PANORAMIC

DEBT CAPITAL MARKETS 2024

Contributing Editors

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Quick reference guide enabling side-by-side comparison of local insights, including an overview of the market climate and regulatory framework; documentation and filing requirements; cross-border issues; underwriting; management of outstanding debt securities; reporting; liability regime; investor remedies; enforcement; and recent trends.

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Debt Capital Markets: Global overview

Catherine M Clarkin, John Horsfield-Bradbury, Ekaterina Roze and Cameron Teschuk

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In 2023, global debt capital markets remained relatively stable compared to 2022, with new issuance levels remaining below the peak activity levels seen in 2021 and 2020. The continued pattern of incremental interest rate hikes in the United States, the European Union and other countries, coupled with persistently high inflation globally, geopolitical pressures, supply chain disruptions and a challenging economic environment and outlook, continued to impact debt capital markets in 2023. However, despite multiple rate hikes in 2023, global debt markets remained resilient as issuers adjusted to the prolonged high-interest-rate environment.

According to data from Refinitiv, global debt issuances of US$6.9 trillion during the first nine months of 2023 were up 2 per cent compared to the first nine months of 2022, and the number of new offerings was up 3 per cent year-over-year. Issuances by financial issuers, governments and agencies comprised approximately 74 per cent of global issuances throughout the first nine months of 2023, compared to 79 per cent over the same period in 2022. New issuances by financial issuers decreased 5 per cent during the first nine months of 2023 compared to the same period in 2022. In contrast, industrials, energy and power and other issuers experienced increases of over 10 per cent in total debt issuances during the same period.

Global investment-grade corporate debt issuances of US$3.4 trillion were up 5 per cent during the first nine months of 2023 compared to the first nine months of 2022. By contrast, high-yield debt issuances of US$170.4 billion increased 51 per cent during the first nine months of 2023 compared to the first nine months of 2022. Notably, three markets – the United States, Canada and Germany – accounted for nearly three-quarters of all high-yield debt issuances in 2023.

Emerging markets corporate debt issuances totalled US$200.3 billion in the first nine months of 2023, representing an increase of 12 per cent compared to the same period of 2022. Corporate debt issuers from India, Thailand and Brazil accounted for 53 per cent of emerging markets activity during the first nine months of 2023. Local currency bond offerings in Asia of US$2.7 trillion increased 2 per cent during the first nine months of 2023 compared to the first nine months of 2022, the strongest opening nine months on record.

According to data from the Securities Industry and Financial Markets Association, global issuances of green, social and sustainability-linked bonds totalled US$604 billion through the first nine months of 2023, compared to US$571 billion during the first nine months of 2022. Global issuances of green bonds during the first nine months of 2023 were up 10 per cent compared to the first nine months of 2022, while global issuances of social and sustainability-linked bonds decreased 2 per cent over the same period. Global issuances

of green bonds represented 66 per cent of all green, social and sustainability-linked bond offerings in 2023, compared to 63 per cent over the same period in 2022.

Market environment

Throughout 2023, many of the macroeconomic and geopolitical challenges experienced in 2022 continued, with additional rate hikes in the United States and other countries in response to continued high inflation. New challenges emerged during the year, including the US regional banking crisis in early 2023 and the conflict between Israel and Gazain the later part of the year. Despite the challenging market conditions, global debt markets remained relatively stable and issuers continued to access the markets.

Continued inflation and prolonged high interest rates adversely affected borrowing

In 2022, the Federal Reserve initiated what has become the swiftest tightening of US monetary policy in the last few decades, prompted by the largest increase in inflation rates in 40 years. As of December 2022, the US federal funds target rate had reached 4.25 to 4.5 per cent, compared to 0.25 per cent at the beginning of 2022 and throughout 2021, and, in 2023, the Federal Reserve continued tightening monetary policy, with four rate increases during the year. As of 27 July 2023, the US federal funds target rate reached 5.25 to 5.5 per cent.

Regulators in other countries also continued to raise interest rates in 2023. For example, the European Central Bank increased its policy rate multiple times, bringing the deposit rate to 4 per cent as of September 2023, compared to 2 per cent at the beginning of 2023. In the United Kingdom, the base rate was 0.1 per cent from March 2020 through December 2021, increased to 3 per cent at the end of 2022 and increased further to 5.25 per cent as of August 2023.

Recent actions and statements from US and international regulators have led some analysts to believe that the period of regular rate increases may be coming to an end in 2024. Officials of the Federal Reserve recently signalled that the regulator may be finished with its extended campaign of consistent rate hikes, and analysts expect the Federal Reserve to begin cutting rates in 2024 if inflation remains at current levels. Analysts expect that rate cuts will be global. Initial projections generally indicate that target rates are expected to remain close to current levels throughout the beginning of 2024, with the potential for limited rate cuts in mid to late 2024 if inflationary pressures continue to subside. However, despite the potential for rate cuts in 2024, analysts generally believe a higher-for-longer interest rate environment will remain for 2024 and possibly longer-term.

Default outlook

Rating agencies, as well as investment banks, have generally increased their default forecasts for corporate issuers as analysts fear that prolonged periods of high interest rates could lead to increased defaults if economic growth falters. According to S&P, monthly defaults and speculative-grade default forecasts steadily increased throughout 2023. In 2024, S&P projects that defaults will continue to rise to 5 per cent in the United States and 3.75 per cent in Europe, both values above long-term historical trends. According to Fitch, corporate high yield and leveraged loan default rates are expected to rise in 2024, before declining in 2025. Similarly, Moody's expects speculative-grade corporate defaults to increase to 5 per cent in 2024 due to higher borrowing costs and other factors. Analysts and

rating agencies expect non-investment grade issuers and companies in emerging markets to be more heavily impacted by prolonged high interest rates and other macroeconomic challenges.

LIBOR transition

The global debt markets continued to transition away from the London Interbank Offered Rate (LIBOR) to the alternative interest rate benchmarks, including risk-free interest rates. The ICE Benchmark Administration, the administrator of LIBOR, ceased publication of all euro and Swiss franc LIBOR settings on 31 December 2021, along with certain Japanese yen, British pound sterling and US dollar LIBOR settings, and ceased publication of all remaining US dollar LIBOR settings on 30 June 2023. Although one-, three- and six-month US dollar LIBOR settings have been published under a synthetic methodology since 30 June 2023, in April 2023, the UK Financial Conduct Authority announced that it intends for the publication of these settings to cease in September 2024. In the United States, in December 2022, the Federal Reserve adopted final rules implementing the Adjustable Interest Rate (LIBOR) Act, which replaces references to US dollar LIBOR in certain contracts with a benchmark replacement rate based on forward-looking term SOFR after 30 June 2023.

For US dollar issuances, issuers have transitioned to the use of the Secured Overnight Financing Rate (SOFR), which is based on the overnight repurchase markets. In July 2021, the US Alternative Reference Rates Committee formally recommended CME Group's forward-looking SOFR term rates. In December 2022, the Federal Reserve adopted final rules that identify forward-looking SOFR term rates as the benchmark replacement rate for certain US-governed contracts that do not have adequate fallback provisions. For other currencies, the alternative reference rates include the Sterling Overnight Index Average (SONIA), the Euro Short-Term Rate (ESTR), the Swiss Average Rate Overnight (SARON) and the Tokyo Overnight Average Rate (TONAR). These rates are generally based on overnight borrowing rates (in the case of SONIA and TONAR); daily, verifiable money market transactions (in the case of ESTR) and secured transactions in the Swiss money market (in the case of SARON).

Looking ahead to 2024

Looking ahead to 2024, some analysts project a more promising environment for global bond markets in 2024 premised on expected rate cuts and stable inflation. In the United States, comments from officials of the Federal Reserve signal that the regulator may be finished increasing the federal funds rate, and analysts expect the Federal Reserve to begin cutting rates in 2024 if inflation remains at its current levels. As a result, following periods of inverted yield curves in 2023, some analysts expect the yield curve to steepen in 2024. The market appears to expect the US federal funds rate to decrease by approximately 75 basis points in 2024 (Bloomberg), although expectations vary widely. Expectations regarding the timing of potential rate cuts by the Federal Reserve also vary significantly, with some analysts predicting decreases in the first part of 2024 and others later in the year. Outside of the United States, analysts also generally expect other central banks to engage in limited rate cuts in 2024, though, as with the United States, predictions vary significantly. It remains to be seen whether when and to what extent central banks will introduce rate cuts in 2024, which will impact the global debt capital markets. Other than the potential for small rate cuts

in 2024, many analysts expect that a higher-for-longer interest rate environment will remain in 2024 and possibly longer-term.

Some analysts have expressed concerns that a higher-for-longer interest rate environment could negatively impact some issuers, particularly those with poor credit quality or unstable earnings. The International Monetary Fund and others have raised concerns that expectations of a soft landing for the global economy as inflation ceases and central banks begin easing monetary policies may be offset by the impact of persistent core inflation in certain jurisdictions and potential underlying weaknesses in certain sectors. Unexpected increases in inflation, decreases in debt repayment capacities and macroeconomic shocks could offset any potential improvements in economic conditions in 2024.

While analysts generally remain cautiously optimistic that 2024 will present an improved environment for debt issuances and debt investors, there remains significant uncertainty across multiple sectors and jurisdictions. A number of macroeconomic and other factors could significantly impact how debt issuance activity develops in 2024, including, among other things, a resurgence in inflation and the resulting impact on expected interest rates, geopolitical instability, weakening credit conditions and economic growth in emerging markets and weaker economic growth in major economies.

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Belgium

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MARKET SNAPSHOT

Market climate

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

The Belgian debt securities market is relatively well developed. There is a clear legal framework, part of which has recently been overhauled and modernised, as well as competent law firms to guide issuers during the entire process. Belgian investment banks have ample experience in working with issuers on debt securities transactions.

Large corporations and small and medium-sized enterprises are, however, still primarily financed through bank financings, with debt capital markets being a secondary source of funding.

Issuers of debt securities are mainly Belgian entities, active in a variety of sectors, as well as governmental authorities. In terms of the instruments issued, these are, for the most part, non-complex debt securities issued through both private placements and public offerings, including to retail investors. A recent trend is the strong rise in environmental, social and governance bonds, by a variety of issuers.

The main trading facility is Euronext Brussels, a regulated market on which approximately 530 bonds of approximately 55 issuers are currently listed. On Euronext Growth Brussels, the main multilateral trading facility, 65 bonds of 34 issuers are currently listed.

As mentioned above, the Belgian legal framework relevant to debt issuances was recently amended, specifically by the entry into force of a new corporate law code. Among others, more flexible provisions concerning the general meeting of bondholders were introduced. Further, it is now also possible to appoint a bondholders' representative and to issue perpetual debt instruments.

Law stated - 3 January 2024

Regulatory framework

2 | Describe the general regime for debt securities offerings.

The Belgian Financial Services and Markets Authority (FSMA) is tasked with the supervision of the Belgian capital markets and their participants, as is the European Securities and Markets Authority (ESMA) on a European level. The National Bank of Belgium and the European Central Bank jointly supervise financial institutions.

The legal framework applicable to capital markets in Belgium is primarily shaped by EU legislation, both directly applicable, and indirectly, supplemented by specific Belgian legislation, notably in the area of prospectuses and consumer protection. Soft law by the FSMA and ESMA also has a significant impact. Finally, the internal rulebooks of Euronext are to be complied with by listed issuers.

The Prospectus Regulation and its Delegated Regulations set out the requirements for and contents of a prospectus. Further relevant to debt issuances are the Market Abuse

Regulation, which aims at tackling various forms of market abuse, the Markets in Financial Instruments Directive II (MiFID II), setting out rules for various forms of (offerings of) investments, the Packaged Retail and Insurance-based Investments Products Regulation, applicable to specific investment products, the Benchmarks Regulation, establishing a regime for benchmark administrators, and the Securitisation Regulation, laying down a general framework for securitisation.

In addition, at the end of October 2023, the Council of the EU formally adopted the Regulation on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds (the Green Bond Regulation), as previously approved by the EU Commission and the EU Parliament.

The Green Bond Regulation was published in the Official Journal of the EU on 30 November 2023, entered into force 20 days thereafter and will apply as from 20 December 2024.

The Green Bond Regulation lays down uniform standards for issuers who wish to use the designation 'European green bond' or 'EuGB' for the marketing of their bond. The standards will enable investors to direct their money more confidently towards more sustainable technologies and businesses.

Belgian law governs a variety of other topics and numerous laws and decrees are to be complied with. Noteworthy are the Belgian Prospectus Law and the Belgian Code of Economic Law (CEL). The Prospectus Law, among others, broadens the scope of the Prospectus Regulation to additional types of investment instruments. Further, the Belgian consumer protection legislation, set out in the CEL, is elaborate and contains specific rules for offerings made to consumers, for example, prohibiting the unilateral redemption without proper compensation or provisions allowing for unilateral changes to certain key terms and conditions.

The FSMA has further issued several position papers on various topics, for example, on consumer protection, as has ESMA, for example, on risk factors, which have to be complied with.

Finally, the rulebooks of the stock exchanges are to be mentioned here, as they could impose certain additional obligations on issuers with listed securities, for example, in terms of disclosure of information.

Law stated - 3 January 2024

FILING AND DOCUMENTARY REQUIREMENTS

General filing requirements

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

In the context of a public offering of debt securities, provided that the offer has a total consideration of more than €5 million, the issuer must prepare, file and publish a prospectus.

In practice, the formal filing with the Belgian Financial Services and Markets Authority (FSMA) will follow after several informal filings and an unofficial 'no further comments' confirmation from the FSMA. Issuers must submit their applications to the FSMA by email. Once the prospectus is formally approved and published, it is valid for 12 months. Any subsequent supplements to the prospectus also require approval of the FSMA.

In the case of passporting of a prospectus approved by another EU authority, the FSMA will be notified by such competent authority (typically of the home member state of the issuer) and will be provided with a certificate of approval. However, prior approval of any marketing materials to be used on Belgian territory by the FSMA will still be required.

In the case of passporting of a prospectus approved by another EU authority, the FSMA will be notified by such competent authority (typically of the home member state of the issuer) and will be provided with a certificate of approval. However, prior approval of any marketing materials to be used on Belgian territory by the FSMA will still be required.

In the case of a request for admission to trading of debt securities, the prospectus or information note, a technical term sheet and an application form must be provided to Euronext, together with several ancillary documents.

Law stated - 3 January 2024

Prospectus requirements

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

A prospectus is required for public offerings of investment instruments for a total consideration exceeding €5 million. If the investment instruments are to be admitted to trading on a multilateral trading facility (MTF), the threshold is €8 million. Regardless of the amount of the offering, a prospectus is required in the case of admission to trading of the investment instruments on a regulated market (it being understood that certain exceptions apply for the listing of securities that represent less than 20 per cent of the total listed securities).

For public offerings of which the total consideration is less than the aforementioned thresholds and for direct admissions to trading of investment instruments on an MTF (or a segment thereof), a (substantially less complex and shorter) information note is required.

In addition, there are further exemptions for public offerings of securities for a total consideration below €500,000.

A prospectus must comply with the information requirements provided for in the disclosure regime contained in the annexes to the Prospectus Regulation, and will include information relating to, among others:

- the terms and conditions applicable to the debt securities;
- the applicable risk factors related to the issuer and the securities;
- the rights attached to the securities; and
- the use of the proceeds.

In general, the information requirements are more stringent for public offerings of complex debt securities and for public offerings to retail investors. European Securities and Markets Authority (ESMA) Guidelines further clarify which information must be provided by the issuer in a prospectus.

In addition, a prospectus must also contain a summary, the requirements of which are also set out in the Prospectus Regulation.

An information note, which can be no longer than 15 pages, is considerably shorter than a prospectus and must contain information on the issuer, the investment instruments, and on the key risks and must include the issuer's annual accounts for the last two financial years.

Law stated - 3 January 2024

Documentation

5 | Describe the drafting process for the offering document.

The prospectus or offering memorandum is generally jointly prepared by the issuer's and the banks' legal counsel, with input from the issuer, its auditor and the banks assisting the issuer in the transaction. Usually, the issuer's legal counsel will be responsible for drafting the issuer-specific parts, whereas the banks' counsel will hold the pen on those parts specifically relating to the offered debt instruments. However, the person ultimately responsible for the contents of the entire prospectus is the issuer.

The main documents produced in an offering of debt securities include:

- a mandate letter, in which the issuer instructs the banks on the transaction;
- a prospectus, information note or offering document;
- marketing materials;
- a subscription or placement agreement;
- one or several agency agreements;
- a clearing services agreement;
- legal opinions by the counsel to the issuer and banks; and
- arrangement and comfort letters from the issuer's auditor.

Disclosure requirements may vary depending on the specific features of the offered instruments and the specificities of the issuer. Generally, the disclosure requirements for debt securities are more limited than those for equity securities. Further, alleviated disclosure requirements will apply for debt instruments with a minimum denomination of €100,000 for which admission to trading on a regulated market is sought or for debt instruments that are offered to qualified investors only. A proportionate disclosure regime also applies to small and medium-sized enterprises (SMEs), companies that have listed

equity securities and companies with a reduced market capitalisation that already have listed debt securities.

In the context of a public offering by a Belgian issuer, a prospectus is subject to certain language requirements that may, depending on the region of the issuer's seat, require a full translation of the prospectus. Prospectus summaries will always need to be made available in Dutch or French. Further, marketing materials and official press releases relating to such public offering will need to be approved by the FSMA prior to their publication or circulation. Otherwise, the agreements documenting the transaction between the various parties to it, in general, do not differ significantly between a public offering and a private placement.

Law stated - 3 January 2024

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

The terms and conditions of the debt instruments are mainly included in the offering memorandum or prospectus. In the case of a Euro medium-term note programme, a form of final terms will be included in the offering memorandum or base prospectus, and a document setting out the final terms applicable to that specific issuance will need to be drawn up for each separate issuance under the programme.

In addition, a subscription or placement agreement made between the issuer and involved banks will document, among others, the terms governing the subscription or placement of the debt securities offering. Two types of commitments can be agreed upon: a hard commitment, whereby the banks commit to purchase themselves all securities not sold to investors, or a best-efforts commitment, whereby the banks only have a best-efforts obligation to place the debt securities in the market and usually will commit to make the payment on behalf of the investors that effectively subscribed to the securities. Further, an agency agreement made between the agents (usually, paying agent, calculation agent and listing agent) and the issuer will include the terms and conditions relating to the various services to be rendered on behalf of the issuer. Finally, a clearing agreement will be entered into with the clearing system (typically the Belgian National Bank in case of Belgian law governed bonds) for the purpose of clearing the bonds.

In relation to public offerings, the prospectus should always be provided free of charge in a durable medium to investors who request it. A hard copy version must be made available to potential investors who specifically request it. The prospectus will also be published on, among others, the websites of the FSMA, ESMA, the issuer and the banks. The same requirements apply in the case of an information note.

The subscription or placement agreement and the agency agreement are usually confidential and not made available to the public.

Law stated - 3 January 2024

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

Yes, when there is a legal requirement to publish a formal prospectus. Such prospectus must be approved by the FSMA before it is published and prior to issuing the debt securities. Once approved, the prospectus must be made public a reasonable time in advance of, and at the latest at the beginning of, the offer to the public or the admission to trading of the debt securities. It shall be deemed available to the public when published in electronic form on any of the websites of the issuer, the offeror and the financial intermediaries placing or selling the securities. An electronic version of the prospectus must be provided to the FSMA for publication on its website and an electronic version will be provided by the FSMA to ESMA.

Where an information note is required instead of a prospectus, no prior approval by the FSMA of such information note needs to be obtained. The same publication requirements do, however, apply. Further, the information note must be provided to the FSMA for publication on its website, as well as to Euronext in the case of listed securities.

In the event of an offering of debt securities not qualifying as a public offering and where no admission to trading on a Belgian exchange is requested, the offering documentation should not be made public.

Law stated - 3 January 2024

Authorisation

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

A prospectus must be approved by the FSMA before it is published and prior to issuing the debt securities. Where an information note is required instead of a prospectus, no prior approval by the FSMA needs to be obtained.

Once a draft prospectus has been filed with the FSMA, the FSMA has, in principle, 10 business days to examine the submission and to issue its decision on the approval of the prospectus. Each time the issuer submits a new version of the prospectus, a new term of 10 business days will be granted for the FSMA's review. In practice, several informal filings will occur first, following which an informal 'no further comments' is obtained from the FSMA. It is common practice to agree with the FSMA on a timeline for the approval process.

For offerings to the public by an issuer that does not have any securities admitted to trading on a regulated market, nor has previously issued securities to the public, the term granted to the FSMA is extended to 20 business days. For plain vanilla instruments issued by issuers with a positive track record, a five business days accelerated procedure can be applied. Fast-track approvals (five business days) are also possible for frequent issuers using a universal registration document as part of a base prospectus.

The FSMA may, in all of the above-mentioned situations, suspend its review if the prospectus clearly does not meet the requirements.

Law stated - 3 January 2024

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

The FSMA may refuse approval of the public offering if the requirements set out in the Prospectus Regulation and in the Prospectus Law are not complied with. In general, the FSMA describes its task as ensuring the fair and proper treatment of investors through accurate and complete information, in order to create transparent financial markets.

Law stated - 3 January 2024

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

Several exemptions apply for public and private offerings and can exempt the issuer from the obligation to draw up a prospectus or information note, as applicable.

For private offerings of securities: (1) addressed solely to qualified investors, (2) addressed to fewer than 150 natural or legal persons per member state (other than qualified investors), (3) whose denomination per unit amounts to at least €100,000, or (4) addressed to investors who acquire securities for a total consideration of at least €100,000 per investor, for each separate offer, no prospectus nor information note will be required.

For (1) public offerings of investment instruments for a total consideration below €5 million or, if admitted to trading on an MTF, for a total consideration below €8 million, or (2) direct admissions to trading of investment instruments on an MTF, an information note is required. Certain exemptions apply here as well.

In addition, further exemptions apply for public offerings of securities for a total consideration of less than €500,000.

Law stated - 3 January 2024

Offering process

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

When looking at the practical aspects relating to a public offering, a difference should be made between offerings under an existing debt issuance programme, and a stand-alone transaction. Whereas the former can be completed in a relatively brief period of time, typically some weeks, the latter usually takes about six weeks to three months. In practice, much depends on the specificities of the transaction and the level of experience of the issuer.

In the first phase of the process, the lead managers and legal counsel will agree to a timeline, draft the necessary documentation and submit the prospectus and marketing materials for approval to the FSMA.

Once the FSMA confirmed its sign-off, the public offering may be launched. The issuer, together with the banks, will subsequently market the offered debt securities, often by means of a roadshow and information package for the investors.

Closing of the offering period may occur earlier if the issuance is fully subscribed. Two business days after the closing of the offering period, settlement usually occurs.

If the debt securities are offered through a private placement, the timeline will be substantially shorter, as no approval by the FSMA is required.

Law stated - 3 January 2024

Closing documents

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

The typical closing documents consist of a bring-down capacity legal opinion and an enforceability legal opinion issued by the legal counsel, a bring-down comfort letter issued by the auditor, non-insolvency certificates, a director's certificate and signed corporate authorisations. If applicable, there will also be final terms relating to the (first) issuance made under an issuance programme. Finally, if applicable, there will be a rating agency approval confirmation, as well as a confirmation of listing by the stock exchange.

Law stated - 3 January 2024

Listing fees

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

The FSMA's fees for the review and approval of a prospectus are determined by Royal Decree and will vary depending on the type of transaction, as well as the underlying deal specifics (eg, amount and type of debt securities issued). Typically, they will range from €4,000 to €20,000.

In addition, Euronext fees, calculated on the basis of an admission fee and an annual fee, will be due in respect of the listing of debt securities. These vary between €15,000 for short-term debt securities and €18,000 for medium or long-term debt securities issued on a stand-alone basis. For medium or long-term debt securities issued under a programme, the total maximum Euronext fee is €14,500. However, when issuing debt instruments linked to shares (such as convertible bonds), the issuer must also pay an annual fee of €2,500 per line.

Finally, agency fees, which will be agreed between the issuer and the (paying, listing and calculation) agent, will usually also be due.

Law stated - 3 January 2024

KEY CONSIDERATIONS

Special debt instruments

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

Although a Belgian market for special debt instruments exists, it is not as active as the market for plain vanilla debt securities. Special debt instruments that are being traded on the Belgian debt capital markets include:

- fixed rate bonds;
- convertible bonds;
- covered bonds;
- exchangeable bonds;
- subordinated bonds;
- bonds with transfer restrictions;
- equity-linked notes;
- real estate certificates; and
- Pfandbrief-style products.

High-yield bonds are not issued or traded that often and when Belgian issuers do issue such instruments, they are usually placed with international investors and listed abroad.

In recent years, certain Belgian issues have made German law governed Schuldschein offerings.

Recently, there has been a substantial increase in the issuance of environmental, social and governance (ESG) bonds, in particular green bonds. Noteworthy is that there is a specific Belgian label, issued by the Belgian Federation of the Financial Sector, which is compliant with the relevant EU legislation.

Further, 'tax shelter certificates' can be issued, which is a form of investment certificate entitling an investor to a temporary tax exemption of retained taxable profits.

Law stated - 3 January 2024

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

The rules applicable to the offering of special debt securities are generally the same as those applicable to regular debt securities. The Prospectus Law is relevant in this context, as it has a broader scope of application than the Prospectus Regulation ('investment instruments' as opposed to 'securities'). As a result, although the offering of certain special debt securities may be exempt under the Prospectus Regulation, it could still trigger the obligation to draw up a prospectus or information note under the Prospectus Law.

Further, specific disclosure requirements may apply to the offering of special debt instruments, in particular those under the Packaged Retail and Insurance-based Investment Products Regulation. ESG bonds may also require specific additional ongoing disclosure.

In an accounting context, the correct qualification of hybrid securities (ie, securities having equity and debt features) could prove difficult. The International Financial Reporting Standards Foundation provides guidance with IAS 32 for this classification.

Law stated - 3 January 2024

Classification

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

The Prospectus Regulation defines equity securities, being shares and other transferable securities equivalent to shares in companies, as well as certain convertible instruments relating thereto. All other types of securities are qualified as non-equity securities. The specific requirements under the Prospectus Regulation differ for each of these types, with the more stringent requirements generally being applicable to equity securities.

The classification as equity or debt securities has fiscal implications (ie, withholding tax deductions), as well as consequences in certain insolvency scenarios (subordination of equity). A requalification is possible.

Law stated - 3 January 2024

Transfer of private debt securities

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

There are no specific transfer restrictions on privately offered debt securities. The general restrictions set out in the Prospectus Regulation and the Prospectus Law apply. However, in practice, parties contractually agree to certain restrictions, among others, to prohibit the transfer to consumers, with a view to preventing the application of specific consumer protection rules.

Law stated - 3 January 2024

Cross-border issues

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

There are no specific rules applicable to foreign issuers.

It is possible that offerings that are exempt in other member states under the Prospectus Regulation still trigger the requirement to draw up a prospectus or information note in Belgium, as set out in the Prospectus Law.

Law stated - 3 January 2024

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

The Prospectus Regulation provides for an EU harmonised legal framework for the mutual recognition of prospectuses. If the requirements are met (ie, the prospectus is approved by the competent authority of the home member state of the issuer and is submitted with the Belgian Financial Services and Markets Authority (FSMA) and European Securities and Markets Authority (ESMA) by the competent authority), the prospectus is eligible to receive a 'passport' for a public offering in Belgium. The additional formalities to be complied with are limited and mainly consist of the requirement to translate the prospectus in Dutch, French or English and provide a summary of the prospectus in Dutch or French if advertisements will be made. Such issuers should, however, be aware that certain terms and conditions of these instruments may not be enforceable in Belgium because of the applicable consumer protection legislation. There are no special rules applicable to Belgian issuers offering debt securities outside Belgium.

In addition, the Prospectus Regulation provides that prospectuses of third countries can also be 'passported' when:

- they are approved by the competent authorities of third countries;
- the information requirements imposed by those third-country laws are equivalent to the requirements under the Prospectus Regulation; and
- a cooperation arrangement exists between the FSMA and that third country's competent authority.

However, the FSMA will not accept prospectuses of third countries that are on the list of the European Commission with jurisdictions that have strategic deficiencies that pose significant threats to the financial system of the EU.

Law stated - 3 January 2024

Underwriting

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

Hard underwriting, in which the banks effectively take on the risk of placing the debt securities in the market, is rarely used anymore in Belgium. A typical transaction will have

soft underwriting by the banks (ie, underwriting when the order book is closed) on a joint and several basis.

There are, in principle, no major differences between underwriting in the context of a public or a private offering.

Law stated - 3 January 2024

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

Underwriting is qualified as a regulated investment service for the purposes of the Marketing in Financial Instruments Directive II (MiFID II). That means, in principle, that there is a licensing requirement for entities wishing to perform underwriting activities in Belgium. However, only stockbroking firms and EU MiFID entities are eligible to perform underwriting activities in Belgium. In addition, entities from third countries are allowed to underwrite in Belgium, if they meet certain requirements and after registration with the FSMA.

Law stated - 3 January 2024

Transaction execution

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

The key transaction issues depend on the specificities of each transaction. They will typically be of a commercial or regulatory nature.

Settlement of a transaction typically occurs on a delivery versus payment basis, meaning that delivery of the securities and of the proceeds will happen simultaneously. This will occur two business days after closing, with the agent being the responsible party.

Debt securities are usually settled through the securities settlement system operated by the National Bank of Belgium (NBB), which operates in a similar manner to other clearing and settlement systems. The reason for this is that only the NBB's settlement systems allows for tax-free trading of debt securities for non-resident and corporate investors. The settlement systems operated by Clearstream and Euroclear are sometimes used as well.

Law stated - 3 January 2024

Holding forms

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

Most public debt securities issued under Belgian law are held in electronic accounts and are traded through the securities settlement system of the NBB. Belgian law does not allow

for securities to be issued in bearer form. Registered securities, however, could be used, although this is rarely done in practice for publicly offered securities. Debt securities issued by Belgian issuers but governed by foreign law (often English law) can be held in bearer form, although they cannot be physically delivered in Belgium.

Law stated - 3 January 2024

Outstanding debt securities

24 | Describe how issuers manage their outstanding debt securities.

A variety of options can be used by issuers to manage their outstanding debt securities, including open market purchases, making use of call options, consent solicitations, and tender and exchange offers to the bondholders.

Unlike in many other European jurisdictions, where takeover rules only apply to equity securities, Belgian issuers should be aware that tender and exchange offers on debt securities are, in principle, subject to Belgian takeover legislation requiring the issuer to publish an FSMA-approved takeover prospectus in the event the tender offer is made to the public and it cannot rely on one of the available exemptions.

Concerning call options, Belgian law provides for specific requirements when the option is exercised in relation to consumers (in the broad, legal sense of the word). Among others, the consumer must receive proper compensation.

For any form of purchase by an issuer of outstanding debt securities, market abuse legislation prohibits the preferential treatment of specific security holders. Further, an issuer may not resell its purchased bonds at a later stage, as Belgian law provides that a debt claim disappears when the debtor and creditor become the same person by operation of law.

Law stated - 3 January 2024

REGULATION AND LIABILITY

Reporting obligations

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

Disclosure obligations are mainly imposed by the Market Abuse Regulation, the Transparency Directive, the Belgian Code of Companies and Associations, and, if applicable, Euronext rules (or rules of the applicable trading venue).

The Market Abuse Regulation imposes an ongoing disclosure requirement on listed issuers, who must disclose inside information to the markets as soon as possible, with very limited exceptions, and file the same with the Belgian Financial Services and Markets Authority (FSMA).

The Transparency Directive sets out a periodic disclosure requirement, obliging issuers to publish semi-annual and annual financial statements within, respectively, three and four months after the relevant account period has ended. Filing with the FSMA is also required.

Issuers having their registered seat in Belgium also need to disclose certain information to the general meeting of bondholders, in accordance with the Belgian Code of Companies and Associations.

Finally, entities listed on one of the Euronext markets need to comply with the Euronext internal rules, set out in the rule books. The requirement is rather broad, as all necessary information to enable holders of debt instruments to exercise their rights has to be published. Other disclosure requirements set out therein mirror these set out in the Market Abuse Regulation.

Law stated - 3 January 2024

Liability regime

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

Liability in relation to a prospectus may arise for misleading statements, fraud, market abuse and misrepresentation. The prospectus summary, in principle, cannot give rise to liability, except when, read together with the prospectus, it can be deemed misleading.

The actors that are subject to liability are the issuer, the offeror, the person requesting admission to trading and, as applicable, the guarantor. These actors have to declare that the prospectus contains information that is accurate and that no material information has been omitted from the prospectus.

The Prospectus Regulation does not provide for an autonomous civil liability regime. However, according to the Prospectus Law, the responsible actors are jointly and severally liable towards investors for damage caused by misleading or inaccurate information.

There is no different analysis for securities of other types as the Prospectus Law applies to all investment instruments.

Law stated - 3 January 2024

Remedies

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

An investor can either seek damages contractually or damages in tort. In Belgium, class action suits are not allowed for this purpose, meaning that an investor would need to claim damages on an individual basis, although this can still be in the same proceedings as other investors.

The mere fact that the FSMA has ruled that an issuer has made certain infringements of applicable laws, does not mean that investors can automatically be granted damages. Individual procedures still need to be initiated by each investor, and the civil court is not bound by the FSMA's ruling. However, if it is ruled that the prospectus contains misleading or inaccurate information, any investors' damage is deemed to be the result thereof, unless proven otherwise.

Law stated - 3 January 2024

Enforcement

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

The FSMA can request the actors responsible for the prospectus to remedy the prejudice caused by misleading or incorrect information provided for in the prospectus, and, more generally, may request the actors to comply with the relevant laws.

Further, the FSMA has the authority to (1) publish a statement of its findings whereby it reveals the identity of the infringer and the nature of the infringement ('name and shame') and (2) impose a penalty payment or fine or both.

Law stated - 3 January 2024

Tax liability

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

Under Belgian corporate income tax law, interest paid or attributed on debt instruments is, in principle, deductible for Belgian corporate income tax purposes, subject to certain conditions and interest deduction limitation – including hybrid mismatch – rules. As a general rule, dividend payments are not deductible for corporate income tax purposes. Consequently, attention should be paid to the proper qualification of the instrument in terms of either debt or equity.

Interest paid or attributed on debt instruments are, in principle, subject to a 30 per cent withholding tax subject to exemptions and reduced rates.

The Belgian tax on stock exchange transactions applies, in principle, to the purchase and sale on a secondary market of qualifying financial instruments, provided such transaction is (1) entered into or executed in Belgium through a professional intermediary or (2) deemed to be entered into or executed in Belgium. The applicable tax rate and capped amount depends on the specific nature of the instrument. Exemptions may apply in certain situations. The purchase and sale of financial instruments upon their issuance (ie, primary market transactions) are out of scope.

An annual tax on securities accounts may apply to (1) Belgian resident individuals and legal entities holding a securities account with a Belgian or foreign intermediary and (2)

non-resident individuals and legal entities holding a securities account with a Belgian intermediary. The applicable tax base is the average value, provided it exceeds €1 million, of taxable financial instruments and cash balance held on a securities account during the reference period. The applicable tax rate is, in principle, 0.15 per cent. Exemptions may apply in certain situations.

Law stated - 3 January 2024

UPDATE AND TRENDS

Key developments of the past year

30 | Please provide any updates and trends in your jurisdiction's debt capital market.

Due to uncertainty in the international markets, mainly relating to inflation and the Russia-Ukraine conflict, the Belgian debt capital markets saw, as in 2022, substantially less activity than expected. Although strong corporate borrowers continued to raise funds through debt issuances, high interest rates made this relatively unattractive. For smaller companies, investors' risk aversion made it difficult to successfully place debt instruments. Governmental entities, on the other hand, were active and continued to raise large amounts of funds throughout the whole of 2023.

In October 2023, the Council of the EU formally adopted the Green Bond Regulation, as previously approved by the EU Commission and the EU Parliament. The Green Bond Regulation was published in the Official Journal of the EU on 30 November 2023, entered into force 20 days thereafter and will start to apply 12 months from its entry into force (ie, on 20 December 2024).

The Green Bond Regulation lays down uniform standards for issuers who wish to (on a voluntary basis) use the designation 'European green bond' or 'EuGB' for the marketing of their bond.

The standards will enable investors to direct their money more confidently towards more sustainable technologies and businesses.

The key provisions of the Green Bond Regulation are the following:

- all proceeds of EuGBs will need to be invested in economic activities that are aligned with the EU Taxonomy;
- issuers opting for a 'EuGB label' must use standardised disclosure templates that include an EuGB factsheet, annual allocation report and impact report;
- a centralised registration and supervisions system is established for external reviewers of EuGBs;
- optional disclosure templates are also provided for bonds marketed as environmentally sustainable and for sustainability-linked bonds; and
- proper disclosure and external review will be enforced by the national competent authorities that can also impose fines.

Law stated - 3 January 2024



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UPDATE AND TRENDS

Key developments of the past year

MARKET SNAPSHOT

Market climate

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

Chinese issuers frequently issue debt securities in both the domestic markets and the offshore/international markets to raise funds. Types of debt securities vary depending on the markets where they are issued.

Domestic markets

China's domestic bond markets consist of the interbank bond market (accounting for over 86 per cent of the total size of the onshore debt market as of the end of November 2023) and the exchange bond market. The interbank bond market is an over-the-counter (OTC) wholesale market accessible only to qualified institutional investors. Debt securities can be offered on the interbank bond market via public offering (to institutional investors) and private placement. The exchange bond market is available to both retail investors and institutional or professional investors. Although debt securities can be offered to the general public, offering debt securities only to professional investors through public offering or private placement is the prevailing practice. Debt securities offered on China's domestic debt capital markets include straight debt as well as other products, such as convertible bonds, asset-backed securities and (mostly for financial institution issuers) hybrid instruments. In recent years, green and sustainability linked debt securities have also gained popularity. The domestic high-yield debt market is, however, not well defined in China. According to the People's Bank of China (PBOC), the total issuance of debt securities on China's domestic bond markets amounted to 65.6 trillion yuan in 2023 (up to the end of November 2023), of which 33.5 trillion yuan was issued by financial institutions and 12.9 trillion yuan by non-financial institution (non-FI) corporates, making China the second largest bond market in the world.

Offshore/international market

Chinese issuers are also active on Asia's offshore debt markets. Issuers primarily include financial institutions, non-FI corporates, local government financing vehicles, as well as central and local governments. Similar to other international debt markets, offshore debt offerings by Chinese issuers are usually made to professional investors only. Debt securities offered include both investment grade and high-yield bonds, as well as certain hybrid instruments such as preference shares and perpetual bonds. Since 2022, restrictions on debt financing by property developers and concerns over defaults in the real estate sector has resulted in a weak sentiment in the high-yield market. This is accompanied by the US dollar and euro interest rate hikes and the Chinese government's efforts to control debt raising by local government financing vehicles. In the meantime, debt issuance by sovereign issuers (including China's Ministry of Finance, PBOC and provincial or municipal governments) increased significantly. As a result, the overall size of offshore debt issuance by Chinese issuers remained stable in 2023 compared to 2022.

Law stated - 5 January 2024

Regulatory framework

2 | Describe the general regime for debt securities offerings.

Domestic issuances

Debt securities offered and traded on China's interbank bond market and exchange bond market are regulated by of different authorities and subject to different regulatory regimes, as follows:

- Debt securities issued by financial institutions (financial bonds) and primarily offered and traded on the interbank bond market (with limited exceptions) and are regulated by China's central bank, the People's Bank of China (PBOC) in accordance with the Administrative Measures for the Issuance of Financial Bonds on the National Interbank Bond Market (unofficial English translation). Bond offerings by financial institutions are subject to PBOC's approval. Issuers must meet the specific eligibility requirements imposed by PBOC, including those relating to corporate governance, capital adequacy ratio, profitability and other risk management indicators.
- Debt securities issued by non-FI corporates and offered and traded on the interbank bond market are regulated by the National Association of Financial Market Institutional Investors (NAFMII), a self-regulatory body under the supervision of PBOC. Issuers are required to register their issuance programmes with NAFMII, and may issue debt instruments in multiple series within the two-year validity period of a registration. NAFMII has promulgated a series of rules regarding registration and offering of debt securities by corporate issuers on the interbank bond market, including the Rules for the Registration and Issuance of Debt Financing Instruments of Non-Financial Enterprises in Inter-bank Market and the Guidelines on Debt Financing Instruments of Overseas Non-Financial Enterprises (English translation). NAFMII has also promulgated detailed forms setting out the disclosure requirements for offering documents.
- Debt securities offered and traded on the exchange market are regulated by the China Securities Regulation Commission (CSRC) and the relevant stock exchanges (ie, the Shanghai Stock Exchange and the Shenzhen Stock Exchange) in accordance with the Administrative Measures for the Issuance and Trading of Corporate Bonds and the rules of the respective stock exchange. Public offerings of corporate bonds on the exchange market are required to be registered with CSRC.

Offshore/international issuances

Chinese issuers (including offshore vehicles controlled by Chinese corporates or financial institutions and red chip companies with their primary business operations in China) are required, pursuant to the Administrative Measures for the Review and Registration of Mid-to Long-Term Foreign Debts of Enterprises (the 2023 NDRC Measures), to go through a review and registration process with the National Development and Reform Commission (NDRC) for their offshore offerings of debt securities with an original maturity of one year or longer. The 2023 NDRC Measures also expressly empowers NDRC to manage the total size and mix of

debt securities issued by Chinese enterprises on the offshore/international markets. NDRC has broad discretion in determining whether to grant foreign debt registration and the size of foreign debt registered for each potential issuer. In addition to NDRC's pre-issuance review and registration, issuers are also required to register their foreign debt with the State Administration of Foreign Exchange (SAFE) and submit certain foreign debt related information to NDRC after each issuance (where applicable).

Law stated - 5 January 2024

FILING AND DOCUMENTARY REQUIREMENTS

General filing requirements

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

Domestic issuances

Registration and approval requirements for public offerings of debt securities in China differ, depending on the type of issuer and the market where the debt securities are offered and traded.

- Financial bonds: Debt securities issued by financial institutions, which are primarily offered and traded on the interbank bond market (with limited exceptions), and subject to the regulation by China's central bank, the People's Bank of China (PBOC). An offering of financial bonds, whether through a public offering or private placement, requires PBOC's approval. Issuers can set up programmes and offer multiple series of debt securities over a period of two years following PBOC's approval.
- Debt financing instruments: For debt securities issued by non-financial institution (non-FI) corporates, foreign sovereigns and supranational issuers on the interbank bond market (ie, debt financing instruments), registration with the National Association of Financial Market Institutional Investors (NAFMII, a self-regulatory body under the supervision of PBOC) is required, regardless of whether the debt financing instruments are offered via a public offering or a private placement. Similar to financial bonds, issuers can set up programmes and offer multiple series of debt securities over a period of two years following NAFMII's registration.
- Debt securities issued on the stock exchange market: For a public offering of debt securities on the stock exchange market, registration with the China Securities Regulation Commission (CSRC) are required. An application for registration is first reviewed by the stock exchanges, after which it is submitted to CSRC for registration approval. For private placements on the exchange market, a post-issuance filing with the Securities Association of China (a self-regulatory body under the CSRC's supervision) is required.

Offshore/international issuances

Chinese issuers (including offshore vehicles controlled by Chinese corporates or financial institutions and red chip companies with their primary business operations in China) are required to obtain a registration approval from the National Development and Reform Commission (NDRC) for their offshore offerings of debt securities with an original maturity of one year or longer. Issuers or their Chinese parent companies or affiliates are required to submit an application to NDRC specifying certain basic information on the issuer and the proposed debt issuances.

Law stated - 5 January 2024

Prospectus requirements

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

For domestic public offerings of debt securities, issuers are generally required to prepare and publish a prospectus or offering circular, and such disclosure document is generally required to include the following information on the issuer (and the guarantor, if applicable) and the debt securities:

- customary legends and alerts;
- a customary 'risk factors' section;
- material information on the business operation, management, credit rating and financial conditions (in the form of a 'management analysis and discussion');
- use of proceeds;
- terms and conditions of the debt securities and the offering arrangements;
- investor protection arrangements and bondholders' meeting provisions;
- potential liability management actions;
- on-going disclosure arrangements;
- tax considerations; and
- parties involved in the offering.

Information contained in the disclosure document is subject to the general requirement of being true, accurate and complete. Depending on the type of issuer (financial institution or otherwise) and the market where the debt securities are offered (interbank bond market or stock exchange market), the disclosure document is required to be in compliance with the specific forms promulgated by different regulators.

PRC regulators do not impose mandatory disclosure requirements for offshore debt issuances. Issuers are only required to comply with the disclosure requirements in the jurisdiction where the debt securities are offered.

Law stated - 5 January 2024

Documentation

5 | Describe the drafting process for the offering document.

For domestic debt issuances, documentation is less complex as compared to the prevailing practices on international markets. The key document for an onshore debt issuance is the disclosure document (an offering circular or a prospectus). Traditionally, underwriters assist the issuers in preparing the disclosure document based on their due diligence exercise. However, external legal counsel have also taken part in the preparation of disclosure documents on behalf of the issuer in recent years, especially for debt issuances by international issuers. Disclosure documents are subject to the general disclosure standard of being true, accurate and complete, regardless of whether the offering is public or private. However, for private placements, the disclosure standard is usually less rigid.

For offshore debt issuances by Chinese issuers, the documentation practice is very similar to those in other international markets, where the issuer's international legal counsel usually prepares the key disclosure document (an offering circular or offering memorandum) and the underwriters' international legal counsel usually prepares the other transaction documents (such as terms and conditions of the bonds, subscription or purchase agreements, trust deeds or deeds of covenants, agency agreements, etc). For private placements on the offshore market, documentation requirements are usually more flexible depending on the requirements of the placing agents and the investors.

Law stated - 5 January 2024

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

For domestic issuances, there is no contract, indenture or deed documenting the terms and conditions of debt securities. The terms and conditions are contained in the offering document (in the form of an offering circular or a prospectus). Therefore, the offering document is deemed more than an information disclosure document, but also a contract between the issuer and the investors regarding the debt securities.

For offshore debt issuances by Chinese issuers, the documentation is very similar to those in other international markets. The terms and conditions of debt securities are usually negotiated as a separate document, and documented in a trust deed or indenture, or deed of covenant made by the issuer (and, in the case of a trustee structure, the bond trustee).

Law stated - 5 January 2024

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

For domestic issuances that are subject to approval or registration requirements (ie, offerings on the interbank bond market, and public offerings on the stock exchange market), the offering document (in the form of an offering circular or a prospectus) is a

key application document. In that sense, the offering document is required to be approved by the regulators before use. Issuers may set up programmes on the interbank bond market and offer multiple series of debt securities over a period of two years following the regulator's approval/registration. The offering document for each subsequent offering after the regulator's approval/registration is not subject to the same review and approval process.

For private placements on the stock exchange market, the offering document is not subject to an ex ante approval requirement.

For offshore issuances, the offering document is often subject to the review by the stock exchange on which the debt securities are to be listed. However, this stock exchange review is usually conducted on the form of the offering document instead of the substance.

Law stated - 5 January 2024

Authorisation

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

For domestic public offerings of debt securities, registration or approval requirements differ depending on the type of issuer and the market where the debt securities are offered and traded.

- Debt securities issued by financial institutions (financial bonds), which are primarily offered and traded on the interbank bond market (with limited exceptions), are subject to the regulation by PBOC. Issuers can set up programmes and offer multiple series of debt securities over a period of two years following PBOC's approval.

PBOC is required to determine whether to approve an application within 20 business days after its formal acceptance of an application. However, PBOC may raise comments or queries on the application. Time spent by the applicant to respond to such comments and queries is not counted to this 20-business day limit.

- For debt securities issued by non-FI corporates, foreign sovereigns and supranational issuers on the interbank bond market (ie, debt financing instruments), registration with NAFMII is required. Similar to financial bonds, issuers can set up programmes and offer multiple series of debt securities over a period of two years following NAFMII's registration.

An application for registration is first reviewed by the NAFMII pre-vetting team, who may raise comments or queries on application document. Pursuant to the Rules and Procedures for the Registration of Debt Financing Instruments of Non-Financial Enterprises, the NAFMII pre-vetting staff are required to provide their comments and queries within two to 10 business days after its acceptance of the application. However, there is no limit on how many rounds of comments and queries the NAFMII pre-vetting staff may raise. After the NAFMII pre-vetting team is satisfied

that the application documents meet the required standards, the application is then submitted to the registration committee for final registration approval. The registration committee may raise additional comments or impose additional conditions in their determination.

- For public offerings of debt securities on the stock exchange market, registration with the China Securities Regulation Commission (CSRC) is required.

An application for registration is first submitted to, and reviewed by, the stock exchange on which the debt securities are to be listed. The stock exchange is required to reach a final recommendation within two months after its formal acceptance of an application, after which the stock exchange submits the application to CSRC for registration approval. CSRC is in turn required to reach a final determination within three months after receiving the recommendation from the stock exchange. However, both the stock exchanges and CSRC may raise comments and queries on application documents. Time spent by the applicant to respond to such comments and queries is not counted to the relevant time limits.

Although issuers and underwriters are not allowed to actually offer the securities for subscription before obtaining the relevant approval/registration, the marketing restrictions commonly seen in other jurisdictions before the approval/registration does not apply. Issuers and underwriters may approach potential investors during the application process to speed up the final offering process.

Law stated - 5 January 2024

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

For domestic public offerings of debt securities, regulators generally have broad discretion on granting an approval/registration. Factors taken into account may include the creditworthiness and qualification of the issuer, the proposed use of proceeds and sometimes even market sentiment.

Law stated - 5 January 2024

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

For debt securities offered on the interbank market, rules for public and private offerings are similar as to the requirements for approval by and registration with Chinese authorities.

Debt securities offered on the stock exchange market via private placements are exempt from the registration requirement, and are only required to be filed with the Securities Association of China (a self-regulatory body under the CSRC's supervision) after the offering is completed. For a private placement of debt securities, the offerees must be qualified professional investors, and the total number of offerees may not exceed 200 for each private placement. Debt securities offered via a private placement may not be publicly marketed.

Law stated - 5 January 2024

Offering process

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

A public offering of debt securities in China's domestic markets usually involves the following steps:

- Documentation preparation and due diligence: underwriters and legal counsel conduct the required due diligence and assist the issuer preparing the relevant application and offering documents.
- Application for approval/registration: depending on the type of issuer and the market on which the debt securities are to be offered, an application for public offering is submitted to PBOC, NAFMII or the relevant stock exchange. The regulators may raise comments or queries during the review process. In the meantime, issuers and underwriters often approach potential investors to seek interests in the debt securities to be offered.
- Offering and pricing: After the approval/registration is granted, the issuer and the underwriters are permitted to proceed with the offering and pricing. For offerings on the interbank bond market, issuers may offer multiple series of debt securities within two years after obtaining the relevant approval/registration. For offerings on the stock exchange market, a registration is required for each offering.
- Settlement: Settlement of debt securities in China are more expedient compared to that on the international markets, as all debt securities are centrally registered in the name of the beneficial owners and the debt securities are cleared on a completely dematerialised basis. Closing documents are also more streamlined as a nominal holder or bond trustee is not required.

Law stated - 5 January 2024

Closing documents

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

For debt securities offered on the domestic market, closing documents primarily relate to the settlement logistics, including payment instructions and bond registration forms. Practices for other closing documents and certificates (such as closing opinions, comfort letters and closing certificates) are not well developed.

For debt securities offered on the offshore market, closing documents are similar to those on other international markets and usually include legal opinions, comfort letters, issuer's closing certificates and other logistic documents.

Law stated - 5 January 2024

Listing fees

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

Debt securities offered on the interbank bond market are usually not listed on stock exchanges and therefore are not subject to listing fees. However, NAFMII is considering allowing debt securities offered by foreign issuers (ie, panda bonds) to be listed on certain foreign stock exchanges. In that case, the listing fee standards for the relevant stock exchange will apply.

Pursuant to the fee standards of the Shanghai Stock Exchange and the Shenzhen Stock Exchange, debt securities are currently exempted from listing fees.

Debt securities offered on the offshore market are subject to listing fee standards published by relevant stock exchanges. The most popular listing venues for Chinese issuers are currently the Hong Kong Stock Exchange, The ChongWa (Macao) Financial Asset Exchange Co. Ltd. and the Singapore Stock Exchange.

Law stated - 5 January 2024

KEY CONSIDERATIONS

Special debt instruments

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

Convertible and exchangeable debt are available only to publicly listed companies and their shareholders, respectively. Domestic markets for other equity-linked or derivative products are not well developed.

Law stated - 5 January 2024

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

Article 13 of the Administrative Measures on the Registration of Securities Offerings by Listed Companies specifies the specific eligibility requirements for listed companies to offer convertible bonds, including those relating to the issuer's corporate governance and financial performance (interest coverage ratio, asset and liability structure, cash flow

and profitability). Other general requirements on debt securities offerings (including the registration and disclosure requirements) also apply to convertible and exchangeable bond offerings.

Law stated - 5 January 2024

Classification

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

The key determinant for debt securities under Chinese law is the feature of principal and interest payment. However, as only limited types of securities are allowed on the onshore market, there is usually little room of ambiguity when categorising securities into debt or equity.

Law stated - 5 January 2024

Transfer of private debt securities

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

On the interbank bond market, debt securities offered via private placements may only be transferred to other subscribers of the debt securities and a pool of institutional investors recognised by the National Association of Financial Market Institutional Investors. On the stock exchange market, debt securities offered via private placements may only be transferred between qualified professional investors. Secondary market transfers of debt securities offered via private placement are made in an over-the-counter manner in both markets.

Law stated - 5 January 2024

Cross-border issues

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

The People's Bank of China (PBOC), the Ministry of Finance and the National Association of Financial Market Institutional Investors (NAFMII) have promulgated a series of rules specifically governing issuances of debt securities (ie, panda bonds) by foreign issuers on the interbank bond market. Foreign issuers that are allowed to issue panda bonds include sovereigns and local governments, supra-nationals, financial institutions and non-FI corporates. The panda bond market has seen significant growth since 2015. The

PBOC approval/NAFMII registration requirements for domestic issuers also apply to foreign issuers. However, seasoned foreign issuers may enjoy certain flexibility as to the disclosure requirements.

Chinese issuers (including offshore vehicles controlled by Chinese corporates or financial institutions and red chip companies with their primary business operations in China) are required to go through a review and registration process with the National Development and Reform Commission for their offshore issuances of debt securities with an original maturity of one year or longer.

Law stated - 5 January 2024

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

Currently China has not made special arrangements for foreign issuers from any specific jurisdiction.

Law stated - 5 January 2024

Underwriting

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

Debt offerings (whether public offerings or private placements) are usually underwritten by a syndicate of banks or securities companies led by certain lead underwriters. Underwriting can be conducted on a firm-commitment or best-efforts basis.

Law stated - 5 January 2024

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

For domestic debt offerings, underwriters must be licensed financial institutions in China. Licensing requirements differ based on the type of debt securities:

- For debt securities issued by financial institutions on the interbank bond market, the underwriters must be financial institutions meeting the specific qualification requirements imposed by the PBOC.
- For debt financing instruments issued by non-financial institution (entities on the interbank bond market, the underwriters must be financial institutions that are members of NAFMII with underwriting qualifications. NAFMII grants two different types of qualifications: the qualification to act as a lead underwriter, and the qualification to act as a junior syndicate member.
-

For debt securities issued on the stock exchange market, the underwriters must be securities companies with underwriting licenses granted by the China Securities Regulation Commission.

Law stated - 5 January 2024

Transaction execution

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

Transaction execution issues vary considerably from deal to deal. Issues may arise from commercial or market-related aspects or during the regulatory approval/registration process. Transaction execution issues are more likely to arise in complex or innovative transactions or for debut issuers.

Domestic debt offerings are settled on a free-of-payment basis and in a dematerialised manner. No global or individual notes are issued. Debt securities are delivered directly to investors' securities accounts maintained with the relevant centralised clearing and registration systems based on the confirmation from the issuer and the underwriters. Issuers usually receive proceeds from the lead underwriters, who could be exposed to settlement risk. However, there is a certain clearing system that may also receive the subscription monies from investors and wire the proceeds to issuers.

Law stated - 5 January 2024

Holding forms

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

All debt securities offered on the domestic markets are held in uncertificated book-entry form. The securities registration and clearing systems in China operate on a completely dematerialised basis.

Law stated - 5 January 2024

Outstanding debt securities

24 | Describe how issuers manage their outstanding debt securities.

Traditionally, on the domestic debt markets, issuers have managed their outstanding debt securities via the collective action clauses contained in their debt securities, in other words, through convening bondholders' meetings to approve amendments or extensions. Open market purchases were rare due to regulatory restrictions. However, on both the interbank bond market and the stock exchange market, the regulators have recently promulgated

rules and regulations to introduce a variety of liability management technics, such as buybacks and exchange offers.

Law stated - 5 January 2024

REGULATION AND LIABILITY

Reporting obligations

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

On the domestic debt markets, issuers (and guarantors, if applicable) are required to make on-going disclosure for outstanding debt securities. On-going disclosure requirements include annual and quarterly reports (including financial statements) and disclosure of the prescribed material events. Foreign issuers may be exempted from quarterly reporting if it does not publish such quarterly reports in other markets either.

For offshore debt securities with an original maturity of one year or longer, Chinese issuers (including offshore vehicles controlled by Chinese corporates or financial institutions and red chip companies with their primary business operations in China) are required, in addition to the pre-issuance registration with the National Development and Reform Commission (NDRC), to: submit to NDRC the offering information after the completion of the issuance; submit to NDRC information on foreign debt raised under the registration certificate within 10 business days after the expiry date of such registration certificate; submit to NDRC the requisite information, including, without limitation, the use of proceeds, history and future plans for the payment of principal and interest and major operational indicators, within five business days before the end of January and July of each year; and submit the relevant information to NDRC promptly upon the occurrence of any material event that may affect the performance of its obligations under their foreign debt.

Law stated - 5 January 2024

Liability regime

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

Underwriters and other professional service providers (including legal counsel, auditors, valuers, etc) are subject to civil, administrative and potential criminal liabilities under securities law. Liabilities for underwriters and other professional service providers are based on fault, and due diligence defence is available to these participants (although seldom successfully asserted). The liability analysis for debt securities is the same for other types of securities (ie, equity securities).

Law stated - 5 January 2024

Remedies

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

Depending on the source of damages, investors may seek remedies based on contract law or securities law. If the damages arise from a default in payment or other bond terms, investors may take legal actions against the issuer (and the guarantor, if applicable) based on a breach of contract. If the damages arise from defects in disclosure (eg, false statements or material omissions), investors may take legal actions against the issuer (and the guarantor, if applicable) as well as the underwriters and other professional service providers (legal counsel, auditors, rating agencies, valuers, etc) based on securities law liabilities.

Law stated - 5 January 2024

Enforcement

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

The People's Bank of China, the National Association of Financial Market Institutional Investors, the China Securities Regulation Commission and the stock exchanges have the power to conduct investigations on suspected misconduct or violations and to impose penalties. Possible penalties include public reprimands, confiscation of illegal gains, fines, suspension of further issuance/related business and disqualification for entry into the market, which can be imposed on issuers, underwriters, other professional service providers and relevant individuals.

Law stated - 5 January 2024

Tax liability

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

On the domestic market, it is not customary for issuers to gross up Chinese taxes. Investors usually bear their own Chinese tax burden for interest income and capital gains. However, for foreign issuers issuing debt securities (ie, panda bonds) in China, issuers usually gross up withholdings and deductions under their home jurisdiction tax laws.

For offshore issuances, it is customary for issuers to gross up Chinese withholding tax (including value-added tax of 6 per cent and income tax of 10 per cent).

Law stated - 5 January 2024

UPDATE AND TRENDS

Key developments of the past year

30 | Please provide any updates and trends in your jurisdiction's debt capital market.

Regulatory reform

The publication of the Guidance Opinion on Deepening the Reform of the Registration-based Regime for Debt Securities and the Guidance Opinion on Improving the Debt Securities Business Practice of Intermediaries under the Registration-based Regime marks the full implementation of the registration-based regime for debt securities on China's stock exchange market. Further, the regulatory authority over enterprise bonds (a special type of bonds issued by enterprise issuers) was consolidated from the National Development and Reform Commission into the China Securities Regulation Commission (CSRC) in March 2023 with a six-month transition period. This shift of regulatory authority consolidated the split markets for enterprise bonds and corporate bonds. CSRC and the stock exchanges subsequently amended the relevant rules for corporate bonds so that they apply to enterprise bonds equally.

Local government debt

The Chinese government further stepped up in its efforts to address the hidden debt of local governments, and formulated a 'full package' plan to resolve the hidden debt issue in July 2023. This includes the special government bond quota approved for 29 provinces and designated municipalities, especially for certain debt saddled regions with limited fiscal strengths. This effort to resolve the hidden debt issue has to some extent resulted in a decrease in debt issuance by local government financing vehicles, a traditionally popular sector in China's debt capital markets.

Debt defaults

As risks continue to materialise, 2023 saw a decline in debt default (108 issues by 38 issuers) compared to the previous year (302 issues by 76 issuers). However, an increase in extensions of debt securities (totalling 204 billion yuan, up from 2022's 193 billion yuan) shows that uncertainties remain for China's debt markets.

Law stated - 5 January 2024

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UPDATE AND TRENDS

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MARKET SNAPSHOT

Market climate

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

India has an active debt securities market that primarily includes issuances by the central and state governments, statutory corporations or bodies, banks, financial institutions, corporate entities and pooled investment vehicles. The types of debt instruments issued in India include government securities, Treasury Bills, state development loans issued by the central and state governments and corporate bonds issued by banks, financial institutions and other corporate entities. Under the External Commercial Borrowing (ECB) regulations, Indian corporates also issue offshore bonds denominated in rupees or other foreign currency.

Debt securities may be issued either on a private-placement basis or to the public, be unlisted or listed on stock exchanges (in India or overseas), have a fixed- or floating-rate coupon and be unsecured or structured as asset- or receivable-backed securities. Banks and financial institutions in India also issue subordinated debt as part of their regulatory capital.

Law stated - 27 December 2023

Regulatory framework

2 | Describe the general regime for debt securities offerings.

The corporate law requirements applicable to issuances by Indian companies are governed by the (Indian) Companies Act 2013, as amended (the Indian Companies Act) and rules made thereunder, which set out the requirements for privately placed and publicly issued debt securities.

Debt securities that are listed on Indian stock exchanges are regulated by the Securities and Exchange Board of India (SEBI), the securities market regulator in India. SEBI has issued the Securities and Exchange Board of India (Issue and Listing of Non-Convertible Securities) Regulations 2021read with SEBI Master Circular bearing reference number SEBI/HO/DDHS/PoD1/P/CIR/2023/119 dated 10 August 2021, in each case, as amended (collectively, the SEBI NCS Regulations), the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations 2018, as amended (the SEBI ICDR Regulations) and the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 read with the SEBI Master Circular bearing reference number SEBI/HO/DDHS/PoD1/P/CIR/2023/1 dated 29 July 2022, each as amended, which are the principal regulations governing debt securities and are enforced by SEBI.

Additionally, foreign investments in India and modes of raising capital offshore are foreign exchange transactions that are strictly controlled in India. The Foreign Exchange Management Act 1999 and the regulations under it constitute the relevant legal framework

for such transactions. The Reserve Bank of India (RBI), the central bank in India, is the primary regulator in this regard. The RBI's Master Directions on External Commercial Borrowings, Trade Credits and Structured Obligations(the ECB Route) govern issuances of debt securities by Indian issuers to eligible overseas investors. Investment by foreign portfolio investors in debt securities issued by Indian entities is governed by the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019, the Foreign Exchange Management (Debt Instruments) Regulations 2019 read along with the RBI's circulars on Investment by Foreign Portfolio Investors (FPIs) in the Debt Market in India (under the Regular Routeand the Voluntary Retention Route), as amended (together, the FPI Route). Finally, investment by foreign venture capital investors in optionally convertible debentures, redeemable and optionally convertible preference shares and debt instruments is governed by the Securities and Exchange Board of India (Foreign Venture Capital Investor) Regulations, 2000, the Foreign Exchange Management (Non-Debt Instruments) Rules 2019 read with the RBI's circularon investment by FVCIs registered under the Securities and Exchange Board of India (Foreign Venture Capital Investor) Regulations 2000, as amended occasionally (the FVCI Route).

The responses in this chapter, unless otherwise specified, do not apply to debt securities issued under the ECB Route, which are almost always listed on overseas stock exchanges, in respect of which the applicable overseas laws (eg, the Securities Act of 1933 (United States)) will be applicable, although certain basic compliances relating to corporate authorisations for the incurrence of debt would need to be undertaken and obtained in compliance with the requirements under the Indian Companies Act.

Law stated - 27 December 2023

FILING AND DOCUMENTARY REQUIREMENTS

General filing requirements

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

An issuer proposing to undertake a public issue of non-convertible debt securities in India is required to comply with filing requirements set out under the Securities and Exchange Board of India (SEBI) (Issue and Listing of Non-Convertible Securities) Regulations, 2021 read with the SEBI Master Circular bearing reference number SEBI/HO/DDHS/PoD1/P/CIR/2023/119 dated 10 August 2021, in each case, as amended (collectively, the SEBI NCS Regulations), which provide for:

- making an application to one or more recognised stock exchanges for listing of debt securities;
- obtaining in-principle approval for listing of debt securities;
- obtaining credit rating from at least one credit rating agency registered with the SEBI; and

- entering into an arrangement with a depository registered with SEBI for dematerialisation of debt securities proposed to be issued.

As per the SEBI NCS Regulations, while a prospectus may be filed by any eligible issuer, a shelf prospectus and each corresponding tranche prospectus can only be filed by certain identified categories of issuers. These include issuers whose equity shares, convertible securities, non-convertible redeemable preference shares or units (as applicable) have been listed on the stock exchanges in India for at least three years and non-banking financial companies, subject to certain eligibility requirements. These include:

- having a minimum net worth;
- having a track record of operating profit for a stipulated period of time;
- having a minimum category of rating by a credit rating agency;
- having no regulatory action pending against the issuer or its promoters or directors before certain identified authorities; and
- not having defaulted on certain identified financial obligations for a stipulated period of time. However, this requirement does not apply if the issuer has cured the defaults at least 30 days prior to filing the draft shelf prospectus.

Further, for any issue of non-convertible debt securities (including any public issue), none of the issuer, its promoters, promoter group or directors (as applicable) should be:

- wilful defaulters;
- fugitive economic offenders;
- debarred from accessing the securities market or dealing in securities;
- promoters or directors of another company that is a wilful defaulter; or
- debarred from accessing the securities market or dealing in securities.

Other than the submission of additional documents and evidence to each stock exchange in accordance with its listing procedure, no other criteria are applicable to public offerings of non-convertible debt securities in India. In particular, the SEBI has, on 5 July 2023, largely made the disclosure requirements for public offerings and private placements of non-convertible debt securities uniform.

An issuer proposing to undertake a public issue of convertible debt securities in India is required to comply with the substantive and procedural requirements set out under the SEBI (Issue of Capital and Disclosure Requirements) Regulations 2018, as amended (the SEBI ICDR Regulations) and the listing procedure of each stock exchange.

Law stated - 27 December 2023

Prospectus requirements

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

An issuer proposing to undertake a public issue of debt securities is required to prepare and file the draft prospectus with the designated stock exchange and submit it with the SEBI as per the disclosure requirements set out under the (Indian) Companies Act 2013, as amended (the Indian Companies Act) and rules framed thereunder, the SEBI NCS Regulations (for non-convertible debt securities), the SEBI ICDR Regulations (for convertible debt securities) and certain other applicable legal requirements. Further, for non-convertible debt securities issued to the public, the issuer files the relevant prospectus with the Registrar of Companies in India (if the issuer is a company) and the designated stock exchange and submits it with the SEBI.

In addition to the customary key disclosures such as details regarding business and industry of the issuer, risk factors (internal and external to the issuer) and financial information, the prospectus should include additional specifically prescribed disclosures such as:

- details pertaining to promoters;
- details pertaining to the use of proceeds;
- litigation relating to the issuer, its subsidiaries, promoters, directors, subsidiaries, group companies or other persons that may have a material adverse effect on the issuer's financial position or could affect any investor's investment decision; and
- details regarding the capital structure of the issuer along with the shareholding pattern.

While certain provisions in relation to the disclosure requirements for a prospectus under the Indian Companies Act and the rules framed thereunder have been repealed, the stock exchanges in India have prescribed through circulars that the erstwhile disclosure requirements be followed for a public offer of debt securities.

Law stated - 27 December 2023

Documentation

5 | Describe the drafting process for the offering document.

The offering document for debt securities (in the form of debentures) issued by Indian companies on a private placement basis is the 'private placement offer cum application letter' (Form PAS-4), which constitutes disclosures prescribed under the Indian Companies Act. Additionally, for listed debt securities, certain additional disclosures, as prescribed under the SEBI NCS Regulations (for non-convertible debt securities) and the SEBI ICDR Regulations (for convertible debt securities), must be made. From 1 April 2024, an issuer making a private placement of non-convertible debt securities must issue a general information document (which is valid for one year from the date of opening of the offer, and covers subsequent offers within its validity period) and a key information document for each individual issuance of listed, privately placed non-convertible debt securities. Until 31 March 2024, an issuer may, with an explanation to the stock exchange, opt to issue a placement memorandum instead of a general information document and a key information

document. Banks issuing subordinated bonds as part of their regulatory capital are also required to include disclosures prescribed by the Reserve Bank of India (under the Master Circular on Basel III Capital Regulations) in their offering documents.

On the other hand, the offering document for public issue of debt securities is the prospectus, which contains disclosures specified in the Indian Companies Act and rules framed thereunder, the SEBI NCS Regulations (for non-convertible debt securities), the SEBI ICDR Regulations (for convertible debt securities) and certain other applicable legal requirements. It may be a standalone prospectus or may be in the form of a shelf prospectus along with a tranche prospectus.

While the disclosures to be made under the prospectus for public issue of debt securities were previously more detailed and comprehensive than those applicable to a private placement, the SEBI has brought uniformity in disclosure requirements for the issue of listed debt securities. An offer document for listed debt securities should include:

- disclosures on financial information;
- risk factors;
- industry overview;
- business and history of the issuer;
- details of the existing borrowings and litigations;
- terms and conditions of the debt securities; and
- use of proceeds and security package, among other things.

While there are no materiality thresholds prescribed for making the disclosures in the offer documents, the transaction participants, as a market practice and on a case-by-case basis, agree on certain qualitative and quantitative thresholds. For instance, while disclosing quantifiable legal proceedings involving the issuer, its promoters, subsidiaries, directors and group companies, thresholds are typically determined as a percentage of the total income or net worth of the issuer.

Drafting of the offering documents is a collaborative process, which typically involves the issuer and its counsel preparing the draft and the merchant bankers or investors and their counsel providing their input and revisions for the purpose of finalisation.

Law stated - 27 December 2023

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

The key documents that govern the terms and conditions for debt securities (in the form of debentures) issued on a private placement basis and public issue of such debt securities are:

- The debenture trustee appointment agreement. This agreement contains the terms for the appointment of the debenture trustee acting for the benefit of the debenture holders and is executed between the issuer and the debenture trustee.

- The debenture trust deed. This deed contains the principal terms of the debt issuances and is executed between the issuer and the debenture trustee (acting for the benefit of debenture holders).
- Security documents (where the debt securities are secured). These documents are executed between the entity providing the security (whether the issuer or other third-party security provider) and the debenture trustee (acting for the benefit of debenture holders).
- The offering document. This document contains the disclosures prescribed under the Indian Companies Act, the SEBI NCS Regulations or the SEBI ICDR Regulations and circulars issued by SEBI and the stock exchanges in relation to the debt securities, as applicable.
- Other transaction agreements that are generally executed for public issue of debt securities include the issue agreement, registrar agreement, public issue account and sponsor bank agreement and the consortium agreement or lead broker agreement.

The offering documents issued for listed debt securities are available on the website of the stock exchange where such securities are listed. Further, the offering documents for public issues of debt securities are also available on the SEBI website. Additionally, debenture trust deeds for public issues of debt securities are available on Bombay Stock Exchange Limited (BSE) and National Stock Exchange of India Limited stock exchange websites. Other documents are generally not available to the public.

The key documents for debt securities issued under the External Commercial Borrowing Route differ in that a domestic debenture trustee is not required to be appointed, and, accordingly, a debenture trustee appointment agreement is not required. Further, instead of a debenture trust deed, the entry into an indenture or bond trust deed governed by the relevant overseas laws or (less commonly) by Indian law is typical, and since Indian securities laws do not apply to such bonds, an offering document is only required where such bonds are governed by overseas laws and listed on overseas stock exchanges. Such offering document will be prepared in accordance with such overseas laws and will be available on the websites of the relevant overseas stock exchanges where the underlying securities are listed.

Law stated - 27 December 2023

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

Generally, for unlisted debt securities issued on a private placement basis, the offering document does not require any regulatory approval before publication. For a public issue of non-convertible debt securities by an Indian company, the relevant prospectus is filed with the Registrar of Companies in India. Further, where the debt securities are proposed to be listed (whether on a private placement basis or for public issues), the draft offering document is submitted to the relevant stock exchange before the issue opening date for obtaining in-principle approval from such stock exchange.

Law stated - 27 December 2023

Authorisation

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

Public offerings of debt securities are typically not subject to any review and authorisation. However, the draft prospectus is submitted with the designated stock exchange before the issue opening date for obtaining in-principle approval from such stock exchange. The in-principle approval may be refused if the issuer is not eligible to undertake a public issue or is not in compliance with the SEBI NCS Regulations or (as applicable) the SEBI ICDR Regulations and other applicable legal requirements. Further, for public offerings of non-convertible debt securities by an Indian company, the relevant prospectus is also filed with the Registrar of Companies in India.

Law stated - 27 December 2023

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

For a public issue of debt securities, no regulatory approval is typically required.

Law stated - 27 December 2023

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

The safe harbour for issuers from the requirement to issue a prospectus (applicable to public issue of debt securities) under the Indian Companies Act is where the issue of such debt securities is being made on a private placement basis (ie, the number of investors does not exceed 50 (or 200 in aggregate in a financial year), not including qualified institutional buyers).

The prospectus for a public offering of non-convertible debt securities by an Indian company is required to be filed with the Registrar of Companies in India. This requirement does not apply to offer documents for a private placement.

Law stated - 27 December 2023

Offering process

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

The process for public issue of non-convertible debt securities is as follows:

- Obtaining the corporate approvals for the issue of non-convertible debt securities, borrowing limits, security creation (where applicable), etc.
- Appointment of the intermediaries.
- Commencement of the due diligence exercise, simultaneously with the commencement of drafting of the draft prospectus. Obtaining relevant consents from the existing lenders, regulators, statutory authorities and any other third parties, as may be required in relation to public issue.
- Obtaining certificates and consents from the issuer, its directors, key managerial personnel, the debenture trustee and relevant third parties to disclose their details in the draft prospectus and provide other factual confirmations in relation to the draft prospectus.
- Execution of the transaction agreements such as issue agreement, registrar agreement and debenture trustee agreement.
- Obtaining comfort letters and other certificates from the auditors of the issuer and the independent chartered accountant.
- Finalisation and filing of the draft prospectus with the designated stock exchange through the lead merchant banker and forwarded to SEBI and simultaneously submission of a due diligence certificate by the debenture trustee with the stock exchanges.
- The draft prospectus is posted on the website of the designated stock exchange for seeking public comments for a stipulated period. The draft prospectus is also displayed on the website of the issuer and merchant bankers.
- The lead merchant banker ensures all comments received on the draft prospectus are suitably addressed.
- Filing of applications to the stock exchanges for the in-principle listing approvals followed by receipt of the in-principle approvals.
- The signing of the debt listing agreement with the stock exchange on which the debt securities are proposed to be listed.
- Execution of the transaction agreements such as public issue account and sponsor bank agreement and the consortium agreement or lead broker agreement.
- Filing of the prospectus with SEBI for its records along with the due diligence certificate from the lead merchant bankers.
- For an issuer that is a company, filing of the prospectus with the Registrar of Companies and obtaining the Registrar of Companies' acknowledgement.
- Filing of the due diligence certificate by debenture trustee with SEBI prior to the opening of public issue.
- Issue of an advertisement in a national daily newspaper with wide circulation.
- The issue opens and closes, and between opening and closing of the issue, applications forms are received from prospective investors.
- The issuer obtains an International Securities Identification Number (ISIN) from a depository before the pay-in date.

- The issuer allots the debt securities in consultation with the designated stock exchange.
- Execution of debenture trust deed.
- Filing of the final listing application to stock exchanges, following which the stock exchanges provide final listing and trading approval.

For debt securities issued on a private placement basis, the process is simpler as drafting and registration of prospectus is not required. Under the private placement process, the issuer obtains all corporate authorisations for debt raising and security creation, along with other lenders' consent (if required), appoints the intermediaries (eg, debenture trustee and credit rating agency), executes the transaction documents (eg, debenture trustee agreement, debenture trust deed and security documents), prepares and issues the offering document to identified investors and allots the securities as per the issue schedule on receipt of application proceeds. For privately placed debt securities that are to be listed, offering documents are also submitted to the stock exchanges for in-principle approval. Once in-principle approval is obtained, a debt listing agreement will be entered into with the stock exchange on which the debt securities are proposed to be listed and a final listing application will be filed (following which the stock exchanges provide final listing and trading approval). An ISIN must be obtained from a depository prior to the pay-in date. In addition, any issue of listed, non-convertible debt securities that is (a) undertaken by an issuer that is in existence for less than three years, (b) in the form of non-equity regulatory instrument issued by a bank or non-banking financial institution, or (c) individually or, when aggregated with other tranches or issuances in that financial year, for an amount of or exceeding 500 million rupees, will be required to be undertaken in accordance with the electronic book-building mechanism (through a stock exchange that provides an electronic platform for the private placement of such securities), with participants in the issue being required to enrol with the platform. Depending on the requirements specific to each transaction, the private placement process is usually completed within three to six weeks.

For both public issue and private placement of listed, secured debt securities, a security cover of at least 100 per cent is required to be maintained. The trustee is required to undertake an independent assessment of the adequacy of security, and before the issuer files the placement memorandum for the issue it is required to furnish a due diligence certificate confirming that all arrangements have been made and consents have been obtained for the creation of security. In addition, before making an application for listing, the issuer is required to have created the security and the debt securities will only be listed if the trustee has furnished another due diligence certificate confirming such creation.

Law stated - 27 December 2023

Closing documents

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

The usual closing documents provided for private placement and public issue of debt securities are corporate authorisations for the issuance and creation of security (where applicable), execution of the debenture documents, issuance of the offering document or relevant prospectus, credit rating and in-principle approval from the stock exchange (if the securities are to be listed), legal opinions and issuer certifications. In addition to the above-mentioned closing documents, auditors' comfort letters are also obtained for the public issue of debt securities.

Law stated - 27 December 2023

Listing fees

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

A regulatory non-refundable fee of 0.00025 per cent of the issue size (subject to a minimum of 25,000 rupees and a maximum of 5 million rupees) is payable by the issuer (subject to monetary thresholds) for public issue of non-convertible debt securities as per the SEBI NCS Regulations, in addition to the processing fee charged for the in-principle approval by the stock exchanges. The listing fees for public issue of debt securities on BSE comprise:

- an initial listing fee of 20,000 rupees; and
- an annual listing fee of a minimum of 285,000 rupees (or 325,000 rupees if the issuer is exclusively listed on the BSE) where the capital of the issuer is up to 1 billion rupees, which goes up to 1.16 million rupees where the capital of the issuer is above 10 billion rupees (and an additional fee of 4,870 rupees for every increase of 50 million rupees above the capital of 10 billion rupees).

Listing fees for public issue of debt securities on the National Stock Exchange of India Limited comprise:

- an initial listing fee of 50,000 rupees;
- an annual listing fee of 300,000 rupees where the capital of the issuer is up to 1 billion rupees, which goes up to 1.22 million rupees (plus additional fees of 5,125 rupees for every increase of capital by 50 million rupees where the capital of the issuer is above 10 billion rupees); and
- for listed companies with a market capitalisation above 25 billion rupees, an incremental fee of 5,000 rupees per 10 billion rupees (capped at 2 million rupees, excluding the component towards paid up capital).

For the listing of privately placed debt securities, as with public issues, a capped regulatory non-refundable fee of 0.00025 per cent of the issue is payable, and an additional non-refundable fee of 5,000 rupees is required to be paid to the designated stock exchange at the time of listing. In addition, the BSE levies:

- an initial listing fee of 20,000 rupees;
-

a listing processing fee (for private companies) of 4,500 rupees per ISIN (or 2,500 rupees per ISIN if the issuer's parent is a public limited company or a listed entity); and

- an annual listing fee calculated based on issue size capped at 1 million rupees per issuer per annum.

Fees payable to the National Stock Exchange of India Limited comprise:

- an initial listing fee of 7,500 rupees; and
- an annual listing fee calculated based on issue size capped at 1 million rupees per issuer per annum.

Law stated - 27 December 2023

KEY CONSIDERATIONS

Special debt instruments

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

Special debt instruments in India include subordinated debt instruments issued largely by banks as part of their regulatory capital that have special loss-absorption features (eg, additional tier I and II bonds, which include write-down and conversion characteristics), market-linked debentures (which often include principal protection), money market derivative instruments issued by financial entities known as 'collateralised borrowing and lending obligations', derivative products such as securitised debt instruments and interest rate derivatives, and debentures and other debt instruments that are convertible into or exchangeable for equity shares, including foreign currency convertible bonds (FCCBs) and foreign currency exchangeable bonds (FCEBs) issued under the external commercial borrowings framework. While the market for these securities has historically been fairly active, the market for FCCBs and FCEBs remains relatively inactive.

Law stated - 27 December 2023

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

The issue of special debt instruments by banks and other financial entities is subject to various guidelines and regulations of the Reserve Bank of India (RBI), including capital adequacy regulations, with the Securities and Exchange Board of India (SEBI) restricting the exposure of retail investors and mutual funds to such securities. The derivatives space is regulated by the Securities Contracts (Regulation) Act 1956 and associated circulars and regulations. Market-linked and convertible debentures are generally governed by the (Indian) Companies Act 2013, as amended and the rules and regulations of the Ministry of Corporate Affairs and the SEBI, whereas FCCBs and FCEBs are largely regulated under

the External Commercial Borrowing (ECB) Regulations and special schemes of the RBI for each of them.

These regulations and pieces of legislation impose various eligibility criteria and special conditions – for instance, the issue of debt convertible into equity necessitates the upfront approval of three-quarters of a company's shareholders in addition to the standard board approval, and the write-down and conversion features of additional tier one securities issued by banks are expressly prescribed by applicable law.

For special debt securities, especially those that have the characteristics of both debt and equity, there are various considerations surrounding their recognition and classification from an accounting perspective. Under the Indian Accounting Standards, the issuer of a special debt security is required to evaluate the terms of the financial instrument to separately recognise the security in its books of account as liabilities or equity. The equity component is assigned the residual amount after deducting from the fair value of the instrument, the amount separately determined for the liability component, which would include the value of any derivative features embedded in a compound financial instrument, such that the sum of the carrying amounts assigned to the liability and equity components always equals the fair value of the instrument.

Such classification of the liability and equity components of a convertible instrument is not revised basis changes in the likelihood of the financial instrument being converted or exercised. At maturity or conversion of the compound debt instrument, the issuer derecognises the liability component and recognises the entire fair value of the instrument as equity. In the case of premature conversion, the entity allocates the consideration paid and any transaction costs for the repurchase or redemption to the liability and equity components of the instrument at the date of the transaction.

Law stated - 27 December 2023

Classification

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

It is generally understood that if an instrument includes an obligation to repay the principal amount invested on one or more maturity dates, that instrument will be considered a debt instrument. While debt securities are generally understood to offer investors fixed returns and are accordingly subject to lower risks, equity securities come with higher risks but also with potentially unlimited returns, usually benchmarked to the company's economic performance. However, more specifically, the classification of securities as debt or equity varies depending on the purpose for which such classification is undertaken. For instance, certain instruments may be classified as equity for accounting or tax purposes but may qualify as debt from a regulatory or foreign exchange management perspective.

From a foreign exchange management perspective, the Foreign Exchange Management (Non-Debt Instruments) Rules 2019 classify instruments such as equity shares, share warrants, fully, compulsorily and mandatorily convertible preference shares and debentures, capital participation in limited liability partnerships and units of trusts and

funds as equity instruments, and all other instruments (including hybrid securities) as debt instruments. While foreign investment in equity instruments are subject to limited sectoral investment caps and eligibility criteria for investors, foreign investment in debt instruments additionally involves periodic countrywide or individual issuer-focussed investment ceilings, minimum maturity or retention requirements and pricing caps, as may be applicable.

Law stated - 27 December 2023

Transfer of private debt securities

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

There are no regulatory restrictions on the transfer of debt securities issued on a private placement basis. However, the transfer of such debt securities by foreign investors will be subject to the Foreign Exchange Management Act 1999 and RBI Regulations pursuant to which such debt securities were issued. For example, debt securities issued pursuant to the ECB Regulations can be transferred by the foreign investor only to another foreign investor that is a recognised lender under the ECB Regulations.

Law stated - 27 December 2023

Cross-border issues

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

Listed Indian companies are permitted to invest up to 50 per cent of their net worth in listed debt securities that are issued by foreign issuers. In addition, Indian mutual funds and venture capital funds or alternative investment funds are permitted to invest in foreign securities subject to the conditions prescribed by the SEBI and in an aggregate cap of US$7 billion (US$1 million per mutual fund) and US$1.5 billion respectively. Other than as set forth above, foreign issuers cannot offer their debt securities to Indian individuals or corporates without the approval of the RBI.

Debt securities can be offered by domestic issuers outside India or to offshore investors under the Master Directions on External Commercial Borrowings, Trade Credits and Structured Obligations (the ECB Route), the Investment by Foreign Portfolio Investors (FPIs) in the Debt Market in India (under the Regular Route and the Voluntary Retention Route), as amended (together, the FPI Route) or the SEBI (Foreign Venture Capital Investors) Regulations 2000, the Foreign Exchange Management (Non-Debt Instruments) Rules 2019 read with the RBI's circular on investment by FVCIs registered under the SEBI (Foreign Venture Capital Investor) Regulations 2000, as amended occasionally (the FVCI Route). Under the ECB Route, a loan registration number is required to be obtained from the RBI before the issue of the relevant debt securities, while investments under the FPI

Route and the FVCI Route each require investors' registration with SEBI as a foreign portfolio investor and a foreign venture capital investor respectively. Offers of securities by domestic issuers in international financial services centres in India are treated as offers made outside India.

Eligible debt securities under the FPI Route are largely limited to non-convertible debentures and commercial paper issued by Indian companies, redeemable preference shares and listed non-convertible debentures issued out of general reserves to the issuers' shareholders outside India as distributions, security receipts issued by asset reconstruction companies, debt instruments issued by banks that qualify as regulatory capital, credit-enhanced bonds, municipal bonds, securitised debt instruments and rupee bonds or units issued by infrastructure debt funds.

Eligible debt securities under the FVCI Route comprise optionally convertible debentures, redeemable and optionally convertible preference shares and (together with units of venture capital funds and alternative investment funds, capped at 33.33 per cent of an FVCI's investible capital) debt instruments issued by Indian companies engaged in any of the identified sectors (including infrastructure, biotechnology and IT related to hardware and software), or Indian start-ups in any sector, in each case in which the FVCI has already made an investment of equity-linked (including convertible) securities and whose securities are not listed on any Indian stock exchange.

In addition, foreign investments in debt securities are subject to eligibility criteria for issuers and investors, periodic countrywide or individual issuer-focussed investment ceilings, minimum maturity or retention requirements (for debt securities issued under the ECB Route), pricing caps and (for debt securities issued under the FPI Route and specifically, under the regular route) investment ceilings of 50 per cent of a single issue and 30 per cent of the FPI's total investment in corporate bonds, other than an issue of exempted securities such as non-convertible debentures and corporate bonds that are under default, by a foreign portfolio investor and its related entities, not being multilateral financial institutions.

Law stated - 27 December 2023

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

Foreign issuers cannot access domestic debt capital markets.

Law stated - 27 December 2023

Underwriting

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

While the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 read with SEBI Master Circular bearing reference number SEBI/HO/DDHS/PoD1/P/CIR/2023/119 dated 10 August 2021, in each case, as amended

(collectively, the SEBI NCS Regulations) provide an option for merchant bankers to underwrite the public issue of debt securities, transactions are typically structured in a manner where no underwriting arrangements are resorted to.

Generally, underwriting arrangements are uncommon for debt securities issued on a private placement basis.

Law stated - 27 December 2023

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

Underwriters in India are required to be registered with SEBI and are regulated by the SEBI (Merchant Bankers) Regulations 1992. Underwriting arrangements are uncommon for public issues of debt securities and debt securities issued on a private placement basis. However, if resorted to, the board of directors of the issuer or a duly authorised committee is generally required to approve the agreement to be entered into with the underwriters, merchant bankers and the issuer.

Law stated - 27 December 2023

Transaction execution

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

The debt securities proposed to be issued through a public offer are required to be listed and traded within six working days of the date of closure of the issue. Upon closure of the issue, the registrar to the issue finalises the basis of allotment along with the designated stock exchange after which the issuer allots the debt securities in consultation with the designated stock exchange. The issuer then obtains the final listing and trading approval from the stock exchanges following which the stock exchanges issue a commencement of trading notice to the issuer.

Law stated - 27 December 2023

Holding forms

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

The debt securities issued through a public issue can be issued only in dematerialised form and are required to be traded on the stock exchange platform only in dematerialised form. However, investors who wish to hold the debt securities in physical form after the issue have the option to rematerialise their debt securities. Once rematerialised, the debt securities cannot be transferred except by way of transmission or transposition.

Law stated - 27 December 2023

Outstanding debt securities

24 | Describe how issuers manage their outstanding debt securities.

Open market purchases and tender or exchange offers for listed debt securities are not common in India. Buy backs of listed debt securities convertible into equity shares can be undertaken by issuers in accordance with the SEBI (Buy-back of Securities) Regulations 2018, including pursuant to a tender offer by the existing holders. However, such buy backs are subject to several strict conditions that render them unpopular, including a ceiling of 25 per cent of the issuer's paid-up capital and free reserves (15 per cent if the securities are being purchased from the open market). In addition, there is no framework for the buy-back of listed debt securities that are not convertible into equity shares.

For privately placed debt, the central government is yet to notify any securities that can be bought back (other than shares and employees' stock options, for which buy back is expressly permitted) and accordingly, Indian issuers do not buy back their privately placed debentures.

Consent solicitations, however, are fairly common – the debenture trust deed governing the terms of an issue of debentures generally allows the terms of such debentures to be amended with the consent of a specified majority (ranging from 51 per cent to 100 per cent). This allows the issuer to bring forward the redemption date with the consent of the required majority of holders.

The above analysis does not apply to debt securities listed in foreign jurisdictions under the ECB Route – here, the liability management transactions described above remain subject to the minimum maturity requirements prescribed by Indian regulators and it is not possible for the issuer to hold such securities (in its own name) pursuant to such open market purchase or tender offer even if momentarily and for the purpose of cancellation of the debt securities.

Law stated - 27 December 2023

REGULATION AND LIABILITY

Reporting obligations

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

Under the (Indian) Companies Act 2013, as amended (the Indian Companies Act), an issuer that is a company is required to file a return of allotment of the debt securities in Form PAS-3 with the Registrar of Companies within a period of 15 days of the date of allotment of debt securities. Such return includes details such as the list of allottees, date of allotment, number of securities issued and nominal value.

Additionally, issuers of listed debt securities are required to comply with ongoing reporting requirements as prescribed under the Securities and Exchange Board of India (SEBI)

(Listing Obligations and Disclosure Requirements) Regulations 2015 and the SEBI Master Circular bearing reference number SEBI/HO/DDHS/PoD1/P/CIR/2023/1 dated 29 July 2022, each as amended, including reporting of information having bearing on the performance or operation of the listed entity and submission of financial results and annual reports. In addition, under the SEBI Master Circular bearing reference number SEBI/HO/DDHS-PoD1/P/CIR/2023/109 dated 31 March 2023, issuers are required to periodically provide auditor's certifications and information for the monitoring of security cover and covenant compliance by debenture trustees.

For debt securities issued pursuant to the External Commercial Borrowing Regulations, the issuer is required to undertake a monthly filing of Form ECB 2 returns within seven days of the close of the month to which it relates. Form ECB 2 requires the disclosure of details such as the amount disbursed or issued in the relevant month (with specific dates of issue), the currency of such disbursement or issuance and the balance amount that will be drawn or issued in the future (with expected dates and amounts), details of utilisation of the proceeds during such month, the outstanding amount at the end of such month and the details of principal and interest payments remitted during such month. If applicable, details of the percentage of the outstanding amount that is hedged or foreign exchange earnings and expenditure (in the currency of the relevant external commercial borrowings) are also required to be reported in Form ECB 2.

Law stated - 27 December 2023

Liability regime

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

Liability regime for debt securities issued under the Indian Companies Act

If a prospectus issued under the Indian Companies Act for debt securities (whether offered to the public or privately placed) contains any material untrue or misleading statement or an omission, then the issuer of such debt securities and any person that authorised the issue of such prospectus (eg, a director or promoter) may be liable to pay compensation to any person who has sustained loss or damage as a consequence of such misstatement or omission. Additionally, any person that has authorised the issue of such prospectus or made a knowing or reckless misstatement to another person to subscribe for such debt securities, may be held criminally liable and subject to imprisonment and fines.

For listed debt securities, the issuer, the stock exchange, the debenture trustee, the merchant banker and other intermediaries (which term has been defined to include any stockbroker, sub-broker, share transfer agent, banker to an issue, trustee of trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment adviser, depository, participant, custodian of securities, foreign institutional investor and credit rating agency) that are associated with the public issue may all be subject to liability. In addition to civil and criminal liability, inter alia, penalties may be imposed by the Securities and Exchange Board of India (SEBI). The intermediaries to the issue may be required to pay penalties and their registration with SEBI may be cancelled for various contraventions,

including for failure to fulfil their obligations to furnish information and returns to SEBI, enter into agreements with their clients and redress investor grievances when asked to do so.

Liability regime for debt securities issued to foreign investors

For contraventions of foreign exchange laws by an issuer, a penalty may be imposed on the issuer and every person who, at the time the contravention was committed, was aware of such contravention and was in charge of and responsible to the company for the conduct of its business (including any director, manager, secretary or other officer of the company with whose consent or connivance or on account of whose negligence such contravention has occurred). If the penalty imposed is not paid within 90 days, the adjudicating authorities designated by the central government may order civil imprisonment of up to six months or three years depending on the amount involved. In addition, a foreign portfolio investor is liable for the contravention of the SEBI (Foreign Portfolio Investors) Regulations 2019, which set forth certain obligations of foreign portfolio investors (including investment restrictions, the obligation to provide information, comply with the law, obtain a permanent account number for Indian income tax purposes, appoint a custodian and a designated depository participant and refrain from creating encumbrances over its investments) and prescribes a code of conduct requiring integrity, high standards of service and professional judgement, appropriate knowledge and competency and the avoidance of misstatement and suppression of information, fraud and manipulation, insider trading and market or price rigging or manipulation, and is liable as an intermediary to an issue (as set forth above). Foreign venture capital investors have various obligations under the SEBI (Foreign Venture Capital Investors) Regulations 2000, including maintaining accounts, providing all information requested by SEBI and appointing a custodian and a designated bank, and to cooperate with any investigation or inspection by SEBI. SEBI may direct a foreign venture capital investor to dispose of its securities and prohibit or suspend such person from making further investments or participating in the capital market and may cancel or suspend the certificate of registration of the foreign venture capital investor for any contravention.

Differences between various types of securities in terms of liability

In general, the liability regime for debt securities is largely similar to that of equity securities, but with certain intermediaries (eg, the debenture trustee)) being involved only in the issue of debt securities.

Law stated - 27 December 2023

Remedies

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

For misstatements and omissions in a prospectus issued under the Indian Companies Act, the issuer and its relevant officers will be liable to pay compensation to any investor that has sustained loss or damage as a consequence of such misstatement or omission. This is in addition to other general legal remedies available to creditors under applicable laws.

Law stated - 27 December 2023

Enforcement

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

For listed debt securities, in addition to its ability to impose penalties on the issuer and any other person that contravenes its obligations under securities laws, SEBI has the ability to conduct investigations, call for documents and reports and, including by directing the stock exchange, impose fines, suspend trading and freeze promoter or promoter group holding of securities in coordination with depositories. SEBI also has the power to restrain any person from accessing the Indian securities market or prohibit any person associated with the Indian securities market to buy, sell or deal in securities or to issue any prospectus, offer document or advertisement soliciting money from the public in India for the issue of securities (if applicable, other than subject to any conditions prescribed by SEBI). For intermediaries, SEBI has the power to cancel or suspend their registration or issue directions to them.

For both listed and unlisted debt securities issued under the Indian Companies Act, penalties may be imposed and adjudicated by officers of the central government that are appointed for this purpose.

For contraventions of foreign exchange laws, the adjudicating authorities appointed by the regulator have the power to take action on contraventions such as the imposition of penalties (or if such penalties remain unpaid for a specified period, the issue of a warrant for the issuer's arrest), recover arrears of any penalty that has not been paid in full by attaching the issuer's property and, in addition to any penalties, direct that any currency, security or any other money or property in respect of which the contravention has taken place, are confiscated to the central government and that the foreign exchange holdings of the defaulter should be brought back into or retained outside India in the manner that they deem fit.

Law stated - 27 December 2023

Tax liability

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

Tax on interest income

Holders of debt securities are liable to pay tax on the interest paid on such debt securities, as per the Income-tax Act 1961 (the IT Act). For non-resident investors, this liability is limited to, inter alia, where the proceeds of the debt securities are used for the business of the issuer in India. Residents are subject to tax on such interest income at the applicable slab rates or corporate tax rates and non-residents are subject to tax at rates up to 40 per cent for rupee-denominated debt and up to 20 per cent for foreign currency denominated debt. The IT Act also provides for concessional tax rates in the case of income from certain specified asset classes. For instance, non-resident investors receiving interest income on bonds listed only on a recognised stock exchange located in an international financial

services centre are eligible for a concessional tax rate of 9 per cent, subject to certain conditions. The rates of tax will stand reduced if an agreement for granting relief of tax or for the avoidance of double taxation (double taxation avoidance agreements (DTAAs)) is applicable and the provisions of such DTAA read with multilateral instruments (MLIs), and to the extent applicable, provide for the taxation in India of interest income at a rate lower than that stated above.

Since the interest payable on the debt securities is subject to taxation in India, there is a requirement for issuers to withhold tax on such interest paid to non-resident investors, ranging from 9 to 40 per cent, subject to any lower rate of tax provided by an applicable DTAA read with an MLI, if and to the extent applicable. Tax would also be required to be withheld on interest payable to resident investors at the rate of 10 per cent.

Transfer taxes

Any gains arising to a non-resident investor from the disposition of debt securities held (or deemed to be held) as a capital asset will generally be chargeable to income tax in India if the debt securities are regarded as property situated in India. It is likely that the Indian tax authorities may treat debt securities as located in India if the issuer is incorporated in and resident in India. Listed debt securities shall be considered long-term capital assets if held for a period of more than 12 months (36 months for unlisted debt securities) immediately preceding disposal. Income tax shall be payable on gains as follows:

- for resident corporate investors, at the rate of 20 per cent of the capital gains on transfer of unlisted debt securities and 10 per cent on transfer of listed debt securities, held as long-term capital assets or at the applicable corporate tax rate (ie, rates ranging up to 30 per cent on short-term capital assets, depending on applicable corporate income tax rate);
- for non-resident corporate investors, at the rate of 10 per cent on the transfer of debt securities held as a long-term capital asset and up to 40 per cent on short-term capital assets, all rates being subject to any benefit under an applicable DTAA read with an MLI, if and to the extent applicable; and
- for non-resident investors that hold bonds as stock-in-trade, gains on transfer would be considered as business income, subject to tax in India only to the extent attributable to a business connection or, if a DTAA is applicable, a permanent establishment of the non-resident investor in India. A non-resident corporate investor would be liable to pay Indian tax on such income at a rate of up to 40 per cent, subject to any benefit under an applicable DTAA read with an MLI, if and to the extent applicable.

Tax shall be withheld by the person making any payment to a non-resident on long-term capital gains at 10 per cent and short-term capital gains at rates ranging up to 40 per cent, depending on the legal status of the recipient of income, subject to any benefit under an applicable DTAA read with an MLI, if and to the extent applicable. A lower or nil withholding tax certificate may be obtained from the Indian tax authorities and furnished to the payer to mitigate or avoid this obligation. Generally, there is no obligation to withhold tax on transfer if the investor is a tax resident of India. However, in certain cases tax may be required to be withheld or collected at the rate of 0.1 per cent of the consideration, subject to satisfaction

of certain conditions. Such obligation to withhold or collect tax would have to be analysed on a case-by-case basis.

All rates mentioned herein are exclusive of applicable surcharge and cess, unless otherwise specified.

Law stated - 27 December 2023

UPDATE AND TRENDS

Key developments of the past year

30 | Please provide any updates and trends in your jurisdiction's debt capital market.

In 2023, regulatory developments in the domestic debt capital market were numerous. On 5 July 2023, the Securities and Exchange Board of India (SEBI) aligned disclosures for public issues and private placements of non-convertible debt securities by publishing a uniform list of disclosures, and overhauled the disclosure regime for private placements. The aim of these amendments was to streamline the disclosure process and avoid redundancies in disclosure. As a result of these amendments, at the time of making a private placement of listed non-convertible debt securities, a general information document (GID) must be issued by an issuer of non-convertible debt securities, with a validity period of one year. The GID will apply to subsequent private placements within that year. In addition, for each issuance, a key information document (KID) containing issue-specific information and updates to the disclosures in the GID, if any, must be issued. This manner of disclosure is mandatory from 1 April 2024 – until such date, a placement memorandum may be filed by an issuer of listed, privately placed debt securities if a satisfactory explanation can be given to stock exchanges.

While the requirement for monthly revalidation of the credit rating was removed, the level of disclosure in relation to issue expenses was enhanced to increase transparency. The alignment of disclosures for public issues and private placements has resulted in further significant enhancements of disclosure requirements for private placements. For instance, outstanding litigations involving the issuer and its promoters, directors and group companies must be disclosed if their outcome could have a material adverse effect on the issuer's financial position. Disclosures on the use of proceeds of the issue have been expanded. Consents of directors, auditors, experts, legal counsel, lenders and other issue participants must be obtained and furnished to stock exchanges for private placements as well.

More recently, the SEBI has introduced mandatory listing obligations with effect from 1 January 2024 (ie, the cut-off date) as follows:

- non-convertible debt securities (NCDS) issued by a listed entity on or after the cut-off date, where such listed entity has outstanding listed NCDS, must be listed;
- NCDS already issued as of 31 December 2023 by a listed entity having outstanding listed NCDS may be optionally (and not mandatorily) listed; and
-

where a listed entity is proposing to issue listed NCDS on date 'x' falling on or after the cut-off date, all outstanding unlisted NCDs issued by that listed entity on or after the cut-off date but before 'x' must be listed within three months from 'x'.

Trends in the debt capital market

The financial year 2022-23 witnessed a revival of investor interest in Indian debt capital markets. Private placements remained the preferred mode of resource mobilisation. Fundraising by investment vehicles such as alternative investment funds, real estate investment trusts and infrastructure investment trusts through the debt capital market was also significant.

For the first time in four years, foreign portfolio investors (FPIs) became net buyers of Indian debt in 2023. November 2023 saw the highest participation from FPIs in the debt segment since October 2017.

As Indian banks and non-banking financial companies have shifted their focus to retail lending and become more conservative, the role of private credit as a source of capital has become increasingly evident. While larger private credit players have been less active, the first half of 2023 saw a deal size of almost US$5.1 billion. It is expected that the share of private credit in fundraising by Indian corporates will grow exponentially in the coming years.

However, compared to the financial year 2022, Indian corporates raised over 30 per cent less funds through the external commercial borrowings (ECB) route in financial year 2023. Given the rise in global interest rates, ECBs are priced higher than domestic debt, and the rupee has remained volatile. As a result, the overseas financial markets are being tapped less than in previous years.

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Law stated - 27 December 2023



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UPDATE AND TRENDS

Key developments of the past year

MARKET SNAPSHOT

Market climate

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

Debt securities issued in Japan include government bonds, municipal bonds, government agency bonds, government-guaranteed bonds, corporate bonds, foreign bonds and special debt instruments, such as convertible bonds. According to the Japan Securities Dealers Association (JSDA), the industry group for securities companies, the total amount raised by debt securities during the period between April 2022 and March 2023 was ¥238.044 trillion, which includes ¥213.028 trillion in Japanese government bonds, ¥5.527 trillion in municipal bonds, ¥3.529 trillion in government agency bonds, ¥12.894 trillion in corporate straight bonds issued by Japanese issuers and ¥1.110 trillion in bonds issued by foreign issuers. Approximately 80 per cent of debt securities issued in Japan are Japanese government bonds. The debt market in Japan has been active under the prolonged low interest rate environment.

Law stated - 28 December 2023

Regulatory framework

2 | Describe the general regime for debt securities offerings.

The principal applicable laws for debt securities offerings are the Companies Act and the Financial Instruments and Exchange Act (FIEA).

The Companies Act requires, among other things, the appointment by the Japanese issuer of a commissioned company for bondholders, which has a role similar to a trustee in other jurisdictions, except in offerings in which the denomination is ¥100 million or more or the number of bonds is less than 50. In many debt offerings, however, commissioned companies for bondholders are not appointed based on the exceptions owing mainly to the stringent responsibilities placed on the company and to the cost. Instead, a fiscal agent is appointed, and the bonds are offered to institutional investors.

The FIEA, a Japanese securities law, regulates the issuance, placement and trading of debt securities in Japan. In general, the FIEA contains a registration requirement for public offerings of debt securities in Japan and requires a Japanese prospectus.

The Financial Services Agency (FSA) is the main government regulator that enforces the FIEA, and it delegates some of its power to the local finance bureaus.

The principal market for securities, in general, is the Tokyo Stock Exchange; however, debt securities are rarely listed in Japan, and most are traded over the counter.

In addition, the JSDA provides certain rules with which securities companies must comply, including rules relating to the underwriting, offering and trading of debt securities.

Law stated - 28 December 2023

FILING AND DOCUMENTARY REQUIREMENTS

General filing requirements

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

An issuer that conducts a public offering of debt securities in the total amount of ¥100 million or more is generally required to file a securities registration statement (SRS) with the competent local finance bureau. For the purposes of this requirement, public offerings are generally defined as offerings that do not satisfy any of the private placement exemptions. Issuers must prepare an SRS for each type of offering in accordance with the forms prescribed by the Financial Instruments and Exchange Act (FIEA). The SRS is filed through the Electronic Disclosure for Investors' NETwork (EDINET) electronic filing system, which is similar to the Electronic Data Gathering, Analysis, and Retrieval system in the United States.

Shelf registration is also available for certain frequent issuers and is widely used for their offerings of debt securities. When an issuer conducts an offering of debt securities by way of shelf registration, it must first submit a shelf registration statement to set up a shelf and, upon pricing, a supplement to the shelf to include pricing and other information of the debt securities to be issued.

Solicitation of the relevant securities to be publicly offered is prohibited until after the filing of the SRS or the shelf registration statement. Binding agreements to sell and purchase the relevant securities may not be made until either the SRS becomes effective, or the shelf registration statement becomes effective and a supplement is filed, as applicable. In general, the SRS or the shelf registration statement becomes effective on the 16th or eighth calendar day from the date of filing, respectively (depending mainly upon the relevant issuer's issuance history in Japan and credit rating), but filing amendments may extend the waiting period.

Issuers such as the government and the local governments are generally exempt from the filing requirements.

In general, the filing requirements apply to debt securities as well as other types of securities.

Law stated - 28 December 2023

Prospectus requirements

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

When an issuer files an SRS in connection with a public offering for ¥100 million or more, the issuer is also generally required to prepare a prospectus in accordance with the form prescribed under the FIEA (statutory prospectus).

Under those circumstances, the relevant securities cannot be sold unless a copy of the statutory prospectus is provided to the investor before or at the time that the underwriters agree with the investor to sell and purchase the securities.

The form of the statutory prospectus is generally the same as that required for the SRS. However, the form differs depending on the type of issuer and securities that were publicly offered. Detailed information regarding the securities (including the terms and conditions of offering) and the issuer (including its business, strategies, management discussion and analysis, risk factors and capital compositions) must be disclosed in the SRS and also in the statutory prospectus.

Generally speaking, the disclosure requirements for foreign issuers are similar to those for Japanese issuers, but certain additional information, including a brief summary of the legal system of the issuer's jurisdiction (ie, company law, foreign exchange and tax regulations), is also required. In addition, the financial statements for the latest two or three fiscal years of the corporate issuers included in the SRS must be audited. Disclosure of non-financial information that is or may be required to be included in the prescribed form under the FIEA, but is not required in the issuer's home jurisdiction, is subject to consultation with the regulatory authority.

Law stated - 28 December 2023

Documentation

5 | Describe the drafting process for the offering document.

The key documents required for public offerings of debt securities in Japan are:

- the terms and conditions;
- the SRS or the shelf registration statement and its supplement;
- the statutory prospectus;
- the subscription agreement; and
- the fiscal agency agreement or the agreement with a commissioned company for bondholders.

With regard to public offerings of bonds in Japan, the terms and conditions, subscription agreements, agreements with the commissioned company for bondholders and fiscal agency agreements have become largely standardised, and, usually, there are not many documentation issues regarding the contents of these documents.

The key documentation issue is the issuer information to be disclosed in the offering document, including risk factors. However, if an issuer has been subject to continuous disclosure requirements and has filed a securities report one year prior to the filing of the SRS, then the SRS may be filed in summary form (ie, using the incorporation method). Further, by satisfying certain other requirements, an issuer is entitled to either registration by reference or shelf registration. These cases generally do not raise many documentation issues.

Japanese law does not generally regulate documentation for private offerings, which may differ from transaction to transaction.

Law stated - 28 December 2023

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

In general, the terms and conditions are prepared as a separate document that is attached to the subscription agreement and the agreement with a commissioned company for bondholders or the fiscal agency agreement, as applicable.

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

The terms and conditions will be disclosed in the disclosure documents (ie, the SRS or the shelf registration statement and its supplement), which can be accessed through the EDINET electronic disclosure system. In addition, in the case of a foreign issuer, these agreements will generally be attached to the SRS or the supplement to the shelf registration.

Law stated - 28 December 2023

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

Japanese law does not require approval of the offering documentation before publication. However, in practice, an issuer will usually consult with the local finance bureau in regard to the content of the SRS approximately two to four weeks prior to filing.

In addition, solicitation of the relevant securities to be publicly offered is prohibited until the SRS or the shelf registration statement is filed. Binding agreements to sell and purchase the relevant securities cannot be made until either the SRS becomes effective or the shelf registration statement becomes effective and a supplement is filed, as applicable. In general, the SRS or the shelf registration statement becomes effective on the 16th or eighth calendar day from the date of filing, respectively. If the documents contain material misstatements, the regulator may order the issuer to file an amendment, may prevent the documents from becoming effective or may extend the waiting period if the extension is necessary for public interest or protection of investors.

Law stated - 28 December 2023

Authorisation

8

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

Public offerings of debt securities are not subject to a prescribed review and authorisation process under Japanese law. However, in practice, an issuer usually consults with the local finance bureau in regard to the content of the SRS in advance, usually around two to four weeks prior to filing the SRS, and may need to reflect the comments of the local finance bureau in the SRS.

In addition, the underwriters usually conduct a due diligence review upon each issuance and when new financial information becomes available; thus, there may be a period during which an issuer must wait for the underwriters' review before the issuer may offer the relevant debt securities.

Law stated - 28 December 2023

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

In general, Japanese law does not require that regulators approve public offerings of securities; thus, there are no grounds upon which regulators may refuse to approve a public offering of debt securities. However, if the disclosure documents contain material misstatements, the regulator may order the issuer to file an amendment, prevent the documents from becoming effective or extend the waiting period if an extension is necessary for public interest or protection of investors.

Law stated - 28 December 2023

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

The disclosure requirements under the FIEA (such as the SRS) apply only to public offerings and do not apply to private placements.

A summary of private placements of newly issued straight bonds in Japan is set out below. A 'private placement' of newly issued securities is defined in the FIEA to mean, in essence, the solicitation of an offer to purchase that is made either:

- to fewer than 50 offerees (a small-number private placement);
- only to certain qualified institutional investors (QIIs) (a professional private placement);
- only to certain specified investors (a specified investor private placement); or
- subject to certain other circumstances as prescribed in the FIEA.

Private placements are subject to transfer restrictions. In a small-number private placement, the purchaser may not transfer the debt securities it purchased unless it transfers all the debt securities as a whole to another person, and because no subdivision

of the securities is permitted, the number of debt securities must be less than 50 at any time. In the case of a professional private placement, the purchaser may transfer the debt securities only to other QIIs.

QIIs, as defined under the FIEA, include financial instrument firms, investment corporations, banks, insurance companies, certain other government-owned financial institutions, large corporations, foreign financial institutions and government agencies.

Specified investors, as defined under the FIEA, include QIIs, the government and the Bank of Japan. In addition, Japanese municipal governments, certain government-linked entities, listed companies and joint-stock companies with a certain level of capital are regarded as specified investors unless any such entity has elected in writing not to be a specified investor. Individuals who satisfy certain conditions under the FIEA and other companies may become specified investors by requesting in writing to a securities company to be treated as a specified investor.

In a small-number private placement, the number of QIIs will be excluded when calculating compliance with the 50-offeree threshold for public offerings if the relevant placement also satisfies certain other requirements. If any debt securities of the 'same kind' (ie, those with the same maturity, interest rate and currency denomination) of the relevant private placement have been issued during the six-month period preceding the scheduled issue date of the relevant private placement, then offerees in Japan of the preceding issue will count towards the offeree threshold.

A specified investor private placement of debt securities is utilised specifically in a market for professional investors called the TOKYO PRO-BOND Market, which was established in 2011. Debt securities to be listed on the TOKYO PRO-BOND Market are subject to transfer restrictions under which the debt securities may only be transferred to specified investors, among others, and the offering procedures and disclosures for those debt securities are subject to rules established by the market.

Law stated - 28 December 2023

Offering process

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

The typical process for a public offering of bonds by a listed company in Japan starts with the passing of a resolution to issue bonds at a meeting of its board of directors and the filing of a shelf registration statement. The issuer will also usually pass a resolution that the bonds will be subject to the Act on Book-Entry Transfer of Corporate Bonds, Shares, etc and will submit a consent form to the Japan Securities Depository Center.

On the launch date, the terms and conditions will be determined, usually by the director of the company to whom the board of directors delegated authority. Also on this date, the issuer will file a supplement to the shelf registration statement and will execute agreements relating to the offering.

On the closing date, the investors will pay the price for the bonds to the underwriters, and the bonds will be recorded in the investor's account using a book-entry system. To allow time to prepare for settlement through the book-entry system, the closing date must be four or more business days after the launch date.

The main transaction documents that are required for public offerings of debt securities in Japan are:

- the terms and conditions;
- the SRS or the shelf registration statement and its supplement;
- the statutory prospectus;
- the subscription agreement; and
- the agreement with the commissioned company for bondholders or the fiscal agency agreement, as applicable.

The process for private offerings can differ from transaction to transaction.

Law stated - 28 December 2023

Closing documents

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

In general, auditor's comfort letters are required as part of the closing documents for a public offering of debt securities. Law firm opinions are not required for public offerings by a Japanese issuer but are required for public offerings by a foreign issuer.

Law stated - 28 December 2023

Listing fees

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

The principal market in Japan is the Tokyo Stock Exchange. The fee for listing bonds on the Tokyo Stock Exchange is ¥1 million. However, only a small number of debt securities are listed in Japan because the majority of the debt securities are traded over the counter.

Law stated - 28 December 2023

KEY CONSIDERATIONS

Special debt instruments

14

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

According to the Japan Securities Dealers Association, the total amount raised by convertible bonds in Japan during the period between April 2022 and March 2023 was ¥3 billion. Some convertible bonds are listed on the Tokyo Stock Exchange. Issuance of other special debt instruments by Japanese companies in Japan is uncommon.

Law stated - 28 December 2023

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

The rules that apply to the offering of special debt securities are generally the same as those that apply to other debt securities. However, the issuance of convertible bonds by Japanese companies is subject to certain rules that apply to equity securities under the Companies Act. For example, those rules require an interval of two weeks or more from the date of filing of a securities registration statement (SRS) or its amendment, or the date of a public notice containing certain offering information, to the closing date.

Law stated - 28 December 2023

Classification

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

In general, an issuer determines whether securities are classed as debt or equity based on their legal formality, although there are securities of each type that have features of the other. Instruments categorised as equity will be subject to rules relating to equity securities under the Companies Act, which are more rigorous than those relating to debt securities.

Law stated - 28 December 2023

Transfer of private debt securities

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

A summary of private placements of newly issued straight bonds in Japan is set out below. A 'private placement' of newly issued securities is defined in the Financial Instruments and Exchange Act (FIEA) to mean, in essence, the solicitation of an offer to purchase that is made either:

- to fewer than 50 offerees (a small-number private placement);

- only to certain qualified institutional investors (QIIs) (a professional private placement);
- only to certain specified investors (a specified investor private placement); or
- subject to certain other circumstances as prescribed in the FIEA.

Private placements are subject to transfer restrictions. In a small-number private placement, the purchaser may not transfer the debt securities it purchased unless it transfers all the debt securities as a whole to another person, and because no subdivision of the securities is permitted, the number of debt securities must be less than 50 at any time. In the case of a professional private placement, the purchaser may transfer the debt securities only to other QIIs.

A specified investor private placement of debt securities is utilised specifically in a market for professional investors called the TOKYO PRO-BOND Market, which was established in 2011. Debt securities to be listed on the TOKYO PRO-BOND Market are subject to transfer restrictions under which the debt securities may only be transferred to specified investors, among others, and the offering procedures and disclosures for those debt securities are subject to requirements under the FIEA.

Transfer restrictions for debt securities offerings by Japanese companies in Japan are usually implemented through disclosure in the book-entry system of the Japan Securities Depository Center (JASDEC).

Law stated - 28 December 2023

Cross-border issues

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

In general, the same rules apply to Japanese and foreign companies for the offering of debt securities in Japan. Certain rules, however, only apply to foreign companies, which may prepare a registration document, such as an SRS in English, if the foreign company satisfies certain conditions.

Offerings of debt securities by domestic issuers only outside Japan will usually be subject to the law of the jurisdiction in which the offering is made; various restrictions under the FIEA, such as registration by an SRS or preparation of a statutory prospectus, do not apply.

Law stated - 28 December 2023

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

At present, Japan does not have any special legal arrangements with other jurisdictions to help foreign issuers access its debt capital markets.

Law stated - 28 December 2023

Underwriting

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

The typical underwriting arrangement for public offerings is firm commitment underwriting, in which the underwriters agree to jointly and severally purchase the securities from the issuer. Arrangements for private offerings can differ from transaction to transaction.

Law stated - 28 December 2023

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

Under the FIEA, the Financial Services Agency (FSA) regulates underwriters as securities companies, which are known as 'type 1 financial instruments business operators'. An entity must register as a type 1 financial instruments business operator to conduct a securities business, including underwriting, in Japan. A registered company is subject to various rules and regulations under the FIEA, including those relating to the business it conducts and its financial status. Pursuant to the FIEA, the Securities and Exchange Surveillance Commission may inspect underwriters as securities companies. Further, the FSA may require reports from securities companies and may issue business improvement orders or orders to suspend business if the securities companies violate securities regulations.

Each underwriting arrangement does not require an individual approval.

Law stated - 28 December 2023

Transaction execution

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

Typically, public debt offerings are subject to the Act on Book-Entry Transfer of Company Bonds, Shares, etc, which provides for delivery versus payment settlement. In that case, an interval of at least four business days is required from the pricing date to the closing date. This system does not permit any global or individual notes.

Law stated - 28 December 2023

Holding forms

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

Typically, public debt securities are held in a JASDEC book-entry system.

Law stated - 28 December 2023

Outstanding debt securities

24 | Describe how issuers manage their outstanding debt securities.

An issuer will typically use market purchases to manage its outstanding debt securities. The mandatory tender offer rule under the FIEA does not apply to debt securities, and tender and exchange offers are not made often.

Law stated - 28 December 2023

REGULATION AND LIABILITY

Reporting obligations

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

Once an issuer has filed a securities registration statement (SRS) in regard to a public offering of debt securities, it will be subject to continuous disclosure requirements under which it must file an annual securities report and, with certain exceptions, a semi-annual report. The issuer must also file an extraordinary report on certain material events that may occur in relation to the corporate information. These reports are filed via the Electronic Disclosure for Investors' NETwork electronic disclosure system.

The annual securities report is a disclosure document that includes information concerning the issuer, including the issuer's financials. The required content for the annual securities report is generally the same as for the SRS, excluding offering and certain other information. The prescribed form for the annual securities report differs depending on the type of issuer and securities that were publicly offered.

Law stated - 28 December 2023

Liability regime

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

If an SRS or shelf registration or its supplement contains a material misstatement or an omission of a material fact, the issuer will be liable for damages incurred by the purchaser in the public offering of debt securities, unless the purchaser was aware of the misstatement or omission at the time of the purchase. The issuer is subject to strict liability, meaning that

it is not necessary to prove the issuer's fault. The officers (directors, officers and corporate auditors) of the issuer, selling shareholders, underwriters and independent auditors who certified false financial statements can also be liable, but they are entitled to a due diligence defence; that is, in general, they will not be liable if they can prove that they did not know, and despite exercising reasonable care could not have known, of any material misstatement or omission.

Any user of the statutory prospectus for the offering may also be subject to similar liability.

The liability analysis for debt securities is not technically different from that of other types of securities.

Law stated - 28 December 2023

Remedies

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

Investors who purchased debt securities can seek damages from the issuer, officers (directors, officers and corporate auditors) of the issuer, selling shareholders, underwriters and independent auditors, as applicable.

Law stated - 28 December 2023

Enforcement

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

An issuer and its officers who are knowingly responsible for a material misstatement contained in an SRS may be subject to penal servitude of up to 10 years or a fine of up to ¥10 million, or both, together with a fine of up to ¥700 million for the issuer. Failure to file an SRS or its amendment is punishable by penal servitude of up to one year or a fine of up to ¥1 million, or both. An issuer and its officers may also be subject to a surcharge (administrative penalty) if a disclosure document contains a material misstatement or an omission of a material fact. In practice, an administrative penalty is imposed more frequently than a fine.

The regulators also have sanctioning powers over registered securities companies, for instance, the ability to request reporting, and may issue business improvement orders or suspend a business in whole or in part, as applicable.

Law stated - 28 December 2023

Tax liability

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

The main tax issues for investors are the withholding tax and the regular income or corporate tax (on a net basis) to be imposed on the interest payable on the bonds. Taxation on investors substantially differs depending upon the classification of the issuers and the investors for tax purposes (eg, whether the investor is resident in Japan).

If the issuer of the bonds is a Japanese corporation, and the investor is an individual non-resident in Japan or a foreign corporation having no permanent establishment in Japan for Japanese tax purposes (foreign investor), as a general rule, the foreign investor will be subject to Japanese withholding tax at the rate of 15.315 per cent on the interest payable on the bonds. However, in the case of bonds issued within Japan using the Japanese book-entry system, interest payable on those bonds to a foreign investor is generally exempt from withholding tax as a special taxation measure (the Japanese Bond Income Tax Exemption Scheme), subject to compliance with certain procedural requirements.

If the issuer of the bonds is a foreign corporation and the issue is made within Japan, as a general rule, a foreign investor will not be subject to any Japanese withholding tax. However, if those bonds are issued by any permanent establishment in Japan of the issuer, the interest will be subject to withholding tax in substantially the same manner as bonds issued by a Japanese corporation mentioned earlier.

Even if a foreign investor is subject to withholding tax under domestic tax law, tax treaties entered into between Japan and the country of tax residence of the foreign investor may provide for an exemption or a reduced rate of 10 per cent in regard to such withholding tax. Certain filings with the Japanese local tax office are necessary to enjoy the benefits under the applicable tax treaty.

Japanese taxation of foreign investors is, as a general rule, finalised by the withholding tax, and there is no need to file a Japanese tax return for regular income tax or corporate tax. No transfer or transaction taxes are imposed in general in respect of bonds issued within Japan. In general, a foreign investor will not be subject to Japanese taxation on capital gains arising from the sale of bonds.

The main tax issue for issuers is the deduction of interest on the bonds in calculating their taxable income. As a general rule, interest payable by an issuer who is a Japanese corporation or a foreign corporation (where the bonds are attributed to a permanent establishment of the issuer in Japan) will be deductible as expenses in calculating its taxable income.

However, in respect of interest payable to certain foreign affiliates of the issuer, interest deduction may be limited pursuant to anti-tax avoidance measures, such as thin capitalisation rules, transfer pricing rules and earnings stripping rules. The earnings stripping rules that were significantly revised by the 2019 tax reform apply to business years commencing on or after 1 April 2020, so that deduction of interest payable to foreign non-affiliates of the issuer may also be limited to some extent in certain circumstances.

Law stated - 28 December 2023

UPDATE AND TRENDS

Key developments of the past year

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30 | Please provide any updates and trends in your jurisdiction's debt capital market.

Backed by increased interest in sustainable development goals (SDGs), an increased number of Japanese issuers have issued SDG bonds, such as green bonds, social bonds and sustainability bonds, with proceeds to be used for SDG projects. According to the Japan Securities Dealers Association, the industry group for securities companies, the total amount raised by SDG bonds that were publicly offered in Japan during the period between January and September 2023 was ¥4.8 trillion.

Law stated - 28 December 2023

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Luxembourg

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UPDATE AND TRENDS

Key developments of the past year

MARKET SNAPSHOT

Market climate

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

Luxembourg is a renowned financial centre that is particularly active in the debt segment of the capital markets. As a result of a favourable legal and tax framework, debt issuances of all types are frequently structured through Luxembourg. In addition, the markets operated by the Luxembourg Stock Exchange (LuxSE) are prominent in the listing and negotiation of debt instruments.

To date, the LuxSE operates two markets:

- the Regulated Market (within the meaning of Directive 2014/65/EU on markets in financial instruments, as amended (MiFID II)), known as Bourse de Luxembourg; and
- the Exchange Regulated Market, set up in 2005 as a multilateral trading facility (MTF) (within the meaning of MiFID II), which provides an alternative market to the Regulated Market (ie, the Euro MTF).

The LuxSE also offers the possibility for issuers to list their securities on its Securities Official List (SOL) without admission to trading. The SOL is designed for issuers looking for visibility without the possibility of having their securities traded. Securities listed on the SOL are not subject to the extensive regulatory framework applicable to securities admitted to trading on trading venues, such as the Regulated Market and the Euro MTF.

Moreover, within the framework of Regulation (EU) No. 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, as amended (the Prospectus Regulation), the LuxSE has established a professional segment for each of the two markets it operates. The professional segments are specifically designed for issuers targeting professional clients (within the meaning of MiFID II) only. Securities admitted to the professional segments are not accessible to retail investors. Trading on the professional segments is only allowed for professional investors.

In 2016, the LuxSE launched the Luxembourg Green Exchange (LGX), which is the world's first and leading platform dedicated exclusively to green, social and sustainable financial instruments. It was awarded a prestigious prize in the category 'Financing for Climate Friendly Investment' at the United Nations Global Climate Action Award 2020. Issuers whose securities are listed on the LGX benefit from higher visibility and investors enjoy easy access to sustainable financial instruments and a high level of transparency.

According to publicly available information and recent figures provided by the LuxSE, as of 30 November 2023, the markets operated by the LuxSE had 42,640 quotation lines of securities in 71 currencies from over 1,789 issuers in 99 countries.

About 58 per cent of debt securities listed in Luxembourg are listed on the Regulated Market. At present, a broad range of debt securities are traded on the LuxSE. 38 per cent

of all securities traded on the markets operated by the LuxSE are debt securities, excluding structured securities. These debt securities include:

- International debt: the LuxSE is the European leader in terms of listed international bonds.
- High-yield bonds: the LuxSE is Europe's leading exchange for the listing of high-yield bonds.
- Green bonds: with 999 green bonds listed in 30 currencies by 202 issuers as at 30 November 2023, the LuxSE is the leading listing venue for green bonds. In October 2021, the LGX listed the first green bond issued by the European Commission under the NextGenerationEU programme. This €12 billion bond issuance was, at the time of listing, the world's largest green bond issued to date. It is still the largest green bond displayed on the LGX.
- Social bonds: as of 30 November 2023, 177 bonds have been categorised as social, including bonds issued by Micro, Small & Medium Enterprises Bonds SA and the Nederlandse Waterschapsbank NV. In October 2020, the LuxSE also marked the listing of the first social bond issued under the EU Support to mitigate Unemployment Risk in an Emergency (SURE) programme in the context of the covid-19 pandemic. By March 2022, the European Commission had issued €91.8 billion social bonds under the SURE, all listed on the LuxSE and displayed on the LGX. Social bonds are bonds the proceeds of which must be used to finance or refinance social projects or activities that achieve positive social outcomes or address a social issue or both.
- Sustainable bonds: as of 30 November 2023, 581 bonds have been categorised as sustainable, including bonds issued by the International Bank for Reconstruction and Development, the International Development Association, the BNG Bank NV and SG Issuer. Sustainable bonds are bonds the proceeds of which are exclusively used to finance or refinance a combination of green and social projects or activities.
- Dim sum bonds: in 2011, the LuxSE admitted to trading the first dim sum bonds, denominated in China's yuan. Some 48 per cent of dim sum bonds that are listed on European stock exchanges are listed with the LuxSE and the first offshore yuan bonds in the eurozone by a mainland China issuer are also listed with the LuxSE.
- Sovereign debt: the LuxSE lists at least one issue of the sovereign debt of 62 different countries.
- Sukuk: the LuxSE was the first European stock exchange to list sukuks in 2002. Some 22 sukuks have since then been listed on the LuxSE (including the sovereign sukuk issued by the Luxembourg state in 2014, the first sovereign sukuk to be denominated in euros).
- Supranational debt: Luxembourg remains a prominent listing venue for supranational debt issuers, including the EIB, the World Bank, the European Bank for Reconstruction and Development, the European Stability Mechanism and the European Commission.
- Asset-backed securities: in November 2023, there were 1833 asset-backed securities from 359 issuers.
-

Debt issuance programmes: there were about 516 debt issuance programmes in operation on the LuxSE as of November 2023.

- Others: the LuxSE also lists other types of debt instruments, such as indexed bonds, convertible bonds and commercial papers.

Moreover, to keep up with recent market developments and the increasing interest in sustainable finance, the LuxSE decided in November 2020, to welcome sustainability linked bonds on its LGX platform. As of 30 November 2023, there were 92 sustainability linked bonds on the LGX platform (including Aegea Finance SARL, Orbia Advance Corporation SAB De CV and Rexel SA).

In February 2021, the LuxSE teamed up with the Climate Bonds Initiative (an international non-profit organisation aimed at mobilising the US$100 trillion bond market for climate solutions) to display on the LGX a brand-new section dedicated exclusively to climate-aligned issuers (CAI), which are public or private companies with outstanding debts that are not labelled as green, social or sustainability bonds, but which finance climate-aligned activities. The Climate Bonds-LGX Climate-Aligned Issuers section includes 19 CAIs in 14 different countries.

In April 2023, the LuxSE won the prize of 'Exchange of the Year' at the Environmental Finance Bond Awards 2023 for the sixth year in a row, for its work in advancing gender finance and fostering sustainable finance in emerging markets.

On 31 January 2022, the LuxSE listed the first security tokens representing a debt instrument on the SOL. In the first phase, the LuxSE only considers applications that fulfil the following criteria: debt instruments offered exclusively to qualified investors (as defined in the Prospectus Regulation) or issued in a denomination per unit that amounts to at least €100,000; issuers having previously issued securities in capital markets or applications having a proven track record in capital market transactions; and pricing in fiat currency. To be considered for admission on the SOL, security tokens must comply with the Guidelines for the registration of DLT Financial Instruments onto the SOL (published by the LuxSE in January 2022) as well as the LuxSE Rulebook.

This development was followed by the admission of three digital securities issued by the EIB, including the world's first digital Climate Awareness Bond, which was admitted on the LuxSE in June 2023.

The LuxSE also listed, in October 2023, the first financial instrument issued on a Distributed Ledger Technology (DLT) and admitted to trading in the European Union. The €100 million Digital Native Note, issued by the World Bank (International Bank for Reconstruction and Development) using Euroclear's new Digital Securities Issuance service and admitted on the LuxSE's Regulated Market, marks the first time a digitally native security issued on a DLT infrastructure is admitted to trading on a market falling within the scope of MiFID II.

As of 30 November 2023, there were eight security tokens admitted on the LuxSE, three of these were digital green bonds.

Further to a memorandum of understanding signed on May 2022 with the United Nations Entity for Gender Equality and the Empowerment of Women, the LuxSE has been flagging sustainable gender-focused bonds displayed on the LGX that either raise financing for project advancing gender equality and women's empowered or set gender equality targets.

As of December 2023, 65 gender-focused bonds were listed on the LuxSE and displayed on the LGX. Gender-focused bonds are social, sustainability or sustainability-linked bonds that allocate all or part of their proceeds or set clear key performance indicators related to advancing gender equality in their issuer documentation and carry post-issuance reporting attesting to the issuer's concrete actions.

Finally, Regulation (EU) 2023/2631 of 22 November 2023 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds (the EU Green Bond Regulation), which entered into force on 20 December 2023, will apply as of 21 December 2024. The EU Green Bond Regulation aims to make green bonds more transparent and comparable based on their environmental objectives to reduce the risk of greenwashing. The proceeds of green bonds should only be able to be invested in taxonomy-aligned economic activities. Issuers must fulfil the requirements of the EU Green Bond Regulation in order to use the designation 'EU Green Bonds'.

Law stated - 22 January 2024

Regulatory framework

2 | Describe the general regime for debt securities offerings.

The regulatory framework applicable to public offers of debt securities, and to their listing, is set out in the Prospectus Regulation and the Law of 16 July 2019 on prospectuses for securities (the Prospectus Law).

In addition, the admission to trading of debt securities on both markets operated by the LuxSE is subject to the Rules and Regulations of the LuxSE (the LuxSE Rules).

In Luxembourg, the offer of debt securities may be subject to one of the three following regimes, depending on the nature of the offering and the market where the securities are to be admitted to trading.

First regime

Offer of debt securities to the public and admission to trading on a regulated market (within the meaning of MiFID II) subject to an EU-wide, harmonised framework under the Prospectus Regulation

No offer of debt securities to the public or admission to trading on the Regulated Market within the territory of Luxembourg is allowed unless a prospectus has been duly approved by the Luxembourg competent authority (ie, the Financial Sector Supervisory Commission(CSSF)) or by a foreign competent authority and passported to Luxembourg, each in accordance with the Prospectus Regulation. An offer of securities to the public is understood as 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, to enable an investor to decide to purchase or subscribe to those securities.

A prospectus drawn up in accordance with this regime is subject to EU harmonisation under the Prospectus Regulation and benefits from the European passport, meaning that

a prospectus approved by a European competent authority may be passported to any other member state for the purposes of an offer or a listing.

Second regime

Offers of debt securities to the public and admission to trading of securities falling outside the scope of the Prospectus Regulation

Without prejudice to any exemption that may apply under the Prospectus Law, no offer to the public or admission to trading on the regulated market of debt securities falling outside the scope of the Prospectus Regulation is allowed, unless an alleviated prospectus is approved by the CSSF (for offers to the public) or by the LuxSE (for admissions to trading) in accordance with the Prospectus Law. An alleviated prospectus does not benefit from the European passport regime. The rules that apply are specific to Luxembourg and, as a result, are not harmonised.

Third regime

Admission to trading on a non-regulated market in Luxembourg

The Prospectus Law empowers the LuxSE to approve prospectuses for listings on the Euro MTF, in accordance with the LuxSE Rules. High-yield bonds typically listed on the Euro MTF are, in general, subject to this framework.

Law stated - 22 January 2024

FILING AND DOCUMENTARY REQUIREMENTS

General filing requirements

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

Unless an exemption under the Prospectus Regulation or the Law of 16 July 2019 on prospectuses for securities (the Prospectus Law) applies, no offer of debt securities shall be made to the public within the territory of Luxembourg without the prior publication of a Prospectus Regulation compliant prospectus, duly approved by the Financial Sector Supervisory Commission (CSSF) or by the competent authority of another member state and passported to Luxembourg.

Requirements in connection with an application with the CSSF for the approval of a prospectus are set out in the Prospectus Regulation, the Delegated Regulation (EU) No. 2019/980, the Delegated Regulation (EU) No. 2019/979, the Prospectus Law, the CSSF Circular 19/724, as amended (CCSF Circular 19/724) and the CSSF Circular 21/771 on the application of the guidelines of the European Securities and Markets Authority on disclosure requirements under the Prospectus Regulation of 20 April 2021 (CSSF Circular 21/771).

Applications related to the Prospectus Regulation and the Prospectus Law must be submitted through a CSSF web platform called e-Prospectus.

The application shall include the following:

- The documents to be approved, in particular the draft prospectus containing all information required for investors to make an informed assessment and, where applicable, the documents incorporated by reference that have not yet been approved by the CSSF beforehand.
- Documents included by reference in the prospectus must also be filed (in a searchable electronic format) with the CSSF and be accessible through hyperlinks pointing directly to the relevant documents, which must remain valid and freely accessible for at least 10 years. To comply with these requirements, the Luxembourg Stock Exchange (LuxSE) has built the Perma Link Upload Service – PLUS tool.
- A cross-reference list indicating where the information required under the relevant annexes of the Delegated Regulation (EU) No. 2019/980 can be found in the draft prospectus. In the case of a base prospectus, a precise indication as to which category (A, B and C categories introduced by the Delegated Regulation (EU) No. 2019/980) the information belongs.
- To the extent applicable, a reasoned waiver request in relation to certain information required under the relevant regulation.

Applications shall be filed with the CSSF by the issuer, the offeror or by a person acting on behalf of one of those persons. The issuer may draw up the prospectus as a single document or as separate documents, composed of a registration document, containing information on the issuer, a securities note containing information on the securities, and a summary (if applicable).

When securities are issued under a base prospectus, the final terms of the offered securities shall be filed with the CSSF and published in accordance with the Prospectus Regulation.

Every significant new factor, material mistake or material inaccuracy relating to the information included in a prospectus that may affect the assessment of the securities and that arises or is noted between the time when the prospectus is approved and the closing of the offer period or the time when trading on a regulated market begins, whichever occurs later, shall be mentioned in a supplement to the prospectus without undue delay. Supplements shall be submitted to the CSSF for approval.

When a prospectus is submitted to the CSSF for approval in connection with an admission to trading on the Regulated Market, a separate application for the admission to trading will have to be filed with the LuxSE as well.

In accordance with the Prospectus Regulation, issuers seeking to raise funds on a regular basis can file a universal registration document (URD), which describes the issuer's organisation, business, financial position, earnings and prospects, governance and shareholding structure. The mechanism is available to issuers whose securities are admitted to trading on the Regulated Market or the Euro multilateral trading facility (MTF). Once approved for two consecutive financial years, subsequent URDs can be filed or amended without prior approval of the competent authority. Frequent issuers will thus benefit from a fast-track prospectus approval process.

Separately, the LuxSE Rules will govern the filing process, the approval and the content requirements applicable to prospectuses in connection with the admission to trading of securities on the Euro MTF.

On 10 October 2022, the LuxSE launched a so-called FastLane service further to which eligible issuers on the Euro MTF may be fully exempted from the otherwise mandatory approval of their listing particulars by the LuxSE. The FastLane process benefits the following types of issuances:

- non-equity securities and equity convertible bonds issued by issuers whose shares are admitted to trading on a regulated market (within the meaning of Directive 2014/65/EU on markets in financial instruments, as amended) or equivalent;
- non-equity securities issued or guaranteed by states (other than member states), their regional or local authorities;
- non-equity securities issued by or guaranteed by member states' regional or local authorities;
- non-equity securities issued by multilateral institutions that are not public international bodies, and of which at least one Organisation for Economic Co-operation and Development (OECD) member state is a member;
- securities issued by central banks; and
- securities issued by associations with legal status or non-profit-making bodies, recognised by a member state or an OECD member state, to obtain the means necessary to achieve their non-profit-making objectives.

Qualifying issuers must file an admission document containing the terms and conditions of the securities for which admission to trading is sought, in a searchable electronic format. The LuxSE will neither review nor approve the admission document. In addition, an application form for obtaining a FastLane admission must be filled in and must include public sources of information about the issuer and the securities. The LuxSE can require the submission of any other document that it may deem necessary.

Law stated - 22 January 2024

Prospectus requirements

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

Unless an exemption under the Prospectus Regulation or the Prospectus Law (or both) applies, no offer of debt securities shall be made to the public within the territory of Luxembourg without the prior publication of a Prospectus Regulation compliant prospectus approved either by the CSSF or by the competent authority of another member state and passported in Luxembourg.

The prospectus shall comply with the following requirements:

- Information requirements:

- Prospectuses for public offers of debt securities shall comply with the information requirements set out in the Prospectus Regulation, the Delegated Regulation (EU) No. 2019/980 and the Delegated Regulation (EU) No. 2019/979, including the relevant annexes applicable to debt instruments.
- The prospectus will contain information on the assets and liabilities of the issuer, its financial position, profits and losses, future prospects and the rights attached to the offered securities. The prospectus shall also include information on the applicable risk factors, business and markets' descriptions, financial statements of the issuer and management discussion and analysis.
- It will need to contain a summary conveying, in non-technical language, the essential characteristics and risks associated with the issuer, any guarantor and the securities. The Prospectus Regulation and the Delegated Regulation (EU) No. 2019/979 detail the features of such summary. However, certain exemptions from the obligation to include a summary can apply (eg, for debt instruments having a minimum denomination of at least €100,000).
- The CSSF may request further information to be included in the prospectus for certain types of issuers.
- A simplified disclosure regime for secondary issuances under the framework of the Prospectus Regulation also allows issuers – under certain conditions – to draw up a simplified prospectus.
- Additionally, the Prospectus Regulation introduces the concept of an EU growth prospectus for certain issues by small and medium-sized enterprises, which permits an alleviated standard of disclosure in a standardised format. These provisions aim to facilitate access to capital markets for smaller companies.

- Language requirements:

- Where Luxembourg is the home member state (as defined by the Prospectus Regulation) and an offer to the public is made in Luxembourg only, the prospectus may be drawn up in Luxembourgish, English, French or German.
- The same applies where Luxembourg is the home member state and public offers are made in one or more other member states. However, in such a case, the prospectus shall also be made available either in a language accepted by the competent authorities of each host member state or in a language customary in the sphere of international finance, at the choice of the issuer or offeror.

Law stated - 22 January 2024

Documentation

5 | Describe the drafting process for the offering document.

Market practice in Luxembourg for the drafting of offering documentation, notably the prospectus, closely follows international practices, standards and procedures.

Typically, the prospectus or offering memorandum is drafted by the issuer's counsel (often a joint effort by local and international counsels), in accordance with applicable rules and regulations and closely reviewed by the issuer's management team, the investment banks, acting as managers and initial underwriters or purchasers, the auditors and their respective counsels. It is common practice to hold regular drafting sessions involving all parties, notably for the most relevant sections, such as the description of the debt instruments, management analysis and discussions of business prospects.

There are key documentation issues concerning the level and detail of disclosure on the issuer's business and prospects, including the relevant risk factors, the description of certain matters of Luxembourg law relevant in the context of the issuance (ie, insolvency law, corporate governance and tax) and the description of the main legal features of the debt instruments.

Where the offer qualifies as an offer to the public (and no exemption from the obligation to draw up a Prospectus Regulation compliant prospectus applies) or if the debt instruments are to be admitted to trading on a regulated market and the issuer's home member state (within the meaning of the Prospectus Regulation) is in Luxembourg, the drafting process also involves the CSSF as the Luxembourg competent authority for the purposes of the Prospectus Regulation. The CSSF will comment in detail on the draft documentation until it is approved.

The drafting process for offerings benefiting from an exemption from the obligation to draw up a Prospectus Regulation compliant prospectus follows a similar process and will be subject to high standards of care and transparency. If such an offer is followed by an application for listing on the Official List of the LuxSE and an admission to trading of the debt securities on the Euro MTF, the LuxSE will be involved in the review process.

Law stated - 22 January 2024

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

Issuances and offers of debt securities are primarily governed by the following three key documents:

- The terms and conditions of the debt instruments set out in detail the legal content of the debt instruments to be offered, governing the calculation and payment of interests, the amortisation of the principal, the events triggering a mandatory or voluntary early redemption, the events of default, etc. Although these may be governed by Luxembourg law, it is common to have debt instruments issued by Luxembourg issuers governed by English law or New York law, specifically for the high-yield bonds segment (in which Luxembourg is particularly active). The debt instruments are created under a trust deed or an indenture, which, in addition to the terms and conditions, will describe the applicable security package and guarantees, and detail the usual incurrence and maintenance covenants agreed by the issuer.

- The underwriting or purchase agreement (or dealer agreement for debt programmes) governs the relationship between the issuer and the financial intermediaries who will assist in placing the instruments with the final investors. This agreement is usually confidential and not disclosed to investors.
- The agency agreement governs the relationship between the issuer, the trustee and the agent appointed to administer the outstanding debt instruments, including the payments of interest and principal, updates to the register of bondholders (if any), the sending of notices to investors and other actions on behalf of the issuer.

The terms and conditions are, as a rule, fully disclosed in the applicable prospectus or offering memorandum prepared in connection with the offer. In addition, the terms and conditions and the agency agreement are usually made available to investors at the registered office of the issuer or the appointed agent.

In addition, other documents that may be prepared in connection with the offer include the relevant issuer's corporate authorisations, the global notes and/or certificates representing the debt instruments, engagement letters for auditors and the listing applications.

When a trustee or a common representative acting on behalf of the holders of the debt instruments is appointed, which is also common, a trust deed or an appointment agreement is put in place setting out the roles, rights and obligations of the entity appointed to act on behalf of, and in the interest of the investors. For high-yield bonds issuances, this is achieved under the applicable trust deed or indenture.

Furthermore, for secured issuances, as often is the case with high-yield bonds, the contractual documentation will also include the relevant security documents.

Law stated - 22 January 2024

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

Contractual documents relating to offers of debt securities are not subject to regulatory approval. Only prospectuses prepared pursuant to the Prospectus Regulation, or the Prospectus Law (or both) shall be approved by the relevant authority prior to their publication.

Once approved by the relevant competent authority, the prospectus shall be made available to the public prior to, and at the latest at, the beginning of the public offer of the debt securities involved. In accordance with the Prospectus Regulation, the prospectus will be deemed available to the public when published in electronic form on any of the following websites:

- the website of the issuer or offeror;
- the website of the financial intermediaries placing or selling the securities, including paying agents; or
- the website of the LuxSE.

Offering documents falling under an exemption from the obligation to publish a Prospectus Regulation compliant prospectus (such as high-yield bonds) are not subject to the approval process.

Law stated - 22 January 2024

Authorisation

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

Upon submission of the draft prospectus, the CSSF shall notify the issuer within 10 working days of its decision regarding the approval of the prospectus. Frequent issuers with a universal registration document may benefit from a fast-track approval process of five working days. Failure by the CSSF to notify its decision within the review period is considered an implicit decision of refusal.

If the CSSF finds, on reasonable grounds, that the submitted documents are incomplete or that supplementary information is needed, it shall notify the issuer or offeror within the review period specified above, and the review period shall start to run only from the date on which such information is provided.

The effective timetable for the approval of the prospectus can thus vary from two to three weeks to two or more months, mainly depending on whether the issuer is a first-time issuer, the existence of a registration document, the characteristics of the offer (cross-border, etc) or the securities offered (eg, the complexity of the terms and conditions) and the completeness of the file.

For a first-time offeror or in the case of a complex transaction as well as for transactions aimed at the retail market, it is thus advisable to file the offering documentation well in advance.

During the offer period, any promotional communication or advertisement relating to an offer of securities to the public must be clearly recognisable as such, and the information contained therein cannot be inaccurate or misleading and must be in line with the prospectus.

The document shall also indicate that a prospectus has been or will be published and shall specify where potential investors are or will be able to retrieve a copy thereof.

Advertisements disseminated to potential retail investors are subject to specific requirements detailed in the Delegated Regulation (EU) No. 2019/979.

Similar rules apply to public offers made pursuant to an alleviated prospectus.

Regulation (EU) No. 596/2014 on market abuse, as amended (the Market Abuse Regulation) and as supplemented in particular by the Commission Delegated Regulation (EU) No. 2016/958, sets out an EU harmonised framework for persons producing or disseminating investment recommendations relating to listed securities. The aim is to ensure high standards of fairness, probity and transparency so as to avoid misleading market participants or the public.

Law stated - 22 January 2024

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

The CSSF will not approve a prospectus until it is satisfied that it meets all the requirements set out in the Prospectus Regulation (including any applicable delegated and implementing regulations relating thereto) and in Part II of the Prospectus Law (for a Prospectus Regulation compliant prospectus) or in Part III of the Prospectus Law (for an alleviated prospectus).

Similarly, the LuxSE will refuse to approve any listing particulars drawn up for the purposes of listing on the Official List and admitting to trading debt securities on the Euro MTF, unless the requirements set out in the LuxSE Rules are met.

Law stated - 22 January 2024

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

In principle, offers of securities to the public in Luxembourg require the publication of a prospectus that complies with the Prospectus Regulation, either approved by the CSSF or by the competent authority of another member state and subsequently passported to Luxembourg. The Prospectus Regulation and the Prospectus Law, however, provide for a set of exemptions from the obligation to publish a Prospectus Regulation compliant prospectus.

This will be notably the case for the following offers of debt securities:

- offers addressed to qualified investors (as defined in the Prospectus Regulation) only;
- offers addressed to fewer than 150 natural or legal persons per member state, other than qualified investors;
- offers of securities whose denomination per unit amounts to at least €100,000; or
- offers addressed to investors who acquire debt securities for a total consideration of at least €100,000 per investor, for each separate offer.

Furthermore, Luxembourg has opted for the small-scale exemption introduced by the Prospectus Regulation, pursuant to which issues of securities are exempt from the obligation to publish a Prospectus Regulation compliant prospectus if the total amount of the offer in all member states is less than €8 million (on a rolling 12-month basis). Prior notification must be sent to the CSSF when making use of this exemption.

For offers with a total consideration in all member states of at least €5 million and less than €8 million over a 12-month period, an information note must be published in accordance with the Prospectus Law, in addition to the prior notification to the CSSF. The Prospectus

Regulation will not apply to offers of securities with a total consideration in all member states of less than €1 million over a 12-month period.

High-yield bond issuances structured out of Luxembourg will typically be exempt from the requirement to publish a Prospectus Regulation compliant prospectus, as such offers are usually addressed solely to qualified investors.

However, any subsequent resale of debt securities (including the placement of securities through financial intermediaries) that previously fell within one of the aforementioned exemptions will be regarded as a separate offer and could trigger an obligation to publish a Prospectus Regulation compliant prospectus, unless one of the aforementioned exemptions applies to the said resale itself.

Similar exemptions apply to offers of securities governed by Part III of the Prospectus Law (ie, the alleviated regime).

While there are no specific rules governing exempt offers of securities, general principles of Luxembourg law will remain applicable, particularly regarding liability for inaccurate or incomplete information. Issuers and underwriters in the context of exempt offers are therefore required to treat all prospective investors (including qualified investors) fairly and equally, particularly concerning the material information made available in the context of the offer.

Law stated - 22 January 2024

Offering process

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

For offers requiring the approval of a prospectus by the CSSF, the primary focus is on drafting such a document in view of its submission to the regulator. This is a joint task carried out by the issuer, the underwriters and their respective advisers, which will take in normal circumstances, from four to 10 weeks, depending on the characteristics and track record of the relevant issuer. The CSSF will agree on a tentative timetable for approval, although the approval will in any event be subject to all legal requirements being complied with.

Once the prospectus is approved and, if applicable, passported to any other relevant member states, the offer period can start, usually for a period ranging between five and 15 days.

In parallel, the issuer's management team and the underwriters will conduct marketing and sales activities to reach out to investors.

As the offer period comes to an end, the underwriters will proceed with the allocation of the offer and its settlement, which usually occurs on the second day following the end of the offer period. Price stabilisation activities, if any, will follow usually during a period of up to 30 days.

Exempt offers of debt securities for which an application for listing on the Official List and admission to trading on the Euro MTF is made (eg, high-yield bonds) are subject to less stringent regulatory requirements and a more flexible process, especially in terms of marketing activities, which may begin earlier in the process. The prospectus is approved by the LuxSE between two and four weeks following the first filing.

Law stated - 22 January 2024

Closing documents

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

Customary documentation to be produced in connection with the closing of a debt issuance includes:

- legal counsels' legal opinions covering matters of Luxembourg law (including private international law);
- certificates issued by appropriate officers of the issuer or guarantor, providing usual assurances as to solvency and authority to enter into the relevant transaction documents; and
- auditor's opinions and comfort letters.

Law stated - 22 January 2024

Listing fees

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

Listing on the Regulated Market

CSSF fees	
Approval fee • Stand-alone prospectus • Base prospectus	• €5,720 • €8,910
Additional fees may apply for the approval of supplements, as well as in the case of multiple issuers or guarantors. The overall amount levied by the CSSF shall in no event exceed €22,000.	

LuxSE fees	**First listing**
Listing fee	€1,500
Maintenance fee	Maximum €800

Listing on the Euro MTF

LuxSE fees	**First listing**
Approval fee	€3,000
Listing fee	€1,500
Maintenance fee	Maximum €800

In both cases, supranational issuers and recurrent issuers benefit from reduced fees of the LuxSE.

Law stated - 22 January 2024

KEY CONSIDERATIONS

Special debt instruments

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

The Luxembourg Stock Exchange (LuxSE) lists and admits to trading equity linked notes, hybrid notes, exchangeable and convertible bonds and has a high market share in this area. The post-2008 global financial crisis years have seen a significant increase in these types of products issued mostly by financial sector entities seeking to meet regulatory capital requirements.

The launch in 2016 of the Luxembourg Green Exchange (LGX) has boosted interest in green securities listings in Luxembourg. The LGX is the first platform dedicated exclusively to green securities. The LGX helps issuers market their green securities by generating awareness about their green projects. It is expected to be further enhanced by the entry into force and application of the EU Green Bond Regulation.

In addition, under the umbrella of the LGX, issuers can also list social and sustainable bonds. These two categories of bonds are based on strict eligibility criteria that are in line with the Social Bond Principles and the Sustainability Bond Guidelines developed by the International Capital Markets Association (ICMA). An independent assessment on the use of proceeds, a selection process and management of proceeds is required for social or sustainable bonds to be categorised as such. The LuxSE also welcomes sustainability linked bonds on its LGX platform since the publication of ICMA's Sustainability-Linked Bond Principles in June 2020.

Law stated - 22 January 2024

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

Issuance of special debt instruments generally follows the rules that apply to the offer and admission to trading of debt instruments.

For Regulation (EU) No. 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, as amended (the Prospectus Regulation) compliant transactions, the relevant offering documentation will need to comply with the disclosure requirements set out in the Prospectus Regulation, Delegated Regulation (EU) No. 2019/979, Delegated Regulation (EU) No. 2019/980 and, specifically, in the schedules that apply to special types of equity linked debt issuances (as further detailed in Circular CSSF 21/771).

Where equity linked debt instruments are to be issued and offered by a Luxembourg entity, a requirement for approval by a general meeting of shareholders may as a rule apply, including for the purpose of withdrawing the statutory preferential rights of existing shareholders.

Under the LuxSE Rules, convertible or exchangeable bonds may only be admitted to trading on one of the markets operated by the LuxSE if the underlying shares have themselves been previously admitted to trading on the same market, or on another market offering similar assurances. By derogation, these securities may, however, be admitted to trading if the LuxSE is satisfied that the holders of the debt instruments have received all the required information to form an opinion on the value of the shares related to such debt instruments.

As far as the listing of green, social and sustainable bonds on the LuxSE is concerned, issuers will need to comply with certain specific disclosure requirements and obtain an independent assessment on the use and management of the proceeds to join the LGX. To remain on the LGX, issuers will have to commit to ex post reporting obligations (to ensure that the proceeds are used to finance green, social and sustainable projects).

Additionally, the LGX eligibility criteria for sustainability linked bonds are built on the ICMA's Sustainability-Linked Bond Principles, which cover five core principles:

- selection of key performance indicators;
- calibration of sustainability performance targets (SPTs);
- the bond must include a financial or structural impact (or both), involving trigger event(s).
- reporting; and
- independent and external verification of performance.

Law stated - 22 January 2024

Classification

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

For the purposes of Luxembourg law, the classification of security as equity or debt will be determined by a substance approach, taking into account the relevant features of the securities. Typical features of equity instruments include voting rights alongside holders of common share capital, participation in the profits of the issuer, right to liquidation proceeds and the residual value of the issuer as well as subordination to all other creditors.

The Prospectus Regulation expressly defines equity securities as shares and other transferable securities equivalent to shares in companies, as well as any other type of transferable securities issued by the same issuer (or another entity belonging to the same group), giving the right to acquire shares or transferable securities equivalent to shares.

Conversely, typical features of debt instruments include a claim for payment of principal, fixed or variable interests, no voting rights alongside shareholders and no participation in liquidation proceeds.

The content of a Prospectus Regulation or a LuxSE Rules compliant prospectus will differ in an equity issue or a debt issue and different elements will need to be provided to investors. In addition, debt instruments may benefit from certain exemptions, which may preclude the qualification of a securities offer as a public offer, or which may otherwise provide for an exemption to draw up and publish a Prospectus Regulation compliant prospectus.

Law stated - 22 January 2024

Transfer of private debt securities

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

Provided that the transfer qualifies as an exempt offer pursuant to the Prospectus Regulation or the Prospectus Law of 16 July 2019 on prospectuses for securities (the Prospectus Law) (or both) no general restrictions are imposed on the transferability of debt securities.

Any subsequent offer qualifying as an offer of securities to the public within the meaning of the Prospectus Regulation or the Prospectus Law (or both) will be subject to the obligation to publish a prospectus unless an exemption applies.

It is customary for certain transaction documentation (notably the underwriting agreement and the offering memorandum) to include an undertaking by the underwriters, directors or managers not to offer and sell the debt securities in a way that could trigger the obligation to publish a Prospectus Regulation compliant prospectus under the applicable laws and regulations.

Typically, these undertakings are devised to make sure that the relevant offer of securities falls under one of the exemptions provided for in the Prospectus Regulation or the Prospectus Law (or both).

Law stated - 22 January 2024

Cross-border issues

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

Under the EU harmonised legal framework for mutual recognition of prospectuses under the Prospectus Regulation, when Luxembourg is the host member state (within the meaning of the Prospectus Regulation), the prospectus and any supplement thereto, is valid for an offer of securities to the public in Luxembourg or an admission to trading on the Regulated Market, as soon as the Financial Sector Supervisory Commission (CSSF) and the European Securities and Markets Authority (ESMA) have received a certificate of approval from the competent authority of the home member state of the issuer, attesting that the prospectus has been drawn up in accordance with the Prospectus Regulation. In such cases, the CSSF does not undertake any approval or administrative procedures relating to the prospectus.

No specific rules apply to securities offered outside Luxembourg by a Luxembourg issuer, except when Luxembourg is the home member state (within the meaning of the Prospectus Regulation), in which case the Prospectus Regulation (including the EU harmonised framework for the passporting of prospectuses) and the Prospectus Law will apply similarly.

Law stated - 22 January 2024

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

Under the EU harmonised rules for mutual recognition of prospectuses, issuers of debt securities that obtain the approval of a prospectus (in the context of an offer of securities to the public or an admission to trading on a regulated market) in another member state, may require the competent authority of the relevant home member state to notify the CSSF and the ESMA to passport their prospectus.

Once this process is completed, the issuer will be allowed to offer the relevant debt securities in Luxembourg or have its securities admitted to trading on the Regulated Market (or both) (in the latter case, the LuxSE in its capacity as market operator of the Regulated Market will still need to approve the listing application).

Law stated - 22 January 2024

Underwriting

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

Underwriting activities in connection with Luxembourg debt capital markets follow the prevailing standards in the international capital markets very closely, notably those set out by the ICMA.

Underwriters will typically agree to purchase the offered securities, for subsequent distribution to investors. A typical underwriting agreement will include the issuer's representations and warranties, the agreement to purchase and sell the debt securities, the covenants and undertakings of the issuer, the terms of the offering and the applicable indemnity clauses.

In general, there are no fundamental differences in the underwriting arrangements for a public offering or private offering.

Law stated - 22 January 2024

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

Underwriters established in Luxembourg are subject to a licensing requirement with the CSSF and to its supervision (unless duly licensed in another member state).

Other than the requirements set out previously, underwriting agreements related to debt issuances are not subject to the approval of the CSSF.

Law stated - 22 January 2024

Transaction execution

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

As a significant international financial centre, Luxembourg hosts several clearing and settlement agents with notable backgrounds and experience in public offers and admission to trading in Luxembourg.

Clearstream Banking SA, LuxCSD SA, Euroclear Bank SA/NV and BNY Mellon CSD SA/NV are the main players.

Settlement and execution of debt issuances will fundamentally depend on the form of representation of the securities.

In any event, settlement and delivery of debt instruments occur typically on a payment-against-delivery basis, on the second day following the end of the offer or placement period. Regardless of the actual form of the debt securities (bearer, registered or dematerialised), the debt instruments are subsequently registered in the books of the entity operating the relevant settlement system and thereafter credited to investors through the accounts held with the participant financial intermediaries.

Admission to trading will, as a rule, occur on the date of settlement and issue of the debt securities.

Law stated - 22 January 2024

Holding forms

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

The traditional and most commonly used form of representation for debt securities in Luxembourg is the registered form or bearer form.

In both cases, the issuance is either represented by a global note deposited with a custodian or common depositary, who will keep the global note for the account of the central securities depository or depositaries or registered in the bondholders' register maintained by the Luxembourg issuer at its registered office or an appointed registrar, on behalf of a nominee for the account of the central securities depository or depositaries. These debt securities are represented by book-entry rights that may subsequently be credited on the accounts of the CSD's participants with the relevant number of issued debt instruments, who in turn will (directly or indirectly) credit the securities accounts of the ultimate investors.

The applicable terms and conditions will provide only for certain exceptional circumstances in which definitive notes may be issued, notably in scenarios where there is a severe disruption of the accepted clearing systems.

The Law of 6 April 2013 on dematerialised securities, as amended, (the 2013 Law) introduced in Luxembourg the concept of dematerialised securities. This law requires the whole issuance of (debt) fungible instruments through a single securities issuance account maintained with a settlement organisation, which is required to be based in Luxembourg and specifically licensed as such. Once the dematerialised debt instruments are registered on the single securities issuance account they can be transferred and held through securities accounts opened in the name of the relevant investors with financial intermediaries.

The 2013 Law has contributed to the modernisation of Luxembourg securities law by providing enhanced legal certainty and flexibility for cross-border issues and holdings of securities. It is interesting to note in this respect that further to recent amendments to the said law, dematerialised securities can now also be directly issued by using blockchain technology.

Law stated - 22 January 2024

Outstanding debt securities

24 | Describe how issuers manage their outstanding debt securities.

Management of outstanding debt securities by Luxembourg issuers or in relation to debt securities admitted to trading on one of the markets operated by the LuxSE, follows the prevailing market practices in the international capital markets and will depend on the goals and needs of the relevant issuer, on the overall market conditions and the terms and conditions applicable to the relevant debt securities.

During the 2008 global financial crisis and recent covid-19 pandemic, there was a considerable increase in the number of interactions between issuers and investors (acting through trustees or other fiduciaries) in the context of liability management transactions, for the purpose of obtaining consent for certain actions (notably, in connection with rating triggers) as well as tender and exchange offers, as issuers sought to take advantage of arbitrage opportunities or to extend the maturities of outstanding issuances.

Issuers often re-purchase their debt securities on the open market.

For debt securities listed on the Regulated Market or the Euro MTF, these interactions are subject to mandatory disclosures and public dissemination requirements, allowing investors and the market to have access to such information.

Law stated - 22 January 2024

REGULATION AND LIABILITY

Reporting obligations

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

Where debt securities are admitted to trading on the Regulated Market and the issuer's home member state (within the meaning of the Directive 2004/109/EC, as amended (the Transparency Directive) is in Luxembourg, reporting and disclosure obligations will apply to the issuer of such securities pursuant to the law of 11 January 2008 on transparency requirements, as amended, implementing the Transparency Directive in Luxembourg (the Transparency Law). Moreover, the issuer will be subject to the obligations set out in the Market Abuse Regulation and the Luxembourg Stock Exchange (LuxSE) Rules.

Since 4 March 2022, reporting under the Transparency Law and certain reporting under the Market Abuse Regulation must be filed through a new Financial Sector Supervisory Commission (CSSF) platform called eRIIS (electronic Reporting of Information concerning Issuers of Securities
).

Under the Transparency Law, issuers are notably required to:

- file, store and publish regulated information (within the meaning of the Transparency Law), which comprises, inter alia, financial information; and
- disclose any changes in the rights of holders of debt securities or the issuance of new debt securities.

Specific exemptions from the reporting and disclosure obligations exist, notably for certain public law bodies and debt securities with a minimum denomination of €100,000.

Under the LuxSE Rules, issuers whose debt securities are admitted to trading on one of the markets of the LuxSE shall, inter alia, communicate certain information to the LuxSE, including information relating to events affecting the debt securities, such as any amendment affecting the rights of different categories of debt securities, any redemption, any issue or subscription of securities or a change of the issuer's name.

Debt securities admitted to trading on the Euro multilateral trading facility (MTF) are not subject to the Transparency Law but will be subject to the reporting and disclosure obligations set out in the Market Abuse Regulation and the LuxSE Rules.

Issuers with debt securities admitted to trading on the Euro MTF shall publish certain information (eg, redemption notices, periodic financial information, changes to the rights of bondholders) in accordance with the LuxSE Rules.

Pursuant to the Market Abuse Regulation, issuers whose debt securities are admitted to trading on a regulated market or the Euro MTF are also required to publish inside information as soon as possible (although such publication can be delayed under certain conditions).

Inside information must be disclosed in a manner ensuring fast access to such information on a non-discriminatory basis. To ensure such disclosure Luxembourg issuers usually use the disclosure services offered by the LuxSE.

The Market Abuse Regulation also requires issuers of debt securities to ensure the prompt disclosure of all transactions made by persons discharging managerial responsibilities within the issuer (PDMRs) and by persons closely associated with PDMRs in relation to the debt securities issued or to derivatives or other financial instruments linked thereto.

In 2017, the LuxSE introduced a multi-functional reporting tool – the Financial Instruments Reporting Services Tool (FIRST) – to publish regulated information in accordance with regulatory standards. FIRST makes it possible to simultaneously distribute announcements to the market, to the Officially Appointed Mechanism (as defined by the Transparency Law) and to the CSSF, all through a single portal. The issuer can access the platform either directly or via its agent or law firm.

Additionally, the use of a legal entity identifier (LEI) code, a unique and universal 20-digit identifier designed to permit absolute certainty in the identification of entities participating in financial transactions and exchanging information with local regulators and trading venues, has become a standard requirement under a number of EU regulations and directives, including capital markets legislation. In Luxembourg, issuers with securities admitted to trading on the Regulated Market or the Euro MTF are required:

- to obtain an LEI code prior to the admission to trading becoming effective; and
- to have their LEI code active as long as their debt securities are admitted to trading on the LuxSE.

Law stated - 22 January 2024

Liability regime

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

Liability for the information given in a prospectus attaches to the issuer, the offeror, the person asking for the admission to trading on a regulated market or multilateral trading facility or the guarantor, as the case may be.

This principle applies to debt securities and other types of securities. Neither the Prospectus Regulation nor the Law of 16 July 2019 on prospectuses for securities (the Prospectus Law) foresees an autonomous civil liability regime, as they mainly establish the situations upon which civil liability may be sought and the relevant persons incurring (non-exclusive) liability.

The persons responsible for the prospectus must be clearly identified in the prospectus by their names and functions or, in the case of legal persons, by their names and registered offices, as well as declarations made by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its accuracy.

These declarations will not however exempt from liability (whether liability in tort or contractual liability) other parties contributing to the preparation of the prospectus, if it is evidenced that they have provided false or misleading information.

The Prospectus Regulation and the Prospectus Law specify that no civil liability shall attach to any person solely on the basis of the summary, including any translation thereof, unless it is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus, or if it does not provide, when read together with the other parts of the prospectus, key information to help investors when considering whether to invest in such securities. The summary shall contain a clear statement to that effect.

Law stated - 22 January 2024

Remedies

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

The most common remedy in the context of a debt securities offering is the liability for incorrect, inaccurate or incomplete information contained in the prospectus.

Under Luxembourg law, liability towards the underwriters by the issuer or the offeror will in general be contractual, whereas the liability of the issuer or the offeror towards investors will, as a general rule, be based on civil liability in tort principles.

Civil litigation may be brought by investors seeking to recover any losses suffered in connection with the offer of securities. In addition, administrative proceedings may be started by the CSSF, following a complaint by a private investor or further to its own initiative.

Law stated - 22 January 2024

Enforcement

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

Both the Prospectus Regulation and the Prospectus Law confer broad powers on the CSSF to take remedies and sanctions in the presence of improper activities in connection with offers of securities in Luxembourg.

The CSSF is in particular entitled to:

- require additional disclosures in the prospectus;
- suspend a public offer or an admission to trading on the Regulated Market for a period of up to 10 consecutive working days;
- prohibit or suspend any advertisements regarding an offer to the public for a period of up to 10 consecutive working days;
- disclose, or require the issuer to disclose, all material information that may influence the assessment of the securities offered to the public or admitted to trading on the Regulated Market to ensure investor protection or the smooth operation of the market; or
- prohibit an offer to the public or trading on the LuxSE.

In this context, the CSSF is entitled to publicly announce that a certain issuer, an offeror or a person asking for admission to trading on the Regulated Market is failing to comply with its regulatory obligations.

Moreover, the CSSF may impose administrative fines in connection with violations of the Prospectus Regulation and the Prospectus Law from €250 to €250,000 against those who obstruct its powers of surveillance and investigation or who have knowingly communicated inaccurate or incomplete information. Further, in certain cases, the CSSF can impose a fine against a legal person of up to €5 million or up to 3 per cent of the total annual turnover.

Additionally, a person who knowingly makes an offer of securities to the public in Luxembourg without having obtained approval of a prospectus under the Prospectus Regulation and the Prospectus Law may be subject, in the case of a legal person, to a criminal fine ranging from €251 to €5 million and in the case of a natural person, from €500 to €700,000.

The CSSF is also the competent authority to monitor compliance with and enforce the provisions of the Transparency Law and the law of 23 December 2016 on market abuses, as amended (the Market Abuse Law). The Market Abuse Law implements Directive 2014/57/EU on criminal sanctions for market abuse (the Market Abuse Directive) in Luxembourg.

To ensure compliance with these texts, the CSSF can impose a set of administrative sanctions, the scope of which is completed by various criminal sanctions, both detailed in the Transparency Law and Market Abuse Law.

In terms of administrative sanctions provided by the Market Abuse Law, the CSSF is entitled to sanction market abuses (ie, insider dealing, unlawful disclosure of inside information or market manipulation) in different manners, from an injunction to stop the prohibited behaviour, to the issue of a public warning disclosing the name of the person responsible for the prohibited behaviour or fines of up to €5 million (or up to €15 million or 15 per cent of the total annual turnover in the case of a violation by a legal person) or up to 10 times the profits gained or the losses avoided because of the infringement (where those can be determined).

Criminal sanctions relating to the same market abuses comprise (to the extent the person had the intention to obtain for itself or the benefit of a third party, an illicit gain) a fine of up to €5 million or imprisonment of up to four years (or both), for infringements of the insider dealing prohibition (including the recommendation to engage in insider dealing) and market manipulation (or a fine of up to €15 million in the case of such a violation by a legal person).

The fines for infringement of the insider dealing prohibition (including the recommendation to engage in insider dealing) can be increased up to 10 times the profit derived from the illicit transaction and shall, in any event, not be lower than the amount of the actual profit made. An attempt to commit any of the prohibited activities shall be punishable by the same criminal sanctions.

In the case of a violation of the prohibition to unlawfully disclose inside information (and again to the extent the person had the intention to obtain for itself or the benefit of a third party, an illicit gain with the help of any fraudulent means), a fine of up to €500,000 or imprisonment of up to two years (or a fine of up to €1.5 million in the case of such a violation by a legal person) can be imposed; moreover:

- administrative (but not criminal) sanctions are also specified against persons discharging managerial responsibilities and persons closely associated with them (both terms within the meaning of the Market Abuse Regulation) who fail to notify the relevant issuer or the CSSF of transactions conducted on their own account relating to the securities of that issuer or derivatives or other financial instruments linked thereto; and
- in the case of securities admitted to trading in Luxembourg, the LuxSE supervises issuers' compliance with the LuxSE Rules. In terms of sanctioning powers, the

LuxSE can suspend or withdraw from trading any debt security that no longer complies with, or whose issuer no longer conforms to, the LuxSE Rules relating to disclosure obligations, except where such measure would be likely to significantly damage the interests of investors or compromise the orderly operation of the market.

Further, the LuxSE can, on its own initiative, delist debt securities from trading on a market when it firmly believes that for specific reasons, the normal and consistent market for these debt securities cannot be maintained.

Law stated - 22 January 2024

Tax liability

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

Preliminary remarks

This summary solely addresses the principal Luxembourg tax consequences of the issue, acquisition, ownership and disposal of bonds and does not purport to describe every aspect of taxation that may be relevant to a particular holder.

It assumes that each transaction with respect to the bonds is at arm's length and that, based on genuine legal and economic considerations, the bonds are to be treated as debt for tax purposes. Moreover, it assumes the issuer is a capital company that is fully subject to tax in Luxembourg.

This summary does not address the Luxembourg tax consequences for a bondholder who:

- is an investor as defined in a specific law (eg, the law on family wealth management companies of 11 May 2007, as amended, the law on undertakings for collective investment of 17 December 2010, as amended, the law on specialised investment funds of 13 February 2007, as amended, the law on reserved alternative investment funds of 23 July 2016, the law on securitisation of 22 March 2004, as amended, the law on venture capital vehicles of 15 June 2004, as amended and the law on pension saving companies and associations of 13 July 2005);
- is, in whole or in part, exempt from tax;
- acquires, owns or disposes of bonds in connection with a membership of a management board, a supervisory board, an employment relationship, a deemed employment relationship or management role; or
- has a substantial interest in the issuer or a deemed substantial interest in the issuer for Luxembourg tax purposes. Generally, a person holds a substantial interest if such person owns or is deemed to own, directly or indirectly, more than 10 per cent of the shares or interest in an entity.

Withholding tax – bondholders

Non-resident bondholders

Generally, payments of interest and principal under bonds made to non-residents of Luxembourg are made free from withholding or deduction of or for any taxes of whatever nature imposed, levied, withheld or assessed by Luxembourg or any political subdivision or taxing authority of or in Luxembourg. An exception would apply (for instance) to payments on instruments that are, in whole or in part, profit-sharing instruments, in which case a 15 per cent withholding tax may apply (subject to a domestic law exemption or a double-tax treaty reduction).

Individual resident bondholders

Under the law of 23 December 2005, as amended from time to time (the Relibi Law), payments of interest and similar income made or deemed to be made to an individual who is resident in Luxembourg may be subject to a withholding tax of 20 per cent of the payment.

Taxes on income and capital gains – bondholders

Non-resident bondholders

Non-resident bondholders that do not have a permanent establishment in Luxembourg to which the bonds or income thereon are attributable are not subject to Luxembourg income taxes in respect of any benefits derived or deemed to be derived in connection with the bonds.

Non-resident bondholders that have a permanent establishment in Luxembourg to which the bonds or income thereon are attributable are subject to Luxembourg income taxes in respect of any benefits derived or deemed to be derived in connection with the bonds.

Resident bondholders

Individuals

Any benefits derived or deemed to be derived from or in connection with bonds that are attributable to an enterprise from which an individual derives profits, whether as an entrepreneur or pursuant to a co-entitlement to the net value of an enterprise, are generally subject to Luxembourg income tax. A resident individual who invests in the bonds as part of such person's private wealth management is generally subject to Luxembourg income tax in respect of interest and similar income (eg, premiums or issue discounts) derived from the bonds, except if tax is levied on such income in accordance with the Relibi Law. A gain realised by a resident individual, acting in the course of the management of that person's private wealth, upon the sale or disposal, in any form whatsoever, of bonds is generally not subject to Luxembourg income tax, provided this sale or disposal takes place more than six months after the bonds are acquired. However, any portion of such gain corresponding to accrued but unpaid interest is subject to Luxembourg income tax, except if tax is levied on such interest in accordance with the Relibi Law. Any benefit derived by a resident individual from the disposal of bonds prior to their acquisition is subject to income tax as well.

Corporations

A corporate resident bondholder must generally include any benefits derived or deemed to be derived from or in connection with the bonds, such as interest accrued or received, any redemption premium or issue discount, as well as any gain realised on the sale or disposal, in any form whatsoever, of the bonds, in its taxable income for Luxembourg corporate income and municipal business tax purposes.

General

If a bondholder is neither resident nor deemed to be resident in Luxembourg, such holder will, for Luxembourg tax purposes, not carry on or be deemed to carry on an enterprise, in whole or in part, through a permanent establishment or a permanent representative in Luxembourg by reason only of the execution of the documents relating to the issue of bonds or the performance by the issuer of its obligations under such documents or under the bonds.

Net wealth tax – bondholders

Corporate bondholders resident in Luxembourg and non-resident corporate bondholders that maintain a permanent establishment in Luxembourg to which or to whom such bonds are attributable are subject to annual net wealth tax on their unitary value (ie, non-exempt assets minus liabilities and certain provisions that are economically connected to such non-exempt assets as valued according to the Luxembourg valuation rules), levied at a rate of 0.5 per cent if the unitary value does not exceed €500 million and, to the extent that the unitary value exceeds €500 million at a rate of 0.05 per cent.

Individuals are not subject to Luxembourg net wealth tax.

Inheritance and gift tax – bondholders

Where bonds are transferred for non-consideration:

- no Luxembourg inheritance tax is levied on the transfer of the bonds upon the death of a bondholder in cases where the deceased was not a resident or a deemed resident of Luxembourg for inheritance tax purposes; and
- by way of gift, Luxembourg gift tax will be levied in the event that the gift is made pursuant to a notarial deed signed before a Luxembourg notary or produced for registration, directly or indirectly, before the Registration and Estates Department.

Other taxes and duties

It is not compulsory that the bonds be filed, recorded, or enrolled with any court or other authority in Luxembourg. No registration tax, stamp duty or any other similar documentary tax or duty is due in respect of or in connection with the issue of bonds, the performance by the issuer of its obligations under the bonds, or the transfer of the bonds.

A fixed or ad valorem registration duty in Luxembourg may, however, apply:

- upon registration of the bonds before the Registration and Estates Department in Luxembourg where this registration is not required by law; or
- if the bonds are:
    - enclosed to a compulsorily registrable deed under Luxembourg law; or
    - deposited with the official records of a notary.

FATCA

The Foreign Account Tax Compliance Act (FATCA) was enacted into US law in March 2010 as part of the Hiring Incentives to Restore Employment Act. FATCA aims to reduce tax

evasion by US citizens and requires, among other things, foreign financial institutions (FFIs) outside the United States to spontaneously provide information about financial accounts held, directly or indirectly, by specified US persons or face a 30 per cent US federal withholding tax imposed on certain US-source payment (FATCA Withholding).

To implement FATCA in Luxembourg, Luxembourg entered into a so-called Model 1 Intergovernmental Agreement (the IGA) with the United States, and a memorandum of understanding in respect thereof, on 28 March 2014. The IGA was implemented under Luxembourg domestic law by the Law of 24 July 2015 (the Luxembourg FATCA Law). Luxembourg FFIs that comply with the requirements of the IGA and the Luxembourg FATCA Law will not be subject to FATCA withholding.

Under the IGA and the Luxembourg FATCA Law, Luxembourg FFIs are required to perform certain necessary due diligence and monitoring of investors, and to report to the Luxembourg tax authorities on an annual basis, information about financial accounts held by:

- specified US investors;
- certain US-controlled entity investors; and
- non-US financial institution investors that do not comply with FATCA.

Such information will subsequently be remitted by the Luxembourg tax authorities to the US Internal Revenue Service.

Bondholders may be required to provide information to the issuer to ensure the issuer's compliance with the IGA and the Luxembourg FATCA Law. In the event that a bondholder does not provide the required information, the issuer may need to report the financial account information of such bondholder to Luxembourg tax authorities.

Common reporting standard

The Organisation for Economic Co-operation and Development has developed a new global standard, the Common Reporting Standard (CRS), for the automatic exchange of financial information between tax authorities. Luxembourg is a signatory jurisdiction to the CRS and has conducted its first exchange of information with tax authorities of other signatory jurisdictions in September 2017, as regards reportable financial information gathered in relation to fiscal year 2016. The CRS has been implemented in Luxembourg via the law dated 18 December 2015 concerning the automatic exchange of information on financial accounts and tax matters and implementing Directive 2014/107/EU.

The regulations may impose obligations on the issuer and the bondholders, if the issuer is considered as a reporting financial institution (eg, an investment entity) under the CRS, so that the latter could be required to conduct due diligence and obtain (among other things) confirmation of the tax residency, tax identification number and CRS classification of bondholders to fulfil its own legal obligations.

Issuer

Corporate income tax and municipal business tax

The issuer is subject to corporate income tax (CIT), which is levied at a rate of 17 per cent in the tax year 2023. The CIT is increased with a 7 per cent surcharge for the unemployment fund, bringing the combined rate to 18.19 per cent. The issuer is further subject to municipal

business tax (MBT). In the municipality of the city of Luxembourg, the MBT rate currently stands at 6.75 per cent. The CIT and the MBT add up to an effective tax rate of 24.94 per cent for the city of Luxembourg. For CIT and MBT purposes, taxable profits are determined on a single basket (no distinction between income and gains) and worldwide basis. Income and profits, losses and expenditure as recognised for local commercial accounting purposes determine the Luxembourg taxable basis, subject to certain adjustments, such as corrections under the arm's length principle and other adjustments contained in domestic tax law or tax treaty provisions. For Luxembourg tax purposes, the issuer must operate at arm's length when dealing with associated companies. Moreover, the issuer must prepare proper transfer pricing documentation that must be made available upon request to the Luxembourg revenue. In the absence of transfer pricing documentation, the burden of proof of the arm's length nature of the transaction rests on the taxpayer.

Net wealth tax

The issuer is subject to net wealth tax (NWT) levied every 1 January of any given year at a headline rate of 0.5 per cent of its taxable net wealth if the unitary value does not exceed €500 million and, to the extent that the unitary value exceeds €500 million, at a rate of 0.05 per cent. Broadly, the taxable basis consists of the fair market value of all its (non-exempt) assets minus the fair market value of its liabilities and certain provisions that are economically connected to such (non-exempt) assets as valued according to the Luxembourg valuation rules. The issuer will be liable to an annual minimum NWT under certain circumstances. This minimum annual NWT typically amounts to €4,815 and applies if more than 90 per cent of the total assets of the issuer consist of certain financial assets and such assets exceed €350,000. Subject to conditions, all or part of the NWT is creditable against CIT in respect of the preceding year.

Value added tax

Where the issuer uses the proceeds to grant interest-bearing loans it carries on an activity falling within the scope of the Luxembourg value added tax (VAT). For VAT purposes, its revenue in the form of interest is tax-exempt. The issuer should be entitled to recover the input VAT incurred by it if it lends to non-EU borrowers. The issuer will have the obligation to register for VAT purposes with the Luxembourg revenue as a business enterprise. Typically, it will have to file VAT returns on a monthly basis in addition to an annual VAT return.

Dividends paid by the issuer

Dividend distributions made by the issuer are subject to a 15 per cent Luxembourg dividend withholding tax (WHT). A full dividend WHT exemption typically applies when the (direct) shareholder of the issuer satisfies the following two conditions for this exemption:

- it is a capital company resident of a treaty country and subject in its country of residence to income tax comparable with the Luxembourg CIT or, alternatively, a company entitled to the benefits of Directive 2011/96/EU (Parent-Subsidiary Directive); and
- it holds a direct participation in the issuer of at least 10 per cent or, alternatively, with an acquisition cost of at least €1.2 million for an uninterrupted period of at least 12 months.

A WHT return for a dividend payment must be filed within eight days of the moment that the dividends are made available. A WHT return should be filed even if the dividend payment is exempt from WHT. Liquidation distributions are not subject to this WHT.

Provided that the non-resident parent company owns all of the shares in the issuer for a continuous period of at least six months, any capital gains derived from a (deemed) disposal of the shares in the issuer should not be subject to capital gains tax in Luxembourg.

Law stated - 22 January 2024

UPDATE AND TRENDS

Key developments of the past year

30 | Please provide any updates and trends in your jurisdiction's debt capital market.

In terms of the Luxembourg Stock Exchange's (LuxSE) core activities, 2023 was a stronger year than 2022. In November 2023, the LuxSE passed the 13,000 new listings mark for the first time since 2008, representing €1.18 trillion. The LuxSE also saw a positive growth in the number of trades on its markets in 2023 and the setting up of new debt issuance programmes. In particular, the European Union and the European Atomic Energy Community (Euratom) launched in late December 2023 the new EIS Debt Issuance Programme, a landmark programme that our Luxembourg and Belgian offices assisted the European Commission on.

At the end of November 2023, the exchange had 41,342 securities admitted to listing and trading on its markets, including 585 new green, social and sustainability securities displayed on the Luxembourg Green Exchange (LGX), representing a total value of €201 billion. As the leading exchange for sustainable securities, the LuxSE has consolidated its firm commitment to fostering sustainable finance and advancing gender finance through various initiatives, in particular through:

- expanding the display of gender-focused bonds on the LGX, further to its recent commitments with UN Women to link gender and finance (as of December 2023, around 65 gender-focused bonds were listed on the LuxSE and displayed on the LGX);
- the release of a study entitled 'Linking gender and finance: An overview of the gender-focused bond market', which analyses data on 169 outstanding listed green, social, sustainability and sustainability-linked bonds identified via the LGX DataHub, which allocate all or a portion of their proceeds to financing projects or set clear objectives that contribute to gender equality and women's empowerment;
- the launching for International Women's Day 2023, of the first gender bond issued by a Sub-Saharan African issuer – a US$32 million bond from NMB Bank, a commercial bank in Tanzania;
- the launching in May 2023 by ICMA and the LuxSE of ICMA's new database dedicated to sustainable bond data, aimed at assisting market practitioners

to strengthen their knowledge of the sustainable bond market, follow market developments, identify sustainable opportunities and incorporate ESG factors in their decisions; and

- the welcoming in November 2023, of the first Cabo Verdean green bond on the LuxSE and the LGX. The pioneering bond focused on the blue economy and issued by the International Investment Bank was referred to as a Marine and Ocean-Based Blue Bond and raised financing for sustainable ocean-based projects in the island state.

Another significant milestone was when the LGX reached in December 2023, the 1,000 outstanding green bonds mark. In addition to encompassing 1,000 green bonds, there are also around 850 social, sustainability and sustainability-linked bonds displayed on LGX. In particular, as of 30 November 2023, the EIB had 68 securities displayed on the LGX (55 green bonds and 13 sustainable bonds).

In September 2023, the LuxSE marked the 3-year anniversary of the LGX DataHub by making the LGX DataHub dashboard publicly available on the LuxSE's website. The dashboard provides an aggregate view of sustainable bond data of more than 13,000 sustainable debt instruments listed worldwide. It addresses the complex data challenge that asset managers and investors are facing in their investments and reporting activities.

Further to the adoption of Regulation (EU) 2023/2859 of 13 December 2023, the EU created a single point of access to public financial and non-financial information regarding EU companies and EU investment products. The European Single Access Point (ESAP) will give companies more visibility towards investors and open more financing opportunities, especially for small companies in small capital markets. The ESAP does not impose any additional information reporting requirements on European companies. Sustainability information will also be made available on ESAP.

In September 2023, Luxembourg published the final bond report relating to its pioneering sovereign sustainability bond issued in September 2020, as foreseen by Luxembourg's Sustainability Bond Framework. The document is primarily aimed at international institutional investors and includes allocation and impact reports. The bond, valued at €1.5 billion, has financed or refinanced a diverse portfolio of 74 projects across seven different sectors, driving positive environmental and social impacts (including, the development of tram lines, wastewater treatment facilities and the construction of affordable housing). Luxembourg was the first European country as well as the first AAA-rated country in the world to issue a sustainable sovereign bond.

One of the listing highlights of 2023 was the listing on the LuxSE of the very first financial instrument issued by the World Bank on a Distributed Ledger Technology (DLT) and admitted to trading on the LuxSE. The admission of this landmark listing, which joins the ranks of several earlier admissions leveraging DLT technology, represents a natural step forward for the LuxSE and reflects its continuous support to the adoption of digitally native securities in the international bond market.

The number of new high yield bond issuances increased in 2023. The increase was underpinned by a robust refinancing activity. Recently, liability management transactions became an increasingly prevalent method for issuers to adjust their capital structure when facing financial headwinds, navigating uncertain financial markets or a challenging credit

environment. The high interest rate environment created a very challenging scenario for companies with impending maturities to refinance their debt raised at a very low price just a few years earlier. As a result, we have seen an increasing number of issuers turning to liability management transactions, including consent solicitations, tender and exchange offers, to tackle those challenges.

Law stated - 22 January 2024

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MARKET SNAPSHOT

Market climate

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

There has traditionally been a deep and active market for debt securities in the Netherlands.

The Dutch financial sector comprises large globally-operating financial institutions as well as small institutions with a more domestic focus, albeit with significant cross-border activities in many cases. Both categories are active participants in the Dutch and international capital markets, with Dutch financial institutions issuing debt instruments across the international spectrum, including commercial paper, bonds, structured notes and regulatory capital instruments. Dutch financial institutions have historically also been active in the asset-backed capital markets, particularly in the context of covered bonds and residential mortgage-backed securitisation transactions. At the same time, large Dutch pension funds and other institutional investors make significant investments in debt instruments issued in the Dutch and international capital markets.

In addition to the financial sector, various large international corporate conglomerates headquartered in the Netherlands tap the Dutch and international capital markets with various debt instruments, including commercial paper, bonds, convertible bonds, exchangeable bonds and high-yield notes.

The Netherlands is also known for its flexible corporate law, a favourable regulatory regime for group finance companies, the quality of financial regulators and, historically, a favourable tax climate. This has led to many international financial institutions and global corporates establishing Dutch finance companies, which act as a treasury and cash management centre for their group and issue various types of debt instruments, primarily bonds and structured notes.

Law stated - 18 December 2023

Regulatory framework

2 | Describe the general regime for debt securities offerings.

Regulators

The Dutch Authority for the Financial Markets (AFM) is tasked with market conduct supervision and supervises the Dutch capital markets and its participants. The AFM provides guidance on capital markets issues as relevant for the Dutch capital markets, in addition to guidance from the European Securities and Markets Authority. The Dutch Central Bank (DCB) and the European Central Bank are tasked with prudential supervision.

Regulatory framework

The regulatory framework for debt capital markets consists of various laws and regulations at a domestic and European level. EU directives relevant to the capital markets are mostly implemented into the Dutch Financial Supervision Act (and its underlying regulations), typically on time and without substantial deviations. EU regulations such as the Prospectus Regulation have direct effect in the Netherlands and do not require implementation.

Financial Supervision Act

The Dutch Financial Supervision Act (FSA) and its underlying regulations implement, among other things, the Transparency Directive, the Markets in Financial Instruments Directive (MiFID) and other EU directives relevant to the debt capital markets. The FSA more generally sets out market access and rules for financial institutions active in and from the Netherlands and contains market conduct rules for the financial sector and participants in the capital markets, which are primarily intended to protect market integrity, investors and clients of financial institutions.

The FSA and its underlying regulations also set out powers of the AFM and DCB to supervise the financial markets and impose sanctions where necessary.

The Dutch Civil Code and the Dutch Insolvency Act

The Dutch Civil Code provides the main Dutch statutory framework for corporate law, contract law, liability law, international private law and consumer protection law, which all affect the documentation and interpretation of debt instruments that are issued by Dutch entities or governed by Dutch law.

The Dutch Insolvency Act provides for the ranking of creditors in general, as well as in relation to regulatory capital instruments, including as a result of implementation of the EU Bank Recovery and Resolution Directive into Dutch law.

EU regulations

A significant part of the law relevant to capital markets transactions comprises of EU law, in the form of directives, as implemented into Dutch law, or in the form of directly applicable EU regulations.

EU regulatory capital requirements applicable to financial institutions have shaped the capital markets, including in relation to banks and investment firms under the Capital Requirements Directive and Regulation, the Bank Recovery and Resolution Directive and the Single Resolution Mechanism Regulation, and in relation to insurance companies under the Solvency II Directive.

Other relevant EU regulations include:

- the Prospectus Regulation, setting out the framework for when a prospectus is required when offering debt instruments to the public or admitting the same to trading on a regulated market;
- the Benchmarks Regulation, governing the provision and administration of benchmarks, the contribution of input data to a benchmark and imposing additional requirements on supervised entities that use benchmarks;
-

the Market Abuse Regulation, providing for an EEA-wide framework on all forms of market abuse, such as prohibitions on insider dealing, the unlawful use of insider information and market manipulation, and a requirement to publish price sensitive information;

- the Markets in Financial Instruments Regulation, supplementing MiFID, which introduced changes to the laws applicable to capital market transactions and capital market participants;
- the Packaged Retail and Insurance-based Investment Products Regulation, which sets out information requirements relating to packaged retail investor products and insurance-based investment products in an effort to make them more transparent and their risks and costs more understandable for retail investors; and
- the Securitisation Regulation, which provides for an EEA-wide framework applicable to simple, transparent and standardised securitisations and general rules on due diligence and transparency.

Other relevant regulations in the realm of sustainable finance include the EU Taxonomy Regulation, which provides a general framework to determine whether a certain activity is sustainable, and the EU Sustainable Finance Disclosure Regulation (SFDR), which applies to the activities of financial market participants, including in relation to capital markets. The EU Corporate Sustainability Reporting Directive (CSRD), which will require large companies to include sustainability reporting in their annual financial reporting, is also relevant.

Future developments

The EU Listing Act package, proposed in 2022 and discussed by EU legislators in 2023, will receive further attention in 2024. The EU Listing Act package is expected to improve the European capital markets union, and will result in amendments to the Prospectus Regulation, the Market Abuse Regulation and the rules under the Markets in Financial Instruments Directive, as well as some degree of European harmonisation in relation to insolvency laws and multiple voting structures.

The year 2024 and onwards will also be characterised, as before, by further developments and implementation of current and new European initiatives in relation to sustainability and environmental, social and governance (ESG) initiatives. In this context, relevant developments include the proposed European Green Bonds Regulation, which aims to set an EU standard for how companies and public authorities can use green bonds to raise funds on capital markets and to improve the ability of investors to identify and trust high-quality green bonds. Also, the European Corporate Sustainability Due Diligence Directive (CSDDD) will have relevance to financial market participants when it comes to ESG related matters. Other elements that will likely affect the capital markets include the regulation of crypto-assets and the use of distributed ledger technology.

Market infrastructure

Euronext Amsterdam

Euronext Amsterdam is the main regulated market in the Netherlands for the listing and trading of debt instruments. Its rule books provide for listing requirements.

Euroclear Netherlands

Debt instruments are generally cleared through Euroclear or Clearstream and may be cleared through Euroclear Netherlands, in which case the Dutch Securities Giro Act and Euroclear Netherlands rules apply. If a clearing member were to become insolvent, in certain circumstances, investors could benefit from additional protection of their ownership rights in the securities held by such clearing member under the Dutch Securities Giro Act.

Industry

The International Capital Market Association is an important forum for Dutch capital markets participants, offering principles and standards facilitating the functioning of the market. Other notable local industry associations advocating for the Dutch capital markets and its participants include the Dutch Association of Banks, the Dutch Securitisation Association and the Dutch Covered Bond Association. The Dutch Fund and Asset Management Association is the main Dutch industry association for asset managers.

Law stated - 18 December 2023

FILING AND DOCUMENTARY REQUIREMENTS

General filing requirements

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

The Prospectus Regulation requires a prospectus to be published if securities are to be offered to the public or admitted to trading on a regulated market in the Netherlands. The Prospectus Regulation defines an 'offer of securities to the public' as '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.' This definition also applies to the placing of securities through financial intermediaries.

The Dutch Authority for the Financial Markets (AFM) is the Dutch competent authority with regards to approving prospectuses. Typically, a draft prospectus is sent to the AFM together with all incorporated information and reference tables, allowing the AFM to verify where mandatory disclosure items have been reflected in the prospectus. Should the AFM have any comments, these should be incorporated in the prospectus. Once the AFM has indicated that it has no further comments, the prospectus can be filed for official approval. After the prospectus is approved, the AFM publishes it on its website. Supplements to the prospectus must be approved by the AFM as well and include additional disclosure in relation to the issuer of the securities, such as the incorporation of recent financial results.

If the final terms of the offer of debt securities are not included in the base prospectus, the final terms need to be filed with the AFM, where possible prior to the offer of such securities.

Additional disclosure requirements apply to securitisations and packaged retail investor products, such as the making available of the prospectus and relevant transaction

documentation through a securitisation repository and a key information document, respectively.

Law stated - 18 December 2023

Prospectus requirements

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

Unless an exception or exemption applies, an issuer will have to publish an approved prospectus before offering debt securities to the public in the Netherlands. The prospectus must comply with the requirements set out in the Prospectus Regulation and its underlying regulations.

An issuer can publish either a prospectus or a registration document, together with a summary and a securities note. The approved prospectus will be valid for 12 months following approval, provided it is supplemented from time to time in accordance with applicable regulations.

The standard of disclosure in a prospectus is that it must contain the information required by an investor to make an informed investment decision in respect of the debt instruments. This includes information about the issuer and the debt instruments, such as:

- the assets and liabilities, profits and losses, financial position, and prospects of the issuer and any guarantor;
- the rights attaching to the debt instruments;
- the reasons for the issuance and its impact on the issuer;
- relevant risk factors; and
- the terms and conditions of the debt instruments.

In general terms, the content requirements are more onerous for complex debt securities and those aimed at retail investors. Depending on the product, other requirements may apply. For example, the Packaged Retail and Insurance-based Investment Products Regulation requires issuers to produce a key information document when offering packaged retail investor products to retail investors, which may include structured notes.

Offering and listing documents follow recommendations by regulatory bodies, such as the European Securities and Markets Authority and the AFM, and industry bodies, such as the International Capital Markets Association, to ensure the prospectus is consistent with market practice. For example, following guidance from regulators and best market practices identified by industry associations, green, sustainability-linked, social and other environmental, social and governance bonds require additional disclosure to inform investors of their particular characteristics.

Law stated - 18 December 2023

Documentation

5 | Describe the drafting process for the offering document.

In the Dutch market, either counsel to the issuer or the arranger may hold the pen on drafting the prospectus and other issuance documentation, while the other side provides comments. The dealers, agents, auditors, rating agencies and other third parties involved provide further input to the documentation. Regardless of the division of tasks and responsibilities when preparing the prospectus, the issuer is ultimately responsible for all information contained in the prospectus, while other parties sometimes take responsibility for specific parts of the prospectus.

Key documentation issues typically revolve around the inclusion and contents of risk factors, transaction structure, description of the issuer and, if relevant, assets backing the transaction. In addition, selling restrictions are included in the prospectus to ensure compliance with applicable securities offering and listing laws. Often, local counsel are engaged to cover relevant offering or listing jurisdictions.

In determining what information to disclose, the issuer needs to consider whether such information is required to be included for investors to understand the investment and the debt securities offered or otherwise relevant to their investment decisions. In reviewing the prospectus, the AFM will also consider whether the information contained in the prospectus is sufficiently clear, concise and material. However, the AFM's approval of the prospectus cannot be seen as an endorsement of the issuer or the debt instruments that are the subject of the prospectus.

Private placements are usually structured in such a way that they are exempt from the prospectus requirements. However, sometimes an offering circular is drafted for private placements that closely follow the form of prospectuses used in public transactions.

Law stated - 18 December 2023

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

The terms and conditions of debt securities (and their offerings) are primarily provided for in:

- The prospectus, which must be approved by the AFM and made available to the public.
- The underwriting or subscription agreement, which is entered into by the issuer, lead managers or dealers, setting out the terms governing the subscription for the debt security offer. It is usually not publicly available (in the case of a base prospectus, this subscription agreement is typically a short-form document that builds upon the terms of an underlying programme-wide programme or dealership agreement).
- The agency agreement, which is entered into by the issuer and agents (such as the paying agent or calculation agent), setting out the terms and conditions concerning

services to be rendered on behalf of the issuer in relation to the notes or the noteholders. It is usually not publicly available.

- The trust deed and deed of covenant, which sets out the rights of noteholders and responsibilities of the (security) trustee (if applicable). The trust deed or deed of covenant will not be published, but the terms and conditions will generally be included in the prospectus.
- Any security documents: when the debt securities are secured, security documents will be entered into by, among others, the issuer and the security trustee.

Which of these documents are used in a particular transaction depends on the nature of the instrument and the governing law. For example, a plain vanilla debt instrument governed by Dutch law would typically not involve a deed of covenant or trust deed.

Law stated - 18 December 2023

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

Yes, the AFM must review and approve a prospectus (including supplements) before it can be published and before debt securities can be offered to the public or listed and traded on a regulated market. A final prospectus must be submitted to the AFM in PDF format and in a version that can be directly published (including the date, final format and any images). The Prospectus Regulation requires a prospectus to be made available to the public. In this context, issuers will generally also publish their prospectus upon approval on their website. The prospectus may also be made available in other forms provided for in the Prospectus Regulation. The AFM will also publish prospectuses on its website, which the AFM also submits to the European Securities and Markets Authority for inclusion in its register of approved prospectuses.

Law stated - 18 December 2023

Authorisation

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

An issuer seeking to offer debt securities to the public, or admit them to trading on a regulated market, must submit a draft prospectus to the AFM for approval. The AFM has 10 business days to review the prospectus and notify the applicant of its decision. If the prospectus is for public debt securities to be issued for the first time, the time frame for approval is 20 business days. The AFM can approve the prospectus or request the issuer to incorporate additional information in the prospectus in the form of a response sheet, after which it will review the prospectus again within 10 business days. It may be that the procedure is repeated several times before the prospectus is approved, and this is not atypical, in particular, for new issuers.

Once the prospectus has been approved, it can only be amended or supplemented via a supplement in accordance with the terms of the Prospectus Regulation. In principle, the AFM must approve supplements to prospectuses within five business days, although it may occur that the AFM provides comments before a supplement can be approved. Previously, the AFM allowed for the approval of a supplement within one business day if that supplement related exclusively to incorporation by reference to a press release, quarterly report or (semi-)annual financial results of the issuer. This is no longer an officially guaranteed procedure, although similar supplements can typically still be approved quite swiftly.

There are no restrictions imposed on the issuer and underwriters during the review process, other than that they are not allowed to offer the debt securities, and changes can be made to the prospectus and transaction documents (which will also need to be reflected in the prospectus where relevant). Changes to the prospectus will need to be reviewed and approved by the AFM and could therefore result in delays in the approval process. Once a prospectus is approved, and changes are made to the prospectus during an offer by way of a supplement, investors may be entitled to revoke their investment orders pursuant to the Prospectus Regulation.

A preliminary prospectus is typically used for marketing purposes and roadshows, but no debt securities may be marketed in such a way that this constitutes a public offer of debt securities.

Law stated - 18 December 2023

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

The AFM will only approve a prospectus once it is satisfied that it meets all the requirements set out in the Prospectus Regulation and its underlying regulations. If relevant requirements are not met, it will refuse to approve a prospectus, whether for a public offering or a listing.

Law stated - 18 December 2023

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

The Prospectus Regulation exempts certain public offers of debt instruments from requiring an approved and published prospectus. These exemptions are related to, among other things:

- debt securities offered solely to qualified investors;
- debt securities offered to fewer than 150 natural or legal persons per member state, other than qualified investors;
- debt securities that can only be acquired for a total consideration of at least €100,000 per investor, per offer;
- debt securities with a denomination of at least €100,000; and

- debt securities with a total consideration of less than €5 million in all EEA member states, calculated over a period of 12 months, provided that such offering is notified to the AFM and an information document is provided to the AFM, and a warning is included in marketing and offering materials that there is no requirement to publish a prospectus and that the offering does not fall under the supervision of the AFM.

Separate exemptions apply in relation to the admission of trading of debt securities. If one of the exceptions for a public offer applies and the debt securities are admitted to trading on a regulated market, a prospectus is still required in accordance with the Prospectus Regulation unless a separate exemption applies for this admission to trading.

Law stated - 18 December 2023

Offering process

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

The timetable for a debt securities offering depends on various factors. Most importantly, it depends on whether the issuance is done under an existing debt issuance programme, which can be done within a matter of days or weeks, or as a stand-alone issue, which can take two months or more to complete. A private placement typically takes less time to complete than a public offering, in particular where no approved prospectus is required.

A deal typically starts with the appointment of the (lead) managers and legal counsel to both the issuer and the managers. Together with the auditors, these parties will agree on the transaction's structural features, draft the transaction documentation and, if applicable, the prospectus, and liaise with relevant third parties, including the AFM, credit rating agencies and third-party service providers. The main transaction documents are:

- the prospectus;
- the underwriting or subscription agreement;
- the agency agreement;
- the trust deed and deed of covenant; and
- any security documents.

Once the prospectus is in final form (subject to pricing information) and the transaction documents are either signed or in agreed form, a public offering is launched with a public announcement. The marketing often comprises:

- a roadshow, during which the issuer (and sometimes the arranger or managers) speaks to investors; and
- an investor information package, which typically includes, among other things, an investor presentation, term sheet and a preliminary prospectus.

After launching the deal, the issuer, arranger and lead managers answer questions from prospective investors and fill their order book.

During or shortly after the marketing period, the transaction documents are signed. The final prospectus is then submitted for approval to the AFM and, following approval, the notes are issued, and settlement takes place.

Law stated - 18 December 2023

Closing documents

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

Closing documents generally include:

- legal opinions in respect of legal and tax elements relevant to the transaction, including the enforceability of the transaction documents and the capacity of the issuer and other relevant transaction parties, such as guarantors;
- corporate authorisations and closing certificates;
- comfort letters;
- due diligence reports and reliance letters (if applicable); and
- rating and listing confirmations.

Law stated - 18 December 2023

Listing fees

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

Issuers pay a fee to the AFM for the approval process for a prospectus, information document or supplement. These fees may amount up to €15,000 for the approval process relating to a prospectus for debt securities without equity component (depending on the nature of the issuer) and amount to €2,500 for a supplement to the prospectus.

To list debt securities on Euronext, initial admission fees and/or annual fees are due. Depending on the type of securities (maturity, issued amount), the total amount of admission and annual fees may be up to €20,000 (for stand-alone bond issuances) or €18,000 (for bond issuance programmes) or €15,000 (for short-term debt securities) as of 1 January 2024.

Law stated - 18 December 2023

KEY CONSIDERATIONS

Special debt instruments

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

There is an active market in the Netherlands for special debt instruments, including equity-linked notes, convertible debt and other derivative products. However, such a market is generally less active than that for plain vanilla debt instruments, such as fixed-rate notes, floating-rate notes, zero coupon notes and so on, although increasing interest rates have led to more issuance of convertible and exchangeable debt securities.

Financial institution issuers (including banks, certain investment firms and insurers) subject to regulatory capital requirements (such as Capital Requirements Directive and the Solvency II Directive) and bail-in legislation (the Bank Recovery and Resolution Directive), have been actively issuing debt instruments to satisfy applicable capital requirements. Examples include additional tier 1 and tier 2 notes and senior non-preferred notes for minimum requirement for own funds and eligible liabilities purposes.

Sustainable finance instruments, such as green and sustainability-linked bonds, are being issued by many issuers, including financial institutions and corporate issuers. Such bonds are considered green based on the use of proceeds of the bonds or sustainability-linked if based on an issuer benchmark or sustainability targets. Most large financial institutions have a green or sustainable bond framework that they use in environmental, social and governance issuances in line with principles and guidelines of the International Capital Markets Association.

Large volumes of structured notes featuring underlyings, caps, floors and other embedded derivatives, are issued by Dutch (group) finance companies.

Law stated - 18 December 2023

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

The main rules governing the issuance from a regulatory perspective consist of the Prospectus Regulation, the Market Abuse Regulation, the Markets in Financial Instruments Regulation (MiFIR), the Benchmarks Regulation, and the Dutch Financial Supervision Act and its underlying regulations, which implements among other things, the Transparency Directive and the Markets in Financial Instruments Directive (MiFID). From a contractual and company law perspective, the main rules are set out in the Dutch Civil Code. The Dutch Insolvency Act provides for the ranking of creditors in general, as well as in relation to regulatory capital instruments, including as a result of implementation of the Bank Recovery and Resolution Directive into Dutch law.

Additional rules may apply depending on the specific security. For example, retail offerings of structured and insurance-linked products fall under the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation and securitisations fall under the Securitisation Regulation.

Issuers should be aware of the accounting, tax and regulatory implications of debt instruments with equity features that are particularly relevant in the context of highly structured (asset-linked) transactions. For example, such notes may, depending on the features and circumstances, not qualify as 'debt' for regulatory purposes, in which case a given transaction structure could potentially qualify as an investment fund (requiring licensing or registration); give rise to regulatory capital or bail-in issues (if the issuer is a financial institution); create accounting issues; or forfeit beneficial tax treatment applying to debt instruments.

In relation to zero coupon notes, Dutch law transfer limitations may apply.

Law stated - 18 December 2023

Classification

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

The Prospectus Regulation distinguishes between debt and equity securities. This distinction affects, among other things, applicable exemptions from the requirement to publish a prospectus as well as the disclosure and information requirements (with issuers of equity securities generally being subject to more onerous requirements). Equity securities are defined as shares and other transferable securities equivalent to shares in companies, as well as any other type of transferable securities giving the right to acquire any of the aforementioned securities as a consequence of their being converted or the rights conferred by them being exercised, provided that securities of the latter type are issued by the issuer of the underlying shares or by an entity belonging to the group of the issuer. All other types of securities are considered non-equity securities.

Certain types of perpetual, subordinated and profit-linked debt securities may be reclassified as equity for tax purposes, which in particular may affect the withholding tax analysis in the context of a particular issue, and regulatory issues may arise where securities do not qualify as debt from the perspective of investment fund regulation (eg, debt structures are generally out of the scope of the Alternative Investment Fund Managers Directive).

Law stated - 18 December 2023

Transfer of private debt securities

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

There are no general transfer or trading restrictions that apply to privately offered debt securities (unlike in the US) other than usual selling restrictions to ensure compliance with the Prospectus Regulation and its underlying regulations and the Dutch Financial Supervision Act. In addition, typically, limitations are imposed in connection with

compliance with the product governance rules under MiFID and in order to avoid the application of the PRIIPs Regulation.

Zero coupon notes may also be subject to Dutch law transfer limitations.

Law stated - 18 December 2023

Cross-border issues

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

None.

Law stated - 18 December 2023

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

Under the Prospectus Regulation, a prospectus approved in one EEA country can be passported into another EEA country through a notification procedure. Foreign issuers are permitted to make use of exemptions from prospectus requirements on the same basis as any domestic or EU issuers.

Pursuant to the Prospectus Regulation, the Dutch Authority for the Financial Markets (AFM) may approve third-country prospectuses provided they comply with the information requirements set out in the Prospectus Regulation and provided that the relevant supervisory authority of the issuer has concluded a cooperation arrangement with the AFM. The AFM will not cooperate with supervisory authorities in a third country where the relevant third country is on the European Commission's list of jurisdictions that have strategic deficiencies in their national anti-money laundering and counter-terrorism financing regimes.

Passporting rights also apply to dealers, agents and other investment services providers with a licence in an EEA jurisdiction, and this licence is required to participate in a transaction.

Law stated - 18 December 2023

Underwriting

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

In the Netherlands, managers of debt securities offerings will typically only underwrite the securities at the end of the book-building process when they are satisfied that there is sufficient demand from investors for such offering. A typical underwriting agreement will

allow the managers to underwrite the offered debt securities on joint and several basis. It will, among other things, include provisions relating to each manager's commitments and their fees and commissions, offering restrictions, the representations and warranties of the issuer (in respect of itself and the offering documentation) and broad indemnity provisions in favour of the managers.

Law stated - 18 December 2023

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

MiFID (as implemented in the Dutch Financial Supervision Act) principally regulates underwriters of debt securities, and the underwriting of debt securities (on a committed or non-committed basis) constitutes a regulated investment service under MiFID. Underwriters are also bound by MiFID product governance requirements as well as product governance requirements under PRIIPs or the Dutch Financial Supervision Act. Accordingly, underwriters must ensure that they have a licence for underwriting debt securities when acting in the Netherlands unless an exemption applies.

Law stated - 18 December 2023

Transaction execution

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

Execution and settlement vary from transaction to transaction and depend, among other things, on market conditions and other commercial factors. Global notes are widely used for debt capital markets transactions.

Transactions are often settled on a delivery versus payment basis, where the (global) securities and proceeds of the issuance are exchanged simultaneously. A typical debt securities offering settles within two or three business days after signing.

Debt securities can be cleared through Euroclear Netherlands in accordance with the Dutch Securities Giro Act and Euroclear Netherlands regulations, although it is usual for transactions to clear through Euroclear Bank SA/NV and Clearstream, Luxembourg.

Law stated - 18 December 2023

Holding forms

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

Debt securities are generally held in bearer or registered form and represented by a global note or certificate deposited with or registered in the name of the relevant common depositary or safekeeper of the clearing system. If a US offering is made, the offered

securities are typically in registered form to ensure compliance with certain US law requirements.

End investors typically hold debt securities through a chain of intermediaries and generally can transfer their interests by way of book-entry transfers.

Law stated - 18 December 2023

Outstanding debt securities

24 | Describe how issuers manage their outstanding debt securities.

Generally, liability management in the Netherlands is in line with international practice. Issuer call options are not unusual, and Dutch issuers also make use of open market purchases, consent solicitations, tender offers and exchange offers to manage their outstanding debt. As a matter of Dutch law, the purchase of debt securities may, by operation of law, extinguish such instruments if the debt and claim are united in the same person. However, specific exceptions to this rule apply in relation to bearer securities.

Market abuse considerations apply, and caution should be exercised to ensure that the repurchase of debt instruments does not constitute the preferential treatment of specific security holders. Repurchases should, therefore, insofar as possible, be effectuated on a random or non-discriminatory basis. Additional limitations apply to the purchasing of subordinated debt securities or capital instruments, as the repurchase of such instruments may be inconsistent with their subordinated nature or require consent from regulators.

Law stated - 18 December 2023

REGULATION AND LIABILITY

Reporting obligations

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

Reporting obligations for issuers of debt securities derive mostly from the Market Abuse Regulation and the Transparency Directive (each to the extent applicable). Issuers are also bound by the Euronext rules when their debt securities are admitted to trading on Euronext Amsterdam.

The Market Abuse Regulation requires issuers of securities to disclose inside information to the market and to comply with certain procedural requirements.

The Transparency Directive has been implemented in the Dutch Financial Supervision Act. Under the terms of the Transparency Directive, issuers of debt securities (other than those issuers that solely issue debt securities with a minimum denomination per unit of €100,000) are required to publish their semi-annual and annual financial statements within three or four months, respectively, after the end of the reporting period.

The Dutch Foreign Financial Relations Act imposes reporting on certain types of issuers for Dutch national balance reporting purposes. Specific disclosure requirements apply under the Packaged Retail and Insurance-based Investment Products Regulation and the Securitisation Regulation.

Law stated - 18 December 2023

Liability regime

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

Debt offerings may give rise to various types of liability, ranging from claims in tort for negligent misstatement (including misleading advertisement) to mis-selling claims. Dutch case law has introduced the concept of a 'reference investor', being an ordinary investor who is targeted by the offering and assuming this investor has taken knowledge of the disclosed information, is reasonably informed and cautious, but does not have any (product) specific knowledge or experience. As such, the question is not whether a statement was misleading for a specific investor, but the expectations of such objectified reference investor need to be taken into account. Liability may attach to the issuer and (in certain circumstances) the managers and distributors of the securities.

The liability regime for debt securities is the same as for other types of securities. However, claims for the mis-selling of securities may be more likely to succeed in the case of complex and risky debt securities sold to non-professional investors.

This liability regime also applies to any greenwashing of debt securities, in which debt securities are offered or marketed as green or sustainability-linked when they do not actually meet relevant standards and expectations.

Law stated - 18 December 2023

Remedies

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

The remedies available to investors depend on the ground for liability invoked. Damages in contract intend to place the claimant in the position that they would be in had the contract been duly performed, whereas damages in tort seek to place the investor in their original state before the tort. Dutch law does not provide for punitive damages.

The Netherlands introduced legislative reforms to increase the range and effectiveness of collective claim actions, and the practice of collective claim actions, in general, has expanded.

Law stated - 18 December 2023

Enforcement

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

The Dutch Authority for the Financial Markets (AFM) may apply informal and formal sanctions, depending on the violation. Informal sanctions include a standard-bearing conversation or letter or a warning letter. Formal sanctions include issuing fines, ordering specific actions, prohibiting further issuance of securities or prohibiting specific securities from being issued and making public announcements of failures to comply. The AFM may also refer matters to the Public Prosecution Service for criminal investigation. Before the AFM proceeds to impose a formal sanction, the offender is usually given the opportunity to express their views on a proposed measure. However, in some instances, the AFM may refrain from doing so.

Market participants faced with sanctions imposed by the AFM have recourse to the Dutch courts, which can overturn the sanctions decisions of the AFM.

In recent years, the AFM has exercised its supervisory powers also by way of awareness and information campaigns, conducting market surveys and investigations and requiring market participants to report on compliance with relevant rules and regulations.

Law stated - 18 December 2023

Tax liability

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

Dutch issuers themselves are subject to Dutch corporate income tax at the statutory Dutch corporate income tax rates.

Interest paid on debt instruments is generally not subject to Dutch withholding tax, although certain exceptions may apply depending on the identity of the issuer, the bondholder or the characteristics of the debt instruments. For example, where bonds qualify as equity or are issued by entities related to the bondholder, withholding tax may apply. In each case, tax advice should be sought.

Generally, no Dutch VAT or transfer taxes are payable in respect of the issue of bonds or in respect of payments of interest and principal under bonds. Also, generally, there is no Dutch stamp duty or registration tax payable in respect of or in connection with the issue, transfer or redemption of the bonds, other than court fees in case of proceedings brought before the Dutch courts. Generally, a bondholder of a debt security who derives income from a bond or realises a gain from the disposal or redemption of a bond, will not be subject to Dutch tax on such income or gain, provided it is not a tax resident in the Netherlands and certain conditions are met.

Law stated - 18 December 2023

UPDATE AND TRENDS

Key developments of the past year

30 | Please provide any updates and trends in your jurisdiction's debt capital market.

The Dutch finance and corporate sectors aim to take their corporate social responsibilities seriously, and this is reflected in an increase in sustainable finance: green, sustainability or sustainability-linked or social bonds are being issued and offered by many issuers, including financial institutions and corporate issuers, in the Netherlands. Looking ahead, several major legal developments are underway:

- The EU continues to develop rules and regulations in relation to environmental, social and governance (ESG) and sustainable finance, and this will continue to affect and develop the capital markets in the Netherlands.
- Regulatory capital requirements remain subject to further legal development, and financial institution issuers (including banks, investment firms and insurers) will need to monitor requirements pursuant to the Capital Requirements Directive and Regulation, the Bank Recovery and Resolution Directive and the Solvency II Directive.
- Further development of European ESG and sustainability regulations will also lead to further scrutiny and supervision by the Dutch authorities. The Dutch Central Bank, the Dutch Authority for the Financial Markets and the Dutch Ministry of Finance proactively address ESG and sustainability issues in the financial sector.
- Further regulatory developments are expected in the context of crypto-assets and the use of distributed ledger technology, with these regulatory developments likely to affect the Dutch and European capital markets directly.
- The EU Listing Act proposals, amending several rules discussed in this contribution, will also be topical in 2024.

Law stated - 18 December 2023

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Switzerland

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UPDATE AND TRENDS

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MARKET SNAPSHOT

Market climate

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

Switzerland has an active bond market with mostly domestic offerings. There were 393 bond listings in 2022 and 436 such listings in 2023 on SIX Swiss Exchange, of which about 90 per cent were denominated in Swiss francs. The total volume raised by bonds and money market papers was around 116 billion Swiss francs in 2023 (2022: 114 billion Swiss francs).

Swiss corporate issuers use, in particular, straight bonds with maturities that typically range between four and 10 years. Convertible bonds and high-yield bonds are relatively rarely issued in Switzerland. In terms of volume and number of instruments issued, issuers from the banking sector clearly dominate the Swiss bond market. Such instruments may be senior debt, but a significant part consists of bail-in-bonds and debt that is recognised as regulatory capital (tier 2 or additional tier 1).

Due to the 35 per cent withholding tax on interests, which can only be reclaimed under certain double taxation treaties, bonds with a high take-up by a foreign investor base tend to be offered through foreign finance subsidiaries of Swiss corporate issuers. In this case, the proceeds cannot be applied in Switzerland.

Regarding the Swiss (straight) debt market, there is a significant retail participation in bond offerings compared to certain other jurisdictions.

‘Green Bonds’, and generally bonds with an environmental, social and governance component, are seen with increasing frequency on the Swiss market.

Law stated - 1 February 2024

Regulatory framework

2 | Describe the general regime for debt securities offerings.

Under private law, bonds are governed by the 34th Title of the Code of Obligations (CO). The rules are applicable where bonds with uniform conditions are offered directly or indirectly for public subscription by a borrower whose domicile or commercial office is in Switzerland. In this case, the bondholders form a community of creditors by operation of law. Private-law claims and rules regarding bond restructurings are enforceable in front of courts.

Public offerings of securities, including bonds, are governed by the 3rd Title of the Financial Services Act (FinSA). This includes the duty to publish a prospectus and (in rare cases) a key investor document, unless exemptions apply. If a public offering is made without the required documentation, criminal sanctions may apply. The same is true for the violation of certain core financial services conduct rules, including failing to register customer advisers and disclosing retrocessions (kickbacks). Prosecution is conducted by the Federal Finance

Department. The Swiss Financial Market Supervisory Authority (FINMA) has neither the competence to issue criminal sanctions nor a general market supervision and enforcement competence. However, prudentially supervised institutions are subjected to measures under their respective licensing and supervision regime if public offering or conduct rules are violated.

Brokers involved as underwriters in bond offerings require a securities dealer licence if they have a permanent presence in Switzerland. Prudential licensing or anti-money-laundering rules are generally not triggered if such brokerage or underwriting is performed on a merely cross-border basis. Administrative enforcement against persons acting without the required licence or registration is conducted by FINMA, while the Federal Department of Finance prosecutes criminal violations.

As to the financial services conduct regime according to the 2nd Title of the FinSA- , acting as underwriters (whether on a firm underwriting or best efforts placement basis) for issuer ('sell side') is exempt under article 3 paragraph 3 letter b Financial Services Ordinance. However, on the 'buy side' (ie, when it comes to selling the securities to the investors), the FinSA may apply. The conduct rules are applicable in the context of services relating to the acquisition or disposal of financial instruments towards customers. This is interpreted relatively broadly by legal writers in Switzerland and includes various activities in connection with placements of securities in Switzerland, including selling agency and brokerage. The conduct rules to be followed when performing such placement activities vary widely based on the investor category (institutional, professional, private). Whereas almost no conduct duties apply for institutional investors, notably prudentially supervised financial institutions, it will be required to register customer advisers as such and to join an ombudsman office if services are performed for Swiss investors who declared an opting-out regarding retail investor protection (ie, high-net-worth individuals and their investment vehicles). Such duties and various other conduct rules apply as well when bonds are sold to retail investors. A duty that applies in any case for services (including brokerage) in Switzerland is the duty to precisely disclose and waive any retrocessions (kickbacks) to customers, which arguably means that there is a requirement to disclose underwriting fees to investors and have them waive the conveyance of such fees. The financial services regime is backed by criminal sanctions against violators not subject to prudential supervision conducted by the Federal Department of Finance.

Furthermore, article 68 FinSA requires that advertisements for financial instruments be labelled as such and must indicate where the prospectus and key investor document (if appliable) are available.

Swiss law does not require ratings for the bonds or the participation of rating agencies in the offering or listing process.

The listing and admission to trading are governed by the stock exchange's self-regulation. All stock exchanges (SIX Swiss Exchange, SIX Digital Exchange and BX Swiss) allow the listing of bonds and have a regime that sets out the conditions for such listing (for SIX Swiss Exchange, see the Additional Rules for the Listing of Bonds). Prospectuses are to be examined by the prospectus review bodies instituted by SIX Exchange Regulation and BX Swiss. Violations of stock exchange rules are generally sanctioned by the stock exchanges bodies.

Specific market supervision regarding insider trading and market manipulation is conducted by FINMA, which can also issue administrative measures. Criminal violations of insider trading and market abuse rules are prosecuted by the Office of the Attorney General of Switzerland.

Law stated - 1 February 2024

FILING AND DOCUMENTARY REQUIREMENTS

General filing requirements

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

The Swiss disclosure regime for bonds benefits from an exemption to have a pre-approved prospectus at the time of the offering, which allows for an extraordinary fast time to market. Generally, a public securities offering in Switzerland and an admission to trading of securities can only occur on a prospectus that was approved by a prospectus review body. However, for bonds and structured products, there is a significant alleviation of the procedural disclosure rules: a bond offering as well as a provisional listing and admission to trading can be effected without a pre-approved prospectus, provided a bank or securities dealer is engaged in the offering and certain declarations are given by it. The prospectus filing and approval are made subsequent to the offering and results in the definitive listing and admission to trading of the bonds. The listing for bonds is conducted based on a swift, internet-based process.

Law stated - 1 February 2024

Prospectus requirements

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

Any person who makes a public offer for the acquisition of securities in Switzerland or any person who seeks the admission of securities to trading on a trading venue (stock exchange or multilateral trading facility) must first publish a prospectus. There are exceptions from the duty to publish a prospectus based on the type of offering (eg, to professional investors only or to less than 500 persons in Switzerland, article 36 of the Financial Services Act (FinSA)), type of securities (eg, bills with a term of less than one year, article 37 FinSA) and regarding the admission to trading (article 38 FinSA). In addition to the duty to publish a prospectus, there may be a duty to prepare a key investor document. This applies to retail offerings (article 58 FinSA), but there is an exemption for debt securities without a derivative character and convertible bonds (article 59 FinSA).

The prospectus must contain the essential information for the investor's decision regarding the issuer and guarantor, the securities and the offering. The overarching guideline is therefore that everything that may be material for a (reasonable) investor's decision on

whether or not to buy certain bonds has to be disclosed. This includes the specific risks relating to the issuer, guarantor and the bonds. Annex 2 of the Financial Services Ordinance provides for the minimum content of a prospectus for debt securities, although the overarching principle remains that all material facts are disclosable.

Law stated - 1 February 2024

Documentation

5 | Describe the drafting process for the offering document.

In the Swiss (straight) bond market, it is still customary for the bank or securities dealer engaged with the offering to draft the prospectus and the bond purchase agreement and to act as listing agent. However, the risk factors specific to the issuer are usually reviewed and subjected to a (usually non-documentary) due diligence by the legal counsel to the issuer. All material facts that may affect the (reasonable) investors' decision to invest in the securities must be disclosed. A due diligence conducted by counsel may not be required for straight bond offerings of issuers with a high investment grade rating. However, the banks or securities dealers acting as underwriters will perform a certain due diligence on the issuer and its business.

In convertible bond offerings, the disclosure and due diligence performed is more extensive, and both the issuer and underwriters are usually represented by counsel.

High-yield offerings by Swiss issuers, which are relatively rare, are typically conducted in line with the London market standard.

Law stated - 1 February 2024

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

Bonds under Swiss law are governed by terms and conditions that are a part of the bond purchase agreement and will be reflected in the prospectus or other relevant offering documentation. No trustee or similar construction is needed under Swiss law. The bond terms are negotiated between the issuer and the underwriters. In the straight bond and convertible bond market, such bond purchase agreements and terms are relatively standardised and usually give rise to negotiations only regarding few topics, such as the covenants (if any) and events of default.

In a documented (public) offering, the bond terms are made available in the prospectus.

Law stated - 1 February 2024

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

Bonds (including convertible bonds and exchangeable bonds, warrant bonds, mandatory convertible notes, contingent convertible bonds and write-down bonds) and structured products are excluded from the pre-approval of the securities prospectus before the offering and provisional listing. The condition for this is that a bank or security dealer engaged with the offering provides certain declarations. A prospectus approval is then only required after the offering of the bonds.

The prospectus can be made available in electronic form, which has been established as the standard method of publication in the 2020s. The distribution of printed prospectuses is rare in Swiss bond markets. However, printouts must be handed out if an investor requests so.

Law stated - 1 February 2024

Authorisation

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

There is no authorisation required for the public offering of debt securities in Switzerland except for the approval of the prospectus, which can be obtained only after the offering if a bank or securities dealer issues a confirmation regarding certain facts at the time of the offering. The listing of debt securities is subject to compliance with the stock exchanges' self-regulatory admission conditions.

Law stated - 1 February 2024

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

Given that there is no ex ante review of bond offerings, there are no grounds for refusal. Failure to provide the required document (prospectus, key investor document) in the offering may be subject to criminal sanctions or regulatory enforcement. Breach of listing conditions set out by the stock exchanges may result in sanctions according to the stock exchange rules, including a delisting of the securities.

Law stated - 1 February 2024

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

The main difference between public and private offerings is the duty to publish a prospectus. This applies for public offerings and admissions to trading at a Swiss stock exchange or multilateral trading facility. Even if a public offering is conducted, there are exceptions from the duty to publish a prospectus based on the type of offering (eg, to professional investors only or to less than 500 persons in Switzerland, article 36 FinSA), type of securities (eg,

bills with a term of less than one year, article 37 FinSA) and regarding the admission to trading (article 38 FinSA).

Law stated - 1 February 2024

Offering process

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

Due to the ex post approval process regarding Swiss bond prospectuses, the time to market can be relatively condensed. If an issuer has securities listed on a Swiss stock exchange, the process is only limited by the ability of the underwriters to prepare and finalise the documentation and due diligence. A Swiss corporate (straight) bond offering process can be conducted in two to four weeks, while a convertible bond takes around four to six weeks due to the more extensive disclosure and more complex terms. High-yield bond offerings, which are relatively rare for Swiss issuers, take six to eight weeks due to the in-depth due diligence and disclosure required.

Conversely, bond issuances based on an existing programme with a base prospectus, such as those typically conducted by banks, can be completed in a matter of days due to the established process and disclosure.

Law stated - 1 February 2024

Closing documents

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

Closing documentation in a Swiss bond offering is typically limited to the corporate authorisations and certain certificates and declarations of the issuer. Legal opinions are generally not given in a straight bond offering. In a convertible bond offering, the legal counsel are asked to issue technical legal opinions. Furthermore, a tax ruling usually needs to be present. In high-yield bond offerings, disclosure letters (typically 10b-5) are issued.

Law stated - 1 February 2024

Listing fees

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

For SIX Swiss Exchange, the fixed listing fee is 2,000 Swiss francs and the variable fee amounts to 10 Swiss francs per 1 million francs nominal value. Additionally, there is a 5,000 Swiss francs charge for the prospectus approval. For emission programmes with

base prospectuses, the examination and registration of the programme costs 6,000. Swiss francs, the listing fee is 2,000 Swiss francs, and the renewal of a programme is 3,000 Swiss francs.

As to BX Swiss, there is an 8,000 levy for new issuers. For bond listings, a 1,000 Swiss francs fee per five years maturity of a bond and a 2,000 Swiss francs minimum listing fee per bond is levied. The maximum listing fee is 5,000 Swiss francs. Fees are increased 50 per cent for bonds with an option element (convertible, exchangeable, etc).

Law stated - 1 February 2024

KEY CONSIDERATIONS

Special debt instruments

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

The Swiss market for equity-linked, convertible or exchangeable debt is relatively limited. There is only a mid-single-digit number of public offerings and listings of convertible or exchangeable bonds per annum in years with normal capital markets activity. There are currently about 30 convertible or exchangeable bonds traded in Switzerland.

The bond market on the Swiss stock exchanges furthermore covers a wide range of instruments, including floating-rate notes, asset-backed securities, green bonds and loan participation notes.

As to other special debt instruments, the market for structured products is quite active in Switzerland, and there is a wide variety of investment products that are either derivatives or structured products. It is possible to list a variety of special debt instruments on SIX Swiss Exchange (see the Directive on Debt Securities with Special Structures). According to the Swiss Structured Products Association, a total of around 65,000 products in Switzerland, of which a total of 56,193 are structured products, are admitted for trading on SIX Swiss Exchange. Moreover, a few thousand structured products are traded on BX Swiss. In addition to the public markets, the Swiss over-the-counter derivatives market is significant.

Law stated - 1 February 2024

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

Convertible and exchangeable bonds are treated as bonds under Swiss disclosure and listing rules. The exemption for prospectus approvals regarding bonds is also applicable to convertible bonds and exchangeable bonds, warrant bonds, mandatory convertible notes, contingent convertible bonds and write-down bonds, as well as structured products.

Structured products may only be offered to retail clients by Swiss banks, insurances, securities dealers and their foreign equivalents. The use of special purpose vehicles is permitted under certain conditions.

Law stated - 1 February 2024

Classification

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

There is no explicit legal definition or delineation that would allow for a sharp and concise separation of debt and equity. Generally, securities such as common shares, preference shares, non-voting shares and profit participating certificates are considered equity securities from a capital market point of view. Conversely, debt securities are such securities that give rise to a claim against the issuer (rather than a participation right), even if such securities have an equity link (convertible, exchangeable, write-off, etc). For the purposes of market regulations and disclosure obligations, the distinction is generally not problematic for that reason. This is different from an accounting perspective.

The formal disclosure rules distinguish between equity securities, debt securities, derivatives, (equity) securities issued by real estate companies, (equity) securities issued by investment companies and collective investment schemes. Stock exchange regulations may differentiate these categories further and implement standards or segments with particular rules, but as in the case of general disclosure rules, equity-linked debt instruments are considered as debt. The accounting treatment may differ.

Law stated - 1 February 2024

Transfer of private debt securities

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

There are no particular restrictions on private debt securities under Swiss law. Transfer restrictions implemented in such securities often pertain to US law and the Swiss 10/20 Non-Bank Rules, which provide a safe haven from withholding tax. In Switzerland, any debt security can be re-sold privately. However, if the offer to sell a security is made publicly by any person, which does not have to be the issuer of the security, the disclosure rules apply unless there is an exemption.

Law stated - 1 February 2024

Cross-border issues

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

Under Swiss law, foreign debt issuers are generally treated the same as Swiss issuers. Key questions for offerings and listings of securities issued by foreign companies are whether the financial reporting standard is recognised by the relevant Swiss stock exchange and, if the ex post prospectus approval is intended to be used, whether the issuer has securities already listed on a recognised stock exchange. As to the laws applicable to the bonds, all Organisation for Economic Co-operation and Development laws are recognised by SIX Exchange Regulation and there is a possibility to apply for further laws to be recognised (see article 6 of theAdditional Rules for the Listing of Bonds). Foreign issuers wishing to list their bonds at SIX Swiss Exchange must engage a Swiss paying agent (see article 12 of the Additional Rules for the Listing of Bonds).

There are no special rules for domestic issuers offering debt securities only outside Switzerland.

Law stated - 1 February 2024

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

There are relatively few obstacles for foreign issuers to list debt securities on Swiss stock exchanges if they are reporting under a recognised financial standard and they have securities listed on a recognised stock exchange.

Law stated - 1 February 2024

Underwriting

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

For a public offering, a bank or securities dealer (or a syndicate of such institutions) will typically act as first purchasers of the debt securities and then on-sell the securities to the investors. Underwritings are normally performed on a best efforts basis, except for issuers and securities with high investment grade rating. Bond purchase agreements (BPA) are relatively standard according to Swiss market practice. The BPA is generally drafted by the bank side and contains a set of usual closing conditions, representations, warranties and covenants of the issuer. Negotiation on BPAs and terms is usually rather limited according to the Swiss market practice for straight investment grade bonds, although issuers will always have to ensure that the relevant representations, warranties, covenants and bond conditions are actually correct and feasible in its specific case and do not unduly constrain their future business and financing.

Private debt offerings may occur in an ‘undocumented’ manner (ie, without a prospectus). It is also possible that there is a direct first subscription of the debt securities by the end investor rather than a bank or securities dealer.

Law stated - 1 February 2024

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

If an underwriter has a permanent physical presence in Switzerland (branch, representative office or the like), it is subject to Swiss licensing requirements as a security dealer. If the underwriting is done by a foreign institution without a presence in Switzerland, no licence is required.

Underwriting agreements are not subject to approval or registration.

Law stated - 1 February 2024

Transaction execution

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

The execution regarding debt securities issued by Swiss companies is relatively straightforward and handled by the underwriters. Based on the register of uncertificated securities of the issuer, a booking is made into the main register of SIX SIS, the Swiss central securities depositary (CSD). On the back of this main register entry, intermediated securities are created. There is no need for any physically issued note or deed by virtue of Swiss law. The systems of SIX SIS are able to handle settlement in various currencies, and foreign CSDs may be connected to it through CSD links to allow for a transnational settlement.

Settlement of the bond (issue and payment, usually effected delivery-versus-payment) is typically conducted 10 business days after the allocation of a bond. The settlement cycles for other debt securities may vary.

The proceeds of the debt securities are generally conveyed by the underwriter to the issuer after deduction of fees and expenses in accordance with the securities purchase agreement.

The provisional listing and admission to trading of debt securities offered with an ex post approval of the prospectus is usually conducted shortly before or on the issue and payment date. The prospectus must generally be approved within 60 days of the start of the public offering or listing.

Law stated - 1 February 2024

Holding forms

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

Publicly offered and traded debt securities are almost exclusively held as book-entry (intermediated) securities.

Law stated - 1 February 2024

Outstanding debt securities

24 | Describe how issuers manage their outstanding debt securities.

The typical terms of Swiss debt securities are relatively open as to how an issuer may manage its debt securities. Purchases in the market, including for cancellation purposes, are generally allowed as long as the purchases occur outside the scope of the market manipulation provisions. A public tender is usually also permissible under the conditions that the tender offer is made to all holders of the securities alike. A public tender for repurchasing bonds is conducted relatively rarely in the Swiss market. A tender offer for existing debt securities may be combined with a clean-up call in accordance with the terms and condition or an offering of new securities. For repurchases of convertible or exchangeable bonds, the rules on public takeovers have to be observed.

Law stated - 1 February 2024

REGULATION AND LIABILITY

Reporting obligations

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

The reporting obligations are governed by the listing rules of the stock exchange where the debt securities are listed. For bonds listed on SIX Swiss Exchange, reporting obligations include the publication of annual financial statements, ad hoc publicity, and a duty to publish changes in the securities. If a debt security is issued by a fully consolidated financing entity and guaranteed or otherwise secured by a parent entity, the reporting duties are generally to be met by the parent entity.

Law stated - 1 February 2024

Liability regime

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

There are two liability regimes in public offerings: civil liability (article 69 of the Financial Services Act (FinSA)) and criminal liability (article 90 FinSA).

As to civil liability, any person who fails to exercise due care and thereby furnishes information that is inaccurate, misleading or in violation of statutory requirements in prospectuses, key information documents or similar communications is liable to the acquirer of a financial instrument for the resultant losses. An important point to note

is that not only the issuer or offeror of securities may be sued, but any person that furnishes information in offering documents. There is no corporate veil that would protect such persons furnishing information. In addition to prospectus liability under the FinSA, a contractual liability may be incurred under the applicable securities purchase agreement. However, securities disputes are rather rare in Switzerland, in particular relating to bonds.

As to criminal liability, a fine of up to 500,000 Swiss francs shall be imposed on any person who wilfully provides false information or withholds material facts in the prospectus or key information document or fails to publish the prospectus or the key information document by the beginning of the public offer at the latest. Further, a fine of up to 100,000 Swiss francs shall be imposed on any person who wilfully fails to make the key information document available prior to subscription or conclusion of the contract. The criminal sanctions do not apply to persons and entities subject to Swiss prudential supervision and to persons working for them. In cases of wilful misconduct, there may be liability under general criminal provisions (eg, fraud) and torts as well.

In private transactions, mostly contractual and general criminal and tort rules apply. While certain legal authors deny this, the prospectus liability rule might be applied by analogy to private placements if a communication similar to a prospectus is used.

Law stated - 1 February 2024

Remedies

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

Investors may enforce prospectus liability in front of the competent courts. If a financial service provider violated their contractual duties, such as by selling an unsuitable financial instrument, the customers may enforce the contractual liability against the financial service provider in front of court as well. Neither criminal nor regulatory sanctions can be demanded or enforced by investors, but investors may bring violations to the attention of the competent authorities.

Law stated - 1 February 2024

Enforcement

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

The Swiss enforcement system consists of three pillars: civil liability, regulatory enforcement and criminal sanctions. Civil liability is enforced by investors and other relevant parties in front of court. Regulatory enforcement is generally conducted by the Swiss Financial Market Supervisory Authority (FINMA), which has certain administrative enforcement powers, including the authority to:

- issue orders to restore compliance with the law;

- take substitutive measures;
- issue prohibitions to exercise one's profession or certain other activities;
- 'naming and shaming';
- confiscate;
- appoint investigating agents;
- revoke licences; and
- withdraw recognitions.

However, FINMA has no general market supervisory competence. The enforcement measures can only be applied towards prudentially supervised entities under article 3 of the Financial Market Supervisory Act and their personnel. An exception is the administrative enforcement of the insider trading and market manipulation prohibitions. The administrative enforcement gap is filled by criminal sanctions, which are applicable to non-supervised persons and entities.

Law stated - 1 February 2024

Tax liability

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

Unless within the safe haven of the 10/20 Non-Bank Rules, each payment of interest on bonds issued by a Swiss issuer, as well as payments that qualify as interest for Swiss federal withholding tax purposes (such as a potential issue discount or repayment premium, but not repayment of principal), is subject to deduction of 35 per cent Swiss federal withholding tax by the issuer. Foreign issuers are not subject to this withholding tax, but the proceeds of the bonds can then not be applied in Switzerland. Withholding taxes are refundable for bondholders domiciled in Switzerland. Foreign bondholders could request a refund of withholding tax by virtue of a double taxation treaty between Switzerland and their jurisdiction of domicile, if any.

The issue of bonds to their initial holders will not be subject to Swiss federal stamp duty on the dealing in securities (primary market). For secondary market dealings in the bonds to which a Swiss or Liechtenstein domestic bank or a Swiss or Liechtenstein domestic securities dealer is a party, the transaction may be subject to Swiss federal stamp duty on the dealing in securities at a rate of up to 0.15 per cent of the consideration paid for the bonds.

Lastly, Switzerland has concluded a multilateral agreement with the EU on the international automatic exchange of information in tax matters. Based on this and on further agreements signed or intended to be signed, Switzerland collects data in respect of financial assets (including bonds) and exchanges it with certain foreign authorities.

Law stated - 1 February 2024

UPDATE AND TRENDS

Key developments of the past year

30 | Please provide any updates and trends in your jurisdiction's debt capital market.

Despite the volatility caused by the Russia–Ukraine and Israel–Gaza conflicts and other events, as well as higher inflation and interest rates, the volume and number of Swiss bond listings remained relatively stable. However, the average maturity of newly issued debt instruments has slightly dropped and yields have increased.

There is a continued market interest in Green Bonds and other sustainable or ESG-related investments.

A further trend is the increased interest of financial institutions and corporate issuers in digital bonds issued using the distributed ledger technology. The first Swiss digital stock exchange, SIX Digital Exchange, saw its first bond listing in November 2021.

Law stated - 1 February 2024

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UPDATE AND TRENDS

Key developments of the past year

MARKET SNAPSHOT

Market climate

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

Under the current legal regime in Taiwan, the permitted and typical securities offering by a foreign issuer in Taiwan is in the form of the issuance of straight bonds denominated in foreign currency, including US dollars, Australian dollars, Chinese yuan (ie, Formosa bonds) and the listing of those bonds on the Taipei Exchange (TPEx).

Since 2013, one government policy has been to promote the issuance of Formosa bonds by foreign issuers. Certain rules were eased regarding the issuance procedures, offering requirements and the investment limit being introduced to the market.

On this basis, the regulatory regime distinguishes two offering routes:

- professional Formosa bonds, which refer to bond investments for professional investors; and
- retail Formosa bonds, which refer to bond investments for retail investors who do not fall within the scope of 'professional investors'.

Based on our observations of the local market, the most popular and most frequently asked about debt securities offering activity in Taiwan by foreign issuers or stakeholders is the offering of professional Formosa bonds. This chapter will focus on this regime.

According to the currently applicable TPEx regulations, the term 'professional investor' includes the following three types of investors:

- professional institutional investors, which currently include:
- overseas and domestic banking enterprises, securities enterprises, futures enterprises, insurance enterprises, fund management companies and government investment institutions, but exclude insurance agents, insurance brokers and insurance surveyors;
- overseas and domestic government funds; pension funds; mutual funds; unit trusts; funds managed by financial service enterprises; or the fiduciary investment assets delivered through financial consumers' mandates or transferred under financial consumers' trusts that are accepted by financial service enterprises pursuant to the Securities Investment Trust and Consulting Act, the Futures Trading Act or the Trust Enterprise Act; and
- other institutions approved by the Financial Supervisory Commission (FSC);
- a legal entity or fund that has applied in writing to the securities firm for the status of professional investor and that meets the following three criteria:
- its total assets exceed NT$50 million according to its most recent financial report that has been audited or reviewed by a certified public accountant (CPA) (the financial report of a non-Taiwanese offshore legal entity is not required to be audited or reviewed by a CPA);

- the person authorised by the investor to handle trade has sufficient professional knowledge and trading experience in bonds; and
- it fully understands that the securities firm is exempted from certain responsibilities towards professional investors in connection with bond trading activities and agrees to sign up as a professional investor; and
- a natural person that has applied in writing to the securities firm for the status of professional investor who meets the following three criteria:

- they:

- have provided proof of financial capacity of at least NT$30 million; or
- have made a single trade, the transaction amount of which is higher than NT$3 million, their total assets and investments booked at and made through the securities firm are higher than NT$15 million, and they have provided a statement certifying that the value of their total assets has exceeded NT$30 million;
- they have sufficient professional knowledge or trading experience in bonds; and
- they fully understand that the securities firm is exempted from certain responsibilities towards professional investors in connection with bond trading activities and agree to sign up as a professional investor.

Law stated - 13 December 2023

Regulatory framework

2 | Describe the general regime for debt securities offerings.

Under the Securities and Exchange Act, as amended on 28 June 2023 (SEA), no person is allowed to engage in any securities business or offer securities in Taiwan without obtaining prior approval from and completing the required registration with the FSC, unless an exemption from relevant approval or registration is obtained.

Pursuant to the ruling issued by the FSC dated 7 September 2022 (the FSC ruling), the FSC relaxed the criteria and procedures for the issuance and offering of professional Formosa bonds as opposed to ordinary offerings of securities under the SEA. Major regulatory exemptions are summarised below:

- no prior approval from and registration with the FSC and the Central Bank of the Republic of China (Taiwan) (CBC) are required;
- no credit rating is required;
- no trustee structure is required;
- the foreign issuer is only required to report to the CBC (sending a copy to the TPEx) through the submission of an offering plan, basic information and information on the use of proceeds;
- the issuance documents can be prepared following international offering practice; and

- the bonds shall be listed on the TPEx.

The Taipei Exchange Rules Governing Management of Foreign Currency Denominated International Bonds, as amended on 2 November 2023 constitute another major local regulation that governs the issuance and offering of professional Formosa bonds. At the time of writing, the English courtesy translation of these TPEx regulations only reflects the update until the previous amendment in March 2023; the most recent amendment was added in November 2023.

Law stated - 13 December 2023

FILING AND DOCUMENTARY REQUIREMENTS

General filing requirements

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

To offer and list a professional Formosa bond, the foreign issuer is required to file the listing application with the Taipei Exchange (TPEx) and make a report to the Central Bank of the Republic of China (Taiwan) (CBC) (sending a copy to the TPEx) for each prospective bond offering. All the application and reporting documents can be in Chinese or English. If any document is in a language other than Chinese or English, the issuer is required to prepare an English translation that is to be submitted along with the documents in the original language for the TPEx's reference.

The documents required for the TPEx application generally include the following:

- Application letter in the prescribed form and signed by the issuer.
- Certificate signed by the issuer to certify that the information contained in the application documents is true and accurate and is not misleading.
- Confirmation signed by the issuer and evidence of the actual completion of the bond offering.
- Confirmation sheet confirming that the prospectus of the notes has been posted on the website designated by the TPEx (ie, the Market Observation Post System (MOPS)).
- Bond offering plan and the interest schedule in prescribed form.
- Documents evidencing that the bonds have been registered with a foreign or domestic securities depository. As bond registration with a Taiwanese local securities depository is not a mandatory requirement, most foreign issuers register the bonds with Euroclear or Clearstream, which is an acceptable arrangement to Taiwanese regulators.
- Bond listing agreement in a form prescribed by the TPEx, to be signed by the issuer and the TPEx.
-

Confirmation sheet confirming that the basic information of the bonds has been posted on the website designated by the TPEx (ie, MOPS).

- The meeting minutes of the board or the shareholders' meeting, to the extent applicable, approving the offering and issuance of the bonds. If the authorisation of the board or shareholder of the issuer is not required for the offering and issuance of the professional Formosa bonds under the issuer's programme, there is no need to submit this document; however, the regulator will request the issuer to provide the relevant authorisation documents that prove it has set up the programme and how each drawdown can be authorised.
- Documents evidencing that all required approvals for the offering and issuing of bonds from the regulatory authorities in the jurisdictions where the issuer was incorporated or listed (if applicable) have been obtained. If there is no need for the issuer to obtain such approval, the document is not required, but the issuer must certify that there is no such approval requirement.
- Documents evidencing the due incorporation and good standing of the issuer (eg, the certificate of incorporation of the issuer).
- Documents evidencing that the issuer has appointed a qualified securities firm or a bank to act as the liquidity provider to provide quotations.
- Securities underwriter confirmation opinion, to be executed by the lead manager.
- Checklist for counsel signed by the issuer's legal counsel.
- Documents confirming the rating of the issuer, guarantor or bond (if any).
- Other documents requested by TPEx from time to time, such as the specimen signature of the authorised signatory of the issuer, the authority delegation or power of attorney.

For the report to the CBC, the foreign issuer must submit:

- the offering plan (eg, term sheet);
- its basic information in a local, standard form; and
- a description of the use of the proceeds raised from the bond offering.

The documents for the CBC report can be prepared by the lead manager of the transaction.

Law stated - 13 December 2023

Prospectus requirements

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

According to the ruling issued by the Financial Supervisory Commission (FSC) dated 7 September 2022 (the FSC ruling), the offering prospectus of professional Formosa bonds must be in line with international offering practices.

While the FSC ruling is silent on the definition of 'international offering practices', the regulator advises that a drawdown under the medium-term note programme (MTN programme) or debt issuance programme of the issuer is acceptable; hence, a foreign issuer can simply use its existing MTN programme or debt issuance legal regime to issue professional Formosa bonds.

The issuer is not required to prepare a supplemental prospectus merely for offering professional Formosa bonds; nonetheless, certain Taiwan-related provisions (ie, TPEx's disclaimer, the Taiwan settlement procedure, taxation and selling restrictions) are required or recommended to be included in the offering documents, possibly in the relevant paragraphs of the pricing supplement or the final terms of the bonds.

Law stated - 13 December 2023

Documentation

5 | Describe the drafting process for the offering document.

As indicated in the FSC ruling, the requirements for the offering circular or prospectus for the issuance of professional Formosa bonds must be in line with international offering standards or practices.

According to the regulator, to offer professional Formosa bonds, a foreign issuer can simply follow its standard bond offering process to prepare the offering and transaction documentation as it has done in other jurisdictions; hence, the transaction and offering documents for issuing professional Formosa bonds can be governed by foreign law (in most cases, English law or New York law), and the use of the template documents under the issuer's programme is acceptable.

From the perspective of Taiwanese law, the offering of Formosa bonds in Taiwan falls within the scope of a public offering rather than a private placement, regardless of the number of potential investors or the issuance size, etc; thus, there is no distinction between the documentation and disclosure requirements for the offering of professional Formosa bonds in Taiwan.

Law stated - 13 December 2023

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

In addition to the existing offering prospectus (including the supplements and amendment, if any) under the issuer's debt issuance programme, the major transaction documents for each professional Formosa bond deal are:

- the term sheet; and
- the pricing supplement or the final terms signed by the foreign issuer (and the guarantor, if applicable) indicating or supplementing the major commercial terms and conditions of the bonds to be offered to investors.

As required by the TPEx, the offering prospectus, the pricing supplement or final terms, and the wrapper will be uploaded to the website designated by the TPEx for disclosure to investors and the public.

Law stated - 13 December 2023

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

No. To list professional Formosa bonds in Taiwan, although the offering prospectus (including the supplements and amendment, if any) and the term sheet, and the pricing supplement or final terms are part of the required documents for the TPEx's review of the listing application, the TPEx's review is not a condition to the use of these bond offering documents.

Law stated - 13 December 2023

Authorisation

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

Yes. To offer and issue professional Formosa bonds in Taiwan, a foreign issuer must, via the local licensed securities firm that is appointed by the issuer as the lead manager, file the application with the TPEx and make a report to the CBC (with a copy sent to the TPEx) for the prospective bond offering. Although the report to the CBC is basically for notification purposes, and the CBC will neither provide any formal response nor approve the report, the issuance and offering will be subject to the review and approval of the TPEx.

In terms of the time frame, the report and application usually take place one to two business day after the pricing of the deal. In a typical case, the TPEx will complete review within three business days of the day on which it accepts the application; however, it may file for internal approval to extend the review period under special circumstances. In practice, in most cases, the local manager will recommend the application and reporting to be conducted seven calendar days prior to the scheduled closing and bond issuing day.

Law stated - 13 December 2023

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

According to the Taipei Exchange Rules Governing Management of Foreign Currency Denominated International Bonds, as amended on 2 November 2023, if the TPEx discovers that the application pack contains any omission or incomplete disclosure of the required information, the applicant (ie, the foreign issuer) will be requested to supplement the information within a prescribed period set by the TPEx. If the applicant fails to submit the

required information within that period, a notice of rejection will be issued, with a copy also being sent to the competent authority (ie, the FSC).

Law stated - 13 December 2023

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

Under the current Taiwan legal regime, since the offering of Formosa bonds (regardless of whether the issuance is of professional or retail Formosa bonds) in Taiwan is a public offering rather than a private placement, different rules do not apply to the issuance of Formosa bonds. In addition, the issuance and offering of professional Formosa bonds are under an exempted regime as opposed to the ordinary securities offering regime in Taiwan.

Law stated - 13 December 2023

Offering process

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

Under the current Taiwan legal regime, the offering of Formosa bonds (regardless of whether the issuance is of professional or retail Formosa bonds) is categorised as a public offering rather than a private placement. A professional Formosa bond offering transaction can usually be closed within four to six weeks from the preparation of the transaction documents to the closing and settlement, if the process goes smoothly.

The major documents used for marketing and offering in a professional Formosa bond transaction include:

- the offering prospectus (including the supplements and amendment, if any) under the debt issuance programme; and
- the term sheet and the pricing supplement or the final terms, signed by the foreign issuer.

In addition, the subscription agreement will be signed by the issuer and the local licensed securities underwriters regarding the purchase or subscription for the bonds. The subscription agreement will not be disclosed to the public, but a copy must be submitted to the Taiwan Securities Association for recordation.

The key parties in a professional Formosa bonds deal include the foreign issuer and the underwriters and their respective external legal counsels of the relevant jurisdictions.

Law stated - 13 December 2023

Closing documents

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

In addition to the transaction documents and standard drawdown closing documents, the underwriters usually request the Taiwanese legal counsel to issue a closing legal opinion on the relevant Taiwan legal issues as a closing condition.

Law stated - 13 December 2023

Listing fees

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

To list professional Formosa bonds in Taiwan, two types of fees are payable: the listing fee and the administrative fee. The fees can be paid in US dollars or other foreign currency equivalents, using the denominating currency of the bond issue.

Listing fee

The annual listing fee is the amount equal to 0.0003 per cent of the total nominal value of the bonds; however, the total amount of the annual listing fees payable will be capped at NT$500,000 and floored at NT$50,000. For example, for a transaction with a nominal amount of US$200 million to US$300 million, the ceiling of the listing fee will be NT$500,000 per year, and no additional annual listing fee will have to be paid if the same issuer issues more bonds in the same year.

The listing fee for the issuing year should be paid after the listing application package is submitted to the TPEx, and the actual fee payable will be calculated pro rata based on the actual period of TPEx listing, with partial months counted as whole months.

Administrative fee

A one-time administrative fee of NT$100,000 is payable for each issuance and is reduced to NT$70,000 in the case of a repeat bond issuance by an issuer through the use of the prospectus or offering circular under the same programme in a previous issuance.

Law stated - 13 December 2023

KEY CONSIDERATIONS

Special debt instruments

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

Under the current Taiwan legal regime, special debt instruments are essentially not permitted, including, for example, equity-linked notes, exchangeable or convertible debt

or other derivative products directly issued and offered by foreign issuers to investors in Taiwan.

Law stated - 13 December 2023

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

Under the current Taiwan legal regime, foreign issuers are not permitted to offer special debt instruments to investors in Taiwan; thus, there is no applicable rule in this regard.

Law stated - 13 December 2023

Classification

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

Although there is no law or regulation in Taiwan setting the requirement to determine whether securities are classed as debt or equity, according to the Securities and Exchange Act (SEA) and its Enforcement Rules, convertible corporate bonds, corporate bonds with warrants, stock warrants, call (or put) warrants, certificates of payment for shares, stock warrant certificates, certificates of entitlement to new shares, bond conversion entitlement certificates and Taiwan depositary receipts are deemed as equity-type securities.

Law stated - 13 December 2023

Transfer of private debt securities

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

Since the offering of Formosa bonds (regardless of whether it concerns the issuance of professional or retail Formosa bonds) is a public offering, there is no private placement regime available in this context; nonetheless, as a general legal principle, transfer of privately placed debt securities strictly follows the transfer restriction set forth in the terms and conditions or the placement documents of the debt securities.

Law stated - 13 December 2023

Cross-border issues

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

Yes. In addition to the SEA, which serves as the fundamental securities offering regime, for the offering of debt securities by foreign issuers in Taiwan, the Regulations Governing the Offering and Issuance of Securities by Foreign Issuers are the major regulations that apply to the subject matter. For domestic issuers offering debt securities only outside Taiwan, the main regulations with which the domestic issuer must comply are the Regulations Governing the Offering and Issuance of Overseas Securities by Issuers. Further, the Financial Supervisory Commission (FSC), as the regulator of the securities offering, has the power to issue rulings that govern and effect more detailed rules from time to time.

Law stated - 13 December 2023

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

No.

Law stated - 13 December 2023

Underwriting

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

In the context of a professional Formosa bonds offering, the licensed underwriter's responsibility is to sell, market and distribute bonds for the foreign issuer. Since November 2015, the underwriting requirement has been a requisite for Formosa bonds deals.

The FSC requires that the sale or distribution of professional Formosa bonds be made by a local licensed securities underwriter that obtains a special approval issued by the CBC for underwriting professional Formosa bonds. Non-licensed offshore entities (even the affiliates of the local licensed underwriter) are not allowed to participate in any activities relating to marketing, soliciting, selling and distributing Formosa bonds, regardless of whether those activities are carried out in Taiwan or outside Taiwan.

Law stated - 13 December 2023

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

The securities business in Taiwan is highly regulated. According to the SEA, the approval and certificate of licence granted by the FSC are required for the operation of a securities business by a securities firm (including a bank holding a securities business licence). A securities underwriting business is one type of securities business that may be operated.

A securities firm (including a bank holding a securities business licence) cannot commence operation of its business unless it is admitted to the Taiwan Securities Association (TSA) as a member. The TSA is a self-disciplinary association handling matters following the direction and supervision of the securities business industry prescribed by the FSC.

In the context of a professional Formosa bonds offering, approval with respect to underwriting arrangements in the specific deal is not required, but the underwriters must have obtained licence to engage in the underwriting business of professional Formosa bonds, and the subscription agreement executed for the specific deal must be submitted to the TSA for recordation.

Law stated - 13 December 2023

Transaction execution

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

In a professional Formosa bonds transaction, most foreign issuers choose to register the bond issue with a foreign securities depository enterprise recognised by the Taipei Exchange (TPEx), such as Euroclear or Clearstream. Given this, there is no specific settlement requirement or procedure for a professional Formosa bond transaction. Unless there is a special request or arrangement on a deal basis, the foreign issuer can simply follow its standard settlement mechanism to settle the transaction, including the delivery of bonds and payment transfer. The date for the bonds to be admitted to trading on the TPEx is the issue day of the bonds (ie, the closing date of the transaction).

Law stated - 13 December 2023

Holding forms

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

According to the Taipei Exchange Rules Governing Management of Foreign Currency Denominated International Bonds, as amended on 2 November 2023, if the Formosa bonds are registered with a domestic securities depository enterprise, physical certificates will not be produced, and securities firms trading those bonds shall be restricted to book-entry delivery through a domestic, centralised securities depository enterprise. Although this requirement does not apply to bonds registered with other internationally recognised securities depository entity, in practice, book-entry delivery also applies, and a global certificate of the notes will be issued.

There is no local law requirement for the Formosa bonds to be issued in bearer or registered form; thus, either bearer or registered form is acceptable.

Law stated - 13 December 2023

Outstanding debt securities

24 | Describe how issuers manage their outstanding debt securities.

The way in which issuers manage outstanding Formosa bonds is generally subject to the terms and conditions of the bond (eg, early redemption and the issuer's call option) and the SEA; nonetheless, for any special arrangement that has not previously appeared in the market, it is recommended to discuss with the local underwriter or the TPEx in advance to seek oral blessing of the proposed arrangement.

Law stated - 13 December 2023

REGULATION AND LIABILITY

Reporting obligations

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

During the term of the bonds, the foreign issuer of professional Formosa bonds is subject to periodic and non-periodic reporting obligations, as follows:

- prior to the first trading date of the Formosa bonds on the Taipei Exchange (TPEx), it shall upload the required information in Chinese or English to the website designated by the TPEx, including:
  - basic information of the foreign issuer;
  - the terms and conditions of the Formosa bond; and
  - other information required by the TPEx;
- except for the sovereign issuer, the foreign issuer shall make the following periodic report to the website designated by the TPEx in respect of:
  - any change to the issuing details of the Formosa bonds, such as the outstanding amount, within 10 days of the end of each month; and
  - a copy of its annual report within 20 days of the completion or printing date of its annual report; and
- it shall upload the following information to the website designated by the TPEx before the commencement of trading hours on the next business day following the date on which the event occurs:
  - material information for which prompt reporting is required by the laws and regulations of the issuer's registered country or the country where the issuer's shares are listed;
  - issuance, maturity or repurchase of the bonds;
  - change to the credit rating of bonds or the foreign issuer;

- information regarding appointment and change of the liquidity provider, as well as the relevant information of the liquidity provider (including the contact person, telephone number and details of the bonds issued); and
- any other matter that has material effect on the price or value of the bonds.

Law stated - 13 December 2023

Liability regime

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

A foreign issuer of professional Formosa bonds will be subject to a penalty of NT$30,000 or suspension of trading of the Formosa bonds on the TPEx and report to the competent authority for any of the following:

- it violates any provision of the Taipei Exchange Rules Governing Management of Foreign Currency Denominated International Bonds, as amended on 2 November 2023 (including the reporting obligations); or
- it wilfully releases any unconfirmed information or publicly announces inaccurate or false information.

If a foreign issuer violates the reporting obligations and is required to make a supplemental public announcement, it must make the supplemental announcement within two days of its receipt of the notice from the TPEx. Should the issuer fail to do so within that period, a daily penalty of NT$10,000 will be imposed until it makes the required supplemental announcement.

Liabilities arising from the prospectus in connection with the offering under the Securities and Exchange Act (SEA) may also apply to a professional Formosa bonds offering deal.

Civil liabilities

According to article 32 of the SEA, if the major contents in a prospectus contain any false or misleading information or omissions, each of the following persons shall be jointly and severally liable, within the scope of their responsibilities, with the issuer to any bona fide counterparty for damages arising therefrom:

- the issuer and its responsible persons;
- the employees of the issuer who have signed on the prospectus to certify the accuracy of the whole or part of the prospectus;
- underwriters; and
- the professionals (including but not limited to accountants, lawyers, engineers or other professionals) who have signed on the prospectus to verify the accuracy of the whole or part of the prospectus or state their opinions thereunder.

All persons, other than the issuer, listed above (including the issuer's directors) can discharge their liabilities if they prove to the court that they have exercised reasonable care (eg, conduct due diligence) and had justifiable reasons to believe that the major contents in the prospectus are correct; however, strict liability is imposed on the issuer, so no similar exemption is available to the issuer.

There is no clear definition regarding the responsible persons under the SEA. Applying the concept under the Company Act, the directors, the managers, the agent for litigious and non-litigious matters in Taiwan of the issuer (if any), the supervisors, of a company may, within their respective scope of duty, be deemed as the responsible persons of the issuer. Therefore, whether the foregoing persons will be deemed by the court as the responsible persons of the issuer depends on their internal authority allocation.

Criminal liabilities

Any breach of article 32 constitutes a criminal offence, and the issuer, its responsible persons and employees may be subject to imprisonment ranging from one year to seven years or a fine of up to NT$20 million, or both; nevertheless, for the above persons to be subject to criminal liability, such person should be deemed by the court to have deliberately committed the charged offence (ie, they deliberately provided false information or neglected to provide relevant information).

Given the above, it is only when the person intentionally provides any untrue, incorrect or misrepresentative major contents in the prospectus that criminal liability will be established. For the issuer, the criminal penalty will be imposed on the person in charge of the violation (which could include the chair and the staff in charge, depending on the internal approval process).

Law stated - 13 December 2023

Remedies

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

According to article 32 of the SEA, the foreign issuer, its responsible persons and other relevant persons (including the underwriter, professionals and employees of the issuer who sign on the prospectus to certify the accuracy of the whole or part of the prospectus) could be jointly liable for the investor's claim for damages suffered or arising from any false or misleading information or omissions in the offering prospectus of Formosa bonds.

However, all persons, other than the issuer (including the foreign issuer's responsible persons, such as the chair, the directors, the CEO and the managers), would be discharged from the civil liability if they can prove to the court that they have exercised reasonable care and had justifiable reasons to believe that the major contents in the prospectus are correct.

To our knowledge, there is no litigation or charge in Taiwan against any foreign issuer of Formosa bonds or its responsible persons to date; thus, no local court precedent may serve as guidance.

Law stated - 13 December 2023

Enforcement

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

The Financial Supervisory Commission (FSC), as the regulator of the market, has the power to impose sanctions on the market players (mainly, securities firms) in accordance with the SEA, depending on the severity of the violation, and order the securities firm to correct the violation within a prescribed period.

The types of sanctions that can be imposed on a local securities firm (including a bank holding a securities business licence) are:

- a warning;
- an order for the securities firm to remove its directors, supervisors, or managerial officers from their office;
- suspension of the business, in whole or in part, of the company or of its branch for a period of not more than six months;
- voidance or revocation of the securities business licence; or
- other necessary measures as the regulator deems fit.

If any director, supervisor or employee of a securities firm is found to be in violation of the SEA or any other related laws or regulations, and if the violation may affect the normal operation of the securities firm, the FSC may order the securities firm to suspend business operation for not more than one year or discharge the person at any time.

Law stated - 13 December 2023

Tax liability

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

Foreign issuer of professional Formosa bond

As it is not a Taiwanese statutory tax withholder, there is no Taiwan withholding tax on the interest or premium to be paid by the foreign issuer on the bond.

Individual bondholders in Taiwan

Payments of any interest or premium under the bond to a Taiwanese individual holder are not subject to Taiwanese income tax; however, the holder must include the interest or premium in calculating his or her basic income for the purpose of calculating his or her alternative minimum tax, unless the sum of the interest and other non-Taiwan sourced income received by the holder and the persons who are required to jointly file the tax return in a calendar year is below NT$1 million.

Corporate bondholders in Taiwan

For the interest or premium receivable under the bond as part of its taxable income, the corporate bondholder must pay income tax at a flat rate of 20 per cent as it is subject to income tax on its worldwide income on an accrual basis.

Securities transaction tax

In general, the sale of corporate bonds or financial bonds is subject to securities transaction tax (STT) at a rate of 0.1 per cent based on the transaction price. Under the current taxation regime, the STT has ceased to be levied on the sale of corporate bonds and financial bonds until 31 December 2026; therefore, the sale of professional Formosa bonds is exempt from STT if the sale is conducted on or before 31 December 2026.

Law stated - 13 December 2023

UPDATE AND TRENDS

Key developments of the past year

30 | Please provide any updates and trends in your jurisdiction's debt capital market.

To follow the government policy of promoting environmental, social and corporate governance investment, the Taipei Exchange (TPEx) further amended the Taipei Exchange Operation Directions for Sustainable Bonds on 8 July 2022, introducing accreditation of sustainability-linked bonds (SLB) into the market. The key distinguishing point of these SLBs, as compared to the previously announced accreditation of sustainable bonds in April 2021, is that the use of proceeds of SLBs can still fall under general corporate purpose, which is not limited to any specific green or social investment projects. Instead, SLB issuance allows the issuer to incorporate sustainable development into its business decisions and business models through establishing sustainable development key performance indicators and sustainability performance targets and link these factors to principal and interest payment terms of bonds.

TPEx recently amended the Taipei Exchange Rules Governing Management of Foreign Currency Denominated International Bonds in November 2023 to reflect the introduction of the electronic filing mechanism to the bond listing application procedure and urge the foreign issuers of professional Formosa bonds to proceed with the listing application through TPEx's electronic filing system.

Law stated - 13 December 2023



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UPDATE AND TRENDS

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MARKET SNAPSHOT

Market climate

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

In the United Kingdom, there has been a very active market for debt securities offerings for several decades. The particular features of this market are as follows.

Internationalism

Offerings of debt securities in the UK involve issuers and investors incorporated or established anywhere in the globe using London as a global financial centre to access the international debt capital markets. The success of the international debt capital markets within the UK has resulted in there being no meaningful domestic-only market.

Size

The investor pool in the UK for debt securities is among the deepest in the world. According to data released by the London Stock Exchange (LSE), US$351 billion of debt capital was raised through the issuance of 853 bonds during 2022. In total, there are more than 13,000 debt securities from all over the world actively listed on the LSE's main market.

Sophistication

The full spectrum of debt capital markets products is offered in the UK. This spectrum ranges from plain vanilla senior fixed or floating rate Eurobonds, issued either under a programme or on a stand-alone basis; to complex structured products, such as asset-backed debt, covered bonds and derivative securities; to subordinated debt, such as regulatory capital for banks or insurers and hybrid debt for corporates; and to equity-linked debt such as exchangeable bonds, convertible bonds and warrants. There is also an active UK market in high-yield bonds, short-term money market instruments, loan participation notes, green bonds and other environmental, social or governance (ESG) investments and private placements.

Wholesale rather than retail

The wholesale debt markets in the UK make up the vast majority of debt issued.

Range of issuers

Issuers that access the UK's debt capital markets include corporates, financial institutions and other regulated entities, sovereigns and municipalities and charities.

Law stated - 8 June 2023

Regulatory framework

2 | Describe the general regime for debt securities offerings.

The underlying principles of English law governing the debt capital markets in the United Kingdom remain the largely uncodified common law principles of contract law, trusts law and the law of negotiable instruments. The common law is overlaid by a UK statutory regime and, in particular, the Financial Services and Markets Act 2000 and related statutory instruments, such as the Financial Promotions Order. This statute law is underpinned by regulation, in particular that contained within the Financial Conduct Authority (FCA) handbook (including the Listing Rules, the Prospectus Regulation Rules and the Disclosure and Transparency Rules) and binding guidance on these rules from the FCA.

Much of the UK's regulatory framework for debt capital markets originally derived from EU financial services law, which until the end of the Brexit implementation period on 31 December 2020, applied in the UK in the same way that it applies across the European Economic Area. For example, EU directives were required to be implemented into UK law, and EU regulations were directly applicable in the UK. At the end of the Brexit implementation period under the European Union (Withdrawal) Act 2018, the body of EU law then applicable was onshored into the UK domestic framework, with certain modifications creating a new body of UK domestic law called retained EU law. Since the end of the Brexit implementation period, the UK's regulatory architecture is entirely distinct from EU regulatory architecture, although it initially mirrored it closely. The extent to which the UK regulatory framework and the EU regulatory framework diverge from each other over time (either as a result of changes made by the UK or as a result of changes made by the EU) is an open question.

Issuers with securities listed on the LSE are also obliged to follow the rules and regulations of the LSE. Many market participants voluntarily follow the recommendations of trade associations and, in particular, those contained within the International Capital Markets Association's Primary Market Handbook.

Law stated - 8 June 2023

FILING AND DOCUMENTARY REQUIREMENTS

General filing requirements

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

The UK prospectus regime requires an issuer to publish a prospectus in the case of either a non-exempt public offering of debt securities in the UK or an admission of debt securities to a regulated market in the UK. The Financial Conduct Authority (FCA) is the UK competent authority for the purposes of approving prospectuses. An issuer will typically publish a prospectus either on its own website or on the London Stock Exchange (LSE) website,

using the LSE's Regulatory News Service. The FCA will also file prospectuses it approves with the UK's National Storage Mechanism.

An issuer that is exempt from the requirement to publish a prospectus may be required to publish listing particulars if the debt securities are admitted to the LSE's Professional Securities Market, which is within the UK's listing regime, but is a multilateral trading facility rather than a regulated market for regulatory purposes. The LSE's International Securities Market is outside the UK's listing regime and is a multilateral trading facility for the purposes of UK regulation and, as such, an issuer is required to produce an admission particulars (the contents of which are regulated by the LSE itself rather than the FCA).

In the case of a prospectus or listing particulars, the issuer is required to prepare other administrative documents in connection with the FCA approval process, including checklists, confirmation letters in relation to sanctions compliance and contact details. There are no specific filing requirements for debt securities that are different from those of other securities.

Law stated - 8 June 2023

Prospectus requirements

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

An issuer making a non-exempt public offering of debt securities in the UK is required to publish a prospectus. The contents of a prospectus are governed by the UK prospectus regime, but issuers also consider the expectations of the market.

The starting point for the contents of a prospectus is the general duty of disclosure contained within the UK Prospectus Regulation, which states:

> A prospectus shall contain the necessary information which is material to an investor for making an informed assessment of: (a) the assets and liabilities, profits and losses, financial position, and prospects of the issuer and of any guarantor; (b) the rights attaching to the securities; and (c) the reasons for the issuance and its impact on the issuer. That information may vary depending on any of the following: (a) the nature of the issuer; (b) the type of securities; (c) the circumstances of the issuer; (d) where relevant, whether or not the non-equity securities have a denomination per unit of at least EUR 100 000 or are to be traded only on a regulated market, or a specific segment thereof, to which only qualified investors can have access for the purposes of trading in the securities.

In addition to complying with the general duty of disclosure, an issuer must also consider the specific detailed contents requirements set out in annexes to the regulation containing detailed disclosure rules relating to the UK prospectus regime (ie, the UK PR Delegated Regulation). These annexes function as building blocks, and the relevant annexes that

an issuer must consider depend on the nature of the investors (it is assumed that if the denomination of the debt securities is greater than or equal to €100,000 that the investors will be professional) and the nature of the securities. The annexes contain disclosure items relating to both the issuer's business and also the debt securities themselves. As a general rule, the contents requirements for more complex debt securities or for those aimed at retail investors are more onerous than those for plain vanilla debt securities aimed at wholesale investors. The UK prospectus regime not only regulates the contents of a prospectus but also its style, requiring that it be 'easily analysable, concise and comprehensible'.

In addition to regulation, an issuer must also be mindful to ensure that its prospectus is prepared in accordance with guidance from the relevant regulators, including technical and procedural notes contained within the FCA's knowledge base. The FCA also expects market participants to continue to take into consideration the European Securities and Markets Authority's questions and answers on prospectuses (to the extent that they applied before the end of the Brexit implementation period and to the extent that they are still relevant in the UK). The contents of a prospectus are also subject to market expectations, the requirements of investors and the recommendations of industry bodies such as the International Capital Markets Association. When an issuer comes to prepare its prospectus, it will, therefore, be well advised to consider the prospectuses of similar issuers or securities to ensure that its disclosure is consistent with market practice.

Law stated - 8 June 2023

Documentation

5 | Describe the drafting process for the offering document.

The UK prospectus regime requires an issuer to take responsibility for the contents of its prospectus and it will also have statutory and common law liability for its prospectus. While the managers are not required to take responsibility for the contents of the prospectus, they typically have their names on it and, therefore, have reputational reasons for being concerned with its contents. The managers may also have liability in certain circumstances. This means that the prospectus drafting process is, in practice, highly collaborative, drawing both on the issuer's greater knowledge of its business and also the managers' greater technical knowledge and market experience. Both sides will also lean heavily on their legal counsel for the drafting, in particular the more technical disclosure, such as legends, selling restrictions and other rubrics designed to comply with regulatory requirements.

In practice, the issuer will focus on the risk factors and the business description, drawing from its other public disclosures (such as annual reports and previously published prospectuses) to minimise the risk of inconsistent public disclosure and related liability. The managers will verify the disclosure in a series of procedures known as 'due diligence', including drafting sessions and written comments and questions on the disclosure. The intensity of the due diligence process varies in accordance with the relevant risk: a lower-rated issuer, or an issuer established in a jurisdiction that is not part of the Organisation for Economic Co-operation and Development, or an issuer of junior securities,

will typically encounter a more onerous due diligence exercise than a higher-rated issuer that is familiar to the markets.

Law stated - 8 June 2023

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

The terms and conditions of the debt securities are set out within the trust deed (assuming a trust structure) or the fiscal agency agreement (assuming a fiscal agency structure). The parties to a trust deed are the issuer and the trustee, who has a fiduciary responsibility towards the bondholders under the trust. The parties to the fiscal agency agreement are the issuer, the fiscal agent and the paying agent. In the case of a fiscal agency structure, there will also be a deed of covenant in which the issuer makes certain undertakings directly to the bondholders. It is also market practice for the terms and conditions to be disclosed in full in the published prospectus, and the relevant documents are usually available in hard copy at the offices of the agent or trustee and sometimes electronically on the issuer's website.

Law stated - 8 June 2023

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

A regulated offering or listing document, such as a prospectus or listing particulars, must be approved by the FCA before it is published. At a minimum, a prospectus or listing particulars must be published electronically.

An exchange-regulated admission document, such as an admission particulars, must be reviewed by the LSE before securities may be admitted, though this review is typically less onerous than an FCA approval process.

Law stated - 8 June 2023

Authorisation

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

The prospectus requires approval, which occurs after an iterative review process in which the FCA raises questions on drafts of the prospectus, typically related to the specific content requirements of the prospectus regime. Once the issuer has addressed all the FCA's questions, the prospectus is approved. The FCA commits to reviewing the first draft of the prospectus within four clear working days and subsequent submissions within two clear working days.

Before the prospectus is approved, it is customary for the issuer and the managers to observe certain publicity restrictions ensuring that any information released in connection with the offering meets regulatory requirements. In the UK, the advertisement rules contained within the UK prospectus regime and the UK's domestic financial promotions regime regulate the way in which publicity materials related to an offering may be distributed. These ensure that the contents of publicity materials must be consistent with the prospectus and distributed to appropriate investors.

Law stated - 8 June 2023

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

If an issuer is unable to produce a prospectus that complies with the prospectus regime, the FCA may refuse to approve the prospectus. The FCA is also obliged not to admit the debt securities to the UK's official list unless it is satisfied that the listing rules are complied with.

The FCA also has a statutory strategic objective to ensure that markets function well by protecting consumers, promoting competition and protecting financial markets. The FCA has the power to prevent a public offering of securities if the offering contravened the FCA's statutory objectives.

Law stated - 8 June 2023

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

The UK prospectus regime contains certain exemptions from the requirement to produce a prospectus in the case of a public offers. The most common exemptions are:

- where the offer is addressed to fewer than 150 persons in the UK;
- where the offer is only addressed to qualified investors; and
- where the minimum denomination per unit of the debt securities is at least €100,000 or equivalent in another currency.

Offers of debt securities that fall within one of these exemptions that are not admitted to trading on a regulated market may be considered private offerings, even if, in practice, they are relatively widely distributed and publicised.

Law stated - 8 June 2023

Offering process

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

The public offering process, timetable and documentation will depend on whether the offering is a stand-alone transaction or a drawdown under a debt issuance programme. The complexity of the transaction, market conditions and extent to which the issuer has a track record of securities offerings will all also impact the timetable.

A stand-alone offering will typically require approximately two months from mandate to closing. During the period from mandate to launch, the issuer and the managers together with their legal advisers will agree the transaction structure, negotiate the transaction documentation and progress the drafting and approval of the prospectus with the FCA. The transaction is launched when it is announced publicly, and the issuer and the managers market the transaction to investors on the basis of either a preliminary prospectus or a roadshow presentation. Once sufficient interest has been generated in the transaction, the documentation has been agreed and the prospectus approved, the transaction can be priced and the subscription agreement signed. Typically, four or five days are required between signing and closing. At closing, the conditions precedent are provided to the managers, the remaining transaction documents are signed, the notes are issued, and the proceeds of the issuance are transferred to the issuer.

A drawdown under a debt issuance programme will involve a much shorter timetable since it will typically only require agreement of the terms of the issuance. In the case of a private offering in which no prospectus or listing particulars is required, the transaction timetable would typically be shorter and less complex because there is no need to factor in the FCA approval process.

Since 2018, the offering process for both public and private offerings of debt securities in the UK has been regulated by the product governance regime, which initially derived from the EU Markets in Financial Instruments Directive II and now applies in the UK by virtue of the PROD chapter of the FCA Handbook. This regime imposes a number of obligations on UK-regulated firms that advise on the issuance of bonds or are involved in the underwriting or placing of bonds, including an obligation to identify a target market for the bonds, specify investors for whom the financial instrument is compatible and create a distribution strategy compatible with the needs of the target market.

Law stated - 8 June 2023

Closing documents

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

The usual closing documents are the trust deed and paying agency agreement (in the case of a trustee structure), fiscal agency agreement and deed of covenant (in the case of a fiscal agency structure), the global notes, legal opinions, auditors' comfort letters, closing certificates and payment and settlement instructions.

Law stated - 8 June 2023

Listing fees

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

Issuers are required to pay fees to both the FCA and the LSE. FCA vetting fees for prospectuses for debt securities are £2,000. The LSE's admission fee depends on the face value of the securities and the type of issuer:

- for Eurobonds, financial institutions and corporates (excluding supranational issuers), the fees range from £3,625 to £6,515;
- for issuances under a programme (excluding supranational issuers), the fees range from £500 to £5,750; and
- for supranational issuers, the fees range from £990 to £4,640.

Law stated - 8 June 2023

KEY CONSIDERATIONS

Special debt instruments

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

There is a very active market for special debt instruments in the UK, including equity-linked notes and derivative products.

Law stated - 8 June 2023

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

The contents requirements for a prospectus depend upon the nature of the securities. In the case of special debt securities, specific additional disclosure will be required. Prospectuses for most equity-linked debt transactions, which are typically structured to convert into new shares, are required to include equity-level disclosure in relation to the issuer, including an operating and financial review, a working capital statement and a capitalisation and indebtedness table. However, it is relatively common for offerings of equity-linked debt to be structured to avoid the UK prospectus regime, by issuing the debt in high denominations and by admitting it to trading on a multilateral trading facility. In addition to disclosure issues, equity-linked debt transactions must also consider whether statutory pre-emption rights need to be disapplied.

Prospectuses for derivative products must also include additional disclosure relating to the underlying.

Since 2018, certain packaged retail and insurance-based investment products may not be made available to retail investors without the publication of a key information document.

Special debt securities may also raise accounting issues that the issuer must consider. Hybrid securities that possess both debt and equity characteristics may present difficulties regarding the appropriate classification (whether debt or equity). From the perspective of the International Financial Reporting Standards, IAS 32 provides guidance for the classification of securities as debt or equity.

Law stated - 8 June 2023

Classification

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

The UK prospectus regime defines 'equity securities' to include shares, other transferable securities equivalent to shares and equity-linked securities. All those securities that are not equity securities are defined as 'non-equity securities'. Under the prospectus regime, the disclosure requirements for equity are more onerous than the disclosure requirements for debt, reflecting the level of risk associated with each kind of security. For example, both equity and debt prospectuses are required to contain risk factors, but risk factors for an equity prospectus relate to the profitability of the issuer and thus tend to be more detailed than risk factors for a debt prospectus that relate to the solvency of the issuer.

Law stated - 8 June 2023

Transfer of private debt securities

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

Provided that secondary market trading in debt securities complies with the regulatory requirements of the product governance regime and the PRIIPs regime, debt securities may be freely transferred in the UK. Other than in the case of some private placements, which are commercially similar to bank loans and designed as 'buy to hold' investments, there are no typical contractual limitations on the ability of investors to transfer privately offered debt securities.

Law stated - 8 June 2023

Cross-border issues

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

No. The UK allows offers of debt securities by foreign issuers into the UK on the same basis as it allows offers of debt securities by UK issuers. There are no special rules for UK issuers that offer securities outside the UK.

Law stated - 8 June 2023

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

The UK has an equivalence framework that allows the Financial Conduct Authority (FCA) to approve prospectuses drawn up in accordance with a third-country regime that are considered equivalent to the UK regime. HM Treasury made an equivalence declaration in relation to the EU prospectus regime, but the FCA has confirmed that it will not currently make use of its powers to approve prospectuses drawn up in accordance with the EU prospectus regime. In practice, this regime could, theoretically, be used by retail issuers because wholesale issuers are already exempt from the requirement to produce a prospectus in the UK because of the €100,000 denomination exemption. HM Treasury is in the process of reforming the UK equivalence regime for prospectuses.

Law stated - 8 June 2023

Underwriting

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

In a public offering of debt securities in the UK, it is usual practice for the managers to underwrite the bonds on a joint and several basis. This means that if any of the managers defaults, each other manager is liable to underwrite the defaulting manager's commitment. The subscription agreement specifies the principal amount to which each manager commits and how commissions and fees are to be distributed. Usually, commissions and fees are distributed pro rata to each manager's commitment.

In certain circumstances, the managers will not underwrite the issuance but will agree to use best efforts or reasonable efforts to place the notes.

Law stated - 8 June 2023

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

In the UK, underwriting debt offerings falls within the concepts of 'dealing in investments as principal', 'dealing in investments as agent' and 'arranging deals in investments', which are regulated activities under the Financial Services and Markets Act 2000. No person may carry on a regulated activity in the UK unless they are an authorised person. Credit institutions and investment firms that are authorised by the FCA that intend to underwrite debt offerings require that these specific regulated activities are included within their

permissions. Underwriting of debt offerings is also regulated by the product governance rules.

Law stated - 8 June 2023

Transaction execution

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

Transaction execution issues vary considerably from deal to deal. Issues can be commercial or market-related (eg, if the due diligence process reveals that the issuer's disclosure is unsatisfactory) or regulatory or technical (if the issuer is unable to comply with a requirement of the FCA). Transaction execution issues are more likely to arise in complex and innovative transactions or for debut issuers.

Transactions are usually settled on a delivery versus payment basis, a process under which the transfer of the proceeds and of the securities are made simultaneously on the basis of instructions given by the lead manager and the issuer.

Law stated - 8 June 2023

Holding forms

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

Public debt securities are usually represented by a global note, whether the note is in bearer form or registered form, in order to save the time and cost of printing definitive notes. For debt offerings where the notes are not offered to US persons, both bearer form and registered form are common. If there is a US offering, the notes will be in registered form to comply with US taxation requirements.

In certain limited circumstances, for example, if the issuer defaults or the clearing systems close down, the global notes can be exchanged into definitive notes. The global notes are held on behalf of the clearing systems by an agent bank acting as common depository or common safekeeper. Investors hold their entitlement via a chain of intermediaries leading to a direct account holder at a clearing system, with trading effected via electronic account transfers.

Law stated - 8 June 2023

Outstanding debt securities

24 | Describe how issuers manage their outstanding debt securities.

Issuers manage their outstanding debt securities via a number of liability management techniques, including open market purchases, consent solicitations and tender and exchange offers.

Open market purchases involve the issuer using a broker to buy the debt securities from market participants. Depending on the terms and conditions of the debt securities, after purchase, the issuer may either hold the debt securities in treasury for subsequent reissuance into the market or cancel them.

Consent solicitations involve the issuer seeking to amend the terms of existing bonds by having a resolution passed at a meeting of bondholders. The process for bondholder meetings, including voting mechanics, notice periods and quorums is set out in the trust deed or the fiscal agency agreement. Typically, trustees also have the power to amend the terms of existing bonds without bondholder consent to correct a manifest error.

Tender offers involve the issuer purchasing some or all of the existing debt securities for cash pursuant to a tender offer. The terms of the tender offer are set out in a tender offer memorandum sent to the bondholders. Typically, the issuer seeks to incentivise participation in the offer by means of a participation fee or by a structure known as a Dutch auction wherein each bondholder specifies the price at which it is willing to participate and the issuer selects bondholders on that basis.

Exchange offers involve the issuer purchasing some of or all the existing bonds in exchange for new bonds with different commercial terms. The terms of the exchange are set out both in an exchange offer memorandum and typically also a new prospectus in respect of the offer and admission of the new bonds. Exchange offers tend to be extremely bespoke and reflect specific commercial considerations. For example, a distressed issuer that is restructuring its debt may seek to issue new bonds that amortise over a longer period. If a resolution is required, care should be taken to ensure that the interests of the minority bondholders that vote against the resolution are not abused.

Law stated - 8 June 2023

REGULATION AND LIABILITY

Reporting obligations

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

The UK's transparency regime (that originally derived from the EU Transparency Directive) and market abuse regime (that originally derived from the EU Market Abuse Regulation) impose ongoing reporting obligations on the issuer during the life of the bonds. The issuer must also comply with continuing obligations under the UK's listing regime, the rules and regulations of the London Stock Exchange (LSE) and any additional contractual reporting obligations set out within the terms of the bonds and the transaction documentation.

The UK transparency regime requires all issuers to publish periodic financial information, including annual reports, and issuers of low denomination debt also to publish half-yearly

reports. Issuers are also required to publish information related to changes to the issuer's constitution and changes to the rights of holders.

The UK Market Abuse Regulation requires issuers to announce inside information that directly concerns the issuer and comply with a number of related record-keeping and procedural requirements. Inside information is information that is precise and not generally available that would likely have a significant effect on the price of the issuer's securities if it were made generally available. Inside information is further defined to mean information that a reasonable investor would be likely to use as part of the basis of their investment decision.

Law stated - 8 June 2023

Liability regime

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

A prospectus may give rise to liability under a number of different civil and criminal liability causes of action under statute or common law. There may be common law tortious liability for negligent misstatement where a person making a statement breaches the implicit duty of care owed by him or her. There may be statutory contractual liability for negligent misstatement under the Misrepresentation Act 1967 where an investor acted on an incorrect or misleading statement. Liability may also arise under the tort of deceit. The Financial Services and Markets Act 2000 (FSMA) also contains specific liability regimes for untrue or misleading statements in a prospectus and omissions from a prospectus.

The Fraud Act 2006 and the FSMA set out a number of criminal offences related to market abuse and false representation with the intent of making a gain or causing a loss.

Given the broad range of potential causes of action, it is possible that, in addition to the issuer, the managers may be subject to liability for misleading prospectuses in certain circumstances. The liability analysis is similar for all types of securities.

Law stated - 8 June 2023

Remedies

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

The remedy available to the investor depends on the relevant head of liability. The FSMA sets out a specific compensation regime payable to any person who suffers loss as a result of an untrue statement in a prospectus or the omission of information required to be included in a prospectus. If the investor is able to prove misrepresentation, they may be entitled to damages. The measure of damages will depend on the head of liability. Typically, damages in tort seek to put the claimant back in their original state before the tort, whereas

damages in contract seek to put the claimant in the position they would have been in had the contract been performed on its terms.

Law stated - 8 June 2023

Enforcement

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

Under the FSMA, the Financial Conduct Authority (FCA) has a statutory power to impose a penalty on an issuer who has contravened any provision of the FCA handbook or the FSMA. The FCA may also censure any person instead of imposing a penalty upon him or her. The nature of any penalty or censure tends to be extremely fact-specific and tailored to the particular circumstances at hand.

Law stated - 8 June 2023

Tax liability

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

Payments of interest on bonds may be made without deduction of or withholding for or on account of UK income tax, provided that bonds carry a right to interest and the bonds are and continue to be listed on a 'recognised stock exchange'. The LSE is a recognised stock exchange for the purposes of UK legislation.

Interest on money market instruments that have a maturity of fewer than 365 days may also be paid without withholding or deduction on account of UK income tax.

In other cases, and subject to the availability of another exemption, an amount must generally be withheld on account of UK income tax at the basic rate (currently 20 per cent) from any payments of interest on bonds that have a UK source. However, where an applicable double tax treaty provides for a lower rate of withholding tax (or for no tax to be withheld) in relation to a holder, HM Revenue and Customs can issue a direction to the issuer to pay interest to the holder without deduction of tax (or for interest to be paid with tax deducted at the rate provided for in the relevant double tax treaty).

Where interest has been paid under deduction for or on account of UK income tax, holders who are not resident in the UK may be able to recover all or part of the tax deducted under an appropriate provision in any applicable double taxation treaty.

Law stated - 8 June 2023

UPDATE AND TRENDS

Key developments of the past year

30 | Please provide any updates and trends in your jurisdiction's debt capital market.

ESG bonds

In recent years, there has been an increased trend in issuing green and other environmental, social or governance (ESG) bonds. ESG bonds typically fall into two categories: 'use of proceeds' bonds and sustainability-linked bonds.

Use of proceeds bonds are where the proceeds will be exclusively applied to finance or re-finance projects with clear environmental benefits (green bonds), positive social outcomes (social bonds) or a combination of green and social projects (sustainability bonds).

While the 'use of proceeds' model remains extremely popular, some issuers have been attracted to the relatively newer format of sustainability-linked bonds. Sustainability-linked bonds do not have a dedicated use of proceeds for eligible projects. Instead, the financial and/or structural features of the bond vary depending on the achievement of (and/or failure to achieve) pre-set ESG objectives. The most common example has been a coupon step-up if the issuer fails to meet certain pre-agreed sustainable performance targets linked to credible key performance indicators.

ESG bonds are not currently subject to significant regulation, but most issuers voluntarily choose to adhere to guidance from the International Capital Market Association, including, for example, its Green Bond Principles, which have four key components:

- use of proceeds;
- project evaluation and selection;
- management of proceeds; and
- reporting.

Benchmark reform and the transition from the IBORs to near risk-free rates

Benchmark reform and the transition from the interbank offered rates (IBORs) to near risk-free rates has been a complex multi-year project impacting all financing products and all major currencies. Several issues with IBORs were identified following the financial crisis in 2007, leading to comprehensive benchmark reform, which is ongoing. Broadly, the Financial Stability Board has recommended that authorities and benchmark administrators should reform and strengthen major IBORs and identify alternative risk-free rates and encourage the market to use them. Further to FCA announcements, sterling, euro, Swiss franc and Japanese yen LIBOR panels as well as panels for one-week and two-month US dollar LIBOR ceased at the end of 2021. The remaining US dollar LIBOR panels will cease at the end of June 2023. The FCA has announced its intention to use its powers to require the continued publication on a changed methodology (also known as 'synthetic') basis for the one-month, three-month and six-month US dollar LIBOR settings until the end of September 2024. Synthetic three-month sterling LIBOR (the last remaining synthetic sterling LIBOR rate) will cease at the end of March 2024. These synthetic LIBOR

rates are not intended for new contracts, but are available for some holders of legacy LIBOR-referencing contracts.

New sterling and US dollar-denominated floating rate notes are typically being linked to SONIA and SOFR (the near risk-free rates for sterling and dollars, replacing sterling LIBOR and US dollar LIBOR), and market conventions for documenting these near risk-free rates have developed.

Although there are still no plans to discontinue EURIBOR, there has been a focus on implementing robust fallback provisions to address any future discontinuation following recommendations from the Working Group on Euro Risk-Free Rates.

UK Prospectus Regime Reform

Following the UK's exit from the EU, there has been a number of initiatives to reform financial services regulation in the UK. As part of this and in particular, the UK Listing Review (the Hill Review), in March 2022, HM Treasury published a policy paper on reform of the UK prospectus regime. Among a range of other changes, HM Treasury suggested a departure from the current UK Prospectus Regulation regime (inherited from the EU) under which prospectuses for public offers and admission to trading are subject to the same overall regime. HM Treasury proposed that the regulation of public offers of securities and the regulation of admissions to securities markets should be dealt with separately.

In December 2022, HM Treasury published an illustrative statutory instrument and policy note that set out a new framework for the prospectus regime. In particular, the statutory instrument proposes to give the FCA powers to specify the circumstances when a prospectus is required if securities are to be admitted to trading on a UK-regulated market, determine the contents, approval and publication of a prospectus and certain other matters that are currently set out in the UK Prospectus Regulation.

The FCA is currently seeking engagement from market participants and trade associations as to the scope of its proposed powers under the new prospectus regime before embarking on a formal consultation in 2024. The new regime is not expected to be in place until 2025.

Law stated - 8 June 2023

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UPDATE AND TRENDS

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MARKET SNAPSHOT

Market climate

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

The US debt capital markets are the largest in the world – over twice the size of the next largest market – and are an important source of capital for companies to finance their businesses. Debt securities issuances were significantly lower in 2023 and 2022 compared to the levels seen in 2021 and 2020 as a result of rapid increases in interest rates, uncertain macroeconomic conditions and market volatility. However, companies have continued to access the US debt capital markets at close to pre-pandemic levels, and 2023 issuance levels showed a slight improvement over 2022.

Commonly offered debt securities in the United States include investment-grade notes, high-yield notes, convertible notes, structured notes and asset-backed notes. In addition, in recent years, green or sustainability linked debt securities have become increasingly common. The steps involved in conducting an offering of debt securities in the United States depend on whether the transaction will be registered with the Securities and Exchange Commission (SEC) or whether it will be conducted on an unregistered basis in reliance on an exemption from the registration requirements of section 5 of the Securities Act of 1933. The type of security offered and the manner of offering depend on a range of factors, including the issuer's credit profile, its financing, liquidity and capital needs, its reporting status under the Securities Exchange Act of 1934 and the prevailing interest rate environment. The offering timeline and process, the required documentation, the scope of potential liability and the types of investors to whom the securities may be offered and sold may be impacted by these structuring decisions.

Law stated - 31 December 2023

Regulatory framework

2 | Describe the general regime for debt securities offerings.

Offerings of debt securities in the United States must comply with the US federal securities laws as well as laws and regulations that may apply at the state level (commonly known as Blue Sky laws). The Securities Act is the principal statute that governs the offer and sale of securities in the United States and requires that an offer or sale be registered with the SEC or qualify for an exemption from registration (ie, an exempt transaction or exempt security). In addition, the Securities Act imposes disclosure requirements for registered public offerings to ensure that investors have access to accurate information in making investment decisions. The Securities Act, together with the Exchange Act, the Investment Company Act of 1940, the Sarbanes-Oxley Act of 2002 (parts of which are incorporated in the Exchange Act) and other securities laws, form a comprehensive framework of securities regulation in the United States. The Trust Indenture Act of 1939 also applies to public offerings of debt securities in the United States.

The SEC is the regulatory agency charged with administering the US federal securities laws and overseeing the key participants in the US capital markets system. The Financial Industry Regulatory Authority, an independent, self-regulatory organisation working under the supervision of the SEC, oversees its member financial institutions, including broker-dealers, and regulates, among other things, underwriting fees and conflicts of interest in public offerings of securities. The Department of Justice may monitor and bring charges against market participants for fraud or other criminal violations of the US federal securities laws. Certain entities in particular industries, such as financial institutions, are also subject to industry-specific regulations that relate to securities offerings.

Issuers that list debt securities on an exchange will become subject to the reporting regime under the Exchange Act and be subject to oversight by the relevant exchange.

Law stated - 31 December 2023

FILING AND DOCUMENTARY REQUIREMENTS

General filing requirements

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

In a public offering of debt securities in the United States, the issuer must file a registration statement with the Securities and Exchange Commission (SEC) under the Securities Act. The form of registration statement used will depend on the issuer, its reporting history and market capitalisation, among other factors. The most common types of registration statements include the following:

- A registration statement on Form S-1 (or F-1 in the case of a foreign private issuer (FPI)): this is a long-form registration statement that may be used to register debt securities by an issuer that is not a reporting company under the Exchange Act or has not been subject to the reporting requirements for at least 12 calendar months.
- A registration statement on Form S-3 (or F-3 in the case of an FPI): this is a short-form registration statement that may be used by eligible seasoned issuers to register securities, most commonly in the form of a 'shelf registration' pursuant to which offerings of securities may be made from time to time (referred to as 'shelf offerings'). Eligible issuers include registrants that have filed all required reports under the Exchange Act for at least 12 calendar months on a timely basis and have a worldwide market capitalisation held by non-affiliates of at least US$75 million. An issuer may also be eligible to use Form S-3 or F-3 to register non-convertible investment-grade debt securities if certain additional eligibility requirements are met.
- An automatic shelf registration statement for well-known, seasoned issuers (WKSIs): this is a short-form registration statement on Form S-3 or F 3 that is automatically effective upon filing with the SEC. To qualify as a WKSI, an issuer must be eligible to register a primary offering of its securities on Form S-3 or F-3; have a worldwide market capitalisation held by non-affiliates of at least US$700

million or have issued at least US$1 billion aggregate amount of non-convertible securities other than common equity in the last three years for cash; and not be an ineligible issuer or an asset-backed issuer. The benefit of an automatic shelf registration statement is that it may be used to issue securities immediately upon filing with the SEC, whereas each of the Forms referred to above require approval from the SEC following a comment period prior to use.

Each form-of-registration statement contains two parts. The first part is the prospectus, which contains material information regarding the issuer and the securities being offered. The prospectus is used to market an offering to investors. The second part contains additional information and exhibits, which are filed with the SEC but not distributed to investors.

For shelf offerings, the issuer is required to file a prospectus supplement to the prospectus included in the shelf registration statement to provide additional information about the offering and the terms of the securities.

Under the Trust Indenture Act (TIA), an issuer is required to file a form of TIA-qualified indenture and a Form T-1 relating to the trustee with the registration statement. The indenture governs the terms and conditions of the securities being offered. The TIA requires the inclusion of certain provisions in the indenture for the benefit of the security holders. Indentures for private offerings of debt securities often include many TIA provisions, even though it is not strictly required.

Law stated - 31 December 2023

Prospectus requirements

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

The registration statement filed in connection with any public offering of debt securities must include a prospectus. The applicable form of registration statement sets forth the qualitative and quantitative disclosure requirements that govern the content of the prospectus. The following are some of the principal categories of information that must be disclosed:

- descriptions of the issuer's business, the securities being offered and the expected use of proceeds from the offering;
- risk factors relating to the issuer and the securities;
- information regarding the issuer's executive officers and directors and corporate governance arrangements;
- information about the underwriters and the plan of distribution;
- tax considerations relating to the securities;
- consent from legal advisers and auditors;
-

financial statements and any related information for the issuer and any guarantors prepared in accordance with, or reconciled to, the US Generally Accepted Accounting Principles or, in the case of FPIs, the International Financial Reporting Standards;

- if required under the SEC's rules depending on the materiality of the transaction, financial statements for any significant company being acquired (including pro forma financial statements relating to the acquisition); and
- management's discussion and analysis (MD&A) of financial condition and results of operations.

Under the SEC's integrated disclosure framework, the disclosure requirements in filings under the Securities Act and the Exchange Act are based on the same set of rules and regulations for US companies (Regulation S-K for non-financial statement disclosure and Regulation S-X for financial statement disclosure). FPIs satisfy a different set of disclosure requirements, which are similar but in some respects less proscriptive and allow a foreign company to provide only disclosures required in its home country. Issuers that are subject to Exchange Act reporting requirements can generally incorporate by reference disclosure from their Exchange Act filings (eg, financial statements, MD&A and business description) into their registration statement under the Securities Act, which can save significant time and effort during the preparation of offering documents.

Law stated - 31 December 2023

Documentation

5 | Describe the drafting process for the offering document.

The process for drafting the offering documents for public offerings and private offerings is very similar. In public offerings, the offering document is called a prospectus (which may be supplemented by a prospectus supplement), and in private offerings, it is generally called an offering memorandum or offering circular.

A prospectus in a public offering must satisfy the applicable disclosure requirements. In addition, the disclosure must be complete in all material respects and free from material misstatements or omissions. There is no distinct test for materiality; rather, information is material if it would be 'viewed by the reasonable investor as having significantly altered the "total mix" of information made available' (*Basic Inc v Levinson*, US Sup Ct (1988)). Material misstatements or omissions in the offering documentation can give rise to lawsuits by investors, including class actions, or SEC enforcement actions.

To help ensure the accuracy and completeness of an offering memorandum in a private offering, its disclosure will generally track the disclosure in a prospectus for a comparable registered offering. This approach mitigates potential liability for the issuer and other market participants. However, because an unregistered offering is not subject to the same disclosure requirements, market participants may take a more flexible approach with regard to certain, specific SEC requirements that are burdensome to satisfy. Offering documents for private offerings must also not contain any material misstatements or omissions, and

offering documents for both registered and unregistered offerings must not contain any knowing and wilful false statements, whose inclusion could potentially result in criminal prosecution.

All parties involved in an offering are involved to various degrees in the drafting process. The issuer and its counsel draft most of the disclosure, while the underwriters and their counsel often draft certain sections of the offering document, including the description of the notes, which describes the terms of the securities, and the underwriting section, which describes who the underwriters will be, what compensation they will receive and any conflicts of interest, among other things. All parties, including the auditors, are involved in reviewing and commenting on the offering document. In addition, underwriters and their counsel may request backup materials to support the disclosure, particularly quantitative disclosure that is not otherwise comforted by the auditors. The trustee and its counsel will generally review the portions of the offering document relating to the terms of the securities, with a focus on those sections relating to the rights and obligations of the trustee.

The drafting process will be significantly more extensive if an issuer is not subject to the reporting obligations of the Exchange Act or is not able to incorporate its Exchange Act filings into the registration statement or offering memorandum. In particular, preparation of financial information that is being used as part of the disclosure for a US offering for the first time can require a significant amount of time. In addition, in a registered offering, unless the issuer is a WKSI whose registration statement is effective automatically upon filing, the drafting process may involve a series of comments from and responses to the SEC, which may involve various revisions to the offering document to accommodate the SEC's comments. The SEC review process can take a couple of months or more, depending on the scope of the SEC's comments and the revisions required.

Law stated - 31 December 2023

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

The key document governing the terms and conditions of the debt securities is the indenture. An indenture may be in the form of a stand-alone indenture or a base indenture that is supplemented in connection with a particular offering of debt securities. The parties to the indenture are the issuer, any guarantors and the trustee. The interests of the security holders are represented by the trustee. The underwriters are not parties to the indenture but provide input on the terms and conditions investors will expect and accept, particularly with respect to high-yield, green or sustainability linked or other complex debt securities.

A summary of the terms and conditions of the debt securities is provided in a section of the prospectus called the Description of the Notes. Although this section does not govern the terms and conditions of the securities, it must accurately describe the securities because investors will rely on it for making their investment decisions, and the issuer and other market participants could have potential liability for any material misstatements or omissions.

In registered offerings, the indenture or form of indenture is accessible as an exhibit to the issuer's registration statement, and the executed indenture or supplemental indenture is filed as an exhibit to a current report filed by the issuer with the SEC at closing. For private

offerings, issuers that are reporting companies under the Exchange Act also generally file their indentures as exhibits to their periodic reports filed with the SEC.

Law stated - 31 December 2023

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

A registration statement for a public offering must be filed with the SEC before any offers are made and must become effective before any sales are made. With the exception of shelf registration statements for WKSIs, which become effective automatically upon filing, the staff of the SEC may review a registration statement before declaring it effective. The SEC review may involve a full review of the registration statement or a limited review of certain aspects of the disclosure. Alternatively, the SEC may advise the issuer that it does not intend to conduct a review. The SEC will initially take about 30 days to review the initial filing and less time to review subsequent amendments.

An issuer will seek to have any SEC comments cleared before beginning marketing efforts for the offering. This will avoid the risk of further amendments to the document after it has been sent to potential investors that could require recirculation of the prospectus. In addition, the Financial Industry Regulatory Authority (FINRA) must review all public offerings in which a broker-dealer participates as the underwriter, unless an exemption applies. The FINRA review is primarily focused on underwriting compensation and disclosure of potential conflicts of interest involving the underwriters. The FINRA rules provide exemptions from the filing requirements for, among other things, particular types of securities, such as investment-grade, non-convertible debt securities, as well as offerings of securities registered on Forms S-3, F-3 or F-10 if the registrant is an 'experienced issuer' under the FINRA rules. If a FINRA review is required, the SEC will expect FINRA to issue a no-objection letter before the SEC will declare the registration statement effective.

In registered offerings, the registration statement, including the prospectus, becomes publicly available on the SEC's website after it is filed. In addition, the issuer will provide the underwriters with a PDF of the prospectus for distribution to investors during marketing and may, if requested, also provide hard copies of the prospectus.

In unregistered offerings, the offering document is not required to be publicly filed and remains confidential. Private offerings of debt securities do not require SEC or FINRA approval. Similar to public offerings, the issuer will share a PDF of the offering document with the underwriters for distribution to investors in connection with the marketing of the offering, and it may, if requested, also deliver the offering document in hard copy.

Law stated - 31 December 2023

Authorisation

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

Public sales of debt securities in the United States cannot be made unless the issuer has an effective registration statement on file with the SEC. If the registration statement is subject to SEC review, it will not be declared effective until all SEC comments have been resolved and the review is complete. Only shelf registration statements filed by WKSIs become automatically effective without SEC review. Once a non-WKSI shelf registration statement has been declared effective, any subsequent prospectus supplements filed with the SEC in shelf offerings will not be subject to SEC review.

The SEC review and comment process varies in length. For example, the SEC staff may decide not to review a shelf registration statement filed by a non-WKSI seasoned issuer but will almost certainly review a long-form registration statement filed by a non-reporting issuer, the review process of which could take a couple of months or longer.

Under US federal securities laws, the issuer or underwriters may 'test the waters' and engage in certain written or oral communications with investors before or after a registration statement is filed to gauge investor interest in a contemplated registered securities offering. These communications are subject to various conditions and may be required to be publicly filed.

In addition, FINRA may review the registration statement, and industry-specific regulators, such as regulators of financial institutions, may also review the offering documents.

Law stated - 31 December 2023

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

The SEC will only declare a registration statement effective once all comments have been cleared and the review process is complete. Industry specific regulatory approval may be required for certain issuers.

Law stated - 31 December 2023

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

Every offer or sale of a security must be either registered with the SEC or exempt from registration (ie, in an exempt transaction or involving an exempt security). Most transaction-based exemptions are set out in, or based on, section 4 of the Securities Act. To provide issuers with greater certainty when relying on those exemptions, the SEC has adopted rules that set forth 'safe harbours' from registration. Each exemption and safe harbour has specific requirements relating to issuer eligibility, the number and type of eligible investors, offering size and communication restrictions, among other matters. The most commonly used exemptions are:

- Private placements: the most commonly used registration exemptions by issuers are the private placement exemptions provided by section 4(a)(2) and Regulation D. Securities sold in a private placement are restricted securities subject to resale restrictions:

- Section 4(a)(2) of the Securities Act exempts 'transactions by an issuer not involving any public offering'. Although 'public offering' is not defined, factors used to determine the nature of the offering include the number and sophistication of offerees, the size and manner of the offering and investor access to information.
- Regulation D under the Securities Act provides three safe harbours from registration (Rules 504, 506(b) and 506(c)). Rule 504 provides an exemption for small offerings of securities not exceeding US$5 million in any 12-month period as long as certain conditions are met. Rule 506(b), most commonly relied upon by issuers, exempts offerings of any size and permits sales to an unlimited number of 'accredited investors' and up to 35 other purchasers, provided there is no general solicitation or advertising. In contrast, Rule 506(c) permits general solicitation or advertising, provided that all purchasers are accredited investors and issuers take reasonable steps to verify that purchasers are accredited investors. Accredited investors include enumerated categories of entities (eg, banks, broker-dealers and insurance companies) and qualifying natural persons (based on certain wealth, income or knowledge requirements). Rule 506(d) disqualifies certain 'bad actors' from participating in unregistered offerings under Regulation D.

- Resale exemptions for privately placed securities: Rule 144A and Regulation S are resale safe harbours that are available to persons other than the issuer to effect resales of restricted securities. The safe harbours under Rule 144A and Regulation S are often used concurrently in unregistered offerings of debt securities, in other words:
  - Rule 144A is a safe harbour frequently used in the US debt capital markets that permits financial intermediaries, such as underwriters ('initial purchasers' in this context), to buy unregistered securities from an issuer and resell them to 'qualified institutional buyers' (entities that are deemed financially sophisticated), provided certain conditions are satisfied. Securities sold in a Rule 144A transaction must not be the same class of securities listed on a US national securities exchange. Securities sold pursuant to Rule 144A are restricted securities that are subject to resale restrictions.
  - Regulation S is a safe harbour based on extraterritoriality. Under Regulation S, securities may be offered and sold outside the United States in offshore transactions without registration with the SEC. Generally, an offering under Regulation S must not be made to persons in the United States, and there can be no directed selling efforts in the United States. Additional conditions apply depending on the category of issuer.

- Exempt securities: section 3 of the Securities Act exempts certain types of securities from registration. For example, section 3(a)(2) exempts any security issued or guaranteed by a US bank. A foreign bank can also rely on this exemption if the foreign bank has a US branch or agency that issues the securities directly or guarantees the securities issued by the foreign parent. In addition, commercial paper with a maturity of nine months or less may be exempt under section 3(a)(3) (or, alternatively, may be issued pursuant to the section 4(a)(2) private placement exemption).

Although unregistered offerings are not subject to the registration requirements of the Securities Act, they are still subject to, among other things, the anti-fraud provisions of section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Law stated - 31 December 2023

Offering process

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

A typical public offering process for debt securities can be divided into four steps.

Organisational matters

After the issuer engages one or more banks as underwriters, the working group will have a 'kick-off' call to ensure that all parties are aligned on the timeline, responsibilities and documentation.

Document preparation and due diligence

The offering documentation will be prepared by the issuer and its counsel with input from all parties. Underwriters' counsel will prepare the underwriting agreement and take an active role in documentary due diligence. All parties will participate in due diligence calls with the issuer's management and the auditors.

Once all parties have had the opportunity to review and comment on the registration statement, the registration statement will be filed with the SEC. After receiving the SEC's comments, the issuer and its counsel will take the lead in responding to the comments and amending the registration statement. During this process, the parties will continue to negotiate the transaction documents, including closing deliverables, and conduct due diligence.

Assuming favourable market conditions, once all SEC comments have been addressed, the offering will be launched, and marketing will commence using the prospectus and, often, a roadshow presentation. This process helps to gauge investor interest in the securities. Management may also participate in calls with investors.

Pricing

Unless the issuer is a WKSI, at least two business days before pricing, the issuer will file an acceleration request with the SEC, requesting that the registration statement be declared effective. Subsequently, a pricing call is held with representatives of the issuer, including any required pricing committee, and the underwriters to determine the final offering price, the interest rate and other terms of the debt securities.

Following the pricing call, the underwriters and their counsel prepare a term sheet reflecting the pricing terms. Once all parties have reviewed the term sheet, the issuer files the final term sheet with the SEC as a free-writing prospectus. Concurrently, the underwriters confirm sales with the investors. The issuer, any guarantors and the underwriters execute the underwriting agreement, and the auditors then deliver their comfort letter to the underwriters. Within two business days after pricing, the issuer files the final prospectus reflecting the pricing terms with the SEC.

Settlement

Settlement for a debt securities offering typically occurs two to seven business days following the pricing date. On the settlement date, the indenture is executed, and closing documents are delivered. Following completion of the documentary conditions for settlement, the underwriters wire the net proceeds to the issuer, and the issuer issues and delivers the debt securities to the underwriters. Settlement usually occurs through the Depository Trust Company. After the offering settles, the issuer files a current report with the SEC, which attaches the executed indenture and a legal opinion regarding the legality of the debt securities.

Offerings of debt securities pursuant to an effective shelf registration statement can be done on an accelerated timeline and are frequently used by established SEC-reporting companies. At launch, a preliminary prospectus supplement reflecting the terms of the particular offering, along with any necessary updates to the base prospectus, is filed with the SEC. The final prospectus supplement reflecting the pricing terms is filed with the SEC within two business days of pricing.

Unregistered offerings generally follow a similar process, except that no SEC filings are required. A confidential offering memorandum is prepared that is generally consistent in form and substance with the disclosure in a prospectus for a comparable public offering. Marketing, pricing and settlement also follow a similar process. Depending on the issuer and the number and nature of the offerees, an offering document may not be used in certain private placements of debt securities.

Law stated - 31 December 2023

Closing documents

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

Both public and private offerings of debt securities involve a number of documents that are delivered at closing. The primary documents required by the underwriting or purchase agreement or indenture include:

- legal opinions and disclosure letters (10b-5 letters) addressed to the underwriters or initial purchasers from both counsel to the issuer and counsel to the underwriters;
-

comfort letters from the issuer's independent auditors addressed to the underwriters or initial purchasers, providing certain assurances in respect of financial information included in the registration statement or offering memorandum;

- certificates from the issuer's officers certifying various matters, including the continued accuracy on the closing date of the representations and warranties in the underwriting or purchase agreement;
- a secretary's certificate from the issuer attaching organisational documents and resolutions and certifying that documents such as the registration statement, underwriting or purchase agreement and indenture have been signed by duly authorised signers of the issuer;
- opinions and certificates addressed to the trustee; and
- a certificate from the trustee.

Law stated - 31 December 2023

Listing fees

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

Typically, investment-grade securities are not listed on an exchange, although it is common for trading markets to develop. Certain foreign issuers list debt securities on an exchange for non-US legal or tax reasons where a listing is required. If debt securities are listed, both the New York Stock Exchange (NYSE) and Nasdaq have an initial listing fee and an ongoing annual fee that vary depending on the type of debt securities, the principal amount issued and outstanding and whether other securities of the issuer are already listed on the exchange. For example, the initial listing fee for bonds on the NYSE is US$25,000, and the annual listing fee for structured products ranges from US$25,000 to US$100,000.

Law stated - 31 December 2023

KEY CONSIDERATIONS

Special debt instruments

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

Depending on prevailing market conditions, including interest rates, markets remain active in the United States for various types of special debt instruments. Convertible bonds, for example, have at times been attractive across industries, in particular among large publicly traded technology and life sciences companies. In addition, structured notes, linked to the performance of one or more underlying assets, continue to be actively offered by large financial institutions to retail investors.

Debt instruments are sometimes coupled with derivatives to enhance their features for market participants. For example, an issuer will sometimes issue convertible bonds while

also entering into a call spread with affiliates of the underwriters. A call spread transaction is designed to protect the issuer against equity dilution by effectively raising the conversion price for the bonds.

Law stated - 31 December 2023

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

The registration and disclosure requirements under the Securities Act and Exchange Act are generally applicable regardless of the type of securities being offered. However, certain types of companies, such as financial institutions, investment companies and asset-backed issuers are subject to additional disclosure requirements.

The Financial Industry Regulatory Authority (FINRA) also imposes suitability requirements on FINRA-member broker-dealers, meaning that they must determine whether the instrument being offered to a particular investor is suitable for that investor. It may not be appropriate, for example, for broker-dealers to sell highly novel or complex securities to certain retail investors, even if the securities are registered with the Securities and Exchange Commission (SEC).

In addition, the New York Stock Exchange (NYSE) and Nasdaq shareholder approval requirements relating to the issuance of additional equity securities may apply to convertible bonds; thus, careful analysis is required in advance of those offerings.

Special debt instruments can involve complex accounting implications for the issuer, which are often dependent on the settlement mechanism (eg, cash, physical or net share settlement) and other features. The issuer's auditors should be closely consulted in advance of issuing those types of instruments.

Law stated - 31 December 2023

Classification

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

A security's features will determine whether it is classified as a debt or equity instrument. Although a security may be treated as debt or equity for purposes of the requirements of the Securities Act, the security may be treated differently for tax, accounting, credit rating or regulatory capital purposes. For example, although a mandatorily convertible debt security would be treated as a debt security for purposes of the Securities Act, requiring it to be issued under an indenture qualified under the Trust Indenture Act, it may be treated as equity for tax and accounting purposes.

Law stated - 31 December 2023

Transfer of private debt securities

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

Debt securities sold in a private offering are considered restricted securities and may only be resold in compliance with an exemption from registration or in a registered transaction. Rule 144 of the Securities Act provides an exemption for the resale of restricted securities in the United States and provides that restricted securities may be publicly resold if a number of conditions are met, including a prescribed holding period. A six-month holding period is required for resales involving securities of an issuer that is an SEC reporting company by a holder that is not an affiliate of the issuer. A one-year holding period is required for resales by a holder that is an affiliate of the issuer or if the issuer is not an SEC reporting company. Additional conditions must also be satisfied in transactions by people or entities that are deemed to 'control' the company, often including directors, certain officers and significant shareholders (referred to as 'affiliates') before the securities can be sold under Rule 144, including volume limitations and filing requirements. Once sold under Rule 144 to a non-affiliate of the issuer, formerly restricted securities become unrestricted securities.

Investors in unregistered debt securities may be granted registration rights, which generally require the issuer to register the debt securities under the Securities Act for resale within a specified period after the offering or upon request of the holders of the debt securities.

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Cross-border issues

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

A key consideration for a foreign company is whether it qualifies as a foreign private issuer (FPI) as defined in Rule 405 under the Securities Act. If a company does not qualify as an FPI, it is subject to the same registration and disclosure requirements as those applicable to domestic US entities. A foreign company will qualify as an FPI:

- if 50 per cent or less of its outstanding voting securities are held directly or indirectly of record by US residents; or
- if each of the following is true:
    - the majority of its executive officers or directors (considered separately) are not US citizens or residents;
    - no more than 50 per cent of its assets are located in the United States; and
    - its business is not administered principally in the United States.

The SEC has adopted specific rules applicable to FPIs that are designed to recognise international and home jurisdiction standards. The rules applicable to FPIs include the following:

- an FPI may prepare its financial statements in accordance with the International Financial Reporting Standards (as approved by the International Accounting Standards Board) and is not required to reconcile them to the US Generally Accepted Accounting Principles;
- an FPI is not required to publicly file quarterly financial information (although recent period information may be required to undertake an offering of debt securities);
- an FPI may be automatically exempt from Exchange Act reporting obligations if certain conditions are satisfied; and
- an FPI can use special SEC registration and reporting forms (including, eg, Form F-1 or Form F-3 for registering debt securities), which require fewer disclosure requirements than the corresponding forms applicable to US issuers.

NYSE and Nasdaq rules also provide exemptions for FPIs from many of their corporate governance requirements.

US issuers can offer debt securities outside the United States without registration under the Securities Act by relying on Regulation S.

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

The Multijurisdictional Disclosure System permits eligible Canadian issuers to, among other things, register securities under the Securities Act and satisfy reporting requirements under the Exchange Act by use of documents largely prepared in accordance with Canadian securities requirements.

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Underwriting

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

Public and Rule 144A debt offerings are typically underwritten by a syndicate of banks. Private placements of debt securities will not be underwritten, and the securities will be purchased directly from the issuer by the individual purchaser through a placement agent.

In underwritten offerings, the syndicate is generally led by one or several lead underwriters that provide marketing and pricing advice to the issuer. A master agreement among underwriters will govern the relationship among the syndicate members, including the underwriters' proportionate liability.

Almost all underwritten offerings are done on a 'firm commitment' basis, which means that the underwriters commit to purchase from the issuer all the securities being offered

to the public and, therefore, carry all the marketing risk. Underwriters purchase the debt securities from the issuer at a discount to the public offering price, and that spread is their compensation for their work on the offering.

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

FINRA regulates the activities of underwriters in US securities offerings. In public offerings, FINRA's rules primarily relate to the regulation of conflicts of interests (and required disclosure) and excessive and unfair compensation. FINRA also requires notice filings in certain private offerings, generally where the investors include natural persons. Approval is not required in connection with entry into underwriting arrangements.

Law stated - 31 December 2023

Transaction execution

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

Settlement of a debt offering usually occurs within two to seven business days after the pricing date. Registered offerings are generally settled through the Depository Trust Company (DTC). For those offerings, the issuer usually prepares global debt securities, the originals of which are delivered to the trustee, and once the offering settles, investors hold interests in the debt securities in book-entry form. However, for certain unregistered debt securities offerings, such as those done as a section 4(a)(2) private placement, individual notes may be issued to each investor, which can involve considerable advance planning and coordination.

On the closing date for an offering, the underwriters will generally send payment for the securities to the issuer, and once the issuer confirms receipt of the payment, a closing call is held with the underwriters, the issuer, counsel and the DTC. During the call, the DTC will confirm that the securities have been issued and delivered to the account of the underwriters. In certain cases, delivery of the debt securities is made against payment, which involves additional advance coordination.

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Holding forms

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

Almost all debt securities in the United States are held in registered form because of tax considerations; bearer notes are uncommon and may be subject to adverse tax

consequences. In registered offerings, debt securities are generally evidenced by global certificates, and the investors in the securities hold their interests indirectly in book-entry form through the DTC. Most securities are directly held by broker-dealers that participate in the DTC system. Unregistered debt securities may be certificated.

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Outstanding debt securities

24 | Describe how issuers manage their outstanding debt securities.

Depending on the prevailing interest rate environment, liquidity needs and other considerations, issuers manage their outstanding debt securities through a variety of means, including:

- cash redemption, if the securities provide for a redemption mechanism (which may be at the issuer's option or mandatory following the occurrence of certain events and which may include the payment of a make-whole premium);
- exchange offers through which an issuer can exchange outstanding debt securities for new debt securities;
- open-market repurchases;
- privately negotiated repurchase transactions;
- public tender offers; and
- consent solicitations to amend the terms of outstanding securities.

Depending on the transaction, additional SEC disclosure or registration requirements may be applicable. For example, tender offers (including exchange offers) for debt securities must be conducted in compliance with the tender offer rules under the Exchange Act, which provide, among other things, that a tender offer generally must be kept open for at least 20 business days from the commencement, subject to extension if certain terms of the tender offer change. Five business-day tender offers and exchange offers for investment-grade debt are permitted when certain conditions are satisfied.

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REGULATION AND LIABILITY

Reporting obligations

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

A registered offering of debt securities will result in an issuer becoming subject to the reporting requirements under the Exchange Act unless the issuer is already a Securities and Exchange Commission (SEC) reporting company. The periodic reports that must be

filed by a US reporting company under the Exchange Act include annual reports, quarterly reports and current reports.

Annual reports are comprehensive disclosure documents that require audited financial statements, a management's discussion and analysis (MD&A) of financial condition and results of operations and a description of the issuer's business and risk factors, among other material information. Quarterly reports are generally considerably shorter and require quarterly unaudited financial statements, an MD&A and certain updates to the information included in the annual report. Current reports are triggered by the occurrence of specific material events, such as entry into a material agreement or a change in the board of directors of the issuer, and generally must be filed within four business days of the reportable event.

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Liability regime

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

The issuer, its directors and officers who sign the registration statement for a public offering, the auditor and any underwriters may be subject to liability under section 11 of the Securities Act for any material misstatements or omissions in the registration statement and related prospectus. There is strict liability for the issuer under section 11, but other parties, such as directors, signing officers and underwriters, may be able to assert a due diligence defence if they can show that they engaged in reasonable investigation and had reasonable grounds to believe, and believed, in the accuracy of the challenged disclosure.

In addition, any person who offers or sells a security in a public offering by use of offering material or an oral communication containing a material misstatement or omission may be subject to liability under section 12(a)(2) of the Securities Act. Similar to the due diligence defence available under section 11, a defendant may be able to avoid liability if it can show that it did not know, and using reasonable care could not have known, of the material misstatement or omission.

Section 11 and section 12(a)(2) liability is applicable only to public, not private, offerings. However, in both private and public offerings, issuers and other parties may face liability under section 10(b) of the Exchange Act and Rule 10b-5 thereunder. To be liable under section 10(b) or Rule 10b-5, a defendant must have acted recklessly or wilfully, which is a higher standard than under section 11 and section 12(a)(2).

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Remedies

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

Depending on the circumstances, investors may seek to obtain damages or rescind the purchase of the securities.

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Enforcement

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

The SEC may sanction individuals or entities through administrative proceedings. Possible sanctions include cease and desist orders, suspension or revocation of broker-dealer and investment adviser registrations, censures, bars from association with the securities industry, civil monetary penalties and disgorgement. The SEC may also seek similar sanctions in civil suits brought in US federal court.

The Department of Justice may pursue criminal actions, which can result in damages or imprisonment, or both. The Financial Regulatory Authority is able to impose fines, restitution or disgorgement on its member firms or, for more egregious violations, can suspend members and employees involved in the misconduct. Other regulators, such as those that regulate financial institutions, may have additional sanctioning powers.

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Tax liability

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

The primary tax issue for a US corporate issuer of debt instruments is whether the issuer can deduct the interest for US tax purposes. That requires an analysis of the terms of the instrument to ensure that it should be classified as a debt instrument for US tax purposes. In addition, interest expense of a US corporation is generally not deductible to the extent in excess of 30 per cent of the adjusted taxable income of the issuer. Adjusted taxable income is similar to 'earnings before interest, taxes, depreciation, and amortization', or EBITDA, for the taxable years 2018 to 2021 and 'earnings before interest and taxes', or EBIT, thereafter.

One significant tax issue for US taxable investors is whether the debt instruments are treated as issued with an original issue discount (OID) in excess of a de minimis amount, in which case investors must generally accrue the OID over the life of the security. If a secondary market investor acquires a debt security at a discount to its issue price (or at a discount to the adjusted issue price in the case of a security issued with an OID), the investor may be required to treat a portion of the gain as ordinary income.

In addition, if a debt security provides for contingencies, it is possible that the debt instrument could be treated as a contingent payment debt instrument for tax purposes, in which case a US investor may be required to accrue phantom income and to treat gain as ordinary rather than capital.

Purchases and sales of debt instruments are not subject to US transfer taxes. Debt securities that are held in bearer form may be subject to adverse tax consequences.

A non-US investor is generally not subject to US withholding tax on interest payments on debt securities issued by a US issuer if the investor:

- provides standard US tax forms or other acceptable information to a withholding agent; and
- does not actually or constructively own 10 per cent or more of the issuer's voting stock.

In addition, withholding tax could be imposed under the rules of the Foreign Account Tax Compliance Act if the investor or an intermediary does not comply with certain certification and identification requirements.

Non-US investors' capital gains are generally not subject to taxation in the United States as long as they are not in the United States for 183 days in a calendar year.

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UPDATE AND TRENDS

Key developments of the past year

30 | Please provide any updates and trends in your jurisdiction's debt capital market.

Debt issuances in the United States remained relatively stable in 2023 compared to 2022, with 2023 issuance levels showing only a slight improvement over 2022 levels, and in each case representing a significant decline compared to the levels seen in 2021 and 2020 (Refinitiv). High levels of inflation, additional increases in the Federal Reserve's target federal funds rate during the first half of 2023, ongoing market volatility (including as a result of the US regional banking crisis in early 2023) and uncertain economic outlooks in the United States and globally continued to impact the US debt capital markets in 2023. Based on data from the Securities Industry and Financial Markets Association (SIFMA), US corporate bond issuances totalled US$1.2 trillion during the first 10 months of 2023, up 2.9 per cent year-over-year. This amount reflects a significant decrease from total issuances during the same period of 2020 and 2021. Average yields on investment-grade corporate bonds remained above 5 per cent through the first three quarters of 2023, and average yields on high-yield corporate bonds reached 9 per cent in the third quarter of 2023 (SIFMA).

In 2022, the Federal Reserve initiated what has become the swiftest tightening of US monetary policy in the last few decades, prompted by the largest increase in inflation rates in 40 years. As of December 2022, the US federal funds target rate had reached 4.25 to 4.5 per cent, compared to 0.25 per cent at the beginning of 2022 and throughout 2021, and, in 2023, the Federal Reserve continued tightening monetary policy, with four rate increases during the year. As of 27 July 2023, the US federal funds target rate reached 5.25 to 5.5 per cent. However, recent comments from officials of the Federal Reserve signal that the regulator may be finished with its extended campaign of consistent rate hikes,

and analysts expect the Federal Reserve to begin cutting rates in 2024 if inflation remains at current levels. Despite the potential for rate cuts in 2024, analysts generally believe a higher-for-longer interest rate environment will remain for 2024 and possibly longer-term.

In 2023, the transition in the United States from debt securities based on the London interbank offered rate (LIBOR) to debt securities based on Secured Overnight Financing Rate (SOFR), a rate based on the overnight repurchase agreement (repo) markets, continued. This moved the reference rate from being based on approximately US$1 billion transactions per day (for three-month LIBOR) to the repo market with around US$1 trillion transactions per day (SIFMA). The publication of the most commonly used US dollar LIBOR settings ceased as of 30 June 2023. A forward-looking term SOFR rate has been recommended by the Alternative Reference Rates Committee, a group of private market participants organised by the Federal Reserve and the New York Federal Reserve Bank, and has been widely adopted by market participants. In December 2022, the Federal Reserve adopted final rules implementing the Adjustable Interest Rate (LIBOR) Act enacted by the US Congress, which replaced references to US dollar LIBOR in certain contracts, including those governed by US state or federal law that lack adequate fallback provisions with a benchmark replacement rate based on term SOFR after 30 June 2023. The December 2022 rules also included conforming changes for legacy LIBOR-linked contracts.

In addition, the SEC has proposed or adopted a number of significant new rules in recent years, certain of which could impact US debt capital markets directly or indirectly.

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