particular for Open Market initial public offerings, such as the Entry Standard segment of the Frankfurt Stock Exchange or m:access on the Munich Stock Exchange. Neither the application for inclusion in the Open Market nor the actual inclusion establishes a definite opportunity to purchase; consequently a public offering is not made. The threshold of the public offering is crossed only in the event of additional promotional activities being undertaken.

The term 'promotional activity' should be given a broad interpretation in this sense. All sources of information relate to the public, in contrast to individuals, if they are accessible to an undefined group of people. This naturally includes the internet, but also company journals used to make announcements or electronic systems such as Bloomberg or Reuters. The use of external investment intermediaries (tied agents) also regularly meets the 'public' criterion.

Exceptions to the duty to provide a prospectus apply in the case of certain types of offers and in relation to certain securities (see question 7).

If a prospectus is drawn up, it is not allowed to be published and distributed before being approved by BaFin (see question 3). BaFin will approve the content of the prospectus and make its decision within 10 working days after having received the prospectus in respect of completeness and conformity with WpPG. This period is extended to 20 working days if the public offering concerns securities that are not yet licensed to be traded on an organised market in an EEA member state. If the prospectus is incomplete, or if it requires supplementary information, the periods stated apply only from the time when this supplementary information is received. In the case of an IPO, the timing for supplementary information is crucial and should be discussed with BaFin in advance. The approved prospectus is made available by BaFin on its website for 12 months. The offeror must publish the prospectus without delay, at the latest, one working day before the start of the public offering. Each important new circumstance or significant inaccuracy that could affect the assessment of the securities must be stated in an addendum to the prospectus. The addendum also must be approved by BaFin, and it must be published in the same way as the original prospectus.

Research reports are not regarded as prospectuses under WpPG and within the meaning of the prospectus liability provisions under stock exchange law. There is no special legal basis of liability in respect of defective or incomplete reports. Nonetheless, liability on a purely civil basis is not excluded, in particular in the case of 'scalping'. In the case of larger public offerings, rules of conduct for marketing and capital markets communication are, therefore, customary in the market in order to minimise liability risks.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

In principle, secondary offerings of securities through a public offering are subject to the same requirements as primary offerings so that the WpPG is applicable. Secondary equity offerings are regularly used to diversify shareholdings among the general public in order to create a (larger) free float. In respect of prospectus requirements, it should be proved whether the pre-conditions for a public offering exist and, if so, whether an exemption rule comes into play. Such an exemption from the duty to provide a prospectus may be considered in the case of subsequent tranches of a share offering if, over a period of 12 months, the new shares amount to less than 10 per cent of the shares of the same type that have already been admitted to trading in the same market.

According to the AktG, any offer by an issuer for subscription of new shares is subject to the subscription rights of the existing shareholders in proportion to their existing shareholding. Under the rules of the AktG, it is possible to exclude pre-emptive rights in whole or in part, but only if such exclusion is made in the same resolution as the one that decides on the capital increase. In addition, such an exclusion of pre-emptive rights must be approved by at least 75 per cent of the share capital represented at the general meeting (unless an even larger majority is required in the articles of association).

Further, the selling shareholder is liable only for defects in the existence of the right embodied in the share, such as for the existence of the company, as well as the existence, content and scope of features of the ownership rights (participation in profits, voting rights, freedom from investment arrears and any ancillary obligation).

If a major shareholder sells shares to an underwriting syndicate, it is customary for additional assurances to be given extending beyond the principles of legal liability. The greater the 'proximity' of the selling shareholder to the issuer (an original shareholder or member of the company's executive body), the more likely the banks are to demand a non-liability-dependent guarantee. This relates in particular to the assurance that the selling shareholder does not know of any facts that are not in the public domain that could be relevant to the valuation of the business, the shares, or both.

However, the selling shareholder is not liable for the value or the negotiability of the shares, for the level of the dividend, for defects in the business or for any over indebtedness of the company.

6 What is the typical settlement process for sales of securities in a public offering?

The introduction of the securities, for example, the commencement of the listing, may take place (at the earliest) one working day after the prospectus has been published or, if none has been published, one working day after admittance to trading. This trading application can be made one working day prior to admittance to trading. The authority to settle the details of the listing's acceptance was transferred by the act implementing MiFID to the respective stock exchange regulations.

The following settlement is the process whereby securities are delivered, usually against payment, to fulfil contractual obligations such as those arising under securities trades. As part of performing the delivery obligations entailed by the trade, settlement involves the delivery of securities and the corresponding payment. The clearing and settlement process in Germany is characterised by an integrated structure. Generally, every placed trading order follows the clearing and settlement chain provided by Deutsche Börse AG, which means, for example, that after trading on Xetra, clearing will be operated by Eurex Clearing AG and settlement delivery will be executed in the Clearstream Banking AG system, both of which are subsidiaries of Deutsche Börse AG.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

As a basic description, an offer to the public is an offer directed at the general public, which means an offer that targets an unlimited number of potential investors. In contrast, a private placement of securities (debt and equity) requires, for example, a personal relationship between the issuer and the actual investor prior to the offer. Hence, Germany has broad exemptions from disclosure requirements for sales to sophisticated investors or to market professionals. An offer is not deemed to be an offer to the public (and therefore no prospectus is required) if it is made only to certain categories of investors. The key exemptions (some of which may be combined) in this regard are in accordance with section 3, clause 2 of the WpPG and include offers:

- solely addressed to qualified investors (defined as professional investors in line with the definition under MiFID);
- addressed to fewer than 150 individuals or legal entities (other than qualified investors) per EU/EEA state;
- addressed to investors only who acquire securities for at least €100,000 per investor with respect to each separate offering of securities;
- where the minimum denomination per unit amounts to at least €100,000; or
- where the total consideration for all offered securities in the EEA is less than €100,000 over a period of 12 months.

Pursuant to section 1, clause 2 WpPG there is no prospectus requirement where securities are issued by institutions licensed under the KWG for deposit taking or by issuers, the shares of which are already listed on a regulated market and the overall subscription price for all shares offered does not exceed €5 million.

Further, under section 4, clause 2 of the WpPG, an issuer is not required to publish a prospectus for admission to trading if the securities being issued are exempt, in particular:

- shares representing, over a 12-month period, less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated market;
- shares being offered in exchange for shares of the same class already admitted in the same regulated market, provided that the issuance does not require a capital increase;
- shares being offered in connection with a takeover offer or spin-off, provided that a document is available containing information that is equivalent to that of a prospectus; and
- shares already admitted to trading that are offered to existing or former employees or directors, provided that certain information is supplied.

8 What information must be made available to potential investors in connection with a private placing of securities?

In the case of a private placement of securities, there are no specific statutory requirements for any information to be provided to potential investors. However, if the issuer is providing potential investors with information, such private placement documents might be expected to contain, in an understandable manner, all information necessary to enable investors to make an informed assessment of the issuer's assets and liabilities, financial situation, profits, losses and future prospects and the rights attached to the securities. In relation to minimum requirements, Commission Regulation (EC) No. 809/2004 as amended and section 5 of the WpPG can therefore be used in an analogous manner. Further, if an issuer does not make use of an exemption under section 3, clause 2 of the WpPG and prepares an informational document, such a document will be regarded as a prospectus and the WpPG and other rules will apply.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

There are no statutory provisions that apply especially to the transferability of securities (debt and equity) acquired by investors through a private placement. If the exceptions stated in WpPG (as outlined in question 7) apply and the securities are admitted to trading on the stock exchange, the related securities can be traded on the stock exchange in accordance with the applicable laws and regulations of such stock exchange. Where such securities are not admitted to trading, it should be noted that in the issuer company's articles of association the transferability of securities may also be defined, and such articles may restrict the transferability of such securities. Further, there are no mechanisms in place to enhance the liquidity of securities in a private placement.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

In a fully internationalised securities market, issuers in public primary markets should be able to offer securities (debt and equity) to investors worldwide using one set of optimal distribution procedures and disclosure documents, and subject to one set of liability standards and enforcement remedies. Such a standardised issuance on internationally accepted rules would reduce the costs of issuing securities that are in international demand, a benefit that would be shared by both issuers and investors.

However, such international rules are not yet implemented worldwide. To date, EU or EEA member states have implemented a passport regime under the Prospectus Directive (see question 3). Accordingly, the WpPG requires an issuer of a pan-European offering of securities to acquire a passport in most cases from its home member state authority. This means that a German issuer who wants to publicly offer securities not only in Germany as its home member state but also in one or more other EU or EEA member states must file a prospectus with BaFin for approval. As soon as the prospectus and any supplements thereof are approved by BaFin, the approval entitles the issuer to validly publicly offer the securities in one or more EU or EEA member states without needing further approval of the prospectus. A further requirement is the prior notification of the respective supervisory authority in the particular EU or EEA member state. The same applies vice versa, namely, if a prospectus has been approved by a supervisory authority in another EU or EEA member state, BaFin has been notified and certain further language requirements have been met.

If an offer of securities is made outside Germany, the respective issuer must comply with the securities laws of such jurisdictions.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Convertible bonds can be converted during their term at the option of the bondholders or of the issuer into the issuer shares. In contrast, exchangeable convertible bonds differ from 'ordinary' convertible bonds in that they are issued by a company (issuer) and can be exchanged for the securities of another company (entity). Typically, an exchangeable convertible is a bond that pays periodic coupons and is callable at preset prices, whereby

ordinary convertible bonds can be exchanged for a set number of the entity's shares at bond maturity or when the bond is called before maturity, if bondholders wish to do so. Moreover, participation bonds are issued by companies, which provide investors with the right to participate in dividends to the shareholders.

Under German corporate law the issue of convertible bonds, participation bonds and participation rights requires a resolution of the shareholder's meeting adopted by at least 75 per cent of the share capital represented at the meeting, unless there is a different majority provided in the articles of association. Further, in the case of a domestic stock corporation, other certain statutory rules have to be observed.

Further, the issuance of exchangeable or convertible bonds, warrants or rights offerings falls within the scope of the WpPG, so that the issuer has to observe the respective statutory requirements of the WpPG. Pursuant to the rules in the WpPG any issuer wishing to make a public offering or an admission to trading of such securities must, subject to certain exemptions, submit a prospectus to BaFin (see question 2).

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

In the German market the commonly used international standards, in particular the International Capital Market Association (ICMA) standards, are applicable in debt and equity offerings. Parties to the underwriting agreement are the issuer, the selling shareholders (if any), and the banks as underwriters. Typically, the underwriting agreement is signed by the lead managers on behalf of the other members of the underwriting syndicate and the issuer. The main terms of the underwriting agreements relate to the details of the underwriting, the offering of the securities, admission to listing and the respective obligations of the parties.

In a firm commitment underwriting agreement, the institutions participating in the underwriting agree that they will purchase securities being offered for resale to the public. The underwriters must pay for and hold the securities for their own account if they are not successful in finding public investors. This form of underwriting is mainly used by well-known underwriters and provides a greater assurance that the issue will be placed with the desired investors, like insurance companies or pension funds.

The other common type of underwriting agreement is where the underwriters agree to use their best efforts to sell the issue as the issuer's agent. In such a case, to the extent that investors cannot be found, the issue will not be sold. Further, a best-efforts agreement may provide that no securities will be sold unless buyers can be found for all securities, while others state with a lower minimum such as 50 per cent shall apply for a special type of securities.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

Underwriting agreements in respect of German debt and equity securities offerings contain indemnity clauses, with the purpose of indemnifying and protecting the underwriters against any loss and damage resulting from untrue statements of material fact or material omissions in the issuance prospectus, or resulting from any inaccuracy in representations and warranties contained in such an underwriting agreement and the company or officers certificates. Such indemnity clauses apply only between the underwriters themselves and will not apply to the investors. The clauses also often include affiliates and parent companies of the underwriters and exclude damages and liabilities arising from information provided by the underwriters.

Further, force majeure clauses in equity underwriting agreements generally cover any event that could affect national or international financial markets overall, such as any change in general economic or political conditions of the issuer or currency exchange fluctuations, any suspension or material limitation in trading in securities on the main stock exchanges and any other related event that could have an adverse effect on the success of the offering. Additionally, in some underwriting agreements that relate to equity offerings, success fee clauses are implemented, which are paid at the issuer's discretion. Further, debt underwriting agreements follow mainly the ICMA's rules and recommendations relating to force majeure and other issues.

In Germany, it is market standard for equity securities offerings to have initial underwriting agreements providing for an over-allotment

option in connection with the activities that underwriters may perform during the 30-day stabilisation period following the listing of the shares. This over-allotment option is typically granted by the company on existing shares ('greenshoe' shares) sold by one or more existing shareholders, instead of newly issued shares.

14 What additional regulations apply to underwriting arrangements?

There are no specific further requirements for underwriting agreements. However, in the case of transactions based on an underwriting agreement, it is important for foreign banks to observe the licensing requirements pursuant to section 32, clause 1 of the KWG. The decisive factor is whether the initiative was taken by the foreign entity or by the German issuer. If the foreign entity specifically targets the domestic market with its range of services, the underwriting of securities at the foreign entity's own risk would constitute underwriting activities, which requires a licence in accordance with section 1, clause 1, sentence 2, No. 10 of the KWG. Alternatively, the 'issuing syndicate' will constitute principal brokering activities, which also requires a licence in accordance with section 1, clause 1, sentence 2, No. 4 of the KWG. In addition, best-efforts underwriting as an 'agency syndicate' would constitute contract brokering activities requiring a licence in accordance with section 1, clause 1a, sentence 2, No. 2 of the KWG.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

Any issuer, whose securities (debt and equity) are listed on a domestic stock exchange, is subject to several ongoing reporting obligations (see question 16). Such obligations are mainly stated in the WpHG and relate to issuers whose securities are admitted to trading on a domestic stock exchange on an EU regulated or unregulated market. Under the exchange rules of the Frankfurt Stock Exchange, an issuer with shares admitted to the 'prime standard' segment of the regulated market must fulfil additional reporting obligations in addition to the obligations that apply to the 'general standard' segment.

16 What information is a reporting company required to make available to the public?

BaFin has issued the fourth edition of its Issuers' Guidelines (published on 8 November 2013), which are designed to provide guidance for domestic and international issuers whose securities have been admitted to trading at a domestic exchange on the interpretation and execution of the various laws applicable to financial market participants, in particular under the WpHG, and to outline BaFin's administrative practice in monitoring the financial market. The modifications are based on the changes in the reporting of voting rights pursuant to the Securities Trading Act. BaFin had to update Chapter VIII of the Issuers' Guidelines on 'Reporting of voting rights' and Chapter XI on the 'Information necessary for exercising rights attached to securities'. Further, another reason for revising the Issuers' Guidelines that was required was the consideration of two new acts, namely the Investor Protection and Capital Markets Improvement Act and the Risk Limitation Act, as well as a judgment of the Federal Court of Justice (BGH).

Ad hoc notifications

Section 15 of the WpHG (see question 17) imposes a statutory requirement for an issuer of securities (debt and equity) who has applied for admission to trading on an organised market (ie, an EU-regulated market) on a domestic stock exchange, or who is admitted to trading, to immediately notify the market of any 'insider information' as defined in the WpHG. If issuers fail to disclose the insider information in time or if the information provided is false or incomplete, BaFin is entitled to intervene and to impose sanctions, and such issuer may become liable also to investors. Information is regarded as insider information and must be disclosed by the issuer immediately, that is, ad hoc:

- if it contains specific facts about the issuer;
- if it is not public knowledge;
- if it has the potential to influence the market price; and
- if it relates directly to the issuer where it is questionable whether any information can be regarded as insider information, issuers are well advised to adhere to the cases and explanations provided by BaFin in the Issuers' Guidelines.

An exemption from this reporting requirement is defined in section 15, clause 3 of the WpHG. However, if the information qualifies as insider information and no exemptions apply, the ad hoc disclosure must be published on a pan-European basis via electronic information platforms posted on the website of the issuer and submitted to the company register. In addition, BaFin and the management of the relevant stock exchange must be notified prior to the disclosure. On 23 April 2013, the BGH issued an important decision where it tightened the disclosure obligations of publicly listed companies. Following a pre-ruling of the European Court of Justice (ECJ) in June 2012, the BGH held that in the event of a time-intensive, decision-making process aimed at a particular outcome, any intermediate step may in itself constitute insider information and thereby will trigger a separate disclosure obligation, provided that the facts underlying the relevant intermediate step are relevant for the share price and share-price-specific. According to the BGH, the relevant information must be sufficiently precise and, if publicly disclosed, likely to significantly affect the share price. The BGH decision will require practitioners to adapt to advanced ad-hoc publication requirements. To reduce legal uncertainty and to mitigate the corresponding liability risks in cases where a protracted decision-making process is still perceived to be at an early stage or in other cases where an early disclosure may harm the company, alternatively, the issuers may want to opt for an exemption from the disclosure requirements that is provided under statutory law. To qualify for such an exemption the issuers must have a corresponding legitimate interest (provided there is no reason to expect that the public will be misled), maintain an insider list and implement adequate internal and external procedures ensuring that the insider information remains confidential. The issuer bears the burden of proof for fulfilling those requirements.

Notification on director's dealing

Section 15a of the WpHG requires persons who are members of the management and supervisory board, or who have regular access to insider information and are entitled to make important managerial decisions or issuers whose securities are admitted to trading on an organised domestic stock exchange or who have filed an application for admission to trading, to promptly publish information to both the issuer and BaFin about any dealings in the company's own shares within five working days. This also applies to associated persons, namely, spouses, registered civil partners, dependent children and other relatives living in the same household for at least one year. In order to prevent circumvention of section 15a of the WpHG, legal entities, such as establishments acting in a fiduciary capacity and partnerships that are dealing in the company's shares, may also be subject to the disclosure requirement. However, no reporting requirement is applicable if the total sum of all transactions conducted by such persons is below €5,000 by the end of a calendar year.

Further, in accordance with section 15a, clause 4 of the WpHG, the issuer must forward the information immediately to the company register, inform BaFin about the publication and provide BaFin with the publication document.

Reporting obligations with respect to voting rights

Pursuant to section 21, clause 1 of the WpHG, anyone whose share of a domestic listed company's voting rights equals, exceeds or falls below 3, 5, 10, 15, 20, 25, 30, 50 or 75 per cent as a result of a purchase or sale, or by any other means, is obliged to inform the listed company and BaFin that he or she has achieved, exceeded or fallen below the aforementioned thresholds. In addition to direct holdings of voting rights capital market participants also have to file notifications when they hold certain financial instruments with which shares can be acquired. In this case, however, the opening threshold has been set to 5 per cent. Ultimately, any change in voting rights must be reported to the listed company and BaFin without undue delay, namely, within four trading days at the latest (section 21 of the WpHG). The listed company must also pass on the notification without undue delay – within three trading days at the latest – to 'a combination of media for Europe-wide dissemination' and to the company register that stores the data. In accordance with the Act on the Strengthening of Investor Protection and Improved Functioning of the Capital Markets, existing notification obligations under section 25 of the WpHG for financial instruments, unconditionally entitling their holders to acquire existing shares that carry voting rights, are extended to 'other instruments'. These other instruments include, inter alia, claims for the return of shares pursuant to securities lending agreements and repurchase agreements. Under section 25a of the WpHG, the notification obligation is extended to all

financial and other instruments that are not already subject to notification under other provisions and that, based on their legal structure, entitle the owner to purchase issued shares carrying voting rights from the listed company. Such holdings of financial instruments must be reported to the listed company and BaFin even if the listed company of the instrument does not have any influential right on the buying of such voting rights or even if a purchase is not being considered at all. In this case, the threshold for notification is also 5 per cent.

Further, pursuant to section 26 of the WpHG, an issuer whose home state is Germany an EU or EEA member state with securities admitted to trading on a domestic stock exchange must immediately publish certain voting rights-related information received from third parties and inform BaFin and the company registers no later than three trading days after receipt of such information. The requirements relate to:

- achieving, exceeding or falling below 3, 5, 10, 15, 20, 25, 30, 50 or 75 per cent of the voting rights of the issuer;
- holding at least 3 per cent of the voting rights of the issuer, whose home state is Germany at the first time of admission to trading of the securities; and
- direct or indirect holding of financial instruments, which provide entitlement to a one-sided acquisition of securities with voting rights in the issuer, whose home state is 5, 10, 15, 20, 25, 30, 50 or 75 per cent of the voting rights of the issuer.

The respective publication has to be done in line with requirements stated in the WpAIV.

Further, section 26a of the WpHG provides that any domestic issuer has to publish information about and inform BaFin of the total number of voting rights of the above-mentioned thresholds at the end of each calendar month in the case of an increase or decrease of such voting rights. In addition, pursuant to section 27a of the WpHG, any issuer with Germany as its home member state has to publish information received from an investor who holds at least 10 per cent of its voting rights. Such an investor has to disclose to the issuer his or her objectives with respect to the acquisition of the voting rights (eg, strategic goal, realisation of trading profits, exertion of influence in the management or change of capital structure) and the origin of the used funds (equity capital or borrowed funds) within 20 trading days after having reached or exceeded this 10 per cent threshold. If the investor's intention has changed, the investor also has to inform the issuer within 20 trading days. Alternatively, the issuer could publish the fact that the investor does not comply with the requirements stated in section 27a of the WpHG.

General reporting obligations

Under the detailed regulations of sections 30a to 30f of the WpHG, any issuer whose home member state is Germany and whose securities are admitted to trading on a domestic stock exchange, as well as any issuer from other member states of the EU or EEA whose securities are admitted to trading on a domestic organised market and whose home member state does not provide for similar regulations of the domestic stock exchange, has to publish in electronic format information to allow investors to exercise their rights in connection with such securities. In the case of shares the reporting obligations relate, inter alia, to:

- the convening of the shareholders' meeting;
- the distribution and payment of dividends;
- the issuance of new shares or rights;
- any agreement or exercise with respect to the securities; and
- modifications to its articles of association.

Further, any issuer of debt securities admitted to trading can invite its creditors to participate in a creditor meeting in any EU or EEA member state if the creditors have received all related information and the denomination of the bonds is at least €50,000.

Specific financial reporting obligations

Under sections 37v et seq. of the WpHG, an issuer of securities (debt and equity) with a registered seat in Germany or an issuer with its seat in an EU or EEA member state whose securities are admitted to trading on a domestic stock exchange has to prepare annual financial statements and semi-annual financial reports as well as interim management statements that set out the development of business activities during the reporting period or, alternatively, quarterly financial reports. The WpHG states details on the content of the reports, the means of publishing such reports and respective

publication deadlines. As a matter of principle, issuers must meet the following financial reporting requirements:

- publish an announcement on the internet stating the date and the exact address of the website on which the accounting documents are being made publicly available (according to BaFin, the documents must be posted directly on the indicated website or at least must be accessible by just one link);
- notify BaFin of the publication of the announcement and pass the announcement to the company register; and
- publish the complete accounting documents on the website and submit the documents to the company register in order to be stored there.

Publication of annual financial statements on the website must be made publicly available, at the latest, four months after the end of the financial year, whereas semi-annual financial statements must be published within two months of the end of the half year. BaFin recommends publishing the announcement approximately one week prior to the publication of the statements. The WpHG also provides details on deadlines and contents (eg, for annual and semi-annual reports, a 'true and fair view' statement made according to the best knowledge of the legal representatives of the issuer) and imposes on issuers the obligation to publish a notice as to the online availability of the financial statements, which must also remain available to the public at the corporate register for at least five years.

Reporting obligations under the German Corporate Governance Code

German stock corporations listed on the regulated market must publish an annual declaration on whether they comply with the recommendations of the German Corporate Governance Code and explain any non-compliance with such recommendations.

Reporting obligations under the Rules of the Frankfurt Stock Exchange

Pursuant to the Stock Exchange Rules of the Frankfurt Stock Exchange, the reporting obligations of the 'General Standard' segment set out the minimum reporting requirements. In the case of a listing in the 'Prime Standard' segment, listed companies must, in addition to the 'General Standard' segment reporting obligations, comply with international reporting standards. Such additional obligations include in particular:

- consolidated financial statements and quarterly reports in German and English;
- internet publication of a financial calendar in German and English;
- ad hoc disclosures, also in English; and
- the performance of an analyst conference each year.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The main rules prohibiting manipulative practices in securities offerings and secondary market transactions are those related to insider dealing and market manipulation.

Insider dealing

The WpHG's insider dealing regulations relate to 'insider securities', 'insider information' and prohibition of 'insider dealing' by imposing publicity and reporting duties on issuers. In this regard, under section 12 of the WpHG insider securities are defined as all kinds of financial instruments, including derivatives, that are either admitted to trading on a regulated or regulated unofficial market at a domestic stock exchange or admitted to trading on an organised market in another member state of the EU or EEA. Securities that are not traded on such an exchange are also insider securities if their price depends on another financial instrument defined as insider security. Further, insider information is defined pursuant to section 13 of the WpHG as any information or facts that are not publicly known, relating to one or more issuers of insider securities or the insider securities themselves, and that may considerably influence the stock market price of the insider security if made publicly available. Consequently, section 14, clause 1 of the WpHG prohibits purchase or sale of insider securities on one's own account or the recommendation or influencing of other persons in purchasing or selling insider securities with knowledge of insider information. Additionally, the unauthorised transmission of insider information to other persons is prohibited.

Section 15 of the WpHG states that issuers of financial instruments (admitted for trading on a domestic stock exchange or an EU or EEA issuer whose financial instruments are admitted to trading on a domestic stock exchange) are obligated to promptly publish insider information that directly concerns their business or financial situation. Details of this publication requirement are defined in sections 4 et seq of the WpAIV and the BaFin Issuers' Guidelines. It should be noted that if issuers do not publish insider information or do not publish it correctly, sections 37b and 37c of the WpHG provide for investors' rights for compensation.

As outlined in question 16, pursuant to section 15a of the WpHG, persons with management responsibilities for the issuer have to report their transactions in shares of the issuer or related financial instruments exceeding €5,000 per year to the respective issuer and to BaFin within five business days. The same obligations apply for relatives of such persons and legal entities with whom the relevant persons have close relationships. In addition, the issuer is also obliged to publish the respective notification. Finally, under section 15b of the WpHG, issuers of financial instruments that have applied for admission to trading or are admitted to trading on a domestic regulated market are required to provide lists of persons who have regular access to insider information on the issuer. The same rule applies for third persons, especially advisers – in particular lawyers and investment bankers. Upon request by BaFin, the entities must provide their insider lists quickly and completely to BaFin, so that they can investigate suspicious transactions. The precise form and content of the insider lists are described in sections 14 to 16 of the WpAIV and BaFin's Issuers' Guidelines. Such insider lists are confidential and will not be published.

Market manipulation

Rules regarding the manipulation of financial markets apply to persons abroad or persons domiciled in Germany whose action or omissions take place in Germany or abroad with respect to financial instruments traded on an exchange located in Germany or in organised markets located in member states of the EU or EEA. In particular, section 20a, clause 1 of the WpHG contains a list of prohibited actions and omissions, such as providing untrue or misleading information concerning circumstances that are of crucial importance for the valuation of financial instruments or the withholding of such information if the provision or withholding of the information has the potential to influence the stock exchange or market price of a financial instrument or the price of a financial instrument on an organised market in another member state of the EU or the EEA.

Further, it is forbidden to initiate transactions or issue purchase or sell orders that have the potential to generate untrue or misleading signals affecting supply and demand on the stock exchange or the market price of financial instruments or to create an artificial price level or execute any other misleading act that has the potential to influence the stock exchange or market price of a financial instrument. The aforementioned applies to financial instruments that are either admitted to trading on a domestic stock exchange or listed on the regulated market or the regulated unofficial market, or admitted to trading on an organised market in another member state of the EU or EEA. The same applies if the application for such admission or for such trading has been made or publicly announced.

However, actions or omissions that follow accepted market practices are not prohibited even if they could be regarded as market manipulation in accordance with section 20a, clause 1 of the WpHG. Such accepted market practices are those that may reasonably be expected and anticipated in the respective market. Criteria for accepting such a market practice by BaFin are, inter alia, that the market practice is sufficiently transparent for the entire market and does not impair the market efficiency. In the MaKonV, BaFin has outlined its view on such accepted market practices. In particular, if an entity trades its own shares in the course of buy-back programmes or for stabilisation purposes, it does not breach the prohibition of market manipulation if these actions are carried out in line with the provisions of Commission Regulation (EC) No. 2273/2003 as implemented in section 20a, clause 3 of the WpHG (see question 18). Further, German law is also applicable to buy-back programmes or stabilisation measures occurring outside Germany if such financial instruments are traded on a domestic stock exchange. In this regard, BaFin is one of the competent supervisory authorities in such cases, and foreign stabilisation rules are acknowledged only if they are identical to or in line with those of Commission Regulation (EC) No. 2273/2003 and the MaKonV.

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

Price stabilisation measures in connection with an offering of securities will generally be undertaken by the lead underwriter in accordance with the over-allotment of securities. The respective underwriter, however, has to make sure that it does not contravene any applicable security regulations. In particular, section 20a, clause 1 of the WpHG states an offence of disseminating false information concerning circumstances of material importance to the valuation of a financial instrument or to withhold information where this 'has the potential to influence the stock exchange or market price of a financial instrument' (see question 17). The WpHG also makes it a criminal offence to effect transactions that generate false or misleading signals for the supply or demand or for the price of the financial instruments.

However, under section 20a, clause 3 of the WpHG in connection with Commission Regulation (EC) No. 2273/2003 price stabilisation shall not be regarded as market manipulation. For the application of this exemption for price stabilisation measures and share repurchases, several requirements must be met.

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

Liability for a securities transaction arises particularly in connection with the information contained in the prospectus. In this regard, section 21 and 22 WpPG (with respect to securities admitted to trading on a stock exchange) and section 20 VermAnlG (with respect to investment units that are not regarded as security not admitted to trading on a domestic stock exchange but publicly distributed) provide for a liability of persons who have assumed responsibility for the prospectus (persons who are mentioned in the prospectus) or who have a mandate for the issuing of the prospectus. Usually, this includes the issuer, the underwriters, in particular the global coordinator(s) and, under certain circumstances, the selling shareholders (in a most recent judgment the Federal Court of Justice confirmed a prospectus liability of the controlling enterprise in the underlying case of a public offering of bonds).

The liability under the WpPG concerns incorrectness or incompleteness of relevant information with respect to the securities in favour of investors who have purchased such securities on the basis of the prospectus within six months after the first admission to trading or public offer of the securities. Details that have to be included in the prospectus are contained in the WpPG, respectively. In particular, pursuant to section 5, clause 4 of the WpPG, the prospectus must contain information with respect to persons who assume liability for the content of such prospectus. Further, such information has to be contained in the summary of the prospectus, which is a mandatory requirement for the preparation of a prospectus filing. Purchasers of such securities may make a claim for restitution of the purchase price as long as such price does not exceed the initial offer price and for the cost accrued in connection with the purchase. Statutory liability for the prospectus is joint and several.

There are a number of statutory defences to a prospectus liability claim, in particular if the respondent is able to demonstrate that he or she was not aware of an error or omission and that this unawareness was not caused by lack of knowledge or gross negligence.

Further, the aforementioned liability for the prospectus incorrectness or incompleteness is joint and several. Under the underwriting agreement, the issuer usually takes on responsibility for the content of the prospectus and agrees to indemnify every other party from claims arising from its content, except to the extent other parties were solely responsible for a particular part of the prospectus. In accordance with section 23 WpPG. Overall, liabilities under section 21, 23 or 24 of the WpPG cannot be excluded.

Civil law liability

In addition, certain circumstances may lead to further civil law claims resulting from a contractual relationship (eg, culpa in contrahendo doctrine) or tort pursuant to the mandatory rules of the BGB as mentioned in section 25, clause 2 of the WpPG.

Update and trends

In addition to several regulatory changes discussed above, the following changes to and clarifications of the rules and regulations governing German securities were introduced in 2014.

On 22 October 2014, ESMA issued a new version of its Question and Answers regarding prospectuses, in particular with three new questions regarding required prospectus summary disclosures and two revised answers. In its revised answer to Question 82, ESMA clarified that the Regulation's requirements for prospectus summaries apply to proportionate disclosure regimes (PDRs). It also indicated the summary requirements applicable to the relevant PDR annexes. In its revised answer to Question 91, ESMA clarified that the issuer may provide an individual summary relating to several securities provided that the securities differ only in 'some limited details'. In Question and Answer 93, ESMA clarified that, an issuer preparing a prospectus supplement should take and disclose the key financial information from the financial information that the applicable regulation annex requires to be disclosed in the prospectus in cases where the applicable regulation annex does not require selected financial information to be disclosed in the prospectus. In Question and Answer 94, ESMA explained that not all risks contained in the risk factor section of the prospectus need to be included in the prospectus summary, but only the risks that the issuer considers to be key. The disclosure of such key risks should give potential subscribers adequate information to determine the origin, nature and potential consequences of such risks. In Question and Answer 95, ESMA confirmed that a summary relating to an individual securities issue cannot incorporate further information for which there is neither an option nor placeholder in the earlier summary in the base prospectus including final terms).

On 19 December 2014, ESMA provided technical advice to the Commission in the form of a final report regarding the registration of a

multilateral trading facility as an SME growth market under section 33 (3) MiFID II and MiFIR. The following new provisions are of note:

- The criteria for an issuer to trade financial instruments on an SME growth market shall be no more burdensome than those for trading in regulated markets.
- With regard to eligibility, non-equity issuers can be counted as SMEs when determining whether SME issuers comprise at least 50 per cent of an SME growth market if either the total nominal value of such issuer's debt securities is less than €200 million or the issuer is an SME under article 2(1)(f) of the Prospectus Directive.
- Rather than being published on the issuer's website, all regulatory information must be published on the SME growth market operator's website.
- Only issuers on an SME growth market are required to comply with the Market Abuse Regulation.
- As a minimum, an issuer must follow local financial reporting rules when drafting annual and bi-annual financial statements.

Also in 2014, several drafts and proposals were issued to amend certain rules and regulations governing German securities issuers. Of note is the following:

In November 2014, the Federal Ministry of Justice proposed draft amendments to the Stock Corporation Act, which closely mirror those proposed in 2012, except that they do not include a provision on 'say on pay'. Overall, the amendments are intended to provide more flexibility for the financing of German stock corporations and greater transparency of unlisted corporations. These amendments are not expected to come into force before June 2015.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

Under German law there are no special or exclusive remedies and sanctions for improper securities activities. In line with general German law principles, remedies and sanctions can be established in civil litigations, administrative procedures and criminal prosecution. Further, the assumption of liability in the prospectus is mandatory for natural persons or entities responsible for its content in accordance with section 5, clause 4 of the WpPG. In the case of any improper security activities, BaFin may initiate administrative proceedings against the respective parties.

Further, an investment service undertaking must produce a protocol on the investment advice pursuant to section 34, clause 2a of the WpHG to be drafted and handed over to a retail client even in the case of investment

advice offered to persons who are not yet customers but who demonstrate that they are interested in such a client relationship. This applies also if the client relationship finally fails to be solicited. As a consequence, the investment service undertakings are required to implement appropriate and effective organisational internal measures, which include monitoring and control aspects. To enable monitoring procedures, not only shall the offered investment advice be documented, but also discussions on investments in financial instruments, even if no investments were recommended. Further, the respective documentation must, if applicable, contain evidence that no investment advice was offered. Criminal prosecution might even be initiated based on the activities of the parties pursuant to the German Criminal Code and other applicable criminal rules and regulations.

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Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

Some of the key statutes and regulations governing securities offerings in India and the authorities administering them are as follows:

- the (India) Companies Act, 2013 (2013 Act) (to the extent notified) and (India) Companies Act, 1956 (1956 Act) (to the extent such enactment is in force) (collectively, Companies Act) – the Companies Act is the principal legislation governing companies in India and sets out the broad framework for the offering of securities by companies, including public offerings and private placements. With effect from 1 April 2014, the majority of the provisions of the 2013 Act, including the relevant provisions relating to offering of securities by companies, have come into force. In addition, the relevant rules under the 2013 Act in relation to allotment of securities, share capital and acceptance of deposits (Rules) have also come into force. While the Companies Act is primarily administered by the Ministry of Company Affairs (MCA), certain specified provisions of the Companies Act, in relation to listed companies and public offering of securities, are administered by the Securities and Exchange Board of India (SEBI);
- the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (ICDR Regulations) – the ICDR Regulations, framed by the SEBI, are the principal legislation that comprehensively regulate the public offering of securities and other securities offerings by listed companies such as rights offerings. The ICDR Regulations lay down detailed provisions on eligibility, disclosure requirements, restrictions and procedures to be followed in relation to public offering of securities and other kinds of securities offerings by listed companies. The ICDR Regulations are administered by the SEBI;
- the Foreign Exchange Management Act, 1999 (Foreign Exchange Act) – the Foreign Exchange Act, including the rules and regulations framed and the circulars issued thereunder, sets out requirements in relation to foreign investment in Indian securities and also regulates foreign currency debt securities by Indian companies. The Foreign Exchange Act, including the rules and regulations framed and the circulars issued thereunder, is administered by the Reserve Bank of India (RBI). In this regard, the Union Budget for 2015-2016 proposes that certain provisions relating to capital account transactions under the Foreign Exchange Act are to be administered by the government of India. However, the relevant amendment to the Foreign Exchange Act has not yet been made;
- the Securities Contracts (Regulation) Act, 1956 (Securities Contracts Act) – the Securities Contracts Act, along with the rules and regulations framed thereunder, govern listing of securities on stock exchanges and certain aspects of public offering of securities. The Securities Contracts Act is administered by the MCA, along with the SEBI and the stock exchanges;
- the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 (Debt Regulations) – the Debt Regulations, issued by the SEBI, govern offering of debt securities, including public offerings and private placements of listed debt securities. The Debt Regulations are administered by the SEBI; and
- the SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013 (RPS Regulations) – the RPS

Regulations, issued by SEBI, govern offering of non-convertible redeemable preference shares, including public offerings and listing of privately placed non-convertible preference shares. The RPS Regulations are administered by SEBI.

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

Public offering of equity shares and convertible securities

In case of a book-built issue, both primary and secondary public offerings of equity shares and convertible securities require filing of a draft offer document (the draft red herring prospectus) with SEBI, for its observations, and with the stock exchanges; filing of an updated offer document (the red herring prospectus), incorporating SEBI observations with the Registrar of Companies, before inviting subscriptions; and, thereafter, filing of an offer document updated for pricing details (the prospectus) with the Registrar of Companies. In case of a fixed-price issue, both primary and secondary public offerings of equity shares and convertible securities require filing of a draft offer document (draft prospectus) with SEBI for its observations and, upon receiving observations from SEBI, filing of an offer document with pricing details (prospectus) with the Registrar of Companies, before inviting subscriptions.

An issuer seeking to list its equity shares or convertible securities is also required to fulfil certain eligibility conditions prescribed by the stock exchanges. For instance, the National Stock Exchange of India Limited (NSE), for listing of equity shares pursuant to an initial public offering, prescribes a minimum post-IPO (defined below) paid-up equity capital of 100 million rupees and a market capitalisation of 250 million rupees. The NSE also prescribes that there should not have been any material regulatory or disciplinary action initiated by stock exchanges or any regulatory authority in the three years before the date of application for listing. In addition, at various stages of the offering process, certain approvals must be obtained from the stock exchanges where equity shares are proposed to be listed: an in-principle approval at the time of filing of the draft offer documents, a listing approval upon the issuance or transfer of equity shares, and a trading approval before the commencement of trading of the equity shares on the stock exchanges.

Schedule VIII of the ICDR Regulations sets out detailed requirements as to the disclosures to be made in an offer document. These include detailed disclosures relating to capital structure, business, risks relating to the issuer and offering, objects of the offering, legal proceedings relating to the issuer, financial statements, management's discussion on the financial condition of the issuer, and any other information material for investors to make an investment decision. In addition, the 2013 Act and the Rules require certain additional disclosure requirements, such as source of the promoter's contribution and legal action pending or taken by any government department or statutory body during last five years against the promoters of the issuer. Further, the SEBI has released a circular setting out the format of a 'General Information Document', which requires information of general nature and not specific to the issuer to be issued along with an abridged prospectus in public offerings. If it is a rights offering by a listed issuer, subject to compliance with the periodic disclosure requirements

of stock exchanges and certain other conditions, the ICDR Regulations provide for limited disclosures in the offer document.

Under the Securities Contracts Act at least 25 per cent of the equity shares of a listed company should be held by members of the 'public', namely, by shareholders other than promoters and affiliates. An unlisted company undertaking an IPO is also required to comply with this condition by offering an appropriate number of shares to the public in the IPO. In this regard, pursuant to a recent amendment, the relevant rules provide for certain exceptions to this condition:

- in case of public offers where the post issue capital calculated at the offer price is more than 16,000 million rupees and up to 40,000 million rupees, the public shareholding can be a percentage pursuant to a public offer equivalent to the value of 4,000 million rupees; and
- if the post issue capital of the company calculated at offer price is more than 40,000 million rupees, the rules provide for an unlisted company to offer at least 10 per cent of its equity shares in the IPO.

In both cases, however, such a company will be required to increase its public shareholding to 25 per cent within three years from the listing, in a manner specified by the SEBI.

In this regard, the SEBI introduced an alternative mode of public issue: the institutional placement programme (IPP). Under this route, listed companies can make a primary or a secondary public offering of equity shares to certain institutional investors recognised under the ICDR Regulations as qualified institutional buyers (QIBs). Since the equity shares under the IPP are offered only to institutional investors, the SEBI has exempted issuers from the requirement of filing a draft offer document. Thus, in an IPP, the issuer can directly issue the red herring prospectus, and thereafter the prospectus, and is required to file them with the Registrar of Companies, the SEBI and the stock exchanges. Further, unlike other public issues, in an IPP, the disclosure requirements in the offer document have been rationalised along the lines applicable to an offer document issued in a qualified institutional placement (QIP) (see question 8).

Public offering of debt securities

In terms of the Debt Regulations, a public offering of debt securities requires filing of a draft offer document with a stock exchange for seeking public comments. Thereafter, upon suitably addressing the comments received from the public, an offer document (prospectus) is filed with the Registrar of Companies. Certain classes of issuers, such as public financial institutions, specified government companies, non-banking financial companies and listed companies satisfying the prescribed eligibility criteria under the Debt Regulations may also undertake successive public offerings of debt securities through a shelf prospectus. A shelf prospectus is valid for a period of one year, and up to four offerings of debt securities can be made under such a shelf prospectus. Prior to each offering, an issuer is required to file an information memorandum with the Registrar of Companies, which sets out the principal terms and conditions of the securities offered, and any material developments that may have occurred after filing of the shelf prospectus. In terms of the Debt Regulations, an offer document (including a shelf prospectus) is required to set out all material disclosures necessary for the subscribers to make an informed investment decision, including certain matters specified in the Debt Regulations and the Companies Act. For purposes of listing of debt securities, an in-principle approval from the stock exchanges where the debt securities are proposed to be listed is to be obtained before launching the transaction; a listing approval upon allotment and a trading approval is required to be obtained from the stock exchanges before commencement of trading.

Public offering of non-convertible redeemable preference shares

Similar to the Debt Regulations, under the RPS Regulations, prior to making a public offering of non-convertible redeemable preference shares, a draft offer document has to be filed with the stock exchanges seeking comments from the public. Subsequently, upon suitably addressing the comments received, an offer document (prospectus) is filed with the Registrar of Companies. The offer document is required to set out all material disclosures necessary for the subscribers to make an informed investment decision, including certain matters specified in the RPS Regulations and the Companies Act.

Listing of non-convertible redeemable preference shares requires certain eligibility conditions to be satisfied by an issuer. For instance, the issuer or the promoter should not have been restrained, prohibited or debarred by the SEBI from accessing the securities market or dealing in securities as on

the date of filing of the draft offer document or offer document. Additional requirements under the RPS Regulations include obtaining an in-principle approval from the stock exchanges where the non-convertible redeemable preference shares are proposed to be listed and obtaining at least one credit rating by a credit rating agency registered with the SEBI. The issuer must also enter into a listing agreement with the relevant stock exchange. The SEBI is yet to prescribe the format of the listing agreement for issuers of listed non-convertible redeemable preference shares.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

Public offering of equity shares and convertible securities

For the purposes of a public offering of equity shares and convertible securities, other than in the case of an IPP, as an initial step, the draft offer document is required to be filed with the SEBI, for its observations, and with the stock exchanges. The draft offer document is also made publicly available on the website of the SEBI and that of the lead managers. However, the ICDR Regulations, subject to the fulfilment of certain conditions, provide for 'fast-track issues', wherein a draft offer document need not be filed with SEBI for its observations. In terms of the ICDR Regulations, the SEBI may issue observations within a period of 30 days from the filing of the draft offer document or from the receipt date of any clarification sought by SEBI on the offer document. Pending review of the draft offer document by the SEBI, the offer document cannot be filed with the Registrar of Companies and the offering cannot commence. The process of review of the offer document by the SEBI takes an average of three months, but it could take longer depending on the nature of the clarifications sought by the regulator.

In a book-built issue, upon receiving observations from the SEBI and before inviting subscriptions, an updated offer document (the red herring prospectus) is registered with the relevant Registrar of Companies. Thereafter, upon closure of the bidding period and the price discovery process, an offer document updated for pricing details (the prospectus), is filed with the Registrar of Companies.

In fixed-price public offering of securities, the prospectus (with the pricing details) is filed before inviting subscriptions.

In an IPP, upon filing of the red herring prospectus with the Registrar of Companies, the SEBI and the stock exchanges, the issuer is required to announce a price band or a floor price at least one day before the bidding period. Thereafter, upon the closure of bidding, the issuer is required to file a prospectus.

Public offering of debt securities

In a public offering of debt securities, the draft offer document or a draft of the shelf prospectus, as the case may be, is filed with the stock exchange and displayed on its website and is required to be made available for comments from the public for a period of seven working days. Such a draft offer document or draft shelf prospectus may also be displayed on the website of the issuer and the lead managers. Thereafter, upon suitably addressing the comments received from the public, the offer document (prospectus or shelf prospectus, as the case may be) filed with the Registrar of Companies is also to be simultaneously filed with the stock exchange for dissemination, before inviting subscriptions. The offering can commence only upon the filing of the offer document with the Registrar of Companies and a designated stock exchange.

In the case of an offering undertaken in pursuance of a shelf prospectus, an information memorandum (typically referred to as a 'tranche prospectus') is also required to be filed with the Registrar of Companies along with the shelf prospectus prior to inviting subscriptions.

Public offering of non-convertible redeemable preference shares

In a public offering of non-convertible redeemable preference shares, the opening of the offering can commence only upon filing of the offer document with the Registrar of Companies and the stock exchange. Similar to the requirements prescribed under the Debt Regulations, the draft offer document filed with the stock exchange and displayed on its website must be made available for comments from the public for a period of seven working days. The draft offer document may additionally be displayed on the websites of the issuer, lead managers and the stock exchanges where the non-convertible redeemable preference shares are proposed to be listed. Upon addressing the comments received from the public, the offer

document (prospectus) filed with the Registrar of Companies is also to be simultaneously filed with the stock exchange for dissemination and forwarded to the SEBI for its records.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Under the ICDR Regulations, publicity restrictions in relation to public offerings of equity shares and convertible instruments commence from the date of approval of the offering by the board of directors of the issuer. During the period between the date of approval of the offering by the board and the filing of the draft offer document with the SEBI, all public communications and publicity materials are to be consistent with the past practices of the issuer, failing which a disclaimer is required to be provided in all materials indicating that the issuer is proposing a securities offering and is in the process of filing the draft offer document with the SEBI. After filing of the draft offer document, all publicity materials issued by the issuer or its associates are required to contain only factual information and not contain any estimates or projections or otherwise state anything extraneous to the offer document. Additionally, all publicity materials are required to contain a disclaimer stating that the issuer is proposing a securities offering and a draft offer document or offer document has been filed with the SEBI or the Registrar of Companies.

The Debt Regulations and RPS Regulations prescribe certain restrictions relating to advertisements by an issuer. The advertisements are required to be fair and clear and not contain any estimates or projections that are misleading, or otherwise state anything extraneous to the contents of the offer document. In addition, the advertisements must state that investors are to invest only on the basis of information contained in the offer document.

Research reports issued by the lead managers are required to be prepared only on the basis of publicly available information relating to the issuer, disclosed in the draft offer document or offer document or otherwise to the public by the issuer. Further, research reports are required to contain only factual information and not contain any estimates or projections. In addition, the SEBI has recently issued the SEBI (Research Analysts) Regulations, 2014 (Research Regulations), which provide for detailed conditions, among others, in relation to the registration of research analysts, their policies and procedures, and compensation and limitation on publication of research reports. Under the Research Regulations, subject to internal policy and research analysts affiliated to book runners cannot issue a research report, in the case of an initial public offering for a period of 40 days following the pricing date, and in the case of a further public offering this restriction is only for 10 days. This restriction would also apply for the period commencing 15 days prior to any lock-up arrangement and continue until 15 days after expiry or waiver of the lock up arrangement. Further, specifically the Research Regulations also prohibit research analysts affiliated to other underwriters (being syndicate members) from issuing a research report for a period of 25 days from the date of filing of the red herring prospectus.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

In cases of primary securities offerings, the securities are to be first offered to the existing shareholders of the issuer (a rights offering), unless a special resolution is passed by the shareholders. Further, in a primary offering of securities, the minimum subscription is required to be no less than 90 per cent of the offering, failing which, application money needs to be refunded. This requirement does not apply to a secondary offering of securities. Restrictions relating to the further issuance of securities by the issuer, between the filing of the draft offer document and the listing of the equity shares, uniformly apply to both primary and secondary offerings of securities.

In the case of a secondary offering of securities, the selling shareholder is required to certify, as a declaration in the offer document, that all statements in relation to itself and the securities being offered by it in the offer document are true and correct. Additionally, the selling shareholder is required to certify that it has obtained all approvals and consents to be obtained by it in relation to the offering. Any misstatement in this regard could attract civil and criminal liability under the Companies Act, action by the SEBI or tort liability under common law. Under the 2013 Act, it is provided that a selling shareholder shall reimburse expenses incurred by

the company in undertaking the sale of secondary shares. Additionally, the selling shareholder is liable for the timely refund and for payment of interest in the event of any delay in making refunds.

6 What is the typical settlement process for sales of securities in a public offering?

Under the ICDR Regulations, application monies should be deposited by the bidders at the time of making the bid. The SEBI has prescribed that listing of securities should be completed within 12 working days from bid closing. Accordingly the allotment or transfer of securities is usually completed within nine working days and shares are credited in the dematerialised accounts within 11 working days of the bid closure date. In this regard, so as to reduce the settlement timelines, the SEBI has recently released a discussion paper proposing to complete the listing of securities within six working days after the bid closure.

Settlement of non-convertible debt securities is governed by the Debt Regulations and the bylaws of the stock exchanges. Similar to issuances of equity securities, the SEBI has prescribed that in public issuances of debt securities, after closure of the bidding period, the listing of securities should be completed within 12 working days.

As regards trading and settlement of non-convertible redeemable preference shares, the conditions to govern the settlement process are yet to be issued by the SEBI.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

The 2013 Act prescribes certain requirements in relation to private placements of all securities, including shares and debentures. Under the 2013 Act, for an offering to qualify as a private placement, it needs to be ensured that the offer and allotment of securities is not made to more than 50 persons. However, under the Rules, this limit has been raised to 200 persons in aggregate in a financial year for each kind of security. Further, these limits do not apply to securities issued to employees under stock options and to QIBs.

Unlike the 1956 Act, under the 2013 Act, even unrelated and independent multiple offers made during a financial year will be combined to determine compliance with the requirement to offer securities to less than the specified number of persons. In other words, for an offer or invitation to subscribe to qualify as a private placement, the 'rule of 200' should be adhered to in one financial year, namely, all private placements (other than private placements to QIBs and employees under stock options) in one financial year will be aggregated for the purpose of computing the number of investors. Further, the Rules state that each private placement is to be approved by a special resolution of shareholders, and the size of the offer to each investor should not be less than 20,000 rupees of the face value of the security. However, for a private placement of debt securities, a single special resolution for all placements in a year may be passed.

The ICDR Regulations provide for the private placement of equity shares and convertible securities by listed companies through the following routes:

- QIP under Chapter VIII of the ICDR Regulations – through this route a listed company may privately place its securities with QIBs. In a QIP, an issuer is required to issue a placement document to potential investors, which is to be filed with the stock exchanges. The placement is required to be made at a price not less than the average of the weekly high and low closing price of the securities during the two weeks preceding the date of the board meeting that approves the placement, provided that a discount of up to five per cent may be given on such price, subject to the shareholders approval; and
- 'preferential issue' under Chapter VII of the ICDR Regulations – through this route an issuer may privately place its securities with any person subject to the fulfilment of certain conditions, including those related to pricing. A placement under this route is required to be approved by the shareholders of the issuer in a general meeting. The equity shares offered under the placement, if such shares are frequently traded, are required to be allotted at a price not less than the higher of the average of the weekly high and low of the volume weighted average price of the securities during the two weeks or the 26 weeks preceding the date of the meeting of the shareholders that approves the placement. In the event equity shares offered are

infrequently traded, pricing shall take into account, among other valuation parameters, book value and trading multiples for comparable companies.

An arrangement to sell a block of shares of an Indian listed company may be effectuated on an Indian stock exchange either as a 'bulk deal', a 'block deal' or as an offer for sale by promoters and their affiliates through the stock exchange mechanism (OFS) as follows:

- **block deal** – a block deal involves the sale of shares in a single transaction through a separate trading window of a stock exchange. This trading window is available for 35 minutes on a trading day, and an order must be placed for a minimum quantity of 500,000 shares or for a minimum value of 50 million rupees. However, the order price cannot vary by more than 1 per cent of the previous closing price or the ruling market price of the shares. Upon completion of the sale, the stock exchange is required to publish certain details of the transaction, such as the identity of the participants, quantity of shares sold and the price;
- **bulk deal** – a bulk deal involves the sale of shares, through one or more transactions during a trading day, such that the total quantity of shares traded is more than 0.5 per cent of the number of shares listed on the stock exchange. There is no restriction on the pricing of a bulk deal. However, the offer is placed in the open market due to which any participant may have the opportunity of accepting it. Upon intimation by the brokers, the stock exchange is required to publish certain details of the transaction, such as the identity of the participants, quantity of shares and price; and
- **OFS** – in addition to IPP, the SEBI has provided OFS as another mode of increasing public shareholding to 25 per cent in listed companies or for the promoters, and their affiliates, of top 200 listed companies on stock exchanges by market capitalisation to sell part of their stock. The OFS route is now also available to investors holding at least 10 per cent of share capital in a company. Under the OFS route, promoters, their affiliates and other eligible shareholders can sell shares in a listed company through a separate trading window on the stock exchanges. Subject to certain exceptions, the size of the offering is required to be at least 250 million rupees, including a minimum of 10 per cent of the offer size being reserved for retail investors. The intention to offer shares through OFS must be announced by the seller at least two days before the opening of the offer, and the offer cannot be kept open for more than a single trading day on the stock exchanges. Although there is no restriction on the pricing of an OFS, the seller is required to set a floor price below which bids shall not be accepted. Further, the seller may offer a discount on the OFS pricing to retail investors. Allocation in an OFS can be on a price priority basis or on a proportionate basis at a single clearing price, and the settlement is carried out through the normal settlement mechanisms of the stock exchanges.

In addition to the Companies Act, the Debt Regulations and RPS Regulations also regulate the listing of debt securities and non-convertible redeemable preference shares, respectively, issued on a private placement basis. An issuer issuing such securities on a private placement basis and listing them on stock exchanges is required to obtain a credit rating of its debt securities and is to file a disclosure document to the stock exchanges containing disclosures relating to certain matters specified in the Companies Act and the Debt Regulations and RPS Regulations, as applicable.

8 What information must be made available to potential investors in connection with a private placing of securities?

Under the 2013 Act, private placements are required to be made through a private placement offer letter in the format prescribed under the Rules. The format prescribed under the Rules includes disclosures relating to the business, risk factors and legal action pending or taken by any government department or statutory body during the last three years against the promoters.

In addition, the ICDR Regulations also prescribe the contents of an offer document depending on the form of private placement undertaken. In a QIP, the placement document issued to potential investors and filed with the stock exchanges is required to contain all material information in relation to the issuer and the placement, including details of risk factors and the business, legal proceedings and management of the issuer's details of use of proceeds in relation to the placement. In a preferential issue of securities by a listed issuer under ICDR Regulations, the regulations do

not prescribe any additional information to be made available to potential investors. However, in the notice for the general meeting of the members approving the placement, certain details relating to the placement, such as the identity of the investors and the objects of the placement, are to be disclosed.

For listing debt securities issued on a private placement basis, in addition to the Companies Act, the disclosure document is also required to contain certain disclosures specified in the Debt Regulations, such as details of the offering and the terms of the debt securities, the objects and brief details of business and corporate history of the issuer.

In relation to the listing of non-convertible redeemable preference shares issued on a private placement basis, in addition to the Companies Act, the disclosure document is also required to contain certain disclosures as set out in the RPS Regulations, including the terms of the issue, key operational and financial parameters for the three audited years prior to the issue and a brief summary of the business of the issuer.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

In a QIP, the allotted securities are not to be sold by the allottee for a period of one year from the date of allotment, except on the stock exchange.

In a preferential issue under Chapter VII of the ICDR Regulations, the allotted securities are non-transferable for a period of one year from the date of allotment. In the case of a preferential issue, the equity shares allotted are also non-transferable for a period of three years for members of the promoter or promoter group and one year for shareholders other than those belonging to the promoter or promoter group.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

In relation to securities offerings outside India, the applicable foreign exchange provisions under the Foreign Exchange Act are required to be complied with. In addition, an offering of foreign currency convertible bonds is governed by Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipts Mechanism) Scheme while the depository receipts (DRs) by an issuer in India in overseas jurisdictions is regulated by the recently issued Depository Receipts Scheme (New DR Scheme).

Under the New DR Scheme, Indian companies can issue any of the 'permissible securities' to foreign depository, as underlying security for issue of DRs, unlike the old regulations which permitted only equity shares to be offered as underlying security. Further, as a significant departure from the old regulations, the New DR Scheme permits all Indian companies to raise capital abroad through issue of DRs without the (previously applicable) requirement of prior or subsequent listing in India. The New DR Scheme provides for undertaking DRs issuance in form of a sponsored scheme, where the Indian company is involved in the process (whether by issuing securities or by engaging with existing security holder to deposit the securities with custodian) and enters into a formal agreement with a foreign depository, and also gives Indian companies access to the DR market in the form of an unsponsored scheme where any person other than the Indian issuer may, without any involvement of the issuer, deposit securities with a domestic custodian in India, for issue of DRs. However, if such unsponsored issue of DRs is proposed to be undertaken on the back of listed securities, the issuance can only be undertaken if the DRs give the holder the right to issue voting instructions and such DRs are listed on an international exchange.

Indian entities may undertake a DRs' issuance in a foreign jurisdiction which is a member of financial action task force on money laundering and regulator of that securities market in that jurisdiction is a member of the International Organization of Securities Commissions. A current list of such permissible jurisdiction is provided in the New DR Scheme. Further, as per the New DR Scheme, the price of underlying securities issued should not be less than price applicable to the corresponding mode of issuance to domestic investors under the relevant laws.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depository shares or rights offerings?

Offerings of convertible securities by listed companies in India are governed by the Companies Act and ICDR Regulations and disclosures in offer documents need to comply with the provisions contained therein. These regulations also set out the pricing mechanisms and conversion periods of these securities.

Rights issues of equity or convertible securities by listed companies may be made with limited disclosures in offer documents, provided issuer companies comply with certain requirements laid down in the ICDR Regulations.

Although warrants are recognised instruments for raising capital under the ICDR Regulations, they may be issued only if accompanied by non-convertible debt instruments, if issued under the QIP route. In a public issue or a rights issue, the tenure of warrants issued along with securities should not exceed one year and only one warrant should be attached with every security issued. Further, the permission of the government of India is required for the issuance of warrants to non-residents by Indian companies operating in certain sectors where government approval is required.

Foreign currency convertible bonds (FCCBs), depository receipts and foreign currency exchangeable bonds are instruments, which, if issued by listed companies, also need to comply with the regulations prescribed by the RBI and the government of India. Further, the restrictions with respect to external commercial borrowings, as specified by the RBI, are applicable to FCCBs.

The 2013 Act and the Rules also prescribe certain specific conditions applicable to an offering of depository receipts, such as in relation to eligibility requirements, voting rights and use of proceeds.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

Typically, the underwriting agreements entered into with issuer companies provide for underwriting only to the extent of the completion of the bids procured by the underwriters from investors. Further, underwriters may not be required to underwrite certain types of bids such as bids submitted through an 'application supported by blocked amounts' (commonly referred to as 'ASBA bids').

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

Typically, indemnity provisions in underwriting agreements relate to the obligation of issuer companies to indemnify the lead managers for any untrue statement in the offer documents or any breach of the representations and warranties provided by the issuer in the underwriting agreement. The liability of lead managers to indemnify issuer companies, if any, is limited to the extent of their details and particulars specified in the offer document.

Force majeure clauses pertaining to the volatility of the stock markets and general economic and financial conditions grant the lead managers the right to terminate the underwriting agreement with reasonable notice being provided to the issuer company. Remuneration details, including success fees, if any, are usually captured in separate engagement letters negotiated between the issuer company and each of the lead managers.

Over-allotment options, or greenshoe options, are permitted under the ICDR Regulations, granting the option of allotting securities in excess of the securities offered in the public issue as a post-listing price stabilising mechanism. However, issuer companies rarely resort to greenshoe options in public issues in India.

14 What additional regulations apply to underwriting arrangements?

In the event that an issuer making an initial public offering does not meet certain conditions specified in the ICDR Regulations, it is required to allot at least 75 per cent of the issue to QIBs. Under the ICDR Regulations, such allotment to QIBs cannot be underwritten.

In addition, the SEBI (Underwriters) Regulations, 1993 (Underwriters Regulations) lay down conditions relating to the registration process for underwriters, their duties and obligations towards fulfilling underwriting

commitments, and some of the clauses that underwriting agreements must contain. The Underwriters Regulations also grant extensive powers to the SEBI to oversee the underwriting process, including powers to inspect the books of accounts, records and documentation of an underwriter and powers to appoint auditors to audit the books of underwriters, if deemed necessary.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

At the time of the listing of the securities, the issuer is required to enter into a standard listing agreement with the stock exchanges. The listing agreement specifies certain periodic disclosures and disclosures relating to price-sensitive information to be made by the issuer to the stock exchanges, which is also to be made available on the website of the issuer. In this regard, the SEBI has recently approved the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2014 (Listing Regulations), which would be replacing the standard listing agreements. While the Listing Regulations have not yet been issued by the SEBI, they are expected to set out periodic and other disclosures largely as under the listing agreement.

In addition to disclosures under the listing agreement, ICDR Regulations require that the disclosures made in the red herring prospectus while making an initial public offer, must be updated on an annual basis by the issuer and must be made publicly accessible in the manner specified by the board. In this regard, the SEBI had released a discussion paper to moot the contours of the proposed 'annual information memorandum' that should be prepared by a company and filed with the stock exchanges. However, in this regard, the regulations have not been yet been amended.

In the event that an issuer plans to issue securities to persons resident outside India, it is also required to report this to the RBI in a specified form and within a specified period, giving particulars of the investors, the rupee equivalent of funds received, particulars of the authorised foreign exchange dealer through which such funds are received and details of any governmental approval required for such remittance. Further, within 30 days of the issue of the securities to such foreign investors, an issuer is required to submit a report on the issue to the RBI in a prescribed form, indicating compliance with the terms and conditions of the Companies Act, the applicable regulations of the RBI, the pricing formula for the issue and certain other details.

Further, an issuer making an issue of debt instruments and non-convertible, redeemable preference shares to persons resident outside India is subject to various pre-issue and post-issue reporting requirements of the RBI, including under the guidelines for foreign currency loans. Additionally, such an issuer is subject to various periodic post-issue reporting requirements to the Indian stock exchanges in terms of the listing agreement for debt securities (Debt Listing Agreement), including dissemination, on a half-yearly basis, of its credit rating, asset cover, debt-equity ratio and the status of interest payments redemption of existing debt securities. Any other events that may affect the business and operations of the issuer are also required to be notified to the stock exchanges by the issuer as and when such events occur.

Additionally, an issuer has to comply with a number of reporting requirements under extant SEBI regulations on takeovers and insider trading, once such securities are listed on the Indian stock exchanges.

As stated previously, under the RPS Regulations, the issuer must enter into a listing agreement with the stock exchange where the non-convertible redeemable preference shares are proposed to be listed. The SEBI is yet to prescribe the format of such a listing agreement required under the RPS Regulations.

16 What information is a reporting company required to make available to the public?

Under the equity listing agreement, an issuer is required to make periodic disclosures to the stock exchanges upon the listing of its equity shares, including:

- quarterly, half-yearly and annual consolidated and stand-alone financial results of the company;
- quarterly shareholding pattern of the issuer – in the event of any restructuring in the capital structure of a company resulting in a change of 2 per cent or more of the paid-up capital, the shareholding pattern of the company before and after the restructuring is to be disclosed;

- prior notice of board meetings and outcome of board meetings in relation to certain decisions such as alteration of the capital structure and declaration of dividends;
- any price-sensitive information relating to the company, including the disruption of operations of the company, a change in the general character or nature of business, commencement of commercial production of any unit or division, the issue of securities, the delisting of shares on any stock exchange, the forfeiture of shares or the institution of any material litigation; and
- notice of any change in the directorship of the company or change in the auditors.

An issuer, upon the listing of its equity shares, is also required to make certain disclosures to the stock exchanges under the SEBI regulations on insider trading, including:

- disclosure of any person holding more than 5 per cent shares or voting rights of the issuer;
- disclosure of any change in holdings of any person holding more than 5 per cent of shares or voting rights of the issuer;
- disclosure of the holdings of any director or officer of the issuer of the equity shares, voting rights or derivative positions taken in relation to the equity shares of the issuer;
- disclosures of any change in the holdings of any director or officer of the issuer of the equity shares, voting rights, or derivative positions taken in relation to the equity shares of the issuer;
- disclosures of the holdings of a person who is a promoter or its affiliate, upon such person acquiring shares or voting rights in the issuer; and
- disclosures of a change in holdings of a person who is a promoter or its affiliate.

The SEBI has recently issued new regulations on insider trading which are to come into force from May 2015. Some of the disclosures required to be made by issuers under the new regulations include:

- disclosure on trading plans of insiders; and
- disclosure of a transaction or series of transactions of a promoter, director or employee of the company where the trades exceed value of one million rupees, in a calendar quarter.

In addition, the new regulations require certain additional disclosures by the promoter, director, inter alia, in relation to details of securities of the company held and transactions in securities of the company, beyond prescribed thresholds.

In 2011, the SEBI issued revised regulations on the substantial acquisition of shares and takeover of listed companies. The revised regulations do not require a company to make periodic disclosures to the stock exchanges. However, acquirers and sellers as well as the promoters of the listed companies are required to disclose certain details in relation to their shareholding and voting rights, to the company as well as to the stock exchanges. Typically, such disclosures must be made upon the shareholding of an acquirer or seller or the promoters reaching certain prescribed threshold limits. In addition, promoters and certain shareholders holding over 25 per cent of the shares of the company are required to make periodic disclosures in relation to their shareholding at the end of each financial year.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The Securities and Exchange Board of India Act, 1992, as amended (SEBI Act), prohibits any person from indulging in 'fraudulent' and 'unfair trade practice' in relation to securities. Further, the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003, as amended, provides for certain acts to be included within the ambit of 'fraudulent' or 'unfair trade practice' in relation to securities. Such acts include:

- dealing in securities not intended to effect transfer of beneficial ownership but to operate 'only as a device to inflate, depress or cause fluctuations in the price of such security for wrongful gain or avoidance of loss';
- any act or omission amounting to manipulation of the price of a security; and
- 'circular transactions' in respect of securities entered into between intermediaries in order to increase commissions to provide a 'false

appearance of trading in such security or to inflate, depress or cause fluctuations in the price of such security'.

'Manipulation of market' would be analysed on the basis of the intention of the parties, as determined on the facts and circumstances of each case. The artificiality of trades cannot be established on the basis of percentage of purchases, but only on the basis of collusion or nexus between the parties to the transaction. Further, such nexus should be intended to 'create misleading appearance of trading and to manipulate the price and volume of the scrip price to tamper the discovery mechanism'.

Further, under the Companies Act, any person who deceives another person to induce him or her to enter into any agreement for dealing in securities or agreement for securing profits from a yield of securities is liable for action as fraud. Under the 2013 Act inducing, by deception, any person to enter into an agreement for obtaining credit facility from any bank or financial institution has also been specifically included with the ambit of the provision.

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

A greenshoe option, or over-allotment option, is a recognised mechanism in the ICDR Regulations pertaining to price stabilisation. It grants the option of allotting shares in excess of the shares offered in a public issue as a post-listing price stabilising mechanism. Specific provisions governing the role of stabilising agents and the process of over-allotment have been laid down in the ICDR Regulations. However, issuer companies usually do not opt for greenshoe options in public issues in India.

While the ICDR Regulations provide the mechanism for price discovery in public offerings through the 'book building' process, the SEBI does not regulate pricing in public offerings. Over the past few years, on account of macroeconomic, sector specific and other reasons, Indian capital markets have witnessed the trading prices of a large percentage of companies getting listed falling below the issue price, post listing. In this regard, the ICDR Regulations provide for a safety-net mechanism, whereby a promoter of the issuer could undertake to provide a one-time exit opportunity retail investors at issue price, in the event the price of the securities, post listing, falls below the issue price. However, providing a safety net is voluntary and it is not common in public issues in India.

Concerned with the negative impact on investor confidence in the market on account of fall in trading prices post listing, in October 2013 the SEBI had proposed a mandatory safety net mechanism. Post this proposal, while few issuers in discussion with SEBI provided for a form of safety net mechanism in IPOs, ultimately the mandatory safety net mechanism was not adopted on account of the onerous impact on issuers and promoters. While the concern on pricing of public issues has remained, with a view to provide for more reasonable price discovery, the SEBI in some of the recent public offerings has provided for certain percentage of bids in the offering to be received from specified Indian institutional investors.

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

Liability in respect of a securities offering under Indian law can broadly be classified as follows.

Companies Act

The 2013 Act provides for civil liability for inclusion of any misleading statement in a prospectus (as opposed to 'untrue statement' under the 1956 Act). A civil suit under this provision may be initiated by any person who subscribes to the securities in the offering against the directors or promoters of the issuer or any other person who has authorised the issue of prospectus. The 2013 Act also proposes to extend civil liability over persons named as 'experts' in the prospectus. The 2013 Act does not provide for certain carve-outs, which were otherwise provided in the 1956 Act. Accordingly, persons attracting civil liability may no longer disclaim liability on statements made in a prospectus, unless a director withdraws his or her consent before the issue of prospectus and the prospectus is issued without his or her authority, and the prospectus is issued without the consent of a person and such person gives a reasonable public notice on becoming aware that the prospectus has been issued without his or her consent or knowledge.

Update and trends

Over the past year there have been few significant regulatory changes in the Indian securities market with introduction of certain new products and an overhaul of existing regulations. The SEBI has also recently issued fresh regulations on insider trading in India, which in addition to listed companies also regulate to be listed companies. Further, the government of India has recently issued a fresh scheme on issuance of depository receipts, which, subject to certain conditions, specifically provide for listing abroad without requirement of prior and subsequent listing in India. In relation to this scheme, while RBI has amended the applicable foreign exchange regulations to align it with the scheme, the status of various circulars issued over a period of time to broad base the previous scheme, such as circulars providing for two-way fungibility and sponsored depository issue, the scheme is not clear and further operational guidelines may be required.

The SEBI has also issued regulations on real estate investment trusts and infrastructure investment trusts, permitting issuance and listing of units by stable income generating real estate and infrastructure assets. While the regulations on real estate investments trusts and infrastructure investment trusts were issued in September 2014, for these investment vehicles to be launched in India tax treatment may need to be further liberalised. In this regard, the Union Budget for 2015-2016 has proposed rationalising the tax treatment on capital gains and providing a pass through for rental incomes. While statutory adoption of these proposals is expected to provide an impetus to the launch of these vehicles in India, certain other measures such as complete pass-through for up-streaming of dividend income may be helpful. Further, the current foreign exchange regime may not permit foreign investors from investing in these vehicles and this restriction may need to be liberalised.

The Companies Act also imposes criminal liability for inclusion of any untrue statement in a prospectus. Criminal action may be initiated against any person who has authorised the issue of the prospectus. Under the 2013 Act, criminal liability will not be attracted, if the person having authorised the issue of prospectus establishes that the statement or omission was immaterial or that he or she had reasonable grounds to believe that the statement was true or necessary.

SEBI Act and the ICDR Regulations

Under the SEBI Act and the ICDR Regulations, SEBI has wide powers to take steps in the interests of investors, including prohibiting an issuer from issuing an offer document. Further, various intermediaries associated with a securities offering, including the lead managers, are required to be registered with the SEBI and are to discharge certain obligations in relation to the offering. For instance, in a public offering, the lead managers are required to certify to the SEBI that disclosures in an offer document are true, fair and adequate so as to enable the investors to make a well-informed decision as to the investment. To this end, lead managers are required to conduct due diligence of the issuer, and maintain records and documents pertaining to the due diligence. Action may be initiated by the SEBI against intermediaries, in terms of the regulations framed under the SEBI Act, for a breach of such obligations.

Common law liability

Common law liability is recognised in India and a suit may be initiated against the issuer and the lead managers for negligent misstatement in the offer document. However, instances of claims under common law are few in India and courts are perceived to not award substantial amounts for claims for damages.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

Securities litigation is at a fairly nascent stage in India at present. The Companies Act prescribes both civil and criminal consequences for mis-statements in a prospectus. In addition, the SEBI Act prescribes both civil and criminal sanctions against persons or entities that are in violation of its provisions, including failure to supply requisite information or documents to the SEBI, failure to maintain books of accounts or redress investor grievances in a listed company, the omission of insider trading, non-reporting under the extant regulations on acquisitions of shares and takeovers and the failure by various intermediaries in the securities market to adhere to rules and regulations laid down by the SEBI. Complaints on any such grounds may be filed by any entity with an adjudicating officer appointed by the SEBI on its behalf, who is empowered, upon hearing both the parties in the matter, to impose such penalties as he or she may deem fit against the entity against whom the complaint is directed, within the contours of the SEBI Act.

Appellate proceedings in such regard may also be filed by any individual aggrieved by an order of the adjudicating officer with the Securities Appellate Tribunal, a special appellate tribunal constituted under the SEBI Act to redress violations relating to the securities market. Any decision of the Securities Appellate Tribunal may subsequently be appealed to the Supreme Court of India as the court of last appeal. The SEBI Act excludes civil courts from ruling upon any matter or in any dispute that pertains to the jurisdiction of the SEBI adjudicating officer or the Securities Appellate Tribunal.

Besides the above-mentioned remedies, the SEBI may also recognise any violation of its rules and regulations by any entity of its own accord and impose civil and criminal sanctions as it may deem fit.



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Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The directly relevant legislation on securities offerings is the Financial Instruments and Exchange Law (FIEL) and the Enforcement Order and related Cabinet Orders thereunder.

The Financial Services Agency (FSA) is primarily responsible for the administration of these rules, and delegates its powers under Japanese law to each local finance bureau (LFB) of the Ministry of Finance for the registration of disclosure documents, including the Securities Registration Statement (SRS); and to the Securities and Exchange Surveillance Commission for inspections of securities companies, daily market surveillance and investigations of criminal offences. The FSA has issued guidelines concerning corporate disclosure and certain other matters for the interpretation of the FIEL and related regulations.

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

Offerings (whether primary or secondary) of securities may not be made without filing an SRS with the competent LFB, unless exempted from the registration requirements under the FIEL. The FIEL contains two broad classifications of securities: clause I securities and clause II securities. Clause I securities include, among others, equity shares of companies, corporate bonds, government bonds and units of investment trust or investment corporation. Clause II securities include, among others, beneficiary interests in trusts and collective investment schemes (as defined in the FIEL). Exemptions to registration requirements are different among these two classifications of securities.

Offerings of certain securities such as equity securities of Japanese companies or foreign corporations may be made simultaneously with the listing of such equity securities on one or more stock exchange in Japan; provided that the equity securities of foreign corporate issuers listed on a stock exchange outside Japan may be 'publicly offered without listing' in Japan, which is an arrangement known as POWL. The securities offered by POWL are subject to ongoing disclosure requirements even though they are not listed.

An SRS shall contain, in a prescribed form, information concerning the securities offered (terms of securities and offering) and the issuer (including description of its business, affiliated companies, officers and employees, assets, shareholdings, stated capital and financial statements) or, in the case of certain securities such as those relating to investment trusts and securitisation, the investment structure (including description of investment structure, investment policy and underlying assets, if any). Foreign corporate issuers are also required to incorporate in the SRS an outline of the legal system and certain other information of its home jurisdiction. Presentation of financial statements made in accordance with certain overseas generally accepted accounting principles (GAAP) may be recognised, in which case material differences from Japanese GAAP for such financial statements should be described in the SRS. Before the amendments to the relevant Cabinet order, which took effect on 1 October 2012, an SRS of a foreign corporate issuer must contain financial statements for the most recent

five years, among which the most recent two years' financial statements must be audited by CPA. However, after the amendments to the Cabinet order, an SRS of a foreign corporate issuer may contain three years' financial statements (all of which must be audited by CPA) instead of the five years' financial statements. The information required for the SRS is generally not different for debt and equity or primary and secondary offerings except for the information concerning the securities offered.

An issuer that has complied with certain conditions including the continuous disclosure obligation in Japan for one year or more may utilise the shelf registration under FIEL, in which case the issuer may incorporate its continuously disclosed documents in the SRS by reference. A registered prospectus with content that is substantially the same as the SRS must be delivered to investors at or prior to the sale of the securities registered pursuant to the SRS, except for certain limited cases.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

According to the usual practice, an issuer submits a draft SRS to the LFB for review or otherwise consults the LFB in advance (normally two to four weeks before the filing date). No fee is payable for registration of the SRS. A foreign issuer is required to appoint a Japanese resident as its attorney-in-fact to file an SRS. A certain procedure is required to prepare for filing for the first time through the Electric Disclosure for Investors' Network (EDINET), which is an electronic filing system similar to EDGAR in the US.

Once the SRS is filed and becomes available for public inspection, solicitation can commence, but no binding contract of purchase of securities can be made unless and until the registration under the SRS becomes effective and the prospectus corresponding to the SRS, including the amendment, has been delivered to the investors. The SRS becomes effective on the 16th calendar day from the date of filing, in principle, or on the eighth day in the case of shelf registration. If the SRS is amended during such waiting period, another waiting period shall start from the date of such amendment. However, such waiting period may be shortened to make the registration effective in accordance with the FIEL and relevant guidelines.

Under the amendments to the disclosure guidelines issued by the FSA, which took effect on 27 August 2014, the waiting period for certain well-known seasoned issuers (that have complied with the continuous disclosure obligation in Japan for one year or more, and both market capitalisation and annual trading volume of which shares are 100 billion yen or more) were lifted and the SRS shall become immediately effective upon the filing of the SRS with respect to the shares listed in Japan or rights offering for such listed shares on the condition that dilution of the total outstanding shares as a result of the issuance of such shares is 20 per cent or less.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Publicity under certain circumstances could fall within pre-filing solicitation (gun-jumping) or a selling effort that triggers a violation of the FIEL. There was no safe-harbour rule applicable to publication that could be considered as solicitation of certain securities that would otherwise be subject to public offering rules. In general, any acts that attract interest of investors on certain securities and promote them to purchase or acquire those securities may be considered to be 'solicitation' which is subject to

public offering rules. However, under the amendments to the disclosure guidelines issued by the FSA, which took effect on 27 August 2014, the scope of publicity restrictions is clarified to some extent by giving several examples of acts that do not constitute 'solicitation'. Under the amended guidelines, a pre-hearing from professional investors or principal shareholders with some conditions (such as confidentiality agreement), distribution of corporate information at least one month before the filing of SRS without reference to the offering, periodic publication of corporate information in the ordinary course of business without reference to the offering, and certain other acts are prescribed as those examples that do not constitute solicitation.

Underwriters are also, in principle, subject to the same restrictions on pre-filing solicitation and selling efforts. The Japan Securities Dealers Association (JSDA) has issued a guideline to its member securities companies as to the contents of a research report, establishment of an appropriate and reasonable internal review system and ensuring the independence of analysts. The amended disclosure guidelines, which took effect on 27 August 2014, also clarified an example where securities firms are allowed to issue research reports in the ordinary course of business on the condition that the securities firms have established a Chinese wall to isolate their researchers from any unpublished information regarding pre-filing solicitation or selling efforts of certain securities.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

There is no major difference between primary and secondary offerings under the public offering rules of the FIEL except that the secondary offering of securities that have been already subject to continuous disclosure requirements is exempted from the filing of the SRS, in which case the delivery of a prospectus and the filing of a securities notification is required if the secondary offering of equity securities is conducted by insiders of the issuer (including the issuer, its subsidiaries, their directors and officers, shareholders holding 10 per cent or more of total voting rights of the issuer (principal shareholders)), securities firms that acquired such securities from the insiders for resale or underwriters of such securities having a standby commitment. Holders of shares have no pre-emptive rights in the case of listed Japanese companies.

The selling shareholder in a secondary public offering is jointly and severally liable with the issuer, directors, corporate auditors, CPA and underwriters in the case of a material misstatement or omission in the SRS or the prospectus prepared by the issuer, unless the selling shareholder proves that it did not know, with due care having been taken, about such material misstatement or omission.

6 What is the typical settlement process for sales of securities in a public offering?

The legislation to introduce paperless securities, the Law Concerning Book-Entry Transfer of Corporate Debt Securities and Stocks, etc, came into force in January 2009. Shares of Japanese corporations listed on any securities exchange in Japan automatically became paperless at that time.

At present, transfer of equity securities of Japanese listed corporations or certain corporate bonds are effectuated by the proceedings under the book-entry transfer system operated by Japan Securities Depository Center Inc. In the case of bonds, the issuer shall choose at the time of issuance whether the bonds will be treated under the book-entry transfer system.

Settlement of the sale of securities subject to the book-entry transfer system in a public offering is achieved under the book-entry system and any investor who wishes to purchase the securities so offered must maintain a trading account to own the securities at account management institutions under the system, such as securities firms or banks. The securities offered will be recorded in the account of the investor on the designated delivery date after the investor has paid the purchase price through the relevant bank.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

Under the FIEL, a private placement of clause I securities for a primary offering must satisfy the following requirements:

- the number of offerees (not placees) in Japan is fewer than 50 (small number placement);
- offerees are limited to qualified institutional investors (QIIs) as designated under the FIEL (QII limited placement); or
- offerees are limited to professional investors as designated under the FIEL (professional investors limited placement).

Certain requirements to ensure the transfer restriction must also be met in order to avail the private placement exemption as described in the three points above. In addition, certain information prescribed by the FIEL and relevant orders thereunder as well as those required by the stock exchange in which the securities are or will be traded must be provided to the investors or publicly announced prior to the commencement of the offering.

The professional investors limited placement was newly introduced by a recent amendment of the FIEL and relevant orders thereunder. This amendment aimed at creating a new securities market targeting professional investors.

None of the exemptions above are available to an offering of equity securities issued by a reporting company when the ongoing reporting obligation is triggered in relation to the same type of (underlying) shares. In addition, the small number placement or QII limited placement is not available for the same type of securities offered by way of the professional investors limited placement.

The number of offerees of the same kind of securities (as defined in a cabinet order) offered within six months before the existing offering must be aggregated for the calculation of the number of offerees in a small number placement (integration rules). However, the number of QIIs is disregarded when certain selling restrictions are complied with in respect of such QIIs. An offering of options to subscribe or acquire shares of the issuing company only to directors, corporate auditors, officers and employees of the issuing company or its direct wholly-owned subsidiaries may be made without filing an SRS when certain conditions are met, even if such offering does not constitute a private placement. The Enforcement Order and related cabinet orders under the FIEL, were amended on 6 April 2011 and the exemption described above is now expanded to an offering of options to directors, corporate auditors, officers and employees of a second-tier subsidiary (ie, an entity that is directly and wholly owned by a direct wholly-owned subsidiary) of the issuer and these options are excluded from the integration rules described above.

Before the amendments to the FIEL, which took effect on 1 April 2010 (2010 FIEL amendment), a secondary offering constituted a private placement unless the number of offerees of securities with uniform terms (such as selling price and closing date) was 50 or more. Under the 2010 FIEL amendment, a private placement of clause I securities for a secondary offering must satisfy the requirements of the small number placement, QII limited placement or professional investors limited placement. The respective requirements for each category are mostly the same as those for a primary offering described above except that the integration rules in a small number placement shall apply to offerees for a period of one month and that the total number of holders of the securities may not exceed 1,000 as a result of the small number placement of foreign securities.

In addition, the following secondary offering transactions, among others, are exempted from the requirements for public offering:

- sale of securities through the market;
- sale of securities listed in Japan between securities firms or professional investors (eg, block trade);
- sale by foreign securities firms to securities firms in Japan or QIIs or sale by securities firms or QIIs to other securities firms for resale of foreign securities not subject to the transfer restriction of private placement;
- sale of securities not subject to the transfer restriction of private placements held by a seller other than insiders of the issuer (including the issuer, its subsidiaries, its principal shareholders and their directors and officers) or securities firms;
- sale of securities not subject to the transfer restriction between the insiders described in (iv); and
- sale of securities to the issuer or for resale to the issuer.

Further, for a public offering, with a total value of less than ¥100 million (the value of the offering of the same type of securities made within one year before the existing offering must be aggregated for the calculation of such total value of the offering), no SRS needs to be filed. Instead, a simplified

form of securities notification must be filed before the commencement of the offering (there is no waiting period for such procedure).

Under the 2010 FIEL amendment, for a secondary offering by securities firms of securities issued abroad or issued in Japan but with respect to which no solicitations were made in Japan (foreign securities), no SRS needs to be filed even if such offering does not constitute a private placement, if the following conditions (foreign securities secondary offering), among other conditions, are met:

- information on sale price of such foreign securities is easily available in Japan through the internet or other methods;
- such foreign securities are listed on a designated foreign exchange or continuously traded overseas, as the case may be; and
- the issuer's information (in Japanese or English) is publicly announced pursuant to regulations of foreign exchange or applicable foreign law, as the case may be, and easily available through the internet or other methods.

In the case of clause II securities, the primary or secondary offering of clause II securities constitutes a public offering when more than 50 per cent of the capital or assets of the collective investment schemes issuing such clause II securities will be invested in securities and the number of purchasers, not offerees, as a result of such offering will be 500 or more, whether they are QIIs or not.

8 What information must be made available to potential investors in connection with a private placing of securities?

In the case of a private placement of securities, a document must be delivered to each investor at or prior to the time of sale stating certain items prescribed by the FIEL and relevant cabinet orders. In general, such items include the disclaimer that no SRS has been filed for the placement, and the applicable transfer restriction, conditions or restriction of the rights as required under the FIEL on the relevant securities, unless the total amount of the placement (including private placements made within one month before the existing placement) is less than ¥100 million or disclosure as to the securities placed has already been made. This requirement is not applicable to a small number placement of shares. In respect of the professional investors limited placement, certain information about the securities as well as issuer information must be provided to the potential investors or publicly announced upon or prior to the commencement of the placement as described in question 7. Securities firms that conduct a foreign securities secondary offering described in question 7 must provide to the potential investors or publicly announce certain information about the securities and the issuer upon or prior to the commencement of the placement subject to certain exceptions. Such securities firms are continuously required to provide or publicly announce certain information upon request of their customers or occurrence of certain material facts subject to certain exceptions.

There is no other specific requirement under the FIEL on the information to be provided to potential investors in connection with a private placement.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

There are transfer restrictions on the securities acquired in a private placement to the effect that the securities offered in a QII limited placement or a professional investors limited placement can only be transferred to QIIs or professional investors, as the case may be, and the securities offered in a small number placement must not be transferred to another, other than as a whole (unless the total number of bond certificates in the placement is less than 50 and cannot be further divided). Shares offered in a small number placement or clause II securities are not subject to any transfer restriction. Similar restrictions are applicable to private placements in a secondary offering under the 2010 FIEL amendment.

There was no mechanism to enhance the liquidity of securities sold in a private placement. However, upon the recent amendment to the FIEL, which aimed to create securities exchanges solely for professional investors, securities placed in a professional investors limited placement can be traded on such exchanges. At present, the Tokyo Stock Exchange operates the Tokyo Pro Market for professional investors in equity securities and the Tokyo Pro-bond Market for professional investors in debt securities.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

There are no specific rules applied to offerings of securities outside Japan when the solicitation of the offer is made outside Japan, irrespective of the home jurisdiction of the issuer. Timely disclosure to the market or the filing of an extraordinary report required by the ongoing disclosure requirements in respect of such offering may be required if the issuer is a listed company or a reporting company in Japan, as the case may be.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Exchangeable or convertible securities, warrants or depositary shares are in general treated as 'securities' under the FIEL and identical regulation on the offering of securities shall apply.

For the offering of convertible securities or options to acquire or subscribe for shares, a small number placement is not available when the issuer is subject to an ongoing reporting obligation in relation to the underlying shares. Any additional payment required for the exercise of rights under the securities shall be aggregated for the calculation of the threshold offering value to be exempted from the SRS filing.

In order to facilitate and promote the use of rights offering as an alternative to public offering of listed shares, the cabinet order under FIEL was amended with effect from 23 April 2010. Before the amendment, an SRS had to be filed, in principle, at least 26 calendar days before the record date for the rights offering. However, after the amendment, in the case of rights offering by way of an allotment of listed options to existing shareholders without contribution, the SRS becomes effective on the 16th calendar day from the date of filing, in principle, or on the eighth day with respect to shelf registration, as with a usual public offering. Further, under the amendments to the FIEL that took effect on 1 April 2012, where the options to be allotted to existing shareholders are or will be listed on a stock exchange, and certain information, including the fact that an SRS has been filed, is published in the newspaper, the issuer is not required to deliver prospectuses to prospective purchasers.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

'Firm commitment' underwriting is commonly used, in which underwriters usually agree to jointly and severally purchase securities from the issuer for resale to the public at a specified public offering price. The lead manager organises and manages an underwriting syndicate, and executes with the issuer an underwriting agreement on behalf of the syndicate.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

A typical underwriting agreement requires the issuer to indemnify the underwriters for any liability they may incur under the FIEL because of the SRS or a prospectus containing material misstatements or omissions.

A force majeure clause usually not only specifies force majeure events such as financial, political or economic crises, war or other national disasters and governmental restrictions on the securities market in general, but also has a catch-all clause to cover any material adverse event on the offering and distribution of securities or dealings therein in the secondary market.

Commission and fees are, in general, payable upon a successful closing in the usual form of the underwriting agreement.

Greenshoes and over-allotments are common. The amount of the greenshoes and over-allotments must not exceed 15 per cent of the total number of shares to be offered in Japan under the regulations of the JSDA.

14 What additional regulations apply to underwriting arrangements?

An underwriter of securities is required to be registered under the FIEL. The FIEL classifies financial businesses into four categories, and an

Update and trends

The Tokyo Pro-Bond Market is a new bond market for professional investors, which was established in 2011 based on the 'professional markets system' adopted under the amendments to the FIEL in 2008, and is currently operated by the Tokyo Stock Exchange Inc (TSE). In 2014, in order to vitalise this new market in the interest of promoting the development of financial markets in Japan, Development Bank of Japan, a government-affiliated financial institution, announced its plan to invest in up to ¥100 billion of the bonds listed on the Tokyo Pro-Bond Market as a principal investor. Since then, issuance of bonds in the Tokyo Pro-Bond Market has been becoming popular for foreign issuers, in particular financial institutions.

In the Tokyo Pro-Bond Market, all the documentation and disclosure can be prepared in English and, therefore, would not entail any cost of translation into Japanese, as compared to a public offering in Japan (which usually needs translations). In most cases, the issuer can list its existing MTN programme (such as Euro MTN) directly on the TSE without any substantive modifications. A prospectus or offering

circular of the MTN and annual report in its home market would be sufficient as a programme information disclosed in the Pro-Bond market. At the time of pricing, 'specified securities information', which is mostly equivalent to the 'final terms' in the MTN, will be prepared in the course of the drawdown process of the programme. For this purpose, the pricing supplement of the existing MTN would usually be sufficient.

After the issuance, 'issuer filing information' must be filed once a year within three months of the fiscal year end (or longer when so permitted in the home country). For this purpose, an annual report in its home country would suffice. The issuer is expected to renew the programme annually because it expires after a year. An amendment to, or replacement of, the MTN programme can be 'voluntarily' filed as an amendment to programme information.

In addition, timely disclosure (ie, press release) in the Tokyo Pro-Bond Market is required only when a prescribed material event occurs such as the issuer's bankruptcy, liquidation, default of bonds, change of corporate name or any other equivalent material event.

underwriter of securities is required to be registered for the first-type financial instruments business, which requires the most stringent financial, personnel or internal governance conditions as well as other matters. All financial institutions engaging in underwriting business are members of, and are subject to the rules of, the JSDA.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

A company becomes subject to ongoing reporting obligations if:

- its securities are listed on any stock exchange or registered with any over-the-counter market in Japan (other than the market limited to professional investors);
- it has filed or should have filed an SRS in relation to an offering of securities; or
- the number of holders of securities was 1,000 or more (in the case of equity shares) or 500 or more (in the case of collective investment schemes) at the end of certain designated fiscal years (this is applicable only to certain securities including equity shares or collective investment schemes and can be avoided under certain conditions).

Ongoing reporting obligations may be exempted upon approval by the LFB when the company goes into liquidation proceedings, suspends its business for a considerable period or, in relation to the second condition above, the number of holders of securities becomes less than 25 at the end of the immediately preceding fiscal year or the number of holders of shares (which include shares and similar securities of foreign issuers under the amendments to the relevant Cabinet order, which took effect on 26 August 2013) has been less than 300 at each end of the fiscal year for the past five years.

The issuer of securities offered by way of the professional investors limited placement must periodically provide certain information regarding its business to the investors or publicly announce them.

16 What information is a reporting company required to make available to the public?

The reporting company must file an annual securities report with the LFB within three months (or six months in the case of foreign corporations) of the end of each fiscal year. The information to be included in the securities report is basically identical to the issuer information for the SRS. The reporting company must also file a semi-annual report for the initial six-month period within three months of the end of such period, or quarterly reports described below.

Issuers of shares listed on any securities exchange in Japan (other than the market limited to professional investors), in general, are required to file quarterly reports within 45 days after the end of each quarterly fiscal period, except in certain limited cases. Such issuers must also file a certificate by representative directors and the chief financial officer, if any, confirming the lack of untrue statement in the annual or quarterly report and a report regarding the internal control system for financial reporting or other information to be disclosed together with the annual securities report. The reporting company must also file an extraordinary report without delay

upon the occurrence of a material event, such as an overseas offering of its securities, a change of its parent company or major shareholders, the company's decision to implement a merger, a share-for-share exchange or a corporate split, or a disaster or litigation having a material effect on the company.

A foreign corporation, if it has satisfied certain conditions, is able to file a disclosure document in English disclosed in accordance with the regulations in a foreign jurisdiction instead of a securities report, when filed with a summary thereof and other supplementary documents in Japanese. This English language disclosure was not available for the purpose of the SRS, but, under the amendments to the FIEL that took effect on 1 April 2012, instead of filing an SRS in Japanese, a foreign corporation, if it has satisfied certain conditions, is able to file a disclosure document concerning the issuer in English disclosed in accordance with the regulations in a foreign jurisdiction, when filed with a summary thereof and other supplementary documents in Japanese as well as information concerning the securities (ie, the terms of securities and offering) in Japanese.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The FIEL lists prohibited manipulative acts such as the sale of listed securities or trading derivatives in disguise and conspiracy with others to match orders, with an intent to mislead the market, or a series of manipulative transactions, the intentional dissemination of false or misleading statements, with an intent to induce market transactions. Those who violate these prohibitions owe civil liability to indemnify losses to the participant in the manipulated market, and may also be subject to criminal proceedings and forfeiture of the benefit from such acts, as well as an administrative surcharge. The FIEL recently broadened and strengthened the criminal sanction and administrative surcharges in relation to manipulative transactions.

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

Stabilisation activities are only permitted for the purpose of the facilitation of a public offering and are only permitted in stock exchanges when conducted in accordance with the FIEL. The FIEL and the relevant orders prescribe the manner and conditions of permitted stabilisation activities. Stabilisation must be carried out by the underwriters of the relevant offering and other certain prescribed persons, the list of which is required to be submitted to the relevant securities exchanges. The fact that the stabilisation is contemplated must be stated in the relevant prospectus. The period for which the activities are permitted is, in general, after the date of pricing and up to the end of the subscription period. The price at which the stabilisation transaction can be carried out is also regulated by the FIEL and relevant ordinance.

Liabilities and enforcement**19 What are the most common bases of liability for a securities transaction?**

The issuer, directors, executive officers, corporate auditors, CPA, underwriters and selling shareholders (if any) are jointly and severally liable to any person who purchases securities when there is a material misstatement or omission in an SRS or registered prospectus. The issuer is strictly liable for material misstatements or omissions, but the others can avoid liability by proving that they did not know, after due care, of such misstatements or omissions. The FIEL shifts the burden of proof to the defendants for culpability as above and, in the case of the issuer, also for the amount of damages caused by a misstatement or omission with a provision presuming such amount. Similar liability as with a registered prospectus is imposed on such use of any offering materials other than the prospectus.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

In addition to civil liability, an issuer who filed an SRS with material misstatements or omissions may be subject to criminal proceedings (and, on conviction, imprisonment for up to 10 years or a fine of up to ¥10 million, or both, together with a fine up to ¥700 million in the case of a company, under the recent amendment of the FIEL) and an administrative surcharge. Violations of other regulations under the FIEL, such as failing to file the SRS when required, selling securities within the waiting period or without delivering a registered prospectus, and regulation on fraudulent market transactions and stabilisation transactions, may also be subject to criminal proceedings and an administrative surcharge.

The underwriters would also be subject to administrative sanctions, such as the suspension of the whole or part of their business, should they act in violation of securities regulations.

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Luxembourg

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Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The legal framework governing the offering of securities on the Luxembourg Stock Exchange (LSE) and their admission to trading on a regulated market results from a blend of national laws and European directives requirements. The offering of securities is primarily governed by the Law of 10 July 2005 relating to the prospectus for securities (the Prospectus Law), which implements 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 (the 2003 Prospectus Directive). The prospectus law was further amended by the Luxembourg law of 3 July 2012 (2012 Law) implementing Directive 2010/73/EU and by the law of 21 December 2012, with the view to take into consideration the EU Regulation No. 1095/2010 establishing the European Supervisory Authority (ESA). The Prospectus Directive was supplemented by the Commission delegated regulation No. 382/2014 of 7 March 2014 which sets out regulatory technical standards specifying situations in which the publication of a supplement to the prospectus is mandatory.

The 2012 Law, beyond the strict implementation of the 2010 Prospectus Directive, further amended the Prospectus Law in respect of public offerings and the admission to trading on a regulated market of securities that are not subject to Community harmonisation under the 2003 Prospectus Directive.

The public offering of securities representing units issued by undertakings for collective investment other than the closed-end type are subject to the sole provisions of the Laws on Undertaking of Collective Investments dated 17 December 2010. Units of an open-end type are out of the scope of the Prospectus Law irrespective of the frequency and periodicity of their repurchase. The prospectus they issue is valid for an offer to the public or their admission on a regulated market.

The Prospectus Law distinguishes three different types of legal regimes for offerings and admission:

- First Regime: relating to the offering and admission on a regulated market of securities subject to European harmonisation under the Prospectus Directive (Part II of the Prospectus Law with a full prospectus regime).
- Second Regime: relating to securities that are not encompassed by the Prospectus Directive and addressing two types of operations (Part III of the Prospectus Law with a simplified prospectus regime):
 - their public offering in Luxembourg; and
 - their admission to a Luxembourg regulated market.
- Third Regime: relating to the admission of securities to trading on markets not listed as a regulated market by the European Commission (Part IV of the Prospectus Law). At present, there is only one such regulated market in Luxembourg: the Euro Multilateral Trading Facility (MTF) market.

The regulatory supervisory authority, the Commission for the Supervision of the Financial Sector (CSSF) has issued several administrative circulars, which complete the body of existing rules and regulations, and which provide an overview and recommendations in respect of the Prospectus Law requirements.

In addition to the Prospectus Law, admission to trading on the LSE is subject to the Grand-Ducal Regulation of 13 July 2007 on the keeping of an official list (the Official List Regulation) and the LSE's own rules and regulations, the LSE Rules and Regulations (together, LSE Listing Rules). The LSE Listing Rules set out the requirements for admission to a Luxembourg regulated market and regulate the conduct of listed companies.

Specific regulations also apply to public offerings pursuant to public takeover bids (ie, the Law of 19 May 2006 implementing European Directive 2004/25/EC).

The CSSF is the authority primarily responsible for the supervision and enforcement of the statutes and regulations governing public offerings of securities in the Grand Duchy of Luxembourg (Luxembourg). In particular the CSSF is responsible for approving prospectuses under the regime covered by the Prospectus Directive (First Regime) and the simplified prospectuses relating to securities that are outside of the scope of the Second Regime. The CSSF regularly issues and promulgates instructions and guidelines under the form of administrative circulars that implement these statutes and regulations. Further to the creation of the ESA, the CSSF cooperates with the ESA, pursuant to the requirements of the Regulation 1095/2010 in matters of exchange of information and proceeds to the necessary reporting to enable the ESA to carry out its mission.

The LSE is the sole institution authorised to administer one or several securities markets situated or operating in the Luxembourg market. It has the residuary competence for approving offers of securities admitted to trading under the Second Regime, namely, which are not covered by the Community harmonisation for the offering of securities and admitted to trading on the LSE or the Euro MTF (the Luxembourg alternative regulated market). The LSE has been operating the Euro MTF since 18 July 2005. This second market, which is not included in the list of regulated markets of the European Commission, is an alternative for issuers that wish to benefit from a certain regulatory framework, but do not require a European passport for prospectuses.

The LSE is responsible for administering and enforcing the LSE Listing Rules as well as approving the admission of an entity to the official list and the quotation of the entity's securities on the LSE.

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

Pursuant to the Prospectus Law, any issuer intending to make a public offering or an admission to trading of securities (equity or debt) on a regulated market situated or operated within the territory of Luxembourg must, subject to certain exemptions, publish a prospectus. The issuer must notify the competent authorities (the CSSF or the LSE) of such intention in advance. An 'offer of securities' to the public is a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities. Securities include shares in companies and their equivalent, but also bonds or other forms of securitised debt, depositary receipt in respect of such securities and other securities giving the rights to sell or acquire any such transferable securities or giving rise to a cash settlement determined by reference

to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

Certain types of offers are exempt from the obligation to publish a prospectus, and consequently the obligation to notify the CSSF or the LSE. These are as follows:

- offers of securities addressed solely to qualified investors;
- offers of securities addressed to fewer than 150 natural or legal persons other than qualified investors, per member state;
- offers of securities addressed to investors who acquire securities for a total consideration of at least €100,000 per investor, for each separate offer;
- offers of securities whose denomination per unit amounts to at least €100,000; and
- offers of securities with a total consideration in all member states of the European Union of less than €100,000, which limit must be calculated over a period of 12 months.

Qualified investors are defined by article 2 of the Prospectus Law in a consistent manner with the definition of professional investors for purpose of the MiFID Directive 2004/39/EC of 21 April 2004 (MiFID Directive). Qualified investors are those listed under category I of Annex II of the MiFID Directive including those persons or entities who are deemed as professional investors on request, in compliance with Annex II of the MiFID Directive, or who are recognised as an eligible counterparty pursuant to article 24 of this directive, unless they have opted to be treated as non-professionals.

In addition, the offering of certain types of securities are exempt from the obligation to publish a prospectus. These types of securities are the following:

- shares issued in substitution for shares of the same class already issued, if the issuing of such new shares does not involve any increase in the issued capital;
- 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 Community legislation on exchange offers;
- securities offered, allotted or to be allotted in connection with a merger, provided that a document is available containing information that is regarded by the regulatory authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation on mergers;
- shares offered, allotted or to be allotted free of charge to existing shareholders, and dividends paid out in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer;
- securities offered, allotted or to be allotted to existing or former directors or employees by their employer whose securities are already admitted to trading on a regulated market or by an affiliated undertaking, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer;
- dividends paid out to existing shareholders in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer; this obligation applies also to a company established outside the European Union whose securities are admitted to trading either on a regulated market or on a third-country market. In the latter case, the exemption applies provided that adequate information, including the document referred thereto, is available at least in a language customary in the sphere of international finance and provided that the European Commission has adopted an equivalence decision regarding the third-country market concerned; and
- securities offered, allotted or to be allotted to existing or former directors or employees by their employer or by an affiliated undertaking provided that the company has its head office or registered office in the European Union and provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer.

As regards information to be disclosed in prospectuses, the Prospectus Law refers explicitly to the Annexes of the European Commission Regulation 809/2004/EC as amended, which deal with the level of information required to be disclosed, depending on the prescribed category of issuer and the type of securities to be offered. In general, the prospectus must contain all information necessary for investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and future prospects of the issuer and of any guarantor of the securities to be listed, as well as the rights attaching to such securities and any conditions under which they are issued. In particular, the prospectus should include disclosures of applicable risk factors, business and market descriptions, the financial statements of the issuer and a management discussion and analysis (MD&A) section. The prospectus must also include a summary section (key information), which conveys, in plain language, appropriate information relating to the securities offered including risks associated with the issuer, any guarantor and the securities in order to aid investors when considering whether to invest in such securities. This summary must be drawn up in a common format in order to facilitate comparability of the summaries of similar securities. This summary is not required for non-equity securities having a denomination of at least €100,000.

The issuer may decide to issue the prospectus as a single document or as separate documents. A prospectus composed of separate documents must split the required information into a registration document, a securities note and a summary note. The registration document contains the information relating to the issuer. The securities note contains the information concerning the securities offered to the public or to be admitted to trading on a regulated market.

Issuers who offer securities under the Second Regime are only required to publish a simplified prospectus. The compulsory content of the simplified prospectus is listed in Annexes I and III to VI of the LSE Rules and Regulations. Alternatively, reference may be made to the Annexes of Regulation 809/2004 of the European Commission dated 29 April 2004.

Issuers who offer securities intended to be traded on the LSE under the Second Regime are required to publish a prospectus, which must be approved by the LSE. The compulsory content of the simplified prospectus is listed in sub-chapter 1 of Chapter XI of the LSE Rules and Regulations.

Issuers who offer securities on the Euro MTF under the Third Regime are required to file a prospectus with the LSE in accordance with the requirements of the LSE Rules and Regulations.

Prospectuses can be drafted in Luxembourgish, French, German or English and other languages deemed acceptable to the CSSF or the LSE. Once approved the prospectus must be filed with the CSSF (www.e-file.lu). The official submission of the prospectus must be made securely through the CSSF internet platform (e-file). Every significant new fact, material mistake or inaccuracy relating to the information included in the prospectus, which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, must be mentioned in a supplement to the prospectus. Such a supplement must be approved in the same way within a maximum of seven working days and published in accordance with at least the same arrangements as were applied when the original prospectus was published.

To the extent the securities offered to the public are also intended to be listed on the LSE, an additional request for being admitted to the LSE must be filed with the LSE. An application for admission to trading in securities on one of the securities markets operated by the LSE is also deemed to be an application for admission to the official list. Therefore, an application for admission to the official list without an application for admission to trading on one of the securities markets operated by the LSE will not be accepted. For debt and derivative programmes, the decision of listing is effective for one year and may be renewed annually in order to allow new listings.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

According to the Prospectus Law, no offer of securities can be made to the public within the territory of Luxembourg without prior publication of a prospectus approved by the CSSF or the LSE.

To the extent that no prospectus may be published unless it has been approved beforehand by the CSSF or the LSE, the public offering process is

therefore a two-step process that entails first, the approval of the prospectus, and second, its publication.

This approval, however, does not guarantee the economic and financial soundness of the offering or listing, nor the quality or solvency of the issuer. The authorities require that a specific disclaimer be inserted in the prospectus in this respect. The draft prospectus is initially submitted for review purposes to such relevant authorities. They have 10 working days to notify their decision to approve the prospectus. This time limit is extended to 20 working days if the securities are offered by an issuer who has not issued securities admitting to trading on a regulated market and has not previously offered securities to the public. The time limit runs from the working day following that of the official submission.

If, at the time of the receipt or processing of the submitted file, the file is not complete or additional information is needed, the issuer will be advised that the file is incomplete, and the time limit then starts to run only from the working day following that on which the requested information has been provided by the issuer in accordance with the provisions of the Prospectus Law. The CSSF has 10 days from the submission date to notify the issuer that the file is incomplete or that supplementary information is needed.

The authorities may still validly notify their approval after the expiry of the above-mentioned time limit. In particular, this enables the issuer to ask the CSSF to approve the prospectus on a date, which, due to the timetable of the transaction, falls beyond the prescribed time limits provided in the Prospectus Law as regards the notification of the decision of approval. The same principles apply to applications for approval of supplements to the prospectus within the time limit for approval of seven days.

It should be noted that prior to the official submission, the issuer must notify its intent to proceed to the public offering or the listing of securities on the LSE. It would also be well advised to solicit from the relevant authorities their preliminary view, in particular when the contemplated offering or listing is unusually complex. Communication with the CSSF or the LSE is easy and straightforward and is usually made by electronic communication.

Issuers intending to list their securities on the LSE must also file a request form for admission of securities to trading and a letter of undertaking whereby they commit to maintain their entity in good standing, comply with applicable regulations and report adequately to the authorities as needed.

Once approved and submitted to the CSSF or the LSE, the prospectus must be made available to the public by the issuer, offeror or person asking for admission to trading on a regulated market as soon as is practicable or at a reasonable time before, and at the latest, at the beginning of, the offer to the public or the admission to trading of the securities involved. In addition, in the case of an initial public offer of a class of shares not already admitted to trading on a regulated market that is to be admitted to trading for the first time, the prospectus shall be available at least six working days before the end of the offer.

The Prospectus Law rules that the prospectus is deemed available to the public when published:

- by insertion in one or more newspapers circulated throughout, or widely circulated in Luxembourg;
- in printed form made available to the public, free of charge, at the offices of the LSE, or at the registered office of the issuer and at the offices of the financial intermediaries placing or selling the securities, including paying agents;
- in electronic form on the issuer's website and, if applicable, on the website of the financial intermediaries placing or selling the securities, including those agents in charge of the financial service;
- in electronic form on the website of the LSE; or
- in electronic form on the website of the CSSF.

The Prospectus Law does not require, as proposed by the Prospectus Directive, publication of a notice stating that the prospectus has been made available and where it can be obtained. It is noteworthy that prospectuses are published by the CSSF on the website of the LSE for a period of at least 12 months, and this is sufficient to fulfil the obligation to publish imposed on the issuer.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Any advertisements must state that a prospectus has been or will be published and indicate where investors are or will be able to obtain it. The mention of the decision of approval of the prospectus by the Commission

does not constitute an appreciation of the opportuneness of the transaction proposed to investors.

Advertisements must be clearly recognisable as such and the information contained therein must not be inaccurate or misleading. They also must be consistent with the information contained in the prospectus, if already published, or with the information required to be in the prospectus, if the prospectus is published afterwards. All information concerning the offer to the public or the admission to trading on the LSE disclosed in an oral or written form, even if not for advertising purposes, must always be consistent with that contained in the prospectus.

The CSSF has the power to exercise control over the compliance of advertising activity, relating to a public offer of securities within the territory of Luxembourg or an admission of securities to trading on the LSE. The provisions of the Prospectus Law do not provide for the prior communication and formal approval of advertisements. However, the issuer may submit their draft advertisement to the CSSF via electronic mails with the view to obtaining a CSSF opinion as to their compliance with legal and regulatory requirements.

The preparation and distribution of research reports should be made in accordance with the provisions of Luxembourg law, in particular the Law of 9 May 2006 (Market Abuse Law) transposing Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (Market Abuse) and Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation. The Directives 2003/124/EC, 2003/125/EC and 2004/72/EC are intended to be abrogated by new Regulation 596/2014 of the European Parliament and Council of 16 April 2014, with effect as of 3 July 2016.

According to the Market Abuse Law persons who produce or disseminate investment recommendations in Luxembourg or who, from abroad, specifically target the Luxembourg public must specifically ensure that the recommendations are presented fairly, that they clearly mention conflicts of interests and that they include all the other references provided for by the law.

In particular, the entity producing these reports must at least ensure that:

- the material sources are indicated including the relevant issuer, together with confirmation as to whether the investment recommendation has been disclosed to that issuer and amended following this disclosure before its dissemination;
- the basis of valuation or methodology used to evaluate a financial instrument or an issuer of a financial instrument, or to set a price target for a financial instrument, is adequately summarised;
- the meaning of the investment recommendation made, which may include the time horizon of the investment to which the investment recommendation relates, is adequately explained and any appropriate risk warning (including a sensitivity analysis of the significant assumptions) is indicated;
- the date on which the investment recommendation was first released for distribution is indicated clearly and prominently, as well as the relevant date and time for any financial instrument price mentioned;
- where an investment recommendation differs from an investment recommendation concerning the same financial instrument or issuer, issued during the 12-month period immediately preceding its release, this change and the date of the earlier investment recommendation are indicated clearly and prominently; and
- reference is made to the planned frequency, if any, of updates of the recommendation and to any major changes in the coverage policy previously announced.

Finally, it should be noted that the 'simple communication of information on a security or an issuer without securities being offered for purchase or subscription cannot be considered as an offer to the public'. It is necessary that the communication of information is made in relation to an offer of securities. Thus, in principle, the availability of information or advice to invest in certain securities does not in itself constitute an offer to the public.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

Secondary offerings of securities through public offering are subject to the same requirements as primary offerings. However, a secondary offering

can be exempted from the prospectus obligations inasmuch as the obligations do not apply to the admission to trading on a regulated market of shares representing, over a period of 12 months, less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated market.

Any subsequent resale of securities is to be regarded as a separate offer and the conditions of the Prospectus Law apply for the purposes of deciding whether or not that resale is an offer to the public. In this respect, the placement of securities through financial intermediaries remains subject to publication of a prospectus if none of the exemption conditions for a public offering are met for the final placement.

A primary offering of shares or equity-linked securities, namely, warrants, securities convertible into shares of a Luxembourg company wholly for cash, requires that such securities be first offered to the existing shareholders on a pro rata basis, unless the statutory pre-emption right is disapplied. The statutory pre-emption right may be disapplied by resolution of the shareholders resolving in a duly convened meeting of shareholders or by the board of directors if such a power has been granted to them by the shareholders pursuant to the authorisation granted to the board to issue equity and equity-linked securities (authorised capital).

Pre-emption rights can be restricted to certain classes of shares in the articles of incorporation of the Luxembourg company.

6 What is the typical settlement process for sales of securities in a public offering?

The LSE relies on the following clearing and settlement entities: LCH Clearnet SA, Clearstream Banking SA or Euroclear Bank SA.

Generally, the settlement-delivery of securities occurs on the third trading day following the end of their placement. Upon issue, the securities are registered in the books of the settlement entities, which will credit the accounts of the financial intermediaries on the settlement-delivery date.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

Private placements of securities fall outside the scope of public offerings and, accordingly, are exempted from the obligation to publish a prospectus. See question 2 for a list of offers that are exempt from the obligation to publish a prospectus. There are no specific rules governing the private placing of securities. However, general principles of laws would apply and issuers should endeavour to deliver accurate and not misleading information on the securities issuance and the private placing process. Their liability could be involved on grounds of general principles of contractual and civil law or liability in tort (see questions 8 and 19).

8 What information must be made available to potential investors in connection with a private placing of securities?

There are no specific regulations or legal provisions governing private placement of securities.

General principles of law must, however, apply. This involves investors being treated equally and fairly and having access to the same information when subscribing to the securities. Article 17 of the Prospectus Law sets out that when no prospectus is required, material information provided by an issuer or an offeror and addressed to qualified investors or special categories of investors, including information disclosed in the context of meetings relating to offers of securities, must be disclosed to all qualified investors or special categories of investors to whom the offer is exclusively addressed.

It is also advisable that the persons who carry out a private placement in Luxembourg inform potential investors that: any prospectus relating to the offering of securities has not been submitted to the clearance procedures of the CSSF. They should also take the necessary measures to avoid the placement qualifying as a public offering and require the necessary undertaking from investors that they act for their own account and do not intend to resell the securities under the terms of a public offering. Finally, they should provide accurate and complete information in respect of the placed securities in order to enable the investors to make an informed assessment of the securities.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

There are no particular restrictions on the transferability of securities acquired in a private placement, except that any resale to the public of such securities must be made in accordance with the rules on public offerings (see question 1).

The new law of 6 April 2013 on dematerialised securities has modernised the Securities Law by creating a third category of securities alongside securities in bearer or registered form and introduces a general regime for them, thereby providing Luxembourg capital companies the option to issue shares in dematerialised form and for all other issuers to issue dematerialised debt securities governed by Luxembourg law. Generally, the law on dematerialised securities introduces a comprehensive and complete regime covering the issue, conversion, pledging, transmission and conditions required for the issue of dematerialised securities. The Luxembourg legislator took the opportunity to implement certain principles arising from the Unidroit Convention on Substantive Rules for Intermediated Securities dated 9 October 2009 and has taken into account preliminary work on the draft EU directive on the legal certainty of securities holding and transactions. The law provides that the issuance of dematerialised securities (equity and debt) must be registered in an issue account held with one single securities settlement system or one single central account holder. The holding of dematerialised securities may be realised through a chain of holdings involving one or more intermediaries between the security settlement system or central account holder and the ultimate holders of the dematerialised securities. Transfer of dematerialised securities is effected by book entry transfer between accounts. Payments by the issuer to a securities settlement system or central account holder discharge the issuer. The law offers some additional guarantees to the acquirers of securities against any earlier defective book entry and impose the obligation for an intermediary to hold sufficient securities equal to the aggregate number of securities credited to the securities accounts maintained for its account holders and for itself.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

Following the implementation of the Prospectus Directive, in order to carry out an offering of securities in another member state of the European Economic Area (EEA), a Luxembourg issuer must obtain the approval of the CSSF on the prospectus and make an application for the delivery of a certificate of approval to the ESA and the competent authority of the EEA member state in which the public offering is contemplated. Within three trading days following such application or, within one trading day after approval of the prospectus by the CSSF (if the application has been submitted at the same time on the first filing of the prospectus), the CSSF issues a certificate of approval to the competent authority of the other jurisdiction, specifying that the prospectus has been drawn up in accordance with the Prospectus Directive and is valid for any public offerings carried out in any member state of the EU.

When an offer of securities is carried out in a jurisdiction other than Luxembourg and restricted to foreign subscribers, the Luxembourg issuer needs to comply only with the securities laws of such jurisdiction.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Offerings of exchangeable or convertible bonds, warrants, depositary shares or rights, fall within the scope of the Prospectus Directive and the Prospectus Law. In this respect, the issuer or offeror must comply with the disclosure requirements contained in the relevant Annexes of the European Commission Regulation 809/2004/EC and therefore must follow the process described further under question 2.

Under the LSE Rules and Regulations, convertible bonds, exchangeable bonds and bonds with warrants may only be admitted to the official list if the shares or units to which they relate have previously been admitted to this list or admitted to trading on another market, that operates in a legitimate, recognised and open manner or are admitted at the same time.

By derogation these securities may, however, be admitted to the official list provided that the LSE is satisfied that the holders of the bonds have at their disposal all the necessary information to form an opinion concerning the value of the shares or units related to such bonds.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

No standard form of underwriting agreement or guidelines exist that are provided by the Luxembourg financial authorities or professional bodies.

Underwriting agreements in the Luxembourg market usually comply with the prevailing international practice in equity or debt offerings, in particular with the International Capital Market Association (ICMA) standards. The LSE is an associate member of the ICMA. Underwriting agreements are several rather than joint-and-several.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

Indemnity

Underwriting agreements for Luxembourg equity securities offerings usually contain an indemnity clause, for the purpose of indemnifying and protecting the underwriters and their directors, officers and employees, or controlled interests against any loss or damages resulting from untrue or misleading statements of material fact or material omissions contained in the prospectus, or any breach of the representations, warranties and agreements contained in the underwriting agreement. Underwriting agreements for debt securities also feature very similar indemnity clauses. Greenshoe shareholders can also agree to indemnify the underwriter under certain circumstances. This indemnity obligation is normally guaranteed by the assignment for security purposes of the proceeds of the offering.

Force majeure

Force majeure clauses in equity underwriting agreements generally cover any event that could affect financial markets, such as any change in general economic conditions or currency exchange, any suspension or material limitation in trading in securities on the main stock exchanges and other events that could prevent or have an adverse effect on the success of the offering. Debt underwriting agreements follow the ICMA's rules and recommendations relating to force majeure.

Success fees

Underwriting agreements relating to equity offerings frequently provide for incentive and success fees, which are paid at the issuer's discretion. Incentive fees apply to the gross proceeds of the offering while success fees are paid if a certain threshold of gross proceeds is reached.

Over-allotment

It is market practice for equity securities offerings to have underwriting agreements providing for an over-allotment option in connection with the 30-day stabilisation activities that underwriters may perform during the stabilisation period following the listing of the shares, in accordance with the provisions of the Market Abuse Directive. Any stabilisation action usually ends no later than 30 days after the issue date of the relevant securities or 60 days after the date of the allotment, whichever is earlier.

This over-allotment option is typically granted by the company on newly issued shares or by the selling shareholders on existing shares. Article 11(a) of the Stabilisation Regulation (see question 18) restricts the extent of over-allotment, such that over-allotments not covered by a greenshoe should not exceed 5 per cent of the original offer. The regulation implementing the Prospectus Directive does not require that the prospectus disclose information on the size of the 'over-allotment facility' and therefore this additional information is not required in cases where the offer falls within that regulation. Typical forms of subscription agreement and agreements among managers used for euromarket offerings do not explicitly limit the amount of over-allotment, but may only authorise the stabilising manager to over-allot securities in accordance with the applicable law or to the extent permitted by the applicable law.

14 What additional regulations apply to underwriting arrangements?

There are no specific Luxembourg regulations applying to underwriting arrangements. The provisions of the European Regulation relating to buy-back programmes and the stabilisation of financial instruments (2273/2003/EC) apply directly to underwriting agreements in the Luxembourg territory. This regulation restricts the time-related conditions for stabilisation and sets the limit for over-allotment of securities and greenshoe options (not exceeding 15 per cent of the original offer). The Luxembourg Law on Market Abuse (transposing Directive 2004/72/EC of 29 April 2004) is also likely to govern certain provisions of underwriting arrangements.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

Any issuer whose securities (equity or debt) are admitted to trading on the LSE is subject to ongoing reporting obligations (see question 16) according to the LSE Rules and Regulations and the Transparency Rules.

The Luxembourg Law of 11 January 2008 relating to the transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (the Transparency Law) and its implementing regulation (the Transparency Regulation) apply to issuers of securities for whom Luxembourg is the home member state. The Transparency Law does not apply to securities issued by collective investment undertakings other than the closed-end type, or to securities acquired or disposed of in such collective investment undertakings.

Issuers admitted to the Euro MTF market are not subject to the Transparency Law and Transparency Regulation but are subject to the reporting requirements set out by the LSE Rules and Regulations.

Shareholders, acting alone or in concert, of an issuer acquiring 95 per cent of the issuer capital and its voting rights must notify the CSSF when they reach this limit or cease to reach it. This notification is required in order to trigger the compulsory withdrawal or redemption of the securities held by other shareholders (Luxembourg Law of 21 July 2012).

16 What information is a reporting company required to make available to the public?

Annual financial reports

Issuers for whom Luxembourg is the home member state must make public their annual financial reports, at the latest, four months after the end of each financial year and must ensure that they remain publicly available for five years. These annual financial reports must comprise the audited financial statements; the management report and management statements that the financial statements are prepared in accordance with the applicable set of accounting standards; a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer; and a description of the principal risks and uncertainties that they face.

Half-yearly financial reports

Issuers of shares or debt securities for whom Luxembourg is the home member state must also make public a half-yearly financial report covering the first six months of the financial year as soon as possible after the end of the relevant period, but at the latest, two months thereafter. The issuers must ensure that the half-yearly financial report remains available to the public for five years.

Interim management statements

Issuers whose shares are admitted to trading on a regulated market and for whom Luxembourg is the home member state must make public a statement by their management during the first six-month period of the financial year and another statement during the second six-month period. Each statement must be made in a period between 10 weeks after the beginning and six weeks before the end of the relevant six-month period. It shall contain information covering the period between the beginning of the relevant six-month period and the date of publication of the statement. Such a statement must provide an explanation of material events and transactions that have taken place during the relevant period, their effect on the financial position of the issuer and its controlled undertakings, a general description of the financial position and performance of the issuer and its controlled undertakings during the relevant period.

Issuers whose home member state for Transparency Law purposes is Luxembourg must disclose the regulated information through a specialised

company and store it with the LSE through the central storage of regulated information (OAM, Officially Appointed Mechanism).

Several exemptions are provided by the Transparency Law such as for certain sovereign issuers and issuers of debt securities with a denomination per unit of at least €100,000.

The Transparency Law also requires certain notifications regarding the acquisition or disposal of major holdings. These requirements apply to the direct or indirect shareholders who acquire or dispose of shares who must notify the issuer of the proportion of voting rights held as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 33.33 per cent, 50 per cent and 66.66 per cent. Notifications are also required in the case of specific circumstances of major proportions of voting rights.

The Euro MTF market does not fall into the scope of the European Union Directives and the Transparency Law. Issuers whose securities are admitted to the Euro MTF market are only subject to the specific publication requirements of the LSE Regulations. Reporting obligations on the Euro MTF are less stringent than those required by the Transparency Law. Issuers on the Euro MTF must disseminate the following information:

- information or events or decisions affecting the security holders;
- information on material changes to the issuer's shareholders structures;
- audited annual financial statements and management reports, prepared in accordance with the issuer's national law; and
- semi-annual financial statements to be published with four months of the issuer's half year and comprising information on revenues and profit or loss for the period together with a commentary on any material factor having had an effect on the financial or trading position of the issuer during this period.

Issuers of debt securities with a denomination per unit of at least €50,000 are exempted from the publication of financial information.

In the case of a takeover bid of a Luxembourg company's securities or securities admitted to trading on the LSE, the Law of 19 May 2006 implementing Directive 2004/25/EC on takeover bids (the Takeover Law) will apply and impose disclosure requirements of specific information on the issuer.

Every issuer whose securities are admitted to trading on a securities market of the LSE must ensure the provision in Luxembourg of equivalent information to that made available to the market of any other stock exchange or stock exchanges situated or operating outside the member states of the European Union, to the extent that this information may be important for evaluating the securities in question.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The Luxembourg Law of 9 May 2006 transposing the Directive on Market Abuse 2003/6/EC (Market Abuse Law) aims at combating insider dealing and market manipulation (market abuse) in order to ensure the integrity of financial markets, enhance investor confidence in those markets and thereby ensure a level playing field for all market participants. It sets out a framework for the prevention, detection and efficient sanction of market abuse, imposes new obligations on market participants, entrusts the CSSF with specific competences and missions and sets down preventive measures. By 3 July 2016, the Market Abuse Directive shall be superseded by the EU Regulation 596/2014 of 16 April 2014 on market abuses which shall come in effect at that time.

The Market Abuse Law applies to all securities admitted to trading on at least one regulated market or for which a request for admission to trading on such a market has been made. Prohibitions of market abuse also apply to all financial instruments admitted to trading on at least one MTF or for which a request for admission to trading on an MTF has been made. This obligation applies whether or not the transaction was carried out on such a regulated market or such an MTF.

The Market Abuse Law lays down a set of requirements for market participants with the major aim of preventing market abuse, namely:

- credit institutions and the other professionals of the financial sector established in Luxembourg are required to notify the CSSF without delay if they reasonably suspect that a transaction might constitute market abuse;
- the regulated markets, credit institutions, investment firms and

market operators of an MTF must adopt structural provisions aimed at preventing and detecting market manipulations;

- issuers of financial instruments are required to disclose to the public inside information that directly concerns them as soon as possible;
- issuers or persons acting on their behalf and for their account must establish a list of persons who have access to inside information;
- persons discharging managerial responsibilities within an issuer that has its registered office in Luxembourg and persons closely associated with them, must notify to the CSSF and to the issuer all operations conducted on their own account related to the issuer's shares admitted to trading on a regulated market, or to derivatives or other financial instruments linked to these shares and the issuer must make these operations public; and
- persons who produce or disseminate investment recommendations in Luxembourg or who, from abroad, specifically target the Luxembourg public must ensure that the recommendations are presented fairly, that they clearly mention conflicts of interest and that they include all the other references provided for by the law.

Circular CSSF 07/280 on the implementation rules of the Market Abuse Law provides explanations and guidelines concerning the elements that could be indications of market manipulation: the arrangements and format for suspicious transaction reports, the lists to be drawn up by issuers, or persons acting on their behalf or for their account, including those persons having regular or occasional access to inside information and the notifications relating to operations conducted by persons discharging managerial responsibilities within an issuer and persons closely associated with them, as well as the modalities for public disclosure of such operations.

Luxembourg Company Law also imposes fines and imprisonment on any person who, by fraudulent means, causes or attempts to cause the price of company shares, bonds or other securities to rise or fall (article 165 of Company Law of 10 August 1915).

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

The provisions of the European Regulation relating to buy-back programmes and stabilisation of financial instruments (2273/2003/EC the Stabilisation Regulation) have a direct binding effect in the Luxembourg territory. Any price stabilisation programmes and buy-backs aimed at supporting the price of securities must comply with article 9 of the Stabilisation Regulation and the Second European Company Directive that prohibits an EU entity from redeeming its own shares beyond certain limits.

It is worth noting that Luxembourg permits stabilisation transactions prior to the commencement of trading on a regulated market. Under the present terms of the Stabilisation Regulation, over-allotment with the view to support the price of the securities is authorised provided:

- the securities are over-allotted only during the subscription period and at the offer price;
- a position resulting from the exercise of an over-allotment facility by an investment firm or credit institution that is not covered by the greenshoe option may not exceed 5 per cent of the original offer;
- the greenshoe option may be exercised by the beneficiaries of such an option only where relevant securities have been over-allotted;
- the greenshoe option may not amount to more than 15 per cent of the original offer;
- the exercise period of the greenshoe option must be the same as the stabilisation period required; and
- the exercise of the greenshoe option must be disclosed to the public promptly, together with all appropriate details, including in particular the date of exercise and the number and nature of relevant securities involved.

Disclosure requirements imposed by the Stabilisation Regulation do not apply to offerings of securities that fall under the Prospectus Directive.

Circular CSSF 07/280 also details buy-back and stabilisation activities falling under the safe harbour exemptions as laid down by the Stabilisation Regulation. In particular, it specifies that within one week of the end of the stabilisation period, the following information must be adequately disclosed to the public by issuers, offerors, or entities undertaking the stabilisation: whether or not stabilisation was undertaken; the date at which stabilisation started; the date at which stabilisation last occurred; and the

Update and trends

New developments in the field of market abuse and financial instruments

Following the financial crisis, the EU authorities have been quite active in the field of financial market regulations and investor's protection. The two most prominent achievements of this legislative relate to market abuse and financial instruments.

New Regulation No. 596/2014 on market abuse (Market Abuse Regulation) shall enter into application in July 2016. By 3 July 2016, member states will have to transpose the Directive 2014/57/EU on criminal sanctions for market abuse (Market Abuse Directive) into their national law. The new rules on market abuse update and strengthen the existing framework to ensure market integrity and investor protection provided by the existing Market Abuse Directive (2003/6/EC) which will be then repealed. The Market Abuse Regulation ensures regulation keeps pace with market developments such as the growth of new trading platforms, over-the-counter trading and new technology such as high frequency trading, strengthens the fight against market abuse across commodity and related derivative markets, explicitly bans the manipulation of benchmarks (such as LIBOR), reinforces the investigative and administrative sanctioning powers of regulators

and ensures a single rulebook while reducing, where possible, the administrative burdens on SME issuers. The Market Abuse Directive complements the Market Abuse Regulation by requiring all member states to provide for harmonised criminal offences of insider dealing and market manipulation, and to impose maximum criminal penalties of not less than four or less than two years' imprisonment for the most serious market abuse offences.

Member states have two years to transpose the new regulatory rules which will be applicable starting January 2017 and included in the new Directive on Markets in Financial Instruments repealing Directive 2004/39/EC (MiFID II) and the Regulation on Markets in Financial Instruments. The new legal framework aims to make financial markets more efficient, resilient and transparent. It will improve conditions for competition in the trading and clearing of financial instruments. Building on the rules already in place, MiFID II also strengthens the protection of investors by introducing robust organisational and conduct requirements or by strengthening the role of management bodies. The new framework also increases the role and supervisory powers of regulators and establishes powers to prohibit or restrict the marketing and distribution of certain products in specific circumstances.

price range within which stabilisation was carried out, for each of the dates during which stabilisation transactions were carried out.

Issuers, offerors or entities undertaking the stabilisation must record each stabilisation order or transaction with, as a minimum, all related relevant information and data (in particular, the name and number of securities bought or sold, the date and time of the transaction, the price of the transaction and the possibility to identify the investment firm) extended to financial instruments other than those admitted or going to be admitted to the regulated market.

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

Liability arising from inaccurate or misleading information or untrue representations made in the prospectus is the most common liability. This liability is based on the general principles of liability in tort set out in the Luxembourg Civil Code (articles 1382 and 1383). This liability relies on the issuer, the offeror, the person asking for the admission to trading or the guarantor. These persons must be clearly identified in the prospectus. They must also state in the prospectus that to the best of their knowledge it does not contain any incorrect facts or omissions that are likely to affect its import. This statement increases the likelihood that they must assume the direct responsibility for any damages resulting from any inaccuracy in the prospectus. These statements do not release the other contributors to the prospectus from their liability, if it is evidenced that they have been providing false or misleading information. The summary note does not entail

any civil liability unless it is misleading, inaccurate or inconsistent with the main prospectus.

Where the security transaction is based on a contractual relationship, the liability would be assessed on the basis of the general principles of contract law. This would be the case in the event of an underwriting agreement with the issuer or direct contractual relationship between the issuer and the subscriber of securities. The liability will be triggered at the occurrence of a negligence or fraud, as this will be further set out in the contractual agreement governing the security transaction and the general principles of contract law.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

Remedies and sanctions for improper securities activities can be brought in three basic ways: civil litigation, administrative proceedings and criminal prosecutions. None of these remedies are exclusive.

Civil litigation

Civil litigation may be brought by private parties who would generally seek to recover losses suffered. The damage would be generally assessed in respect of the liability in tort contained in the Luxembourg Civil Code. However, the occurrence of a specific damage to the investor is unlikely to be recognised to the extent that courts would usually refuse to consider the loss of value of shares as a prejudice distinct from the prejudice suffered by the issuer.

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Administrative proceedings

Administrative proceedings may be brought by the CSSF or the LSE, pursuant to the Prospectus Law, the LSE Rules and Regulations or other applicable and relevant regulation. In addition, the CSSF has investigative powers and the capacity to suspend or prohibit a public offer or admission to trading on a regulated market if it has reasonable grounds for suspecting that legal provisions have been infringed. It may also impose cease-and-desist orders for any improper activities that are contrary to the Prospectus Law. The CSSF may render these decisions public and impose financial administrative sanctions of a pecuniary nature with the view to enforce its decisions.

An appeal to a court of unlimited jurisdiction may be made before the administrative court against decisions taken by the CSSF. Decisions taken by market operators are subject to a right of appeal before the ordinary jurisdictions.

Criminal prosecutions

Criminal prosecutions are instituted by the public prosecutor, acting independently and on its own initiative or on request of CSSF. Various improper securities activities are deemed as criminal offences. For instance, anyone who knowingly carries out an offer of securities to the public within the territory of Luxembourg without a prospectus in accordance with the provisions of the Prospectus Law may be subject to a fine ranging from €250 to €125,000. Company Law also sets out diverse criminal offences for breach of its provisions such as the manipulation of the price of securities. Any interested party may lodge a complaint with the public prosecutor against the person or company deemed to be liable, accompanied by a request for compensation of loss, if any. Defendants subject to such criminal actions may face substantial fines, corporate dissolution and, in the case of individuals, imprisonment.

Macedonia

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Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The relevant statutes governing securities offerings are the:

- Securities Law;
- Companies Law;
- Foreign Exchange Law;
- Company Takeover Law;
- Law on the Investment Funds;
- Rules of Trading of the Macedonian Stock Exchange AD Skopje; and
- Rules on the Conditions and the Manner for obtaining approval or registration of domestic securities abroad.

The main role in the area of securities is given to the Macedonian Securities and Exchange Commission (MSEC), as well as the Central Securities Depository of Macedonia (the Depository).

However, the main responsibility for the administration of the securities legislation lies with the MSEC. The MSEC regulates and supervises all participants in the operation of securities in the territory of Macedonia. The MSEC is also responsible for the legal and efficient functioning of the securities market, as well as for investors' rights protection.

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

Public offering of securities in the sense of the Securities Law is a public call for inscription and buying of securities published in the media. Unlike the private offer that is intended for investors who are known in advance, the public offering of securities is intended for a large number of investors who are not known in advance, and who do not have equal access to the information relevant for the issuer of the securities. When an issuer issues securities by means of a public offering for the first time he or she becomes an issuer with special reporting obligations. This category has special further responsibilities in terms of informing the public of its working, especially when it comes to price-sensitive information. Public offering of securities can take place after acquiring approval from the MSEC. The issuer must submit a request for approval to the MSEC in order to issue securities through the process of a public offering. The request for approval consists of the following:

- basic data about the issuer of the securities;
- basic data about the persons on the supervisory board and management board or the board of directors of the issuer;
- basic data about the security to be issued; and
- data about the business of the issuer and the use of proceeds from the issuing of the securities.

The MSEC prescribes the contents of the request for approval for issuance of securities, types of issuers and types of securities, through the process of public offering. The decision on the request is made within 60 calendar days of submission.

Public offers amounting to less than the Macedonian denar equivalent of €25,000 do not require approval by the MSEC. In this case, the MSEC is only informed of the offer, the issuing of the securities is notified to the MSEC and an announcement of the offer is made in the media. However, this type of offer (without approval by the MSEC) can only be made twice a year.

The offer of securities made contrary to the provisions of the Securities Law will be considered null.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

When the public offering of securities takes place, the request for approval must be submitted to the MSEC together with the following accompanying documents:

- statute of the company;
- trade registration;
- financial statements for the previous three years, compiled in accordance with International Financial Reporting Standards;
- report of a certified auditor for the previous three years, conforming to International Standards of Auditing;
- the act for issuing securities;
- a statement of the management, appointing a person who is designated by the issuer as the one who is responsible for the contents of the prospectus and who assures that the issuance is in compliance with this law and that the act of issuance, the data and information contained in the request for approval are true and correct, and the data and information contained in the prospectus are true and correct and the prospectus does not omit any price-sensitive information, except omissions approved by the MSEC;
- a proposed prospectus and invitation to subscribe and pay for the securities and other information for purchasers; and
- other documents that the MSEC requires.

The review process of the request should not take more than 60 calendar days from submission of the request. While the review is in progress no offering can take place.

The issuer must begin the procedure for subscription and payment for publicly offered securities within, but no later than, 30 calendar days following the receipt of the MSEC's approval. The issuer must publish an invitation for subscription for and payment of its securities in the Macedonian language and Cyrillic alphabet, in a daily newspaper published in Macedonia, 14 calendar days prior to the commencement of the subscription for securities.

The issuer must also publish the prospectus and invitation for subscription and payment of the securities on the stock exchange's web page, where the securities are or will be listed 14 calendar days prior to the commencement of the subscription for securities. The prospectus must be made available to all interested parties in the main offices of the issuer and in all locations at which the applicable securities may be subscribed and paid.

The public offer of securities must be conducted for no longer than 12 months after the day stipulated in the prospectus for the commencement of subscribing and paying in of the securities. The public offer shall be deemed successful if, within this deadline, at least 60 per cent of the

securities offered in the prospectus are subscribed for, unless a higher threshold is stipulated by the issuer in the prospectus. No later than 15 calendar days following the close of a public offer, the issuer must notify the MSEC of the quantity of the subscribed and paid securities, namely, the realisation percentage. The issuer must publish this information in at least one daily newspaper published nationwide and in the Macedonian language no later than 15 calendar days after the offering closes.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

The issuer of securities may issue advertisements in conjunction with a public offering of securities. All advertisements relating to a public offer of securities have to include information on the day of the first publishing of the prospectus and the location of where a copy of it may be obtained. Advertisements must be of a promotional nature. The information in an advertisement must not be inaccurate or misleading and should be consistent with the information contained in the prospectus.

Also, a brokerage house can publish advertisements in the media offering to buy or sell securities on behalf of the issuer.

Restrictions outlined above for the issuer and the brokerage house also apply to the underwriters.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

Until recently, the Securities Law did not have a definition for 'initial public offer' (it only spoke of a public offer of securities). With the amendment of this law at the end of January 2013, 'the initial public offer' was defined as the first public offer of securities published by a joint stock company or a public offer published at the transformation of a limited liability company into a joint stock company. Usually, the initial public offer is used by the companies to provide additional capital to finance further growth of the company.

One of the main features of the joint stock companies is that, according to legal regulations, the company may get fresh capital by issuing of new shares (known as secondary offering of shares, SPO, Secondary Public Offering), offering a new issue of shares for the first time to the general public. This is to raise capital from external sources where existing shareholders in the joint stock company – the publisher – are willing to cut or divide their participation in the existing shareholder structure with new investors – shareholders.

The motives for a secondary offering of new shares are providing additional capital to finance the development of the company, protection of undertaking and increasing competitiveness, taking over competing companies or companies from similar branches and activities, etc.

However, no additional provisions were made that would differentiate the initial public offer from the subsequent public offers made by the joint stock companies, so in essence the same rules apply to both situations.

6 What is the typical settlement process for sales of securities in a public offering?

A subscription for publicly offered securities are carried out at the seat of the issuer or at an office of a brokerage house or bank that is authorised by the issuer. During the subscription period, all amounts paid by a purchaser for offered securities must be kept in a special bank account and such funds may not be withdrawn or used by the issuer until the offering has been successfully closed. Upon successful closing of the public offer the issuer should register the securities with a licensed securities depository.

The settlement process is carried out by the securities depository. The ownership rights are established by the registration of the security in the owner's account at the depository (if a new security is issued), or by transfer to the new owner's account at the depository.

The statement of the securities account position delivered to the owner of the securities is considered proof of title when the excerpt is issued. Transfer of the securities and payment of the subscription monies are settled by a delivery versus payment transaction.

The settlement can occur immediately and no later than three working days from the day of the conclusion of the transaction.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

At the end of 2013, the definition of 'private placing' of securities has changed. In accordance to the new definition, a 'private placing' is an offer for inscription and payment of securities:

- directed to not more than 20 persons individually named in the act for issuance of the securities, who are not shareholders of the joint stock company and who are not related parties to the shareholders in the joint stock company (the exception to this is when there is a legal requirement or if the obligation of the shareholder to increase the participation in the basic capital is at the request of a body or institution supervising joint stock companies;
- that is directed only to institutional investors;
- in case of increase of the basic capital of the company;
- in case of conditioned increase of the basic capital; and
- in the case of a loan that is transformed into a share in the company in a procedure for increasing the basic capital of the company when the loan is given by the sole shareholder of the company.

No prospectus needs to be prepared and published for this purpose.

In the event of a private offering, the issuer must submit to the MSEC its request for approval of the private offering, an act of issuance of securities and a proposed announcement to the public for realisation of the private offering.

The MSEC shall decide within 15 days from the submission of the complete request. Certain special rules apply to this part of the procedure regarding pricing, which cannot vary by more than 20 per cent from the market value of the securities. The securities subject to a private offering are to be paid within 15 calendar days from the day the decision of the MSEC becomes final. If the identity of the buyer of the securities changes during the duration of the private offer, the issuer must acquire authorisation. Within five business days of closing a private offering, the issuer must inform the MSEC of the quantity of the securities subscribed for and paid for (ie, the realisation percentage). The issuer can make only one private offer of securities per calendar year. The MSEC prescribes the form and the contents of the request for approval, announcement and notice.

8 What information must be made available to potential investors in connection with a private placing of securities?

The same as applies as per a public offering (see question 2).

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

Except for the restriction in the time period for placing a private offer (see question 7), no other restrictions apply to the transferability of securities acquired in a private placing.

The delivery versus payment settlement mechanism is used to enhance the liquidity of securities sold in a private placing. Obligations to transfer securities resulting from trade transactions shall be settled by a simultaneous change of the right in securities ownership from the seller's account to the buyer's account and payment of the purchase price of securities, in accordance with the delivery versus payment principle.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

In accordance with the Law on Foreign Exchange Operations, Securities Law and the Rules on the Conditions and the Manner for obtaining approval or registration of domestic securities abroad, Macedonian residents can issue and introduce securities and share certificates in investment funds that are domiciled abroad only after approval from the MSEC. The issuer of the securities submits a request for approval for issuing and introducing securities abroad to the MSEC. The MSEC determines the conditions and the manner in which it is possible to obtain approval for issuing and introducing securities abroad. If the resident meets the conditions and requirements determined by the MSEC, upon prior request, within 30 days of submission of the request along with the required documentation, the

MSEC issues approval for the issuance and introduction of securities and share documents abroad from the resident investment funds, or if they do not meet the requirements and conditions, MSEC shall make a decision to refuse the request.

The MSEC then informs the Ministry of Finance and the National Bank of Republic of Macedonia of the granted approval.

Residents may register, pay and trade securities abroad only through an authorised participant in securities market or through an authorised participant in a foreign stock exchange or organised securities market.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

The Securities Law makes no specific provisions for offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

In accordance with the Securities Law, the possibility of underwriting exists for entities authorised by the MSEC, but it is not commonly used. Few of the entities authorised by the MSEC have registered for this type of activity.

The arrangements are focused on execution of the transactions and the activities on behalf of the issuer of the securities, which are required for the successful public offering of securities with or without mandatory purchase of the unsold securities.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

As mentioned above, the details of the underwriting arrangement are not regulated in detail by the legislation, and in its essence, this is a matter for the parties to agree on.

14 What additional regulations apply to underwriting arrangements?

Other than the provisions contained in the Securities Law no regulations regarding underwriting arrangements exist.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

In accordance with the definition given in the Securities Law, a joint stock company that has made a public offer of securities, a company with a basic capital equivalent to €1 million or more and has over 50 shareholders, with the exception of companies listed on the stock exchange, is considered a joint stock company with special reporting obligations.

The MSEC keeps a register of joint stock companies with special reporting obligations.

Joint stock companies with special reporting obligations must distribute to the MSEC the annual, half annual and current report. For the half-annual report, there is a special deadline for this and the joint stock company must submit this report to the MSEC within 45 calendar days from the ending of the half-year period. Companies also have an ongoing reporting obligation in relation to each piece of price-sensitive information, and for such information, they have the obligation to submit a report to the MSEC immediately, but not later than the following working day, as well as the obligation to publish information on such price-sensitive information in at least one daily newspaper in Macedonia.

The obligation for ongoing reporting ends on the day of deletion of the joint stock company from the register of companies with special reporting obligations.

16 What information is a reporting company required to make available to the public?

Each reporting company must publish a summary of the audited annual report, along with the opinion of the certified auditor, in at least one daily

Macedonian newspaper within 15 calendar days from the day the audited annual report was received by the MSEC.

The reporting company must immediately issue a public report published in at least one daily newspaper in Macedonia as soon as possible, but no later than 10 calendar days after obtaining the price-sensitive information.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The Securities Law lists several prohibited actions related to securities, including unauthorised offering of securities, price manipulation, spreading incorrect information, use of manipulative and fraudulent actions and incorrect or misleading financial reports.

The offering of securities made contrary to the legal provisions will be considered null. It is also prohibited, when making an offering of securities, to include false price-sensitive information in the prospectus, or to omit to include important information or price-sensitive data, if this could mislead investors.

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

The Law on securities does not provide articles on support of the price of securities in connection with their offering. Such provisions are given in the Law on takeover of joint stock companies. In accordance with this law, the price, namely, the exchange ratio for the securities determined by the offeror of the purchase offer, must be equal for all the securities of a certain kind that are subject to the purchase offer.

The price in the takeover bid must not be lower than the highest price at which the bidder or the persons it acts in concert with has bought securities in the last 12 months prior to the announcement of the intention to take over.

If the price is lower than the average price of the securities reached at an authorised stock exchange in the last 12 months prior to the announcement of the intention to take over, the bidder shall be obligated to offer at least the average price reached at an authorised stock exchange.

If the securities that are the subject of the takeover bid are not traded in the last 12 months prior to the announcement of the intention to take over, the bidder shall be obliged to offer a price at least in the amount of the average value of the securities determined by an authorised appraiser. The average price of the securities reached at an authorised stock exchange shall be calculated as a simple arithmetic mean of the daily weighted average prices reached at the authorised stock exchange.

The bidder who, in a period of one year upon the expiry of the deadline for acceptance of the successful takeover bid, acquires securities at a price higher than the price in that bid, shall be obliged to pay the difference in the price in cash to the persons who accept the bid within a period of eight days as of the acquisition of the new securities.

If the bidder in its takeover offers convertible securities in a conversion ratio according to which the person who accepts the bid does not receive a whole number of convertible securities, the bidder shall be obliged to offer the person who accepts the bid payment of the difference in price.

If the buyer in the procedure for takeover of shares purchases at least 95 per cent of the shares with the right to vote in the company to which the purchase offer refers, he or she has the right to purchase the other shares from the shareholders that did not accept the purchase offer, which must be done at an identical price to the ones in the public offer (ie, the last changed version of the public offer).

From the perspective of the minority shareholder and the protection of his or her interests, if the buyer in the procedure for the takeover of shares purchases at least 95 per cent of the shares with the right to vote in the company to which the purchase offer refers, he or she has the obligation to purchase the other shares from the shareholders that did not accept the purchase offer, which must be done at an identical price to the ones in the public offer (ie, the last changed version of the public offer – the squeeze-out, sell-out principle).

Liabilities and enforcement**19 What are the most common bases of liability for a securities transaction?**

The MSEC has far-reaching authority to control the behaviour of the participants in a securities transaction through several measures. However, parties pursuing compensation for manipulations and improper activities that have caused them to suffer damage can only attain a remedy by bringing civil proceedings.

The MSEC may also start proceedings before other authorities where there is a founded suspicion that an entity has breached the provisions of the securities legislation. It is also authorised to be joined in judicial proceedings, with the purpose of informing the court on its views and interpretations on the matter.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

A civil proceeding is one of the mechanisms that can be used to remedy improper securities activities. Where the lawsuit is brought by a purchaser of securities that was unaware that the published prospectus contained invalid data, reimbursement of the paid-in sum plus the calculated interest, lowered for the income made and the lost profits as a result of not possessing the security, may be claimed.

A lawsuit can be filed against the issuer of the securities, the signatories of the prospectus, the members of the managing and supervisory boards or the board of directors at the time the prospectus was issued, the accountant or authorised supervisor who has given consent to be named as a person who prepared or approved a part of the prospectus.

The compensation given may not exceed the price at which the securities were offered to the public, and is determined as the difference between the price paid for the securities and:

- their value at the moment of initiating a court procedure;
- the price at which the securities were sold at the securities exchange prior to initiating the judicial proceeding; and
- the price at which the securities were sold at the stock exchange after the finishing of the judicial proceeding.

A civil proceeding can also be initiated for securities' price manipulation, where compensation can be awarded for lost profits. The right to initiate a civil procedure becomes obsolete one year from the day the facts for the breach of law were acquired, and a maximum of three years from the breach of the legal provisions.

In general, civil, criminal and administrative procedures are available in the case of improper securities activities.



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Statutes and regulations

- 1 **What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?**

Statutes

Securities offerings in Nigeria are governed by the Investments and Securities Act, No. 29 of 2007 (ISA) and the Companies and Allied Matters Act chapter C20, Laws of the Federation of Nigeria 2004 (CAMA).

Regulations

The Rules and Regulations issued pursuant to the ISA by the Securities and Exchange Commission to regulate the capital market (SEC Rules) and the Listing Rules issued by the Nigerian Stock Exchange (the Listing Rules) are the relevant regulations governing securities offerings.

Regulatory authority

The Nigerian Securities and Exchange Commission (SEC) is the regulatory authority that is responsible for the administration of the SEC Rules.

Public offerings

- 2 **What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?**

The ISA provides that only public companies and banks may offer securities to the public or make an invitation to the public to deposit money. 'The public' is not defined under the ISA or the SEC Rules, however, an invitation is deemed to have been made to the public where an offer is:

- published, advertised or disseminated by any means;
- made or circulated among any persons selected as members or debenture holders of the company concerned or as clients of the person circulating the invitation;
- made to one or more people on terms that the people to whom it is made may renounce or assign the benefit of the offer in favour of any other person; or
- made to any person to acquire securities dealt in by a securities exchange or capital trade point or in respect of which the invitation states that an application has been made or shall be made for permission to deal in the securities on a securities exchange or capital trade point.

Notably, the ISA in defining invitation to the public specifically excludes any invitation that can properly be regarded in all circumstances as not being calculated to result, directly or indirectly, in the securities becoming available for purchase by persons other than those receiving the invitation as a matter of domestic concern.

Regulatory filings

An offer to the public must be made pursuant to a prospectus, which should be registered with the SEC before the offer. The prospectus is required to include a summary of the offer stating the amount or number of shares on offer, the offer price, minimum application and multiples thereafter, financial information, indebtedness, the purpose and use of the issue proceeds, details of material contracts and material claims and litigation. In addition

to the prospectus, copies of the issuer's certificate of incorporation, its memorandum and articles of association, and the vending and underwriting agreements (if applicable), must be filed with the SEC, as well as copies of all material contracts referred to in the prospectus, its audited accounts for the five years preceding the application (the latest audited accounts must not be more than nine months old for corporate bodies or 12 months old for states), local governments and federal government agencies and supranational bodies and copies of advertising posters and other materials proposed to be published by the issuer to promote the offering.

In the course of the public offer, the issuing house is required to make copies of certain documents – such as the constitutional documents of the issuer, its material contracts, its audited accounts and a list of pending litigation – available for inspection by prospective investors.

Stock exchange filings

Where it is intended that the securities to be issued will be quoted on the Nigerian Stock Exchange (the NSE), the approval of the quotations committee of the NSE must also be obtained. The Listing Rules require that companies that have not previously been listed should file (among others) the following documents prior to the listing of such securities: a formal application, a copy of the prospectus, a certificate of incorporation, constitutional documents of the company, a general undertaking, certified copies of resolutions approving the issue of the securities to be listed and the prospectus, copies of documents that are referred to in the prospectus, the written consent of all experts to the inclusion of statements made in the prospectus, a letter of consent from the issuing house or underwriter to the issue conveying its satisfaction that the director's statement in the prospectus that the working capital is sufficient was made after due inquiry, a copy of the underwriting agreement, and a statement of the maximum number of shares that may be held by each shareholder.

There is no major difference between the filing requirements in respect of debt and equity, and primary and secondary offerings except that, in respect of a debt offering, additional documents such as trust deeds and credit rating reports are also required to be filed with the SEC.

- 3 **What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?**

The steps for registration and filing vary depending on whether a book-building process is used by the issuer. Where a book-building process is not used, the registration and filing process involves three basic steps. The first is an application to the SEC for registration of the securities and clearance of the prospectus and other documents and to the NSE for approval to list the securities after the offer has been concluded. The second step is the signing of the offer documents by the parties and the advisers. Thereafter, copies of all the duly signed offer documents are registered at the Corporate Affairs Commission and sent to the SEC, after which the SEC gives its approval for the offer to be opened to the public.

Where a book-building process is used in relation to equities, a portion of the offer may be reserved for retail investors, however, for fixed-income securities, only qualified institutional and high net-worth investors may participate. The registration and filing process involves filing the red herring prospectus, containing all information except the price at which the securities are offered and the volume of securities, with the SEC. Following approval by the SEC, the red herring prospectus is circulated to qualified

institutional and high net-worth investors together with an indicative price range within which the securities and offers for subscription to the securities are invited. On receipt of the orders the book runners aggregate the orders received and together with the issuer, no later than two weeks from the day the book opens, determine the price at which the securities shall be offered based on the orders received. Once the price is determined, the prospectus is updated and filed with the Commission along with Form SEC 6 within 48 hours. Offers that are carried out on the basis of a book building are required by the SEC to be fully underwritten.

An offering cannot commence while review of the offering by the SEC or the NSE is still in progress. Under rule 282 of the SEC Rules, it is an unlawful act for any person to offer for sale or to buy or sell securities:

- before the issuer has filed a registration statement with the SEC;
- after the registration statement has been filed but before it is cleared by the SEC; or
- after the completion board meeting but before the issue is authorised to open except in the following circumstances:
 - preliminary negotiations or actual agreement between the issuer and the underwriter;
 - oral offers not made to the public; and
 - notices of proposed offering.

However, the rules provide that although an issuer may not sell securities before a public offer opens, it may give notice that it proposes to make a public offering of securities to be registered under the ISA, provided that such notice states that the offering will be made only by means of a prospectus and contains minimal information limited to the name of the issuer; the title, amount and basic terms of the securities to be offered; the anticipated time of the offering; and the purpose of the offering.

The review of the offer documents by the SEC takes an average of four weeks to complete. The SEC is under an obligation to provide a response within six weeks. The SEC will issue a deficiency letter if it finds the application to be incomplete or deficient in any way. The NSE Quotations Committee meetings, at which applications for listing shares are considered and approved are usually held twice a month and ad hoc sessions can also be applied for.

The SEC Rules allow for shelf registration, which is a filing undertaken by issuers intending to access the market in the near future, and permits issuers to disclose certain information in a core disclosure document that is updated on a regular basis. All public companies listed for a minimum of 12 months are eligible to issue, offer for subscription or purchase, or issue an invitation to subscribe for or purchase securities pursuant to a shelf registration. The value of the issue on offer made pursuant to a shelf registration may not be less than 5 billion naira. In addition, securities may not be allotted or issued on the basis of a shelf prospectus that has been filed with the SEC for over two years.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Advertisements must not be misleading, should avoid the use of technical terminology and complex language, and must not promise or guarantee a rapid increase in profits. Historical financial information and all other information contained therein should not go back further than five years.

While an investment adviser may circulate material in which it recommends an investment to its clients, if the investment adviser is an underwriter of the offering, the notice should also contain a statement that the person making the recommendation is interested in the success of the offer.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

The SEC Rules do not generally differentiate between primary and secondary offerings and the information required to be provided in the prospectus for these two types of offering is the same. As the articles of listed companies must provide that fully paid shares are free from restrictions on transfer, there are no pre-emptive rights in respect of a secondary offering of listed shares.

Where any company allots securities with a view to all or some of those securities being offered for sale to the public, any document by which the offer is made is deemed to be a prospectus issued by the company and both the seller of the securities and the issuer are liable for any untrue statement contained in it (see question 19). Where a secondary offering is made

within six months of the allotment by the company, it is presumed under the regulations that the company allotted the securities with a view to all or some of these securities being offered for sale to the public.

6 What is the typical settlement process for sales of securities in a public offering?

Subscription monies are usually payable upon application and are held in an account opened for that purpose with a receiving bank pending the completion of the settlement process. After the offer closes and the issuing house receives returns from the receiving agents in respect of the applications made, the issuing house prepares an allotment proposal to be approved by the board of directors of the issuer and this is then sent to the SEC. Upon receipt of the SEC's approval of the basis of allotment, the registrars may issue certificates or credit the accounts of the investors at the central securities depository. It is at this point that the issue proceeds are released to the issuer by the receiving bank and any monies received in respect of any oversubscription are returned to the affected subscribers. The securities must be listed on the NSE within 30 days after the allotment clearance.

Allotment is usually done no later than six weeks after the offer closes. It can be longer than this where the approval of the regulator of the relevant sector is required such as in respect of banks.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

The SEC Rules contain specific rules on the private placement of shares by a public company. They provide that no public company may offer for sale or subscription or sell any securities by way of a private placement without obtaining the prior written approval of the SEC. A private placement is defined as any issue of securities not involving a public offering. The provision applies to all public companies, whether their shares are listed on a stock exchange or not. A private placement by a public company is restricted to no more than 50 purchasers.

As a condition for approval, an issuer seeking to issue shares by private placement must show evidence of a dire need of fresh funds or technical expertise and must satisfy the SEC that private placement remains the only viable option for achieving its objectives. The private placement must be approved by the shareholders of the issuer by a special resolution (ie, one approved by 75 per cent of the votes cast at the meeting). The resolution must also state the price and the number of shares being offered. The notice of a general meeting authorising the placement by an issuer must be published in two national daily newspapers and evidence of the publications must be filed with the SEC. Other than this, private placements are not permitted to be advertised, mentioned or discussed in the print and electronic media. Quoted companies are restricted in the number of shares they can offer by way of a private placement; the SEC Rules provide that, unless a company can show that it is 'ailing', the aggregate number of shares that may be offered by such companies should not exceed 30 per cent of their existing issued and paid up capital prior to the offer.

Unless otherwise approved by the SEC, the offer may not be open for a period exceeding 10 working days. The issuer is required to file two copies of the placement memorandum with the SEC. The SEC Rules provide that certain mandatory information about the issuer must be included in the placement memorandum (see question 8).

Within 10 working days of the offer closing, the issuer is required to file a report on the offer with the SEC containing names and addresses of the purchasers; the amount purchased by each of them and mode of payment; time of payment; nature of the offeree; and the amount that the company raised.

The SEC does not regulate private placement of shares by private companies. This is governed primarily by the CAMA, the company's articles of association, and any shareholders agreements as well as any arrangements made between the issuer and the potential investor.

8 What information must be made available to potential investors in connection with a private placing of securities?

The SEC Rules specify the information required to be made available in a placement memorandum that is intended to be issued to potential investors. It provides that a placement memorandum must contain certain information including a summary of the offer; financial summary for five

years (or less if the issuer is less than five years old); details of the directors and the professional advisers; historical financial information about the issuer containing the accounting policies, balance sheets, profit and loss accounts, cash-flow statements and notes on the accounts; statutory and general corporate information about the issuer and any other material information. This information should be such as to enable the investor to have a proper understanding of the issuer, its business and the securities being offered.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

There are no restrictions on the transfer of securities acquired pursuant to a private placement.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

There are no specific rules applicable to the issue of securities outside Nigeria by a Nigerian issuer, but the issuer would need to notify the SEC and the NSE.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

The definition of 'securities' under the ISA includes exchangeable and convertible securities, the public offer of which is thus subject to the same regulations and restrictions as set out above. Under the NSE listing rules, where a company intends to issue convertible securities, it must ensure that it maintains at all times sufficient unissued capital to cover the outstanding conversion rights. The SEC Rules also require, amongst other things, board and shareholder resolutions authorising the issuance of the convertible securities.

Nigerian companies are prohibited under the CAMA from issuing share warrants to the bearer and would instead issue options.

Rights are tradable on the NSE. An issuer offering new shares to its existing shareholders by way of rights must deliver to the SEC a rights circular containing certain information including the period during which the rights will be tradable on the NSE. The issuer should also apply to the NSE for the quotation of the rights on the exchange for the relevant period.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

Underwriting is defined as an arrangement whereby an underwriter undertakes to pay an issuer of securities on a predetermined date an amount based on the price of the securities with a view to reselling and not as a form of investment.

There are typically two types of underwriting arrangements used in Nigeria: firm underwriting (where the underwriter must make the amount underwritten available to the issuer on the day the offer opens); and standby underwriting (where the underwriter has an obligation to purchase any unsold securities at the offer price when the offer closes).

The SEC Rules give the issuer of a public offer the discretion as to whether or not to have an issue underwritten. The underwriting of a rights issue is also left to the discretion of the issuer subject to the prior approval of the issuer's shareholders who must pass a special resolution that in the event of an under-subscription, their pre-emptive rights are waived, to enable the underwriter to take up any unsubscribed shares.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

The underwriting agreement usually provides that the issuer will indemnify the underwriter in connection with any losses that it may suffer as a result of any misrepresentations contained in the offering document.

Underwriting agreements usually allow the underwriters, at their option, to be released from their underwriting commitments if, at any

stage before the opening of the offer, there is a material and adverse change in the financial condition of the issuer, if there are material adverse conditions affecting the securities market generally or if any national or local emergency or any introduction of prohibitive governmental regulations occur. Where the underwriter intends to terminate the underwriting agreement, it must give at least five working days' notice to the SEC stating its reasons for the intended termination. The SEC, if satisfied, may then approve the termination of the underwriting agreement.

Underwriting fees are not usually related to the success of the offer and standard underwriting agreements do not typically contain over-allotment provisions. The underwriting fees are subject to negotiation between the issuer and the underwriter and are usually a percentage of the amount underwritten.

14 What additional regulations apply to underwriting arrangements?

All underwriting and sub-underwriting agreements must be submitted to the SEC for clearance along with other registration documents.

Where there is a firm underwriting of the whole issue and full payment has been made and received by the issuer, the following regulations apply: the securities warehoused by the underwriter must be sold on the NSE within six months from the date of allotment to the underwriter; and the date of allotment and entry of the underwriter's name in the register of members must be three days from the date of fulfilment of the underwriting commitment. If the securities are not disposed of within six months, the underwriter has to apply to the SEC for an extension of time within which to dispose of the securities. The SEC has wide discretion to either grant or deny this application. The SEC is required to communicate its decision to the underwriter within 10 days. Underwriters are required to file quarterly returns to the SEC in respect of undisposed securities until the securities have been fully disposed of.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

Where the securities of the issuer are listed on the NSE, the issuer becomes subject to ongoing reporting obligations as detailed in question 16.

An issuer of securities is expected to file the following returns to the SEC:

- Quarterly Earnings Forecast;
- Quarterly Financial Report;
- Unclaimed Dividend Report (to be filed semi-annually);
- Half yearly returns;
- Annual Report; and
- Corporate Governance report.

16 What information is a reporting company required to make available to the public?

Reporting companies are expected to submit quarterly returns to the NSE and the SEC and to publish their half-year unaudited results and full-year audited financial statements in at least two newspapers. They must also submit copies of their audited financial statements and such other returns as may be prescribed by the SEC on a periodic or annual basis. They must also file their audited financial statements with the Corporate Affairs Commission as part of the annual return to be filed for that year.

Listed companies have extensive reporting obligations to the NSE. Notable among which is the ISA requirement that a public listed company disclose to the relevant securities exchange, its quarterly earnings forecast within 20 days of the commencement of a new quarter. Other reporting obligations of quoted companies include the obligation to give the NSE notice of any changes to the company's directors and key officers. They must inform the NSE, in advance of a board meeting, of the intention to discuss dividends or appoint new directors at the meeting. They must also inform the NSE in advance of the intention to close the register of members and transfer books of the company. The ISA also imposes some reporting obligations on all public companies (whether or not the company is a listed company). The ISA provides that the chief financial officer or persons performing similar functions in a public company must make certain representations to the SEC about the reports submitted to the SEC and, in addition, the officers must certify that any periodic or annual report filed to the SEC has been reviewed by that officer. The officer must also certify that based on his or her knowledge, the report does not omit to state any

true statement of material fact and does not contain any untrue statement of a material fact.

A reporting company that fails to ensure that all its reporting obligations, as well as those of its officers, are complied with shall be liable to a penalty of no less than 1 million naira and a further penalty of 25,000 naira per day for the period it fails to comply with the reporting provisions of the ISA.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The ISA specifically outlaws the participation, directly or indirectly, in two or more transactions, in securities of a company, that have raised, lowered or stabilised, or are likely to raise, lower or stabilise the price of the securities on the exchange with the intention of inducing others to sell, purchase or subscribe for the securities of the company or a related company. The law also prohibits the buying or selling of securities of a listed company outside the facilities of a recognised stock exchange. The penalty for contravening these provisions is a fine of 500,000 naira in addition to the nullification of the transaction.

The ISA also generally prohibits various manipulative practices, including insider dealing; abuse of information obtained in an official capacity; false trading; market rigging; market manipulation of listed securities; making false or misleading statements; fraudulent inducement of persons to deal in securities; manipulative and deceptive devices and contrivances; and fraudulent devices, schemes, etc. A person convicted of any of these offences would be liable to compensate any person for any direct loss suffered by that person as a result of the transaction, unless the information was known or with the exercise of reasonable diligence could have been known to that person at the time of the transaction. In addition to this civil liability, the person could be charged with a criminal offence for which he or she would be liable on conviction, in the case of an individual, for a fine of not less than 500,000 naira or an amount equivalent to twice the amount of the profit derived or loss averted by the use of the information obtained in contravention of the provisions of the ISA, or to imprisonment for a term not exceeding seven years. In the case of a body corporate, it would be liable for a fine of no less than 1 million naira, or an amount equivalent to twice the amount of the profit derived from it or loss averted by the use of the information obtained in contravention of the provisions of the ISA or to imprisonment for a term of two years, or to both imprisonment and a fine.

As a further precaution, directors and other insiders of public companies are also required by the provisions of the SEC Rules to notify the SEC of any sale or purchase of their shares in a public company no later than 48 hours after such activity. Insiders for this purpose include holders of 5 per cent or more of the equity of the company.

There are also specific sanctions for persons who authorise the issue of any inaccurate statements in a prospectus issued to the public as detailed in question 19.

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

The SEC Rules provide that during a private placement, where the issuer is a publicly quoted company, the price of its securities will be placed on technical suspension by the stock exchange during the period of the offering.

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

Misstatements in prospectuses

The ISA provides for both civil and criminal liability in relation to misstatements in prospectuses.

Civil liability for misstatements in a prospectus

Where an investor has subscribed for securities relying on the prospectus and has sustained loss or damage by reason of an untrue statement contained therein, the following persons shall be liable to pay compensation for the loss or damage the investor may have sustained: a director or promoter of the company; any person who has authorised the issue of the prospectus; and an expert, where the loss arises from any untrue statement purported to be made by him or her in his or her capacity as an expert.

Criminal liability for misstatement in a prospectus

Where a prospectus includes any untrue statement, any officer who authorised the issue of the prospectus commits an offence and is liable:

- on conviction to a fine of no less than 1 million naira or imprisonment for a term not exceeding three years, or to both a fine and imprisonment; or
- on summary conviction, to a fine not exceeding 1 million naira or to imprisonment for a term not exceeding three months, or to both a fine and imprisonment, unless he or she proves either that the statement was immaterial or that he or she had reasonable grounds and believed that the statement was true.

The ISA provides that a person shall not be deemed to have authorised the issue of a prospectus by reason only of his or her having given consent to the inclusion in the prospectus of a statement purporting to be made by him or her as an expert.

Insider dealing

With respect to insider dealing, the ISA provides for criminal liability. In relation to individuals, on conviction, liability is a fine of 500,000 naira or an amount equivalent to twice the profit derived by the insider or the loss averted by the use of the information obtained in contravention of the provisions of the ISA. In relation to corporate bodies, the liability is for a fine of no less than 1 million naira or an amount that is twice the profit derived or loss averted by the use of the information obtained in contravention of the provisions in the ISA.

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20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

Remedies for improper securities activities may be sought through civil action or criminal prosecution as described in question 19. In addition, the Investment and Securities Tribunal (the tribunal) set up under the ISA has the power to adjudicate disputes and controversies arising under the ISA and the SEC Rules. The tribunal's jurisdiction covers civil disputes

between capital market operators and their clients; between capital market operators; between capital market operators and stock exchanges; and between quoted companies and the regulators. If, in the course of its investigations, the tribunal discovers evidence of any criminality, it is obliged to pass such information on to the criminal prosecuting authorities. The Administrative Proceedings Committee of the SEC also has the power to adjudicate disputes arising under the ISA and SEC Rules and can impose sanctions on any offending party.

South Africa

Ezra Davids, David Yuill and Ryan Wessels

Bowman Gilfillan Inc

Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The relevant statutes governing securities offerings and trading are the Companies Act, 2008 (the Companies Act), the Collective Investment Schemes Control Act, 2002 (CISCA), the Financial Advisory and Intermediary Services Act, 2002 (FAIS Act), the Banks Act, 1990 (Banks Act) and the Financial Markets Act, 2012 (the Financial Markets Act). This legislation applies to listed and unlisted securities.

Regulations

There is one licensed exchange in South Africa, the Johannesburg Stock Exchange (JSE), for the listing of equity and debt securities. The JSE has two primary boards – a main board and an alternative exchange (AltX) for small and medium-sized companies.

Previously, debt securities were listed on and regulated by the Bond Exchange of South Africa (BESA), which was a licensed exchange separate from the JSE. However, BESA became a wholly owned subsidiary of the JSE in June 2009. The listing of debt securities is now regulated by the JSE pursuant to the Debt Listings Requirements of the JSE (the Debt Listings Requirements).

The Financial Markets Act consolidates the law relating to the regulation and control of, inter alia, exchanges and securities, trading, central securities depositories (relevant for dematerialised shares), the custody and administration of securities, market abuse matters, restrictions on who may market securities, and ancillary matters.

The listing of equity and debt securities on the JSE is subject to compliance with the Listings Requirements of the JSE (the Listings Requirements), the Debt Listings Requirements and JSE approval. The JSE must approve all circulars and placing documents prior to such documents being sent to shareholders or, in the case of debt securities, to potential investors. Sponsors must approve all announcements to be made prior to publication except for those containing JSE regulated timetables, which aspect of the announcement will also require JSE approval.

The issue of debt securities can be construed as ‘the acceptance of deposits from the general public’, which activity, under the Banks Act, requires a banking licence unless the debt securities are issued in accordance with the provisions of the Commercial Paper Regulations (CP Regulations) or the Securitisation Regulations published in terms of the Banks Act, in which case the issuer is not required to have a banking licence. The CP Regulations were created specifically to allow non-bank entities to issue debt securities and it is under this safe harbour that the majority of South African issues of debt securities are undertaken.

Exchange controls restrict how non-South African companies raise capital in South Africa (inward listings) and how South African companies and local authorities raise capital abroad.

Regulatory authorities

The regulatory authorities responsible for the administration of the rules and regulations governing securities offerings include the Commissioner of the Companies and Intellectual Property Commission (Commission) (who has replaced the Registrar of Companies of the Companies and Intellectual Property Registration Office), the Registrar of Securities Services (this has remained unchanged since the Financial Markets Act

came into force), and the Financial Services Board (FSB). The Companies Act has also established a Companies Tribunal with the authority to review decisions of the Commission (Companies Tribunal). In the case of equity and debt securities, the authorities include the Issuer Services Division (formerly the Listings Division) of the JSE and the Takeover Regulation Panel (TRP) (which has replaced the Securities Regulation Panel under the old Companies Act, 1973). In the case of debt securities, the Registrar of Banks is one of the regulatory authorities. The regulatory authority that deals with exchange controls is the Financial Surveillance Department of the South African Reserve Bank (FSD).

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

Primary and secondary markets – equity and debt

In terms of the Companies Act, an offer of securities (including equity and debt securities) to the public can only be made by a South African public company or a foreign company (incorporated outside South Africa) that has lodged its constitution and details of the board of directors with the Commission.

An offer to the public must usually be accompanied by a prospectus that is registered with the relevant exchange, in the case of offerings of listed securities; or with the Commission, in the case of offerings of unlisted securities. If the document is a prospectus, then the JSE also requires proof that it has been registered with the Commission. Detailed disclosures must be made in the prospectus in accordance with the relevant provisions of the Companies Act and, in the case of listed securities, the JSE Listings Requirements.

The ‘public’ includes any section of the public, whether selected as holders of the company’s securities, clients of the person issuing the prospectus concerned, or holders of any particular class of property. The latter phrase appears to be the legislature’s response to a criticised decision of the Supreme Court of Appeal in 2005, where the Court held that an offer to subscribe for equity securities made by a listed company to shareholders of another listed company on a particular date was not an offer to the public. The Companies Act also contains safe harbours from ‘offers to the public’ so that offers can be made without a prospectus to, inter alia, persons whose ordinary business it is to deal in securities, or persons who fall into certain categories of institutional investors, or persons who are paying more than a prescribed amount (at present 1 million rand) for the securities to be acquired by them.

The Companies Act contains the requirement that a prospectus must contain all the information that an investor may reasonably require to assess the assets and liabilities, financial position, profits and losses, cash flow, and prospects of the company in which a right or interest is to be acquired and to assess the securities being offered and rights attached to them. Permission to exclude information will, in the case of offers of listed securities, need to be obtained from the relevant exchange and, in the case of offers of unlisted securities, from the Commission. In addition, the Companies Act provides that the prospectus must comply with the detailed disclosure requirements set out in the Regulations to the Companies Act.

The Companies Act envisages three types of offerings: primary, secondary and initial public offerings. These terms are specifically defined.

In a primary offering, the offer is made by the issuer itself or a member of the same group of companies. In a secondary offering, the offer is made for investors to purchase (not subscribe for) securities already in issue, from a seller that is not the issuer or a subsidiary of the issuer. An initial public offering is an offering (primary or secondary) by a company whose shares have never been offered to the public before, or where they have been offered before, all of those that were offered, have been reacquired by the issuer. The securities offered under an initial public offering need not be listed. In this article, these terms will only be used in the manner defined in the Companies Act where specifically mentioned.

Primary offers – equity

Listings and additional listings of equity securities are subject to the provisions of the Listings Requirements and JSE approval. All applications for listing are to be submitted to the JSE through a sponsor. In accordance with the Listings Requirements, applicants seeking to list any securities are required to submit a number of documents to the JSE for review. Comprehensive pre-listing statements must be prepared and distributed. Sometimes a circular, rather than a pre-listing statement, must be prepared and distributed. A circular has less comprehensive disclosure requirements than a pre-listing statement. In practice, if a prospectus is required in terms of the Companies Act, it will be the same document as the pre-listing statement or circular and will need to be registered with the relevant exchange. The content requirements of a pre-listing statement and prospectus are largely the same. An announcement containing an abridged pre-listing statement must also be published. Depending on which market on the JSE the proposed listing will occur, certain profit history and public shareholding is required in respect of the issuer.

Primary offerings of securities to the public include initial public offerings (IPOs), issues for cash or rights offers.

Historically in South Africa, an IPO involved an offer to the public to take up securities in a company that is not yet listed but which will be listed if the offer is successful. In terms of the Companies Act, an IPO is a more specific concept (as noted above) and will always require a prospectus (which will be lodged with the Commission in the case of unlisted securities or with the relevant exchange in the case of listed securities).

The JSE recognises a non-pre-emptive primary offering, being an issue of equity securities (or securities convertible into equity) for cash. The issuer can make such offer on a non-pre-emptive basis if the terms of the issue are:

- specifically approved by 75 per cent of equity securities holders present and voting in a general meeting in respect of that particular issue excluding any parties and their associates participating in the issue (known as a 'specific issue for cash'). Full details of the proposed issue of equity securities must be included in a circular to shareholders convening the meeting to waive their pre-emptive rights and for issues to related parties at a discount, the board must obtain a fairness opinion; or
- approved under a general authority by 75 per cent of equity securities holders present and voting at a general meeting by their giving of a renewable mandate to the directors of the issuer, to issue up to 15 per cent of equity securities for cash (although, in practice, shareholders will often only approve a lower percentage) subject to the Listings Requirements and to any other restrictions set out in the mandate (known as a 'general issue for cash'). In a general issue of shares for cash, the equity securities must be issued to public shareholders and not to related parties (broadly defined to include, among others, shareholders holding at least 10 per cent of the equity securities, directors and connected persons, etc) and may not be issued at a discount of more than 10 per cent. No regulatory filings are required when the authority for a general issue of shares is sought but announcements are required if shares are issued in terms of such authority.

Rights offers are offerings by companies to their existing security holders in terms of which such holders have a right to subscribe for additional securities in proportion to their existing holding. The subscription price is usually below market price and accordingly the right to subscribe at that price may have value and may be traded. No prospectus is required for a rights offer but a circular is required to be sent to existing security holders in terms of the Listings Requirements and a more detailed pre-listing statement (known as revised listings particulars) where the dilution will exceed 50 per cent. The Companies Act also requires the rights offer circular to contain prescribed information. Renounceable letters of allocation, conferring

rights on the recipients to either subscribe for securities in terms of the rights offer or renounce and cede their subscription rights to existing security holders or third parties, must be approved by: the JSE and conform to the applicable provisions of the JSE Listings Requirements, in the case of listed securities; and the Commission and conform to the provisions of the Companies Act, in the case of unlisted companies.

The Companies Act, subject to the relevant company's Memorandum of Incorporation (MOI), gives the board the authority to issue shares, provided that (in the case of private companies) it is done on a pre-emptive basis. In the case of listed public companies, the JSE Listings Requirements typically require that the MOI contain a provision requiring all issues of shares to be ordinarily on a pro-rata pre-emptive basis, except in certain limited circumstances (such as for the acquisition of assets). However, in the case where any primary offer results in the voting rights of a particular class of shares issued or to be issued pursuant to the transaction being equal to or exceeding 30 per cent of the voting rights in respect of all the shares of that class held by shareholders immediately before the transaction, the issue of those shares will require approval by shareholders holding 75 per cent of the voting rights exercisable in that meeting in respect of that resolution (even if such issue is done on a pre-emptive basis).

Secondary offers – equity

Where a party acting independently of a company makes an offer to the public for the acquisition of securities in such company, the offeror is unlikely to be in a position to meet the requirements for the issue of a prospectus because such offeror is not privy to all the information required to be stated in the prospectus regarding the company. In these circumstances, the offeror is required, in terms of the Companies Act, to prepare a written statement, which must set out certain prescribed minimum information concerning the offeror, the securities offered, and the company concerned. If the offer is accompanied by a prospectus (for example, because there is a combined primary and secondary offering), then no written statement is required.

A copy of the written statement must be lodged with the Commission for registration before it is issued, distributed or published. No written statement is permitted to be issued, distributed or published more than three months after the date of registration thereof.

Where the securities to which the offer relates are or will be listed on the JSE or in respect of which permission to deal therein has been granted by the JSE, no such written statement is required and the person making the offer must state such fact in writing in the offer. Further, no written statement is required if the parties to whom the securities are offered or the material is published are persons whose ordinary business or part of whose ordinary business it is to deal in shares, whether as principals or agents, or who are at the time of the offer the holders of shares of the same company.

Both primary and secondary offerings are subject to the same safe harbours in relation to the categories of person to whom the offer can be made without it being considered to be an offer to the public.

Generally, there are no disclosure requirements under the JSE Listings Requirements applicable to secondary offerings of equity securities.

Primary offers – debt

The issue of debt securities to the public may necessitate the registration of a prospectus in accordance with the provisions of the Companies Act where such an issue constitutes an 'offer to the public' (see Public offerings above).

Each issue of debt securities, whether or not such issue constitutes an 'offer to the public' as contemplated in the Companies Act will, unless specifically exempted, have to comply with the provisions of the CP Regulations and, in the case of securitisations, the Securitisation Regulations. The CP Regulations mainly impose additional disclosure obligations on an issuer over and above the disclosures required under the Companies Act (if applicable) and Debt Listings Requirements. The CP Regulations also provide directions as to who can issue debt securities and the denominations that an issue of debt securities can be issued in and they place restrictions on the purpose for which monies raised under an issue of debt securities may be applied.

Debt securities that are listed on the JSE will also have to comply with the Debt Listings Requirements.

Secondary offers – debt

In the same manner that secondary public offerings of equity securities require only a written statement under the provisions of the Companies

Act rather than a prospectus, secondary public offerings of debt securities require only a written statement and do not require a prospectus. If the debt securities are listed, a written statement is not required either.

There are no disclosure requirements under the Debt Listings Requirements applicable to secondary offerings of debt securities.

Primary offer – inward listings by foreign entities on South African exchanges

A foreign entity wishing to list securities on the JSE requires prior FSD approval. To the extent that such foreign entity is conducting business in South Africa, it may be required to register as an external company. Under the Companies Act, making or offering of securities should not, in and of itself, constitute ‘conducting business’.

Foreign companies with an inward listing are allowed to use shares as acquisition currency in South Africa and to include South African shareholders in a rights offer. As a result of recent relaxations of South Africa’s exchange control restrictions, all South African residents’ shareholdings in inward secondary listed securities are treated as the holdings of South African assets without any distinction between institutional and non-institutional investors. South African residents are now allowed to accept inwardly-listed shares as acquisition currency in respect of acquisition issues and to exercise their subscription rights in terms of a rights offer.

A foreign entity with an inward listing that raises capital in South Africa must open a special bank account in South Africa for the duration of the listing for purposes of receiving and recording the capital raised. The capital raised must be deployed as soon as possible but not later than one month after being raised and recorded in the special bank account. There are no additional registrations or filing processes for foreign companies raising capital in South Africa (over and above the prospectus or placing document required by any local exchange) other than the requirement to file its constitution and board composition with the Commission.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

Equity offerings

In terms of the Companies Act, when unlisted securities are to be offered to the public, the prospectus, including all copies of material contracts (including any underwriting agreement) to which the issuer is a party, must be lodged and registered with the Commission, which must ensure that all the statutory formalities have been complied with before such prospectus may be issued or the offer made. However, it is not the duty of the Commission to make any assessment of the merits of the offer, nor does the registration of a prospectus imply any approval of the offer.

There is no prescribed time period for registration by the Commission in the Companies Act; therefore, parties will have to take account of the process (based on market practice timelines) when preparing transaction timetables.

In the case of an offer of listed securities, the procedure for the approval of a prospectus, placing of a document or offering a circular by the JSE is as follows: any potential issuer must appoint a sponsor who will be responsible for all dealings between the issuer and the JSE, including the filing of relevant documents. The sponsor must submit the documents to the JSE for informal comment and, following feedback, for informal approval and eventually formal approval. It typically takes between three to four weeks for the JSE review process to be completed.

Debt offerings

The Debt Listings Requirements do not set out any specific timelines with regards to the listing process; however, the Debt Listings Requirements do stipulate that the submission of all necessary documentation and information required by the JSE must be done in accordance with the timetable detailed on the JSE website. In our experience, the JSE approval process for a placing document typically takes between three to four weeks. This timing may, of course, be affected by matters such as the identity of the issuer or the nature and complexity of the debt securities sought to be issued.

Preliminary approval of the relevant placing document must be obtained from the JSE when any placing document, offering, road show or marketing in connection with debt securities that are to be listed, is undertaken. The preliminarily approved placing document may be circulated to market participants and potential investors provided that amendments effected thereafter shall be limited to certain restricted amendments.

A signed, final placing document must be made available to the JSE for formal approval and to investors within 48 hours prior to the listing date.

An offer may not commence while the review of the offer by the applicable regulatory authority is still in progress.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

In providing offering related documentation to local investors, the marketing of securities restrictions under the Companies Act, CISCA and FAIS Act must be considered. For instance, under the Companies Act, an advertisement relating to a public offer may be considered as drawing the attention of the public to an offering of securities, and the Companies Act accordingly requires such an advertisement to: have satisfied the disclosure requirements of the Companies Act applicable to a registered prospectus; and be registered prior to being published. Where such advertisement, however, clearly indicates that it is not a prospectus, as well as where and how the relevant prospectus may be obtained, and further satisfies other prescribed requirements contained in the Companies Act, it need not be registered with: the relevant exchange, in the case of listed securities; and the Commission, in the case of unlisted securities. However, if an advertisement does not satisfy all of the requirements of the Companies Act, and despite any statement to the contrary contained in the advertisement, it nevertheless will be regarded as having been intended to be a prospectus and this would mean that anyone responsible for the dissemination of such advertisement would be guilty of an offence.

As a general comment, any communication (oral, internet website or otherwise) made, or written documentation disseminated, that could reasonably be construed as inviting, inducing or influencing investors to participate in an offer of securities or relate to the future profits or losses or valuation of a company or its securities, prior to, during, and immediately following an offering of securities, should: be fair and accurate and not misleading or untrue; if written, contain appropriate disclaimer language; be consistent with (and not contradict) the information that will be contained in any offering document; and in a listed context, if it contains any price sensitive information, be released in a way which is appropriate and complies with relevant insider dealing legislation and stock exchange rules. Typically, in the context of security offerings, publicity guidelines are pre-agreed to effectively manage the release of communication from a regulatory and market practice compliance perspective.

There are no specific restrictions dealing with the publishing of research reports by underwriters, but the considerations set forth above apply equally.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

There are no special rules differentiating secondary and primary offerings other than the distinction made in the Companies Act, described in question 2, between the requirement of a written statement rather than a prospectus and the Listings Requirements’ obligation.

There are onerous prospectus provisions that impose liability on persons involved in the preparation of a prospectus and directors of the issuer could also incur liability in relation to a prospectus or offer document at South African common law (for deceit or negligence) or for negligent or fraudulent misrepresentation under the South African law of delict. This is not the case for secondary offerings that are accompanied by a written statement. A secondary offering accompanied by a prospectus (which in practice is only likely to occur as part of a combined primary and secondary offering) results in selling shareholders being subject to almost all of the same prospectus liability provisions of the Companies Act as the directors of the issuer who approved the prospectus. In particular, selling shareholders are liable (in the same manner that the directors of the issuer are liable) to pay compensation to all persons who have acquired any shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement in the prospectus, or in any report or memorandum appearing on the face of, or issued with, or incorporated by reference in, the prospectus.

6 What is the typical settlement process for sales of securities in a public offering?

Typically, the underwriter provides the issuer or seller with a subscription notice or a purchase notice setting out the name of each subscriber

or purchaser, as the case may be, who is entitled to acquire securities and, if specified by the subscriber or purchaser, the details of its account with a South African central securities depository participant (CSDP) into which the securities offered are to be credited (for dematerialised securities).

The issuer or seller is then provided with evidence that the underwriter has transferred the aggregate offer consideration for the securities to be issued by the issuer to such underwriter, or to subscribers arranged for by such underwriter, or to be sold by the seller as the case may be, into a bank account designated by the issuer or seller less a commission equal to a percentage of the gross proceeds from the issue of any securities subscribed for, or the sale of any shares purchased, and the expenses of the offering.

Upon receipt of confirmation of the payment for the securities offered as contemplated above, the issuer will then issue or procure the issuance of the shares to subscribers, or the seller will transfer the shares, as directed by the underwriter in the subscription or purchase notices and will procure that either: the securities offered are credited to the account of the offeree with the CSDP, as designated by the underwriter in the subscription or purchase notice, by issuing an instruction to the relevant CSDP, or in the case of materialised securities, share certificates in respect of such offered securities are issued as instructed in the subscription or purchase notices.

Underwriters are generally responsible for determining the procedures necessary to ensure that the interests of subscribers or purchasers of the securities offered are protected.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

The Companies Act provides for the various instances in which the private placement of securities can occur. In a nutshell, a private placement under South African law is any offer for securities that does not constitute an offer to the public in accordance with the Companies Act. Initial public offerings are often done on a private placement basis. The Companies Act only requires public offerings to be accompanied by a prospectus and has no rules or procedures for private placements.

If securities (including debt securities) are intended to be listed on the JSE following a private placement, the Listings Requirements (and in the case of debt securities, the Debt Listings Requirements) set out the specific requirements and documents to be submitted to the JSE by the issuer in order for the listing of the securities to take place. Typically, if an initial public offering is done by way of a private placement, a pre-listing statement will be required. The Listings Requirements also include rules that regulate vendor private placings (ie, private placings of shares issued to a vendor of assets to the company, to settle a vendor cash consideration). Privately placed debt securities (whether listed or unlisted) may also need to comply with the CP Regulations and, in the case of a securitisation, the Securitisation Regulations.

8 What information must be made available to potential investors in connection with a private placing of securities?

The disclosure requirements are contractual for private placings. If the private placing coincides with an initial listing of securities, then a pre-listing statement containing the prescribed information will need to be prepared.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

Restrictions

There are no special rules restricting the transferability of shares acquired in a private placement. This is usually governed by contract.

Mechanisms to enhance liquidity

This can be achieved by:

- placing appropriate provisions in the private treaties between the relevant parties;
- utilising the over-allotment or 'greenshoe' options in the case of price stabilisation of listed securities (permissible in terms of the Listings Requirements or the disclosure requirements); and
- market-making in the case of debt securities, subject to the conditions set out in the CP Regulations.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

Except for the prior approval of the FSD of the terms of the offerings and certain exchange control restrictions that may apply to such terms, there are no general South African rules or restrictions applicable to offerings of securities outside South Africa by South Africans. However, in certain industries, offerings of certain securities are restricted, for example, in the telecommunications industry.

For companies listed on the JSE, the Listings Requirements regulate dual listings and provide that the exchange on which the primary listing resides takes precedence in the enforcement of any rules ahead of the exchange on which the secondary listing resides. However, where the primary listing is not on the JSE, the JSE reserves the right to instruct the issuer to comply with certain specific sections of, or in full with, the Listings Requirements, where it determines such requirements to be in the interest of shareholders. In the event that there is a conflict between the requirements of the relevant exchanges, the most stringent requirements must be complied with.

Notwithstanding any provisions in an issuer's memorandum of incorporation, an issuer may exclude from a rights offer any non-resident security holders with the Commission's approval, if the issuer can demonstrate that the number of excluded security holders is insignificant compared to the cost and inconvenience of issuing to them.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Any issue of such convertible securities for cash (otherwise than to existing holders of equity securities in proportion to their existing holdings) requires approval from the JSE and from 75 per cent of equity securities holders present and voting in a general meeting. Pursuant to general issues for cash, issuers may not, in the aggregate in any one financial year, exceed 15 per cent of the issuer's relevant number of equity securities in issue of that class (taking into account the potential dilution effect, in the year of issue, of any convertible securities in issue). If the convertible securities are issued to a related party (broadly defined to include, among others, shareholders holding at least 10 per cent of the equity securities, directors and connected persons, etc) and the discount to the market price at the time of conversion of the convertible security is not known at the time of issue of the convertible security, or if it is known that the discount will exceed 10 per cent of the 30-day weighted average traded price of the security at the date of exercise, then the issue will be subject to the issuer providing holders of its securities with a fairness opinion from an independent professional expert acceptable to the JSE indicating whether or not the issue is fair to holders of the issuer's securities. The offering of convertible bonds through a book build has been made simpler by the removal of the requirement that convertible bonds can only be approved by shareholders after the specific terms of the convertible bonds have been agreed to.

A rights offer, where the securities offered will be listed, will not be an offer to the public and hence will not require a registered prospectus although a rights offer circular complying with the JSE Listings Requirements and the Companies Act will need to be prepared. In terms of the Companies Act, renounceable letters of allocation conferring rights on the recipients to either subscribe for securities in terms of the rights offer or renounce and cede their subscription rights to existing security holders or third parties, must be approved by the JSE in the case of listed securities, and the Commission in the case of unlisted securities.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

'Best efforts' and 'bought deal' underwriting arrangements are common in South Africa. In a 'best efforts' deal, the underwriter undertakes to use its best efforts to procure that the securities are taken up. Two types of 'bought deals' are common: in the case of a 'bought deal' where the underwriter is obliged to take up any shares that are not taken up by investors and there is a book build, we have 'soft' as well as 'hard' underwriting arrangements. In a hard underwriting arrangement, the underwriter agrees, before the offer

is made, to take up any shares not taken up by the investors. In a soft underwriting arrangement, the underwriter only undertakes to take up shares investors applied for in the book build but did not pay for (ie, the underwriter takes on the 'settlement risk'). Often a soft-underwrite is achieved by only signing the relevant agreement after the book build.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

Underwriting is usually regulated by agreement between the underwriter and the issuer or seller in terms of which the underwriter agrees to subscribe for or purchase, for a commission, any or a specified portion of the securities that are not subscribed for or purchased by the persons to whom they are offered. The commission is usually calculated as a percentage of the issue or purchase price of the securities being underwritten.

Where warranties and indemnities are given by the issuer in underwriting agreements for secondary offerings, care should be taken to ensure that there is no contravention of the provisions of the Companies Act prohibiting the granting of financial assistance by an issuer for the purchase of or subscription for its shares, although the Companies Act allows for this to be condoned in certain circumstances.

With regard to success fees, the parties are free to agree whatever they deem appropriate (subject to the restrictions on underwriting commissions as outlined below). However, the amount of the commission must be disclosed in the prospectus.

All force majeure clauses are subject to agreement between the parties. Over-allotment options are regulated by the Listings Requirements or disclosure requirements in the case of listed securities.

14 What additional regulations apply to underwriting arrangements?

In respect of an underwritten public offering requiring a prospectus, the underwriting agreement relating to the public offering must be filed with the Commission and accompanied by a sworn declaration by two directors of the underwriter that it is, and will be, in a position to carry out its obligations even if no securities are applied for.

Even if an offer of securities is made in respect of which no prospectus is required by the Companies Act, a copy of the underwriting agreement and sworn declarations must be lodged with the Commission no later than the date of the proposed offer of securities.

In terms of the Companies Act, an issuer may only pay commission to an underwriter if: the payment of the commission is authorised by the MOI of the issuer; the commission paid or agreed to be paid does not exceed the rate fixed by the MOI; and the amount or rate of the commission paid or agreed to be paid is, in the case of shares offered to the public, disclosed in the prospectus. The Listings Requirements state that if a public offer is underwritten, the underwriter must satisfy the JSE that it can meet its commitments in the manner required by the JSE. Additionally, any underwriting commission paid to a shareholder of the issuer should not be greater than the current market rate payable to independent underwriters as the Listings Requirements limit the amount of commission payable and such limitation generally equates to (but does not exceed) the current market rate payable to independent underwriters. The applicant is required to present evidence to the JSE proving the reasonableness of such underwriting commission.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

The Listings Requirements (including the Debt Listings Requirements) set out certain continuing obligations that an issuer is required to observe once any of its securities have been admitted to listing on the JSE. In addition, the CP Regulations provide for quarterly returns to be furnished by the issuer of a commercial paper to the Registrar of Banks.

Issuers of unlisted securities must comply with the Companies Act's reporting obligations (including, reviewed interim and audited annual financial statements must be sent to members). The audited annual financial statements of a listed company must include details of all persons with beneficial interests of 5 per cent or more of the securities of such listed company.

In terms of the Takeover Regulations, a person (which includes concert parties and related and interrelated parties) who acquires a beneficial

interest of 5 per cent or any further whole multiple of 5 per cent in a regulated company (which includes public companies, state-owned companies, and, subject to certain criteria being satisfied, private companies) will be under an ongoing obligation to inform the issuer within three business days, if and when it is a party to any transaction that will result in such acquisitions. Also, disposals of securities that result in a beneficial holder (which includes concert parties, related and interrelated parties) in a regulated company dropping below any such 5 per cent multiple threshold must also be disclosed. Upon receiving such trading disclosure, the regulated company will be required to file a copy of such disclosure with the TRP and (unless the trading disclosed involves a trading disposal of less than 1 per cent) report the information to the other holders of the relevant class of securities, and in the case of listed securities, also inform the JSE.

16 What information is a reporting company required to make available to the public?

Equity securities

An issuer whose securities are listed on the JSE must, subject to approval by the JSE, release announcements regarding material price-sensitive information in certain circumstances.

A trading statement must, subject to the Listings Requirements, be published by the issuer (other than issuers who publish quarterly results) as soon as it is satisfied that a reasonable degree of certainty exists that its financial results for the period to be reported upon next will differ by at least 20 per cent from: the financial results for the previous corresponding period; or a profit forecast previously provided to the market in relation to such period. Property entities that elect to adopt distribution per listed security as their measure of financial results, however, must issue a trading statement if the financial results differ by at least 15 per cent, as opposed to the 20 per cent referred to above.

Issuers who publish quarterly results must, instead of publishing a trading statement, include a general commentary in each quarterly results announcement. The declaration of dividends, interest and other similar payments by an issuer should be announced immediately.

Interim reports must be published and distributed to shareholders after the expiration of the first six-month period of a financial year and by no later than three months after that date. In the case of issuers that report to shareholders on a quarterly basis, the quarterly reports must be published and distributed to all shareholders as soon as possible after the expiration of each quarter.

If an issuer has not distributed annual financial statements to all shareholders within three months of its financial year-end, it must publish and distribute to all holders of securities provisional annual financial statements within the three months as specified, even if the financial information is unaudited at that time.

Every issuer must, within six months after the end of each financial year and at least 15 business days before the annual general meeting, distribute to all holders of securities and submit to the JSE a notice of the annual general meeting and annual financial statements for the relevant financial year, which financial statements will have been reported on by the issuer's auditors.

All issuers are required to use their best endeavours to ensure that a minimum percentage of each class of securities (at present 20 per cent) is held by the public. An issuer must inform the JSE in writing, without delay, when it becomes aware that a proportion of any class of listed securities in the hands of the public has fallen below the minimum liquidity free float requirement.

An issuer must ensure that all the necessary facilities and information are available to enable holders of securities to exercise their rights. In particular, it must inform them of the holding of meetings that they are entitled to attend, enable them to exercise their right to vote, where applicable, and release announcements and distribute circulars in terms of the Listings Requirements.

An issuer, through its sponsor, must notify the JSE of any change to the board of directors or company secretary, including the appointment of a new director or company secretary, the resignation, removal, retirement or death of a director or the company secretary, and any changes to any important functions or the executive responsibilities of a director, and any trading in securities by directors or company secretaries (or their associates).

An issuer must notify the JSE of the termination, appointment, and the resignation of the auditors as well as any change of the individual auditor classified as the designated auditor. Notification must be given without

delay and by no later than the end of the business day following the decision to terminate the appointment of the auditor or after receipt of the auditor's resignation.

If securities are registered in the name of a person who is not the holder of the beneficial interest, issuers must establish and maintain a register of disclosures made in terms of the Companies Act, which requires the registered holder to disclose: the identity of the person on whose behalf the security is held; the identity of each person with a beneficial interest in the security; the number and class of securities held and the extent of the beneficial interest. The issuer must further publish the beneficial interests of directors and major shareholders in its annual financial statements. If an issuer receives a notice regarding certain share transactions (namely, affected transactions and offers), the issuer must file a copy of the notice with the TRP and must report the information to the holders of the relevant class of securities, unless the notice concerns a disposal of less than 1 per cent of the class of securities. The issuer must, within 48 hours after receipt of such notice, publish the information contained in the notice on SENS, but not in respect of notices that relate to a disposal of less than 1 per cent of the relevant class of securities.

Issuers must comply with the specific requirements concerning corporate governance and must disclose their compliance with these requirements in their annual report. Additionally, issuers are annually required to confirm that they comply with the corporate governance requirements under the South African Code of Corporate Practices and Conduct as set out in the third King Report on Corporate Governance, and to explain any non-compliance.

Issuers must comply with certain disclosure requirements and obtain shareholder approval for material transactions concluded by the issuer or its material subsidiaries. These disclosure requirements increase depending on the size of the transaction and large transactions require shareholder approval.

Debt securities

An issuer of debt securities is required to publish on SENS any information material to its financial or trading position.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

Financial Markets Act

The Financial Markets Act prohibits insider trading. It stipulates that an insider (as defined) who knows that he or she has inside information (as defined) and who deals directly or indirectly or through an agent for his or her own account in the securities listed on a regulated market, to which the inside information relates or that are likely to be affected by it, commits an offence. Further, an insider, who knows that he or she has inside information and deals, directly or indirectly, for any other person in securities listed on a regulated market to which the inside information relates or that is likely to be affected by it, commits an offence. An insider who knows that he or she has inside information and who discloses the inside information to another person, commits an offence. Finally, it is an offence to encourage or cause another person to deal or discourage or stop another person from dealing in the securities listed on a regulated market to which the inside information relates or that are likely to be affected by it.

The Financial Markets Act also sets out prohibited trading practices. It provides that no person may, either for their own account or on behalf of another person, directly or indirectly use or knowingly participate in the use of, any practice that creates (or is likely to have the effect of creating) a false or deceptive appearance of the trading activity in connection with that security; or creates an artificial price for that security. No person may place an order to buy or sell listed securities that, to his or her knowledge will, if executed, have the effect of creating a false or deceptive appearance of the trading activity in connection with a security; or creates an artificial price for that security. The section sets out a non-exhaustive list of certain transactions that are deemed to be false or deceptive trading practices and are thus prohibited. The section expressly provides that the employment of price-stabilising mechanisms regulated by the Listings Requirements or the JSE Equities and Directives Rules (JSE Rules) does not constitute a practice that creates an artificial price for securities that are subject to such price-stabilising mechanisms, and therefore does not constitute insider trading.

The Financial Markets Act prohibits the making of false, misleading or deceptive statements, promises and forecasts. It states that no person may, directly or indirectly, make or publish in respect of listed securities or in respect of the past or future performance of a public company (which does not have to be listed) any statement, promise or forecast that is:

- at the time and in the light of the circumstances in which it is made, false or misleading or deceptive in respect of any material fact and that the person knows, or ought reasonably to know, is false, misleading or deceptive; or
- by reason of the omission of a material fact is rendered false, misleading, or deceptive and that the person knows or ought reasonably to know, is rendered false, misleading or deceptive by reason of the omission of that fact.

A person who has made such a statement unaware that it was false, misleading or deceptive, and who becomes aware of this, must publish a full and frank correction without delay. Failure to do so results in an offence being committed.

JSE Rules

The JSE Rules state that every transaction in equity securities entered into by a JSE member (a broker) must be concluded on the specific condition that the transaction is entered into subject to the provisions of the Financial Markets Act and JSE Rules.

The 'market conduct' provisions of the JSE Rules prohibit manipulative or deceptive trading practices. Prohibited practices include those that create a false or deceptive appearance of trading activity or an artificial price for an equity security. Specific practices are mentioned in the JSE Rules that require approving or entering on the JSE equities trading system, including:

- an order to buy or sell an equity security with the knowledge that an opposite order or orders of substantially the same size at substantially the same time and at substantially the same price, have been or will be entered by or for the same or different persons with the intention of creating a false or misleading appearance of active public trading in connection with, or an artificial market price for, such equity security;
- orders to buy any equity security at successively higher prices or orders to sell any equity security at successively lower prices for the purpose of unduly or improperly influencing the market price of such equity security;
- an order at or near the close of the market, the primary purpose of which is to change or maintain the closing price of such equity security;
- an order to buy or sell any equity security during an auction call period and cancelling such order immediately before the auction matching, for the purpose of creating or inducing a false or deceptive appearance of demand for or supply of such equity security;
- an order to buy or sell an equity security that involves no change in the beneficial ownership of that equity security;
- effecting or assisting in effecting a market corner;
- maintaining the price of an equity security at a level that is artificial;
- employing any device, scheme or artifice to defraud any other person as a result of a transaction effected through the JSE equities trading system; and
- engaging in any act, practice or course of business in respect of trading in equity securities that is deceptive or that is likely to have such an effect.

Takeover Regulations

The Takeover Regulations, which apply in a takeover situation, impose diverse duties of disclosure on the board of directors of offeror and offeree companies. In addition, the Takeover Regulations impose a duty on such boards and their respective advisers, including financial advisers, to act in the best interests of the holders of the securities involved in an affected transaction and a duty on each director of an offeror and of the offeree company to ensure, so far as he or she is reasonably able, that the Takeover Regulations are complied with in the conduct of an affected transaction. This is explained more fully in the South Africa chapter of *Getting the Deal Through – Mergers & Acquisitions 2015*.

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

Over-allotment, with or without greenshoe options, is, in terms of the Listings Requirements (including the Debt Listings Requirements), a

permissible means of stabilising the prices of listed securities. The Listings Requirements limit the period during which the over-allotment and ancillary transactions may take place.

In the case of securities (including debt securities) listed or to be listed on the JSE, there are comprehensive regulations dealing with, inter alia:

- the size of the over-allotment (which may not exceed 15 per cent of the issue size);
- the stabilisation period (which will end 30 calendar days after the relevant listing or sale date in the case of pre-listing trading);
- disclosure requirements of the stabilisation (in announcements and circulars, including whether there is a greenshoe and the access of the issuer to the stabilising manager's register);
- pricing restrictions;
- the strict requirements and criteria for appointment as a stabilising manager and the obligation to maintain a register of all transactions effected by it in the course of the stabilising action, including net tangible assets of not less than 2 billion rand in jurisdictions acceptable to the JSE; and
- the requirement that the stabilising manager has a scrip lending agreement with a CSDP (to be approved by the JSE).

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

Prospectus liability

The Companies Act imposes liability for untrue statements in a prospectus on certain groups of people. These people are liable to pay compensation to all persons who have acquired shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement.

It is important to note that certain sections of the Companies Act regarding offers to the public impose strict statutory liability in respect of prospectuses and infringement of these sections can constitute both a criminal and a civil offence.

In summary, if there is a material misstatement or omission (whether fraudulent or not), the promoters, directors and other people responsible for the prospectus (including selling share-holders) may incur civil and criminal liability both under the Companies Act and the common law.

Insider trading civil liability

Civil liability that results from insider trading is governed by the Financial Markets Act. In terms of these provisions, the insider may be liable to pay to the FSB an administrative sanction not exceeding any profits or losses made as a result of such dealing, a penalty for compensatory and punitive purposes, interest and costs of suit.

Offences under the Financial Markets Act

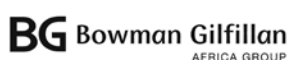
In terms of the Financial Markets Act, any person who commits an offence in relation to insider trading, prohibited trading practices or the making of false, misleading or deceptive statements, promises and forecasts, is liable on conviction to a fine not exceeding 50 million rand or to imprisonment for a period not exceeding 10 years, or both.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

Remedies are generally sought through the courts or regulators such as the FSB and the TRP. The remedies available can be obtained either through criminal, administrative or civil litigation.

The FSB was established in terms of the Financial Services Board Act, 1990 as an enforcement committee to discipline certain professionals operating in the securities industry. After consideration of a matter referred to the enforcement committee, an administrative penalty can be imposed on a person who provides securities services, or the committee may require such person to pay to the FSB a compensatory amount.

The Directorate of Market Abuse (DMA) is empowered in terms of the Financial Markets Act to investigate cases of insider trading, prohibited trading practices and the making of false, misleading or deceptive statements, promises or forecasts in respect of listed securities. The DMA can refer cases of insider trading to the enforcement committee of the FSB, which has the power to impose administrative penalties on an offender. The DMA may also hand the matter over to the prosecuting authorities for consideration or take civil action against an alleged offender.



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Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The offering of securities by Swiss or foreign issuers in Switzerland is governed by a variety of rather fragmented rules and regulations, the applicability of which depends largely on the specifics of the offering, the securities offered, the issuer and the other parties participating in the offering.

For practical purposes, of most relevance are various provisions set forth in the Code of Obligations (CO), including those providing for the basic prospectus disclosure requirements for public offerings of equity and debt securities, and the Federal Act on Stock Exchanges and Securities Trading (SESTA) and its implementing ordinances and regulations, such as, in particular, the listing rules adopted by the relevant exchanges. The listing rules are not adopted by the governmental or regulatory authority, but by the relevant exchanges acting as self-regulated bodies entrusted with various supervisory and regulatory functions. The SIX Swiss Exchange (SIX) is by far the most important stock exchange in Switzerland.

If the offered product qualifies as a Swiss or foreign collective investment scheme under Swiss law, then such offering is subject to the requirements and restrictions set forth in the Federal Act on Collective Investment Schemes (CISA) and its implementing ordinances. The offering in or from Switzerland of structured products or notes (such as index- or fund-linked notes) is also subject to specific requirements and restrictions under CISA.

The Swiss Financial Market Supervisory Authority (FINMA) is the key supervisory and regulatory authority in the Swiss financial market and, as such, is entrusted with various powers and responsibilities including the licensing and supervision of exchanges, banks, securities dealers (ie, brokers, own-account dealers, issuing houses, market makers and derivatives firms), insurance companies and collective investment schemes. Swiss law differentiates between the public offering of securities and their listing on an exchange. Although a government authorisation, filing or registration is neither required nor possible for the public offering of equity or debt securities, the listing of such securities requires prior filings with, and the authorisation of, the relevant exchange. Within SIX, it is the Regulatory Board that is in charge of admitting the listing of, the suspension of the trading in, the delisting of securities and ensuring ongoing compliance.

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

As explained in question 1, Swiss law differentiates between the public offering of securities and their listing. While the public offering of equity or debt securities in Switzerland does not by itself trigger the obligation to submit filings with or seek the approval from a governmental or regulatory authority, this is different with respect to securities to be listed on a stock exchange. Any such listing requires the issuer to submit a listing application together with various annexes (including, in principle, a listing prospectus to the relevant admission board for it to determine whether the listing requirements are met). On SIX, the application must contain various types of information, such as a short description of the securities, the requested date of the first trading day and a declaration that the listing

particulars and the listing notice are complete and comply with the listing rules of SIX (the listing rules), and that there has been no material deterioration of the financial condition of the issuer since the publication of the listing particulars. The listing prospectus must contain specific information on the issuer, including its financial statements, the securities and the persons or companies bearing responsibility for the contents of the listing prospectus.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

If a listing of securities on SIX is intended, an authorised representative (recognised as a listing expert by SIX) must submit a listing application and all relevant annexes to the Regulatory Board on behalf of the issuer no later than 20 trading days prior to the scheduled listing date or, as the case may be, prior to the start of the book-building period. The listing application and its annexes may be in German, French, Italian or English. The SIX may require further information and explanatory statements as it deems necessary and takes a final or, upon the request of the applicant, a preliminary decision on the requested listing. Debt securities and derivatives are eligible for provisional trading pending the final decision on the application, but are not considered to be listed pursuant to the listing rules during that period. The provisional admission of bonds and derivatives can be processed online (internet-based listing) and, provided that the issuer has been approved by the Regulatory Board, allows trading three business days or, under certain circumstances as the case may be for derivatives, one day after the listing application is submitted.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Except for the obligation to prepare a prospectus in accordance with the relevant provisions in the CO and, with respect to listed public offerings, also in accordance with the listing rules, no publicity restrictions apply to the public offering of equity or debt securities. Publicity restrictions apply, however, to the distribution of foreign collective investment schemes in or from Switzerland to retail clients, which require prior registration with the FINMA. The distribution of foreign collective investment schemes exclusively directed at qualified investors does not require prior registration with FINMA but may trigger an obligation to appoint a Swiss representative and a Swiss paying agent depending on the type of qualified investor targeted in Switzerland. Also, restrictions on the ability of underwriters to issue research reports have been introduced by the Swiss Bankers' Association in its Directive on the Independence of Financial Research. The Directive is formally recognised by the FINMA as the minimum standard in the banking industry and is therefore applicable to all Swiss banks and securities dealers. Pursuant to the Directive, the business unit of a bank responsible for financial research must be organisationally, hierarchically, functionally and physically independent from the unit that is responsible for issuing securities or for the bank's investment banking activities. This implies that the investment banking operations and the financial research units of the relevant bank are structured in such a way that other units have no access to privileged information and that any such privileged information is made available simultaneously to the clients. A bank acting as a manager or co-manager in an IPO is barred from publishing research reports on,

or releasing recommendations with respect to, the issuer during a certain 'blackout period'.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

Swiss law allows a shareholder to participate in any newly issued equity or equity-related securities (primary offering) pro rata to its existing participation in the share capital of the issuer. The general shareholders' meeting of the issuer may, however, resolve to exclude such pre-emptive subscription rights on particular grounds ('important reasons'), for example, a merger or an acquisition of a business, with the approval of a qualified majority of two-thirds of the shareholder votes and an absolute majority of the nominal values represented at the meeting (the articles of association of the issuer may provide for higher majorities).

If a prospectus has been prepared in a primary or secondary offering, the persons having assisted in its preparation and distribution may become liable based on prospectus liability (see question 19).

6 What is the typical settlement process for sales of securities in a public offering?

Settlement of on- and off-exchange trades on SIX occurs through SIX SIS Ltd (SIS), Switzerland's central securities depository (CSD), which is licensed as a bank under Swiss law. In September 2007, SIX Securities Services Ltd introduced the single central counterparty (CCP) model with SIX x-clear (a wholly owned subsidiary of SIX Securities Services Ltd) acting as CCP for the clearing of most of the trades in clearing-eligible cash equities and ETFs listed and traded on SIX. These services have been extended to cover European equities and ETFs traded under SIX's Liquidnet Service. The 'Swiss value chain' comprises, among others, SIX, SIS x-clear, SIC⁴ (the updated Swiss interbank clearing system to be introduced in April 2015 and operated by SIX Interbank Clearing Ltd) and SECOM (the securities settlement system operated by SIS), and allows full automation and real-time integration of trade, settlement and payment involving central bank funds (SFIDVP – simultaneous, final, irrevocable delivery versus payment). Once SIX has matched buy and sell orders, settlement instructions are sent to the CCP in the case of transactions matched on-exchange and to the appropriate CSD in the case of transactions that have not been cleared. After having verified that the seller's securities account is sufficiently covered, a payment instruction is released to SIC and after receipt of payment has been confirmed, the transfer of the securities is effected from the seller's to the buyer's account.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

Swiss law does not provide for specific rules governing the private offering of equity or debt securities. As a general rule, the private placement of securities in Switzerland does not require a prospectus. A placement is deemed to be private if it is not made to the public (ie, if it is addressed to a limited circle of offerees). While no clear limitation on the permitted number of potential investors to whom securities can be offered by way of a private placement exists under Swiss law, the more conservative view in Switzerland is that an offering directed at or made to 20 or fewer potential investors (irrespective of their sophistication or wealth) qualifies as a private offering under Swiss law. For the purposes of determining the number of potential investors, the number of persons approached is relevant and not the number of persons who eventually purchase the relevant securities. This rule, which is or was used in other areas of Swiss financial legislation, may be viewed as a safe harbour rule. However, in light of the amended EU Prospectus Directive (although not applicable in Switzerland), pursuant to which an offering addressed to fewer than 150 persons per member state does not trigger an obligation to prepare a prospectus, the above-mentioned 20 offeree rule has been criticised as being too stringent. It is at the same time not disputed that the legal concept of a 'limited circle of offerees' has not only a quantitative, but also a qualitative aspect. Arguing that the focus should not primarily be on the number of offerees approached but on the manner in which potential investors are being approached, an offering to more than 20 potential investors should be permissible (without triggering an obligation to prepare a prospectus), provided that:

- the prospective investors are hand-picked and are being approached on an individual basis (eg, through personal letters or 'by invitation only' presentations); and
- the offering is directed at or made to a pre-defined circle of potential investors that share common qualifying criteria that distinguishes them for the public at large.

However, this latter approach is still untested and an offering of equity or debt securities directed at or made to more than 20 potential investors may not, in the present state of law and practice, be considered to be a safe harbour.

Privately placed debt securities issued by a non-Swiss issuer with the participation of Swiss banks or securities dealers are subject to the guidelines of the Swiss Bankers' Association on notes of foreign borrowers. If the issue of the debt securities is governed by Swiss law, and the securities are denominated in Swiss francs with denominations of 10,000 Swiss francs or more, then the relevant Swiss lead manager is required, pursuant to the guidelines, to prepare a prospectus that complies with the disclosure requirements set forth in the guidelines.

No prior approval of FINMA is required for the offering of shares or interests in a non-Swiss collective investment scheme in or from Switzerland if such offering is directed at and made exclusively to 'qualified investors' (as defined in CISA and its implementing ordinance and guidelines). However, under CISA such offering may trigger regulatory requirements such as the appointment of a Swiss representative and a Swiss paying agent.

The concept of 'qualified investors' encompasses, inter alia:

- financial intermediaries that are subject to a prudential supervision (ie, banks, securities dealers, fund management companies, insurance companies and central banks);
- pension funds;
- corporate investors with professional treasury management;
- high net worth individuals (ie, individuals that are holding, directly or indirectly, a minimum net wealth of 5 million Swiss francs in financial assets or holding a minimum net wealth of 500,000 Swiss francs and having sufficient technical knowledge), provided such individuals or, in case a private investment structure has been set up for one or more high net-worth individuals, the person responsible for managing the investment structure have expressly requested, on a written basis, ('opt-in') to be considered as 'qualified investors'; and
- investors having entered into a written discretionary asset management agreement, provided that they do not exercise their right to 'opt out' of the 'qualified investors' status and the written discretionary asset agreement is entered into with a regulated financial intermediary or with an independent asset manager that is subject to anti-money laundering supervision, rules of conduct meeting certain minimum requirements and the relevant management agreement complies with the directives of a recognised professional organisation (eg, Swiss Bankers' Association guidelines).

In contrast, an offering of foreign collective investment schemes that is exclusively directed at, or made to, financial intermediaries that are subject to a prudential supervision (ie, banks, securities dealers, fund management companies, insurance companies and central banks) or to investors having entered into a written discretionary asset management agreement is not considered 'distribution' within the meaning of CISA and therefore is not subject to any regulatory requirements whatsoever.

Further, the distribution of structured products in or from Switzerland limited to 'qualified investors' as defined in CISA is not subject to regulatory requirements under CISA; in particular, no simplified prospectus will need to be prepared in connection with such offering.

8 What information must be made available to potential investors in connection with a private placing of securities?

Except for specific information and prospectus requirements applicable to privately placed debt securities governed by Swiss law and issued with the participation of Swiss banks or securities dealers pursuant to the guidelines of the Swiss Bankers' Association on notes of foreign borrowers (see question 7), no specific information is required to be made available to potential investors.

Notwithstanding the above, information submitted to potential investors must be accurate and may not be misleading. If false or misleading statements are made in connection with a private placement, the issuer or

the persons involved in preparing the relevant offering documents and the offering may become liable (see question 19).

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

As explained more fully in question 7, any private offering of securities made with an aim to ultimately offer or distribute the relevant securities to the public is deemed to be a public offering. Otherwise, no restrictions apply to the transfer of securities acquired in private placements. In view of the foregoing, liquidity enhancing mechanisms are not commonly used techniques with respect to private placements in Switzerland.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

With regard to offerings of debt securities by foreign issuers in Switzerland, the substantive disclosure requirements for debt securities referred to in questions 2 and 8 also apply to such foreign issuers.

Swiss rules on conflict of law allow an investor to initiate legal actions for compensation of damages incurred in connection with the public offering of equity (and debt) securities, either under the (foreign) law under which the foreign issuer is organised or the law of the jurisdiction where the offering took place (which is assumed to be Switzerland in this case). Foreign issuers should therefore be advised to ensure that their offering of equity (and debt) securities in Switzerland is, in substance, fully compliant with Swiss disclosure requirements, irrespective of the law by which they are organised or by which the offering is expressed to be governed.

Also, specific listing rules exist for foreign issuers with respect to primary, secondary and dual listings of equity securities. Debt securities and derivatives listed on SIX may be governed by Swiss law or the law of any other OECD country. Upon the request of an issuer, the SIX may under certain conditions admit the laws of other countries as well. Eurobonds are eligible for trading on SIX in the 'international bonds' segment and for certain additional exemptions (eg, an issuer of eurobonds does not have to prepare a listing prospectus and is exempt from compliance with ongoing disclosure requirements provided that the relevant bonds are already listed on an exchange recognised by SIX). With regard to the private placement of debt securities of foreign issuers governed by Swiss law with denominations of 10,000 Swiss francs or more in which Swiss banks or securities dealers are involved, the guidelines on notes of foreign borrowers issued by the Swiss Bankers' Association (referred to in question 7) are applicable.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Swiss law contains few specific rules governing the issue of exchangeable or convertible securities. These rules mostly address the circumstances under which the right of the issuer's shareholders to subscribe for the new securities by preference can be suppressed.

No issuance prospectus needs to be produced for the public offering of derivatives (although a listing prospectus may be required). However, the offering to the public of structured products, such as index- or fund-linked notes, in or from Switzerland requires a 'simplified prospectus', which, inter alia, must describe the key characteristics of the structured product, its profit and loss prospects and the important risks for the investors. Further, structured products within the meaning of CISA may only be distributed to retail clients in Switzerland if they are issued, guaranteed or distributed either by a Swiss bank, securities dealer or insurance company, or a non-Swiss bank, securities dealer or insurance company subject to an equivalent supervision and having an establishment in Switzerland whose duty is to make the relevant prospectus available to investors upon their request. If the non-Swiss issuer, the guarantor and the distributor do not comply with these requirements and, in particular, if none of them have an establishment in Switzerland, the structured products may only be distributed to retail clients in Switzerland through a financial institution regulated in Switzerland. The publication of a simplified prospectus is not required where a listing of the product on a Swiss stock exchange is contemplated.

The SIX has adopted specific rules for the listing of derivatives as well as convertible securities. These rules provide for substantive disclosure requirements with respect to both the derivative and the underlying securities.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

Fixed-price underwriting is a common form of underwriting arrangement in Switzerland, in particular with regard to 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. By contrast, 'soft' underwriting has increasingly become a customary underwriting arrangement for equity offerings, whereby the issue price of the securities is fixed after a book-building process. Arrangements by which the securities to be offered are 'underwritten' on a best-effort basis only are also often used.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

The underwriting agreement will typically contain an 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. Depending on the nature and scope of the indemnification provisions, their enforceability may be limited by compulsory Swiss company law (such as the prohibition of redemption of the paid-in share capital). The underwriting agreement 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). The underwriting arrangement usually provides for the payment of the fee only in the case of completion of the offering. In addition, the underwriting arrangement usually provides for an incentive fee paid by the issuer in its sole discretion. Finally, the underwriting agreement typically entitles the lead manager of the underwriting syndicate to over-allot and effect transactions in the newly issued securities with a view to stabilising or maintaining the market price of the newly issued securities at a level other than that which might prevail in the open market.

14 What additional regulations apply to underwriting arrangements?

Pursuant to SESTA, only firms with a securities dealer licence from FINMA may act as underwriters in Switzerland in a professional capacity unless the underwriting by a non-Swiss bank or securities dealer occurs on a mere cross-border basis.

The acquisition of securities of an issuer already listed on a Swiss exchange by the underwriters under the underwriting agreement is subject to the notification requirements for material shareholdings set forth in SESTA (which are usually met by disclosing the relevant information in the prospectus prepared for the offering), unless the underwriters have been granted an exemption by SIX. Also, underwriters are subject to the Swiss Bankers' Association's Directive on the Allocation of Equity-related Securities offered by way of a Public Offering in Switzerland (the Allocation Directive), which sets up minimum standards for the Swiss banking industry and whose purpose is to safeguard fairness and transparency of the allocation of securities in the context of a public offering.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

Neither the offering and issue of securities of a Swiss or foreign issuer by way of private placement, nor the public offering of non-listed securities triggers by itself ongoing reporting obligations under Swiss law (except for the general obligation of, among others, corporations and limited liability companies to prepare financial statements). Rather, such reporting

Update and trends

New proposed legislation

The consultation process regarding the draft of the Swiss Financial Market Infrastructure Act (draft FMIA) ended in March 2014. Furthermore, the consultation process initiated by the Swiss Federal Council in June 2014 concerning the drafts of a new Swiss Federal Financial Services Act (draft FFSA) and of a new Swiss Federal Financial Institutions Act (draft FinIA) ended in October 2014. The proposed legislation, if adopted, would fundamentally change the legal framework governing financial services, institutions and infrastructure in Switzerland.

The draft FMIA

The draft FMIA constitutes an implementation of the principles resolved within the context of the G20/FSB and a response to the 'third country rules' provided by the European Market Infrastructure Regulation (EMIR). The object of the draft FMIA is to regulate the organisation and the operation of financial market infrastructures, the trading of derivatives and the conduct of business rules (including shareholding disclosures, public takeover offers, insider trading and market manipulations).

The draft FFSA

The draft FFSA introduces uniform prospectus rules which shall generally apply to all securities offered publicly into or in Switzerland or admitted to trading on a trading platform in Switzerland. The content and approval of the prospectus are inspired by the EU Prospectus Directive. The obligation to prepare a prospectus under the FFSA will be triggered by any public offering, be it primary or secondary. Similar

to the EU Prospectus Directive, the draft FFSA provides for a number of exemptions from preparing a prospectus. The proposed prospectus rules also provide for an ex ante review and approval process by an independent authority. Further, the draft FFSA introduces an obligation to prepare a basic information sheet which will be necessary for any offering of securities (other than mere equity instruments) to retail investors in Switzerland and which has to be drafted in German, French or Italian.

The draft FinIA

The draft FinIA introduces a supervision of all financial service providers who operate an asset management business in any form whatsoever (including managers of individual client assets and those who manage the assets of Swiss occupational benefits schemes).

New proposed listing standards

SIX Exchange Regulation, responsible for the enforcement of the issuer and participant regulation, proposed a new regulatory standard concept in October 2014 with the aim to streamline the current structure, clearly position Swiss GAAP FER as one of the relevant accounting standards and amend the admission criteria to meet market requirements. The new regulatory standard concept will be based on a Standard for Equity Securities (broken down into a Sub-Standard for International Reporting and Sub-Standard for Swiss Reporting) and a Standard for Debt Securities. IFRS or US GAAP must be used on the International Reporting Standard, whereas issuers who opt for Swiss GAAP FER will be allocated to the Swiss Reporting Standard. The new regulatory standard concept is planned to become effective as of 1 July 2015.

obligations (including ad hoc publicity) become applicable to the issuer only upon the listing of the relevant securities on a Swiss exchange.

16 What information is a reporting company required to make available to the public?

Companies incorporated in Switzerland are required to file certain corporate documents with the commercial registry, such as their articles of association and the documents related to certain corporate actions. These documents are publicly available.

Pursuant to the listing rules of SIX, the main duties that an issuer is required to comply with in order to maintain the listing of its securities consist of:

- producing periodic financial statements in accordance with an accounting standard recognised by SIX (in principle within four months from the close of the relevant financial year);
- notifying specific information to the SIX (in particular certain corporate actions or changes to the terms of the listed securities); and
- disclosing price-sensitive information on an ongoing basis ('ad hoc publicity' rules).

Further, issuers whose equity securities have their primary or main listing on SIX, are required to include a corporate governance report in their annual report (including information on their organisation and governance structure) and to disclose to SIX transactions in equity securities (and assimilated instruments) carried out by their board members and senior management (management transactions), which will then be published by SIX on its website. In addition, Swiss companies having equity securities listed on a stock exchange are required to include a remuneration report in their annual report, which contains information relating to the remuneration received by their (current and former) board members and senior management, and to disclose the stakes held by these persons and significant shareholders of the company. Similar rules apply to non-Swiss companies having equity securities listed on the SIX and not in their home jurisdiction.

In addition, if a third party notifies an issuer incorporated in Switzerland and whose equity securities are listed in Switzerland, or an issuer incorporated outside Switzerland and whose equity securities have a primary listing on a Swiss stock exchange that it has (directly, indirectly or acting in concert with other third parties) acquired or disposed of shares (including certain financial instruments relating to such shares) and thereby reaches, exceeds or falls below the thresholds of 3, 5, 10, 15, 20, 25, 33.33, 50 or 66.66 per cent of the issuer's voting rights, the issuer must

publish a notice regarding such a shareholding on the electronic platform maintained by the relevant disclosure office, if any, or, in the absence of such an electronic platform, in the Swiss Official Gazette of Commerce and in at least one of the main electronic media specialising in stock market data. The same duty applies if the issuer acquires or disposes of its own shares. Issuers are subject to additional reporting obligations if they are subject to a public takeover offer.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The main rules prohibiting market abuse are the provisions of SESTA governing insider trading and market manipulation, which provide for both criminal law and regulatory remedies. The regulatory provisions define insider trading and market manipulation in a manner that goes beyond the criminal offences of insider trading and market manipulation set forth in SESTA (eg, no wilful intent is required) and apply to all market participants regardless of whether they are subject to the supervision of FINMA. Since the scope of those regulatory prohibitions is rather wide and also encompasses legitimate behaviour, the implementing ordinance to SESTA (SESTO) provides for certain exemptions.

Additional rules of conduct are imposed on banks, securities dealers and other financial intermediaries subject to the supervision of FINMA. However, these additional rules of conduct only apply to financial intermediaries subject to the supervision of FINMA, and do not generally apply (subject to certain exceptions) to foreign firms acting in Switzerland on a cross-border basis exclusively.

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

SESTO permits certain price stabilisation measures in connection with a public offering of securities. Such stabilisation measures are only permitted if, inter alia, both the contemplated stabilisation period and the securities dealer carrying out the market stabilisation are made public before the relevant securities start to trade, the market stabilisation occurs within 30 days of the offering, the trades in relation with the market stabilisation are made public and are carried out at a price not exceeding the respective issue price, or in the event of a trading with rights or convertible rights at a price not exceeding the relevant market price.

Liabilities and enforcement**19 What are the most common bases of liability for a securities transaction?**

If there is a public offering of securities, the most common basis of liability is prospectus liability. The present view in Switzerland is that such liability is a liability in tort. Anyone who has participated intentionally or negligently in the preparation or dissemination of a prospectus or a similar instrument containing statements that are untrue, misleading or not in compliance with statutory requirements, is liable to compensate any person who acquires the relevant securities and suffers damage as a result. Improper securities transactions may also give rise to enforcement measures under SESA and the Financial Market Supervision Act (eg, disgorgement of illicit profits) or criminal prosecution for insider dealing or market manipulation.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

Although prospectus liability gives rise to civil litigation, insider dealing and market manipulation may give rise to criminal proceedings against the persons involved. Also, administrative proceedings may be initiated by FINMA, which may give rise to measures such as a suspension of the relevant trader, an injunction from assuming a supervisory function in a regulated firm or a disgorgement of illicit profit. Further measures may be taken against regulated firms, such as a licence withdrawal. Moreover, SIX has disciplinary powers in cases of improper activities in relation to securities listed on its markets and may decide to impose penalties on issuers, participant firms or individual traders.

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Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

Capital Markets Law No. 6362 (CML, or New CML), which entered into force on 30 December 2012, is the main legislation governing securities offerings in Turkey. The New CML replaced Law No. 2499 (Old CML).

The Capital Markets Board (CMB) of Turkey regulates the capital markets and capital market instruments. The CMB has several communiqués and ‘principle decisions’ on securities offerings. The New CML’s definition of securities extends to all capital markets instruments consisting of shares, other securities similar to shares and depository receipts related to shares, debt instruments or debt instruments based on securitised assets, revenues and depository receipts related to these securities which are: sold in Turkey, sold to Turkish investors or sold by issuers domiciled in Turkey. The CML authorises the CMB to impose administrative monetary penalties for violating the specific provisions of the secondary capital markets regulations and to take necessary measures against those who are in breach of law and communiqués, or to bring the case to the public prosecutors’ offices if the breach constitutes a criminal activity under the CML.

Since the enactment of the New CML, CMB has issued numerous new communiqués and principle decisions and has revised the current secondary regulations in line with the New CML. The secondary legislation based on the Old CML remains in force to the extent it does not contradict the New CML. However, the CMB targets to revise all communiqués, regulations and principle decisions to comply with the New CML.

The New CML has created a new securities exchange, called Borsa Istanbul AŞ (BIS), which combines all exchanges operating in the Turkish markets (Istanbul Securities Exchange, Turkish Derivatives and Options Exchange and Istanbul Gold Exchange). BIS was registered on 3 April 2013. Currently, BIS is the only operational exchange in Turkey. In 2014, NASDAQ OMX Group (Nasdaq) and BIS concluded an agreement for the acquisition by Nasdaq of a 5 per cent equity stake in BIS and for the delivery of technologies and advisory services by Nasdaq to BIS.

The BIS markets are organised under five main categories:

- the equities market;
- the emerging companies market;
- the debts securities market;
- the precious metals and diamonds market; and
- the futures and options market.

The sub-markets of the equities market are: the national market, the collective products market, the second national market, the rights coupons market, the watch list companies market, the wholesale market, the free trade platform and official auction.

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

During a public offering, the issuer should first file an application with the CMB in order to amend its articles of association in accordance with CMB communiqués. In addition, the issuer is required to apply to the CMB to

get approval of the draft prospectus which is the main documentation of a public offering. The issuer should submit its financial statements and independent auditor’s reports to the CMB. The CML requires share issuers to make a listing application to BIS, the sole stock exchange in Turkey, for admission in order to trade in the relevant BIS markets. The issuer must also apply to the Istanbul Takas ve Saklama Bankası (Takasbank) for International Securities Identification Number (ISIN) allocation. Finally, as the CML requires, in principle, that capital market instruments (ie, shares, debt instruments, mutual fund participation certificates) must be kept in dematerialised form, issuers must apply to the Central Registry Agency (CRA) for membership and dematerialisation. Issuers also need to make the relevant applications to Trade Registry Offices during the public offering process.

Information and documentation to be provided

CMB’s Communiqué on Prospectus and Issuance Document (II-5.1) requires that the prospectus be published on the issuer’s and the underwriter’s websites and the Public Disclosure Platform (PDP) where relevant. The Communiqué also requires the issuer to register with the Trade Registry and, accordingly, to make an announcement in the Trade Registry Gazette regarding the publication of the prospectus and offering circulars.

Under the CMB regulations, a prospectus should include the financial statements of issuers, prepared in accordance with accounting standards, as well as independent audit reports. The prospectus must include all information reasonably necessary to enable a prospective investor to assess the merits of the issuer, the securities being offered and the proposed investment, including but not limited to risk factors, material financial information, material litigation and profit expectations.

Some of the main information that a prospectus should contain includes: persons liable for the prospectus; independent auditors; financial statements; risk factors; information on the issuer, the group companies and affiliates, if any; information on the operations of issuers and an evaluation of the financial situation, tangible assets, revenue expectations, organisation structure and administrators, personnel, remuneration, main shareholders and the board of directors; declaration on working capital; related parties and related party transactions; the basics of the public offering; undertakings regarding the sale of securities; tax issues; costs of the public offering; a listing of securities, etc. The prospectus may also include appraisal reports, a legal due diligence report or any other report that might be of importance to the purchasing decisions of potential investors.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

An application is made to the CMB for approval of amendments to articles of association where necessary.

For an initial public offering (IPO) of a company, the articles of association of the issuer should be amended in accordance with the CMB regulations. In order to do so, the issuer should draft the relevant amendments and apply to the CMB for approval by a board of directors’ resolution. The General Assembly resolves a decision for the limitation of pre-emptive purchase rights of its existing shareholders if the public offering is to be conducted through capital increase.

Application for the CMB approval

In line with the articles of association amendments, the issuer should prepare a prospectus following relevant CMB regulations. In principle, all securities offerings to the public are required to be processed with an approved prospectus. The CMB evaluates the application by considering whether the prospectus duly and genuinely reflects the information regarding the company and the shares to be issued. Offerings held with no approved prospectus cause civil and criminal consequences. The application may be carried out by an intermediary institution and/or issuer. In addition to the prospectus, an offering circular which is, an informative document regarding offering conditions, is required. The prospectus should be signed by issuers, offerors and intermediary institutions, for example, underwriters.

Application to BIS

Issuers are required to apply to BIS for admission and to be listed in the relevant markets of the exchange. This application is processed in parallel to the CMB application which may be made by an intermediary or issuer.

ISIN Code allocation by Takasbank

During the offering process, all securities to be offered should be assigned ISIN codes. Takasbank is the authorised body for ISIN allocations in Turkey.

Application to CRA for dematerialisation of securities

The CML requires securities to be issued and sold in dematerialised form in the electronic environment, without certificates. In order to do so, issuers are required to apply to the CRA for membership. Rights related to these securities are monitored and relevant records are kept by the CRA electronically.

In the public offering of capital market instruments other than shares (eg, debt instruments) issuers are still required to prepare a prospectus which must be in accordance with the relevant guidelines of the CMB.

Under the current legislation issuers cannot initiate the sale of securities without an approved prospectus or an issuance document. The examination processes of the CMB and BIS would typically last three to six weeks depending on the technicalities and practicalities of the application.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

The CMB Communiqué on the Establishment and Principles of Activities of Investment Companies (III-39.1) requires investment companies to be objective in all publicity, advertising and announcements made in relation to investment services and activities in all types of communication. Any announcements made to the public in connection with an offering of securities must not include inaccurate, misleading, groundless or exaggerated information or omit any material information. The CML requires that the information included in advertisements must not be broader than or inconsistent with the contents of the prospectus and must describe the current status of the issuer and the securities fairly. Except under the conditions permitted under the CML communiqués and guidelines investment companies cannot undertake to guarantee absolute returns or compensation of damages that may incur due to unsuccessful public offering. Numerical data in relation to the financial status of the investment companies and statements in relation to 'portfolio size', 'number of clients', or 'transaction size' should reference official sources. The prospectus may be published before and after it is approved by the CMB provided it is published in accordance with the principles and rules determined by the CMB for publishing a prospectus prior to approval.

The CMB has the power to prohibit and confiscate publications that it considers misleading. Making misleading statements in connection with any offering of securities in Turkey would be a criminal offence for the issuer's board of directors and the authorised people who signed the documents to be disclosed. In addition to criminal liability, civil liability may also arise for providing misleading or inaccurate information under general Turkish law.

Under the CML, the issuers are responsible for losses arising from inaccurate, misleading and incomplete information included in the prospectus. In cases where the loss cannot be compensated for by the issuer or relevant persons such as board members and people authorised by the issuer who signed the documents to be disclosed issuer when it is clear that the loss cannot be compensated for, those who act as public offerors, the leading intermediary institution which acts as intermediary during the issue, the

guarantor if any, and the members of the board of directors of the issuer are responsible to the extent of their fault and to the extent the losses can be attributed to them depending on the necessities of the situation.

The CMB Communiqué on the Establishment and Principles of Activities of Investment Companies (III-39.1) sets out the general principles for investment companies to prevent and/or disclose conflicts of interest that may arise with their clients. This principle applies to research reports as well.

With regard to investment advisory activities, authorised intermediary companies are obliged to disclose to their clients all relations and conditions that might affect the objectivity of their recommendations, especially their important financial benefits arising from the recommended capital markets instruments or important conflicts of interest with the issuer. According to the CMB's Share Communiqué (VII-128.1), underwriters who act as the leading underwriter in an IPO cannot prepare an analyst's report in which a price determination report is analysed.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

The rules for IPOs and secondary public offerings (SPO) in the CMB regulations are essentially the same.

All existing shareholders have statutory pre-emption rights unless otherwise provided in a company's articles of association. It is possible to restrict the exercise of such pre-emption rights in public and non-public companies with a shareholders' resolution to approve the restriction of pre-emption rights or if the company has adopted the registered capital system. These procedures are applicable to both IPOs and SPOs if the offer to the public is carried out by a capital increase.

As per the CMB's Share Communiqué (VII-128.1), a prospectus is required for both IPOs and SPOs. However, there are differences in the required information to be included in the prospectus, and the process of preparing a prospectus for a SPO is more straightforward because it takes place after a company has already gone public. In a SPO, if the shares of a company are already listed on the BIS, listing application to the BIS is not necessary, and so some of the documents, such as an independent legal opinion and a listing application, are not required.

In terms of liability, under the CML issuers are responsible for losses arising from inaccurate, misleading and incomplete information included in the prospectus. The liability for information furnished in the prospectus rests with the issuer in a SPO. If the loss cannot be compensated by the issuer who signed the documents to be disclosed, or when it is clear that the loss cannot be compensated for, those who acted as public offerors, the lead intermediary institution which acted as intermediary during the issue, the guarantor, if any, and the members of the board of directors of the issuer are responsible to the extent of their fault and to the extent the losses which can be attributed to them according to the necessities of the situation. Real persons and institutions such as independent audit, rating and appraisal firms preparing the reports that are included in the prospectus will also be held responsible under the CML for any inaccurate, misleading and incomplete information included in the reports they prepared.

6 What is the typical settlement process for sales of securities in a public offering?

The sales process of an IPO may commence, in principle, at the earliest, three days after the prospectus and the price determination report are published. For SPOs the sales process may begin the day after the prospectus and the price determination report are published. The sale period may last from two days to 20 days as determined by the issuers.

The settlement of securities in public offerings for issuers which apply registered capital system must be realised on same day as the sale. For issuers who do not apply the registered capital system, the settlement must be done within 60 days for bearer shares and 90 days for registered shares.

Takasbank is the only institution which may be used for the settlement of securities transactions in Turkey. The CRA is in charge of the custody of securities in a dematerialised form in Turkey.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

Private placing is mainly regulated under the Communiqué on the Issuance of Capital Market Instruments (II-52). Private placements can be

conducted in two ways: to predetermined investors, at most 150 people at a time, or alternatively, to qualified investors. The capital market instruments which are traded on the BIS's Emerging Companies Market may be subject to private placing by means of capital increase. An application to make a private placing must be filed with the CMB to obtain approval for the issuance document. The procedure for the approval of an issuance document in all types of private placing is the same as the procedure for the approval of a prospectus in a public offering procedure.

In a private placing to predetermined investors the number of securities holders should not exceed 150 people at any time, otherwise the issuer is required to draft a prospectus. However, there is no such upper limit on the number of investors for sales to qualified investors.

Private placing to pre-determined investors or to qualified investors must be conducted by way of an issuance document, which must be approved by the CMB, instead of by way of a prospectus. Any private placing conducted without an approved issuance document may have legal consequences.

Investors are required to sign a declaration in which they confirm they understand and accept the terms and conditions of the private placement. These declarations should be kept by issuers or intermediary institutions, if any, for five years. In sales to qualified investors the following should be included in the declaration: the risks regarding the transaction, and the confirmation of the understanding of such risk by the qualified investor and the investor's declaration that she or he declares him or herself a qualified investor.

8 What information must be made available to potential investors in connection with a private placing of securities?

The issuance document should include the basic qualifications and sale conditions of relevant securities laid out in an easily understandable and assessable manner.

The CMB has published standard issuance document formats in its website for shares and other securities. Accordingly standard documents should include the issuer's name and address, the date of the board of directors' or general assembly's decision on issuance, place of issuance, method of sale, price and nominal and total value of securities to be sold, total capital amount of issuer, issuance limit, information on underwriters and guarantors, if any, etc.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

Capital market instruments issued by way of private placing are subject to some restrictions in terms of transferability according to the Communiqué on the Sale of Capital Market Instruments. The placement of capital market instruments to pre-determined investors is limited to 150 people at the specific time that a private placement is floated. The term for the sale of shares issued in accordance with a capital increase conducted through private placement starts within 10 days following the release of an issuance document and the sale of the shares should be completed within a maximum of 10 days.

BIS controls the Offering Market for Qualified Investors, the market where debt securities of issuers are issued to qualified investors. In this market, sale and purchase of debt securities can only be made among persons who meet the criteria for qualified investors. Debt securities which are issued to qualified investors in the Offering Market for Qualified Investors start trading as unlisted securities on the Outright Purchases and Sales Market without further requirements following the completion of the issuance or expiry of the issuance period.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

Decree No. 32 on Protection of Turkish Currency sets out that an issuer domiciled in Turkey may issue offerings provided that it complies with banking and CMB regulations.

According to Decree No.32, there is no restriction on the export of securities and other capital market instruments. The sale of capital market instruments abroad to be issued and/or offered to the public by legal entities residing in Turkey, excluding public institutions and establishments,

shall be free, provided that such instruments are registered with the CMB pursuant to capital market legislation.

Under the CMB Communiqué on Prospectus and Issuance Document (II.5.1) for any sale of securities abroad, issuers should draft an issuance document which should be approved by the CMB. Additionally, issuances held abroad should, in principle, be conducted electronically through the CRA systems.

The CMB communiqués (ie, Communiqué on Prospectus and Issuance Document, Share Communiqué, Debt Instruments Communiqué) apply to offerings of capital market instruments including securities, equity or debt to persons outside Turkey by an issuer domiciled in Turkey. The Debt Instruments Communiqué (II-31.1) includes different documentation requirements to be submitted for debt instruments being offered offshore.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depository shares or rights offerings?

Warrants and certificates

Offerings of warrants and depository shares are subject to special CMB regulations (ie, Communiqué on Warrants and Investment Company Certificates (VII.128.3)) and Communiqué on Foreign Capital Market Instruments, Depositary Certificates and Foreign Investment Fund Shares (VII-128.4). However, exchangeable or convertible securities are subject to the regulations for ordinary bonds and bills. See questions 2 to 9.

Warrants and certificates to be issued by investment companies ie, domestic or foreign banks and intermediary institutions may be issued through public offering or private placing. Local private placing can be offered only to qualified investors. In order to issue warrant and certificate, the issuing investment company shall have a long term rating note of which should be no less than first three of best rates. The remaining investment companies with no required rating note would need to have a guarantor bank or intermediary institution that satisfies rating note requirement.

Listed companies as well as companies whose shares to be listed may issue warrant through public offering or private placing.

Warrants and investment company certificates should be sold through an intermediary institution and should be trading at exchange including the circumstances that they are sold via private placing to qualified investors. The maturity of warrants and certificates would be between two to five years, in principle. Prospectus requirement for public offering and issuance document requirement for private placing also applies to warrant and certificate issuances.

Depository certificates

Depository certificates may be offered to public through a prospectus. There should be no limitation on transfer of securities, payment of rights derived from underlying obligation. In public offering of depository certificates, issuing company should assign a representative in Turkey. Depositories may be assigned as representative. Issuers are subject to reporting obligations, financial reporting and independent audit. Administrative and financial rights and usage of those rights derived from underlying securities are subject to local legislation of foreign issuers.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

The underwriting arrangements for an offer of shares to the public may be according to a best efforts method or an intermediary underwriting method as per the Communiqué on the Principles Regarding Investment Services and Activities and Ancillary Services (III-37.1). The best efforts method requires the underwriter to show its best efforts in its attempt to sell as many shares as possible to the public in an initial public offering and to enable the return of those shares that have not been taken up within the sale period specified in the prospectus to the issuer or seller and the sale of those shares to those people who have committed to purchase the unsold shares.

The intermediary underwriting method has two sub-categories: firm commitment underwriting and standby underwriting, both of which can be undertaken wholly or partially. Under the firm commitment underwriting method, the underwriters purchase all (or a portion of) the shares directly from the issuer by paying cash, at an agreed upon price in advance of the public offering sale to the public. Under the standby underwriting

method, the underwriters commit to purchase all or part of the remaining unsold capital market instruments by paying the consideration in cash after the public offering procedure. The practice of the partial standby method is common in Turkey.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

According to the Communiqué on the Principles Regarding Investment Services and Activities and Ancillary Services (III-37.1), the CMB published guidelines regarding the minimum content and basics of underwriting agreements. However, the guidelines cover only some parts of such agreements. The remaining content in underwriting agreements is provided in accordance with market practices.

According to the guidelines, the agreement should include: the type of underwriting; basics of capital market instruments (ie, shares); debt instruments; terms and conditions; sale methods; allotments; rights and obligations of parties and consortium members, if any; conditions on success fees and the application of price stabilisation following the public offering.

Indemnity provisions

The relevant sections of underwriting and consortium agreements regarding rights, obligations and undertakings of issuers and selling shareholders typically include indemnification provisions in which the issuers indemnify intermediaries from any loss, damage and liability arising out of breaches of representation, warranties and any untrue statement or omission in the prospectus. Such indemnification provisions are valid provided that they are in accordance with the liability provisions of the CML.

Force majeure provisions

In an underwriting agreement, it is typical to include force majeure provisions which grant issuers and underwriters the right to terminate or postpone the public offering and, accordingly, the underwriting. Under such provisions, parties may terminate or postpone the public offering if the offering becomes impossible or extremely difficult because of judicial decisions, decisions of other authorised bodies, war, fire, acts of God, coup d'état, terrorist attacks, flood, earthquake, etc.

Success fees

CMB regulations allow parties to negotiate success or performance fees. However, the CMB guideline requires that underwriting agreements should set the details concerning the calculation and payment of any success fees in the underwriting agreement and the prospectus.

Over-allotment provisions

Underwriting agreements may contain greenshoe provisions for over-allotments which are broadly applied in Turkish IPOs. The CMB's Share Communiqué (VII-128.1) includes detailed provisions regarding the application of over-allotments. The underwriting agreement should be in line with the CMB communiqués and guidelines. Prospectuses should involve terms regarding the application of over-allotments.

14 What additional regulations apply to underwriting arrangements?

In addition to the requirement to comply with the securities legislation that affects underwriting arrangements such as the CMB's Share Communiqué (VII-128.1) and the Communiqué on the Sale of Capital Market Instruments (II-5.2), some provisions in the Commercial Code and the Code of Obligations are also applicable to underwriting arrangements.

Before obtaining the CMB's approval for the draft prospectus, which should be in compliance with the Communiqué on Prospectuses and Issue Certificates (II-5.1), the underwriting agreement must be submitted to the CMB which may request changes to ensure its compliance with CMB communiqués. The percentage of the total offering amount that is to be underwritten must be disclosed in the prospectus, as stated above.

The CMB's Share Communiqué (VII-128.1) requires underwriting for intermediary institutions and imposes thresholds of 20 million lira and 40 million lira in market value on capital market instruments to determine the underwriting obligation. The underwriter should undertake the purchase of all remaining unsold shares at the sale price if the value of the capital market instruments is under 20 million lira. If the value of the shares is

between 20 million lira and 40 million lira, the underwriter should undertake to purchase: all of the remaining capital market instruments up to a value of 20 million lira and half of the shares exceeding that value. The underwriter does not have any obligation to purchase the remaining shares if the market value of those shares is over 40 million lira.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

All issuers are subject to reporting obligations. However, issuers who have sold their capital markets instruments via private placements may enjoy some exemptions.

Issuers that are subject to the CMB Communiqué on Material Events (II-15.1), one of the main regulations regarding the public disclosure requirements of public companies, are the same issuers whose shares are subject to transactions in different platforms and markets determined by the stock exchange. This includes issuers with temporarily closed operation sequences and those which are publicly held and their related parties.

Issuers must make relevant public disclosures as soon as an inside information which may affect the price of securities or decisions of investors is obtained. However, an issuer has the authority to postpone the public disclosure of inside information in order to protect the legitimate interests of the company provided that the issuer ensures the inside information is not made public.

Furthermore, the CMB Communiqué on Material Events (II-15.1) sets forth the circumstances under which shareholders or founders of a public company or an investment fund become obliged to make ongoing public disclosures. This obligation relates to indirect or direct changes in their shareholding or voting rights in the issuer company that exceed or fall below certain thresholds.

The disclosure requirements for issuers that have issued non-listed securities are regulated under the CMB Communiqué on Material Events of Non-Listed Public Securities (II-15.2). The level of the disclosure required to be made by an issuer that has issued non-listed securities is lower than the disclosure requirement in relation to listed securities.

16 What information is a reporting company required to make available to the public?

CMB communiqués require issuers (excluding investment, house-financing and equity financing funds) to disclose their financial reports in accordance with the CMB Communiqué on the Principles of Financial Reporting in Capital Markets (II-14.1). Thus, such listed companies are obliged to deliver to the CMB and disclose to the public their audited annual and semi-annual financial statements, independent audit reports, and their quarterly balance sheets and income statements. The Communiqué regulates the annual and semi-annual activity reports of the boards of companies. Public disclosures are made through the PDP.

The CMB Communiqué on Material Events (II-15.1) requires listed companies to make periodic or prompt public disclosure in case of a change their capital or shareholding structure for certain thresholds. Furthermore, issuers should make prompt disclosures when inside information occurs.

Issuers of listed security instruments are required to disclose other information required within the scope of the CMB and the BIS legislation. Other information includes, but is not limited to, monthly notifications, portfolio valuation tables, articles of association, internal regulations of funds, prospectuses, circulars, notifications regarding mergers and divisions and split-ups, general information forms, invitation information form and any financial table submitted to any authority.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

Under the CML, manipulative practices are considered a criminal activity which may lead to imprisonment and judicial monetary fine. The CML regulates market manipulation in the form of two types of offence: trade based manipulation and information based manipulation.

Trade based manipulation is committed when anyone buys or sells capital market instruments and: affects the demand and the supply, creates an impression of an active market, stabilises the price of capital market instruments at a certain level, or increases or decreases the prices of capital

Update and trends

The Turkish capital markets have been undergoing restructuring since 2012, with the enactment of the New CML. Since that time, Turkish financial markets have undergone a great transformation. In 2013 and 2014 the CMB issued a large quantity of new secondary legislation, that is, *communiqués*, which have changed the playing field for almost all market players. Established by the new CML for the purpose of serving as a securities exchange, BIS has become the only exchange in Turkey, having a monopoly in the Turkish capital markets. BIS Private Market was launched and started accepting members on 26 August 2014 as a web-based and member-based platform to provide a new marketplace bringing entrepreneurs and investors together to trade shares without going public. Under BIS, the BIST Sustainability Index was launched on 4 November 2014 to provide a benchmark for BIS

companies with high performance in corporate sustainability and a platform for institutional investors to demonstrate their commitment to companies managing environmental, social and governance issues with high performance. Operated by Takasbank, Turkey Electronic Fund Distribution Platform (TEFAS/Platform) transactions commenced as of 9 January 2015 providing investors with access to mutual funds authorised by the CMB. These regulatory and market developments in capital markets determine the upcoming investment trends in 2015. As the new legislation on investment institutions and asset management companies becomes fully effective in 2015, it is expected that investment institutions will operate more like investment banks. All these reforms are expected to create a favourable capital market, more aligned with international practices.

market instruments with the intention to create a wrong or deceptive impression.

Information based manipulation is committed when anyone provides or disseminates misleading, false or deceiving information, news or comments with the intention to create a wrong and deceptive impression to affect the value of the capital market instruments.

The CML defines insider trading as gaining a benefit, eliminating a loss or conferring a benefit on a third party by using non-public information which has the effect of damaging the equality of treatment between traders in the capital markets.

Insider trading is committed if the information is used before such information is publicly disclosed, provided that such information has both of the following features: being directly or indirectly related to capital market instruments or issuers and the potential to affect the price or value of the capital market instruments and investors' decisions.

The CML imposes a prison sentence between two and five years for those who commit an insider trading or manipulation offence or: a judiciary fine for those who commit insider trading or a judiciary fine equivalent to an amount to be monetised per number of days varying from 5,000 days up to 10,000 days for those who commit a manipulation offence.

In addition to provisions in the CML, the CMB has also issued some *communiqués* on manipulation and insider dealing related actions, such as:

- the *Communiqué* on Market Disruptive Actions (VI-104.1);
- the *Communiqué* on the Notification Obligation regarding Market Manipulation and Insider Dealing Offences (V-102.1); and
- the *Communiqué* on the Measures to be Imposed in Insider Dealing and Market Manipulation Investigations (V-101.1).

Manipulative practices categorised under the CML as actions subject to an administrative fine include market disruptive actions and capital market crimes consisting of insider trading and market manipulation.

Actions and transactions without a reasonable economic ground or a financial justification and which are of a nature which causes the deterioration of the function, transparency and consistency of exchanges and other organised markets in securities are defined as market disrupting actions provided that they do not constitute crime. An administrative fine of between 24.672 lira and 617.388 lira is applied to those who engage in market-disrupting actions.

Investment firms and capital market institutions are obliged to notify the CMB of any matter which implies or raises the question of whether a transaction may constitute the crime of insider dealing or market abuse.

The CML sets forth the measures to be applied in the investigation of insider trading and manipulation activities such as:

- prohibiting trading activities in the exchanges temporarily or permanently;
- changing the clearing methods;
- restricting margin trading, short selling, borrowing and lending transactions;
- imposing a guarantee obligation or changing the obligation;
- determining different transaction principles for trade in different markets;
- restricting the extent of the distribution of market data; and
- imposing a transaction or position limit.

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

Price stabilisation to support the price of securities in connection with an offering is an exception to activities otherwise considered insider trading and manipulation. Thus, the CML allows the purchase and sale of capital market instruments or giving or cancelling orders exclusively for the purpose of supporting the market price of these instruments for a pre-determined period, provided that these operations are performed in line with the CMB legislation. Price stabilisation measures are stipulated under the CMB's Share *Communiqué* (VII-128.1), which permits the underwriter to buy shares after the trading of the offered shares starts, if the share price falls below the offer price, in the following situations: public offering of non-public companies, public offering of non-public companies by a capital increase, or the secondary public offering of publicly held companies.

The *Communiqué* on the Issuance of Capital Market Instruments (II-5.2) sets forth the principles to be followed in book building by the price stabilisation method.

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

The most common basis of liability for the issuer of a securities transaction is the liability arising out of the accuracy of the information provided in the prospectus. The following parties to a security transaction may be held liable: public offerors, the leading intermediary institution, members of the boards of directors of the issuers, guarantors and brokerage houses. All are responsible for the accuracy of the information in the prospectus and are liable to pay damages for false statements contained in the prospectus and may be subject to judicial fines to the extent of their fault and of their losses according to the necessity of the situation. In addition, independent auditors and rating agencies and appraisal firms are responsible for the accuracy of their reports, which are included in the prospectus.

The issuer, and depending on their faults and under certain circumstances, the members of the board of directors of the issuer, may be responsible for the compliance of the preparation and submission of the financial statements and reports with the CMB regulations, as well as the true and fair presentation of financial statements and reports.

In addition to judicial fines, the CMB may impose administrative fines for breaches of the CMB *communiqués* or decisions and take measures that it deems necessary or bring the case to court or the public prosecutor's office where relevant.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

The CMB has broad supervisory and enforcement authority. According to the CML, by virtue of its supervisory and enforcement authority, the CMB is authorised to take any measures it deems necessary regarding a breach or an attempted breach of the CML. The CMB may take actions such as terminating securities transactions and offering securities to the public if such transactions do not comply with applicable requirements.

As per the CML, the mechanisms for seeking remedies and sanctions for improper securities activities are imprisonment, judiciary fines imposed by the criminal courts and administrative fines imposed by the CMB.

The CMB is authorised to initiate legal prosecution by submitting a written complaint to the Public Prosecutor's Office, where the penalties for the related offences may be imprisonment or judicial fines. The possible prison sentence is between two and five years and the possible judicial fine is equivalent to an amount of between 20 lira to 100 lira to be monetised per number of days varying from 5,000–10,000 days under article 109 of the CML.

The CMB may impose an administrative fine of between 24,671 lira and 308, 408 lira. Related parties may bring proceedings before the administrative court to challenge the decisions of the CMB regarding the administrative fines.

Another mechanism for seeking a remedy is to apply to the court to obtain a preliminary injunction decision and a lawsuit for the annulment of the transactions carried out based on an action breaching the licensing requirements.

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Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

Two statutes primarily govern the US securities markets at the federal level:

- the Securities Act of 1933 (the Securities Act), which was designed to regulate offerings of securities to the public; and
- the Securities Exchange Act of 1934 (the Exchange Act), which was designed to regulate subsequent trading of those securities in secondary market transactions.

These statutes regulate the securities markets through disclosure requirements as opposed to any requirements for regulatory approval of the merits of an offering.

The Securities Act requires that every offer and sale of a security in the United States be registered with the Securities and Exchange Commission (SEC) unless an exemption is available (eg, offers and sales not involving a 'public offering'). The Securities Act has two basic objectives: to provide investors with material financial and other information regarding the securities to be offered, and to prevent fraud in connection with sales of securities.

To achieve these objectives, the Securities Act requires that, in the absence of an exemption, a statutory prospectus that has been filed with the SEC as part of the registration process be furnished in advance to purchasers of securities and imposes statutory liability for material omissions or misstatements in such documents or any other documents that may be furnished to purchasers of securities under the Securities Act.

The Exchange Act requires US and non-US companies with a security listed on a US stock exchange (including the New York Stock Exchange and NASDAQ), meeting certain asset amount and shareholder number requirements or making public offerings of securities in the United States, to register such securities with the SEC and to file with the SEC annual reports, quarterly reports (in the case of US companies) and certain other reports containing information similar to that required in a registration statement under the Securities Act (see also question 15).

On 5 April 2012, the US adopted a capital formation reform bill known as the Jumpstart Our Business Startups Act (the JOBS Act). The JOBS Act significantly eases restrictions under the Securities Act relating to the initial public offering process for equity securities of a newly designated class of smaller companies and to the private placement capital raising process for virtually all issuers. The JOBS Act also provides ongoing relief, mainly for these smaller companies, from certain requirements under the Exchange Act as well as from certain existing (and potentially future) accounting and auditing rules. Many provisions of the JOBS Act were effective immediately, however the SEC is still in the process of adopting rules to implement other changes and continues to provide guidance on how it will implement some of the otherwise self-executing changes.

Offerings of securities are also subject to state 'blue sky' laws, although the National Securities Markets Improvement Act of 1996 has largely pre-empted state securities laws.

In addition, companies that complete a securities offering that is registered with the SEC or otherwise become subject to the reporting obligations of the Exchange Act also need to comply with the provisions of the Sarbanes-Oxley Act of 2002, including the provisions with respect

to internal control over financial reporting, prohibitions on loans made to executive officers and directors, auditor independence and independent audit committees, certifications by executive officers of financial reports and increased civil and criminal penalties for violations of the securities laws and also the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), which introduced important changes to the corporate governance and executive compensation landscape for public companies.

Regulatory authority

The SEC is the primary administrative authority charged with administering the Securities Act, the Exchange Act and the other federal securities laws. In addition to enforcing these statutes, the SEC is charged with promulgating rules and regulations under such statutes.

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

Unless an exemption from the registration process exists, an issuer must file a registration statement with the SEC before any offers of securities may be made or solicited by the issuer or underwriters (other than specified communications in respect of 'emerging growth companies' as described below), and the registration statement must be declared effective by the SEC before the securities may be sold. The information required to be included in the registration statement is set forth in the rules under the Securities Act and is intended to provide investors with all material information about the offering as well as the business and financial condition of the issuer.

To facilitate disclosure of material information about the issuer and the offering, the SEC promulgated Regulation S-K (governing disclosure generally) and Regulation S-X (governing financial disclosure), which together codify the disclosure requirements for registration statements filed under the Securities Act, regardless of whether the offered security is debt or equity or the offering is primary or secondary.

The rules governing financial disclosure for non-US issuers now allow financial statements of non-US issuers prepared in accordance with International Financial Reporting Standards, as issued by the International Accounting Standards Board, to be accepted by the SEC, subject to certain conditions, without the need for a reconciliation to US GAAP.

The JOBS Act eases certain of these registration requirements for 'emerging growth companies' (EGCs), entities that issue or propose to issue any security and that have less than US\$1 billion in total annual gross revenues and meet certain other requirements. EGCs are granted relief from, among other things, certain financial disclosures required in a common equity initial public offering registration (IPO) statement and may elect to have such registration statement confidentially reviewed by the SEC prior to its use.

In addition to registering the securities with the SEC, an issuer generally applies for listing on a US securities exchange for trading. To be listed on a US securities exchange, it is also necessary to register the securities under the Exchange Act, which can generally be accomplished with a short-form filing under the Exchange Act incorporating the Securities Act filings made with respect to the offering of such securities. In addition, the

relevant stock exchange application usually requires certain undertakings from the issuer that it meets the minimum standards for listing. Such listing standards vary for different types of equity and debt securities.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

Section 5 of the Securities Act effectively divides the registration process into three periods: the pre-filing period, the waiting period and the post-effective period.

The pre-filing period is the period between the time there is an agreement or understanding between the issuer or seller and the underwriters to issue and sell securities and the filing of the registration statement. During the pre-filing period, which typically begins 30 to 45 days before the filing of the registration statement, offers to sell or buy securities, other than by WKSIs and EGCs (as set forth below), are prohibited under the Securities Act.

The waiting period is the period between the filing of the registration statement and when it is declared effective by the SEC. Until the registration statement is declared effective, it is unlawful under the Securities Act to sell the securities that are the subject of the registration statement. However, 'offers' made orally or pursuant to a preliminary prospectus or free-writing prospectus (discussed below) meeting the requirements of the Securities Act are permitted. Offers made by television, radio, internet or any sort of written notice, circular, advertisement, letter or communication in writing not meeting the requirements of a preliminary prospectus or free-writing prospectus under the Securities Act are impermissible during the waiting period. Accordingly, during the waiting period, the underwriters and certain executive officers of the issuer normally commence a 'roadshow' during which they distribute preliminary prospectuses and make oral presentations to potential investors. While on the roadshow, which can last up to several weeks, the underwriters also begin obtaining non-binding indications of interest from potential investors, enabling them to judge the level of investor interest and set an appropriate offering price for the securities.

The length of the waiting period varies according to several factors. A registration statement relating to an issuer's initial public offering will almost always be selected by the SEC for a full review, whereas registration statements relating to more frequent issuers and secondary offerings are less likely to be reviewed. In addition, the particular industry of the issuer and the presence of any 'hot-button' issues in the registration statement may also increase chances for SEC review. If a registration statement is selected for full review, the SEC will generally review the registration statement for approximately 30 days before issuing a comment letter containing questions and requests for additional or supplemental information. Depending on the number and the nature of the SEC comments, issuers are generally able to respond and clear comments within three to six weeks following receipt of the initial SEC comment letter.

The post-effective period is the period after the registration statement has been declared effective by the SEC. During this time the securities registered under the registration statement may be sold so long as the security or, in most instances, the confirmation of sale that is delivered to the purchaser is preceded by a filing with the SEC of a final prospectus meeting the requirements of the Securities Act. Once the registration statement has been declared effective, the issuer and underwriters will negotiate the final offering price and the size of the offering based on the indications of interest solicited during the roadshow as well as other factors, and a final prospectus containing such pricing information will be filed with the SEC and may be printed and sent to investors along with final sales confirmations.

SEC rules in effect from 1 December 2005 substantially altered the registration and communication framework applicable to public offerings. Among the most significant changes was the creation of a class of reporting companies referred to as 'well-known seasoned issuers' (WKSIs), comprising companies with a worldwide public float of US\$700 million or that have issued US\$1 billion of non-convertible securities in registered primary offerings for cash in the last three years. WKSIs are entitled to a flexible registration and communication regime, particularly with respect to 'shelf' registration statements. Shelf registration statements, once effective, allow issuers to make continuous or delayed offerings of registered securities. Under the new rules, shelf registration statements filed by WKSIs become automatically effective upon filing with the SEC and are subject to minimal incremental disclosure requirements. Another significant change

is that the SEC now permits issuers, subject to certain conditions, to use free-writing prospectuses after and, in the case of WKSIs, before filing a registration statement with the SEC. Free-writing prospectuses are written communications, including electronic communications, that constitute offers of securities other than statutory prospectuses filed with the SEC.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Offers of any kind made before the filing of a registration statement, and written offers made other than by a preliminary prospectus or a free-writing prospectus during the waiting period, are violations of section 5 of the Securities Act. Because 'offer' is defined to include 'every attempt or offer to dispose of, or solicitation of an offer to buy [...] for value', and prospectus is defined to include 'any notice, circular, advertisement, letter or communication, written or by radio or television', issuers and underwriters must carefully monitor all publicity about the issuer or the proposed offering in order to avoid running foul of the Securities Act.

Notwithstanding the provisions of section 5 of the Securities Act, the SEC has issued several rules to permit limited publicity relating to the issuer and the offering during the pre-filing and waiting periods. Before filing a registration statement, an issuer may publicly disclose in a press release that it intends to make a public offering of securities, provided that such release contains only limited information (such as the name of the issuer and the title, amount and basic terms of the securities being offered). The underwriters may not be named in such release. In addition, communications by issuers more than 30 days before filing a registration statement are not considered prohibited offers, provided they do not reference a securities offering and provided issuers take reasonable steps to prevent further distribution or publication of such communications during the 30-day period preceding the filing of a registration statement. The SEC also allows reporting issuers (but not other offering participants, including underwriters) to continue publishing regularly released factual business information and forward-looking information, but without referencing an offering. In addition, as discussed in question 3, WKSIs are permitted to make oral offers and use free-writing prospectuses even before a registration statement is filed. During the period after a registration statement is filed but before it is declared effective, the issuer can also advertise the offering through a 'tombstone ad' that complies with the Securities Act rules. Such advertisements are also restricted to certain basic information about the issuer and the offering, but may include the names of the managing underwriters.

The JOBS Act creates a new exemption under section 5 of the Securities Act to allow 'testing the waters' communications with certain investors. The new exemption permits EGCs and their representatives to engage in oral and written communications with potential investors that are qualified institutional buyers (as defined in rule 144A under the Securities Act) or institutions that are accredited investors (as defined in Regulation D under the Securities Act) to determine whether those investors 'might have an interest in a contemplated securities offering' at any time regardless of whether or not the issuer has filed a registration statement.

Research reports

In the absence of any exemptions, research reports would clearly constitute illegal prospectuses under section 5 of the Securities Act. Restrictions on the issuance of research reports are generally more stringent in initial public offerings. Underwriters, however, often conduct research on public companies and issue reports in the ordinary course of their business. To avoid hampering such ordinary course activities, the SEC has adopted rules allowing the limited publication of research reports during the course of an offering. These rules allow an investment bank that publishes research in the ordinary course of its business to continue to do so, provided the investment bank is not participating in the distribution of the issuer's securities and does not receive consideration in connection with the publication of such information from that issuer or any other persons interested in the distribution. In addition, these rules allow a participating underwriter to publish research reports with respect to an issuer that is a reporting company under the Exchange Act, so long as such underwriter has been doing so in the regular course of its business.

The JOBS Act eases certain of these restrictions related to research activities by investment banks related to EGCs. Among other relief, the JOBS Act provides that a broker or dealer is permitted to publish or distribute a research report about an EGC that is the subject of the proposed

public offering of common equity, even if the broker or dealer participates in the offering.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

Contrary to the securities laws of several European countries, there are no special rules differentiating primary and secondary offerings in the United States. Pre-emptive rights in the United States are rare, and the US securities laws do not contemplate any special rules where these rights exist. Also generally absent from the corporate laws of several states are laws that, for example, require state approval for the issuance of shares or impede the ability of issuers to indemnify selling stockholders in such a way that would necessitate special rules differentiating primary and secondary offerings.

6 What is the typical settlement process for sales of securities in a public offering?

The SEC has adopted a rule mandating that the settlement date for sales of securities in a public offering is three business days after the date of the contract of sale (unless the securities were priced after 4.30pm Eastern Standard Time, in which case the settlement date is four business days after the date of the contract of sale). The rule also provides that the parties to a sale transaction may agree to a longer or shorter settlement cycle, although stock exchange requirements may make a longer settlement cycle difficult to implement.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

Yes, section 4(a)(2) (formerly 4(2)) of the Securities Act exempts 'transactions by an issuer not involving any public offering'. A substantial body of case law and SEC regulatory practice has developed concerning private placements under section 4(a)(2). The availability of the exemption turns on a factual analysis of several factors, including the number and sophistication of the offerees, the relationship between the issuer and the offerees, the minimum denomination of the securities being offered and the relative bargaining power between them. To ensure compliance with section 4(a)(2), issuers often have purchasers make certain representations as to their sophistication as investors and their receipt of all requisite information in connection with the offering.

In order to provide issuers with certainty regarding the section 4(a)(2) exemption, the SEC adopted Regulation D, which provides three regulatory exemptions from the registration requirements of the Securities Act for offers and sales by issuers. Rule 504 and rule 505 of Regulation D provide exemptions from the registration requirements of the Securities Act for certain securities offerings limited in aggregate dollar amount (eg, offerings not exceeding US\$1 million or US\$5 million, depending on the parameters of the offering). Rule 506 of Regulation D (by far the most widely used Regulation D exemption) provides issuers with a non-exclusive 'unlimited' safe harbour under section 4(a)(2) of the Securities Act, that exempts offerings of an unlimited amount of securities, to an unlimited number of 'accredited investors' (eg, institutions and certain wealthy individuals) and to no more than 35 non-accredited investors. The previous prohibition on general solicitation and advertising in rule 506 offerings was eliminated by rules adopted by the SEC pursuant to the JOBS Act. The relevant rule changes became effective in September 2013 and allow general advertising and solicitation in rule 506 offerings as long as all purchasers are accredited investors. In an offering made under Regulation D (subject to narrow exceptions), the issuer must exercise reasonable care to ensure that the purchasers are not taking the securities with a view to distribution or other resale.

The primary method of offering high-yield debt securities in the United States is through a section 4(a)(2) private placement by the issuer to financial intermediaries, immediately followed by a resale of such securities to 'qualified institutional buyers' pursuant to rule 144A of the Securities Act or in 'offshore transactions' pursuant to Regulation S, or both methods may be used. Resales pursuant to rule 144A and Regulation S are more fully described in questions 9 and 10.

The JOBS Act directs the SEC to adopt rules creating a new exemption from registration pursuant to section 3(b) of the Securities Act for up to US\$50 million of securities (referred to as 'Regulation A+'). The JOBS Act

also requires the SEC to create by rule a substantial regulatory framework providing for a crowdfunding exemption from registration, whereby small aggregate amounts of securities of an issuer can be sold through brokers or internet 'funding portals' to investors in small individual accounts. The SEC has proposed but not adopted rule amendments related to the additional exemption under section 3(b) and rules related to the crowdfunding exemption. Neither exemption will be available until the public comment process is completed and the SEC adopts final rules implementing each exemption.

8 What information must be made available to potential investors in connection with a private placing of securities?

If a sale is made to a non-accredited investor, Regulation D requires that certain information be provided to the purchaser within a reasonable time before the sale. The information to be provided varies according to whether or not the issuer is a reporting company under the Exchange Act, but in either case such information is similar to that which would be required in a registration statement in the case of a registered offering under the Securities Act. Regulation D does not require that any specific information be provided to accredited investors. Nonetheless, in practice issuers generally provide potential purchasers with information similar to that provided to non-accredited investors.

In addition, rule 144A and Regulation S have limited information requirements. However, issuers offering securities via section 4(a)(2) private placements coupled with resales pursuant to rule 144A and Regulation S typically provide information that is similar to what would be required in a registration statement in the case of a registered offering under the Securities Act.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

Yes. Unregistered securities purchased in a private offering may not be resold except pursuant to a registration statement under the Securities Act or pursuant to an exemption contained in the Securities Act or the rules and regulations thereunder. Several mechanisms exist to facilitate the resale of these so-called 'restricted' securities.

One such mechanism is the 'section 4(1-1/2)' exemption, now '4(a)(1-1/2)', which allows investors who purchased restricted securities in a valid private placement to resell those securities in a further private placement following the procedures set forth in section 4(a)(2) without being deemed an underwriter engaged in a distribution of securities (who is not exempt from the registration requirements of section 5 of the Securities Act).

A similar but more commonly used mechanism for resales of restricted securities is rule 144 under the Securities Act, which defines the circumstances under which an owner of restricted securities or an affiliate of the issuer may offer and sell such securities to the public without being deemed an underwriter engaged in a distribution of securities. Following rule amendments that became effective on 15 February 2008, rule 144 provides a non-exclusive safe harbour for the resale of restricted securities of a reporting issuer beginning six months after issuance of such securities, subject to requirements as to the public availability of certain information regarding the issuer and, in the case of resales by affiliates only, to limitations as to the manner and volume of such sales. With respect to the restricted securities of a non-reporting issuer, rule 144 provides a non-exclusive safe harbour for resales beginning one year after issuance of such securities. Under rule 144, after a one-year holding period, public resales of restricted securities of reporting and non-reporting issuers may now be made by non-affiliates without any restriction.

Another important mechanism for reselling restricted securities is pursuant to rule 144A under the Securities Act, which permits an investment bank or other financial intermediary who has purchased restricted securities from an issuer in a private placement to make resales of those securities to an unlimited number of 'qualified institutional buyers' without being deemed an underwriter engaged in a distribution of securities. Generally speaking, qualified institutional buyers (QIBs) consist of large institutions that own or invest on a discretionary basis, in aggregate, at least US\$100 million in securities of unaffiliated issuers. Sales under rule 144A can take place immediately after a valid private placement under section 4(a)(2), and securities acquired by QIBs pursuant to rule 144A are deemed to be 'restricted securities' for purposes of the resale restrictions. Rule 144A may not be used to offer securities that are fungible (ie, of the same class) with a listed security, and therefore it is not available in

connection with equity offerings of companies whose shares are listed on a US stock exchange.

Finally, Regulation S under the Securities Act (as described in question 10) enhances liquidity for holders of restricted securities by allowing them to resell restricted securities in offshore transactions.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

The SEC has adopted Regulation S to provide an exemption from the registration requirements for securities offered and sold outside the United States. Regulation S provides a safe harbour from the registration requirements of the Securities Act for offers and sales by issuers, distributors and their respective affiliates and resales by persons other than issuers, distributors and their respective affiliates. In general, for an offer or sale of securities to qualify for Regulation S, the offer or sale must be made in an offshore transaction and neither the issuer nor any distributor may engage in any selling activities that might condition the US market for the securities. For an offer or sale of securities to be made in an offshore transaction, the offer may not be made to a person in the United States, and at the time the buy order is originated, either the purchaser is outside the United States (or the seller reasonably believes that the purchaser is outside the United States) or the transaction takes place on a physical trading floor of an established foreign securities exchange located outside the United States. In practice, Regulation S permits US investors who purchase unregistered securities of a non-US issuer, among other things, to resell those securities in the non-US market in which such securities principally trade.

To sell restricted securities under the safe harbour provided by Regulation S, sellers must meet certain other requirements that vary according to the type of issuer. In general, these additional requirements are less burdensome when it is less likely that the securities will flow back to the US market (category 1) and more burdensome when there is an actual or potential substantial US market interest for the issuer's securities (category 3). When adequate information about the issuer is publicly available in the United States, the concerns about securities flowing into the US market are somewhat reduced, and the restrictions fall between the two extremes (category 2).

Historically, the exemption under rule 144A only has been available if both offers and sales were made only to QIBs and reliance on Regulation S is predicated on the absence of 'directed selling efforts' in the US. The prohibition on offers to non-QIBs was eliminated in the rule 144A context by rules adopted by the SEC pursuant to the JOBS Act. The relevant rule changes became effective in September 2013 and allow offers to non-QIBs in rule 144A offerings, as long as sales are made only to QIBs. In addition, the SEC has reaffirmed its historical view that permissible selling efforts in connection with a concurrent US offering should not preclude reliance on Regulation S for a non-US offering.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Convertible securities

An offering of any convertible security, whether convertible debt or warrants, raises the question of what procedures, if any, must be adopted to ensure that the issuance of the underlying securities upon conversion is exempt from the registration requirements of the Securities Act. In most cases, no additional procedures are required because section 3(a)(9) of the Securities Act exempts from the registration requirements of the Securities Act the issuance of securities upon conversion of other securities of the same issuer.

However, this exemption does not apply if a commission or other remuneration is paid or given directly or indirectly for soliciting such exchange, or where the underlying security is that of a different issuer from the issuer of the convertible security (other than in the case of an underlying security of an issuer that fully and unconditionally guarantees obligations of the issuer of the convertible security in respect of such convertible security). Accordingly, in cases where the section 3(a)(9) exemption is inapplicable, steps must be taken by the issuer either to register the underlying securities or to issue such securities pursuant to an exemption from the registration requirements of the Securities Act.

Exchangeable securities

Mandatorily exchangeable securities involve the issuance by one issuer of a debt security that is mandatorily exchangeable at its maturity into common stock of a different issuer (or its cash equivalent). In instances in which the underlying securities are restricted or the issuer of the mandatorily exchangeable securities is an affiliate of the issuer of the underlying securities, both components must be registered to consummate a public offering of the mandatorily exchangeable securities; otherwise, the underlying shares need not be registered to conduct a public offering (provided that the prospectus for the mandatorily exchangeable securities includes certain information concerning the issuer of the underlying securities unless such issuer meets certain registration eligibility and listing criteria).

Depository shares

In lieu of issuing securities directly to US investors, a non-US issuer may establish an American depositary receipt programme whereby the non-US issuer deposits its outstanding securities with the foreign correspondent of a US commercial bank and the US commercial bank issues to the US investors securities (referred to as American depositary shares or ADSs) representing the deposited securities (the physical certificates representing such ADSs are referred to as American depositary receipts or ADRs). The SEC allows non-US issuers to set up, with the assistance of US depositary banks, over-the-counter ADR programmes for shares already outstanding without a need to register the ADRs or the underlying shares under the Exchange Act if the non-US issuer agrees to provide the SEC with certain required material information that it makes publicly available in its home country. However, if the ADRs are listed on a US stock exchange or on NASDAQ, both the ADRs and the underlying securities must be registered under the Exchange Act, which subjects the non-US issuer to the SEC reporting and disclosure requirements and to the provisions of the Sarbanes-Oxley Act of 2002. Also, public offerings of ADRs in the United States must be registered under the Securities Act.

Rights offerings

In 1999, the SEC enacted a rule exempting from the registration requirements of the Securities Act certain rights offerings of non-US issuers. The primary conditions to the exemption are that, at the time of the rights offering, US security holders own no more than 10 per cent of the securities that are the subject of the rights offering, and that the US security holders are permitted to participate in the rights offering on terms at least as favourable as those offered to the other holders of the securities that are the subject of the rights offering. In addition, the securities offered in the rights offering must be equity securities of the same class as those held by the offerees in the United States directly or through ADRs.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

Public securities offerings in the United States are generally made through a syndicate of underwriters led by one or more managing underwriters. The underwriting agreement defines the relationship between the underwriters and the issuer and is the document pursuant to which the underwriters commit to purchase the securities that are the subject of the offering. The underwriters typically agree to purchase the securities three business days after the pricing date. In contrast to the practices in many other countries, the underwriters' commitments to purchase securities pursuant to the underwriting agreement are always several rather than joint-and-several. This practice reflects the limitation of liability of an underwriter under section 11 of the Securities Act to the total offering price of the securities that it underwrites.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

Indemnity

The issuer will covenant in the underwriting agreement to indemnify the underwriters (and their officers, directors, agents and controlling persons) against all liabilities and expenses arising out of alleged misstatements or omissions in the registration statement and the prospectus, excluding certain minor portions for which the underwriters assume responsibility. Because of existing legal uncertainty as to the enforceability of such indemnity provisions, underwriting agreements also usually provide that

if indemnification is held by a court to be unavailable, the issuer and the underwriters will share aggregate losses in such proportion as is appropriate to reflect the relative fault for the misstatement or omission giving rise to the loss, the relative benefits received by the issuer and the underwriters from the offering of the securities (with the liability of each underwriter being capped by the underwriting discount or commission received by such underwriter in respect of the sale of such securities), or both the losses and benefits.

Force majeure

Underwriting agreements in US offerings also routinely contain force majeure and termination clauses permitting the underwriters to terminate their obligations under the underwriting agreement if, in their judgment, there has been a sharp downturn in market conditions or deterioration of the financial condition or business of the issuer between the signing of the underwriting agreement and the scheduled closing of the offering such that consummating the offering would be impracticable. Typical force majeure clauses also extend to the occurrence of natural disasters or calamities, such as an outbreak of hostilities or suspension of trading in the United States or, in certain cases, non-US securities markets. Underwriters tend to view the unilateral right to declare a force majeure event and to terminate as a fundamental protection provided to them in the underwriting agreement. Nonetheless, force majeure clauses in US offerings are rarely exercised by the underwriters, namely because of the limited period of time between the signing of the underwriting agreement and the closing of the offering (typically three business days) and the potential reputational harm associated with an underwriter's exercise of such clauses.

Over-allotment

Because it is customary in US offerings to authorise the managing underwriters to over-allot (ie, to offer and sell more securities than the underwriters have contracted to purchase from the issuer), it is also customary in the underwriting agreement to provide the underwriters with an 'over-allotment option' allowing them to purchase from the issuer at the public offering price (less commission) up to an additional 15 per cent of the securities being offered to cover such over-allotments. The over-allotment option is more commonly found in equity offerings (and equity-linked offerings such as convertible debt) than in debt offerings.

Success fees

These are rare in US offerings because of the unique liability provisions of the Securities Act. Section 11(e) of the Securities Act limits the liability of an underwriter to the total price at which the securities underwritten by it and distributed to the public were offered. However, if any underwriter receives from the issuer some benefit, direct or indirect, for its services that is not shared proportionately with the other underwriters, then such an underwriter forfeits this limitation on liability. As a result, success fees are generally avoided by underwriters.

14 What additional regulations apply to underwriting arrangements?

Several rules and regulations of the Financial Industry Regulatory Authority (FINRA) apply to underwriting arrangements in registered securities offerings. Subject to a number of exemptions depending on the class of security and the particular offering, FINRA will review the underwriting agreement and certain other offering documentation governing the underwriting arrangements prior to an offering to ensure that the terms of such agreements and arrangements are fair and reasonable. FINRA also requires that any over-allotment option be limited to 15 per cent or less of the securities being offered. FINRA places limits on the amount of total compensation that any underwriter can receive in connection with an offering, as well as on participation by any underwriter with certain conflicts of interest in respect of the offering (for example, if the issuer will use offering proceeds to repay a loan to an affiliate of an underwriter). FINRA also imposes several limitations on the allocation of securities and other distribution practices, particularly in 'hot issues' where demand for the securities is high, the market price of the offered securities rises after pricing and potential abuses are considered more likely to occur.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

An issuer may become subject to the ongoing reporting obligations of the Exchange Act in a variety of circumstances. For instance, any issuer that has a class of securities listed on a US securities exchange is subject to the reporting requirements of the Exchange Act. These requirements apply for both debt and equity securities, whether or not the security has been publicly offered in the United States. US companies (other than 'community banks') are also required to become reporting companies if they have US\$10 million or more of assets at the end of a fiscal year and a class of equity securities held by 2,000 or more persons, or 500 or more persons who are not accredited investors.

The same is true for non-US companies, provided that at least 300 of the holders of the class of equity securities are resident in the United States and the company has not claimed, or is not eligible for, the rule 12g3-2(b) reporting exemption under the Exchange Act, which provides that non-US companies otherwise subject to the reporting requirements of the Exchange Act may instead provide (in English) certain information that the company makes public pursuant to the laws of its home country, distributes to its security holders or files with any stock exchange on which its securities are listed. In August 2008, the SEC amended rule 12g3-2(b) to impose additional conditions on eligibility for this exemption. Among other things, rule 12g3-2(b) now requires the 'primary trading market' for the subject class of securities to consist of securities exchanges located within one or two non-US jurisdictions. 'Primary trading market' is defined to mean that at least 55 per cent of the average daily trading volume in the subject class of securities occurred on securities exchanges within one or two non-US jurisdictions during the company's most recently completed fiscal year (and at least one non-US jurisdiction has a greater average daily trading volume than in the US). Further, while the information required to be published remains substantially identical, the initial and existing paper submissions to the SEC were replaced by a requirement to electronically publish (in English) the information on a company's internet website or through another electronic information delivery system generally available to the public in its 'primary trading market'.

Finally, if an issuer files a registration statement pursuant to the Securities Act relating to any security, it must file Exchange Act reports for any year in which there are 300 or more holders (or, in the case of a non-US company, 300 or more US holders) of the securities that were registered (excluding the fiscal year in which the registration statement was declared effective, during which Exchange Act reports must be filed regardless of the number of holders).

16 What information is a reporting company required to make available to the public?

The information required to be made available to the public pursuant to the Exchange Act is substantially similar to that required to be filed with the SEC in the context of a public offering of securities, reflecting a policy decision by the SEC that the information needed to make an informed investment decision is similar in the context of both purchases in a public offering and purchases in the secondary market. Based on this belief, the SEC has implemented an integrated disclosure system to achieve substantial uniformity of disclosure in filings under the Securities Act and the Exchange Act, including disclosure regarding the issuer's business, legal status, results of operations and financial condition. The JOBS Act provides relief to EGCs for certain reporting and disclosure obligations, such as 'say on pay' votes and some executive compensation-related disclosures. Additionally, EGCs are exempted from auditor attestation requirements with respect to internal control over financial reporting under section 404 of the Sarbanes-Oxley Act of 2002 and may elect to omit selected financial data for any period prior to the earliest period for which audited financial statements were presented in their IPO registration statement.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

Regulation M is the primary collection of rules in the United States on market manipulation and stabilisation, with the primary intent of preventing interested parties from engaging in activities that could artificially raise the price of a security in an offering. These rules generally prohibit

underwriters and broker-dealers participating in the offering of a security, as well as issuers and selling security holders, from purchasing (or inducing others to purchase) the securities they are selling in the offering (with certain exceptions, most notably for actively-traded securities) as well as specified 'reference' securities. Under Regulation M, persons conducting short sales within a specified time prior to pricing of an offering are generally prohibited from purchasing in that offering.

FINRA rules also aim to prevent certain manipulative practices. FINRA rules on 'free-riding and withholding' are intended, in the case of 'hot issues' where the price in the secondary market is higher than the public offering price, to ensure that all the securities in the offering are sold at the initial public offering price. The 'Papilsky Rules' adopted by FINRA are also intended to ensure that all the offered securities are sold at the public offering price without direct or indirect discounts, selling concessions or other allowances except as disclosed in a prospectus.

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

Stabilising activities in connection with an offering are permitted, provided that persons initiating stabilising bids do so with reference to the independent prices in the principal market for the security and such bids do not exceed either the independent bid or the offering price of the security.

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

There are several common bases of liability for violating federal securities laws in a securities transaction. Under section 12(a)(1) of the Securities Act, parties who improperly offer or sell securities in violation of section 5 of the Securities Act are strictly liable to the purchaser regardless of whether such purchaser's loss was related to the violation. Recovery under section 12(a)(1) is limited to either rescission or, if the plaintiff no longer owns the security, to monetary damages in an amount equal to the difference between the purchase price and the sale price of the securities.

Section 11 of the Securities Act imposes liability on, among others, an issuer, its directors and the underwriters when a registration statement contains an untrue statement of a material fact or omits to state a material fact necessary to make the included statements not misleading. A fact is 'material' if there is a substantial likelihood that a reasonable purchaser would consider such fact to be important in making his or her investment decision. If such untruths or omissions exist, any purchaser may bring a civil suit, and he or she need not prove either a causal relationship between the material misstatement or omission and the decline in value or that he or she relied on the misstatement or omission in purchasing the security. The plaintiff is also not required to prove intent on the part of the defendant. Under section 11, the defendants may escape liability by proving that the plaintiffs knew of the disclosure deficiency when purchasing the security. Defendants (other than the issuer) also have an affirmative 'due diligence' defence under section 11 whereby they can escape liability by showing that, after reasonable investigation, they had reasonable grounds to believe that the information contained in the registration statement was true and that nothing was omitted. With respect to the 'expertised' portions of the registration statement (eg, the audited financial information of the issuer), affirmative diligence is not required – such defendants need merely show that they had no reasonable ground to believe, and did not believe, that there was a material misstatement or omission at the time of effectiveness. The *WorldCom* decision, *In re WorldCom Inc Securities Litigation*, 346 F.Supp. 2d 628 (SDNY 2004), has introduced some uncertainty into the distinction between 'expertised' and 'non-expertised' portions of the registration statement for purposes of the due diligence defence. A plaintiff who prevails on section 11 grounds is entitled to monetary damages in an amount equal to the difference between the price paid for the securities (but not greater than the public offering price) and the price of the securities at the time of suit or the price at which the securities were disposed.

Another basis for liability in securities transactions is section 12(a)(2) of the Securities Act, which provides that any person who offers or sells a security by means of any oral or written communication that contains an untrue statement of a material fact, or omits to state a material fact necessary to make the included statements not misleading, is liable to the purchaser for damages. As under section 11, the plaintiff is not required to prove intent, but the plaintiff must show that he or she was not aware of the

misstatement or omission and that the misstatement or omission somehow affected his or her decision to purchase the securities. Section 12(a)(2) liability extends only to those who offer and sell the securities, though courts have interpreted this to include officers, directors and principal stockholders of the issuer, where such persons authorise the promotional efforts of the underwriters and help prepare the offering and other selling documents. The SEC has also confirmed that issuers of securities constitute 'sellers' under section 12(a)(2), regardless of the form of underwriting arrangement entered into. Defendants have an affirmative defence if they can prove that they did not know, and reasonably could not have known, of such misstatement or omission. Unlike section 11, no duty to investigate is required. Plaintiffs who still own the securities are entitled to rescission. Plaintiffs who no longer own the securities are limited to recover damages actually caused by the false statements or omissions. Section 12(a)(2) liability attaches at the time an investor becomes committed to purchase securities and enters into a contract of sale (ie, when the investor makes the investment decision). Information conveyed after the contract of sale, for example, in a subsequently delivered final prospectus, would not be considered in evaluating section 12(a)(2) liability at the time of the contract of sale.

Additionally, section 15 of the Securities Act provides that any person who controls any other person who is liable under either section 11 or 12 of the Securities Act will also be liable, jointly and severally, to the same extent as the controlled person (unless the controlling person had no knowledge of, or reasonable ground to believe in, the existence of the facts by reason of which the liability of the controlled person is alleged to exist).

Private placements and unregistered secondary market transactions do not trigger either section 11 or section 12(a)(2) liability. Instead, the anti-fraud provisions of the Exchange Act, in particular rule 10b-5, provide the basis for liability for material misstatements and omissions in such offerings and sales. The key difference in liability under rule 10b-5 as opposed to section 11 or section 12(a)(2), however, is that the plaintiffs must prove that the defendant had intent to defraud, deceive or manipulate investors, as well as reliance on the defendant's wrongful conduct in purchasing the security.

Although rule 10b-5 also applies to registered offerings, these heightened burdens to establishing liability generally result in plaintiffs relying instead on Securities Act liability claims in such offerings. Similar to sections 11 and 12(a)(2), however, the class of defendants can extend to the issuer, its officers and directors, the underwriters and anyone else who directly or indirectly committed the fraud. Plaintiffs who prevail in claims relying on rule 10b-5 may generally recover out-of-pocket losses. As with section 12(a)(2), liability under rule 10b-5 attaches at the time an investor becomes committed to purchase securities and enters into a contract of sale.

Whether section 10(b) of the Exchange Act and rule 10b-5 promulgated thereunder apply extraterritorially has been at issue in recent years. In April 2012, the SEC released a study of the issue mandated by Dodd-Frank as part of its response to the US Supreme Court's decision in *Morrison v National Australia Bank*, 561 US (2010). Morrison reversed lower court precedent by holding that section 10(b) applies only to securities fraud in transactions in securities listed on a US exchange and to transactions in any other security that occur in the US. The SEC's study lacks a definitive recommendation, but does provide Congress with certain options for consideration, including reinstatement of a narrower version of the 'conduct and effects' test, which lower courts applied to section 10(b) actions before Morrison or enactment of a clarified version of the 'transactions' test set out in *Morrison*.

Recent amendments to the securities laws as part of Dodd-Frank expanded the SEC's ability to bring 'aiding and abetting' enforcement actions previously allowed under the Exchange Act by allowing the SEC to also bring aiding and abetting enforcement actions under the Securities Act, the Investment Advisers Act of 1940 and the Investment Company Act of 1940. Dodd-Frank did not, however, provide a private cause of action for aiding and abetting claims, though it did require the Government Accountability Office (the GAO) to conduct a study concerning what effect introducing such a cause of action might have.

The GAO report sets forth arguments for and against authorising such a cause of action, but did not offer a conclusion or recommendation on the advisability of doing so.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

Civil litigation

Civil litigation may be brought by private parties (typically in the form of class action lawsuits), the SEC or other governmental agencies.

Private party plaintiffs generally seek to recover losses suffered as a result of the defendants' conduct. These private rights of action arise from express statutory provisions granting defendants such rights or judicially created rights of action. Private party plaintiffs may also seek injunctive relief to compel, or more likely to enjoin, certain actions by the defendants. Governmental agencies typically seek any of: forfeiture of illegally gotten gains, civil monetary penalties or injunctive relief.

Administrative proceedings

Administrative proceedings may be brought by the SEC or other relevant governmental agencies pursuant to rules promulgated by such agencies and before administrative law judges that the SEC or such governmental agencies employ. These proceedings are subject to limited appellate court review. In particular, the SEC has an enforcement division with the legal capacity, in many cases, to impose civil penalties and to obtain cease-and-desist orders mandating immediate cessation of improper activities. Dodd-Frank expanded the penalties available to the SEC, most notably granting the SEC the ability to impose monetary penalties in cease and desist proceedings.

Criminal prosecutions

Criminal proceedings based on federal securities laws may be instituted only by the United States Department of Justice, though such action is often based on the advice and recommendation of the SEC. Defendants subject to such criminal actions face potentially substantial fines and, in the case of individuals, imprisonment. At the direction of Dodd-Frank, the US Sentencing Commission promulgated in April 2012 amendments to the sentencing guidelines for financial fraud to take into account 'the potential and actual harm to the public and the financial markets resulting from the offences.' The amendments, which provide for increased penalties for certain fraud offences, took effect in November 2012. Dodd-Frank also extended the statute of limitations for securities fraud from five to six years.

Update and trends

The SEC continues to progress rules for the adoption of the 'Regulation A+' and 'crowdfunding' offering exemptions described in question 7 above. Among other reasons, an inability to harmonise the role of state securities regulators with respect to these offerings has delayed implementation. Also, following the preparation of a report mandated by the JOBS Act with respect to simplifying reporting issuers' disclosure obligations, the SEC is reviewing the disclosure requirements in its principal regulations (Regulation S-K and Regulation S-X), and is considering ways to improve the disclosure regime for the benefit of both companies and investors. The goal is to comprehensively review the requirements and to recommend updates that will promote timely, material disclosure by companies and facilitate shareholders' access to that information. Initially, the review will focus on the business and financial disclosures required by periodic and current reports, Forms 10-K, 10-Q and 8-K. Subsequent phases of the project are expected to include compensation and governance information included in proxy statements.

Additionally, Dodd-Frank created an expansive whistle-blower regime that provides significant financial incentives for individuals who know of a potential federal securities laws violation to come forward and that protects those individuals from employer retaliation. Under final rules adopted by the SEC in May 2011 to implement the whistle-blower programme (and subject to certain limitations), if an individual voluntarily comes forward with original information about potential violations of the federal securities laws that leads to a successful enforcement action resulting in sanctions exceeding US\$1 million, such individual will receive an award equal to 10 to 30 per cent of the aggregate monetary recovery. Dodd-Frank also grants protection to whistle-blowers and others who assist SEC investigations by providing them with a private cause of action against retaliating employers. Remedies include reinstatement, double back pay and attorneys' fees.

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