



GETTING THE  
DEAL THROUGH 

# Securities Finance 2017

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Published by  
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© Law Business Research Ltd 2017  
No photocopying without a CLA licence.  
First published 2004  
Fourteenth edition  
ISSN 2055-5423

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



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# Preface

## Securities Finance 2017

Fourteenth edition

**Getting the Deal Through** is delighted to publish the fourteenth edition of *Securities Finance*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

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

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

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

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

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Andrew Pitts of Cravath Swaine & Moore LLP, for his continued assistance with this volume.

GETTING THE  
DEAL THROUGH 

London  
April 2017

# Global overview

Mark Greene, Andrew Pitts and George Stephanakis

Cravath, Swaine & Moore LLP

Global equity capital markets volumes fell in 2016, after having levelled off in 2015, while global debt capital markets experienced a record-setting year. Developing and emerging economies generally trended unfavourably, while advanced economies experienced continued growth over 2015. Initial public offerings (IPOs) and follow-on equity offerings experienced their weakest period in several years, while investment-grade debt issuances surpassed previous volume records.

Growth in the United States slowed markedly over the past year, and – despite positive market sentiment following the election – future growth remains uncertain as a result of open questions regarding policy positions of the new administration. Other major economies had fragile growth as they continue to find traction in their post-crisis recovery efforts. The United States Federal Reserve raised interest rates in December 2016, while other advanced economies continue their monetary easing policies. Major elections and referendums in Europe during 2016 also are likely to have an unpredictable economic impact. As a result, the outlook for the global capital markets remains uncertain for the coming year.

## Equity capital markets

The global equity capital markets experienced their slowest annual period by gross proceeds raised in the past four years. According to Thomson Reuters, global equity issuances totalled US\$655 billion during 2016, a 25 per cent decrease compared with 2015. The energy and power sector accounted for a record level of issuances at 19 per cent of all equity activity during the year, while the financial, industrials and real estate sectors followed with 16 per cent, 13 per cent and 11 per cent, respectively. Follow-on offerings experienced their slowest annual period since 2011, with US\$448.4 billion of total offerings for the year, also a 25 per cent decrease from 2015. Meanwhile, IPOs had their weakest period in four years, totalling US\$131.1 billion worldwide, a decrease of 31 per cent from 2015.

In the United States, equity offerings continued their downward trend from 2015 with respect to overall proceeds and deal volume and IPO transaction volumes fell to their lowest levels in over a decade. According to Thomson Reuters, US equity offerings dropped in 2016, and now account for 27 per cent of overall global issuance. Issuers raised a total of US\$180 billion in the global equity capital markets, a 21.5 per cent decline from 2015. Equity deal volume continued its downward trend from the prior year with 716 deals in 2016. IPO volume hit its lowest point since 2003 with total IPO proceeds amounting to US\$15.6 billion, a 46.8 per cent decrease from the prior year. The energy and power sector accounted for five of the top 10 largest offerings and 33 per cent of the overall transaction volume in equity offerings for the year.

In Europe, the Middle East and Africa, equity offerings failed to match overall proceeds from 2015 and IPO proceeds essentially were cut in half. According to Thomson Reuters, issuers raised a total of US\$170 billion, and saw a 38.6 per cent decline in proceeds from 2015. The number of equity deals in the region fell to 1,022. IPOs across the region also dropped to the lowest level since 2012. IPO volumes totalled US\$35.4 billion, a decrease of 51.2 per cent from 2015. IPOs in the United Kingdom totalled US\$6.9 billion. The financial sector remained the strongest industry among issuers, with the industrials and energy and power sectors coming in second and third. Innogy SE, a carve-out IPO of the renewable, network and retail businesses

of German energy giant RWE, was the largest equity offering in the region, accounting for US\$5.2 billion in proceeds.

In Asia (excluding Japan and Australia), the financials, industrials and high-technology sectors accounted for more than half the region's equity capital markets offerings. According to Thomson Reuters, proceeds to issuers totalled US\$212.5 billion, representing a decrease from 2015 of 9.8 per cent. Asian IPO markets improved slightly, with first-time issuers in Asia raising US\$62.5 billion in proceeds, a 2 per cent increase from 2015. China accounted for US\$154.4 billion in equity issuance. This represents 24 per cent of global equity issuance, China's highest annual percentage since Thomson Reuters began maintaining records in 1980.

In Australia, equity capital markets raised AU\$28.3 billion on 648 deals, a 50.9 per cent decrease in proceeds raised from 2015. Meanwhile, Japan's equity capital markets activity dropped to its lowest level since 2013. According to Thomson Reuters, equity and equity-related issuances raised a total of US\$26.5 billion as a result of 189 deals, a 43.1 per cent decrease in proceeds raised from 2015. IPO proceeds for the year decreased by 28.6 per cent to US\$10.9 billion.

## Debt capital markets

Global debt capital markets experienced a record-setting year. According to Thomson Reuters, global debt issuances totalled US\$7.0 trillion during 2016, a 16 per cent increase compared with 2015. Government and agency issuers accounted for US\$1.9 trillion of the total issuances for the year, increasing 48 per cent from 2015. Financial and government and agency offerings together represented 70 per cent of the total issuances for the year. The market for investment-grade corporate debt totalled a record US\$3.4 trillion globally in 2016, increasing by 11 per cent over 2015. The market for high-yield corporate debt experienced its slowest year since 2011, with volume totalling US\$305.8 billion for 2016, a 13 per cent decline from 2015.

In the United States, investment-grade issuers also experienced record volumes. According to Thomson Reuters, investment-grade issuers raised US\$1.3 trillion from 1,065 deals, representing a 3.4 per cent increase over 2015, and the highest total in over 30 years of record-keeping. The Anheuser Bush InBev offering, used to fund the acquisition of SABMiller PLC, ranked as the second-largest bond issue ever recorded by raising US\$46 billion. High-yield corporate debt issuances in the United States totalled US\$226.2 billion, a 10.7 per cent decrease from 2015. The asset-backed securities market also had a weaker year in the United States, with 412 transactions with total proceeds of US\$220.5 billion, a 19 per cent decline from the prior year.

In Europe, the Middle East and Africa, bond activity reached its second highest level in the past decade. According to Thomson Reuters, proceeds from debt offerings totalled US\$4.0 trillion, a 5.7 per cent increase from 2015. Bond issuance in the Middle East increased 298 per cent from 2015, accounting for US\$92.7 billion of proceeds in the region. The growth was driven by the three largest recorded deals from the region, Teva Pharmaceuticals, Saudi Arabia and the State of Qatar.

In Asia, debt capital markets experienced their best year on record. According to Thomson Reuters, Asian issuances denominated in G3 currencies totalled US\$217.3 billion, an increase of 18.9 per cent and the highest level of proceeds ever recorded. Asian issuances denominated in local currencies also had a record-setting year with US\$1.7 trillion in

proceeds, an increase of 61.1 per cent from 2015. Debt denominated in Chinese yuan totalled US\$1.5 trillion, amounting to 86.3 per cent of the aggregate proceeds for the region.

The debt markets in Australia weakened in 2016, declining 9 per cent to US\$73.5 billion. In Japan, yen-denominated bond activity improved over 2015. According to Thomson Reuters, the overall debt capital markets in Japan saw ¥21.9 trillion of yen-denominated issuances from 1,101 deals, an increase in proceeds of 24 per cent from 2015. However, issuances of Samurai bonds raised only ¥1.3 trillion in proceeds in 2016, a decrease of approximately 38.2 per cent from 2015.

#### **Economic outlook – fiscal and monetary developments**

Global trade growth has slowed to its weakest pace since the global financial crisis of 2008–2009. The International Monetary Fund (IMF) estimates that the net effect was a worldwide growth rate of 3.1 per cent in 2016, while the World Bank estimates the growth rate as 2.3 per cent for the year. Projections for the coming years show improvements in global growth, primarily as a result of higher growth rates expected in emerging markets and developing economies. However, with the new United States administration and United Kingdom's decision to leave the European Union, growth projections remain largely uncertain. Growth in the coming years could be impacted by increasing protectionist tendencies by major economies, as well as by anticipated fiscal policy stimuli in China and the United States. The IMF currently projects global growth at 3.4 per cent in 2017 and 3.6 per cent in 2018, while the World Bank projects a more modest 2.7 per cent and 2.9 per cent for the same periods.

Growth rates in the United States are projected to rise, but are subject to much uncertainty as a result of the new administration. The new administration has proposed infrastructure spending and corporate and personal income tax cuts, which could improve short-term growth. However, the administration also has discussed raising trade barriers and other protectionist policies that could result in retaliatory action and negative effects on the economy. The Federal Reserve raised short-term interest rates in December 2016, with further monetary policy normalisation expected in the following years. The IMF projects a growth rate of 2.3 per cent for the US economy in 2017, while the Federal Reserve's more conservative estimates project a range of 1.9 to 2.3 per cent.

In Europe, questions regarding the impact of the United Kingdom's decision to leave the European Union raise uncertainty regarding growth in the region. Investment rates have been low in the area, but borrowing costs also have been low as a result of negative interest rates being introduced in 2014. Inflation in Europe is still projected to be lower than the European Central Bank's target, despite ongoing monetary easing. According to the World Bank, renewed concerns regarding banking sector stability and profitability may result in more market volatility in the coming years. The IMF projects a growth rate of 1.6 per cent for the eurozone in 2017, with a slightly lower growth rate of 1.5 per cent in the United Kingdom.

Japan's government has announced a series of measures to spur growth, while its central bank has changed its policy from purchasing government debt to seeking to stabilise long-term interest rates around zero. According to the World Bank, Japan's economy remains constrained by an aging labour force and a shift toward part-time employment as well as policy uncertainty with its trading partners. The IMF currently projects a growth rate of just 0.8 per cent for Japan in 2017.

Emerging markets and developing economies are expected to grow at a faster rate than advanced economies in coming years. Projected growth rates, however, are subject to uncertainty as a result of possible trade policy changes in more advanced economies. According to the World Bank, commodity-importing economies are projected to experience higher growth. Projections in commodity-exporting economies are mixed as global growth is expected to improve slightly, but private investment growth remains low. The IMF currently projects growth among all emerging markets at 4.5 per cent in 2017.

Globally, capital markets in the coming year are subject to much uncertainty due to the unknown impact that the new United States administration and the United Kingdom's decision to leave the European Union will have on international trade policies and the business environment. Last year, equity capital markets continued to decline to a four-year low. The debt capital markets, however, had a record-setting year in 2016 and could continue to be robust, but also more expensive as a result of additional potential interest rate increases in the United States. Regardless of the rate changes in the United States, issuers will still have the option of friendly, low-rate market environments in Europe and Japan as central banks in those countries will likely continue their easing policies. Any changes to tax law prohibiting the deductibility of interest expense for US federal income taxes, however, could have a substantially negative impact on issuance by US companies regardless of the rate environment.

Overall, major elections and referendums in advanced economies have given economic forecasters pause, and the outlook for a broad-based and sustained global economic recovery continues to remain uncertain. Policy uncertainty tends to depress investment and global trade may be further impacted by uncertainty regarding possible trade policy changes around the world. As a result, growth projections continue to be tempered by a healthy dose of scepticism.

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

# Austria

Christoph Moser

Weber & Co

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## Statutes and regulations

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

The key laws applicable to securities offerings in Austria are:

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

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

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

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

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## Public offerings

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

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

#### Public offer

Public offering within the meaning of the KMG is considered as any communication to the general public in any form whatsoever that: contains adequate information on the terms and conditions of an offering (or an invitation to subscribe) for securities or an investment, and on the securities or investment themselves; and gives potential investors a basis on which to reach an informed decision on the purchase or subscription to securities or the investment. The Austrian definition also applies to the placement of securities or investments by financial intermediaries. The definition of a public offer in section 1, paragraph 1 No. 1 KMG covers the scope of the definition of the term 'offer of securities to the public' as provided by the PD. In addition, the Austrian definition of public offer extends the scope of the PD definition not only to legally binding offerings but also to any invitations to subscribe.

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

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

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

#### Regulatory filings

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

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

#### Stock exchange filings

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

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

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

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

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

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

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

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

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

Each important new factor, material mistake or inaccuracy relating to the information included in the prospectus that is capable of affecting the assessment of the securities and that arises or is noted between the time when the prospectus is approved and the end of the public offer or, as the case may be, the time when trading of the securities on a regulated market begins, must be published in a supplement to the

prospectus. The supplement must also be approved by the FMA or the respective EU member state authority having approved the prospectus and needs to be published in the same way as the original prospectus.

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

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

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

**Commencement of public offering**

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

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

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

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

Secondary public offerings are subject to prospectus requirements according to the KMG like primary offerings. Therefore, it has to be assessed whether a public offer takes place and whether any prospectus exemption applies, especially in the case of a later resale of securities by financial intermediaries. No further prospectus publication is required if a valid listing prospectus exists that is up to date and the issuer or the person responsible for the preparation of the listing prospectus

has agreed to its use in a written agreement. Any subsequent resale of securities or investments, which were previously the subject of exemptions from the obligation to publish a prospectus, shall be regarded as a separate offer. The placement of securities or investments through financial intermediaries shall be subject to the publication of a prospectus, if none of the conditions are met for the final placement and a public offering exists. The issue of securities is only privileged if a prospectus has been filed within the preceding 12 months regarding the same issuer. The original prospectus can be used for any later offering of the same issuer. Any changes to the material information must be included in a supplement to the original prospectus (see question 3). Liability of sellers in secondary offerings may occur if the seller trades on information not available to the public or has relied on a private placement exemption applicable to institutional investors and resells the securities to the public without publishing a prospectus in respect of such securities. The scope of the selling shareholder's liability follows the general civil law liability rules.

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

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

### **Private placings**

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

Private placements may be exempt from the obligation to publish a prospectus. Pursuant to section 3, paragraph 1 No. 14 KMG, an offer addressed to fewer than 150 natural or legal persons per European Exonomic Area (EEA) member state not being qualified investors is considered as a prospectus exempt 'private placement'.

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

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

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

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

Austrian law does not impose any mandatory requirements for information to be made available to potential investors in a private

placement as long as no listing of securities on a regulated market in Austria (ie, on the Official Market or Second Regulated Market of the VSE) takes place. In the absence of a mandatory requirement, potential investors will, nevertheless, require certain information about the issuer and the offered securities to decide on an investment in the securities. Such information is commonly provided in a voluntarily supplied information memorandum providing information and certain standard disclaimers. If the offeror provides potential investors with such information, the information should in any case be understandable, accurate, true and not misleading in order to avoid any claims by potential investors resulting from culpa in contrahendo. Further, care should be taken that no material information is missing from the information memorandum and that potential investors are treated equally.

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

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

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

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

### **Offshore offerings**

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

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

### **Particular financings**

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

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

Shares issued in substitution for shares of the same class already issued, if the issuance of such new shares does not involve any increase in the issued capital, as well as securities offered in connection with a takeover by means of an exchange offer, or – under certain circumstances – offered or allocated on the occasion of a merger or split up, are exempted from the obligation to publish a prospectus. Further, the obligation to publish a listing prospectus does not apply to shares that account for, over a period of 12 months, less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated market (section 75, paragraph 1 No. 1 BörseG). Therefore, most minor capital increases that are privately placed do not require the drawing up, approval and publication of a prospectus. A listing prospectus is also not required for shares issued within the scope of a conversion or exchange for other securities or as a consequence of the exercise of rights attached to other securities, as long as the shares belong to the same category as the shares already admitted to trading on the same regulated market (section 75, paragraph 1 No. 7 BörseG).

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

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## Underwriting arrangements

### 12 What types of underwriting arrangements are commonly used?

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

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

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

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

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

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

### 14 What additional regulations apply to underwriting arrangements?

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

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## Ongoing reporting obligations

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

Upon listing on the Official Market or the Second Regulated Market of the VSE, which are both regulated markets under (MiFID), issuers become subject to ongoing reporting requirements set forth in the BörseG. Provisions on the reporting obligations are harmonised as a result of the implementation of Directive 2004/109/EC (Transparency Directive, amended by Directive 2013/40/EU), including major shareholding disclosure, ad hoc disclosure and mandatory publications of financial information (see question 16).

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

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

### Ad hoc disclosure

Pursuant to article 17 of Regulation 2014/596/EU (Market Abuse Regulation – MAR), which entered into force in July 2016, issuers of financial instruments shall inform the public as soon as possible of inside information that directly concerns that issuer. Inside information according to article 7 MAR is any information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

The issuer shall ensure that the inside information is made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public and, where applicable, in the officially appointed mechanism referred to in article 21 of Directive 2004/109/EC of the European Parliament and the Council. The issuer shall not combine the disclosure of inside information to the public with the marketing of its activities. The issuer shall post and maintain on its website for a period of at least five years all inside information it is required to disclose publicly.

Inside information has to be disclosed ad hoc with the intention of an EU-wide distribution via certain channels, including Reuters, Bloomberg and Dow Jones Newswire. Any major changes with respect to inside information, which has already been disclosed, must be disseminated immediately after any such change takes place.

In certain cases, an issuer possessing inside information is entitled to postpone the ad hoc disclosure in order to protect its justified interests. Issuers are permitted to delay disclosure of inside information to protect their legitimate interests as long as the public is not misled and confidentiality can be maintained (article 17 paragraph 4 MAR). In such case, the issuer is obliged to ensure confidentiality. The FMA has to be notified immediately after the disclosure of inside information via email. In order to preserve the stability of the financial system, an issuer that is a credit institution or a financial institution, may, on its own responsibility, delay the public disclosure of inside information, under certain circumstances.

### Financial reporting

Issuers of debt and equity securities must disclose annual financial statements no later than four months after the close of the financial year (section 82, paragraph 4 BörseG) and half-year reports no later than three months after the close of the reporting period, and shall ensure that this report is available to the public for at least 10 years (section 87, paragraph 1 BörseG). Moreover, issuers whose shares are admitted to trading on a regulated market must additionally publish quarterly financial statements for the first and third quarters.

### Disclosure of major shareholdings

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

The notification obligation pursuant to section 91 BörseG shall also apply to persons who directly or indirectly hold financial instruments pursuant to section 1, No. 6 WAG 2007 (eg, shares in companies, bonds or other forms of securitised debt, options, futures, swaps) or other similar instruments (section 91a, paragraph 1 BörseG).

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

The disclosure obligation is based on a dual-stage mechanism. The shareholder must inform the FMA, the VSE and the issuer about the voting rights held within two trading days after the trigger event. As soon as the issuer receives the notification of the shareholder pursuant to section 92a, paragraph 1 BörseG, it must publish all information contained therein no later than after two trading days.

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

### Additional obligations

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

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

Moreover, issuers must prepare a corporate action timetable two months before the beginning of the respective business year in German

and English, and keep it up to date and available to the public on their website. The timetable must contain at least the following dates:

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

### Anti-manipulation rules

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

The BörseG and MAR aim to prevent insider dealing and market manipulations. The FMA has extensive investigative and supervisory powers in order to protect the financial markets and to prevent the abuse of inside information and market manipulations. MAR establishes a common regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation (market abuse) as well as measures to prevent market abuse to ensure the integrity of financial markets in the EU and to enhance investor protection and confidence in those markets.

#### Misuse of inside information

Pursuant to article 7 MAR, inside information shall comprise the following types of information:

- (a) *information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments;*
- (b) *in relation to commodity derivatives, information of a precise nature, which has not been made public, relating, directly or indirectly to one or more such derivatives or relating directly to the related spot commodity contract, and which, if it were made public, would be likely to have a significant effect on the prices of such derivatives or related spot commodity contracts, and where this is information which is reasonably expected to be disclosed or is required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets;*
- (c) *in relation to emission allowances or auctioned products based thereon, information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more such instruments, and which, if it were made public, would be likely to have a significant effect on the prices of such instruments or on the prices of related derivative financial instruments;*
- (d) *for persons charged with the execution of orders concerning financial instruments, it also means information conveyed by a client and relating to the client's pending orders in financial instruments, which is of a precise nature, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments, the price of related spot commodity contracts, or on the price of related derivative financial instruments.*

By way of example, in an M&A scenario the decision of the core shareholders to divest their shareholding may already constitute an interim event to be disclosed by means of an ad hoc announcement (see question 16) as it qualifies as inside information. Eventually, the agreement with a purchaser would also constitute inside information. In such case, not only the sale but also the interim event would be subject to the prohibition on misusing inside information, as well as the issuer's ad hoc obligation.

Insider dealing arises where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates. The use of inside information by cancelling or amending an order concerning a financial

### Update and trends

#### MiFID II package

In June 2014, the European Commission adopted new rules revising the Markets in Financial Instruments Directive (MiFID) framework. These consist of a directive (MiFID II) and a regulation (MiFIR). The application of MiFID II has been postponed by one year. MiFID II has to be transposed into national law of the member states by 3 July 2017 and is applicable by 3 January 2018. The main intention of MiFID II and MiFIR is to protect investors from the market uncertainty and market abuse by, for example, (i) improving governance and organisational requirements for investment firms; (ii) improving conduct of business rules that cover firms' relationships with all categories of clients; or (iii) giving the supervisors new powers at national and European level. MiFID II and MiFIR cover the conduct of investment firms, authorisation requirements for regulated markets, reporting and trade transparency. MiFID II aims to reinforce and replace the current European rules on securities markets.

#### Prospectus Regulation proposal

In December 2016 the Commission, Council and European Parliament came to an agreement as to what the draft legislation concerning the Prospectus Regulation should say (the Proposal). The Proposal aims to ensure investor protection and market efficiency across the European Union. It is intended to broaden the attractiveness of offering and

listing securities across the EU, while maintaining a high degree of investor protection, for example:

- the obligation to publish a prospectus shall not apply to an offer of securities to the public whose denomination per unit amounts to at least €100 000;
- no prospectus is required for an offer of securities with a total consideration of less than €1 million (total consideration of the offer over a period of 12 months);
- the threshold for which a prospectus is mandatory increases from €5 million to €8 million;
- member states should be free to set out in their national law a threshold between €1 million and €8 million (total consideration of the offer over a period of 12 months); and
- a new type of prospectus ('the EU growth prospectus') will be available for small and medium-sized enterprises (SMEs), companies with up to 499 employees (small mid-caps) admitted to an SME growth market or small issuances by unlisted companies where the offer does not exceed €20 million (total consideration of the offer over a period of 12 months).

The Proposal is still intended to be resolved upon by the European Parliament and the Council of the EU during 2017.

instrument to which the information relates where the order was placed before the person concerned who possessed the inside information shall also be considered to be insider dealing.

An insider can be any person who has access to inside information as member of administrative, managing or supervisory bodies of the issuer or the member of the market for emission allowances. Further an insider may be someone who is a shareholder of the issuer or the member of the market for emission allowances.

Pursuant to section 48c BörseG, the abuse of inside information and market manipulation shall be deemed to have committed an administrative offence and shall be sanctioned by the FMA by a fine of up to €5 million or up to three times the benefit gained from the infringement including any losses avoided, provided the benefit gained can be stated in figures. According to section 48m, paragraph 1 BörseG, the use of inside information by an insider to buy or sell for himself or herself or a third party financial instruments is a criminal offence and punishable by a court of law, if the price exceeds €1 million. The criminal penalty may be between six months and five years of imprisonment. The same applies to insiders who recommend third parties use the inside information accordingly.

#### Market manipulation

Market manipulation is defined in article 12 MAR as transactions or trade orders or any other behaviour that may give or be likely to give false or misleading signals as to the supply of, demand for or price of, a financial instrument, a related spot commodity contract or an auctioned product based on emission allowances. Market manipulation also includes transactions or trade orders that make use of fictitious devices or any other form of deception as well as dissemination of information that gives false or misleading signals in relation to financial instruments. In particular this includes distribution of information through the media and the internet (eg, spreading of rumours or of false or misleading news). Issuers publishing information should therefore carefully assess whether information to be published may have a misleading meaning. Among other things, transactions known as 'marking the close', matched orders of financial instruments, wash sales or scalping practices are considered to be prohibited acts of market manipulation. Pursuant to MAR, market manipulation shall comprise entering into a transaction, placing an order to trade or any other behaviour which:

- (i) gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument, a related spot commodity contract or an auctioned product based on emission allowances; or
- (ii) secures, or is likely to secure, the price of one or several financial instruments, a related spot commodity contract or an auctioned product based on emission allowances at an abnormal or artificial level;

- unless the person entering into a transaction, placing an order to trade or engaging in any other behaviour establishes that such transaction, order or behaviour have been carried out for legitimate reasons, and conform with an accepted market practice.

Suspected transactions may be justified if the trader has legitimate reasons for his or her acts and the transactions or orders comply with the accepted market practice. Acts of market manipulation are subject to administrative fines by the FMA of up to €5 million per incident or up to three times the amount of the benefit gained taking into account any losses avoided due to the infringement committed provided such benefit can be expressed in figures, unless the market manipulation constitutes a criminal offence pursuant to the Austrian Penal Act, for example, fraud. In this case, the offence falls under the jurisdiction of Austrian criminal courts.

#### Price stabilisation

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

Price stabilisation in connection with an offering of securities, for example, by means of over-allotment or the exercise of 'greenshoe' options, may contravene the restrictions on market manipulation set forth in MAR. Pursuant to article 5 MAR price stabilisation is permitted provided that such stabilisation measures are carried out in accordance with Commission Regulation (EC) No. 1052/2016 (Regulatory Technical Standard (RTS) Regulation). To benefit from the exemption under the RTS Regulation, the following key obligations have to be complied with:

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

- the identity of the entity undertaking the stabilisation, unless unknown at the time of disclosure, in which case it shall be subject to adequate public disclosure before the stabilisation begins;
- the existence and maximum size of any over-allotment facility or greenshoe option;
- the exercise period and any conditions for the use of such options; and
- the place where the stabilisation may be undertaken including, where relevant, the name of the trading venue.

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

When conducting stabilisation measures and exercising an over-allotment facility or green shoe option outside the permitted frame of the RTS Regulation, although the European Securities and Markets Authority has indicated that stabilisation will not necessarily be regarded as abusive solely because it falls outside MAR and the RTS Regulation, a risk remains that the FMA considers such measures as market manipulation, which may lead to criminal sanctions or administrative fines of up to €5 million or up to three times the amount of the benefit gained taking into account any losses avoided due to the infringement committed provided such benefit can be expressed in figures.

#### Liabilities and enforcement

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

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

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

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

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

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

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

- imposing administrative fines up to three times the benefit gained from the violation including any loss avoided, provided the benefit can be stated in figures, or by a fine of up to €1 million;
- imposing administrative fines on legal entities up to €2,500,000, or 2 per cent of the total annual net revenues pursuant, or up to three times the amount of the benefit gained taking into account any losses avoided owing to the infringement committed provided such benefit can be expressed in figures;
- the disgorgement of the profits gained or losses avoided due to the infringement insofar as they can be determined;
- investigation rights in respect of suspicious trading in financial instruments;
- examination order of a revocation of admission to the VSE according to BörseG; and
- the publication of violations.

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# Brazil

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## Statutes and regulations

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

Securities offerings are regulated primarily by the Brazilian Corporate Law (Law No. 6,404/1976), the Brazilian Capital Markets Law (Law No. 6,385/1976) and regulations issued by the Brazilian Securities Commission (CVM), particularly Regulation No. 400/2003, as amended (Regulation No. 400), Regulation No. 476/2009, as amended (Regulation No. 476), Regulation No. 471/2008, as amended (Regulation No. 471), and Regulation No. 480/2009, as amended (Regulation No. 480).

## Public offerings

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

A public offering of securities distributed under the terms of Regulation No. 400 requires registration with the CVM of the issuer as a public company and the offering itself. Under Brazilian securities laws, the securities are not subject to registration. Once a security is listed on a stock exchange or other qualified market, any holder may sell its securities on the respective stock exchange or other market, as long as no public distribution is made.

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

- minutes of the shareholders' meeting which authorised the request for registration in the applicable class;
- the public company constitutive documents;
- the record data form;
- minutes of shareholders' meetings held during the preceding 12 months;
- a copy of the shareholder's agreements filed with appropriate registries at the headquarters of the company, if any;
- a board resolution or a shareholders' meeting appointing an investor relations officer;
- audited financial statements for the preceding three fiscal years;
- audited financial statements reflecting any material change in the company's equity structure after the end of the latest fiscal year, if applicable;
- standardised financial statements form for the last fiscal year;
- standardised quarterly information form for the first three quarters of the current fiscal year, as applicable;
- statements relating to the securities, which are held by senior managers, members of the inspection committee, and members of any technical or advisory committee created pursuant to the

company's by-laws, in accordance with applicable rules governing this issue;

- a reference form and an annual report on the reporting period applicable to public companies; and
- disclosure policy.

A public offering under the terms of Regulation No. 400 requires a prospectus, which primarily includes information about the offeror, the offering, the securities offered and risk factors. A prospectus must include all documents and information detailed by Regulation No. 400 and by the Regulation and Best Practices Code for Public Offerings issued by the Brazilian Association of Financial and Capital Markets (ANBIMA). Accordingly, a prospectus must contain complete, precise, truthful, clear, objective and necessary information regarding the issuer and the offering, using non-technical and easily understood language.

Nearly all qualified Brazilian investment banks have pledged to comply with ANBIMA's Best Practice Code and have agreed to its sanctions in the event of non-compliance with its terms and conditions. Therefore, the underwriting agreement will typically require issuers to conform to the standards of such Code.

Additionally, Regulation No. 400 requires, among other documents, an underwriting agreement, an announcement of commencement and an announcement of closing of the offer. An announcement of commencement must inform the procedures related to the public offering including, offering timetable, the amount of securities offered and a price range reference. A closing announcement reveals, mainly, the number of securities allocated to each investor and the type of investor that accepted the offer with the respective amount of security acquired. Both announcements must be made available on the websites of the offering participants, the relevant stock exchange and the CVM.

Registering a public offer of debt or equity securities under the terms of Regulation No. 400 entails great effort and expense. According to Regulation No. 471, self-regulatory entities may conduct an analysis of the simplified registration process for follow-on offerings of stock exchange-listed equity securities distributed under the terms of Regulation No. 400. The main requirement for a simplified offering procedure under the terms of Regulation No. 400 is that the issuer is compliant with its periodic reporting requirements. ANBIMA is currently the only self-regulatory agency that has executed a cooperation agreement with the CVM in order to conduct such simplified offering procedure. When documents of a public offering are distributed under the terms of Regulation No. 400 and are previously analysed by ANBIMA, the main participants (eg, bookrunners and company or offeror) of such offering must comply with ANBIMA's Regulation, including the rules stipulated by the Best Practices Code for Public Offerings and the Best Practices Code for Agreement Activities, as well as Regulation Nos. 400 and 480.

The CVM must waive registration requirements for securities issued by small and micro-sized companies, as defined by Brazilian regulations. Issuers with wide market exposure, as defined under the terms of Regulation No. 480, may be given automatic offering registration by CVM.

Public offerings in Brazil may also be distributed with restricted selling efforts, under the terms of Regulation No. 476, exclusively to professional investors, as defined by applicable regulation. Such offerings do not require registration with the CVM. Registration of

the issuer, as mentioned above, is not required for an offering of debt securities, as provided by Regulation No. 480, but required for offering under class 'A', for public offerings of equity securities as shares, shares depositary receipts or security convertible into shares.

Pursuant to Regulation No. 476, the types of securities that may be offered to professional investors in a distribution with restricted selling efforts include, among others:

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

The only requirement with respect to filing with the CVM stipulated in Regulation No. 476 is to upload a notice on the CVM's website regarding the commencement and closing of the distribution. Shareholders must have priority rights in the subscription of the newly issued shares. In this case, the main information regarding the offering and the procedures applicable to the exercise of priority rights must be disclosed as a material fact by the company.

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

Registration with the CVM is only mandatory for public offerings under Regulation Nos. 400 and 471. Public offerings of equity or debt securities with restricted selling efforts in accordance with the terms provided by Regulation No. 476 are exempt from any registration with the CVM.

The application for registration of a public offering under the terms of Regulation No. 400 must be jointly submitted to the CVM by the offeror (whether an issuer or a selling shareholder) and the lead underwriter. It must also be accompanied by supporting documents, including drafts of the offering documents. Similarly, the application for registration of a public offering through the simplified offering procedure stipulated by Regulation No. 471 must be submitted to ANBIMA, which conducts a previous analysis of the registration request before submitting it to the CVM.

In practice, the distribution of the preliminary prospectus and the beginning of the bookbuilding process and roadshow presentations are only taken into effect after the CVM deciding that no major issues are anticipated in relation to the proposed public offering. No sales may be completed until the CVM has granted registration for the public offering distributed under the terms of Regulation No. 400, certain statutory announcements are published or made available on the appropriate websites and a final prospectus is available. Upon granting of registration of the public offering, the final prospectus must be made available on websites of the issuer, the offeror, the underwriters, the CVM, the relevant stock exchange and ANBIMA, in the case of follow-on offerings.

The review process of a public offering distributed under the terms of Regulation No. 400 usually takes from eight to 10 weeks from the initial filing to the granting of registration and six to eight weeks if submitted through the simplified offering procedure stipulated by Regulation No. 471.

Public offerings of equity or debt securities with restricted selling efforts in accordance with the terms provided by Regulation No. 476 are exempt from any registration with the CVM, as stated above. Nevertheless, if the securities being offered are shares or securities convertible into shares, the issuer must be registered as a class 'A' issuer with the CVM, as required by Regulations 476 and 480. The process of registration of a company as a class 'A' issuer usually takes approximately 60 days from the date of the initial filing to the granting of registration.

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

Offerors, selling shareholders and underwriters must treat any proposed offering under the terms of Regulation No. 400 as material, non-public information until an application for the registration of the public offering is filed with the CVM. Use or disclosure of material, or non-public information, may constitute insider trading or a breach of fiduciary duties, depending on the circumstances, and may lead to civil, administrative or criminal penalties.

Regulation No. 400 does not specifically prohibit underwriters from producing offering materials in addition to the prospectus, which includes the reference form. Such materials, including any roadshow presentations, must be consistent with the prospectus and must be filed with the CVM in order to preserve a documentary record.

In addition, marketing materials intended for broad dissemination must be approved by the CVM if the offering is being distributed under the terms of Regulation No. 400. Marketing materials must be consistent with the information contained in the prospectus and may only be used after the application for registration has been filed with the CVM and a preliminary prospectus has been made available to prospective investors. Marketing materials must include a legend referring the investors to the prospectus and to risk factors provided for in the company's reference form. An exception is available for investor educational materials, which may be made available even prior to the submission of an application to the CVM.

Investors in a public offering distributed under the terms of Regulation No. 400 must receive a prospectus, which may be sent electronically. If any other material or information are used in connection with a sale of securities in the public offering, the issuer will be, and the offeror and the lead underwriter may be, liable for any material misstatement or omission in the offering documents.

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

Additionally, until the public offering is disclosed to the market, the issuer, the offeror, the bookrunners and everyone involved in the offering must: (i) limit the disclosure of information relating to the offering to what is necessary for the purpose of the offering, warning recipients of the reserved and confidential nature of the information transmitted; and (ii) restrict the use of reserved and confidential information strictly for the purpose related to the preparation of the offering. From the moment the offering becomes public, all the information related to the offeror and the offering must comply with the principles of quality, transparency and equal access to information. Therefore, all parties involved in the proposed public offering under the terms of Regulation 400 must abstain from discussing or mentioning the proposed offering and the issuer in the news with broad circulation and business media until the completion of the public offering.

According to CVM regulations, there is no restriction on the ability of analysts who have an employment or contractual relationship with the underwriters or their affiliates to issue research reports, provided that the underwriters and prospective underwriters submit to the CVM and their respective Brazilian accrediting entity any research or other reports relating to the issuer or the offering that may be issued or distributed while the offering is ongoing. The requirement of Regulation No. 400 that research reports be submitted to the CVM is not applicable to public offerings under the terms of Regulation No. 476.

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

Primary and secondary offerings have similar rules. Additional disclosure requirements apply to primary offerings, as the issuer will be required to discuss the use of proceeds and, in case of equity offerings, the dilution of existing shareholders. Although holders of shares of a Brazilian issuer are entitled to statutory pre-emptive rights to subscribe for new issuances of shares, such pre-emptive rights may be withheld in the context of a public offering if the by-laws permit such restrictions. Almost all Brazilian issuers limit pre-emptive rights in public

offerings. In follow-on offerings under the terms of Regulation No. 400, issuers will often withhold statutory pre-emptive rights and make, alternatively, ad hoc arrangements for existing shareholders to enjoy a measure of priority in the allocation of newly issued shares.

In primary public offerings of shares distributed with restricted selling efforts, pre-emptive rights of existing shareholders may be denied only to shareholders who receive priority allocation on the subscription of the total amount of securities being offered, or if the non-granting of such priority allocation is approved by shareholders representing the totality of the company's capital stock.

A controlling shareholder who is a seller in a secondary offering is liable to investors for material misstatements or omissions to the same extent as an issuer in a primary offering. Accordingly, a controlling shareholder has a compelling incentive to ensure that the disclosure is complete and reliable or, more likely, to secure an agreement whereby the issuer is obligated to indemnify the seller for any material misstatements. A non-controlling selling shareholder is only liable if it fails to act diligently to ensure that the offering documents are free of material misstatements and omissions.

Pursuant to Regulation No. 400, Brazilian issuers have a duty to cooperate with any selling shareholder that intends to conduct a secondary offering subject only to the condition that any additional expense incurred by the issuer related to the offering are reimbursed by the seller.

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

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

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

Public offerings may be settled by wire transfer of funds from the lead underwriter to the offeror. Most transactions are settled under ad hoc arrangements. In more complex public offerings, a significant number of intermediaries may participate in the distribution efforts, particularly if the offering has a retail tranche directed primarily to individuals. In such cases, the lead underwriter and the offeror often hire a clearing house for the São Paulo Stock Exchange (BM&FBOVESPA) to settle the public offering on a primarily delivery against payment basis.

### **Private placings**

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

No specific rules define a private placement, although the Brazilian Capital Markets Law and Regulation No. 400 define public offerings by reference to a list of factors that suggest a public offering of securities. Over time, the CVM has provided guidance, on a case-by-case basis, on the kinds of offerings that fall outside registration and prospectus requirements. Specifically, a private placement is defined by the absence of general solicitation, as defined by applicable regulations, or if intended for previously identified offerees who are employees, shareholders or other affiliates of the issuer. As a practical matter, offerors and other parties will submit any offering that may trigger registration requirements to the CVM for a confirmation that the proposed transaction does not constitute a public offering.

Although not strictly a private placement, Regulation No. 400 contemplates the possibility of an exemption from registration and prospectus requirements available for offerings aimed at qualified investors. The only guidance extracted from Regulation No. 400 is the requirement that qualified investors must represent to the offeror that they are knowledgeable and experienced investors who had access to information regarding the issuer, which they deem sufficient for their investment decision and are aware of the exemption from registration requirements.

Please note that offerings made to a limited number and type of investors, and not to the general public, are regulated by Regulation No. 476. Therefore, under the terms of Regulation No. 476, only professional investors may be approached. Professional investors are the following:

- financial institutions;
- insurance companies;
- private welfare opened or closed capital organisations;
- individuals or entities that hold financial investments in an amount exceeding 10 million reais, provided that such investor declares his or her condition as professional investor;
- investment funds;
- investment clubs, provided that their manager is authorised to execute such services by the CVM;
- portfolio administrators and securities consultants who are authorised by the CVM, in relation to their own resources; and
- foreign investors.

Moreover, up to 75 professional investors may be approached in the selling efforts, and no more than 50 professional investors may purchase securities in such offering. However, offeror's shareholders exercising their priority or preference rights and foreign investors shall not be considered for the purpose of determining the maximum number of investors to be approached or that may acquire securities in the offering.

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

No information requirements apply to a private placement of securities under CVM regulations. However, the CVM suggests that information similar to what is usually provided in a prospectus, including the reference form, be provided to investors to assist them in their investment decision. Offerors and issuers may consider providing a disclosure document to prospective investors only to document the representations made at the time of the investment decision. Any offeror in a private placement will be liable for material misstatements or omissions under the general theory of liability for fraud.

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

Generally, securities acquired in a private placement may only be transferred in private transactions, except when the same class of securities is traded on a stock exchange or other qualified market, in which case any holder may sell its securities on the stock exchange or other market immediately.

Please note that public offerings distributed with restricted selling efforts also have certain trading restrictions. Securities acquired in such public offerings may not be transferred during a 90-day period counted as from the date of their initial sale. Pursuant to Regulation No. 476, such lock-up rule does not apply to public offerings of shares, warrants and depositary receipts.

In addition, securities acquired by professional investors in a public offering distributed with restricted selling efforts can only be traded among qualified investors, which are:

- professional investors;
- individuals or entities that hold financial investments in an amount exceeding 1 million reais, provided that such investors declare their condition as a qualified investor;
- individuals who have been approved on technical qualification examinations or have certifications approved by the CVM as requirements for the registration of autonomous investment agents, portfolio managers, analysts and consultants of securities, in relation to their own securities; and
- investment clubs, provided that at least one of the quotaholders manages the fund and is considered a qualified investor.

Such restriction will be exempt in case the issuer is registered as an issuer of public securities or, in relation to shares, warrants, convertible or exchangeable debentures or deposit certificates, there has been a previous public offering of securities of the same type and class registered with the CVM or 18 months have passed from the date of the listing of securities of the same type and class with the stock exchange.

## Offshore offerings

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

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

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

## Particular financings

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

Exchangeable or convertible securities and warrants require special attention in connection with registration of foreign investment with the Central Bank of Brazil. The accurate registration of the terms of the security, including any conversion, exchange or other features is crucial to permit the later exchange or conversion. American and global depositary receipt programmes require the approval of the CVM and the Central Bank of Brazil.

Regulation No. 476 also allows public offerings distributed with restricted selling efforts of shares, convertible securities and warrants, as long as they are intended exclusively for professional investors.

## Underwriting arrangements

### 12 What types of underwriting arrangements are commonly used?

In equity offerings, the lead underwriter and the bookrunners will typically enter into a firm commitment underwriting agreement with the issuer or the selling shareholder, as the case may be. The bookrunners will also enter into separate agreements with the co-managers, by which the co-managers agree with the underwriting agreement and provide their own firm commitment to place or purchase the shares on offer.

In equity offerings, underwriters usually give a firm commitment to purchase the securities that are not effectively settled by investors at the settlement date. A qualified underwriter must mediate in any public offering of securities.

Despite being a common practice in debt offerings, in special circumstances, the underwriters may give a firm commitment to place the securities offered in equity offerings, instead of only committing to purchase the securities that are not effectively settled.

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

An underwriting agreement for a Brazilian public equity offering will typically provide for broad indemnification rights, a limited number of termination events and a flat commission. Regulation No. 400 allows the underwriter to receive and exercise overallotment options, which are generally used in offerings with an international tranche. Any compensation payable to the underwriters must be stipulated in the underwriting agreement.

Regulation No. 476 does not expressly state that an offeror may grant an overallotment option to the underwriters, as currently provided by Regulation No. 400. In response to a formal consultation by BM&FBOVESPA and ANBIMA, CVM has stated that public offerings distributed with restricted selling efforts allow the granting of overallotment options, provided that current shareholders are entitled to priority rights in the subscription of such shares in primary offerings.

### 14 What additional regulations apply to underwriting arrangements?

The lead underwriter in a public offering under the terms of Regulation No. 400 has the primary responsibility for liaising with the CVM and fulfilling regulatory obligations to provide information to the CVM while ensuring that the offering is conducted in a manner that is fair to investors. The lead underwriter also shoulders most of the exposure of the underwriters in connection with liability for material misstatements or omissions in the offering documents.

The lead underwriter must devise a plan of distribution and assure fair treatment of investors by other underwriters. Depending on the special listing segment of BM&FBOVESPA the issuer has consented to (Novo Mercado, Nível 1 or Nível 2), it will be required to seek to disperse its shares widely among investors in the market. Typically, issuers meet this requirement by developing a retail offering primarily targeting individual investors. The commitment by issuers to a special listing segment of BM&FBOVESPA is a requirement imposed by the ANBIMA's Best Practice Code.

However, a retail offering would not be feasible in a public offering of shares distributed with restricted selling efforts due to the limitation of selling the securities only to professional investors, as previously explained. In order to clarify this point, BM&FBOVESPA issued a circular specifying the following:

- (i) an initial public offering – IPO distributed with restricted selling efforts requires the shares to be listed in BM&FBOVESPA's special listing segment for low and mid-caps (Bovespa Mais and Bovespa Mais – Level 2), as such offerings do not provide for the liquidity levels required from an issuer to be entitled to list its shares in other special listing segments; and
- (ii) offerings with restricted selling efforts of issuers listed in Novo Mercado, Nível 1 or Nível 2 should comply with one of the following criteria in order to reach the minimum distribution of shares offered:
  - individual investors or investment clubs must hold at least 10 per cent of the issuer's capital stock prior to the offering and the offering provides for priority allocation to shareholders;
  - individual investors or investment clubs that may exercise pre-emptive or priority rights, when considered together with individual investors (eg, those holding managed investment portfolios) and investment clubs approached in the offering distributed with restricted sales, represent at least 10 per cent of the investors at which the offering is directed to; or
  - the average daily trading volume (ADTV) of the issuer's shares must be equal to or higher than 4 million reais, considering the trades executed within the three-month period prior to the offering distributed with restricted selling efforts.

If the issuer does not meet any of the conditions mentioned in (ii) above, BM&FBOVESPA will automatically grant a period of 18 months counted as from the closing of the offering for the company to comply with distribution rules, which can be achieved by either: registering a public offering with the CVM, pursuant to Regulation No. 400; or reaching an ADTV of 4 million reais, considering the trades executed within the three months prior to the above-mentioned 18-month period.

Underwriters will usually receive deposits from retail investors in individual, segregated accounts in anticipation of pricing a public offering. Deposits are permissible as long as a preliminary prospectus is available. After the public offering has been registered and commenced, each retail investor will receive the number of shares corresponding to the amount purchased and deposited in the offering price. An investor may withdraw its deposits if the final prospectus, including the reference form, contains materially different information than the information in the preliminary prospectus, including the reference form.

Regulation Nos. 400 and 476 impose a duty on the lead underwriter to take all measures and act with high standards of diligence, being responsible for any lack of diligence or omission. The underwriter must ensure that the information provided by the offeror is true, consistent, correct and sufficient. Additionally, under the terms of Regulation No. 476, the lead underwriter must disclose any conflicts of interest to investors, ensure that investors have sufficient knowledge and experience in finance and business to assess the quality and risks of the securities offered, and make sure that the investment is suitable

### Update and trends

In March 2016, BM&FBOVESPA initiated a public consultation in order to update the regulatory framework for Nível 2 and Novo Mercado, two of BM&FBOVESPA's special listing segments. The special listing segments were created by BM&FBOVESPA in 2000, and since then, have had two updates – 2006 and 2011. The amendments currently under discussion relate mainly to (i) capital structure and outstanding free float shares; (ii) management (nomination policy, nomination and compensation committee and independent directors, performance evaluation of management and management opinion in tender offers); (iii) internal controls and disclosure (code of conduct, statutory audit committee, compliance, internal controls and risk and environmental report); (iv) 30 per cent tender offer requirement; (v) segment delisting and sanctions (voluntary delisting and compulsory delisting); and (vi) corporate reorganisation. BM&FBOVESPA expects to conclude the discussions with the market on 30 June 2017.

On December 2016, the CVM issued a Public Hearing Notice SDM No. 10/16 in order to amend Regulation No. 480. The main change proposed by the CVM relates to an annual periodic form containing information regarding the rules established in the Brazilian Code of Corporate Governance, which was recently published by a group named GT Interagentes, and includes 11 of the most important entities of the Brazilian capital markets, such as ANBIMA, ABRASCA, APIMEC and BM&FBOVESPA. GT Interagentes seeks to strengthen corporate governance and expand the protection and trust of investors. Furthermore, the CVM proposes an amendment to the reference form in order to improve reported information and simplify the disclosure of practices stipulated in the Brazilian Code of Corporate Governance and improve the rules related to financial statements, information provided by special status issuers, trading of securities issued by pre-operational companies and conditions related to the cancellation of registration of class A publicly held companies.

to the level of sophistication and the investor's risk profile. It must also collect from investors declarations regarding their condition as professional investor.

Moreover, if a public offering under the terms of Regulation No. 400 is oversubscribed by more than one-third of the offered securities, no security may be placed with affiliates of the underwriters, the issuer or any other parties involved in the offering, except for orders placed by non-institutional investors and provided that they comply with CVM recommendations and are considered sufficient to mitigate the use of confidential information by investors to obtain improper advantage. Although, Regulation No. 476 does not provide for any kind of similar restriction, it is common for public offerings distributed with restricted selling efforts to have similar standards in order to implement the best market practice.

### Ongoing reporting obligations

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

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

As mentioned before, public offerings of debt securities distributed with restricted selling efforts do not require the issuer to obtain registration as a public company with the CVM. Nonetheless, Regulation 476 requires material facts notices to be disclosed and annual audited financial reports to be available on the issuer's website for three years.

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

Brazilian corporate law mandates disclosure of any material events involving a public company, including most corporate resolutions and shareholders' agreements. Public companies are also required to file annual and quarterly reports with the CVM, including annual audited and quarterly unaudited financial statements prepared in accordance with Brazilian accounting principles, which have been in line with IFRS since 2011.

Under the CVM and BM&FBOVESPA regulations, officers, directors, members of the inspection committee, controlling shareholders and related parties are required to disclose their holdings of securities issued by a public company and any transactions involving such securities within 10 days counted from the end of the calendar month in which such transactions occur.

Under Regulation No. 480, the reporting company must file annually with the CVM the record data form and the reference form, and must update the reference form within seven business days from the date of certain material events established in the rule. It must also file with the CVM corporate documents in preparation for shareholders' meetings and an updated reference form annually, except when any material event as described in the above-mentioned Regulation occurs that obligates the issuer to update the form. This amendment to the form must occur within seven days counted from the date the material event took place.

CVM Regulation No. 481/2009, as amended (Regulation No. 481), also requires that class 'A' publicly held companies that are registered with the CVM under class 'A' must disclose certain information with supporting documents for shareholders' meetings.

Moreover, since January 2015, CVM Regulation No. 552/2014, as amended (Regulation No. 552), establishes criteria to determine what type of information on related-parties' transactions must be reported by publicly held companies. The purpose of this new regulation is to allow investors and the CVM to monitor the most relevant transactions immediately.

### Anti-manipulation rules

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

Issuers, selling shareholders, underwriters and any other persons involved in a public offering are barred from trading in the securities of an issuer once the preparation for a public offering has begun. However, Regulation No. 400 establishes certain circumstances by which they can trade, including trades by order and on behalf of third parties and stabilisation activities that allow underwriters to engage in certain limited price-supporting trades during the course of a public offering. In addition, the CVM will monitor market activities under general mandates barring manipulative practices.

CVM Regulation No. 358/2002, as amended (Regulation No. 358), also prohibits the negotiation of securities by the issuer, the controlling shareholders, officers, members of the board of directors, members of the inspection committee or members of any technical or advisory body created by the company's by-laws, during the period a disclosure of a material fact regarding the issuer is pending or within 15 days prior to the disclosure of any financial report. Such prohibition does not apply to specific situations established by Regulation No. 358, including individual investment plans filed at the company's headquarters, establishing dates and amounts of shares to be undertaken, or to fulfil the exercise of stock options granted in the context of the issuer's stock option plan.

Additionally, CVM Regulation No. 530/2012 (Regulation No. 530) prohibits subscription of shares in public offerings by investors who have carried out short sales of the issuer's shares on the date the price per share was fixed and on the previous five trading sessions. Regulation No. 530 defines short sales as those sales carried out by investors who are not holders of the shares in reference or whose ownership results from a share loan or other equivalent instrument. This prohibition does not apply to: transactions carried out by entities in the exercise of market-making activity; and transactions later covered by acquisition in the market of the total amount of shares corresponding to the short position no later than two trading sessions before the date the price per share was fixed.

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

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

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

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

In addition, for the purposes of preventing fluctuation in the market price of shares distributed under the terms of Regulation No. 400, during the first days of trading, a member of the syndicate of underwriters may undertake some actions as a counterparty on the secondary market. One of the underwriters is allowed to engage in stabilisation activities for a period of up to 30 days counted from the first trading day of the new shares. In this regard, the stabilisation agent may over-allot shares in connection with the offering, creating a syndicate short position and may bid for, and purchase, shares in the open market to stabilise the price of shares. The stabilisation agent is not required to carry out these activities every day, and they may be discontinued at any time.

A price-stabilisation agreement must comply with CVM Regulation No. 505/2011, as amended, and BM&FBOVESPA regulations, and must be in a form approved by the CVM and BM&FBOVESPA. The CVM requires the parties to take actions that are sufficient to eliminate the possibility of market manipulation and to ensure transparency of negotiations. Reports of stabilisation activity must be provided to the CVM.

Regulation No. 476 does not expressly admit price stabilisation activities in public offerings of shares distributed with restricted selling efforts, as is customary in public offerings conducted under the terms of Regulation No. 400. In response to a formal consultation by BM&FBOVESPA and ANBIMA, the CVM's understanding was

that price stabilisation activities in public offerings distributed with restricted selling efforts would only be allowed in case of an amendment to Regulation No. 476, which has not occurred to date.

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

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

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

The CVM does not usually deny registration to an offering and will not take a position regarding the accuracy of any disclosure documents. In most cases, the CVM will demand an amendment to the prospectus, the reference form and other documents until it is satisfied that its concerns have been addressed. As mentioned before, public offerings with restricted selling efforts are not registered with the CVM; however, they remain subject to the CVM's supervision.

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

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

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

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# Canada

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## Statutes and regulations

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

Generally speaking, Canadian securities law focuses on three principal areas, namely, registration of securities advisers and dealers, issuers and securities, and enforcement, with each of the 10 Canadian provinces and three territories regulating itself by way of its local securities law statute (eg, the Securities Act (Ontario) (OSA)) falling largely under the purview of a securities regulator in each such province or territory (the Regulators).

The securities law statutes (the Statutes) for each of the 10 Canadian provinces and three territories are as follows:

- Ontario: Securities Act, RSO 1990, c S.5;
- British Columbia: Securities Act, RSBC 1996, c 418;
- Alberta: Securities Act, RSA 2000, c S-4;
- Saskatchewan: Securities Act, 1988, The, SS 1988-89, c S-42.2;
- Manitoba: Securities Act, CCSM c S50;
- Quebec: Securities Act, CQLR c V-1.1;
- New Brunswick: Securities Act, SNB 2004, c S-5.5;
- Nova Scotia: Securities Act, RSNS 1989, c 418;
- PEI: Securities Act, RSPEI 1988, c S-3.1;
- Newfoundland: Securities Act, RSNL 1990, c S-13;
- Yukon: Securities Act, SY 2007, c 16;
- Northwest Territories: Securities Act, SNWT 2008, c 10; and
- Nunavut: Securities Act, SNu 2008, c 12.

In an effort to harmonise their regimes across Canada, the Canadian provinces and territories have formed the Canadian Securities Administrators, which facilitates the promulgation of national instruments (NIs), multilateral instruments (MIs) and their related companion policies (CPs). The NIs, MIs and CPs are incorporated into the Statutes in the form of regulations, which form many of the main operative regulatory provisions governing securities offerings throughout Canada.

Key NIs and MIs include NI 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations; NI 41-101 General Prospectus Requirements; NI 45-106 Prospectus Exemptions; NI 51-102 Continuous Disclosure Obligations; NI 55-102 System for Electronic Disclosure by Insiders (SEDI); NI 55-104 Insider Reporting Requirements and Exemptions; Criminal Code of Canada; MI 61-101 Protection of Minority Security Holders in Special Transactions; NI 62-103 The Early Warning System and Related Take-Over Bid and Insider Reporting Issues; and NI 62-104 Take-Over Bids and Issuer Bids.

The above-listed statutes, NIs and MIs form a constituent part of the basic regulatory framework for securities regulation in Canada. Compliance with this framework is achieved by the Regulators through the review and enforcement of their requirements, including dealer registration, adviser registration, continuous disclosure obligations (quarterly and annual financial filings), corporate governance implementation, proxy solicitation regulation, director independence, audit committee independence, minority shareholder protection, the sale of securities by way of a prospectus or by way of a prospectus exemptions, takeover bid regulation, and the early warning reporting and SEDI insider reporting regime.

## Public offerings

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

#### Regulatory filings – initial public offering

Generally speaking, an initial public offering of securities in Canada that is a primary offering is completed by way of a prospectus offering, which qualifies the securities (debt or equity) for distribution by preparing a prospectus in prescribed form (the Prospectus Requirement).

The purpose of the prospectus is provide the investing public with full, true and plain disclosure of all material information in relation to the issuer and its securities such that the investing public can make an informed investment decision. Such information includes extensive disclosure in relation to the issuer's business, including the details of its consolidated capitalisation, securities being distributed, management team, board of directors, corporate governance structure, recent acquisitions, material contracts, legal proceedings, relationship with underwriters, rights of withdrawal and rescission, and the risk factors involved in an investment in the applicable securities.

The prospectus must also disclose the details of all financial (IFRS) and expert information in relation to the issuer or its assets. Such information customarily includes the issuer's financial position (annual and quarterly) including:

- annual financial statements, interim financial statements, including balance sheets, and statement of income;
- pro forma financial statements (in relation to an actual or potential transaction), independent auditor reports, auditor certifications; and
- expert reports or studies conducted on the issuer or its assets (ie, mineral property, or oil and gas asset) setting out the particulars of a technical report or reserves report in accordance with the applicable NI that regulates such disclosure.

Additionally, disclosure supporting the financial information is also required to be included within a prospectus and includes a management's discussion and analysis with executive compensation details to be completed in a prescribed form. The nature, details and complexity of such information is indicative of the high level of disclosure required in order for securities to obtain a prospectus qualification and is known colloquially as 'prospectus level disclosure'.

Once an issuer's initial public offering is complete, various continuous disclosure obligations apply to the issuer (see questions 15 and 16).

#### Regulatory filings – secondary offering

A shareholder, often a 'principal' of the issuer or 'control-block' holder, is permitted to sell all or a portion of its securities of the issuer to the public in the issuer's 'primary' offering free of any resale restrictions provided that such secondary offering, including the apportioning of expenses among the selling security holder and the issuer, is appropriately disclosed in the issuer's prospectus.

#### Regulatory filings – subsequent offering

Once an issuer has completed its initial public offering, subsequent financings are once again subject to the Prospectus Requirement or

may be completed by way of a prospectus exemption (meaning such securities are generally freely tradeable after four months) known colloquially as 'a private placement'.

An issuer that has completed its initial public offering does have the ability, if up to date with its continuous disclosure obligations, to complete a subsequent offering by fulfilling the Prospectus Requirement by way of a short form prospectus. Generally, a short form prospectus is a condensed form of prospectus that incorporates by reference an issuer's annual information form, financial statements, management's discussion and analysis and any other relevant publicly filed documentation.

#### Exchange filings

Listings of securities on the Toronto Stock Exchange (TSX) or the TSX Venture Exchange (TSXV) are typically completed by way of:

- an initial public offering;
- listing application;
- a reverse takeover;
- the capital pool company programme of the TSXV; or
- the special acquisition corporation programme of the TSX.

These various forms of listings customarily require the filing with either the TSX or TSXV of a listing application and an original listing agreement.

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

The Prospectus Requirement process begins with the issuer preparing a preliminary prospectus. Once complete, the issuer files its preliminary prospectus, together with the supporting documentation mentioned above, with each of the applicable Regulators where the securities will be offered. In an effort to streamline the review process, the Regulators, with the exception of Ontario, have adopted a 'passport system' allowing the issuer to select a 'principal regulator' (usually in its local jurisdiction) to act as the lead prospectus reviewer on behalf of all other regulators. As it is customary for issuers to take advantage of the passport system, the commentary below will assume its usage.

Upon the preliminary prospectus being receipted by the principal regulator a 'waiting period' commences, being the period of time between when an issuer receives the receipt for its preliminary prospectus and when it receives the receipt for its final prospectus. It is also at this time that an issuer will customarily file its listing application with the applicable exchange (the TSX or TSXV).

Once the waiting period has commenced, the issuer and its underwriters, subject to the delivery of a preliminary prospectus to potential investors prior to solicitation, may begin to build their books, market and price the offering. The principal regulator will use its best efforts to review the preliminary prospectus and provide its first comment letter within 10 working days of the date of the receipt for the preliminary prospectus. The principal regulator may provide further comments as a result of the issuer's responses or the continuing review of the materials, and therefore the complexity of the issuer's disclosure and its ability to respond to the principal regulator's first and subsequent comment letters all have an effect on timing.

The receipt for the final prospectus is only issued by the Regulators after the principal regulator has reviewed the preliminary prospectus, and the issuer has resolved any comments from the Regulators and has filed a final version of the prospectus therewith. The final prospectus is extremely important because it is the document to which regulatory and civil liability attach.

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

Subject to certain requirements, investment dealers are permitted to distribute certain information to potential investors during the waiting period. Such public documentation includes a preliminary prospectus, a standard term sheet, and marketing materials. Investment dealers are also permitted to solicit expressions of interest from potential investors if such purchasers have been provided with a copy of the preliminary prospectus. Although issuers customarily wait for the first comment

letter to arrive, clearance from the principal regulator is not required before delivering marketing documentation.

Standard term sheets delivered during the course of marketing must include prescribed cautionary language noting that such material does not contain full disclosure of all material facts. Marketing materials intended for potential investors must contain similarly prescribed cautionary language in bold type as contained on the cover page and in the summary of the preliminary prospectus.

Additionally, 'roadshows' conducted by investment dealers must adhere to specific requirements over and above the investment dealer registration regime. For example, if an investment dealer allows a potential investor, other than an accredited investor, to attend a roadshow then the investment dealer must begin the roadshow with an oral reading of the following statement:

*This presentation does not provide full disclosure of all material facts relating to the securities offered. Investors should read the preliminary prospectus, the final prospectus and any amendment for disclosure of those facts, especially risk factors relating to the securities offered, before making an investment decision.*

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

Concurrent with a 'primary' offering, it is possible for the completion of a 'secondary' offering, in which an amount of shares held by existing shareholders is offered for sale. Customarily, when a secondary offering is made pursuant to the same prospectus filing as the issuer's primary offering, the selling shareholders bear a share of the expenses of the offering which, in addition to other information about the selling shareholders, must be disclosed appropriately in the prospectus.

Additionally, securities regulators may require that the selling shareholders under a secondary offering certify that the information in the prospectus contains full, true and plain disclosure in relation to the issuer and the securities being distributed. Under securities legislation, selling shareholders are liable for misrepresentations in a prospectus whether or not they sign a prospectus certificate. There are circumstances, however, where the regulator may determine that it is in the public interest to require the selling security holder to affirmatively certify the prospectus. Generally, the regulator would only exercise this discretion where the securities being distributed by the selling security holder represent a substantial portion of the securities being distributed under the prospectus.

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

Generally speaking, the settlement process for sales of securities in a public offering is completed upon securities being held indirectly on behalf of the investing public by the Canadian Depository for Securities (CDS). Issuers apply to CDS for an International Security Identification Number (ISIN) and Committee on Uniform Security Identification Procedure (CUSIP) Number, which facilitates the electronic storage, clearance and settlement processes for securities transfers. This is completed by identifying net positions of each broker, investment dealers or various financial institutions with CDS. In this way, CDS holds the securities registered in its name on behalf of those brokers who in turn hold securities on behalf of their clients. Most trades (including in the secondary market) are reflected on the books of the brokers through whom investors hold their interest. Additionally, only net changes in the brokers' positions are recorded at CDS. Therefore, if a trade is effected between a purchaser and seller of securities by the same broker, then such a broker will adjust its own internal client records while such broker's position with CDS remains unchanged (because such broker's net holdings did not change). However, if one broker acted for the seller and another broker acted for the purchaser then CDS will adjust its records to show the transfer in holdings moving from one broker to another.

With respect to settlement timing, the TSX has adopted a rule mandating that the settlement date for exchange trades in securities is three trading days after the trade date (a T+3 settlement cycle), unless otherwise provided by the parties to the trade by mutual agreement. Nevertheless, it is anticipated that the Regulators and the exchanges will update their respective requirements towards a settlement process

ending only two trading days after the trade in question (a T+2 settlement cycle).

### Private placings

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

The principal rule governing the private placement of securities, both debt and equity, in Ontario and the remainder of Canada is National Instrument 45-106 Prospectus Exemptions (NI 45-106) and/or Part XVII of the Securities Act (Ontario). Commonly relied-upon prospectus exemptions within NI 45-106 and/or Part XVII of the Securities Act (Ontario) for an entity financing a business in Canada include the following exemptions:

- the 'accredited investor' exemption, which allows certain qualified investors, including institutional investors and persons or companies that meet income or asset tests and, in certain circumstances, who have completed a prescribed risk acknowledgement form;
- the 'minimum investment amount' exemption permits a person (though not an individual) to acquire securities on a prospectus-exempt basis where each purchaser invests no less than C\$150,000 paid in cash; and
- the 'private issuer' exemption, which permits an issuer to issue securities to not more than 50 beneficial security holders (excluding holders of non-convertible debt) from a prescribed list of persons, including directors, officers and employees of the issuer, but the issuer must have restrictions on share transfers in either the issuer's originating documents or shareholders' agreement.

NI 45-106 contains other prospectus exemptions, including an exemption for friends, family and close business associates of persons related to the issuer and, for the employees executive officers, directors and consultants of the issuer.

The person relying on the prospectus exemption (generally speaking, the issuer) must implement procedures to ensure that all of the specific terms and conditions of the applicable prospectus exemption have been met (eg, an individual accredited investor completes a prescribed risk acknowledgement form). Recent guidance from the Regulators has advised that it is not sufficient for a person relying on the prospectus exemption to simply obtain representations from a purchaser or a 'check the box' form, but rather the person must take reasonable steps to verify the representations made by the purchaser. The person relying on the prospectus exemption should retain all necessary documents to demonstrate that he or she properly relied on the exemption. In the case of certain trades in reliance on the prospectus exemptions contained in NI 45-106, it may be necessary for the issuer to file a report and pay a fee to the relevant regulator.

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

To rely on certain prospectus exemptions (although not the 'accredited investor', 'minimum investment amount' or 'private issuer' exemptions), an issuer is required to deliver a disclosure document to prospective investors (ie, an offering memorandum). That disclosure document is required to contain certain information about the business, operations, affairs and financial results of the issuer in a prescribed form. An issuer may also voluntarily provide potential investors with a disclosure document regardless of the prospectus exemption relied upon. This voluntarily delivered disclosure document will typically contain certain information about the business, operations and affairs of the issuer. Where a disclosure document is provided to an investor (whether required by the exemption or voluntarily), in certain Canadian jurisdictions, including Ontario, securities legislation grants the investor a right of action for damages or recession if the disclosure document contains a misrepresentation. In addition, a copy of the disclosure document generally must be filed with the relevant regulator.

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

The principal rule related to restrictions to the transferability of securities in a private placement, both debt and equity, in Ontario and the

remainder of Canada is National Instrument 45-102 Resale of Securities (NI 45-102). Generally speaking, NI 45-102 states that purchasers of privately placed securities are prohibited from freely trading the securities (that is, selling the securities without providing a prospectus to subsequent purchasers) except either: in reliance upon a further prospectus exemption; or if the issuer of the securities is or becomes a 'reporting issuer' in any Canadian jurisdiction, a four-month and one day restricted period has elapsed, and the certificate representing the securities carries a prescribed legend. Generally speaking, the four-month and a day restricted period runs from the date of the closing of private placement, or for non-public issuers, the later of the date of the closing of the private placement and the date on which the issuer becomes a 'reporting issuer' under the securities legislation of any jurisdiction of Canada.

### Offshore offerings

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

The principal domestic rules that apply to offerings of securities of an issuer domiciled in Canada outside of Canada are the Multijurisdictional Disclosure System (MJDS) and the application of Canadian private placement rules.

The MJDS facilitates cross-border public offerings of securities between the US and Canada. The MJDS allows eligible Canadian issuers to make registered public offerings in the US using a prospectus prepared and reviewed in Canada by the Canadian securities regulators that is mainly, although not exclusively, in accordance with Canadian disclosure requirements (a 'southbound MJDS prospectus'). Although less frequently used, there is also a reciprocal MJDS that allows eligible US issuers to make registered public offerings in Canada (a 'northbound MJDS prospectus').

In addition to the MJDS, generally speaking, and though the law on this point is currently in flux, securities offered outside of Canada by a Canadian-domiciled issuer will not be subject to Canadian securities laws if reasonable precaution, and restrictions are implemented by the issuer, underwriters and other participants in such an offering of securities outside of Canada to ensure that the securities are not distributed, or redistributed, into Canada or to Canadian residents and that such securities come to rest outside Canada. However, issuers will often comply with the applicable Canadian prospectus exemptions and include legends on the certificates representing the applicable securities in connection with such an offering. Depending on the particular circumstances of the offering, additional Canadian securities laws may need to be considered in the context of the offering of securities of an issuer domiciled in Canada outside of Canada, such as Multilateral Instrument 51-105 Issuers Quoted in the US Over-the-Counter Markets and the blanket orders associated therewith.

### Particular financings

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

An offering of any exchangeable or convertible securities (ie, securities of an issuer exchangeable or convertible into an underlying security of that issuer), whether convertible debt or warrants, typically does not require special considerations since the issuance of the underlying securities upon exchange or conversion is either qualified under a prospectus or is exempt from the prospectus requirements pursuant to NI 45-106.

Rights offerings can be completed in Canada by way of either a prospectus (see questions 2 to 6) or on a prospectus-exempt basis pursuant to NI 45-106. The key conditions of a prospectus-exempt rights offering are that the issuer must be a reporting issuer in Canada and it must be current in its continuous disclosure obligations. In addition, the exercise period for the rights must be no less than 21 days and no more than 90 days and must commence the day after a notice is sent to the issuer's security holders. The maximum dilution that may occur in a prospectus-exempt rights offering is 100 per cent. The basic subscription privilege must be available, on a pro rata basis, to all security holders resident in Canada, though additional subscription rights are permitted in certain circumstances. Certain documents must be provided to security holders of the issuer, including a rights offering notice and a rights offering circular, each of which must be prepared in a prescribed form.

## Underwriting arrangements

### 12 What types of underwriting arrangements are commonly used?

The Canadian capital markets have had some unique characteristics, which has had some effect on the underwriting arrangements. First, Canada has been a capital formation capital for junior resource companies – regardless of where the underlying resource may be situated. Second, the typical deal size in Canada is usually smaller than in the US and UK. Third, Canada has had a long history of corporate governance regulation, the basic rules of which formed part of the foundation for Sarbanes-Oxley corporate governance rules in the US. Fourth, the TSX and the applicable securities regulatory authorities have a global reputation for diligence and proactive monitoring of the public entities in Canada. Accordingly, the form of underwriting agreements, the extensive and pervasive nature of the representations and warranties and the potential liability of the underwriters has led to a detailed and broadly worded underwriting agreement, which in part incorporates by reference the policies and rules of the securities regulatory authorities. Inasmuch as Canada does not have a history of form compliance or the extensive due diligence that may otherwise be done in the US, the underwriters do not seek 10b-5 opinions or form compliance opinions. In Canada, the process of preparing the prospectus and the allocation of liability (which for underwriters is knowledge-based) means that the preparation process includes working cooperatively with the issuer and the securities regulators to present to the investing public (and attaching liability to) that information considered to be most meaningful to the potential investors.

Also, Canada has a statutory two-day withdrawal right for a purchaser after delivery of the prospectus, which adds additional importance to full, true and plain disclosure.

Further, the Canadian practice is not to have pricing or estimated pricing in the preliminary prospectus. The legal standard in Canada for amendments to the preliminary prospectus is that an amendment is needed only where there is a material adverse change in the information. No legal liability attaches to the preliminary prospectus. Accordingly, fewer drafts are submitted to the Regulators and the changes between preliminary and final prospectus may be significant.

In order to facilitate funding by seasoned issuers, Canada has developed its analogue of the S# offering, called a 'bought deal'. In the bought deal the underwriter or underwriters agree with the issuer to buy particular securities at a stated price – and the regulators will review and clear the prospectors in short order. With a bought deal, the market risk goes solely to the underwriter, and the only risk retained by the issuer relates to the issuer and its business.

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

As mentioned above, in Canada there are no opinions for form compliance of 10b-5. However, there are indemnities for misrepresentations. As in the US, there is sometimes a question as to whether an indemnity will be enforceable if the indemnity relates to a failure to comply with legal requirements. Accordingly, the indemnities in Canada usually contain language relating to contribution that will allocate loss based on relative culpability and benefit.

Overallotment options are common, but are permitted solely to facilitate the over-allocation of the distribution and consequent market stabilisation efforts. The liability in the prospectus includes the securities issued pursuant to the overallotment.

The use of success fees in underwriting agreements is not typical in Canada.

The 'market out' clauses in underwriting agreements in Canada would include provisions that would be very similar to force majeure clauses.

### 14 What additional regulations apply to underwriting arrangements?

The rules of IIROC (the Canadian FINRA equivalent) apply to underwriting agreements – especially capital requirements in the context of a bought deal. The limited number of underwriters in Canada (in comparison to the US or the UK) has imposed a market discipline upon the form and content of the underwriting agreements used in Canada.

## Ongoing reporting obligations

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

Under Canadian securities laws, generally speaking, only 'reporting issuers' are subject to periodic and timely disclosure obligations. An issuer can become a 'reporting issuer' in a number of ways. The most common way an issuer of securities becomes a reporting issuer is by filing a final prospectus and obtaining a receipt for such (final) prospectus. Other instances where an issuer of securities becomes a reporting issuer include, but are not limited to:

- an issuer has filed a securities exchange takeover bid circular under the OSA before 14 December 1999; or
- one of Regulators considers that it is in the public interest that a person or company is a reporting issuer.

There may also be ongoing reporting obligations for non-'reporting issuers' that distribute securities to the general public pursuant to certain prospectus exemptions, such as, as of 25 January 2016, the crowdfunding exemption in MI 45-108 Crowdfunding.

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

In 2005, continuous disclosure requirements were harmonised by National Instrument 51-102 Continuous Disclosure Obligations (NI 51-102), which provides continuous disclosure requirements for reporting issuers across Canada. The information that a reporting issuer is required to make available to the public will depend on several criteria, such as whether the reporting issuer is a non-venture issuer (meaning listed on the TSX) or a venture issuer (meaning listed on the TSXV), or depending on its industry (for example, mineral, or oil and gas activities), or whether it is a foreign issuer that meets certain criteria.

Generally, there are two kinds of reporting requirements mandated under the OSA that apply to all reporting issuers: 'periodic' and 'timely'. Periodic disclosure provisions require a reporting issuer to disclose material information at regular, set intervals. Periodic continuous disclosure reporting obligations include: financial disclosure, management's discussion and analysis (MD&A), annual information forms and proxy and information circulars. None of these disclosures are subject to review by securities regulators.

In terms of financial disclosure, a reporting issuer must file audited annual financial statements, as well as interim (unaudited) quarterly financial statements. Accompanying every annual and interim financial statement, an MD&A must be filed. An MD&A must correspond to Form 51-102F1, and should provide a balanced discussion of a reporting issuer's results, financial condition and future prospects and assist current and prospective investors understand what the financial statements present. Furthermore, an MD&A should discuss trends and risks that have affected the financial statements, as well as provide information about the quality, and potential variability of the reporting issuer's earnings and cash flow.

Annual information forms (AIF) (which are similar to a 10K mandated in the USA) must be prepared annually and provide point-in-time material information about the reporting issuer and its business. An annual information form describes an issuer, its operations and prospects, executive compensation, risks and other external factors that may impact the company.

Generally, an information circular must be prepared whenever there is a solicitation. 'Solicit' is broadly defined to capture most attempts to influence security holders. An information circular provides information to allow security holders to make informed decisions on proxy votes. The form of the management information circular is prescribed in Form 51-102F5. If the solicitation is by someone other than management then a circular is also required, albeit with a slightly different form.

In contrast, timely disclosure obligations require a reporting issuer to disclose material changes or changes in material facts as they occur, through press releases and material change reports. The TSX and the TSXV require disclosure by a press release of changes of material facts and material changes. The obligation to file a material change report is triggered by a 'material change'. A material change is defined as 'a change in the business, operations or capital of the reporting issuer that would reasonably be expected to have significant effect on the

market price or value of any of the securities of the reporting issuer'. The Regulators have provided a list of their suggestions as to what facts may require a material change report.

### Anti-manipulation rules

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

The main rules prohibiting manipulative practices in securities offerings and secondary market transactions are found in the Statutes. For example, with respect to Ontario, the enforcement provisions found in Part XXII of the OSA provide that no person or company shall, directly or indirectly, engage, attempt to engage, or participate in any act, practice or course of conduct relating to securities, derivatives or the underlying interest of a derivative that the person or company knows, or reasonably ought to know:

- results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security, derivative or underlying interest in a derivative; or
- perpetrates a fraud on any person or company.

Misleading or untrue statements are also prohibited by the OSA, when the person or company making such statements knows, or reasonably ought to know, that in a material respect the statement is misleading or, similarly, does not state a fact that is required to be stated or that is necessary to make a statement not misleading. The OSA and decisions of the securities regulators also contains prohibitions on 'insider trading' and 'tipping' designed to ensure that people with a sufficiently close connection to an issuer who have access to material undisclosed information do not take advantage, or assist others in taking advantage, of an 'unequal opportunity' as regards the investing public. The OSA provides the applicable Regulator with the power to make an order in the public interest even where there has been no technical breach of securities laws. As the term 'public interest' is not defined in the OSA, the scope of the discretionary power of the Regulator has developed through judicial interpretation, which, in several recent cases, has been broadly applied.

Securities fraud is also codified in the Criminal Code, RSO, 1985, c C-46, where it provides that every person who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of the Criminal Code, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years.

### Price stabilisation

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

Pursuant to Ontario Securities Commission Rule 48-501 – Trading During Distributions, Formal Bids And Share Exchange Transactions, subject to certain restrictions, underwriters can engage in measures to support the price of securities in connection with an offering in the period after trading starts if it is for the purpose of maintaining a fair and orderly market in the offered security by reducing the price volatility of, or addressing imbalances in, buying and selling interests. The securities subsequently purchased must not exceed a specified maximum price. The details of the proposed price supporting measures are included in the final prospectus.

### Liabilities and enforcement

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

As discussed in question 17, the most common basis of liability for an issuer in a securities transaction is statutory liability for misrepresentation. Underwriters who sign a prospectus certificate, directors and certain other persons, such as experts, may also be liable for misrepresentations in a prospectus that is filed as part of a securities transaction. Other types of offering documents (eg, an offering memorandum or a takeover bid circular) also have remedies against certain persons or entities in the event that the associated offering document contains a misrepresentation. As noted above, a misrepresentation is considered to be an untrue statement of material fact or an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made.

Typically, investors are granted a right of action under applicable law with respect to a misrepresentation made by or on behalf of a responsible issuer in its offering or disclosure documents, and a responsible issuer's failure to make timely disclosure of a material change. Generally speaking, individuals or entities who may be liable for a misrepresentation in an offering document will have certain defences available to them. These defences are typically based on the individual or entity not having any knowledge of the offering document being filed, the withdrawal of the individual's or entity's consent to the offering document, including reference to materials prepared by that individual or entity or completion of satisfactory due diligence.

There is statutory liability for directors and corporations and certain others under certain corporate law statutes in connection with securities transactions. For example, certain Canadian corporate law statutes include derivative actions and oppression remedies that may be relied upon in securities transactions. Further, as discussed in question 17, there is also the possibility of criminal sanctions in securities transactions.

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

In certain circumstances, investors resident in certain provinces or territories of Canada are provided with a statutory remedy for rescission or damages, or both, in addition to any other right they may have at law, where certain types of offering documents (eg, prospectus, offering memorandum or takeover bid circular) and any amendment to those documents contain a misrepresentation. Commonly, administrative proceedings at the various provincial and territorial securities commissions will be engaged in the event of improper securities activities.

In the event that the securities of an issuer are listed and posted for trading on a Canadian stock exchange (eg, the TSX, the TSX Venture Exchange or the Canadian Securities Exchange) that stock exchange may halt, suspend or delist trading in an issuer's securities where that issuer fails to comply with the stock exchange's listing requirements. There are also remedies available to investors against issuers, directors, officers and other market participants through civil litigation, including securities class actions. Finally, while rare, criminal prosecution against issuers, directors, officers, underwriters and other market participants is a possible sanction for improper securities-related activities.

# Chile

Matías Zegers and Jorge Timmermann

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## Statutes and regulations

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

The main statute applicable to securities offerings is Law 18,045 Securities Act (LMV), which covers issuers, public offerings, publicly offered and traded securities and their secondary markets (on the floor or over the counter), stock exchanges, brokers, etc.

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

Lastly, the stock exchanges and the securities depositories also play a role in the securities market, since they issue, supervise and enforce their rules upon companies offering their stock in the marketplace. According to LMV and Decree Law 3538 (the Securities and Insurance Superintendency (SVS) Organic Law), the SVS is the regulatory authority responsible for overseeing capital markets' rules in Chile. In fact, the SVS is the entity that approves the public offer of securities and oversees the obligations of companies registered in the Securities Registry in matters such as financial information, accounting principles, information to the market and supervision of secondary markets. However, please note that the issuance of certain securities by the Chilean Central Bank and other state institutions with full state warranty are self-regulated.

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## Public offerings

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

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

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

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

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

- an offer that represents at least 10 per cent of the issuer's capital stock if each investor acquires at least 2 per cent of the issuer's capital stock;
- an offer directed towards employees of the company or its affiliates; and
- an offer to acquire securities over which ownership is required in order to use the facilities of an issuer whose activities relate to charity, education or sports.

Regarding foreign securities, SVS General Rule 352 exempts them from registration when the SVS has subscribed to an agreement with the authorities of a foreign market in order to have access to true, sufficient and timely information about the issuer and its securities. Exempted countries include Canada, Mexico and Spain.

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

The application for registration must include the following information:

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

Once received, the SVS has 30 days to register the issuer and the security, as the case may be. During such term, the SVS may require additional information, either legal, financial or economic, depending upon the issuer, the security or the offering. Once registered, the SVS has to issue the certificate of the filing within three working days.

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

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

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

Pursuant to article 65 of the LMV, the publicity, advertising and dissemination carried out by any means by issuers, stockbrokers, securities dealers, stock exchanges and any other persons or entities that participate in the issuance or sale of securities, may not contain statements, references or representations of any kind that may lead to error, mistake or confusion among the public about the nature, price,

profitability, redemption, liquidity, guarantees or any other characteristics of the publicly offered securities or their issuers.

There are no restrictions on the ability of underwriters to issue research reports.

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

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

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

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

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

Moreover, SVS General Rule 367 authorises over-the-counter trading of foreign securities approved by the SVS or exempted of such approval when regarding any type of foreign security, executed by banks, brokers, and securities agents; and in the case of securities that represent collective investment vehicles, executed by Funds General Administrators authorised by the SVS.

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

Liabilities for the issuer are those mentioned in question 20.

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

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

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

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

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

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

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

#### **Private placings**

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

Private placements are not regulated by the LMV but by the SVS, which issued SVS General Rule 336 (NCG 336) in June 2012.

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

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

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

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

### Update and trends

On 23 February 2017, Law No. 21,000 was published in the Official Gazette, creating the new Financial Market Commission (FMC), a collegial and technical institution that will replace the current SVS. The FMC will come into force within 18 months.

Some of the more important changes introduced by Law No. 21,000 include:

- shifting from a single Superintendent to a collegiate five-member council;
- greater regulatory powers, which will permit faster regulatory adjustments to cope with the challenges of financial market regulation, including, among others, a regulatory impact integrated evaluation system and public consultation;
- improvements to the sanctioning procedure to strengthen its effectivity and the due process guarantees, making it possible to have a timely judicial review of FMC's decisions; and
- splitting of the investigative and accusing functions from the sanctioning functions, which are both currently exercised by the Superintendent, to be now distributed between a prosecutor and the new council.

The FMC will initially supervise the securities and insurance market. In a future reform to the general banking act, the conditions under which it will also supervise the banking system shall be addressed.

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

As mentioned above, no specific information requirements apply to the private placement of securities. Notwithstanding this, the LMV states that the publicity, advertising and dissemination carried out by any means by issuers, stockbrokers, securities dealers, stock exchanges and any other persons or entities that participate in the issue or sale of securities, may not contain statements, references or representations that may lead to error, mistakes or confusion among the public about the nature, prices, profitability, redemption, liquidity, guarantees or any other characteristics of the publicly offered securities or their issuers.

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

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

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

### Offshore offerings

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

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

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

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

### Particular financings

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

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

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

Public offering of such securities shall comply with general rules.

### Underwriting arrangements

### 12 What types of underwriting arrangements are commonly used?

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

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

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

#### Indemnity

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

#### Force majeure

As force majeure is defined in the Chilean Civil Code, its inclusion depends on whether the underwriting agreement is subject to Chilean or foreign law. If the former is the case, then no specific definition is included and general rules about force majeure under the Civil Code apply. If foreign law applies, then the agreement will follow international standards in allowing the underwriter to terminate the agreement if any case of force majeure occurs.

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

#### Success fees

It is not common practice to include success fees.

#### Over-allotment option

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

### 14 What additional regulations apply to underwriting arrangements?

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

### Ongoing reporting obligations

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

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

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

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

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

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

##### **Continuous reporting obligations**

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

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

##### **Regular disclosure obligations**

###### ***Quarterly, half-yearly and yearly financial statements***

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

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

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

The management report usually contains information about the company's strategy and business, a management discussion and analysis of the financial condition of the company and the results of

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

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

##### **Capital variations**

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

##### **Other economic and financial information**

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

##### **Other disclosure obligations**

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

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

##### **Anti-manipulation rules**

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

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

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

##### **Price stabilisation**

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

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



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**Liabilities and enforcement**


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

The most common bases of liability for a securities transaction are those that relate to using any act, practice or mechanism in any misleading or deceiving way, including the use of inside information.

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

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

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

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

There are several mechanisms at different levels:

- administrative: this is not a mechanism for seeking remedies, but the SVS has the authority to impose fines or other sanctions on any person breaching the LMV or the regulations issued by the SVS. In this regard, different departments of the SVS prosecute and decide the case, but the decision is subject to appeal before the Santiago Court of Appeals;
- criminal: if the SVS considers that the activity may be considered to be a crime, it must notify the Prosecutors Office, which, in turn, shall open an investigation. Defendants subject to criminal action may face different levels of imprisonment; and
- civil: as mentioned above, any person affected by securities offerings may ask for damages in the cases and against the person previously specified.

# Germany

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## Statutes and regulations

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

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

- the Act on the Strengthening of Investor Protection and Improved Functioning of the Capital Markets;
- the Act on the Strengthening of German Financial Supervision;
- the Bond Act (SchVG);
- Commission Delegated Regulation (EU) No. 382/2014 of 7 March 2014 supplementing Directive 2003/71/EC of the European Parliament and of the Council with regard to regulatory technical standards for publication of supplements to the prospectus;
- the Delegated Regulation (EU) No. 1392/2014 of 15 April 2014 supplementing Directive 2003/71/EC of the European Parliament and Council with regard to regulatory standards for publication of supplements to the prospectus;
- Commission Regulation (EU) No. 596/2014 of 16 April 2014 on market abuse;
- Commission Regulation (EU) No. 600/2014 of 15 May 2014 on markets in financial instruments and amending Regulation (EU) 648/2012;
- Commission Regulation (EU) No. 909/2014 of 23 July 2014 on securities settlement and the Central Securities Depositories;
- Commission Regulation (EU) No. 1286/2014 of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs);
- Commission Delegated Regulation (EU) 2015/761 of 17 December 2014 supplementing Directive 2004/109/EC of the European Parliament and of the Council with regard to certain regulatory technical standards on major holdings (Regulation 2015/761/EU);
- Commission Delegated Regulation (EU) of 30 November 2015 supplementing Directive 2003/71/EC of the European Parliament and of the Council with regard to regulatory technical standards for approval and publication of the prospectus and dissemination of advertisements and amending Commission Regulation (EC) No. 809/2004 has been adopted;
- the Proposal for a Regulation of the European Parliament and of the Council of 30 November 2015 on the prospectus to be published when securities are offered to the public or admitted to trading;
- Commission Implementation Regulation (EU) 2016/347 of 10 March 2016 laying down implementing technical standards with regard to the precise format of insider lists and for updating insider lists in accordance with Regulation (EU) No. 596/2014;
- Commission Delegated Regulation (EU) .../... of 8 March 2017 supplementing Regulation (EU) No 1286/2014 on key information documents for PRIIPs by laying down regulatory technical standards with regard to the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents;
- the First Act Amending Financial Market Regulations of 30 June 2016 (1. FiMaNoG);
- the German Securities Trading Reporting and Insider List Regulation (WpAIV);
- the Exchange Rules of the Frankfurt Stock Exchange;
- the Financial Stability Act (FinStabG);
- the General Terms and Conditions (Open Market) of Deutsche Börse AG for the Regulated Unofficial Market on the FWB Frankfurter Wertpapierbörse;
- the German Banking Act (KWVG);
- the Investment in Assets Act (VermAnlG);
- the Investment Services Rules of Conduct and Organisation Regulation;
- the Ordinance for the Ascertainment of the Prohibition of Manipulation Practices (MaKonV);
- the Ordinance concerning the Admission of Securities to Official Listing on a Stock Exchange (BörsZulV);
- the Ordinance of Securities Trading Reporting and Insider List (WpAIV);
- the Safe Custody Act (DepotG);
- the Securities Prospectus Act (WpPG);
- the Securities Trading Act (WpHG);
- the Stock Corporation Act (AktG);
- the Stock Exchange Act (BörsG);
- the Act Implementing the Transparency Directive Amending Directive (TRL-ÄndRL-UmsG);
- the Trading Regulations for the Regulated Unofficial Market on the Frankfurt Stock Exchange; and
- the Act Adapting Legislation in the Financial Market Area (KAGB-Anpassungsgesetz).

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

- Directive 2001/34/EC of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities;
- Directive 2004/39/EC of 21 April 2004 on markets in financial instruments (amending Council Directives 85/611/EEC and 93/6 EEC and Directive 2000/12/EC and repealing Council Directive 93/22/EEC (MiFID));
- Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC;
- Directive 2010/73/EU of 24 November 2010 amending Directive 2003/71/EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading;
- Directive 2011/61/EC of 8 June 2011 on Alternative Investment Fund Managers, and amending Directives 2003/41/EC and 2009/65/EC (AIFMD);
- Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups;
- Directive 2014/49 EU on Deposit Guarantee Schemes;
- Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse (CSMAD); and
- Directive 2014/64/EU of 15 May 2014.

The European Securities and Markets Authority (ESMA) in Paris (see Commission Regulation (EC) No. 1095/2010) will ensure the

functioning of the internal market by ensuring a high, effective and consistent level of regulation and supervision. ESMA's tasks include promoting supervisory convergence and providing advice to the EU institutions in the areas of securities and markets regulation and supervision, as well as related corporate governance and financial reporting issues. In Europe, the European banking supervision has started, and since 4 November 2014 the Single Supervisory Mechanism (SSM) has been implemented. The SSM comprises the European Central Bank (ECB) and certain national competent authorities (NCAs) of eurozone countries and other participating countries (participating member states). The three main aims of the SSM are to:

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

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

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

Other responsibilities of BaFin regarding securities supervision are:

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

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

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

## Public offerings

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

In particular, the WpPG requires every public offering of securities (debt and equity) in Germany to be based on a prospectus, if no exemption for this requirement as stated in the WpPG applies. According to the WpPG the content of the prospectus should, *inter alia*, contain the following:

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

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

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

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

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

Additionally, an issuer must publish a prospectus supplement when:

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

The proposed Prospectus Regulation will be transmitted to the European Parliament and the Council for adoption under the co-decision procedure. As with any other EU Regulation, its provisions will be legally binding in all EU member states without transposition into national law as from the day of entry into force. Following its review of the EU Commission's proposal, the European Council published a revised proposal on 15 March 2016. On request of the European Council, the ECB published an opinion on the revised proposal on 17 March 2016. Although no specific timing was set for the implementation of the new regulation, the new regulation will apply 24 months after it enters into force, which is currently expected to be in late 2018.

The proposed Regulation, once adopted, will replace Directive 2003/71/EC, which will be repealed along with its corresponding implementing measures (including Commission Regulation (EC) No. 809/2004). New implementing measures will be adopted to set out the minimum information content of prospectuses. The proposed Regulation will enter into force only after such implementing measures have been adopted.

The proposal contains a 'grandfathering clause' for prospectuses approved in accordance with Directive 2003/71/EC before the date of entry into application of the proposed Regulation. Those prospectuses will continue to be governed by Directive 2003/71/EC.

The WpPG governs both the offering of securities to be admitted to trading on a stock exchange and public offerings without such a simultaneous admission to trading. Where admission to trading on a stock exchange has been applied for, the content of the prospectus and other required documents must further comply with requirements of the BörsZulV. Nevertheless, only one prospectus needs to be prepared for the purpose of the public offering and the stock exchange listing. Further, if an application for admission to trading on the regulated domestic market has been filed, the admission office or, as the case may be, the admissions committee of the relevant stock exchange decides about the admission. According to the BörsZulV, the admission to trading may not be granted prior to one trading day after the filing of the admission application. The securities are allowed to be traded one trading day after the publication of the prospectus. If a prospectus does not have to be published, trading can start one working day after the admission decision has been published. The admission decision will be published at the cost of the issuer in the electronic Official Gazette.

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

For issuers incorporated and seated in Germany the prospectus will be approved by BaFin. Alternatively, for issuers incorporated in other EU member states or in states of the European Economic Area (EEA), the prospectus must be approved by the issuers' home state authority and, thereafter, the home member state authority will notify BaFin of the approval accordingly. For issuers who are incorporated outside the EU and the EEA, the competent regulatory authority is the authority of the EU or EEA state where the securities are offered to the public for the first time, or where the admission for trading on a regulated market is filed for the first time, under the conditions of later choice of the issuer if the home member state has not been determined by its vote or the securities will no longer be traded on a regulated market of the home member state but will be traded on a different regulated market of another EEA state (section 2, clause 1c) of the WpPG).

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

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

- a listing application (signed by the issuer and the credit institution, financial institution or a listing partner);
- a prospectus that has been approved by BaFin and published (a preliminary prospectus is sufficient for filing an application);
- the certified articles of association;
- the certified excerpt from the commercial register;

- a report on the company's formation (if it has not yet existed for three financial years);
- evidence of resolution in relation to the initial public offering (IPO), namely, minutes of the annual general meeting and resolution of the executive board and the supervisory board;
- proof of sufficient working capital for at least 12 months; and
- proof of a free float of at least 25 per cent, whereby exceptions exist for shares in large volumes.

The Open Market regulated by the Frankfurt Stock Exchange provides an alternative to the EU-regulated segment, the organised market, as a point of access to the capital market. On 1 March 2017, Deutsche Börse AG launched a new exchange segment designed to enhance access to investors and growth capital for small and medium-sized enterprises (SMEs). As a segment of the exchange-regulated market, it will replace the entry standard for equities and corporate bonds. The Open Market (divided into the Scale, Quotation Board and the Basic Board) represents the second domestic market segment regulated by private law after the regulated market. However, in contrast to the regulated market, the Open Market is not a recognised market and, as such, is governed by domestic as opposed to EU regulation. For example, the inclusion of securities on the Open Market is governed by the General Terms and Conditions of Deutsche Börse AG for the Regulated Unofficial Market on the Frankfurter Wertpapierbörse, last modified on 1 March 2017. Besides German shares, mainly international shares, bonds of German and international issuers, certificates and warrants are traded on the Open Market. In principle, a registered trading member of the Frankfurt Stock Exchange files the application for inclusion in the exchange trading in the Quotation Board. The inclusion of securities in the Scale segment with the simultaneous inclusion in the Basic Board takes place upon application of the issuer of the securities in connection with a bank, a financial services institution or a company that operates according to section 53, clause 1 of the KWG, or according to section 53b, clause 1 sub clause 1 of the KWG. Ultimately, the organising body of the Open Market, Deutsche Börse AG, makes the decision about inclusion. Issuers must fulfil several formal inclusion requirements. The inclusion of securities in the Quotation Board requires that such securities are admitted to trading on a similar domestic or foreign exchange market recognised by the Frankfurt Stock Exchange. Further, the right to terminate without notice shall remain unaffected. The Frankfurt Stock Exchange shall, in particular, be entitled to terminate the participation in trading for good cause. Further, the issuer and Deutsche Börse AG may terminate the inclusion of securities in the Quotation Board subject to a notice period of six weeks.

In the Open Market the Scale segment is the platform for a cost-effective admission to exchange listing and trading. An issuer applying for the Scale segment must provide detailed information in the form of a prospectus that is valid and approved or certified according to the regulations of the WpPG, or an inclusion document, which allows for a better assessment of the issuer. The issuer must also inform Deutsche Börse AG immediately and in writing about essential circumstances concerning the included securities and itself.

On 26 November 2015, the Act on the Implementation of the Revised EU Transparency Directive came into force in Germany. This Act is especially relevant for companies listed on the regulated market of a German Stock Exchange because it provides for rules regarding the delisting from a regulated market. The Act modifies section 39 of the BörsG in relation to the decision made by board members to apply for the company to be delisted from a regulated market (eg, general and prime standard on the Frankfurt Stock Exchange). The rules will not apply if the shares will remain listed on another German or EU-regulated market with similar delisting rules. However, the rules apply if it is intended for the shares to remain listed on a non-EU regulated market segment (eg, Scale on the Frankfurt Stock Exchange) that is regulated by stock exchange rules only.

According to the revised section 39 of the BörsG, an application to delist the shares from the regulated market is subject to a compensation offer to be made to all shareholders in accordance with the analogous applicable rules of section 31 of the WpÜG. The offer must be aimed at the acquisition of all shares in the company and may not be subject to any conditions. The purchase price has to be offered in euros and the offer price has to correspond to the weighted average domestic stock exchange price over the period of the past six months. Generally, a

valuation of the company is not required unless the shares are traded and priced on less than one-third of the official trading days during the previous six-month period or if the fixed prices on trading days show a price difference of more than 5 per cent on the following trading days. Furthermore, if the stock exchange price has been materially manipulated or inside information relating to the company or its shares has not been properly published, the offer price has to include the difference in terms of the market manipulation. Ultimately, the delisted shareholders may apply for judicial review of the offered purchase price and claim the difference between such purchase price and the company's actual value.

Any envisaged delisting is, therefore, potentially associated with considerable costs resulting from the obligation to make an acceptable purchase offer to the shareholders.

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

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

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

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

Accordingly, advertising measures in advance of going public, or 'roadshows', fall short of an offer within the meaning of the WpPG because the actual opportunity to purchase or subscribe is lacking. The (public) invitation to make an application to conclude the subscription contract, for instance, is sufficient. This issue is important in particular for Open Market initial public offerings, such as the Scale segment of the Frankfurt Stock Exchange or m:access on the Munich Stock Exchange. Neither the application for inclusion in the Open Market nor the actual inclusion establishes a definite opportunity to purchase; consequently a public offering is not made. The threshold of the public offering is crossed only in the event of additional promotional activities being undertaken. The term 'promotional activity' should be given a broad interpretation in this sense. All sources of information relate to the public, in contrast to individuals, if they are accessible to an undefined group of people. This naturally includes the internet, but also company journals used to make announcements or electronic systems such as Bloomberg or Reuters. The use of external investment intermediaries (tied agents) also regularly meets the 'public' criterion.

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

If a prospectus is drawn up, it is not allowed to be published and distributed before being approved by BaFin (see question 3). BaFin will approve the content of the prospectus and make its decision within 10 working days after having received the prospectus in respect of completeness and conformity with section 13 WpPG. This period is extended to 20 working days if the public offering concerns securities that are not yet licensed to be traded on an organised market in an EEA member state. If the prospectus is incomplete, or if it requires supplementary information, the periods stated apply only from the time when this supplementary information is received. In the case of an IPO, the

timing for supplementary information is crucial and should be discussed with BaFin in advance. The approved prospectus is made available by BaFin on its website for 12 months. The offeror must publish the prospectus without delay, at the latest, one working day before the start of the public offering. Each important new circumstance or significant inaccuracy that could affect the assessment of the securities must be stated in an addendum to the prospectus. The addendum also must be approved by BaFin, and it must be published in the same way as the original prospectus.

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

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

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

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

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

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

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

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

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

The following settlement is the process whereby securities are delivered, usually against payment, to fulfil contractual obligations such as those arising under securities trades. As part of performing the delivery obligations entailed by the trade, settlement involves the delivery

of securities and the corresponding payment. The clearing and settlement process in Germany is characterised by an integrated structure. Generally, every placed trading order follows the clearing and settlement chain provided by Deutsche Börse AG, which means, for example, that after trading on Xetra, clearing will be operated by Eurex Clearing AG and settlement delivery will be executed in the Clearstream Banking AG system, both of which are subsidiaries of Deutsche Börse AG.

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### Private placings

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

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

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

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

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

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

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

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

a document will be regarded as a prospectus and the WpPG and other rules will apply.

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

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

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### Offshore offerings

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

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

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

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

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### Particular financings

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

Convertible bonds can be converted during their term at the option of the bondholders or of the issuer into the issuer shares. In contrast, exchangeable convertible bonds differ from 'ordinary' convertible bonds in that they are issued by a company (issuer) and can be exchanged for the securities of another company (entity). Typically, an exchangeable convertible is a bond that pays periodic coupons and is callable at current prices, whereby ordinary convertible bonds can be exchanged for a set number of the entity's shares at bond maturity or when the bond is called before maturity, if bondholders wish to do so. Moreover, participation bonds are issued by companies, which provide investors with the right to participate in dividends to the shareholders.

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

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

## Underwriting arrangements

### 12 What types of underwriting arrangements are commonly used?

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

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

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

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

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

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

In Germany, it is market standard for equity securities offerings to have initial underwriting agreements providing for an overallotment option in connection with the activities that underwriters may perform during the 30-day stabilisation period following the listing of the shares. This overallotment option is typically granted by the company on existing shares ('greenshoe' shares) sold by one or more existing shareholders, instead of newly issued shares.

### 14 What additional regulations apply to underwriting arrangements?

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

## Ongoing reporting obligations

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

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

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

BaFin has issued the fourth edition of its Issuers' Guidelines (published on 8 November 2013), which are designed to provide guidance for domestic and international issuers whose securities have been admitted to trading at a domestic exchange on the interpretation and execution of the various laws applicable to financial market participants, in particular under the WpHG, and to outline BaFin's administrative practice in monitoring the financial market. BaFin will update the Issuer's Guidelines as soon as there is a new administrative practice. BaFin has published information regarding the requirements for ad hoc notifications and notifications regarding manager transactions in a Q&A format until the revised Issuer's Guidelines are published.

## Ad hoc notifications

The Market Abuse Regulation (MAR) imposes a statutory requirement on all issuers of financial instruments to notify the market of inside information so that other market participants are not put at a disadvantage to company insiders. At the European level, article 17 of the MAR is supplemented by various Level 2 and Level 3 measures, while at the national level in Germany it continues to be supplemented by the WpHG, which has been modified and amended with respect to the MAR and the relevant implementing provisions by the 1. FiMaNoG. Moreover, the current version of the WpAIV will continue to apply for the time being, but the MAR and its delegated and implementing regulations take precedence where they contain corresponding or diverging provisions.

The ad hoc disclosure requirement applies to all issuers who have requested or approved admission of their financial instruments to trading on a regulated market or a multilateral trading facility (MTF) in an EU member state. In particular, the ad hoc disclosure requirement applies to issuers whose securities are only trading on an MTF by having applied for the inclusion or having consented to its inclusion by a third party. Article 17 clause 1 of the MAR requires that issuers disclose to the public immediately (ie, ad hoc) any facts about their company that have the potential to influence the price of the financial instrument and relate directly to the issuer. The issuer must ensure that the inside information is made public in a manner that enables fast access and a complete, correct and timely assessment of the information by the public. In terms of publication, the issuer is therefore obliged to use a widely used electronic information system and a combination of media to publish the

information throughout the EU. Further, the issuer must also forward such disclosure notices to the company register in order to be stored there. The issuer must also post and maintain all inside information on its website for a period of at least five years.

BaFin is obliged to intervene if a company fails to disclose inside information covered by the MAR ad hoc disclosure requirement or if the information it provides is late, false or incomplete. BaFin must also check whether issuers, who have utilised the exemption option provided for by law, have exempted themselves from the ad hoc disclosure requirement in a proper manner.

### Managers' transactions

Any manager (or persons closely associated with them) of issuers whose financial instruments are traded on a regulated market, on a MTF or, with effect from 3 January 2018, on an organised trading facility (OTF, cf article 3(1) No. 8 of the MAR in conjunction with article 4(1) No. 23 of Directive 2014/65/EU) are subject to a notification obligation. Pursuant to article 3 clause 1 no. 25 of the MAR, a manager is a person within an issuer, an emission allowance market participant, or another entity referred to in article 19 clause 10 of the MAR, who is: (i) a member of the administrative, management or supervisory body of such entity; or (ii) a senior executive who is not a member of the bodies referred to in point (i) who has regular access to inside information relating directly or indirectly to such entity, and the power to make managerial decisions affecting the future developments and business prospects of such entity. Overall there are not many changes compared to the previous legal situation pursuant to section 15a (2) of the WpHG in the version before the 1.FiMaNoG.

However, a notification obligation only exists if the issuer has requested or approved admission to trading of the financial instruments in a regulated market and, in particular, on an MTF or an OTF. The issuer must have been actively involved in the listing of its financial instruments on an MTF. With regard to the necessary request for approval of trading on an MTF, the following circumstances are possible: (i) issuers who themselves have made a request for admission to/inclusion in trading on an MTF; (ii) issuers who have commissioned a third party to make a request for admission to or inclusion in trading on an MTF; (iii) and issuers who have approved admission to trading of their securities by a third party. In addition to article 19 of the MAR, articles 7 to 9 of Delegated Regulation (EU) 2016/522 deal with exemptions from the prohibition on trading contained within article 19(12) of the MAR. Article 10 of this Delegated Regulation contains a non-exhaustive list of transaction types subject to a notification requirement. Implementing Regulation (EU) 2016/523 contains a template which is to be used for the notification and public disclosure of such transactions.

In addition, section 15 clause 1 of the WpHG stipulates that the information on managers' transactions subject to a notification requirement is to be transmitted without undue delay, however, not before its publication in the company register pursuant to section 8b of the HGB in order to be stored there, and that BaFin must be notified of said publication.

### Reporting obligations with respect to voting rights

The entry into force of the TRL-ÄndRL-UmsG has led to changes to the notification and publication requirements regarding major holdings of voting rights in listed companies and the obligations subsequent to stock exchange admission. Section 21 of the WpHG now regulates the reporting obligation for voting rights derived from shares and section 25 regulates the reporting obligation for all reportable instruments. Section 25a of the WpHG contains a reporting obligation for the sum of the shares and instruments held according to sections 21 and 25 of the WpHG. In addition to the instruments covered by the previous version of section 25 of the WpHG, section 25 of the WpHG contains those instruments that fell under section 25a of the WpHG in the past.

Pursuant to section 21, clause 1 of the WpHG, anyone whose share of a domestic listed company's voting rights equals, exceeds or falls below 3, 5, 10, 15, 20, 25, 30, 50 or 75 per cent as a result of a purchase or sale, or by any other means, is obliged to inform the listed company and BaFin that he or she has achieved, exceeded or fallen below the aforementioned thresholds. In addition to direct holdings of voting rights capital market participants also have to file notifications when they hold certain financial instruments with which shares can be acquired. In this case, however, the opening threshold has been set to 5 per cent. Ultimately,

any change in voting rights must be reported to the listed company and BaFin without undue delay, namely, within four trading days at the latest (section 21 of the WpHG). The listed company must also pass on the notification without undue delay – within three trading days at the latest – to 'a combination of media for Europe-wide dissemination' and to the company register that stores the data. In accordance with the Act on the Strengthening of Investor Protection and Improved Functioning of the Capital Markets, existing notification obligations under section 25 of the WpHG for financial instruments, unconditionally entitling their holders to acquire existing shares that carry voting rights, are extended to 'other instruments'. These other instruments include, inter alia, claims for the return of shares pursuant to securities lending agreements and repurchase agreements. Under section 25a of the WpHG, the notification obligation is extended to all financial and other instruments that are not already subject to notification under other provisions and that, based on their legal structure, entitle the owner to purchase issued shares carrying voting rights from the listed company. Such holdings of financial instruments must be reported to the listed company and BaFin even if the listed company of the instrument does not have any influential right on the buying of such voting rights or even if a purchase is not being considered at all. In this case, the threshold for notification is also 5 per cent.

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

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

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

The respective publications have to be done in line with the requirements stated in the WpAIV.

Pursuant to section 3b of the WpAIV, any issuer whose home state is a third country or has chosen Germany in accordance with section 2, clause 6, No. 2 a of the WpHG or who has published an English language prospectus can publish all information in the English language. The issuer has to use specific forms as outlined in section 17 of the WpAIV. The issuer and BaFin have to be provided with the information in accordance with sections 21, clause 1, sentence 1 and clause 1a; section 25, clause 1, sentence 1; and section 25a, clause 1, sentence 1 of the WpHG in writing or electronically in German or English.

### General reporting obligations

Under the detailed regulations of sections 30a to 30f of the WpHG, any issuer whose home member state is Germany and whose securities are admitted to trading on a domestic stock exchange, as well as any issuer from other member states of the EU or EEA whose securities are admitted to trading on a domestic organised market and whose home member state does not provide for similar regulations of the domestic stock exchange, has to publish in electronic format information to allow

investors to exercise their rights in connection with such securities. In the case of shares the reporting obligations relate, inter alia, to:

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

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

#### Specific financial reporting obligations

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

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

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

The language of the publication is governed by section 3b of the WpHG and section 22 of the WpAIV.

#### Reporting obligations under the German Corporate Governance Code

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

#### Reporting obligations under the Rules of the Frankfurt Stock Exchange

Pursuant to the Stock Exchange Rules of the Frankfurt Stock Exchange, the reporting obligations of the 'General Standard' segment set forth the minimum reporting requirements. In the case of a listing in the 'Prime Standard' segment, listed companies must, in addition to the 'General Standard' segment reporting obligations, comply with international reporting standards. Such additional obligations include in particular, but are not limited to:

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

#### Anti-manipulation rules

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

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

#### Insider dealing and market manipulation

As mentioned above, at the European level the MAR is supplemented by various delegated and implementing regulations, while at the national level in Germany it continues to be supplemented by the WpHG, which related to the MAR and the relevant implementing provisions by the 1.FiMaNoG. The current version of the WpAIV continues to apply, but the MAR and its delegated and implementing regulations take precedence where they contain corresponding or diverging provisions. The 1.FiMaNoG takes precedence over national provisions on insider dealing (previous section 12 to 14 WpHG) and market manipulation (previous section 20(a) WpHG). Further, section 38 and 39 WpHG will reference the directly applicable articles of the MAR on insider dealing (article 14 clause 8 et seqq) and market manipulation (article 12 et seqq).

The MAR defines 'inside information' as 'information of a precise nature, which has not been made public, relating directly or indirectly to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments...'. MAR provides that inside information may generally only be disclosed to another person if such disclosure is made in the normal course of exercising an employment relationship, profession or duties. All other instances where inside information is disclosed will generally be presumed to constitute an unlawful disclosure of inside information. Disclosures made in the course of a 'market sounding' to gauge potential investors' interest in a possible transaction and the conditions relating to it, however, are not regarded as unlawful as long as certain requirements are met. The disclosure of inside information by a person intending to make a takeover bid or a merger is generally permitted as well. The market sounding exception did not exist under the MAD and has been added to the MAR to allow issuers to receive the opinion of potential investors, to enhance shareholder dialogue, and to ensure that deals can be executed and the views of issuers, existing shareholders and potential investors are aligned, without risking violation of the prohibition on unlawful disclosure of inside information.

Apparently, the MAR prohibits insider dealing, which is the case where a person possesses such inside information and uses (or attempts to use) such inside information by acquiring or disposing of financial instruments to which such information relates. Recommending that another person engage in, or inducing another person to engage in, insider dealing is also prohibited. The person recommending or inducing insider dealing based on the inside information that it possesses as well as the person using such recommendation, if the other person knows or should know that it was based on inside information, would be engaged in prohibited insider dealing. The fact that a person possesses inside information will not automatically lead to such an assumption. For a legal person, this is the case if adequate and effective internal procedures were in place that ensured that any natural person who acted on behalf of the legal person, or may have had an influence on the decision, was not in possession of the information, and the legal person did not induce or influence the natural person acting on its behalf.

Further situations in which the possession of inside information does not create a presumption of insider dealing include: (i) where the transaction in question is carried out in the line with a contractual, legal or regulatory obligation that has become due and not to circumvent the prohibition against insider dealing, and which arose before the person possessed inside information, and (ii) where the inside information was obtained in the execution of, and used solely for the purpose of proceeding with, a public takeover or merger with a company, provided that at the time of the merger's approval or the acceptance of the offer by the company's shareholders, any inside information has been made public or has otherwise ceased to constitute inside information.

The MAR requires issuers to inform the public as soon as possible of inside information in a manner that enables fast access and complete, correct and timely assessment of the information by the public in order to comply with the requirements under the EU Transparency

Directive (2004/109/EC), which provides that inside information should be disclosed in a non-discriminatory manner, through media allowing dissemination throughout the EU, and in compliance with certain minimum quality standards. The disclosure of inside information to the public has to be published and kept on an issuer's website for at least five years. The disclosure of inside information may be delayed if (i) immediate disclosure is likely to prejudice the legitimate interests of the issuer; (ii) the delay in disclosure is unlikely to mislead the public; and (iii) the issuer is able to ensure the confidentiality of such information. In the event of a delayed disclosure, the issuer has to inform BaFin that disclosure was delayed and provide a written explanation of how the aforementioned conditions were met immediately after the information is disclosed to the public. Where disclosure of inside information has been delayed and the confidentiality of such inside information is no longer ensured, the issuer is obligated to disclose such inside information to the public as soon as possible.

Issuers, or any person acting on their behalf, are required to draw up an insider list of all persons who have access to inside information and who are working for them under a contract of employment, or otherwise performing tasks through which they have access to inside information (eg, lawyers, accountants). This list is to be updated, if necessary, and submitted to BaFin. The issuer or person acting on its behalf to maintain the list is required to take all reasonable steps to ensure that all persons included on the insider list acknowledge in writing the legal and regulatory duties entailed and are aware of the sanctions that apply for insider dealing and unlawful disclosure. The insider list has to include at least the identity of any person having access to inside information, the reason for including such person on the insider list, the date and time at which such person obtained access to inside information, and the date on which the insider list was drawn up.

### Market manipulation

Any market manipulation is generally prohibited under the MAR regime, which provides a comprehensive catalogue of potential market manipulation activities. Market manipulation is, for example, defined to include any activity which may send false or misleading signals as to the supply of, demand for, or price of a financial instrument, or which may secure the price of financial instruments. An exemption may only apply for this type of market manipulation, according to which behaviour will not constitute market manipulation if the person acting establishes that it conformed to an 'accepted market practice' as determined by BaFin. In assessing whether certain behaviour constitutes accepted market practice, the MAR lists several criteria, such as whether the market practice provides for a substantial level of transparency, whether it ensures a high degree of safeguards for the operation of market forces and the proper interplay of supply and demand, and whether it has a positive impact on market liquidity and efficiency. However, the MAR does not permit BaFin to adopt as accepted market practice certain activities or behaviours, in particular: (i) the dissemination of information through media or the internet that may lead to false or misleading signals as to the supply of, demand for, or price of a financial instrument; (ii) false or misleading information in relation to a benchmark; and (iii) the buying or selling of financial instruments at the opening or closing of the market, which is likely to have a misleading effect on investors.

### Sanctions

The administrative fines regime in section 39 of the WpHG has been revised in accordance with the relevant provisions of the MAR and other EU Regulations under the 1.FiMaNoG. Section 39 clause 1 of the WpHG now defines those fines related to the market abuse law that were not already included in the requirements and prohibitions outlined in the MAR but which relate to the provisions contained in the WpHG. On the other hand, all provisions concerning administrative fines that were restricted to cases of market abuse have been removed from section 39 clause 2 of the WpHG. They are now set forth in clause 3d. Clause 3b now outlines the fines for breaches of the MAR's prohibition against insider dealing with reference to section 38 clause 3 no. 1 of the WpHG. Clause 3c regulates the response to deliberate infringements related to goods, emissions allowances and foreign currencies outlined in section 12 of the WpHG (formerly section 20a clause 4 of the WpHG) in accordance with article 15 of the MAR. Clause 3d addresses additional infringements, whether deliberate or negligent, of the

provisions set out in the MAR for which European provisions require fines to be defined.

Under the new rules, the fine for infringing the prohibitions against market manipulation by natural persons has been increased from €1 million to €5 million. The WpHG now also contains specific provisions for imposing administrative fines on legal entities, and they may be subjected to fines in the future of up to €15 million for deliberate or negligent infringements of prohibitions against insider dealing and market manipulation. BaFin may alternatively impose a fine defined as a percentage of revenue in those cases where this would be greater. It may set a fine of up to 15 per cent of the total annual turnover of the legal entity according to the last available financial statements approved by the management. Section 39 clause 5 of the WpHG outlines in detail how this is to be calculated. Further, as another option, a fine in response to an administrative offence, whether imposed on a natural person or a legal entity, may be calculated at three times the amount of the profits gained or losses avoided because of the infringement, where such amount can be determined and exceeds the legal and annual turnover-related maximum amount.

In accordance with section 40 of the WpHG, BaFin is responsible for pursuing and punishing offences under the WpHG. Its task is to identify offences against the law and to appropriately and proportionately punish the administrative offences committed. In the process, it ensures that the imposed administrative fine has the necessary deterrent effect on the persons committing the breach and on any third parties.

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## Price stabilisation

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

Price stabilisation measures in connection with an offering of securities will generally be undertaken by the lead underwriter in accordance with the overallotment of securities. The respective underwriter, however, has to make sure that it does not contravene any applicable security regulations.

In particular, article 5 clause 1 of the MAR states that the prohibition of insider dealing and market manipulation does not apply to trading with one's own shares in buy-back programmes if the programme fulfils the requirements set out in article 5 clause 1 of the MAR. The existing framework for conducting buy-back programmes of shares by an issuer and stabilisation measures without breaching the prohibitions on insider dealing, unlawful disclosure of inside information, and market manipulation is contained in detail therein. There are exemptions from these prohibitions for both buy-back programmes and stabilisation. In relation to buy-back programmes for shares, the exemption applies where: (i) the full details of the programme are disclosed prior to the start of trading; (ii) trades are reported as being part of the buy-back programme to the competent authority of the trading venue and subsequently disclosed to the public; (iii) adequate limits with regard to price and volume are complied with; and (iv) the trading with one's own shares in buy-back programmes must be carried out with the objectives of reducing the capital of an issuer; of meeting obligations arising from debt financial instruments that are exchangeable into equity instruments; or to meet obligations arising from share option programmes, or other allocations of shares, with respect to employees or members of the administrative, management or supervisory bodies of the issuer or an associate.

On 8 March 2016, the European Commission adopted a Delegated Regulation supplementing the MAR with regard to regulatory technical standards relating to the conditions applicable to buy-back programmes and stabilisation measures which has applied since 3 July 2016.

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## Liabilities and enforcement

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

Liability for a securities transaction arises particularly in connection with the information contained in the prospectus. In this regard, section 21 and 22 WpPG (with respect to securities admitted to trading on a stock exchange) and section 20 VermAnlG (with respect to investment units that are not regarded as security not admitted to trading on a domestic stock exchange but publicly distributed) provide for a liability of persons who have assumed responsibility for the prospectus (persons who are mentioned in the prospectus) or who have a mandate

## Update and trends

### Prospectus Regulation

On 30 November 2015, the EU Commission published a proposal for a regulation on prospectuses to replace Directive 2003/71/EC, as amended by Directives 2008/11/EC, 2010/73/EU and 2010/78/EU. The aim of the new regulation is to contribute to further EU financial market integration and to improve investor protection in the EU. The proposal broadens the scope of the legislation and introduces changes to how a prospectus has to be drawn up. The proposed Prospectus Regulation is now approaching the final stages of the legislative process. After the Dutch EU Council Presidency published its proposal for a general approach on the EU Commission proposal on 3 June 2016, the EU Parliament adopted its amendments to the EU Commission proposal on 15 September 2016. On 16 December 2016, the EU Parliament and Council published a compromise on the text of the Prospectus Regulation in trilogue. In the compromised version of the Prospectus Regulation there have been further revisions made to the previous version. In particular, the Prospectus Regulation should not apply to an offer of securities with a total consideration in the EU of less than

€1 million calculated over 12 months pursuant to article 1 clause 2a. The obligation to publish a prospectus does not apply to offers to the public whose denomination per unit amounts to at least €100,000 or to offers addressed to fewer than 150 persons per member state pursuant to article 1 clause 3. The admission to trading of non-equity securities issued in a continuous or repeated manner by a credit institution will not apply where the total consideration is less than €75 million over 12 months pursuant to article 1 clause 4. Further, it is stated that EU member states may decide to exempt offers to the public from the obligation to publish a prospectus provided that the total consideration of the offer in the EU does not exceed €8 million calculated over a period of 12 months pursuant to article 3 clause 2b. Furthermore, in relation to the 'key information on the securities' of the summary, the brief description of the securities offered should also include the relative seniority of the securities in the issuer's capital structure in the event of insolvency. In article 16 the amendment outlines that each of the risk factors shall be adequately described and presented in a limited number of categories. These categories include the risks resulting from the level of subordination of a security and the impact on the expected

size or timing of payments to holders of the securities in the case of insolvency, or any other similar procedure. Where there is a guarantee attached to the securities, the specific and material risk factors relating to the guarantor must be included. With regard to the final offer price and number of securities, the amendment to article 17 provides that the maximum price and/or amount of securities and the valuation methods and criteria are to be disclosed in the prospectus.

A new article 24a provides rules for the notification of competent authorities concerning registration documents or universal registration documents. It states, among other things, that no fee will be charged by the competent authorities for the notification, or receipt of notification, or any related supervisory activity. Concerning cooperation with third countries, an amendment to article 28 excludes from the conclusion of cooperation agreements any third countries that are on the list of jurisdictions that have strategic deficiencies in their national anti-money-laundering and 'countering the financing of terrorism' regimes, and that pose significant threats to the financial system of the EU, adopted in delegated acts of the EU Commission pursuant to article 9 of the fourth Anti-Money-Laundering Directive.

The EU Parliament is expected to approve this compromised text at the first reading. The text will then be submitted to the EU Council for adoption, and come into force in the first half of 2017. When adopted, the Prospectus Regulation will have direct effect without requiring transposition on the national level. Except for some specific provisions that will apply earlier, it appears that the Prospectus Regulation will apply 24 months from the date of entry into force. This means that if the Prospectus Regulation is published in the Official Journal in the first half of 2017, the majority of its rules will apply in the first half of 2019.

### PRIIPs Regulation

It can be expected that the German legislator will take the PRIIPs Regulation as an opportunity to revise the statutory product information document regulation. It should be revised to ensure that manufacturers, issuers and providers only need to prepare one product information document for each of their products, and thus that consumers do not receive more than one information document per financial product.

for the issuing of the prospectus. Usually, this includes the issuer, the underwriters, in particular the global coordinators and, under certain circumstances, the selling shareholders (in a recent judgment the Federal Court of Justice confirmed a prospectus liability of the controlling enterprise in the underlying case of a public offering of bonds).

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

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

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

### Civil law liability

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

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

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

Further, an investment service undertaking must produce a written protocol on the investment advice pursuant to section 34, clause 2a of the WpHG to be drafted and handed over to a retail client even in the case of investment advice offered to persons who are not yet customers but who demonstrate that they are interested in such a client relationship. This applies also if the client relationship finally fails to be solicited. As a consequence, the investment service undertakings are required to implement appropriate and effective organisational internal measures, which include monitoring and control aspects. To enable monitoring procedures, not only shall the offered investment advice be documented, but also discussions on investments in financial instruments, even if no investments were recommended. Further, the respective documentation must, if applicable, contain evidence that no investment advice was offered. Criminal prosecution might even be initiated based on the activities of the parties pursuant to the German Criminal Code and other applicable criminal rules and regulations.

The European Commission adopted the Commission Delegated Regulation (EU) on 8 March 2017 supplementing the Regulation on key information documents (KID) for PRIIPs by laying down regulatory technical standards with regard to the presentation, content, review and revision of KIDs and the conditions for fulfilling the requirement to provide such documents. The Regulation will apply from 1 January 2018, while article 14 clause 2 will apply until 31 December 2019. The Delegated Regulation was originally adopted by the Commission on 30 June 2016. On 14 September 2016, the European Parliament objected to it. In order to address the concerns of the European Parliament, the European Commission proposed certain amendments to the European Supervisory Authorities.

The PRIIPs Regulation applies to manufacturers and distributors of PRIIPs, and provides that where a PRIIP is to be made available to retail investors, a KID must be prepared and provided to those investors. The requirements as to the form and content of the KID are very detailed and prescriptive. The KID must consist of a maximum of three sides of

an A4-sized paper. In connection with the PRIIPs Regulation, the key information documents pursuant to the PRIIPs Regulation differ from the German product information documents in particular owing to the fact that risks and costs are not to be presented in text form but instead are to be represented in the form of indicators. A new feature in contrast to the existing product information documents is the obligation to add the following comprehension alert to key information documents for particularly complex PRIIPs: 'You are about to purchase a product that is not simple and may be difficult to understand.' Moreover, a central point strengthening consumer protection is that the PRIIP manufacturer may be held liable if a retail investor suffers damages as a result of a key information document that does not meet the requirements of the PRIIPs Regulation, and the investor has therefore made an unwise investment decision. The Regulation places the burden of proof in a legal dispute on the manufacturer, which must show that the key information document complies with the PRIIPs Regulation.

**SQUIRE**   
**PATTON BOGGS**

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# India

## The Capital Markets Group

### Luthra & Luthra Law Offices

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#### Statutes and regulations

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

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

- the (India) Companies Act 2013 (2013 Act) (to the extent notified) and the (India) Companies Act 1956 (1956 Act) (to the extent such enactment is in force) (collectively, Companies Act) – the Companies Act is the principal legislation governing companies in India and sets out the broad framework for the offering of securities by companies, including public offerings and private placements. The majority of the provisions of the 2013 Act, including the relevant provisions relating to offering of securities by companies, have come into force. In addition, the relevant rules under the 2013 Act in relation to allotment of securities, share capital and acceptance of deposits, issue of global depository receipt (Rules) have also come into force. While the Companies Act is primarily administered by the Ministry of Company Affairs (MCA), certain specified provisions of the Companies Act, in relation to listed companies and public offering of securities, are administered by the Securities and Exchange Board of India (SEBI);
- the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (ICDR Regulations) – the ICDR Regulations, framed and administered by the SEBI, is the principal legislation that comprehensively regulates offerings of equity and equity-linked securities by listed companies as well as those that propose to list on any stock exchange in India, which includes the main board of a stock exchange, the institutional trading platform (ITP) and the small and medium enterprise exchange (SME exchange). The ICDR Regulations lay down detailed provisions on eligibility, disclosure requirements, restrictions and procedures for such offerings;
- the Foreign Exchange Management Act 1999 (Foreign Exchange Act) – the Foreign Exchange Act, including the rules and regulations framed and the circulars issued thereunder, sets out requirements in relation to foreign investment in Indian securities and also regulates debt securities by Indian companies that are issued overseas. The Foreign Exchange Act, including the rules and regulations framed and the circulars issued thereunder, is administered by the Reserve Bank of India (RBI);
- the Securities Contracts (Regulation) Act, 1956 (Securities Contracts Act) – the Securities Contracts Act, along with the rules framed thereunder, governs listing of securities on stock exchanges and certain aspects of public offering of securities. The Securities Contracts Act is administered by the SEBI and the RBI;
- the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 (Debt Regulations) – the Debt Regulations, issued by the SEBI, govern offering of debt securities, including public offerings and private placements of listed debt securities. The Debt Regulations are administered by the SEBI; and
- the SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations 2013 (RPS Regulations) – the RPS Regulations, issued by SEBI, govern offering of non-convertible redeemable preference shares, including public offerings and

listing of privately placed non-convertible preference shares. The RPS Regulations are administered by SEBI.

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#### Public offerings

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

###### Public offering of equity shares and convertible securities

In India, a public offering of equity shares and convertible securities may be listed on any of following three market platforms:

- the main board: listing requires issuers to meet certain eligibility criteria and full compliance with the disclosure regime mandated primarily under the 2013 Act and the ICDR Regulations;
- the ITP: the regulatory requirements for listing permit a relaxation of eligibility and issuer disclosure requirements; and
- the SME exchange: for listing of small and medium-sized enterprises whose face value of post-IPO (initial public offering) capital is up to 250 million rupees. The regime for disclosures and eligibility of issuers on this platform has also been set out, and is distinct from those for the main board of the stock exchange.

This chapter largely deals with listing on the main board of the stock exchange and the ITP.

In the case of a book-built issue, both primary and secondary public offerings of equity shares and convertible securities on the stock exchange require filing of a draft offer document (the draft red herring prospectus) with SEBI, for its observations, and with the stock exchanges; filing of an updated offer document (the red herring prospectus), incorporating SEBI observations with the Registrar of Companies, before inviting subscriptions; and, thereafter, filing of an offer document updated for pricing details (the prospectus) with the Registrar of Companies. In the case of a fixed-price issue, both primary and secondary public offerings of equity shares and convertible securities require filing of a draft offer document (draft prospectus) with SEBI for its observations and, upon receiving observations from the SEBI, filing of an offer document with pricing details (prospectus) with the Registrar of Companies, before inviting subscriptions. For an ITP listing, an issuer may elect to list its securities on the stock exchange either by making a public offer or without making one. Accordingly, the issuer may file a draft offer document or a draft information document with the SEBI, with each carrying the specified disclosures, and subsequently, the red herring prospectus and final information document, respectively.

An issuer seeking to list its equity shares or convertible securities on the main board is also required to fulfil certain eligibility conditions prescribed by the stock exchanges. For instance, BSE Limited (BSE) and National Stock Exchange of India Limited (NSE), for listing of equity shares pursuant to an IPO, prescribes a minimum post-IPO paid-up equity capital of 100 million rupees and a market capitalisation of 250 million rupees. Alternatively, an issuer listing its equity shares and convertible securities on the ITP is not required to fulfil any minimum capitalisation requirements. The NSE for listing on the main board also prescribes that there should not have been any material regulatory or disciplinary action initiated by stock exchanges or any regulatory

authority against the applicant company in the three years before the date of application for listing and in the past one year against the promoters, promoting companies, group companies, companies promoted by the promoters and promoting company(ies) of the applicant company. In addition, at various stages of the offering process, certain approvals must be obtained from the stock exchanges where equity shares are proposed to be listed: an in-principle approval at the time of filing of the draft offer document, a listing and trading approval upon the issuance or transfer of equity shares, and prior to the commencement of trading of the equity shares on the stock exchanges. Further, if an issuer or any of its promoters or directors is declared as a 'wilful defaulter' by a bank or financial institution, such issuers are not eligible to make a public offering of equity shares on both the main board and the ITP of the stock exchange. Additionally, if an issuer or any of its promoters or directors is declared as a wilful defaulter, or it is in default of payment of interest or repayment of the principal amount in respect of debt securities issued by it to the public for a period of more than six months, such issuers are also not be eligible to make a public offering of convertible debt instruments.

Schedule VIII of the ICDR Regulations sets out detailed requirements in relation to the disclosures to be made in an offer document. These include detailed disclosures relating to capital structure, business, risks relating to the issuer and the offering, objects of the offering, legal proceedings relating to the issuer, financial statements, management's discussion and analysis on the financial condition of the issuer, and any other information material for investors to make an investment decision. In addition, the 2013 Act and the Rules require certain additional disclosure requirements, such as source of the promoter's contribution and legal action pending or taken by any ministry or government department or statutory authority during the past five years against the promoters of the issuer. Recently, a bill has been introduced in the Parliament to amend the 2013 Act, which among other things proposes to omit certain disclosures requirements for prospectuses. Further, India has decided to adopt the Convergence of its existing standards with International Financial Reporting Standards referred to as the Indian Accounting Standards (Ind AS) and based on the net worth of the issuer; Ind AS shall be applicable to the issuers in a phased manner. In this regard, the SEBI has also clarified the manner of disclosure of financial statements in the offer document for companies intending to list their securities.

Further, the SEBI issued a circular setting out the format of a 'General Information Document', which requires information of general nature and not specific to the issuer to form part of the offer documents and also be made generally available to investors in public offerings of equity and equity-related securities. If it is a rights offering by a listed issuer, subject to compliance with the periodic disclosure requirements of stock exchanges and certain other conditions, the ICDR Regulations provide for limited disclosures in the offer document.

Following the amendment of the ICDR Regulations in August 2015, the ITP has been conceptualised as a trading platform, distinct from the main board of the stock exchange. The ITP has been made available to issuers with non-traditional business models, including those involving intensive application of technologies with at least 25 per cent of the pre-issue capital held by qualified institutional buyers (QIBs), and those other companies in which the shareholding of QIBs is at least 50 per cent. Certain categories of institutional investors are identified by the SEBI as being QIBs, which includes institutions such as banks and insurance companies. Recently, in the 2017 budget speech it was proposed to allow systemically important non-banking financial companies regulated by the RBI and above a certain net worth to be categorised as QIBs. The intent of the ITP is to ease the public capital-raising process for companies meeting alternative criteria that would otherwise find it onerous to fulfil eligibility conditions of listing on the main board of stock exchanges. In terms of disclosure requirements, a company seeking to list on this platform will need to disclose broad objects for utilisation of the issue proceeds and the basis of issue price may include disclosures, except projections, as deemed fit by the issuer. The SEBI has made available to companies listed on the ITP the option to migrate to the main boards of stock exchanges three years after the expiry of the date of listing on the ITP, subject to fulfilment of certain conditions. Recently, SEBI has floated a discussion paper on the review of the framework for the ITP wherein it proposed to rename

the ITP the 'High-tech Start-up & other new business Platform'. The other key proposals included removing the eligibility requirement of a person not holding 25 per cent or more of the post-issue capital of the company intending to list on ITP, extending the lock-in restrictions to equity shares allotted to employees under a stock option scheme and diluting the conditions for allocation for investors as well as raising the limit for discretionary allotment to institutional investors. The changes suggested in the discussion paper are yet to be notified by SEBI.

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

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

In both cases, however, such a company will be required to increase its public shareholding to 25 per cent within three years from the listing, in a manner specified by the SEBI. In this regard, the SEBI introduced an alternative mode of public issue: the institutional placement programme (IPP). Under this route, listed companies can make a primary or a secondary public offering (by promoter/ promoter group) of equity shares to QIBs. Since the equity shares under the IPP are offered only to QIBs, the SEBI has exempted issuers from the requirement of filing a draft offer document. Thus, in an IPP, the issuer can directly issue the red herring prospectus, and thereafter the prospectus, and is required to file them with the Registrar of Companies, the SEBI and the stock exchanges. Further, unlike other public issues, in an IPP, the disclosure requirements in the offer document have been rationalised along the lines applicable to an offer document issued in a qualified institutional placement (QIP) (see question 8).

#### Public offering of debt securities

In terms of the Debt Regulations, a public offering of debt securities requires filing of a draft offer document with a stock exchange for seeking public comments. Thereafter, upon suitably addressing the comments received from the public, an offer document (prospectus) is filed with the Registrar of Companies. Certain classes of issuers, such as public financial institutions, specified government companies, non-banking financial companies and listed companies satisfying the prescribed eligibility criteria under the Debt Regulations may also undertake successive public offerings of debt securities through a shelf prospectus. A shelf prospectus is valid for a period of one year, and up to four offerings of debt securities can be made under such a shelf prospectus. Prior to each offering, an issuer is required to file an information memorandum with the Registrar of Companies, which sets out the principal terms and conditions of the securities offered, and any material developments that may have occurred after filing of the shelf prospectus. In terms of the Debt Regulations, an offer document (including a shelf prospectus) is required to set out all material disclosures necessary for the subscribers to make an informed investment decision, including certain matters specified in the Debt Regulations and the Companies Act. For purposes of listing of debt securities, an in-principle approval from the stock exchanges where the debt securities are proposed to be listed is to be obtained before launching the transaction; a listing approval upon allotment and a trading approval is required to be obtained from the stock exchanges before listing and commencement of trading. After a recent amendment to the Debt Regulations, if an issuer or any of its promoters or directors is declared as a wilful defaulter by a bank or financial institution, or it is in default of payment of interest or repayment of principal amount in respect of debt securities issued by it to the public for a period of more than six months, such issuer will not be eligible to make a public offering of debt securities.

Additionally, the SEBI has approved a proposal to allow companies to raise funds through the issuance of 'green bonds'. While it is expected that such issuances will form part of the existing Debt Regulations itself, this route will enable corporates to issue non-convertible debt securities whose proceeds would be earmarked specifically for deployment in environmentally-friendly projects and businesses.

#### **Public offering of non-convertible redeemable preference shares**

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

Listing of non-convertible redeemable preference shares requires certain eligibility conditions to be satisfied by an issuer. For instance, the issuer or the promoter should not have been restrained, prohibited or debarred by the SEBI from accessing the securities market or dealing in securities as on the date of filing of the draft offer document or offer document. Additional requirements under the RPS Regulations include obtaining an in-principle approval from the stock exchanges where the non-convertible redeemable preference shares are proposed to be listed and obtaining at least one credit rating by a credit rating agency registered with the SEBI. After a recent amendment to the RPS Regulations, if an issuer or any of its promoters or directors is declared as a wilful defaulter by a bank or financial institution or it is in default of payment of interest or repayment of principal amount in respect of non-convertible redeemable preference shares issued by it to the public for a period of more than six months, such issuer will not be eligible to make a public offering of non-convertible redeemable preference shares.

In a departure from the erstwhile position of requiring an issuer to enter into separate listing agreements for each kind of security proposed to be listed, the SEBI has recently prescribed a uniform listing agreement for issuers to enter into with stock exchanges. The substantive provisions of the erstwhile listing agreements have been provided for by way of a regulation, titled SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (the Listing Regulations). The Listing Regulations encapsulate standards to be adhered to by listed companies, including those relating to corporate governance and ongoing disclosures. A shorter uniform listing agreement, however, is still required to be entered into by listed issuers with the stock exchanges.

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

#### **Public offering of equity shares and convertible securities**

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

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

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

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

#### **Public offering of debt securities**

In a public offering of debt securities, the draft offer document or a draft of the shelf prospectus, as the case may be, is filed with the stock exchange and displayed on its website and is required to be made available for comments from the public for a period of seven working days. Such a draft offer document or draft shelf prospectus may also be displayed on the website of the issuer and the lead managers. Thereafter, upon suitably addressing the comments received from the public, the offer document (prospectus or shelf prospectus, as the case may be) filed with the Registrar of Companies is also to be simultaneously filed with the stock exchanges for dissemination and forwarded to SEBI for its records. The offering can commence only upon the filing of the offer document with the Registrar of Companies and a designated stock exchange. In the case of an offering undertaken in pursuance of a shelf prospectus, an information memorandum (typically referred to as a 'tranche prospectus') is also required to be filed with the Registrar of Companies and simultaneously with stock exchanges and SEBI, along with the shelf prospectus prior to inviting subscriptions.

#### **Public offering of non-convertible redeemable preference shares**

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

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

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

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

Research reports issued by the lead managers are required to be prepared only on the basis of publicly available information relating to the issuer, disclosed in the draft offer document or offer document

or otherwise to the public by the issuer. Further, research reports are required to contain only factual information and not contain any estimates or projections or conjectures. In addition, the SEBI (Research Analysts) Regulations, 2014 (Research Regulations) provide for detailed conditions, among others, in relation to the registration of research analysts, their policies and procedures, and compensation and limitation on publication of research reports. Under the Research Regulations, subject to internal policy and procedures, the research analysts affiliated to book runners cannot issue a research report, in the case of an IPO for a period of 40 days following the pricing date, and in the case of a further public offering this restriction is only for 10 days. This restriction would also apply for the period commencing 15 days prior to any lock-up arrangement with respect to the issuer and continue until 15 days after expiry or waiver or termination of such lock-up arrangement. Further, the Research Regulations also specifically prohibit research analysts affiliated to other underwriters (being syndicate members) from issuing a research report for a period of 25 days from the date of opening of the public issue.

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

In cases of primary offerings, the securities are to be first offered to the existing shareholders of the issuer (a rights offering), unless a special resolution is passed by the shareholders. Further, in a primary offering of securities, the minimum subscription is required to be not less than 90 per cent of the offering, failing which, application money needs to be refunded back to the applicants. This requirement does not apply to a secondary offering of securities. Restrictions relating to the further issuance of securities by the issuer, between the filing of the draft offer document and the listing of the equity shares, uniformly apply to both primary and secondary offerings of securities.

In the case of a secondary offering of securities, the selling shareholder is required to certify, as a declaration in the offer document, that all statements in relation to itself and the securities being offered by it in the offer document are true and correct. Additionally, the selling shareholder is required to certify that it has obtained all approvals and consents to be obtained by it in relation to the offering. Any misstatement in this regard could attract civil and criminal liability under the Companies Act, action by the SEBI or tort liability under common law. Under the 2013 Act, it is provided that a selling shareholder shall reimburse expenses incurred by the company on its behalf in undertaking the sale of secondary shares. Additionally, the selling shareholder is liable for the timely refund and for payment of interest in the event of any delay in making refunds.

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

Under the ICDR Regulations, application monies should be deposited by the bidders at the time of making the bid. Since 1 January 2016, the SEBI prescribed regulatory regime requires that listing of securities should be achieved within six working days from bid closing. Accordingly the allotment or transfer of securities is to be completed and shares are to be credited in the dematerialised accounts within four to five working days of the bid closure date. In order to reduce the post-issue timeline for settlement in a public offering, for securities to be listed on the main board of the exchange and the ITP, the SEBI has made bids submitted through an 'application supported by blocked amounts' (commonly referred to as ASBA bids), which are not submitted with the underwriters but directly to the self-certified syndicate banks, mandatory. The SEBI has also removed the option to withdraw the bid after the bid closure date. SEBI has recently indicated that it is considering reducing the listing time gap by bringing down the issue timing from the existing requirement of six working days from the bid closing.

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

As regards trading and settlement of non-convertible redeemable preference shares, the RPS Regulations require listing of the non-convertible redeemable preference shares to be completed within 20 days from the deemed date of allotment, failing which penal interest is

required to be paid to the investors. However, conditions to govern the settlement process are yet to be issued by the SEBI.

#### **Private placings**

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

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

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

SEBI has permitted issuers who have sold shares or debentures to persons exceeding 49, but below 200, in number, in a single financial year to avoid penal action, upon carrying out certain remedial measures. This revised regulatory treatment has enabled certain companies and is expected to continue to assist companies in the rectification of private placements that may have been held to be deemed public offerings under the 1956 Act, when such allotments were made in the breach of the 'rule of 50'.

Additionally, an amendment bill to the 2013 Act has been recently introduced in the Parliament, which seeks to streamline various provisions pertaining to the private placement. Some of these proposed changes relate to dispensing with the requirement of filing of a private placement offer letter (commonly referred to as PAS-4) by the issuer, in favour of a more efficient process. Additionally, the amendment bill also seeks to clarify that private placement offers do not carry a right of renunciation.

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

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

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

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

In addition to the Companies Act, the Debt Regulations and RPS Regulations also regulate the listing of debt securities and non-convertible redeemable preference shares, respectively, issued on a private placement basis. An issuer issuing such securities on a private placement basis and listing them on stock exchanges is required to obtain a credit rating of its debt securities and is to file a disclosure document to the stock exchanges containing disclosures relating to certain matters specified in the Companies Act and the Debt Regulations and RPS Regulations, as applicable. Recently, SEBI has, subject to certain exceptions, mandated electronic book building for issuance of debt securities on a private placement basis in the primary market wherein the issue size is 5,000 million rupees and above (including a greenshoe option). The requirement of using the electronic book mechanism has also been made applicable to tranche issues which individually may be less than 5,000 million rupees, though as a part of a shelf offer, if such issues aggregate to more than 5,000 million rupees (including a greenshoe option) in a financial year.

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

Under the 2013 Act, private placements are required to be made through a private placement offer letter in the format prescribed under

the Rules. The format prescribed under the Rules includes disclosures relating to the business, risk factors and legal action pending or taken by any government department or statutory body during the past three years against the promoters. It has recently been proposed in an amendment bill to the 2013 Act, that the private placement offer letters be done away with, in favour of including certain additional disclosures in the application forms for such private placements, referred to as the private placement offer-cum-application form, thereby reducing the burden of compliance and filing of offer letters by unlisted issuers.

In addition, the ICDR Regulations also prescribe the contents of an offer document depending on the form of private placement undertaken. In a QIP, the placement document issued to potential investors and filed with the stock exchanges is required to contain all material information in relation to the issuer and the placement, including details of risk factors and the business, legal proceedings, management of the issuer and details of use of proceeds in relation to the placement. In a preferential issue of securities by a listed issuer under the ICDR Regulations, the Regulations do not prescribe any additional information to be made available to potential investors. However, in the notice for the general meeting of the members approving the placement, certain details relating to the placement, such as the identity of the investors and the objects of the placement, and disclosures on whether any of the promoters or directors of the issuer company is a wilful defaulter, are to be disclosed.

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

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

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

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

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

#### **Offshore offerings**

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

In relation to securities offerings outside India, the applicable provisions under the Foreign Exchange Act are required to be complied with. In addition, an offering of foreign currency convertible bonds (FCCB) and foreign currency exchangeable bonds (FCEB) are governed by Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipts Mechanism) Scheme, 1993 (FCCB Scheme), Issue of Foreign Currency Exchangeable Bonds (FCEB) Scheme 2008, (FCEB Scheme) respectively, and regulations on external commercial borrowings, while depository receipts (DRs) by an issuer in India in overseas jurisdictions are regulated by the Depository Receipts Scheme, notified in 2014 (New DR Scheme), the 2013 Act and the Rules.

FCCBs are required to be issued with a minimum maturity period of five years and to comply with the conditions applicable to external commercial borrowings, including all-in-cost ceilings. FCEBs are bonds that are exchangeable into an equity share of another company, in any manner, including on the basis of any equity-related warrants attached to debt instruments. Similar to FCCBs, these bonds are also subject to a minimum maturity period of five years.

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

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

In addition, the RBI under the Foreign Exchange Act, permitted Indian companies to issue rupee-denominated bonds or 'masala bonds' in only those overseas jurisdictions and for subscription by investors that are residents of Financial Action Task Force-compliant countries or a similar regional body and regulator of that securities market that is a member of the International Organization of Securities Commissions or a signatory to a bilateral memorandum of understanding with the SEBI for information sharing arrangements. These bonds can be either placed privately or listed on exchanges as per host country regulations. Recently, the RBI has brought down the prescribed minimum maturity period of these bonds from five years to three years. The RBI has recently permitted issuance of rupee-denominated bonds by Indian banks for their capital requirements and for financing infrastructure and affordable housing projects. The proceeds of the issue may be utilised towards all permitted ends other than a few exclusions, such as investment in real estate, capital markets, on-lending, purchase of land and activities prohibited under the Indian foreign direct investment policy. Further, unlike the regulations applicable to traditional external commercial borrowings, the framework for masala bonds does not seek to impose any substantive restrictions on eligibility of issuers' end use or the borrowing costs. Recently, in the budget speech, the Finance Minister proposed to exempt capital gains arising out of transfer of a rupee denominated bond by a non-resident to a non-resident.

### Particular financings

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

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

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

Although warrants are recognised instruments for raising capital under the ICDR Regulations, they may be issued only if accompanied by non-convertible debt instruments, if issued under the QIP route. In a public issue or a rights issue, the tenure of warrants issued along with securities should not exceed 18 months and only one warrant should be attached with every security issued. Further, the permission of the government of India is required for the issuance of warrants to

non-residents by Indian companies operating in certain sectors where government approval is required.

FCCBs, depositary receipts and foreign currency exchangeable bonds and FCEBs are instruments, which, if issued by listed companies, also need to comply with the regulations prescribed by the RBI and the government of India. Further, the restrictions with respect to external commercial borrowings, as specified by the RBI, are applicable to FCCBs, FCEBs and rupee-denominated bonds.

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

### Underwriting arrangements

#### 12 What types of underwriting arrangements are commonly used?

Typically, underwriting arrangements require underwriting only to the extent of the completion of the bids procured by the underwriters from investors. Further, underwriters may not be required to underwrite certain types of obligations such as obligations that arise from negligence of 'self certified syndicate banks', in the case of 'application supported by blocked amounts' (commonly referred to as 'ASBA bids').

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

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

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

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

#### 14 What additional regulations apply to underwriting arrangements?

In the event that an issuer making an IPO, on the main board of a stock exchange, does not meet certain conditions specified in the ICDR Regulations, it is required to allot at least 75 per cent of the issue to QIBs. Under the ICDR Regulations, allotment to QIBs in such a case cannot be underwritten. Further, the provisions relating to underwriting under the ICDR Regulations are not applicable to listing on the ITP made without a public issue.

In addition, the SEBI (Underwriters) Regulations, 1993 (the Underwriters Regulations) lay down conditions relating to the registration process for underwriters, their duties and obligations towards fulfilling underwriting commitments, and some of the clauses that underwriting agreements must contain. The Underwriters Regulations also grant extensive powers to the SEBI to oversee the underwriting process, including powers to inspect the books of accounts, records and documentation of an underwriter and powers to appoint auditors to audit the books of underwriters, if deemed necessary.

### Ongoing reporting obligations

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

At the time of the listing of the securities, the issuer is required to enter into a uniform listing agreement with the stock exchanges and comply with the Listing Regulations. The uniform listing agreement entered into applies to all forms of securities listed on Indian stock exchanges,

including on the ITP. The Listing Regulations replace the periodic and regulatory disclosure requirements set out in the erstwhile standard listing agreement, and also specifies the manner of dissemination of certain disclosures relating to price-sensitive information to be made by the issuer to the stock exchanges, which is also to be made available on the website of the issuer.

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

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

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

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

As stated previously, under the RPS Regulations, the issuer must enter into the uniform listing agreement with the stock exchange where the non-convertible redeemable preference shares are proposed to be listed.

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

The disclosure regime under the erstwhile equity listing agreement has been replaced by a materiality-based disclosure requirement set out under the Listing Regulations. The factors to aid the board of directors of the listed company to ascertain materiality have also been set out. Under the Listing Regulations, a listed issuer of equity shares is now required to make certain periodic disclosures to the stock exchanges without resorting to determination of materiality, including:

- acquisitions, amalgamations, demergers, restructuring, sale or disposal of any business units, divisions or subsidiaries of the entity;
- entering into agreements, such as a joint venture or with media companies, which are binding and not in the normal course of business, or revision, amendment or termination of such agreements;
- schedule of analyst or institutional investor meetings and presentations on financial results made by the listed entity to analysts or institutional investors; and
- notice of any change in the directorship of the company or in the auditors.

The Listing Regulations require that certain information, when it exceeds the thresholds of materiality, be disclosed, including:

- granting, withdrawal, surrender, cancellation or suspension of key licences or regulatory approvals;
- commencement or any postponement in the date of commencement of commercial production or commercial operations of any unit or division; and

- litigation, disputes or regulatory actions with impact on such proceedings.

The SEBI issued regulations on insider trading, which have been in force since May 2015. These regulations are a significant step forward in the manner and mode of periodic and event-linked disclosures, including moving a fair burden of ensuring compliance by insiders, to the company itself. Additionally, these regulations are stated to be applicable not only to listed companies, but also to 'to be listed' companies, although the practical application and enforceability of this revision continues to be examined by market participants. Some of the disclosures required to be made by issuers under the new regulations include:

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

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

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

#### **Anti-manipulation rules**

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

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

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

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

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

### Update and trends

Over the past year there have been a few significant proposals to change the regulatory framework concerning securities transactions with the introduction of a bill to amend the 2013 Act and a discussion paper issued by the SEBI to overhaul the existing ITP framework. Additionally, the SEBI has made certain amendments to the regulatory landscape concerning real estate investment trusts and infrastructure investment trusts, and has also taken a step forward towards reviewing the framework for public issues of convertible securities. The Companies Amendment Bill 2016, among other things, proposes to omit certain disclosures requirements for prospectuses and streamline various rules pertaining to private placements. Some of these proposed changes relate to dispensing with the requirement of filing of a private placement offer letter by the issuer, in favour of including certain additional disclosures in the application forms for private placements, referred to as the private placement offer-cum-application form. These proposed amendments to the 2013 Act are expected to reduce the burden of compliance and simplify the disclosure regime for public offerings and private placements. In a discussion paper issued by the SEBI on the review of the framework for ITP, it has been proposed to rename ITP, for example, 'the High-tech Start-up & other new business

Platform'. The SEBI has also proposed to dilute the conditions for allocation for investors as well as raise the limit for discretionary allotment to institutional investors in the ITP.

The SEBI had also issued a discussion paper for reviewing the framework for public issues of convertible securities. In the recent years, as there has been a decline of the public issuance of convertible securities, the proposals contained in the discussion paper are aimed at reviving issuances of convertible securities. Some of the key proposals include fixing the permissible tenure for public issuance of convertible securities to a maximum of five years. Currently, subject to certain exceptions, there is no fixed period prescribed. The SEBI is also considering permitting in the public issue of convertible securities, an offer for sale by the existing shareholders. Earlier last year, the SEBI provided a detailed framework for public offerings and private placement of infrastructure investment trusts (InvITs), similar to equity and equity-linked securities. Additionally, continuous disclosure requirements by listed InvITs have recently been prescribed. At a policy level, InvITs and real estate investment trusts have witnessed tremendous activity in the past year, with a host of circulars, discussion papers and amendments notified by the SEBI.

### Price stabilisation

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

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

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

Concerned about the negative impact on investor confidence in the market on account of a fall in trading prices post-listing, in October 2013, the SEBI had proposed a mandatory safety net mechanism. Since this proposal, while few issuers in discussion with SEBI provided for a form of safety net mechanism in IPOs, ultimately the mandatory safety net mechanism was not adopted because of the onerous impact on issuers and promoters.

### Liabilities and enforcement

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

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

#### Companies Act

The 2013 Act provides for civil liability for inclusion of any misleading statement in a prospectus (as opposed to 'untrue statement' under the 1956 Act). A civil suit under this provision may be initiated by any person who subscribes to the securities in the offering against the directors or promoters of the issuer or any other person who has authorised the issue of a prospectus. The 2013 Act also proposes to extend civil liability over persons named as 'experts' in the prospectus. The 2013 Act does not provide for certain carve-outs, which were otherwise provided in the 1956 Act. Accordingly, persons attracting civil liability may no longer disclaim liability on statements made in a prospectus, unless a director withdraws his or her consent before the issue of prospectus

and the prospectus is issued without his or her authority, and the prospectus is issued without the consent of a person and such person gives a reasonable public notice on becoming aware that the prospectus has been issued without his or her consent or knowledge.

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

#### SEBI Act and the ICDR Regulations

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

#### Common law liability

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

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

Securities litigation is at a developing stage in India at present. The Companies Act prescribes both civil and criminal consequences for misstatements in a prospectus. In addition, the SEBI Act prescribes both civil and criminal sanctions against persons or entities that are in violation of its provisions, including failure to supply requisite information or documents to the SEBI, failure to maintain books of accounts or redress investor grievances in a listed company, the omission of insider trading, non-reporting under the extant regulations on acquisitions of shares and takeovers, and the failure by various intermediaries in the securities market to adhere to rules and regulations laid down by

the SEBI. Complaints on any such grounds may be filed by any entity with an adjudicating officer appointed by the SEBI on its behalf, who is empowered, upon hearing both the parties in the matter, to impose such penalties as he or she may deem fit against the entity against whom the complaint is directed, within the contours of the SEBI Act.

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

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

Additionally, the SEBI has strengthened its enforcement mechanism through the issue of the SEBI (Settlement of Administrative and Civil Proceedings) Regulations 2014, enabling it to settle violations of securities laws with regulated entities, through an imposition of monetary or non-monetary penalties, including a combination of both. The SEBI (Settlement of Administrative and Civil Proceedings) Regulations 2014, have been recently amended to, inter alia, provide for issuance of a settlement notice prior to the issuance of a formal show cause notice, and re-application of rejected or withdrawn applications in certain cases. This amendment is intended to incentivise defaulters to come forward voluntarily on their own, before any initiation of investigation or enforcement action.

Pursuant to a recent amendment to the ICDR Regulations, stock exchanges have been specifically empowered to undertake actions such as the imposition of fines, suspension of trading, and freezing of promoter or promoter group shareholdings for contravention of ICDR Regulations. This is expected to reduce the cost of undertaking adjudication or quasi-judicial actions in the case of minor violations for listed entities.



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## Statutes and regulations

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

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

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

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## Public offerings

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

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

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

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

Cabinet order, which took effect on 1 October 2012, an SRS of a foreign corporate issuer must contain financial statements for the most recent five years, among which the most recent two years' financial statements must be audited by a chartered accountant. However, after the amendments to the Cabinet order, an SRS of a foreign corporate issuer may contain three years' financial statements (all of which must be audited by CPA) instead of the five years' financial statements. The information required for the SRS is generally not different for debt and equity or primary and secondary offerings except for the information concerning the securities offered.

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

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

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

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

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

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

Publicity under certain circumstances could fall within pre-filing solicitation (gun-jumping) or a selling effort that triggers a violation of the FIEL. There was no safe-harbour rule applicable to publication that could be considered as solicitation of certain securities that would otherwise be subject to public offering rules. In general, any acts that attract interest of investors on certain securities and promote them to purchase or acquire those securities may be considered to be 'solicitation', which is subject to public offering rules. However, under the amendments to the disclosure guidelines issued by the FSA, which took effect on 27 August 2014, the scope of publicity restrictions is clarified to some extent by giving several examples of acts that do not constitute 'solicitation'. Under the amended guidelines, a pre-hearing from professional investors or principal shareholders with some conditions (such as a confidentiality agreement), distribution of corporate information at least one month before the filing of SRS without reference to the offering, periodic publication of corporate information in the ordinary course of business without reference to the offering, and certain other acts are prescribed as those examples that do not constitute solicitation.

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

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

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

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

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

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

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

Settlement of the sale of securities subject to the book-entry transfer system in a public offering is achieved under the book-entry system and any investor who wishes to purchase the securities so offered must

maintain a trading account to own the securities at account management institutions under the system, such as securities firms or banks. The securities offered will be recorded in the account of the investor on the designated delivery date after the investor has paid the purchase price through the relevant bank.

#### Private placings

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

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

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

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

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

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

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

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

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

- (i) sale of securities through the market;
- (ii) sale of securities listed in Japan between securities firms or professional investors (eg, block trade);
- (iii) sale by foreign securities firms to securities firms in Japan or QIIs or sale by securities firms or QIIs to other securities firms for resale

- of foreign securities not subject to the transfer restriction of private placement;
- (iv) sale of securities not subject to the transfer restriction of private placements held by a seller other than insiders of the issuer (including the issuer, its subsidiaries, its principal shareholders and their directors and officers) or securities firms;
- (v) sale of securities not subject to the transfer restriction between the insiders described in (iv); and
- (vi) sale of securities to the issuer or for resale to the issuer.

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

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

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

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

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

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

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

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

There are transfer restrictions on the securities acquired in a private placement to the effect that the securities offered in a QII limited placement or a professional investors limited placement can only be

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

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

#### **Offshore offerings**

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

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

#### **Particular financings**

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

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

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

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

#### **Underwriting arrangements**

##### **12 What types of underwriting arrangements are commonly used?**

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

### Update and trends

The Tokyo Pro-Bond Market is a bond market for professional investors, which was established in 2011 based on the 'professional markets system' adopted under the amendments to the FIEL in 2008, and is currently operated by the Tokyo Stock Exchange Inc (TSE). In 2014, in order to vitalise this new market in the interest of promoting the development of financial markets in Japan, Development Bank of Japan, a government-affiliated financial institution, announced its plan to invest in up to ¥100 billion of the bonds listed on the Tokyo Pro-Bond Market as a principal investor. Since then, issuance of bonds on the Tokyo Pro-Bond Market has become popular for foreign issuers, in particular financial institutions. Furthermore, there was an amendment to the relevant Cabinet order in September 2015 by which a transfer restriction (ie, a prohibition of transfer to investors other than professional investors) can be easily embedded in the conditions of the bonds. Prior to the amendment, two types of transfer restriction agreements were required for Pro-Bonds: (i) between the issuer and investor (underwriter may act as agent on behalf of each investor) and (ii) between the underwriter and investor. Under the amendment, the transfer restriction may be embedded in the conditions of the bonds as long as investors agree (even orally) to comply with the restriction after the explanation of the restriction by underwriters.

In the Tokyo Pro-Bond Market, all the documentation and disclosure can be prepared in English and, therefore, would not entail

any cost of translation into Japanese, as compared to a public offering in Japan (which usually needs translations). In most cases, the issuer can list its existing MTN programme (such as Euro MTN) directly on the TSE without any substantive modifications. A prospectus or offering circular of the MTN and annual report in its home market would be sufficient as a programme information disclosed in the Pro-Bond market. At the time of pricing, 'specified securities information', which is mostly equivalent to the 'final terms' in the MTN, will be prepared in the course of the drawdown process of the programme. For this purpose, the pricing supplement of the existing MTN would usually be sufficient.

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

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

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

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

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

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

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

### 14 What additional regulations apply to underwriting arrangements?

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

### Ongoing reporting obligations

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

A company becomes subject to ongoing reporting obligations if:

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

Ongoing reporting obligations may be exempted upon approval by the LFB when the company goes into liquidation proceedings, suspends its

business for a considerable period or, in relation to the second condition above, the number of holders of securities becomes less than 25 at the end of the immediately preceding fiscal year or the number of holders of shares (which include shares and similar securities of foreign issuers under the amendments to the relevant Cabinet order, which took effect on 26 August 2013) has been less than 300 at each end of the fiscal year for the past five years.

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

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

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

Issuers of shares listed on any securities exchange in Japan (other than the market limited to professional investors), in general, are required to file quarterly reports within 45 days of the end of each quarterly fiscal period, except in certain limited cases. Such issuers must also file a certificate by representative directors and the chief financial officer, if any, confirming the lack of untrue statement in the annual or quarterly report and a report regarding the internal control system for financial reporting or other information to be disclosed together with the annual securities report. The reporting company must also file an extraordinary report without delay upon the occurrence of a material event, such as an overseas offering of its securities, a change of its parent company or major shareholders, the company's decision to implement a merger, a share-for-share exchange or a corporate split, or a disaster or litigation having a material effect on the company.

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

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

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

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

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

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

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

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

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

The underwriters would also be subject to administrative sanctions, such as the suspension of the whole or part of their business, should they act in violation of securities regulations.

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# Luxembourg

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## Statutes and regulations

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

The legal framework governing the offering of securities on the Luxembourg Stock Exchange (LSE) and their admission to trading on a regulated market results from a blend of national laws and European directives requirements. The offering of securities is primarily governed by the Law of 10 July 2005 relating to the prospectus for securities (the Prospectus Law), which implements Directive 2003/71/EC (the 2003 Prospectus Directive). The Prospectus Law was further amended by the Luxembourg law of 3 July 2012 (2012 Law) implementing Directive 2010/73/EU (the 2010 Prospectus Directive) and by the law of 21 December 2012, with the view to take into consideration the EU Regulation No. 1095/2010 (Regulation 1095/2010) establishing the European Supervisory Markets Authority (ESMA). The Prospectus Law was also recently amended in order to allow more flexibility where the securities of a third country issuer are no longer allowed to trading on the regulated market in its home member state but instead are admitted to trading in one or more other member states by the Luxembourg law of 10 May 2016 implementing Directive 2013/50/EU.

The 2012 Law, beyond the strict implementation of the 2010 Prospectus Directive, further amended the Prospectus Law in respect of public offerings and the admission to trading on a regulated market of securities that are not subject to Community harmonisation under the 2003 Prospectus Directive.

The public offering of securities representing units issued by undertakings for collective investment other than the closed-end type are subject to the sole provisions of the Laws on Undertaking of Collective Investments dated 17 December 2010 as amended. Units of an open-end type are out of the scope of the Prospectus Law irrespective of the frequency and periodicity of their repurchase. The prospectus they issue is valid for an offer to the public or their admission on a regulated market.

The Prospectus Law distinguishes three different types of legal regimes for offerings and admission:

- First Regime: relating to the offering and admission on a regulated market of securities subject to European harmonisation under the 2010 Prospectus Directive (Part II of the Prospectus Law with a full prospectus regime).
- Second Regime: relating to securities that are not encompassed by the 2010 Prospectus Directive and addressing two types of operations (Part III of the Prospectus Law with a simplified prospectus regime):
  - their public offering in the Grand-Duchy of Luxembourg (Luxembourg); and
  - their admission to a Luxembourg regulated market.
- Third Regime: relating to the admission of securities to trading on markets not listed as a regulated market by the European Commission (Part IV of the Prospectus Law). At present, there is only one such regulated market in Luxembourg: the Euro Multilateral Trading Facility (MTF) market.

The regulatory supervisory authority, the Commission for the Supervision of the Financial Sector (CSSF) has issued several

administrative circulars, which complete the body of existing rules and regulations, and which provide an overview and recommendations in respect of the Prospectus Law requirements.

In addition to the Prospectus Law, admission to trading on the LSE is subject to the Grand-Ducal Regulation of 13 July 2007 on the keeping of an official list (the Official List Regulation) and the LSE's own rules and regulations (LSE Rules and Regulations, and together with the Official List Regulation, the LSE Listing Rules). The LSE Listing Rules set out the requirements for admission to a Luxembourg-regulated market and regulate the conduct of listed companies.

Specific regulations also apply to public offerings pursuant to public takeover bids (ie, the Law of 19 May 2006, as amended, implementing European Directive 2004/25/EC).

The CSSF is the authority primarily responsible for the supervision and enforcement of the statutes and regulations governing public offerings of securities in Luxembourg. In particular the CSSF is responsible for approving prospectuses under the regime covered by the 2010 Prospectus Directive (First Regime) and the simplified prospectuses relating to securities that are outside the scope of the Second Regime. The CSSF regularly issues and promulgates instructions and guidelines under the form of administrative circulars that implement these statutes and regulations. Further to the creation of the ESMA, the CSSF cooperates with the ESMA, pursuant to the requirements of the Regulation 1095/2010 in matters of exchange of information and proceeds to the necessary reporting to enable the ESMA to carry out its mission.

The LSE is the sole institution authorised to administer one or several securities markets situated or operating in the Luxembourg market. It has the residuary competence for approving offers of securities admitted to trading under the Second Regime, namely, which are not covered by the Community harmonisation for the offering of securities and admitted to trading on the LSE or the Euro MTF (the Luxembourg alternative regulated market). The LSE has been operating the Euro MTF since 18 July 2005. This second market, which is not included in the list of regulated markets of the European Commission, is an alternative for issuers that wish to benefit from a certain regulatory framework, but do not require a European passport for prospectuses.

The LSE is responsible for administering and enforcing the LSE Listing Rules as well as approving the admission of an entity to the official list and the quotation of the entity's securities on the LSE.

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## Public offerings

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

Pursuant to the Prospectus Law, any issuer intending to make an offer of securities to the public or an admission to trading of securities (equity or debt) on a regulated market situated or operated within the territory of Luxembourg must, subject to certain exemptions, publish a prospectus. The issuer must notify the competent authorities (the CSSF or the LSE) of such intention in advance. An 'offer of securities' to the public is a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities. Securities include shares in companies and their

equivalent, but also bonds or other forms of securitised debt, depositary receipt in respect of such securities and other securities giving the rights to sell or acquire any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

Certain types of offers are exempt from the obligation to publish a prospectus, and consequently the obligation to notify the CSSF or the LSE. These are as follows:

- offers of securities addressed solely to qualified investors;
- offers of securities addressed to fewer than 150 natural or legal persons other than qualified investors, per member state;
- offers of securities addressed to investors who acquire securities for a total consideration of at least €100,000 per investor, for each separate offer;
- offers of securities whose denomination per unit amounts to at least €100,000; and
- offers of securities with a total consideration in all member states of the European Union of less than €100,000, which limit must be calculated over a period of 12 months.

Qualified investors are defined by article 2 of the Prospectus Law in a consistent manner with the definition of professional investors for purpose of the Directive 2004/39/EC (MiFID Directive). Qualified investors are those listed under category I of Annex II of the MiFID Directive, including those persons or entities who are deemed as professional investors on request, in compliance with Annex II of the MiFID Directive, or who are recognised as an eligible counterparty pursuant to article 24 of this directive, unless they have opted to be treated as non-professionals.

In addition, the offering of certain types of securities are exempt from the obligation to publish a prospectus. These types of securities are the following:

- shares issued in substitution for shares of the same class already issued, if the issuing of such new shares does not involve any increase in the issued capital;
- securities offered in connection with a takeover by means of an exchange offer, provided that a document is available containing information that is regarded by the CSSF as being equivalent to that of the prospectus, taking into account the requirements of Community legislation on exchange offers;
- securities offered, allotted or to be allotted in connection with a merger, provided that a document is available containing information that is regarded by the regulatory authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation on mergers;
- shares offered, allotted or to be allotted free of charge to existing shareholders, and dividends paid out in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer;
- securities offered, allotted or to be allotted to existing or former directors or employees by their employer whose securities are already admitted to trading on a regulated market or by an affiliated undertaking, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer;
- dividends paid out to existing shareholders in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer; this obligation applies also to a company established outside the European Union whose securities are admitted to trading either on a regulated market or on a third-country market. In the latter case, the exemption applies provided that adequate information, including the document referred thereto, is available at least in a language customary in the sphere of international finance and provided that the European Commission has adopted an equivalence decision regarding the third-country market concerned; and
- securities offered, allotted or to be allotted to existing or former directors or employees by their employer or by an affiliated

undertaking provided that the company has its head office or registered office in the European Union and provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer.

As regards information to be disclosed in prospectuses, the Prospectus Law refers explicitly to the Annexes of the European Commission Regulation 809/2004/EC, which deal with the level of information required to be disclosed, depending on the prescribed category of issuer and the type of securities to be offered. In general, the prospectus must contain all information necessary for investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and future prospects of the issuer and of any guarantor of the securities to be listed, as well as the rights attaching to such securities and any conditions under which they are issued. In particular, the prospectus should include disclosures of applicable risk factors, business and market descriptions, the financial statements of the issuer and a management discussion and analysis (MD&A) section. The prospectus must also include a summary section (key information), which conveys, in plain language, appropriate information relating to the securities offered, including risks associated with the issuer, any guarantor and the securities in order to aid investors when considering whether to invest in such securities. This summary must be drawn up in a common format, in order to facilitate comparability of the summaries of similar securities. This summary is not required for non-equity securities having a denomination of at least €100,000.

The issuer may decide to issue the prospectus as a single document or as separate documents. A prospectus composed of separate documents must split the required information into a registration document, a securities note and a summary note. The registration document contains the information relating to the issuer. The securities note contains the information concerning the securities offered to the public or to be admitted to trading on a regulated market.

Issuers who offer securities under the Second Regime are only required to publish a simplified prospectus. The compulsory content of the simplified prospectus is listed in Annexes I and III to VI of the LSE Rules and Regulations depending on the nature of the securities listed. Alternatively, reference may be made to the Annexes of Regulation 809/2004 of the European Commission dated 29 April 2004.

Issuers who offer securities intended to be traded on the LSE under the Second Regime are required to publish a prospectus, which must be approved by the LSE. The compulsory content of the simplified prospectus is listed under Part III of the Prospectus Law and in sub-chapter 1 of Chapter I of Part 2 of the LSE Rules and Regulations.

Issuers who offer securities on the Euro MTF under the Third Regime are required to file a prospectus with the LSE in accordance with the requirements laid down under sub-chapter 2 of Chapter I of Part 2 of the LSE Rules and Regulations.

Prospectuses can be drafted in Luxembourgish, French, German or English and other languages deemed acceptable to the CSSF or the LSE. Once approved the prospectus must be filed with the CSSF by email or through the CSSF secured internet platform ([www.e-file.lu](http://www.e-file.lu)). Every significant new fact, material mistake or inaccuracy relating to the information included in the prospectus, which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, must be mentioned in a supplement to the prospectus. Such a supplement must be approved in the same way within a maximum of seven working days and published in accordance with at least the same arrangements as were applied when the original prospectus was published.

To the extent the securities offered to the public are also intended to be listed on the LSE, an additional request for being admitted to the LSE must be filed with the LSE. An application for admission to trading in securities on one of the securities markets operated by the LSE is also deemed to be an application for admission to the official list. Therefore, an application for admission to the official list without an application for admission to trading on one of the securities markets operated by the LSE will not be accepted. The decision of listing for any equity, debt or derivative issuance programme is effective for one year and may be renewed annually in order to allow new listings.

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

According to the Prospectus Law, no offer of securities can be made to the public within the territory of Luxembourg without prior publication of a prospectus approved by the CSSF or the LSE.

To the extent that no prospectus may be published unless it has been approved beforehand by the CSSF or, as applicable, the LSE, the public offering process is therefore a two-step process that entails first, the approval of the prospectus, and second, its publication.

This approval, however, does not guarantee the economic and financial soundness of the offering or listing, nor the quality or solvency of the issuer. The authorities require that a specific disclaimer be inserted in the prospectus in this respect. The draft prospectus is initially submitted for review purposes to such relevant authorities. They have 10 working days to notify their decision to approve the prospectus if the issuer already has securities admitted to trading on a regulated market and has previously offered securities to the public. This time limit is extended to 20 working days if the securities are offered by an issuer who has not issued securities admitting to trading on a regulated market and has not previously offered securities to the public. The time limit runs from the working day following that of the official submission.

If, at the time of the receipt or processing of the submitted file, the file is not complete or additional information is needed, the issuer will be advised that the file is incomplete, and the time limit then starts to run only from the working day following that on which the requested information has been provided by the issuer in accordance with the provisions of the Prospectus Law. The CSSF has 10 working days from the submission date to notify the issuer that the file is incomplete or that supplementary information is needed.

The authorities may still validly notify their approval after the expiry of the above-mentioned time limit. In particular, this enables the issuer to ask the CSSF to approve the prospectus on a date that, due to the timetable of the transaction, falls beyond the prescribed time limits provided in the Prospectus Law as regards the notification of the decision of approval. The same principles apply to applications for approval of supplements to the prospectus within the time limit for approval of seven days.

It should be noted that prior to the official submission, the issuer must notify its intent to proceed to the public offering or the listing of securities on the LSE. It would also be well advised to solicit from the relevant authorities their preliminary view, in particular when the contemplated offering or listing is unusually complex. Communication with the CSSF or the LSE is easy and straightforward and is usually made by electronic communication.

Issuers intending to list their securities on the LSE must also file a request form for admission of securities to trading and a letter of undertaking whereby they commit to maintain their entity in good standing, comply with applicable regulations and report adequately to the authorities as needed.

Once approved and submitted to the CSSF or the LSE, the prospectus must be made available to the public by the issuer, offeror or person asking for admission to trading on a regulated market as soon as is practicable or at a reasonable time before, and at the latest, at the beginning of, the offer to the public or the admission to trading of the securities involved. In addition, in the case of an initial public offer of a class of shares not already admitted to trading on a regulated market that is to be admitted to trading for the first time, the prospectus shall be available at least six working days before the end of the offer.

The Prospectus Law rules that the prospectus is deemed available to the public when published:

- by insertion in one or more newspapers circulated throughout, or widely circulated in, Luxembourg;
- in printed form made available to the public, free of charge, at the offices of the LSE, or at the registered office of the issuer and at the offices of the financial intermediaries placing or selling the securities, including paying agents;
- in electronic form on the issuer's website and, if applicable, on the website of the financial intermediaries placing or selling the securities, including those agents in charge of the financial service;
- in electronic form on the website of the LSE; or
- in electronic form on the website of the CSSF.

The Prospectus Law does not require, as proposed by the 2010 Prospectus Directive, publication of a notice stating that the prospectus has been made available and where it can be obtained. It is noteworthy that prospectuses are published by the CSSF on the website of the LSE for a period of at least 12 months, and this is sufficient to fulfil the obligation to publish imposed on the issuer.

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

Any advertisements must state that a prospectus has been or will be published and indicate where investors are or will be able to obtain it. The mention of the decision of approval of the prospectus by the Commission does not constitute an appreciation of the opportuneness of the transaction proposed to investors.

Advertisements must be clearly recognisable as such and the information contained therein must not be inaccurate or misleading. They also must be consistent with the information contained in the prospectus, if already published, or with the information required to be in the prospectus, if the prospectus is published afterwards. All information concerning the offer to the public or the admission to trading on the LSE disclosed in an oral or written form, even if not for advertising purposes, must always be consistent with that contained in the prospectus.

The CSSF has the power to exercise control over the compliance of advertising activity, relating to a public offer of securities within the territory of Luxembourg or an admission of securities to trading on the LSE. The provisions of the Prospectus Law do not provide for the prior communication and formal approval of advertisements. However, the issuer may submit their draft advertisement to the CSSF via electronic mails with the view to obtaining a CSSF opinion as to their compliance with legal and regulatory requirements.

The preparation and distribution of research reports should be made in accordance with the provisions of Luxembourg law, in particular the Law of 23 December 2016 (Market Abuse Law), implementing Regulation 596/2014 (Market Abuse Regulation) and transposing Directive 2014/57/EU (Market Abuse Directive and together with the Market Abuse Law and the Market Abuse Regulation, the 'Market Abuse Legal Framework') and Commission Directive 2015/2392/EU.

Under the new European market abuse legislation, the Market Abuse Regulation and the Market Abuse Directive, are the basis of the legal framework. The Market Abuse Directive, the Market Abuse Regulation and the Market Abuse Law aim to improve financial market integrity and investors' protection by (i) updating and strengthening the current system for combating market abuse, (ii) including new markets and new trading strategies in its scope of application and (iii) introducing new powers for the CSSF and additional obligations for the issuer.

According to the Market Abuse Legal Framework, persons who produce or disseminate investment recommendations in Luxembourg or who, from abroad, specifically target the Luxembourg public, must specifically ensure that the recommendations are presented fairly, that they clearly mention conflicts of interests and that they include all the other references provided for by the Market Abuse Law and the Market Abuse Regulation.

In transposing the Market Abuse Directive, the Market Abuse Law imposes criminal sanctions in respect of the following four offences:

- insider dealing, which is defined as the fact for a person holding inside information to use that information to acquire or dispose of financial instruments to which that information relates;
- recommending or inducing another person to engage in insider dealing, which is described under the Market Abuse Law as the recommending or inducing of another person to engage in insider dealing;
- unlawful disclosure of inside information, which arises where a person possesses inside information and discloses that information to any other person, except when the disclosure is made in the normal exercise of an employment, a profession or duties; and
- market manipulation, which not only encompasses the entering into of a transaction or the placement of an order to trade but also includes any other behaviour that, among other things, (i) gives false or misleading signals as to the supply of, demand for, or price of a financial instrument or a related spot commodity contract, or (ii) transmits false or misleading information or provides false or

misleading inputs or any other behaviour which manipulates the calculation of a benchmark.

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

Secondary offerings of securities through a public offering are subject to the same requirements as primary offerings. However, a secondary offering can be exempted from the prospectus obligations inasmuch as the obligations do not apply to the admission to trading on a regulated market of shares representing, over a period of 12 months, less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated market.

Any subsequent resale of securities is to be regarded as a separate offer, and the conditions of the Prospectus Law apply for the purposes of deciding whether or not that resale is an offer to the public. In this respect, the placement of securities through financial intermediaries remains subject to publication of a prospectus if none of the exemption conditions for a public offering are met for the final placement.

A primary offering of shares or equity-linked securities, namely, warrants, and securities convertible into shares of a Luxembourg company wholly for cash, requires that such securities be first offered to the existing shareholders on a pro rata basis, unless the statutory pre-emption right is disappplied. The statutory pre-emption right may be disappplied by resolution of the shareholders resolving in a duly convened meeting of shareholders or by the board of directors if such a power has been granted to them by the shareholders pursuant to the authorisation granted to the board to issue equity and equity-linked securities (authorised capital).

Pre-emption rights can be restricted to certain classes of shares in the articles of incorporation of the Luxembourg company.

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

The LSE relies on the following clearing and settlement entities: LCH Clearnet SA, Clearstream Banking SA or Euroclear Bank SA.

Generally, the settlement-delivery of securities occurs on the third trading day following the end of their placement. Upon issue, the securities are registered in the books of the settlement entities, which will credit the accounts of the financial intermediaries on the settlement-delivery date.

**Private placings**

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

Private placements of securities made under the circumstances described under article 5 (2) of the Prospectus Law fall outside the scope of public offerings and, accordingly, are exempted from the obligation to publish a prospectus. See question 2 for a list of offers that are exempt from the obligation to publish a prospectus. There are no specific rules governing the private placing of securities. However, general principles of laws would apply and issuers should endeavour to deliver accurate and non-misleading information on the securities issuance and the private placing process. Their liability could be involved on grounds of general principles of contractual and civil law or liability in tort (see questions 8 and 19).

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

There are no specific regulations or legal provisions governing private placement of securities.

General principles of law must, however, apply. This involves investors being treated equally and fairly and having access to the same information when subscribing to the securities. Article 17 of the Prospectus Law sets out that when no prospectus is required, material information provided by an issuer or an offeror and addressed to qualified investors or special categories of investors, including information disclosed in the context of meetings relating to offers of securities, must be disclosed to all qualified investors or special categories of investors to whom the offer is exclusively addressed.

It is also advisable that the persons who carry out a private placement in Luxembourg inform potential investors that: any prospectus relating to the offering of securities has not been submitted to the clearance procedures of the CSSF. They should also take the necessary measures to avoid the placement qualifying as a public offering and require the necessary undertaking from investors that they act for their own account and do not intend to resell the securities under the terms of a public offering. Finally, they should provide accurate and complete information in respect of the placed securities in order to enable the investors to make an informed assessment of the securities.

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

There are no particular restrictions on the transferability of securities acquired in a private placement, except that any resale to the public of such securities must be made in accordance with the rules on public offerings (see question 1).

The new law of 6 April 2013 on dematerialised securities has modernised the law of 1 August 2001 on the circulation of securities by creating a third category of securities alongside securities in bearer or registered form and introduces a general regime for them, thereby providing Luxembourg capital companies the option to issue shares in dematerialised form and for all other issuers to issue dematerialised debt securities governed by Luxembourg law. Generally, the law on dematerialised securities introduces a comprehensive and complete regime covering the issue, conversion, pledging, transmission and conditions required for the issue of dematerialised securities. The Luxembourg legislator took the opportunity to implement certain principles arising from the Unidroit Convention on Substantive Rules for Intermediated Securities dated 9 October 2009 and has taken into account preliminary work on the draft EU directive on the legal certainty of securities holding and transactions. The law provides that the issuance of dematerialised securities (equity and debt) must be registered in an issue account held with one single securities settlement system or one single central account holder. The holding of dematerialised securities may be realised through a chain of holdings involving one or more intermediaries between the security settlement system or central account holder and the ultimate holders of the dematerialised securities. Transfer of dematerialised securities is effected by a book entry transfer between accounts. Payments by the issuer to a securities settlement system or central account holder discharge the issuer. The law offers some additional guarantees to the acquirers of securities against any earlier defective book entry and impose the obligation for an intermediary to hold sufficient securities equal to the aggregate number of securities credited to the securities accounts maintained for its account holders and for itself.

**Offshore offerings**

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

Following the implementation of the 2010 Prospectus Directive, in order to carry out an offering of securities in another member state of the European Economic Area (EEA), a Luxembourg issuer must obtain the approval of the CSSF on the prospectus and make an application for the delivery of a certificate of approval to the ESMA and the competent authority of the EEA member state in which the public offering is contemplated. Within three trading days following such application, or within one trading day after approval of the prospectus by the CSSF (if the application has been submitted at the same time on the first filing of the prospectus), the CSSF issues a certificate of approval to the competent authority of the other jurisdiction, specifying that the prospectus has been drawn up in accordance with the 2010 Prospectus Directive and is valid for any public offerings carried out in any member state of the EU. If needed, the said certificate shall enclose a translation of the summary produced under the responsibility of the issuer.

When an offer of securities is carried out in a jurisdiction other than Luxembourg and restricted to foreign subscribers, the Luxembourg issuer needs to comply only with the securities laws of such jurisdiction.

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**Particular financings**


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

Offerings of exchangeable or convertible bonds, warrants, depositary shares or rights, fall within the scope of the 2010 Prospectus Directive and the Prospectus Law. In this respect, the issuer or offeror must comply with the disclosure requirements contained in the relevant Annexes of the European Commission Regulation 809/2004/EC and therefore must follow the process described further in question 2.

Under the LSE Rules and Regulations, convertible bonds, exchangeable bonds and bonds with warrants may only be admitted to the official list if the shares or units to which they relate have previously been admitted to this list or admitted to trading to another market, that operates in a legitimate, recognised and open manner, or are admitted at the same time.

By derogation these securities may, however, be admitted to the official list provided that the LSE is satisfied that the holders of the bonds have at their disposal all the necessary information to form an opinion concerning the value of the shares or units related to such bonds.

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**Underwriting arrangements**


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**12 What types of underwriting arrangements are commonly used?**

No standard form of underwriting agreement or guidelines exist that are provided by the Luxembourg financial authorities or professional bodies.

Underwriting agreements in the Luxembourg market usually comply with the prevailing international practice in equity or debt offerings, in particular with the International Capital Market Association (ICMA) standards. The LSE is an associate member of the ICMA. Underwriting agreements are several rather than joint-and-several.

**13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and overallotment options?**
**Indemnity**

Underwriting agreements for Luxembourg equity securities offerings usually contain an indemnity clause, for the purpose of indemnifying and protecting the underwriters and their directors, officers and employees, or controlled interests against any loss or damages resulting from untrue or misleading statements of material fact or material omissions contained in the prospectus, or any breach of the representations, warranties and agreements contained in the underwriting agreement. Underwriting agreements for debt securities also feature very similar indemnity clauses. Greenshoe shareholders can also agree to indemnify the underwriter under certain circumstances. This indemnity obligation is normally guaranteed by the assignment for security purposes of the proceeds of the offering.

**Force majeure**

Force majeure clauses in equity underwriting agreements generally cover any event that could affect financial markets, such as any change in general economic conditions or currency exchange, any suspension or material limitation in trading in securities on the main stock exchanges and other events that could prevent or have an adverse effect on the success of the offering. Debt underwriting agreements follow the ICMA's rules and recommendations relating to force majeure.

**Success fees**

Underwriting agreements relating to equity offerings frequently provide for incentive and success fees, which are paid at the issuer's discretion. Incentive fees apply to the gross proceeds of the offering while success fees are paid if a certain threshold of gross proceeds is reached.

**Overallotment**

It is market practice for equity securities offerings to have underwriting agreements providing for an overallotment option in connection with the 30-day stabilisation activities that underwriters may perform during the stabilisation period following the listing of the shares. In accordance with the provisions of the Regulation and Commission Delegated

Regulation (EU) 2016/1052 of 8 March 2016 supplementing the Market Abuse Regulation (Stabilisation Regulation), any stabilisation action usually ends no later than 30 days after the issue date of the relevant securities, in the case of a significant distribution in the form of an initial offer publicly announced, or 30 days after the date of the allotment, in the case of a significant distribution in the form of a secondary offer.

This overallotment option is typically granted by the company on newly issued shares or by the selling shareholders on existing shares. Article 3 (3) of the Stabilisation Regulation restricts the extent of overallotment, such that issuers shall not, when executing transactions under a buy-back programme, purchase on any trading day more than 25 per cent of the average daily volume of the shares on the trading venue on which the purchase is carried out.

The regulation implementing the 2010 Prospectus Directive does not require that the prospectus disclose information on the size of the 'overallotment facility' and therefore this additional information is not required in cases where the offer falls within that regulation. Typical forms of subscription agreement and agreements among managers used for Euromarkets offerings do not explicitly limit the amount of overallotment, but may only authorise the stabilising manager to overallot securities in accordance with the applicable law or to the extent permitted by the applicable law.

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**14 What additional regulations apply to underwriting arrangements?**

There are no specific Luxembourg regulations applying to underwriting arrangements. The provisions of the Stabilisation Regulation apply directly to underwriting agreements in the Luxembourg territory. This regulation restricts the time-related conditions for stabilisation and sets the limit for, among other things, overallotment of securities and greenshoe options (not exceeding 15 per cent of the original offer).

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**Ongoing reporting obligations**


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

Any issuer whose securities (equity or debt) are admitted to trading on the LSE is subject to ongoing reporting obligations (see question 16) according to the LSE Rules and Regulations, the Transparency Regulation and the Transparency Law.

The Luxembourg Law of 11 January 2008 relating to the transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (the Transparency Law) as amended by the Luxembourg Law of 10 May 2016 (the Amending Transparency Law) transposing the Directive 2013/50/EU (the Amending Transparency Directive) amending Directive 2004/109/EC (the Transparency Directive) and the Grand-Ducal regulation dated 10 May 2016 (the Amending Transparency Regulation) amending the Grand-Ducal Regulation dated 11 January 2008 on transparency requirements of issuers of securities (the Transparency Regulation) apply to issuers of securities for whom Luxembourg is the home member state. The Transparency Law does not apply to securities issued by collective investment undertakings other than the closed-end type, or to securities acquired or disposed of in such collective investment undertakings.

Issuers admitted to the Euro MTF market are not subject to the Transparency Law and Transparency Regulation but are subject to the reporting requirements set out by the LSE Rules and Regulations.

Shareholders, acting alone or in concert, of an issuer acquiring 95 per cent of the issuer capital and its voting rights must notify the CSSF when they reach this limit or cease to reach it. This notification is required in order to trigger the compulsory withdrawal or redemption of the securities held by other shareholders (Luxembourg Law of 21 July 2012 on mandatory squeeze-out and sell-out of securities of companies currently admitted or previously admitted to trading on a regulated market or having been offered to the public).

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**16 What information is a reporting company required to make available to the public?**
**Annual financial reports**

Issuers for whom Luxembourg is their home member state must make public their annual financial reports, at the latest, four months after the end of each financial year and must ensure that they remain publicly

available for at least 10 years. These annual financial reports must comprise the audited financial statements; the management report and management statements confirming that the financial statements are prepared in accordance with the applicable set of accounting standards; give a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer; and describe the principal risks and uncertainties that they face.

Where the issuer is required to prepare consolidated accounts according to the Seventh Council Directive 83/349/EEC, to Council Directive 86/635/EEC or to Council Directive 91/674/EEC, the audited financial statements shall comprise such consolidated accounts drawn up in accordance with Regulation (EC) No. 1606/2002 and the annual accounts of the parent company drawn up in accordance with the national law of the member state in which the parent company is incorporated.

### Half-yearly financial reports

Issuers of shares or debt securities for whom Luxembourg is their home member state must also make public a half-yearly financial report covering the first six months of the financial year as soon as possible after the end of the relevant period, but at the latest, three months thereafter. The issuers must ensure that the half-yearly financial report remains available to the public for at least 10 years. The half-yearly financial report shall comprise (i) the condensed set of financial statements for the relevant period, (ii) an interim management report and (iii) management statements confirming that the condensed set of financial statements have been prepared in accordance with the applicable set of accounting standards, gives a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer, or the undertakings included in the consolidation as a whole similarly to the annual financial reports mentioned above, and that the interim management report includes a fair review of the information provided under any consolidated accounts.

Issuers whose home member state for Transparency Law purposes is Luxembourg must disclose the regulated information through a specialised company and store it with the LSE through the central storage of regulated information (Officially Appointed Mechanism).

Several exemptions are provided by the Transparency Law such as for certain sovereign issuers and issuers of debt securities with a denomination per unit of at least €100,000.

The Transparency Law also requires certain notifications regarding the acquisition or disposal of major holdings. These requirements apply to the direct or indirect shareholders who acquire or dispose of shares who must notify the issuer of the proportion of voting rights held as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5, 10, 15, 20, 25, 33.3, 50 and 66.6 per cent. Notifications are also required in the case of specific circumstances of major proportions of voting rights.

The Euro MTF market does not fall into the scope of the European Union Directives and the Transparency Law. Issuers whose securities are admitted to the Euro MTF market are only subject to the specific publication requirements of the LSE Rules and Regulations. Reporting obligations on the Euro MTF are less stringent than those required by the Transparency Law. Issuers on the Euro MTF must disseminate the following information:

- information on events or decisions affecting the security holders;
- information on material changes to the issuer's shareholders structures;
- audited annual financial statements and management reports, prepared in accordance with the issuer's national law; and
- semi-annual financial statements to be published within four months of the issuer's half year and comprising information on revenues and profit or loss for the period together with a commentary on any material factor having had an effect on the financial or trading position of the issuer during this period.

Issuers of debt securities with a denomination per unit of at least €50,000 are exempted from the publication of annual financial reports and half-yearly financial reports.

The Amending Transparency Law increased the CSSF powers to ensure that the provisions of the Transparency Law are complied with. Hence, the CSSF now has the power, in case of non-compliance with the Transparency Law, to order an issuer or an holder of shares or other

### Update and trends

Following the sharp decrease in private investments in stock markets since the 2008 financial crisis, the European Commission launched in September 2015 the capital markets union action plan (the CMU Plan) to better connect savings to investments. The CMU Plan set out a comprehensive programme of actions to put in place the building blocks for the capital markets union (the CMU) by 2019.

To achieve such objective, the European Commission laid out in September 2016 a first wave of CMU initiatives composed of the following three main principles:

- firstly, to speed up the adoption of the capital markets proposals relating to (i) the modernisation of the prospectus rules, (ii) the strengthening of venture capital markets and (iii) the adoption of simple, transparent and standardised securitisation rules;
- secondly, to accelerate delivery on (i) a proposal on business restructuring and insolvency and (ii) encourage member states to remove withholding tax barriers; and
- thirdly, to prioritise (i) supporting the development of personal pensions markets, (ii) creating a comprehensive European strategy on sustainable finance and (iii) developing a coordinated policy approach to support the development of the financial technology industry.

According to these principles, the CMU Plan will directly or indirectly impact the European and Luxembourg legislations described above in the coming years in order to support jobs and growth within the European Union.

financial instruments (i) that regulated information be re-published or re-notified, (ii) that a corrected version of the regulated information be published or notified or (iii) that the correction of modification be made in the publication or notification of subsequent regulated information. More generally, the Amending Transparency Law clarifies that the CSSF has the power to enjoin issuers and holders of shares and other financial instruments to comply with the Transparency Law, to cease the conduct in breach of such law and to direct the withdrawal of securities from trading in case of breach of the Transparency Law.

In the case of a takeover bid of a Luxembourg company's securities or securities admitted to trading on the LSE, the Law of 19 May 2006 implementing Directive 2004/25/EC on takeover bids will apply and impose disclosure requirements of specific information on the issuer.

Every issuer whose securities are admitted to trading on a securities market of the LSE must ensure the provision in Luxembourg of equivalent information to that made available to the market of any other stock exchange or stock exchanges situated or operating outside the member states of the European Union, to the extent that this information may be important for evaluating the securities in question.

### Anti-manipulation rules

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

The Market Abuse Legal Framework aims at combating insider dealing and market manipulation (market abuse) in order to ensure the integrity of financial markets and enhance investor confidence in those markets and thereby ensuring a level playing field for all market participants. It sets out a framework for the prevention, detection and efficient sanction of market abuse, imposes new obligations on market participants, entrusts the CSSF with specific competences and missions and sets down preventive measures. On 3 July 2016, the Market Abuse Regulation came in effect and superseded Directive 2003/6/EC.

The Market Abuse Legal Framework applies to all securities admitted to trading on at least one regulated market or for which a request for admission to trading on such a market has been made. Prohibitions of market abuse also apply to all financial instruments admitted to trading on at least one MTF or one organised trading facility (OTF) or for which a request for admission to trading on an MTF or an OTF has been made. This obligation applies whether or not the transaction was carried out on such a regulated market or such an MTF or an OTF. The new Market Abuse Legal Framework broadened its scope of application in comparison with the earlier applicable legislation by applying also to emission allowances auctions and certain spot commodities contracts.

The Market Abuse Law lays down a set of requirements for market participants with the major aim of preventing market abuse, namely:

- market operators and investment firms that operate a trading venue in Luxembourg are required to report to the CSSF without delay orders and transactions, including any cancellation or modification thereof, that could constitute insider dealing, market manipulation or attempted insider dealing;
- the regulated markets, credit institutions, investment firms and market operators of an MTF or an OTF must adopt and maintain effective arrangements, systems and procedures aimed at preventing and detecting insider dealing, market manipulation and attempted insider dealing and market manipulation;
- issuers of financial instruments are required to disclose to the public inside information that directly concerns them as soon as possible;
- issuers or persons acting on their behalf and for their account must establish a list of persons who have access to inside information;
- persons discharging managerial responsibilities within an issuer that has its registered office in Luxembourg and persons closely associated with them, must notify to the CSSF and to the issuer or the emission allowance market and make public: (i) in respect of issuers, all operations conducted on their own account related to the issuer's shares admitted to trading on a regulated market, or to derivatives or other financial instruments linked to these shares and (ii) in respect of emission allowance market participants, every transaction conducted on their own account relating to emission allowances, to auction products based thereon or to derivatives relating thereto; and
- persons who produce or disseminate investment recommendations or other information recommending or suggesting an investment strategy in Luxembourg must ensure that the recommendations are presented objectively, that they clearly mention conflicts of interest and that they include all the other references provided for by the law.

The Luxembourg Company Law also imposes fines and imprisonment on any person who, by fraudulent means, causes or attempts to cause the price of company shares, bonds or other securities to rise or fall (article 165 of the Company Law of 10 August 1915).

#### Price stabilisation

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

The provisions of the Stabilisation Regulation and of the Market Abuse Regulation relating to buy-back programmes and price stabilisation have a direct binding effect in the Luxembourg territory. Any price stabilisation programmes and buy-backs aimed at supporting the price of securities must comply with article 5 of the Market Abuse Regulation and the Second European Company Directive that prohibits an EU entity from redeeming its own shares beyond certain limits.

It is worth noting that Luxembourg permits stabilisation transactions prior to the commencement of trading on a regulated market. Under the present terms of the Stabilisation Regulation, over-allotment with the view to support the price of the securities is authorised provided:

- the securities are over-allotted only during the subscription period and at the offer price;
- a position resulting from the exercise of an over-allotment facility by an investment firm or credit institution that is not covered by the greenshoe option may not exceed 5 per cent of the original offer;
- the greenshoe option may be exercised by the beneficiaries of such an option only where relevant securities have been over-allotted;
- the greenshoe option may not amount to more than 15 per cent of the original offer;
- the exercise period of the greenshoe option must be the same as the stabilisation period required; and
- the exercise of the greenshoe option must be disclosed to the public promptly, together with all appropriate details, including in particular the date of exercise and the number and nature of relevant securities involved.

Issuers, offerors or entities undertaking the stabilisation must record each stabilisation order or transaction with, as a minimum, all related relevant information and data (in particular, the name and number of securities bought or sold, the date and time of the transaction, the price of the transaction and the possibility to identify the investment firm) extended to financial instruments other than those admitted or going to be admitted to the regulated market.

#### Liabilities and enforcement

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

Liability arising from inaccurate or misleading information or untrue representations made in the prospectus is the most common liability. This liability is based on the general principles of liability in tort set out in the Luxembourg Civil Code (articles 1382 and 1383). This liability relies on the issuer, the offeror, the person asking for the admission to trading or the guarantor. These persons must be clearly identified in the prospectus. They must also state in the prospectus that to the best of their knowledge it does not contain any incorrect facts or omissions that are likely to affect its import. This statement increases the likelihood that they must assume the direct responsibility for any damages resulting from any inaccuracy in the prospectus. These statements do not release the other contributors to the prospectus from their liability, if it is evidenced that they have been providing false or misleading information. The summary note does not entail any civil liability unless it is misleading, inaccurate or inconsistent with the main prospectus.

Where the security transaction is based on a contractual relationship, the liability would be assessed on the basis of the general principles of contract law. This would be the case in the event of an underwriting agreement with the issuer or direct contractual relationship between the issuer and the subscriber of securities. The liability

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will be triggered at the occurrence of a negligence or fraud, as this will be further set out in the contractual agreement governing the security transaction and the general principles of contract law.

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

Remedies and sanctions for improper securities activities can be brought in three basic ways: civil litigation, administrative proceedings and criminal prosecutions. None of these remedies are exclusive.

**Civil litigation**

Civil litigation may be brought by private parties who would generally seek to recover losses suffered. The damage would be generally assessed in respect of the liability in tort contained in the Luxembourg Civil Code. However, the occurrence of a specific damage to the investor is unlikely to be recognised to the extent that courts would usually refuse to consider the loss of value of shares as a prejudice distinct from the prejudice suffered by the issuer.

**Administrative proceedings**

Administrative proceedings may be brought by the CSSF or the LSE, pursuant to the Prospectus Law, the LSE Rules and Regulations or other applicable and relevant regulation. In addition, the CSSF has investigative powers and the capacity to suspend or prohibit a public offer or admission to trading on a regulated market if it has reasonable grounds

for suspecting that legal provisions have been infringed. It may also impose cease-and-desist orders for any improper activities that are contrary to the Prospectus Law. The CSSF may render these decisions public and impose financial administrative sanctions of a pecuniary nature with the view to enforce its decisions.

An appeal to a court of unlimited jurisdiction may be made before the administrative court against decisions taken by the CSSF. Decisions taken by market operators are subject to a right of appeal before the ordinary jurisdictions.

**Criminal prosecutions**

Criminal prosecutions are instituted by the public prosecutor, acting independently and on its own initiative or on request of CSSF. Various improper securities activities are deemed as criminal offences. For instance, anyone who knowingly carries out an offer of securities to the public within the territory of Luxembourg without a prospectus in accordance with the provisions of the Prospectus Law may be subject to a fine ranging from €250 to €125,000. Company Law also sets out diverse criminal offences for breach of its provisions such as the manipulation of the price of securities. Any interested party may lodge a complaint with the public prosecutor against the person or company deemed to be liable, accompanied by a request for compensation of loss, if any. Defendants subject to such criminal actions may face substantial fines, corporate dissolution and, in the case of individuals, imprisonment.

# Macedonia

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## Statutes and regulations

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

The relevant statutes governing securities offerings are the:

- Securities Law;
- Companies Law;
- Foreign Exchange Law;
- Company Takeover Law;
- Law on the Investment Funds;
- Rules of Trading of the Macedonian Stock Exchange AD Skopje; and
- Rules on the Conditions and the Manner for obtaining approval or registration of domestic securities abroad.

The main role in the area of securities is given to the Macedonian Securities and Exchange Commission (MSEC), as well as the Central Securities Depository of Macedonia (the Depository).

However, the main responsibility for the administration of the securities legislation lies with the MSEC. The MSEC regulates and supervises all participants in the operation of securities in the territory of Macedonia. The MSEC is also responsible for the legal and efficient functioning of the securities market, as well as for investors' rights protection.

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## Public offerings

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

A public offering of securities in the sense of the Securities Law is a public call for inscription and buying of securities published in the media. Unlike the private offer that is intended for investors who are known in advance, the public offering of securities is intended for a large number of investors who are not known in advance, and who do not have equal access to the information relevant for the issuer of the securities. When an issuer issues securities by means of a public offering for the first time he or she becomes an issuer with special reporting obligations. This category has special further responsibilities in terms of informing the public of its working, especially when it comes to price-sensitive information. A public offering of securities can take place after acquiring approval from the MSEC. The issuer must submit a request for approval to the MSEC in order to issue securities through the process of a public offering. The request for approval consists of the following:

- basic data about the issuer of the securities;
- basic data about the persons on the supervisory board and management board or the board of directors of the issuer;
- basic data about the security to be issued; and
- data about the business of the issuer and the use of proceeds from the issuing of the securities.

The MSEC prescribes the contents of the request for approval for issuance of securities, types of issuers and types of securities, through the process of public offering. The decision on the request is made within 60 calendar days of submission.

Public offers amounting to less than the Macedonian denar equivalent of €25,000 do not require approval by the MSEC. In this case, the MSEC is only informed of the offer, the issuing of the securities is notified to the MSEC and an announcement of the offer is made in the media. However, this type of offer (without approval by the MSEC) can only be made twice a year.

The offer of securities made contrary to the provisions of the Securities Law will be considered null.

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

When the public offering of securities takes place, the request for approval must be submitted to the MSEC together with the following accompanying documents:

- statute of the company;
- trade registration;
- financial statements for the previous three years, compiled in accordance with International Financial Reporting Standards;
- report of a certified auditor for the previous three years, conforming to International Standards of Auditing;
- the act for issuing securities;
- a statement of the management, appointing a person who is designated by the issuer as the one who is responsible for the contents of the prospectus and who assures that the issuance is in compliance with this law, and that the act of issuance, the data and information contained in the request for approval, are true and correct, and the data and information contained in the prospectus are true and correct, and the prospectus does not omit any price-sensitive information, except omissions approved by the MSEC;
- a proposed prospectus and invitation to subscribe and pay for the securities and other information for purchasers; and
- other documents that the MSEC requires.

The review process of the request should not take more than 60 calendar days from submission of the request. While the review is in progress no offering can take place.

The issuer must begin the procedure for subscription and payment for publicly offered securities within, but no later than, 30 calendar days following the receipt of the MSEC's approval. The issuer must publish an invitation for subscription for and payment of its securities in the Macedonian language and Cyrillic alphabet, in a daily newspaper published in Macedonia, 14 calendar days prior to the commencement of the subscription for securities.

The issuer must also publish the prospectus and invitation for subscription and payment of the securities on the stock exchange's web page, where the securities are or will be listed 14 calendar days prior to the commencement of the subscription for securities. The prospectus must be made available to all interested parties in the main offices of the issuer and in all locations at which the applicable securities may be subscribed and paid.

The public offer of securities must be conducted for no longer than 12 months after the day stipulated in the prospectus for the commencement of subscribing and paying in of the securities. The public offer shall be deemed successful if, within this deadline, at least 60

per cent of the securities offered in the prospectus are subscribed for, unless a higher threshold is stipulated by the issuer in the prospectus. No later than 15 calendar days following the close of a public offer, the issuer must notify the MSEC of the quantity of the subscribed and paid securities, namely, the realisation percentage. The issuer must publish this information in at least one daily newspaper published nationwide and in the Macedonian language no later than 15 calendar days after the offering closes.

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

The issuer of securities may issue advertisements in conjunction with a public offering of securities. All advertisements relating to a public offer of securities have to include information on the day of the first publishing of the prospectus and where a copy of it may be obtained. Advertisements must be of a promotional nature. The information in an advertisement must not be inaccurate or misleading and should be consistent with the information contained in the prospectus.

Also, a brokerage house can publish advertisements in the media offering to buy or sell securities on behalf of the issuer.

Restrictions outlined above for the issuer and the brokerage house also apply to the underwriters.

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

Until recently, the Securities Law did not have a definition for 'initial public offer' (it only spoke of a public offer of securities). With the amendment of this law at the end of January 2013, 'the initial public offer' was defined as the first public offer of securities published by a joint stock company or a public offer published at the transformation of a limited liability company into a joint stock company. Usually, the initial public offer is used by the companies to provide additional capital to finance further growth of the company.

One of the main features of joint stock companies is that, according to legal regulations, such company may get fresh capital by issuing new shares (known as secondary offering of shares, SPO), offering a new issue of shares for the first time to the general public. This is to raise capital from external sources where existing shareholders in the joint stock company – the publisher – are willing to cut or divide their participation in the existing shareholder structure with new investors – shareholders.

The motives for a secondary offering of new shares are providing additional capital to finance the development of the company, protection of undertaking and increasing competitiveness, taking over competing companies or companies from similar branches and activities, etc.

However, no additional provisions were made that would differentiate the initial public offer from the subsequent public offers made by the joint stock companies, so in essence the same rules apply to both situations.

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

A subscription for publicly offered securities is carried out at the seat of the issuer or at an office of a brokerage house or bank that is authorised by the issuer. During the subscription period, all amounts paid by a purchaser for offered securities must be kept in a special bank account and such funds may not be withdrawn or used by the issuer until the offering has been successfully closed. Upon successful closing of the public offer the issuer should register the securities with a licensed securities depository.

The settlement process is carried out by the securities depository. The ownership rights are established by the registration of the security in the owner's account at the depository (if a new security is issued), or by transfer to the new owner's account at the depository.

The statement of the securities account position delivered to the owner of the securities is considered proof of title when the excerpt is issued. Transfer of the securities and payment of the subscription monies are settled by a delivery versus payment transaction.

The settlement can occur immediately and no later than three working days from the day of the conclusion of the transaction.

### **Private placings**

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

At the end of 2013, the definition of 'private placing' of securities changed. In accordance with the new definition, a 'private placing' is an offer for inscription and payment of securities:

- directed to not more than 20 persons individually named in the act for issuance of the securities, who are not shareholders of the joint stock company and who are not related parties to the shareholders in the joint stock company (the exception to this is when there is a legal requirement or if the obligation of the shareholder to increase the participation in the basic capital is at the request of a body or institution supervising joint stock companies);
- is directed only to institutional investors;
- in case of an increase of the basic capital of the company;
- in case of a conditioned increase of the basic capital; and
- in the case of a loan that is transformed into a share in the company in a procedure for increasing the basic capital of the company when the loan is given by the sole shareholder of the company.

No prospectus needs to be prepared and published for this purpose.

In the event of a private offering, the issuer must submit to the MSEC its request for approval of the private offering, an act of issuance of securities and a proposed announcement to the public for realisation of the private offering.

The MSEC shall decide within 15 days of the submission of the complete request. Certain special rules apply to this part of the procedure regarding pricing, which cannot vary by more than 20 per cent from the market value of the securities. The securities subject to a private offering are to be paid within 15 calendar days of the day the decision of the MSEC becomes final. If the identity of the buyer of the securities changes during the duration of the private offer, the issuer must acquire authorisation. Within five business days of closing a private offering, the issuer must inform the MSEC of the quantity of the securities subscribed for and paid for (ie, the realisation percentage). The issuer can make only one private offer of securities per calendar year. The MSEC prescribes the form and the contents of the request for approval, announcement and notice.

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

The same as applies as per a public offering (see question 2).

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

Except for the restriction in the time period for placing a private offer (see question 7), no other restrictions apply to the transferability of securities acquired in a private placing.

The delivery versus payment settlement mechanism is used to enhance the liquidity of securities sold in a private placing. Obligations to transfer securities resulting from trade transactions shall be settled by a simultaneous change of the right in securities ownership from the seller's account to the buyer's account and payment of the purchase price of securities, in accordance with the delivery versus payment principle.

### **Offshore offerings**

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

In accordance with the Law on Foreign Exchange Operations, Securities Law and the Rules on the Conditions and the Manner for obtaining approval or registration of domestic securities abroad, Macedonian residents can issue and introduce securities and share certificates in investment funds that are domiciled abroad only after approval from the MSEC. The issuer of the securities submits a request for approval for issuing and introducing securities abroad to the MSEC. The MSEC determines the conditions and the manner in which it is possible to obtain approval for issuing and introducing securities abroad. If the resident meets the conditions and requirements determined by the

MSEC, upon prior request, within 30 days of submission of the request along with the required documentation, the MSEC issues approval for the issuance and introduction of securities and share documents abroad from the resident investment funds, if they do not meet the requirements and conditions, the MSEC shall make a decision to refuse the request.

The MSEC then informs the Ministry of Finance and the National Bank of the Republic of Macedonia of the granted approval.

Residents may register, pay and trade securities abroad only through an authorised participant in a securities market or through an authorised participant in a foreign stock exchange or organised securities market.

### Particular financings

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

The Securities Law makes no specific provisions for offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings.

### Underwriting arrangements

#### 12 What types of underwriting arrangements are commonly used?

In accordance with the Securities Law, the possibility of underwriting exists for entities authorised by the MSEC, but it is not commonly used. Few of the entities authorised by the MSEC have registered for this type of activity.

The arrangements are focused on execution of the transactions and the activities on behalf of the issuer of the securities that are required for the successful public offering of securities with or without a mandatory purchase of the unsold securities.

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

As mentioned above, the details of the underwriting arrangement are not regulated in detail by the legislation, and in essence, this is a matter for the parties to agree on.

#### 14 What additional regulations apply to underwriting arrangements?

Other than the provisions contained in the Securities Law, no regulations regarding underwriting arrangements exist.

### Ongoing reporting obligations

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

In accordance with the definition given in the Securities Law, a joint stock company that has made a public offer of securities, a company with a basic capital equivalent to €1 million or more and that has over 50 shareholders, with the exception of companies listed on the stock exchange, is considered a joint stock company with special reporting obligations.

The MSEC keeps a register of joint stock companies with special reporting obligations.

Joint stock companies with special reporting obligations must distribute to the MSEC the annual, half annual and current report. For the half-annual report, there is a special deadline, and the joint stock company must submit this report to the MSEC within 45 calendar days of the ending of the half-year period. Companies also have an ongoing reporting obligation in relation to each piece of price-sensitive information, and for such information, they have the obligation to submit a report to the MSEC immediately, but not later than the following working day, as well as the obligation to publish information on such price-sensitive information in at least one daily newspaper in Macedonia.

The obligation for ongoing reporting ends on the day of deletion of the joint stock company from the register of companies with special reporting obligations.

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

Each reporting company must publish a summary of the audited annual report, along with the opinion of the certified auditor, in at least one daily Macedonian newspaper within 15 calendar days of the day the audited annual report was received by the MSEC.

The reporting company must immediately issue a public report published in at least one daily newspaper in Macedonia as soon as possible, but no later than 10 calendar days after obtaining the price-sensitive information.

### Anti-manipulation rules

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

The Securities Law lists several prohibited actions related to securities, including unauthorised offering of securities, price manipulation, spreading incorrect information, use of manipulative and fraudulent actions and incorrect or misleading financial reports.

The offering of securities made contrary to the legal provisions will be considered null. It is also prohibited, when making an offering of securities, to include false price-sensitive information in the prospectus, or to omit to include important information or price-sensitive data, if this could mislead investors.

### Price stabilisation

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

The Law on securities does not provide articles on support of the price of securities in connection with their offering. Such provisions are given in the Law on takeover of joint stock companies. In accordance with this law, the price, namely, the exchange ratio for the securities determined by the offeror of the purchase offer, must be equal for all the securities of a certain kind that are subject to the purchase offer.

The price in the takeover bid must not be lower than the highest price at which the bidder or the persons it acts in concert with has bought securities in the past 12 months prior to the announcement of the intention to take over.

If the price is lower than the average price of the securities reached at an authorised stock exchange in the past 12 months prior to the announcement of the intention to take over, the bidder shall be obligated to offer at least the average price reached at an authorised stock exchange.

If the securities that are the subject of the takeover bid are not traded in the past 12 months prior to the announcement of the intention to take over, the bidder shall be obliged to offer a price at least in the amount of the average value of the securities determined by an authorised appraiser. The average price of the securities reached at an authorised stock exchange shall be calculated as a simple arithmetic mean of the daily weighted average prices reached at the authorised stock exchange.

A bidder who, with a period of one year upon the expiry of the deadline for acceptance of the successful takeover bid, acquires securities at a price higher than the price in that bid, shall be obliged to pay the difference in the price in cash to the persons who accept the bid within a period of eight days as of the acquisition of the new securities.

If the bidder in its takeover offers convertible securities in a conversion ratio according to which the person who accepts the bid does not receive a whole number of convertible securities, the bidder shall be obliged to offer the person who accepts the bid payment of the difference in price.

If the buyer in the procedure for a takeover of shares purchases at least 95 per cent of the shares with the right to vote in the company to which the purchase offer refers, he or she has the right to purchase the other shares from the shareholders that did not accept the purchase offer, which must be done at an identical price to the ones in the public offer (ie, the last changed version of the public offer).

From the perspective of the minority shareholder and the protection of his or her interests, if the buyer in the procedure for the takeover of shares purchases at least 95 per cent of the shares with the right to vote in the company to which the purchase offer refers, he or she has the obligation to purchase the other shares from the shareholders that did not accept the purchase offer, which must be done at an identical

price to the ones in the public offer (ie, the last changed version of the public offer – the squeeze-out, sell-out principle).

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### Liabilities and enforcement

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

The MSEC has far-reaching authority to control the behaviour of the participants in a securities transaction through several measures. However, parties pursuing compensation for manipulations and improper activities that have caused them to suffer damage can only attain a remedy by bringing civil proceedings.

The MSEC may also start proceedings before other authorities where there is a founded suspicion that an entity has breached the provisions of the securities legislation. It is also authorised to be joined in judicial proceedings, with the purpose of informing the court on its views and interpretations on the matter.

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

A civil proceeding is one of the mechanisms that can be used to remedy improper securities activities. Where the lawsuit is brought by a purchaser of securities that was unaware that the published prospectus contained invalid data, reimbursement of the paid-in sum plus the calculated interest, lowered for the income made and the lost profits as a result of not possessing the security, may be claimed.

A lawsuit can be filed against the issuer of the securities, the signatories of the prospectus, the members of the managing and supervisory boards or the board of directors at the time the prospectus was issued, the accountant or authorised supervisor who has given consent to be named as a person who prepared or approved a part of the prospectus.

The compensation given may not exceed the price at which the securities were offered to the public, and is determined as the difference between the price paid for the securities and:

- their value at the moment of initiating a court procedure;
- the price at which the securities were sold at the securities exchange prior to initiating the judicial proceeding; and
- the price at which the securities were sold at the stock exchange after the finishing of the judicial proceeding.

A civil proceeding can also be initiated for securities' price manipulation, where compensation can be awarded for lost profits. The right to initiate a civil procedure becomes obsolete one year from the day the facts for the breach of law were acquired, and a maximum of three years from the breach of the legal provisions.

In general, civil, criminal and administrative procedures are available in the case of improper securities activities.




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# Malta

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## Statutes and regulations

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

The Companies Act (Cap. 386 of the Laws of Malta) defines public securities offerings and regulates capital issues by public companies. The Financial Markets Act (Cap. 345 of the Laws of Malta) establishes a framework for the regulation of financial markets. The Financial Markets Act also invests the Listing Authority, as part of the Malta Financial Services Authority (MFSA), with various functions, including the responsibility for authorising admissibility of financial instruments to regulated markets, and the promulgation of, and compliance, of listed financial instruments with, the Listing Rules, currently composed of the Listing Rules governing listings on the Malta Stock Exchange (MSE) and the European Wholesale Securities Market (EWSM) respectively. The MFSA, in turn, is the single regulator for all financial services in Malta. The MSE has also established its own by-laws, which, inter alia, detail the workings of the MSE and outline the various requisites that must be satisfied in order to be admitted to trading. More recently, rules on the Prospects regime (a multilateral trading facility operated by the MSE designed to facilitate capital markets access for SMEs) have also been published by the MSE. The Investment Services Act (Cap. 370 of the Laws of Malta), regulates the constitution and licensing of collective investment schemes and provides offering investment services in or from Malta.

Statutes which, further to the above, also apply in the local securities offerings framework, include the Prevention of Financial Markets Abuse Act (Cap. 476 of the Laws of Malta) (PFMAA), and the Prevention of Money Laundering Act (Cap. 373 of the Laws of Malta).

In addition, various related EU regulations and directives respectively find their applicability to, and have been transposed into, Maltese law, including the Prospectus Regulation (EU Regulation 809/2004), the Market Abuse Regulation (EU Regulation 596/2014) (MAR), the Prospectus Directive (Directive 2003/71/EC), the Transparency Directive (Directive 2001/34/EC) and the Markets in Financial Instruments Directive (Directive 2004/39/EC) (MiFID).

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## Public offerings

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

#### The MSE's Official List (debt and equity)

Prospective issuers wishing to offer securities to the public via the MSE's Official List must submit an application for admissibility to listing to the Listing Authority together with supporting documentation, including the prospectus and any supplements, the application fee, audited accounts covering a minimum of three financial years preceding the application, the applicant's memorandum and articles of association, and the appropriate corporate authorisations.

Upon obtaining the Listing Authority's approval of admissibility, the issuer will need to apply to the MSE for admission to trading, which application, as specified in the MSE by-laws, must also be accompanied by supporting documentation, which includes a copy of the listing particulars or equivalent offering document, the applicant's

memorandum and articles of association, and the appropriate corporate authorisations.

#### Prospects (debt and equity)

As of 2016, SMEs may opt to list securities via Prospects. Offerings made under Prospects that are lower than €5 million and have fewer than 150 investors shall be approved by the MSE. An applicant must firstly appoint a corporate adviser, who will submit the application form on behalf of the applicant. A Prospects application must be accompanied by supporting documentation, including the applicant's company admission document, its memorandum and articles of association, the application fee, and the applicant's business plan.

#### Registry of Companies Filings (equity)

The Companies Act requires companies carrying out a fresh issue of shares to submit, within one month from the date of issue, a return of allotments to the Registry of Companies. This is to contain various details, including the number of shares allotted, and the amounts paid and payable on each share. In the case of public share offerings, the return of allotments is to be accompanied by a declaration confirming compliance with article 97 of the Companies Act. Article 97 states that no such allotment shall be made unless the minimum amount, which in the board's opinion would have been raised by the issue in order to provide for the preliminary expenses, purchase of property and working capital, as stated in the prospectus, is subscribed and paid in cash, and the capital is subscribed in full (whether or not in cash) or the conditions stated in the offer for allotment, where the offer is not fully subscribed, are satisfied.

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

The procedure for offering of securities to the public is a bipartite one, by virtue of which the applicant must initially be admitted to listing by the Listing Authority and then proceed to be admitted to trading on one of the recognised lists of the MSE (typically the MSE's Official List).

#### Admissibility to listing

A prospective issuer must firstly notify the Listing Authority of its intention to submit an application for admissibility to listing at least one month prior to submission. The application for admissibility to listing must subsequently be submitted to the Listing Authority together with all supporting documentation (see question 2). Applicants seeking a primary listing on the MSE's Official List must appoint a sponsor, who is to act as an intermediary between the prospective issuer and the Listing Authority and guide the prospective issuer in relation to the impending listing. The sponsor must possess a Category II or Category III licence under the Investment Services Act, and must be independent of the applicant.

The Listing Authority must, within 10 working days of the date of submission, inform the applicant as to whether the draft prospectus has been approved or rejected. This period may be extended to 20 working days in the cases of offers involving an issuer that does not have any other securities admitted to listing on a regulated market,

and which has not previously offered securities to the public. Once approved, the prospectus must be filed with the Listing Authority and the Registry of Companies. The applicant is required to publicise the prospectus at least six working days before the securities are admitted to listing.

A prospectus may only be published once approved by the Listing Authority, which approval is only effective from the date of formal notification to the sponsor, or, if no sponsor is required, to the applicant.

#### **Admission to trading**

Once admitted to listing by the Listing Authority, the issuer is required to apply for admission to trading on a regulated market. The issuer must prove that it is in compliance with the MSE's by-laws. The sponsor is responsible for ensuring that the proper filing procedures have been followed by the issuer, including all documentation that is required to accompany the application. The MSE shall, within five days from receipt of confirmation of admissibility to listing from the Listing Authority, approve or reject the application. In the case of an initial public offering, the timetable for admission to trading must be agreed to with the MSE at the time of submission of application.

In total, the review process may be expected to last between two to three months.

#### **Prospects**

An SME wishing to list on Prospects must first appoint a corporate advisor, the role of which will be to assist with applying for admission to Prospects through the completion of the application documents (see question 2), and to ensure that, once admitted to Prospects, the issuer maintains good corporate governance and transparency. The MSE shall, subject to the admission application being complete, endeavour to accept or reject the application within 10 days of submission. Admission of a company to Prospects shall become effective when the MSE approves the admission and issues the relevant Prospects notice.

As the regime entertains a more simplified procedure, one may anticipate the review process to be shorter than the aforementioned period of two to three months.

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

The Listing Rules require advertisements related to any securities which have been authorised as admissible to listing to be clearly recognisable as such and easily readable. Specifically, advertisements must be factual, accurate and consistent with the contents of the prospectus, and must not be misleading nor contain any unverifiable claims.

The Listing Rules do not permit any publicity from the date on which the applicant notifies its intention to submit an application for admissibility to listing to the Listing Authority (which notification must be given at least one month before submission), until a final written notice of approval of admissibility is granted by the Listing Authority. Advertisements announcing admissibility to listing must contain a statement indicating that a prospectus has, or will be, published, and the times during which copies thereof will be made available to the public. The MFSA may impose fines on sponsors which allow prospectuses to be disseminated prior to the Listing Authority having provided its approval.

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

Pre-emption rights apply in relation to allotments of equity securities for a consideration in cash. In such cases, the equity securities must be offered, on a pre-emptive basis, to the existing holders of equity securities in proportion to the securities they already hold. Shares may not be offered pre-emptively to the issuer itself. No pre-emption rights arise with respect to secondary offerings by selling shareholders. Pre-emption rights in respect of particular allotments may be restricted or withdrawn by the shareholders via an extraordinary resolution during a general meeting, provided that said resolution is notified to the Registry of Companies. Alternatively, the issuer's memorandum and articles may empower its board to restrict or withdraw pre-emption rights in the same manner.

The Companies Act imposes civil liability on those responsible for, or who have authorised the issue of, a prospectus, for inaccuracies contained in such prospectus, which liability extends to the seller of securities in a secondary offering. Moreover, the provisions of the Companies Act concerning the issue of shares to be listed on a regulated market are applicable to a prospectus relating to a secondary offering.

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

The MSE maintains the Maltaclear system for the clearing and settlement of transactions in financial instruments admitted to any of the MSE's recognised lists, of transactions trade on the XETRA platform, credit operation transactions, as well as any other transactions that may be specified or agreed to with the MSE. Maltaclear transactions are completed on a rolling settlement cycle of not more than T+3 (trade date plus three days), although the MSE may agree to a shorter settlement period. All Maltaclear transfers are operated on a 'delivery-versus-payment' basis, that is, with the final settlement of financial instruments taking place upon the final settlement of funds.

#### **Private placings**

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

Private placings are predominantly regulated by the Companies Act and the Investment Services Act, and do not, therefore, fall within the remit of the Listing Authority.

The Companies Act contains an exhaustive list of offers that do not constitute an 'offer of securities to the public' (and are therefore exempt from the requirement of publishing a prospectus). An offer that would not be so categorised, and may thus be deemed a 'private placing', will include an offer: (i) of securities made solely to 'qualified investors' (ie, professional clients or eligible counterparts, in terms of MiFID); (ii) made to less than 150 persons in each EU or EEA member state, not including qualified investors; (iii) where the minimum consideration paid for each separate offer is at least €100,000; (iv) where the nominal value of each security amounts to at least €100,000 or the total consideration of the offer in the EU or EEA does not exceed €100,000, which limit shall be calculated over a 12-month period; and (v) where the total consideration for non-equity securities issued in a continuous or repeated manner offered by credit institutions in an EU or EEA state does not exceed €75 million over a 12-month period.

Notably, the Companies Act puts forward a rebuttable presumption that an allotment or agreement to allot securities in a company was made with a view to such securities being offered to the public, if it is shown that: (i) an offer for sale to the public was made within six months after the allotment or agreement to allot (for instance, if financial intermediaries with whom securities have been placed proceed to on-sell said securities to persons that do not fall within the exemptions mentioned in the previous paragraph); or (ii) at the date when the offer was made, the whole consideration to be received by the public company in respect of such securities had not been so received.

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

Private placings are not typical in Malta, as the local market is predominantly characterised by retail investors. However, where use is made of private placings, and even though the obligation to draw up a prospectus is inapplicable by virtue of the Companies Act, issuers would generally enter into a private placing agreement with the subscriber which details the terms and conditions regulating the private placement. Further to this, private placing agreements would generally be accompanied by a form of offering memorandum, which would ordinarily contain information akin to that included in a prospectus, the reason for this being that local market participants are accustomed to having such information available.

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

No such restrictions apply by reason of the securities concerned being acquired in a private placing. Transfer restrictions may, however, emanate from a company's constitutive documents if the company in question is a private company.

**Offshore offerings**

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

The Listing Rules provide for the exercise of passport rights by issuers. Where Malta is the home member state and an admission to listing is provided for in one or more EU or EEA states other than Malta, the prospectus approved by the Listing Authority, including any of its supplements, shall be valid in any number of host EU or EEA states. This is the case provided that ESMA and the regulatory authority of each host EU or EEA state are notified accordingly.

In the case of significant new factors, material mistakes or inaccuracies emerging since the Listing Authority's approval of the prospectus, a supplement to the prospectus will need to be published and approved.

Following approval, the Listing Authority will provide the regulatory authority of the host EU or EEA state, at the issuer's request, with a certificate of approval and a copy of the approved prospectus or any supplement to the prospectus as the case may be. ESMA and the issuer (or the person responsible for drawing up the prospectus) shall also be notified accordingly. Where necessary, a translation of the summary of the prospectus shall accompany such notification. The certificate of approval confirms compliance with the requirements of the Prospectus Directive.

A prospectus relating to an admission to listing and for which approval has been obtained by the regulatory authority of another EU or EEA state other than Malta, will not be considered to be an approved prospectus unless that authority has furnished the Listing Authority with a certificate of approval and a copy of the approved prospectus, together with a Maltese or English translation of the summary of the prospectus where this has been requested by the Listing Authority.

The Companies Act requirement to register a prospectus with the Registrar of Companies prior to this being issued applies irrespective of in which jurisdiction the securities in question are to be offered.

**Particular financings**

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

**Exchangeable or convertible securities**

In terms of the Listing Rules, exchangeable or convertible securities that may be converted or exchanged into another class of securities, or options or warrants to subscribe for or purchase such other class of securities, may become authorised to listing only in the case that the other class of securities is or will become, at the same time, a class of securities authorised as admissible to listing. However, the Listing Authority may grant an application for admissibility to listing in respect of exchangeable and convertible securities in other circumstances, where it is satisfied that the holder of the securities has the necessary information available to form an opinion on the value of the underlying securities.

**Warrants**

In relation to the offerings of warrants, a condition for listing is that, bar any exceptional circumstances, the issue of options or warrants to subscribe for shares must be limited to an amount that is equal to 10 per cent of the issuer's share capital at the time of issuing the warrants, excluding any rights under employee share schemes. Additionally, where an application for admissibility to listing is made for options or warrants to subscribe, the terms of issue must provide that the unit of dealing, where traded separately, is an option or warrant to subscribe for one share. This requirement subsists even in the case of a change in the terms of the subscription rights, provided that the quotation on any recognised list remains based on the right to subscribe for one share.

**Depositary shares**

No special considerations exist in relation to depositary shares.

**Rights offerings**

No authorisation will be given by the Listing Authority for a rights issue where the rights cannot be transferred in favour of a third party at the option of the entitled shareholder. An issuer intending to make a rights issue is obliged to provide the Listing Authority with evidence, typically in the form of a board resolution, of the intention to make a rights issue, whether this is for cash or by way of bonus. Immediate notification is required of the issue price and principal terms of the issue, the results of the issue and, if any rights not taken up are sold, details of the sale, including the date and price per share, and if relevant, the amount of any securities issued pursuant to any excess applications together with the basis of any acceptance of those applications.

If existing holders opt not to take up their rights to subscribe in a rights issue, the securities to which the offer relates must be offered for subscription or purchase on a regulated market. Further specifications exist in respect of any premium obtained.

Lastly, an issuer is to ensure that any rights offer remains open for acceptance for at least 14 days.

**Underwriting arrangements**

**12 What types of underwriting arrangements are commonly used?**

Today, underwriting agreements are seldom used in Malta. These agreements have largely been replaced by pre-placement agreements, where the book-building in the lead up to the offer, whether this is debt or equity, is such that the issuer is given the comfort that the offer will be fully placed (a form of comfort akin to that previously given by underwriters).

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

As explained in question 12, the use of underwriting agreements in the local scenario is infrequent. Pre-placement agreements are, in their stead, resorted to. In this respect, indemnity, force majeure, success fee clauses and, in particular, overallotment options, are not generally included in pre-placement agreements. On the other hand, pre-placement agreements would conventionally comprise a sales commission payable by the issuer to the subscriber, which sales commission is usually set in the region of 1 per cent of the value of the securities placed.

**14 What additional regulations apply to underwriting arrangements?**

The underwriting of instruments or placing of instruments on a firm commitment basis is a licensable activity under the Investment Services Act. This activity must be such that the person providing the service assumes the risk of bringing new securities to the market by buying the issue from the issuer, thereby guaranteeing the sale of a certain number of shares to investors. The provision of investment advice through a personal recommendation in relation to the underwriting of a particular instrument is likewise a licensable activity.

**Ongoing reporting obligations**

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

Issuers having their securities admitted to trading on the MSE, where Malta is the home member state, and the EWSM, are obliged to comply with the continuing obligations set out in Chapter 5 of the Listing Rules and Chapter 4 of the EWSM Listing Rules, respectively. SMEs admitted to trading on Prospects must comply with the continuing obligations in the Prospects Rules.

Exemptions from certain continuing obligations in the Listing Rules exist for issuers having only certain debt securities admitted to trading. These include the exemption from the obligation to make publicly available the annual financial report and the half-yearly report. Additionally, there are exemptions from the obligation to make publicly available directors' service contracts and obligations pertaining to

related-party transactions for issuers having only securities with a fixed income admitted to listing.

Issuers are also obliged to endeavour to adopt the Code of Principles of Good Corporate Governance in Appendix 5.1 of the Listing Rules on a comply-or-explain basis. Public interest entities, defined in the Accountancy Professions Act (Cap 281 of the Laws of Malta) as including an issuer of transferable securities admitting to trading on a regulated market in an EU member state, are also encouraged to adopt the Listing Authority's Corporate Governance Guidelines for Public Interest Companies.

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

As mentioned above, Chapter 5 of the Listing Rules specifies the information and documents which a reporting company is required to make available to the public. This is in addition to the reporting requirements in the Companies Act and the requirements relating to the publication of inside information in terms of MAR.

### Company announcements

Issuers are obliged to make precise, timely and accurate company announcements, in either Maltese or English via a regulated market in order to disclose certain information. The information which must be announced is contained in a non-exhaustive list in Chapter 5 of the Listing Rules. Exemptions from the requirement to make certain company announcements exist for issuers having only debt securities admitted to trading on a regulated market.

An exemption from the obligation to make a company announcement or publicly disclose information may also be requested from the Listing Authority where the issuer is of the view that disclosure of the information in question may prejudice the issuer's legitimate interests.

### Periodic financial reporting

The Companies Act stipulates the requirements relating to the accounts, audit and annual return for all companies registered in terms of the Companies Act, including listed companies. In fact, where Malta is the home member state, the Listing Rules provide that the financial statements of issuers must be audited in accordance with the Companies Act.

The Listing Rules impose upon issuers the requirement to make public information relating to their periodic financial reporting. The annual financial report of an issuer must contain the following: the issuer's annual financial statements, the directors' report and the auditor's report; a statement of responsibility made by the issuer's directors; reports by the board and the auditors on the issuer's compliance with the above-mentioned Code of Principles for Good Corporate Governance; as well as certain other information prescribed in the Listing Rules. The annual financial report must be made available to the public immediately following board approval, and this must be no later than four months from the issuer's financial year end and must remain available to the public for at least 10 years. Where the issuer has prepared consolidated accounts, the Listing Rules stipulate how these must be drawn up and what must be included in the annual financial statements in this regard. The obligation to make the annual financial statements publicly available also extends to the guarantor of an issuer, in the same manner and for the same length of time.

A half-yearly report must also be published by an issuer for the first six months of the financial year. This is to contain, as a minimum, the condensed set of financial statements; an interim directors' report; a statement made by the persons responsible within the issuer, stating that to the best of their knowledge, the condensed set of financial statements, prepared in line with the applicable set of accounting standards, gives a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer or the undertakings included in the consolidation as a whole, and that the interim directors' report contains a fair review of the information required in terms of the Listing Rules; and the full auditors' report, where the half-yearly financial report has been audited or reviewed, and where the half-yearly financial report has not been audited or reviewed, a statement to this effect made by the issuer.

Issuers must make their half-yearly report available immediately after this has been approved by the directors, and not more than two months following the end of the relevant period. This must remain available to the public for at least 10 years. The obligation to prepare

## Update and trends

In 2016, the MSE launched its National Capital Markets Strategic Plan, comprising 23 initiatives that are expected to be implemented over the next two years. It includes plans to introduce the listing of exchange traded funds and real estate investment trusts, changes to market-making rules, and other practical initiatives, such as longer trading hours. The European Commission's proposed amendments to the Prospectus Directive are also expected to be approved in the near future, in terms of which the EU-wide default exemption from the requirement to publish a prospectus will increase from €100,000 to €500,000 and the discretionary exemption will increase from €5,000,000 to €10 million. Finally, the MFSA has, by way of its Discussion Paper on 'Investment-Based Crowdfunding', invited market participants to submit their views on the proposed regulatory framework for investment-based crowdfunding.

and publish a half-yearly report does not, however, extend to the guarantor of an issuer.

## Anti-manipulation rules

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

The principal regulatory act is the PFMAA, aimed at safeguarding the integrity of financial markets and enhancing investor confidence, which is primarily achieved by prohibiting: (i) insider dealing, being dealing by a person in possession of inside information who uses that information by acquiring or disposing of, for his or her own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates; (ii) unlawful disclosure of inside information; and (iii) manipulative practices, including the dissemination of information which gives false or misleading signals for the purposes of securing an advantage or profit for oneself or for others, and the employment of fictitious or deceptive means to affect the price of financial instruments.

In particular, the PFMAA has transposed and implemented the requirements under MAR and MAD II (Directive 2014/57/EU), the main thrust of which amendments concerns an increased scope of financial instruments caught by existing offences; the classification of new offences; rules on market soundings and share buybacks; and heightened operational requirements on firms and persons discharging managerial responsibilities.

## Price stabilisation

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

The prohibitions under the PFMAA would not be applicable to price stabilisation measures if the following conditions are satisfied: (i) stabilisation is carried out for a limited period; (ii) adequate price limits are complied with; (iii) disclosure and notification of relevant stabilisation information is made to the competent authority of the trading venue (specifically requiring that the details of all stabilisation measures, regardless of whether they are entered into by issuers, offerors or underwriters, are so notified to the competent authority no later than the end of the seventh daily market session following the date of execution of such measures); and (iv) compliance with ESMA's Regulatory Technical Standards (RTS). For instance, under the RTS price stabilisation measures, with respect to shares, these are permitted so long as they do not exceed 30 days from the date of commencement of trading (in the case of initial offers) and the date of allotment (in the case of secondary offers). With respect to bonds, the time limit is that of the earlier of 30 days from the date on which the issuer received the issue proceeds, or 60 days after allotment.

## Liabilities and enforcement

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

#### Civil liability

In terms of article 94 of the Companies Act, civil liability is imposed upon persons responsible for, or who have authorised the issue of,

a prospectus in which untrue statements have been included, and as a result thereof a person(s) has sustained damage after having subscribed for securities on the basis of such prospectus. On the other hand, a person will only be so liable with respect to the statements contained in the summary note if, when read together with the other constitutive documents of the prospectus, such statements are found to be misleading, inaccurate or inconsistent, or key investor information has not been included.

#### **Administrative liability**

Administrative penalties may be imposed by the MFSA in a number of instances, including the failure to publish a prospectus; failure to cooperate with, and furnish information to, the Listing Authority; and failure to comply with, or infringement of, the Listing Rules.

In general, administrative penalties may be imposed up to a maximum amount of €150,000. However, the maximum administrative penalty that may be imposed for a breach of the Listing Rules is €466,000, and for a breach of the prohibition against insider dealing, unlawful disclosure of inside information or abusive manipulative practices is €5 million and €15 million in respect of natural and legal persons respectively.

#### **Criminal liability**

Criminal liability is attached to certain prohibited activities, such as wilful insider dealing or wilful market manipulation, pursuant to which persons may be liable on conviction to a term of up to six years of imprisonment. Similarly, a person guilty of a contravention of the Listing Rules is liable on conviction to a term of up to four years of imprisonment.

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

Private consumers may lodge a complaint in connection with any financial services transaction to the Consumer Complaints Manager, who falls within the office of the MFSA, requesting the latter to investigate the complaint. Besides providing the complainant with all the information or any other matter that may have come to his or her cognisance in the course of the investigation, in carrying out his or her functions the Complaints Manager may refer complaints to the MFSA's Supervisory Council for its consideration, and will endeavour to encourage the parties in the dispute to reach an amicable settlement.

Where the avenue opted for is court litigation, criminal and civil actions are exercised independently. Even where the activity concerned does not fall within the ambit of the financial markets regulatory framework, court proceedings may be instituted for a breach of the general rules governing contract and tort as found under the Civil Code (Cap. 16 of the Laws of Malta).

Furthermore, administrative penalties may be imposed by means of a written notice and without recourse to a court hearing. Nevertheless, an appeal lies from such administrative penalties and other disciplinary measures, as well as an appeal from certain decisions and determinations of the MFSA, Listing Authority and MSE by persons who feel aggrieved thereby. An appeal must be made to the Financial Services Tribunal within 30 days from which the decision or act in question has been notified to the aggrieved person. Moreover, an appeal may be made to the Court of Appeal on points of law.

The Listing Authority is vested with various powers intended to prevent, detect, investigate and prosecute offences or improper securities activity, including the power to require persons to furnish information or documentation, access to premises and searches therein, and the power to issue other orders and directives (such as the suspension or withdrawal of licences). In addition, the Attorney General may apply to the Criminal Court for the issuing of attachment or freezing orders.

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# Nigeria

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## Statutes and regulations

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

### Statutes

The Investments and Securities Act, No. 29 of 2007 (ISA) established the Securities and Exchange Commission (SEC) as the apex regulator for the Nigerian Capital Market. The ISA and the various Rules and Regulations issued pursuant to the ISA by the SEC (the SEC Rules) constitute the primary legislation and regulation for the issuance of securities in the Nigerian capital market. Other legislation includes the Companies and Allied Matters Act chapter C20, Laws of the Federation of Nigeria 2004 (CAMA), which regulates the activities of companies incorporated in Nigeria and the various state laws permitting the issuance of securities to the public by state governments.

Under the ISA, all securities (debt or equity) issued by public companies in Nigeria must be registered with the SEC, whether or not such securities are issued through a public or private offer. The issuance of the securities must be approved by the SEC and the document through which the securities are issued must also be approved by the SEC. All public issues of securities must be accompanied by a prospectus which must comply with the specific requirements of the ISA and the SEC Rules. Where the securities to be issued are listed securities, in addition to compliance with the provisions of the ISA and the SEC Rules, the documentation and issuance of the securities must comply with the relevant rules of the securities exchange on which the securities are traded. There are currently two main securities exchanges through which listed securities are traded in Nigeria: the Nigerian Stock Exchange (NSE) and the Financial Market Dealers Quotation Over The Counter (FMDQ OTC). The NSE Rulebook 2015 currently contains all the rules and regulations that govern the listing and issuance of securities, as well as the rules that issuers of such securities must comply with.

Both debt and equity securities are listed on the NSE. Unlike the NSE, the FMDQ OTC mainly lists debts and quasi-debt instruments. The offering of securities listed on the FMDQ OTC is governed by the applicable rules issued by the FMDQ.

## Public offerings

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

The ISA provides that only public companies and banks may offer securities to the public or make an invitation to the public to deposit money. 'The public' is not defined under the ISA or the SEC Rules; however, an invitation is deemed to have been made to the public where an offer is:

- published, advertised or disseminated by any means;
- made or circulated among any persons selected as members or debenture holders of the company concerned or as clients of the person circulating the invitation;
- made to one or more people on terms that the people to whom it is made may renounce or assign the benefit of the offer in favour of any other person; or

- made to any person to acquire securities dealt in by a securities exchange or capital trade point or in respect of which the invitation states that an application has been made or shall be made for permission to deal in the securities on a securities exchange or capital trade point.

Notably, the ISA in defining invitation to the public specifically excludes any invitation that can properly be regarded in all circumstances as not being calculated to result, directly or indirectly, in the securities becoming available for purchase by persons other than those receiving the invitation as a matter of domestic concern.

The SEC Rules allow a foreign government or company to issue, sell or offer for sale or subscription, securities to the Nigerian public through the capital market subject to the prior approval of the SEC. Such securities may be denominated in naira or any convertible foreign currency.

### Regulatory filings

An offer to the public must be made pursuant to a prospectus, which should be registered with the SEC before the offer. The prospectus is required to include a summary of the offer stating the amount or number of shares on offer, the offer price, minimum application and multiples thereafter, financial information, indebtedness, the purpose and use of the issue proceeds, details of material contracts and material claims and litigation, a chair's letter or statement disclosing the history and business of the company, directors, management and staff, purpose of the offer, financial summary, prospect and future developments of the company and any other material information. In addition to the prospectus, copies of the issuer's certificate of incorporation, its memorandum and articles of association, and the vending and underwriting agreements (if applicable), must be filed with the SEC, as well as copies of all material contracts referred to in the prospectus, its audited accounts for the five years preceding the application (the latest audited accounts must not be more than nine months old for corporate bodies or 12 months old for states), local governments and federal government agencies and supranational bodies, and copies of advertising posters and other materials proposed to be published by the issuer to promote the offering.

In the course of the public offer, the issuing house is required to make copies of certain documents - such as the constitutional documents of the issuer, its material contracts, its audited accounts and a list of pending litigation - available for inspection by prospective investors.

With respect to cross-border transactions, a foreign issuer is required to file an application for registration of its securities with the SEC, accompanied by a draft prospectus. The filing will be made by an issuing house registered in Nigeria with the SEC as a capital market operator. The SEC Rules specify the type of information that should be contained in the prospectus and requires that the prospectus and other documents to be filed with the SEC must be written or translated to English.

### Stock exchange filings

Where it is intended that the securities to be issued will be quoted on the NSE, the approval of the quotations committee of the NSE must also be obtained. The Listing Rules require that companies that have not previously been listed should file (among others) the following documents prior to the listing of such securities: a formal application, a copy of the

prospectus, a certificate of incorporation, constitutional documents of the company, a general undertaking, certified copies of resolutions approving the issue of the securities to be listed and the prospectus, copies of documents that are referred to in the prospectus, the written consent of all experts to the inclusion of statements made in the prospectus, a letter of consent from the issuing house or underwriter to the issue conveying its satisfaction that the director's statement in the prospectus that the working capital is sufficient was made after due inquiry, a copy of the underwriting agreement, and a statement of the maximum number of shares that may be held by each shareholder.

The NSE Rulebook 2015 also applies to overseas issuers that desire to list their securities in the NSE. Specifically, the NSE Rulebook 2015 – Cross Border Listing Overseas Issuers sets out the application procedures and requirements with regard to the listing of foreign securities in the NSE.

The NSE Rulebook 2015 can be accessed through this link: [www.nse.com.ng/regulation-site/Documents/The%20NSE%20RuleBook%202015.pdf](http://www.nse.com.ng/regulation-site/Documents/The%20NSE%20RuleBook%202015.pdf).

### FMDQOTC filings

Where the debt securities to be issued are to be listed on the FMDQ OTC, the issuer will be required to file the following documents:

- audited financial statements covering the last three fiscal years, where applicable;
- letter of indemnity by the issuer;
- two copies of the approved offer documents (prospectus or information memorandum);
- a copy of the approval letter from the SEC;
- certified true copy (CTC) of the resolutions of the board authorising the issue of the securities and the offer documents;
- CTC of the resolutions of the issuer authorising the issue of the securities;
- CTC of every letter, report, balance sheet, valuation, vending agreement and other contracts or other document any part of which is extracted or referred to in the offer documents;
- CTC of the written consent of all experts;
- CTC of the underwriting agreement,
- credit rating report from a rating agency registered or recognised by the SEC;
- copies of the trust deed or other document securing or constituting the debt securities;
- the letter of allotment or other temporary document of title proposed to be issued;
- two copies of the memorandum and articles of association or other corresponding document;
- unless previously supplied, printers' proofs of the advertisement and posters;
- a copy of the newspaper cuttings advertising the basis of allotment;
- a written undertaking accepting compliance with the post-listing/quotation requirements of the FMDQ;
- a declaration of compliance; and
- a duly completed FMDQ Bond allotment report.

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

The steps for registration and filing vary depending on whether a book-building process is used by the issuer. Where a book-building process is not used, the registration and filing process involves three basic steps. The first is an application to the SEC by the issuing house, for registration of the securities and clearance of the prospectus and other documents, and to the NSE for approval to list the securities after the offer has been concluded. The second step is the signing of the offer documents by the parties and the advisers. Thereafter, copies of all the duly signed offer documents are registered at the Corporate Affairs Commission and by the SEC, after which the SEC gives its approval for the offer to be opened to the public.

Where a book-building process is used in relation to equities, a portion of the offer may be reserved for retail investors; however, for fixed-income securities, only qualified institutional and high net worth investors may participate. The registration and filing process involves filing the red herring prospectus, containing all information except the

price at which the securities are offered and the volume of securities, with the SEC. Following approval by the SEC, the red herring prospectus is circulated to qualified institutional and high net worth investors together with an indicative price range within which the securities and offers for subscription to the securities are invited. On receipt of the orders the book runners aggregate the orders received and together with the issuer, no later than two weeks from the day the book opens, determine the price at which the securities shall be offered based on the orders received. Once the price is determined, the prospectus is updated and filed with the Commission along with Form SEC 6 within 48 hours. Offers that are carried out on the basis of a book building are required by the SEC to be fully underwritten.

An offering cannot commence while review of the offering by the SEC or the NSE is still in progress. Under rule 282 of the SEC Rules, it is an unlawful act for any person to offer for sale or to buy or sell securities:

- before a registration statement has been filed with the SEC;
- after the registration statement has been filed but before it is cleared by the SEC; or
- after the completion board meeting but before the issue is authorised to open except in the following circumstances:
  - preliminary negotiations or actual agreement between the issuer and the underwriter;
  - oral offers not made to the public; and
  - notices of proposed offering.

However, the rules provide that although an issuer may not sell securities before a public offer opens, it may give notice that it proposes to make a public offering of securities to be registered under the ISA, provided that such notice states that the offering will be made only by means of a prospectus and contains minimal information limited to the name of the issuer; the title, amount and basic terms of the securities to be offered; the anticipated time of the offering; and the purpose of the offering.

The review of the offer documents by the SEC takes an average of four weeks to complete. The SEC is under an obligation to provide a response within six weeks. The SEC will issue a deficiency letter if it finds the application to be incomplete or deficient in any way. The NSE Quotations Committee meetings, at which applications for listing shares are considered and approved, are usually held twice a month, and ad hoc sessions can also be applied for.

The SEC Rules allow for shelf registration, which is a filing undertaken by issuers intending to access the market in the near future, and permits issuers to disclose certain information in a core disclosure document that is updated on a regular basis. All public companies listed for a minimum of 12 months are eligible to issue, offer for subscription or purchase, or issue an invitation to subscribe for or purchase, securities pursuant to a shelf registration. The value of the issue on offer made pursuant to a shelf registration may not be less than 5 billion naira. In addition, securities may not be allotted or issued on the basis of a shelf prospectus that has been filed with the SEC for over three years unless renewed on the approval of the SEC. The shelf prospectus of sub-nationals shall be effective for an indefinite period until determined by the SEC.

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

There is a general restriction in the ISA prohibiting the publication, issuance, circulation or distribution of any notice, circular or advertisement to the public that invites or offers for subscription or purchase any securities in a company, without the prior approval of the SEC. In addition, an offer must be made to the public within six months after the registration of the prospectus by the SEC. Advertisements must not be misleading, should avoid the use of technical terminology and complex language, and must not promise or guarantee a rapid increase in profits. Historical financial information and all other information contained therein should not go back further than five years.

While an investment adviser may circulate material in which it recommends an investment to its clients without the need for the SEC's approval, if the investment adviser is an underwriter of the offering, the notice should also contain a statement that the person making the recommendation is interested in the success of the offer.

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

The SEC Rules do not generally differentiate between primary and secondary offerings and the information required to be provided in the prospectus for these two types of offering is the same. As the articles of listed companies must provide that fully paid shares are free from restrictions on transfer, there are no pre-emptive rights in respect of a secondary offering of listed shares.

Where any company allots securities with a view to all or some of those securities being offered for sale to the public, any document by which the offer is made is deemed to be a prospectus issued by the company and both the seller of the securities and the issuer are liable for any untrue statement contained in it (see question 19). Where a secondary offering is made within six months of the allotment by the company, it is presumed under the regulations that the company allotted the securities with a view to all or some of these securities being offered for sale to the public.

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

The SEC and CBN Guidelines on Securities Settlement in Nigeria, which set out the procedures for the settlement of securities in Nigeria, were issued in December 2016 (the Settlement Guidelines). The procedures are as follows.

**The Exchange Traded Securities (equities, ETFs, state, corporate and supranational bonds, federal government securities)**

After each day's transaction (Day T), the clearing/settlement agent (the Central Securities Clearing System PLC (CSCS)) is required to generate the financial obligations of each dealing member firm.

The CSCS should sort the financial positions of the dealing member firms based on their respective settlement banks to determine the net position per settlement bank.

The CSCS is required to alert the settlement banks and the dealing member firms of their net positions on Day T.

On Day T+2 for Equities and T+1 for bonds and federal government (FGN) securities, the CSCS is required to communicate the final financial net settlement obligation of dealing member firms to settlement banks through a payment system agent (if the CSCS has no direct access to the CBN Real-Time Gross Settlement System (RTGS)).

Where the CSCS has direct access to the CBN RTGS, the CSCS should communicate the final financial net settlement obligation of the settlement banks to the CBN RTGS at the same time as the security records are updated so as to achieve simultaneous delivery versus payment (DVP).

On settlement day (ie, Day T+3 for equities and day T+2 for bonds and FGN securities), the CSCS is required to deliver the security to the CBN RTGS while the payment system agent shall apply the net settlement advice against the settlement bank's account with the CBN. On the same day, the settlement banks shall equally credit or debit (funds) the bank account of the respective dealing member firm.

On settlement day, the CSCS is required to update the record of the investors (buyers and sellers) with the registrar.

The dealing member firms should debit or credit the customer account not later than the next working day.

All customers' accounts should be credited with proceeds from the sale of their securities directly into their bank account or deposited into their stock broking account or other acceptable payment modes. Payments is required to reach the beneficiary's account not later than the next working day after settlement.

The Settlement Guidelines can be accessed at <http://sec.gov.ng/approved-guidelines-on-securities-settlements-in-nigeria/>.

**Private placings**

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

The SEC Rules contain specific rules on the private placement of shares by a public company. They provide that no public company may offer for sale or subscription or sell any securities by way of a private placement without obtaining the prior written approval of the SEC. A private

placement is defined as any issue of securities not involving a public offering. The provision applies to all public companies, whether their shares are listed on a stock exchange or not. A private placement by a public company is restricted to no more than 50 purchasers.

As a condition for approval, an issuer seeking to issue shares by private placement must show evidence of a dire need of fresh funds or technical expertise and must satisfy the SEC that private placement remains the only viable option for achieving its objectives. The private placement must be approved by the shareholders of the issuer by a special resolution (ie, one approved by 75 per cent of the votes cast at the meeting). The resolution must also state the price and the number of shares being offered. The notice of a general meeting authorising the placement by an issuer must be published in two national daily newspapers and evidence of the publications must be filed with the SEC. Other than this, private placements are not permitted to be advertised, mentioned or discussed in the print and electronic media. Quoted companies are restricted in the number of shares they can offer by way of a private placement; the SEC Rules provide that, unless a company can show that it is 'ailing', the aggregate number of shares that may be offered by such companies should not exceed 30 per cent of their existing issued and paid up capital prior to the offer.

Unless otherwise approved by the SEC, the offer may not be open for a period exceeding 10 working days. The issuer is required to file two copies of the placement memorandum with the SEC. The SEC Rules provide that certain mandatory information about the issuer must be included in the placement memorandum (see question 8).

Within 10 working days of the offer closing, the issuer is required to file a report on the offer with the SEC containing names and addresses of the purchasers; the amount purchased by each of them and mode of payment; time of payment; nature of the offeree; and the amount that the company raised.

The SEC does not regulate private placement of shares by private companies. This is governed primarily by the CAMA, the company's articles of association, and any shareholders' agreements as well as any arrangements made between the issuer and the potential investor.

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

The SEC Rules specify the information required to be made available in a placement memorandum that is intended to be issued to potential investors. It provides that a placement memorandum must contain certain information including a summary of the offer; financial summary for five years (or less if the issuer is less than five years old); details of the directors and the professional advisers; historical financial information about the issuer containing the accounting policies, balance sheets, profit and loss accounts, cash-flow statements and notes on the accounts; statutory and general corporate information about the issuer and any other material information; and an extract of the annual general meeting and board resolution authorising the issue. This information should be such as to enable the investor to have a proper understanding of the issuer, its business and the securities being offered.

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

There are no restrictions on the transfer of securities acquired pursuant to a private placement. However, where such securities are offered to the public within six months after issuance, the private placement could be deemed to be an offer for sale, for which a prospectus should have been issued. In this instance, all persons offering the securities or making an invitation to the public and every officer who is in default or body corporate making such invitation shall be separately liable to a penalty of 500,000 naira in the case of a body corporate and 100,000 naira in the case of an individual.

**Offshore offerings**

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

There are no specific securities rules applicable to the issue of securities outside Nigeria by a Nigerian issuer, but the issuer would need to notify the SEC and the NSE. Depending on the sector to which the

### Update and trends

The SEC is about to introduce new rules and a number of amendments to its existing rules. Specifically, in addition to the requirements stated in Rule 305 with regard to proceeds of issue, the amendment includes an additional requirement for issuers to open a dedicated interest yielding account after allotment clearance for the purpose of maintaining issue proceeds until they are fully utilised.

The Competition and Consumer Protection Bill is pending before the Nigerian National Assembly. If passed, the Bill will establish a competition regulator to regulate competition in Nigeria. Furthermore, the transfer of securities amounting in an acquisition will fall within the purview of the competition regulator.

issuer belongs, the issuer may need to obtain the approval of its sector regulator before it can proceed with the issue abroad. Having said this, the SEC is proposing a new rule, which would require the approval of the SEC for a Nigerian issuer to issue securities outside Nigeria.

### Particular financings

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

The definition of 'securities' under the ISA includes exchangeable and convertible securities, the public offer of which is thus subject to the same regulations and restrictions as set out above. Under the NSE listing rules, where a company intends to issue convertible securities, it must ensure that it maintains at all times sufficient unissued capital to cover the outstanding conversion rights. The SEC Rules also require, among other things, board and shareholder resolutions authorising the issuance of the convertible securities.

Nigerian companies are prohibited under the CAMA from issuing share warrants to the bearer and would instead issue options.

Rights are tradable on the NSE. An issuer offering new shares to its existing shareholders by way of rights must deliver to the SEC a rights circular containing certain information including the period during which the rights will be tradable on the NSE. The issuer should also apply to the NSE for the quotation of the rights on the exchange for the relevant period.

### Underwriting arrangements

#### 12 What types of underwriting arrangements are commonly used?

There are typically two types of underwriting arrangements used in Nigeria: firm underwriting (where the underwriter must make the amount underwritten available to the issuer on the day the offer opens); and standby underwriting (where the underwriter has an obligation to purchase any unsold securities at the offer price when the offer closes). Owing to the cost of underwriting, issuers might choose not to have their offers underwritten. A lot of factors have to be considered in selecting the type of undertaking to use. This may also sometimes be driven by the state of the market and economy as at the time of issue, the strength of the issuer and the liquidity of the securities. Prior to 2008, a larger number of public offers were underwritten on a firm basis. The proportion of recent public issues that are being underwritten has declined, although of the two types of underwriting available, firm underwriting remains the preferred option.

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

The underwriting agreement usually provides that the issuer will indemnify the underwriter in connection with any losses that it may suffer as a result of any misrepresentations contained in the offering document. The language of the indemnity must be carefully constructed to avoid the issuer breaching the restrictions under section 159 of the CAMA that relate to unlawful financial assistance.

Underwriting agreements usually allow the underwriters, at their option, to be released from their underwriting commitments if, at any stage before the opening of the offer, there is a material and adverse

change in the financial condition of the issuer, if there are material adverse conditions affecting the securities market generally, or if any national or local emergency or any introduction of prohibitive governmental regulations occur. Where the underwriter intends to terminate the underwriting agreement, it must give at least five working days' notice to the SEC stating its reasons for the intended termination. The SEC, if satisfied, may then approve the termination of the underwriting agreement.

Underwriting fees are not usually related to the success of the offer and standard underwriting agreements do not typically contain over-allotment provisions. The underwriting fees are subject to negotiation between the issuer and the underwriter and are usually a percentage of the amount underwritten.

#### 14 What additional regulations apply to underwriting arrangements?

All underwriting and sub-underwriting agreements must be submitted to the SEC for clearance along with other registration documents.

Where there is a firm underwriting of the whole issue and full payment has been made and received by the issuer, the following regulations apply: the securities warehoused by the underwriter must be sold on a securities exchange within six months from the date of allotment to the underwriter; and the date of allotment and entry of the underwriter's name in the register of members must be three days from the date of fulfilment of the underwriting commitment. If the securities are not disposed of within six months, the underwriter has to apply to the SEC for an extension of time within which to dispose of the securities. The SEC has wide discretion to either grant or deny this application. The SEC is required to communicate its decision to the underwriter within 10 days. Underwriters are required to file quarterly returns to the SEC in respect of undisposed securities until the securities have been fully disposed of.

### Ongoing reporting obligations

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

All public companies have the following reporting obligations to the SEC:

- quarterly earnings forecast;
- quarterly financial report;
- unclaimed dividend report (to be filed semi-annually);
- half-yearly returns;
- annual report; and
- corporate governance report.

Where the securities of an issuer are listed on a securities exchange, the issuer becomes subject to ongoing reporting obligations as detailed in question 16.

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

Reporting companies are expected to submit quarterly returns to the NSE and the SEC and to publish their half-year unaudited results and full-year audited financial statements in at least two newspapers. They must also submit copies of their audited financial statements and such other returns as may be prescribed by the SEC on a periodic or annual basis. They must also file their audited financial statements with the Corporate Affairs Commission as part of the annual return to be filed for that year.

Listed companies have extensive reporting obligations to the NSE. Notable among these is the ISA requirement that a public listed company disclose to the relevant securities exchange, its quarterly earnings forecast within 20 days of the commencement of a new quarter. Other reporting obligations of quoted companies include the obligation to give the NSE notice of any changes to the company's directors and key officers. They must inform the NSE, in advance of a board meeting, of the intention to discuss dividends or appoint new directors at the meeting. They must also inform the NSE in advance of the intention to close the register of members and transfer books of the company. There is also a requirement to notify the NSE immediately of any transaction that brings the beneficial ownership in the company's shares to 5 per cent or more not later than 10 business days after such transaction.

In the event of any breach of this requirement, the company shall be liable to pay a fine of 50 per cent of its annual listing fee. The ISA also imposes some reporting obligations on all public companies (whether or not such company is a listed company). The ISA provides that the chief financial officer or persons performing similar functions in a public company must make certain representations to the SEC about the reports submitted to the SEC and, in addition, the officers must certify that any periodic or annual report filed to the SEC has been reviewed by that officer. The officer must also certify that based on his or her knowledge, the report does not omit to state any true statement of material fact and does not contain any untrue statement of a material fact.

A reporting company that fails to ensure that all its reporting obligations, as well as those of its officers, are complied with shall be liable to a penalty of no less than 1 million naira and a further penalty of 25,000 naira per day for the period in which it fails to comply with the reporting provisions of the ISA.

#### Anti-manipulation rules

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

The ISA specifically outlaws the participation, directly or indirectly, in two or more transactions, in securities of a company, that have raised, lowered or stabilised, or are likely to raise, lower or stabilise, the price of the securities on the exchange with the intention of inducing others to sell, purchase or subscribe for the securities of the company or a related company. The law also prohibits the buying or selling of securities of a listed company outside the facilities of a recognised stock exchange. The penalty for contravening these provisions is a fine of 500,000 naira in addition to the nullification of the transaction.

The ISA also generally prohibits various manipulative practices, including insider dealing; abuse of information obtained in an official capacity; false trading; market rigging; market manipulation of listed securities; making false or misleading statements; fraudulent inducement of persons to deal in securities; manipulative and deceptive devices and contrivances; and fraudulent devices, schemes, etc. A person convicted of any of these offences would be liable to compensate any person for any direct loss suffered by that person as a result of the transaction, unless the information was known or with the exercise of reasonable diligence could have been known to that person at the time of the transaction. In addition to this civil liability, the person could be charged with a criminal offence for which he or she would be liable on conviction, in the case of an individual, for a fine of not less than 500,000 naira or an amount equivalent to twice the amount of the profit derived or loss averted by the use of the information obtained in contravention of the provisions of the ISA, or to imprisonment for a term not exceeding seven years. In the case of a body corporate, it would be liable for a fine of no less than 1 million naira, or an amount equivalent to twice the amount of the profit derived from it or loss averted by the use of the information obtained in contravention of the provisions of the ISA or to imprisonment for a term of two years, or to both imprisonment and a fine.

As a further precaution, directors and other insiders of public companies are also required by the provisions of the SEC Rules to notify the SEC of any sale or purchase of their shares in a public company no later than 48 hours after such activity. Insiders for this purpose include holders of 5 per cent or more of the equity of the company.

There are also specific sanctions for persons who authorise the issue of any inaccurate statements in a prospectus issued to the public as detailed in question 19.

#### Price stabilisation

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

The SEC Rules provide that during a private placement, where the issuer is a publicly quoted company, the price of its securities will be placed on technical suspension by the stock exchange during the period of the offering.

#### Liabilities and enforcement

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

###### Misstatements in prospectuses

The ISA provides for both civil and criminal liability in relation to misstatements in prospectuses.

###### Civil liability for misstatements in a prospectus

Where an investor has subscribed for securities relying on the prospectus and has sustained loss or damage by reason of an untrue statement contained therein, the following persons shall be liable to pay compensation for the loss or damage the investor may have sustained: a director or promoter of the company; any person who has authorised the issue of the prospectus; and an expert, where the loss arises from any untrue statement purported to be made by him or her in his or her capacity as an expert.

###### Criminal liability for misstatement in a prospectus

Where a prospectus includes any untrue statement, any officer who authorised the issue of the prospectus commits an offence and is liable:

- on conviction to a fine of no less than 1 million naira or imprisonment for a term not exceeding three years, or to both a fine and imprisonment; or
- on summary conviction, to a fine not exceeding 1 million naira or to imprisonment for a term not exceeding three months, or to both a fine and imprisonment, unless he or she proves either that the statement was immaterial or that he or she had reasonable grounds and believed that the statement was true.

The ISA provides that a person shall not be deemed to have authorised the issue of a prospectus by reason only of his or her having given consent to the inclusion in the prospectus of a statement purporting to be made by him or her as an expert.

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**Market manipulation**

Please see response to question 17.

**Insider dealing**

With respect to insider dealing, the ISA provides for criminal liability. In relation to individuals, on conviction, liability is a fine of 500,000 naira or an amount equivalent to twice the profit derived by the insider or the loss averted by the use of the information obtained in contravention of the provisions of the ISA. In relation to corporate bodies, the liability is for a fine of no less than 1 million naira or an amount that is twice the profit derived or loss averted by the use of the information obtained in contravention of the provisions in the ISA. Where the breach is carried out by a dealing member, in addition to the penalties imposed under the ISA, the NSE may impose a fine equivalent to three times the amount of profit or gain derived by the dealing member involved in insider dealing, which shall be paid by the dealing member no later than 10 business days after the fine is imposed. The NSE may also suspend the dealing member or may withdraw the dealing member's licence.

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

Remedies for improper securities activities may be sought through civil action or criminal prosecution as described in question 19. In addition, the Investment and Securities Tribunal (the tribunal) set up under the ISA has the power to adjudicate disputes and controversies arising under the ISA and the SEC Rules. The tribunal's jurisdiction covers civil disputes between capital market operators and their clients; between capital market operators; between capital market operators and stock exchanges; and between quoted companies and the regulators. If, in the course of its investigations, the tribunal discovers evidence of any criminality, it is obliged to pass such information on to the criminal prosecuting authorities. The Administrative Proceedings Committee of the SEC also has the power to adjudicate disputes arising under the ISA and SEC Rules and can impose sanctions on any offending party.

# Norway

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Advokatfirmaet Schjødt AS

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## Statutes and regulations

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

The primary statutes and regulations governing securities offerings in Norway are the Norwegian Securities Trading Act of 2007 (STA) and the Norwegian Securities Trading Regulations of 2007 (STR) which implement, inter alia, the EU Prospectus Directive (2003/71/EC) (as amended). The STA and the STR set out when a prospectus is required, exemptions from the prospectus requirements as well as the content and disclosure requirements for prospectuses.

The regulatory authority primarily responsible for the administration of these rules is the Financial Supervisory Authority of Norway (NFSA). The NFSA also issues certain guidelines and statements related to the prospectus rules.

Securities offerings in companies listed on a regulated market or a multilateral trading facility will also be regulated by the rules adopted by the relevant marketplace. Three marketplaces are licensed to offer trading in shares in Norway: the Oslo Stock Exchange, Oslo Axess (a regulated market operated by the Oslo Stock Exchange) and Merkur Market (a multilateral trading facility operated by the Oslo Stock Exchange). The applicable rules are found in the Continuing Obligations for Stock Exchange Listed Companies, which apply to companies with shares listed on the Oslo Stock Exchange (Børs) or Oslo Axess and the Continuing Obligations of companies admitted to trading on the Merkur Market (which applies to companies with shares listed on the Merkur Market).

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## Public offerings

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

The type of regulatory or stock exchange filings to be made in connection with a public offering of securities will depend on the type of offering and the type of issuer.

At the outset, the requirement to publish a prospectus relates to the offering of transferable securities (ie, the STA does not differentiate between offerings of debt securities and equity securities nor between primary offerings and secondary offerings).

If a public offering of transferable securities exceeds an amount of €1 million over a 12-month period, and no relevant exemptions apply, a prospectus must be prepared prior to commencement of the offering.

If the public offering takes place in connection with a listing of transferable securities on a regulated market or the public offering will cause the share capital in a class of shares that is already listed to increase by at least 10 per cent, a prospectus will in all cases be required.

Prospectuses shall according to the STA section 7-13 contain such information as, depending on special circumstances of the offeror and the nature of the securities offered, is necessary to enable the investors to make a properly informed assessment of the issuer's and any guarantor's financial position and prospects and of rights attached to the securities mentioned. The information in the prospectus shall be presented in an easily comprehensible and analysable form.

The STA differentiates between national prospectuses and European Economic Area (EEA) prospectuses. National prospectuses must be prepared for offerings in the amount of between €1 million and €5 million while EEA prospectuses must be prepared for offerings of at least €5 million. If the prospectus is prepared in connection with a listing on a regulated market as set out above, the issuers must always prepare an EEA prospectus.

The main differences between national prospectuses and EEA prospectuses are the content requirements and approval or publication process. National prospectuses have significantly less comprehensive content requirements than EEA prospectuses. EEA prospectuses must include the contents set out in the relevant annexes (depending on the issuer and offering) of the EU Prospectus Regulation of 2004 (as amended). With regard to the review and approval process, see question 3.

For companies listed on Oslo Børs, Oslo Axess or Merkur Market, certain additional disclosure obligations will apply including disclosure of inside information relating to the public offering (please see question 16). In addition, the ongoing reporting obligations of such companies require the issuer to disclose, in connection with a public offering, certain particular information in stock exchange announcements including:

- The proposal and decision of the board or general meeting to increase the share capital (in connection with a primary offering).
- Key information regarding offerings directed towards existing shareholders such as rights issues and repair issues (only Oslo Børs or Oslo Axess). The key information should include the date on which the terms and conditions of the offering were announced, the last day including the right to participate, first date excluding the right to participate, record date, the maximum number of new shares in the offering, subscription price, if subscription rights will be admitted to trading, the date of approval of the offering (by the relevant corporate body) as well as any other relevant key information.
- The fact that a prospectus has been approved and where the prospectus may be obtained.

In addition, companies seeking admission to trading of their securities in connection with an initial public offering (IPO) on Oslo Børs, Oslo Axess or Merkur Market, must submit an introductory report and subsequent listing application to the Oslo Stock Exchange.

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

As described in question 2, the STA differentiates between national prospectuses and EEA prospectuses.

A national prospectus prepared in connection with an offering shall only be submitted in final and signed form by email to the Norwegian Register of Business Enterprises. The Norwegian Register of Business Enterprises will not conduct a review of the national prospectus but announce through its electronic announcement portal that a prospectus from the relevant issuer has been published. Following the submission of the prospectus, the offeror of securities may publish the prospectus and commence the offering.

An EEA prospectus prepared in connection with an offering must be filed with the NFSA for their review and approval. An offering may not commence until the prospectus has been approved by the NFSA.

The NFSA requires that the first draft of the prospectus which is submitted for review is as complete as possible, however, so that it will allow some information to be included later in the review process in the event that such information is not ready upon first filing. The prospectus must be accompanied with cross-reference lists setting out where applicable requirements from relevant annexes to the Prospectus Regulation and, if applicable, the ESMA recommendation of 20 March 2013 paragraphs 128-145 for specialist issuers, are fulfilled.

Following the first submission of the draft prospectus, the NFSA will revert with its comments within seven business days (for listed companies) or 10 business days (for unlisted companies). A review process typically takes around five weeks, with approximately three to five iterations between the offeror and the NFSA.

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

As set out in question 3, a national prospectus may not be published until it has been submitted to the Norwegian Register of Business Enterprises. An EEA prospectus may not be published until it has been approved by the NFSA.

If the offeror informs about the offer in advertisements or other ways, it must at the same time inform that further information is given in the prospectus, as well as where the prospectus can be obtained. Any such information included in advertisements or other ways must be in accordance with the information in the prospectus.

In addition, the Norwegian Stockbrokers' Association has issued guidelines setting out restrictions on publication of research reports in connection with public offerings and IPOs.

In connection with public offerings (primary or secondary), research reports shall not be published at the latest seven days before publication of the prospectus and at the earliest 30 days after allocation.

In connection with IPOs, research reports shall not be published at the latest seven days before publication of the prospectus and at the earliest 30 days after the first day of listing.

In connection with repair issues (see question 7), research reports shall not be published at the latest seven days before publication of the prospectus and at the earliest the first day after expiry of the subscription period.

For private placement, there are no similar guidelines but the advisers must consider applying restrictions on a case-by-case basis.

Content and distribution of research reports are regulated in section 3-10 of the STA with secondary regulations, implementing relevant provisions from the EU Market Abuse Directive (2003/6/EC) and Regulation 2003/125/EC. There are also provided supplementary guidelines by the Norwegian Stockbrokers' Association.

The managers or underwriters must take reasonable care to ensure that information is correct and that they fairly disclose their interests or indicate conflicts of interest concerning the financial instruments or the issuer to which that information relates. The underwriters or managers must therefore disclose in the reports all relationships and circumstances that may reasonably be expected to impair the objectivity of the research.

In connection with public offerings and IPOs the managers will customarily prepare research guidelines outlining the principles to be followed for issuance of research reports in connection with the relevant transaction.

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

Pursuant to section 10-4 of the Norwegian Public Limited Liability Companies Act and section 10-4 of the Norwegian Private Limited Liability Companies Act, existing shareholders of a company have a preferential right to subscribe for new shares to be issued. The preferential rights in primary offerings may be deviated from subject to approval from a two-thirds majority of the shareholders at the company's general meeting and provided that such deviation will not represent a breach of the company law principle of equal treatment of shareholders.

The principle of equal treatment as set out in applicable company and securities law is outlined in more detail in question 7.

There is no similar statutory preferential right or principle of equal treatment for secondary offerings.

In offerings involving the publication of a prospectus, there is also a difference between primary and secondary offerings with respect to the statement of responsibility which is included in the prospectus (ie, the declaration that, having taken all reasonable care to ensure that such is the case, the information contained in the prospectus is, to the best of the responsible party's knowledge, in accordance with the facts and contains no omissions likely to affect its import). Section 7-18 (1) of the STA specifically states that in the event there is an offer to subscribe or purchase shares from the company who has issued the shares offered (ie, primary offering) then the board of directors of such issuer is responsible for the prospectus and consequently must sign the statement of responsibility in the prospectus. With respect to secondary offerings there is no similar requirement for the board of directors of the seller or offeror to sign the prospectus and it is assumed (and common practice) that the statement of responsibility in such cases may be signed by the seller or offeror as the responsible entity (as opposed to the individual board members). In IPO prospectuses that comprise both a primary offering by the issuer and a secondary offering by the existing shareholders, the board of directors of the issuer will usually assume sole responsibility for the entire prospectus while the selling shareholder only provides a statement confirming that the shares in the secondary offering are being offered free of any liens or encumbrances.

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

All listed companies in Norway have their shares registered electronically in book-entry form in the Norwegian Central Securities Depository (VPS) and settlement of securities transactions is usually carried out automatically through the VPS.

The typical settlement process for sales of securities in a public offering will depend on whether the offering is done as a pure share sale (secondary offering) or as a share sale in connection with a primary offering. The latter will usually entail that settlement is not carried out until the share capital increase pertaining to the issue of shares in the primary offering has been registered with the Norwegian Register of Business Enterprises while in the event of a pure secondary offering, settlement will usually take place directly following the payment date.

#### **Private placings**

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

Private placements are very common in the Norwegian market as they allow for capital raisings in a timely and cost-efficient manner. This applies both to listed and unlisted companies.

When completing a private placement, the issuer and its advisers must observe the principle of good business conduct as further outlined in question 8 and applicable prospectus rules. Except for that, there are no particular statutory securities law provisions regulating private placements.

The most relevant prospectus exemptions used in private placements in the Norwegian market are:

- offers made to fewer than 150 non-professional investors; and
- offers with a minimum subscription of at least €100,000.

In the event that the securities issued in the private placement are to be admitted to trading on a regulated market, the private placement will trigger an obligation to publish a prospectus regardless of whether the above exemptions are applicable if the capital increase pertaining to the private placement amounts to at least 10 per cent of the number of shares already listed in the same class of shares, calculated over a 12-month period (see section 7-5 No. 1 of the STA). Such listing prospectus must be published before the first day of listing of the new shares.

There are no specific procedures that must be implemented to effect a valid private placement.

It should be noted that for companies with shares listed on the Oslo Stock Exchange or Oslo Axess, the Oslo Stock Exchange will monitor compliance with the securities law principle of equal treatment

of shareholders, which follows from section 5-14 of the STA and the Continuing Obligations for Stock Exchange Listed Companies and is similar to the equal treatment principle set out in Norwegian company law. The provisions read:

- (1) *Issuers of financial instruments admitted to trading on a Norwegian regulated market shall treat the holders of their financial instruments on a non-discriminatory basis. Issuers must not subject the holders of the financial instruments to discriminatory treatment that is not objectively based in the issuer's and the holders' mutual interests.*
- (2) *When trading in or issuing financial instruments or rights to such instruments, the issuer's governing bodies, officers or senior employees must not take measures that are liable to provide them, individual holders of financial instruments or third parties with any unreasonable advantage at the expense of other holders or the issuer. The same applies to the trading in or issuance of financial instruments or rights attached to such instruments within the group of which the issuer is a part.*

Similar rules have also been included in the continuing obligations of companies listed on Merkur Market.

Subsequent repair offerings directed towards existing shareholders who were not invited to participate, or not allocated shares in the private placement are common practice in the Norwegian market as a mitigating factor with respect to a private placement's inherent deviation from the equal treatment principle.

As follows from the provision on equal treatment above, there is no differentiation between primary and secondary offerings.

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

Private placements in the Norwegian market are, as described in question 7, often subject to an exemption to publish an offering prospectus. As long as there is no obligation to publish a prospectus there are no formal requirements for specific information to be made available to potential investors.

However, as set out above, section 3-9 of the STA includes a general provision on good business conduct in securities transactions which set out that: conduct of business rules shall be observed in approaches addressed to the general public or to individuals which contain an offer or encouragement to make an offer to purchase, sell or subscribe to financial instruments or which are otherwise intended to promote trade in financial instruments. The requirement of good business conduct must be seen together with customary market practice. If the information provided to potential investors is in line with customary market practice then the provision will most likely be satisfied with respect to this point. Usually, potential investors in a private placement will receive a company or investor presentation or similar describing the company, the market, risk factors, key financials and transaction details.

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

Generally, there are no transfer restrictions on shares in Norwegian public companies unless this specifically follows from a particular agreement among shareholders or the company's articles of association. For private limited liability companies the Norwegian Private Limited Liability Act provides that the board of directors must consent to any share transfers unless otherwise follows from the articles of association; however, any refusal to consent must have reasonable cause.

There are no specific statutory restrictions that apply to the transferability of securities acquired in a private placement.

Participants in private placements may in some cases enter into lock-up agreements with the seller or issuer or managers.

There are no specific mechanisms used to enhance the liquidity of securities sold in a private placement.

### **Offshore offerings**

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

Issuers domiciled in Norway will, of course, be bound by Norwegian company law, including the principle of shareholders' preferential right. However, there are no specific domestic Norwegian rules that regulate offerings of securities outside of Norway made by an issuer domiciled in Norway. Issuers in Norway carrying out offerings outside of Norway must consider applicable foreign securities law. In the event that the offering is carried out in another EEA member state by an issuer domiciled in Norway, the NFSA will be the relevant prospectus authority unless an application is made and approved for the transfer of the prospectus authority to the relevant EEA member state where the offering is being made.

### **Particular financings**

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

As long as the offering comprises tradable securities, which will normally include convertible bonds, warrants and depositary shares, the prospectus rules will apply.

Rights offerings in the form of an offer to existing shareholders will likely be subject to the simplified prospectus disclosure regime pursuant to the STR section 7-20 of the EU Prospectus Regulation (EC/809/2004) article 26a.

### **Underwriting arrangements**

#### **12 What types of underwriting arrangements are commonly used?**

In the Norwegian market, the typical international underwriting arrangement, whereby the underwriter (usually an investment bank or similar) purchases the securities in the offering in order to resell them to potential investors, is not common other than in international IPO processes involving Norwegian issuers (which is rather seldom).

The most common underwriting arrangement in Norway is that the issuer's financial adviser or the investment firm assisting the issuer in carrying out the offering establishes an underwriting syndicate among the potential participants in an offering or private placement, most commonly the largest shareholders. The investment firm is not usually part of the syndicate. The syndicate guarantees part or full subscription of the shares to be offered in the event that the offer is not fully subscribed. The underwriting agreements seldom include payment guarantees.

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

Underwriting agreements will depend on the type of arrangement. With respect to the typical Norwegian arrangement (being subscription guarantees from certain investors as described in question 12), indemnification of the underwriters, termination in the event of force majeure, success fees and over-allotment options will rarely be included in the underwriting agreement. These types of provisions may, however, be included in the transaction manager's engagement letter or other agreements between the issuer and the manager.

#### **14 What additional regulations apply to underwriting arrangements?**

Typical underwriting arrangements, as described in question 12, are subject to certain regulations with respect to disclosure of information.

In the event of a primary offering, the issuer is required, pursuant to Norwegian company law, to disclose the amount of the underwriting or guarantee commission paid in the general meeting's resolution to issue the shares.

In addition, for companies listed on Oslo Børs, Oslo Axess and Merkur Market there is an obligation in the Continuing Obligations for Stock Exchange Listed Companies and the Continuing Obligations for Companies Listed on Merkur Market to provide the market with information on any underwriting consortium, including the members of the

### Update and trends

The STA and related regulations are under current reform to implement MiFID II, the amendments in the Transparency Directive and the Market Abuse Regulation.

consortium and their guarantee obligations, as well as information on any advance subscription or allotment.

### Ongoing reporting obligations

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

Issuers with financial instruments admitted to trading on a regulated market or multilateral trading facility in Norway will be subject to reporting obligations as set out in the STA. Certain reporting obligations apply from the time the issuer has applied for listing.

Unlisted issuers may be subject to reporting obligations pursuant to agreement with investors. This is often seen in bond agreements in the Norwegian market.

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

The STA differentiates between ongoing and periodic reporting (duty of disclosure).

Issuers with financial instruments listed on a regulated market or multilateral trading facility or issuers who have applied for listing on a regulated market must, at their own initiative, immediately publish inside information unless an exemption to delay disclosure applies. Delayed disclosure may be applied in order not to prejudice the issuer's legitimate interests, provided that the public is not misled by the delay and information is kept confidential.

Furthermore, from the time of listing the issuer becomes subject to a number of specific reporting requirements set out in the Continuing Obligations for Stock Exchange Listing and the Continuing Obligations for companies admitted to trading on the Merkur Market. These rules require, for instance, the companies to immediately disclose the following information related to corporate actions, etc, as per the Continuing Obligations for Stock Exchange Listed Companies section 3.2:

1. Any changes in the rights attaching to the company's shares, including any changes in related financial instruments issued by the company;
  2. The issue of new loans, including any guarantees or collateral provided in that connection. If the issue is in respect of a convertible or subordinated loan, this must be stated. Any issue of similar convertible rights must also be made public;
  3. Proposals and decisions by the board of directors, general meeting or other corporate body on a) dividends; b) mergers; c) demergers; d) increases or decreases in share capital; e) mandates to increase the company's share capital; and f) share splits or reverse splits
- Information on allocation and payment of dividends, as well on issuance of shares, including information on any arrangements for allotment, subscription, cancellation and conversion;
4. Proposals and decisions on the issue of subscription rights;
  5. In the event of the issue of a loan or an increase in share capital as mentioned in items 1, 2 and 3, information shall be given in particular on any underwriting consortium, including the members of the consortium and their guarantee obligations, as well as information on any advance subscription or allotment;
  6. Registered change of company name;
  7. Registered change in the nominal value of the company's shares;
  8. Decisions on changes to the company's board of directors, managing director or financial director, including notice of resignation given by any such person.

The above disclosure requirements apply at all times, regardless of the opening hours of the relevant marketplace.

The relevant regulated market is responsible for carrying out supervision of the compliance with the requirements related to the ongoing disclosure requirements.

The STA requires issuers with Norway as the home state and who have securities admitted to trading on a regulated market to publish annual and half-year financial reports. The NFSA is the authority that carries out supervision of this requirement.

Finally, the STA and applicable stock exchange rules require issuers to report certain information to the relevant stock exchange or the NFSA, such as if the auditor finds that the financial statements should not be approved as they stand, or the auditor has made comments, clarifications or audit reservations in the audit report; see section 5-5 (5).

### Anti-manipulation rules

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

The main rules prohibiting manipulative practices in securities offerings and secondary market transactions are set out in the STA section 3-8. Pursuant to such, no one must undertake market manipulation in connection with financial instruments.

Market manipulation is defined in the STA section 3-8 as:

1. transactions or orders to trade which give, or are likely to give, false, incorrect or misleading signals as to the supply of, demand for or price of financial instruments, or which secure the price of one or several financial instruments at an abnormal or artificial level, unless the person or persons who entered into the transactions or issued the orders to trade establish that their reasons for doing so are legitimate and that these transactions or orders to trade conform to conduct accepted by Finanstilsynet as market practice on the market concerned, or
2. transactions entered into or orders to trade given in relation to any form of misleading conduct, or
3. dissemination of information through the media, including the internet, or by any other means, which gives, or is likely to give, false, incorrect or misleading signals as to financial instruments, including the dissemination of rumours and news, where the person who made the dissemination knew, or should have known, that the information was false, incorrect or misleading. In respect of journalists acting in their professional capacity, such dissemination of information is to be assessed taking into account the rules governing their profession, unless those persons derive, directly or indirectly, an advantage or profits from the dissemination of the information concerned.

Norway has not yet implemented the new EU Market Abuse Regulation and it is still unclear when this will take place.

### Price stabilisation

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

Price stabilisation may, depending on the individual circumstances, constitute market manipulation. However, pursuant to the STA section 3-12, the prohibition against market manipulation does not apply to price stabilisation undertaken in accordance with the safe harbour provisions set out in EU Regulation 2273/2003 on exemptions for buy-back programmes and stabilisation of financial instruments.

Price stabilisation is usually carried out in connection with IPOs by overallotment to one of the lead managers.

### Liabilities and enforcement

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

Liability cases in connection with securities transactions are, and have historically been, limited in number. Thus, it is generally difficult to single out the most common bases of liability for a securities transaction. Participants in securities transactions must naturally adhere to the market abuse rules.

Persons or companies may be subject to civil liability and claims from investors on the basis of lack of information or misleading or untrue information in investor documentation.

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

The STA includes a number of alternative mechanisms for seeking remedies and sanctions for improper activities, including administrative proceeds such as criminal prosecution.

Wilful or negligent violation of the STA's provisions on market abuse and prospectus rules may be subject to sanctions such as surrender of gain, fines and imprisonment. Any such violation will at first be investigated by the NFSA, but criminal prosecution is carried out by the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (Økokrim).

The NFSA may impose a violation penalty in the form of fines if an issuer violates the obligations of issuers under the STAs prospectus rules.

In the event that anyone has incurred a financial loss owing to a third party's improper securities activities, civil litigation by way of lawsuits may also be relevant, depending on the circumstances.

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# South Africa

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## Statutes and regulations

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

The relevant statutes governing securities offerings and trading are the Companies Act 2008 (the Companies Act), the Collective Investment Schemes Control Act 2002 (CISCA), the Financial Advisory and Intermediary Services Act 2002 (FAIS Act), the Banks Act 1990 (Banks Act) and the Financial Markets Act 2012 (the Financial Markets Act). This legislation applies to listed and unlisted securities.

### Regulations

Historically, there has been one licensed exchange in South Africa, the Johannesburg Stock Exchange (JSE), for the listing of equity and debt securities, although recent developments have seen two new exchanges, ZAR X and 4 Africa Exchange, being licensed by the South African Financial Services Board. The JSE has two primary boards – a main board and an alternative exchange (AltX) for small and medium-sized companies.

Previously, debt securities were listed on and regulated by the Bond Exchange of South Africa (BESA), which was a licensed exchange separate from the JSE. However, BESA became a wholly owned subsidiary of the JSE in June 2009. The listing of debt securities is now regulated by the JSE pursuant to the Debt Listings Requirements of the JSE (the Debt Listings Requirements).

The Financial Markets Act consolidates the law relating to the regulation and control of, inter alia, exchanges and securities, trading, central securities depositories (relevant for dematerialised shares), the custody and administration of securities, market abuse matters, restrictions on who may market securities, and ancillary matters.

The listing of equity and debt securities on the JSE is subject to compliance with the Listings Requirements of the JSE (the Listings Requirements), the Debt Listings Requirements and JSE approval. The JSE must approve all circulars and offering documents prior to such documents being sent to shareholders or, in the case of debt securities, to potential investors. Sponsors must approve all announcements to be made prior to publication except for those containing JSE regulated timetables, which aspect of the announcement will also require JSE approval.

The issue of debt securities can be construed as ‘the acceptance of deposits from the general public’, which activity, under the Banks Act, requires a banking licence unless the debt securities are issued in accordance with the provisions of the Commercial Paper Regulations (CP Regulations) or the Securitisation Regulations published in terms of the Banks Act, in which case the issuer is not required to have a banking licence. The CP Regulations were created specifically to allow non-bank entities to issue debt securities and it is under this safe harbour that the majority of South African issues of debt securities are undertaken.

Exchange controls restrict how non-South African companies raise capital in South Africa (inward listings) and how South African companies and local authorities raise capital abroad.

## Regulatory authorities

The regulatory authorities responsible for the administration of the rules and regulations governing securities offerings include the Commissioner of the Companies and Intellectual Property Commission (Commission) (who has replaced the Registrar of Companies of the Companies and Intellectual Property Registration Office), the Registrar of Securities Services (this has remained unchanged since the Financial Markets Act came into force), and the Financial Services Board (FSB). The Companies Act has also established a Companies Tribunal with the authority to review decisions of the Commission (Companies Tribunal). In the case of equity and debt securities, the authorities include the Issuer Services Division (formerly the Listings Division) of the JSE and the Takeover Regulation Panel (TRP) (which has replaced the Securities Regulation Panel under the old Companies Act 1973). In the case of debt securities, the Registrar of Banks is one of the regulatory authorities. The regulatory authority that deals with exchange controls is the Financial Surveillance Department of the South African Reserve Bank (FSD).

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## Public offerings

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

#### Primary and secondary markets – equity and debt

In terms of the Companies Act, an offer of securities (including equity and debt securities) to the public can only be made by a South African public company or a foreign company (incorporated outside South Africa) that has lodged its constitution and details of the board of directors with the Commission.

An offer to the public must usually be accompanied by a prospectus that is registered with the relevant exchange, in the case of offerings of listed securities; or with the Commission, in the case of offerings of unlisted securities. If the document is a prospectus, then the JSE also requires proof that it has been registered with the Commission. Detailed disclosures must be made in the prospectus in accordance with the relevant provisions of the Companies Act and, in the case of listed securities, the JSE Listings Requirements.

The ‘public’ includes any section of the public, whether selected as holders of the company’s securities, clients of the person issuing the prospectus concerned, or holders of any particular class of property. The latter phrase appears to be the legislature’s response to a criticised decision of the Supreme Court of Appeal in 2005, where the Court held that an offer to subscribe for equity securities made by a listed company to shareholders of another listed company on a particular date was not an offer to the public. The Companies Act also contains safe harbours from ‘offers to the public’ so that offers can be made without a prospectus to, inter alia, persons whose ordinary business it is to deal in securities, or persons who fall into certain categories of institutional investors, or persons who are paying more than a prescribed amount (at present 1 million rand) for the securities to be acquired by them.

The Companies Act contains the requirement that a prospectus must contain all the information that an investor may reasonably require to assess the assets and liabilities, financial position, profits and losses, cash flow and prospects of the company in which a right or interest is to be acquired and to assess the securities being offered

and rights attached to them. Permission to exclude information will, in the case of offers of listed securities, need to be obtained from the relevant exchange and, in the case of offers of unlisted securities, from the Commission. In addition, the Companies Act provides that the prospectus must comply with the detailed disclosure requirements set out in the Regulations to the Companies Act.

The Companies Act envisages three types of offerings: primary, secondary and initial public offerings (IPOs). These terms are specifically defined. In a primary offering, the offer is made by the issuer itself or a member of the same group of companies. In a secondary offering, the offer is made for investors to purchase (not subscribe for) securities already in issue from a seller that is not the issuer or a subsidiary of the issuer. An IPO is an offering (primary or secondary) by a company whose shares have never been offered to the public before or, where they have been offered before, all of those that were offered have been reacquired by the issuer. The securities offered under an IPO need not be listed. In this article, these terms will only be used in the manner defined in the Companies Act where specifically mentioned.

### Primary offers - equity

Listings and additional listings of equity securities are subject to the provisions of the Listings Requirements and JSE approval. All applications for listing are to be submitted to the JSE through a sponsor. In accordance with the Listings Requirements, applicants seeking to list any securities are required to submit a number of documents to the JSE for review. Comprehensive pre-listing statements must be prepared and distributed. Sometimes a circular, rather than a pre-listing statement, must be prepared and distributed. A circular has less comprehensive disclosure requirements than a pre-listing statement. In practice, if a prospectus is required in terms of the Companies Act, it will be the same document as the pre-listing statement or circular and will need to be registered with the relevant exchange. The content requirements of a pre-listing statement and prospectus are largely the same. An announcement containing an abridged pre-listing statement must also be published. Depending on which market on the JSE the proposed listing will occur, certain profit history and public shareholding is required in respect of the issuer.

Primary offerings of securities to the public include IPOs, issues for cash or rights offers.

Historically in South Africa, an IPO involved an offer to the public to take up securities in a company that is not yet listed but which will be listed if the offer is successful. In terms of the Companies Act, an IPO is a more specific concept (as noted above) and will always require a prospectus (which will be lodged with the Commission in the case of unlisted securities or with the relevant exchange in the case of listed securities).

The JSE recognises a non-pre-emptive primary offering, being an issue of equity securities (or securities convertible into equity) for cash. The issuer can make such offer on a non-pre-emptive basis if the terms of the issue are:

- specifically approved by 75 per cent of equity securities holders present and voting in a general meeting in respect of that particular issue excluding any parties and their associates participating in the issue (known as a 'specific issue for cash'). Full details of the proposed issue of equity securities must be included in a circular to shareholders convening the meeting to waive their pre-emptive rights and for issues to related parties at a discount, and the board must obtain a fairness opinion; or
- approved under a general authority by 75 per cent of equity securities holders present and voting at a general meeting by their giving of a renewable mandate to the directors of the issuer, to issue up to 15 per cent of equity securities for cash (although, in practice, shareholders will often only approve a lower percentage) subject to the Listings Requirements and to any other restrictions set out in the mandate (known as a 'general issue for cash'). In a general issue of shares for cash, the equity securities must be issued to public shareholders and not to related parties (broadly defined to include, among others, shareholders holding at least 10 per cent of the equity securities, directors and connected persons) and may not be issued at a discount of more than 10 per cent. No regulatory filings are required when the authority for a general issue of shares is sought but announcements are required if shares are issued in terms of such authority.

Rights offers are offerings by companies to their existing security holders in terms of which such holders have a right to subscribe for additional securities in proportion to their existing holding. The subscription price is usually below market price and accordingly the right to subscribe at that price may have value and may be traded. No prospectus is required for a rights offer (as this falls under one of the safe harbours), but a circular is required to be sent to existing security holders in terms of the Listings Requirements and a more detailed pre-listing statement (known as revised listings particulars) where the dilution will exceed 50 per cent. The Companies Act also requires the rights offer circular to contain prescribed information. Renounceable letters of allocation, conferring rights on the recipients to either subscribe for securities in terms of the rights offer or renounce and cede their subscription rights to existing security holders or third parties, must be approved by: the JSE and conform to the applicable provisions of the JSE Listings Requirements, in the case of listed securities; and the Commission and conform to the provisions of the Companies Act, in the case of unlisted companies.

The Companies Act, subject to the relevant company's memorandum of incorporation (MOI), gives the board the authority to issue shares provided that (in the case of private companies) it is done on a pre-emptive basis. In the case of listed public companies, the JSE Listings Requirements typically require that the MOI contain a provision requiring all issues of shares to be ordinarily on a pro-rata pre-emptive basis, except in certain limited circumstances (such as for the acquisition of assets) or unless otherwise approved by shareholders (eg, specific authority to issue shares for cash). However, in the case where any primary offer results in the voting rights of a particular class of shares issued or to be issued pursuant to the transaction being equal to or exceeding 30 per cent of the voting rights in respect of all the shares of that class held by shareholders immediately before the transaction, the issue of those shares will require approval by shareholders holding 75 per cent of the voting rights exercisable in that meeting in respect of that resolution (even if such issue is done on a pre-emptive basis).

### Secondary offers - equity

Where a party acting independently of a company makes an offer to the public for the acquisition of securities in such company, the offeror is unlikely to be in a position to meet the requirements for the issue of a prospectus because such offeror is not privy to all the information required to be stated in the prospectus regarding the company. In these circumstances, the offeror is required, in terms of the Companies Act, to prepare a written statement, which must set out certain prescribed minimum information concerning the offeror, the securities offered, and the company concerned. If the offer is accompanied by a prospectus (for example, because there is a combined primary and secondary offering), then no written statement is required.

A copy of the written statement must be lodged with the Commission for registration before it is issued, distributed or published. No written statement is permitted to be issued, distributed or published more than three months after the date of registration thereof.

Where the securities to which the offer relates are or will be listed on the JSE or in respect of which permission to deal therein has been granted by the JSE, no such written statement is required and the person making the offer must state such fact in writing in the offer. Further, no written statement is required if the parties to whom the securities are offered or the material is published are persons whose ordinary business or part of whose ordinary business it is to deal in shares, whether as principals or agents, or who are at the time of the offer the holders of shares of the same company.

Both primary and secondary offerings are subject to the same safe harbours in relation to the categories of person to whom the offer can be made without it being considered to be an offer to the public.

Generally, there are no disclosure requirements under the JSE Listings Requirements applicable to secondary offerings of equity securities.

### Primary offers - debt

The issue of debt securities to the public may necessitate the registration of a prospectus in accordance with the provisions of the Companies Act where such an issue constitutes an 'offer to the public' (see Public offerings above).

Each issue of debt securities, whether or not such issue constitutes an 'offer to the public' as contemplated in the Companies Act, will, unless specifically exempted, have to comply with the provisions of the CP Regulations and, in the case of securitisations, the Securitisation Regulations. The CP Regulations mainly impose additional disclosure obligations on an issuer over and above the disclosures required under the Companies Act (if applicable) and Debt Listings Requirements. The CP Regulations also provide directions as to who can issue debt securities and the denominations that an issue of debt securities can be issued in and they place restrictions on the purpose for which monies raised under an issue of debt securities may be applied.

Debt securities that are listed on the JSE will also have to comply with the Debt Listings Requirements.

### Secondary offers - debt

In the same manner that secondary public offerings of equity securities require only a written statement under the provisions of the Companies Act rather than a prospectus, secondary public offerings of debt securities require only a written statement and do not require a prospectus. If the debt securities are listed, a written statement is not required either.

There are no disclosure requirements under the Debt Listings Requirements applicable to secondary offerings of debt securities.

### Primary offer - inward listings by foreign entities on South African exchanges

A foreign entity wishing to list securities on the JSE requires prior FSD approval. To the extent that such foreign entity is conducting business in South Africa, it may be required to register as an external company. Under the Companies Act, making or offering of securities should not, in and of itself, constitute 'conducting business'.

Foreign companies with an inward listing are allowed to use shares as acquisition currency in South Africa and to include South African shareholders in a rights offer. As a result of recent relaxations of South Africa's exchange control restrictions, all South African residents' shareholdings in inward secondary listed securities are treated as the holdings of South African assets without any distinction between institutional and non-institutional investors. South African residents are now allowed to accept inwardly listed shares as acquisition currency in respect of acquisition issues and to exercise their subscription rights in terms of a rights offer.

A foreign entity with an inward listing that raises capital in South Africa must open a special bank account in South Africa for the duration of the listing for purposes of receiving and recording the capital raised. The capital raised must be deployed as soon as possible but not later than one month after being raised and recorded in the special bank account. There are no additional registrations or filing processes for foreign companies raising capital in South Africa (over and above the prospectus or placing document required by any local exchange) other than the requirement to file its constitution and board composition with the Commission.

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

#### Equity offerings

In terms of the Companies Act, when unlisted securities are to be offered to the public, the prospectus, including all copies of material contracts (including any underwriting agreement) to which the issuer is a party, must be lodged and registered with the Commission, which must ensure that all the statutory formalities have been complied with before such prospectus may be issued or the offer made. However, it is not the duty of the Commission to make any assessment of the merits of the offer, nor does the registration of a prospectus imply any approval of the offer.

There is no prescribed time period for registration by the Commission in the Companies Act; therefore, parties will have to take account of the process (based on market practice timelines) when preparing transaction timetables.

In the case of an offer of listed securities, the procedure for the approval of a pre-listing statement, placing of a document or offering a circular by the JSE is as follows: any potential issuer must appoint a sponsor who will be responsible for all dealings between the issuer and

the JSE, including the filing of relevant documents. The sponsor must submit the documents to the JSE for informal comment and, following feedback, for informal approval and eventually formal approval. It typically takes between three to four weeks for the JSE review process to be completed.

Although only three submissions are required, it is not unusual for an additional fourth submission to be made. Other documents, such as the memorandum of incorporation of the listed company (which has to comply with Schedule 10 of the JSE Listing Requirements and a competent person report (in the case of a mining company), have to be submitted to the JSE for approval. The JSE has introduced a fast-track listing process whereby companies with primary listings on the main boards of certain foreign exchanges may apply for a secondary listing on the JSE's Main Board or companies with primary listings on junior boards of certain foreign exchanges may apply for a secondary listing on the JSE's AltX. The fast-track listing process is intended to be quicker than the normal JSE process as applicants do not need to produce a pre-listing statement, but instead a pre-listing announcement is required which must contain a reduced list of prescribed information.

### Debt offerings

The Debt Listings Requirements do not set out any specific time-lines with regards to the listing process; however, the Debt Listings Requirements do stipulate that the submission of all necessary documentation and information required by the JSE must be done in accordance with the timetable detailed on the JSE website. In our experience, the JSE approval process for a placing document typically takes 10 business days. This timing may, of course, be affected by matters such as the identity of the issuer, the nature and complexity of the debt securities sought to be issued and the turnaround time for responding to the JSE's comments.

Preliminary approval of the relevant placing document may be obtained from the JSE when any placing document, offering, roadshow or marketing in connection with debt securities that are to be listed, is undertaken. Alternatively, should preliminary approval not be sought, the placing document may be used for marketing-related activities in respect of debt securities that are to be listed, provided that a statement in bold must be placed on the cover page that the JSE has not yet approved such document.

In practice, you would typically obtain informal approval from the JSE prior to an offer being made. However, the Debt Listings Requirements do not prohibit an offer being made prior to informed approval being obtained. Nevertheless, the consequence of this is that the JSE could potentially deny the listing if the instrument does not comply with the Debt Listings Requirements. The granting of a listing of debt securities must be announced by the issuer on the Stock Exchange News Service no later than close of business on the day before the listing. A signed, final placing document must be made available to the JSE for formal approval and to investors within 48 hours prior to the listing date.

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

In providing offering-related documentation to local investors, the marketing of securities restrictions under the Companies Act, CISCA and FAIS Act must be considered. For instance, under the Companies Act, an advertisement relating to a public offer may be considered as drawing the attention of the public to an offering of securities, and the Companies Act accordingly requires such an advertisement to: have satisfied the disclosure requirements of the Companies Act applicable to a registered prospectus; and be registered prior to being published. Where such advertisement, however, clearly indicates that it is not a prospectus, as well as where and how the relevant prospectus may be obtained, and further satisfies other prescribed requirements contained in the Companies Act, it need not be registered with: the relevant exchange, in the case of listed securities; or the Commission, in the case of unlisted securities. However, if an advertisement does not satisfy all of the requirements of the Companies Act, and despite any statement to the contrary contained in the advertisement, it nevertheless will be regarded as having been intended to be a prospectus and this would mean that anyone responsible for the dissemination of such advertisement would be guilty of an offence.

As a general comment, any communication (oral, internet website or otherwise) made, or written documentation disseminated, that could reasonably be construed as inviting, inducing or influencing investors to participate in an offer of securities or relate to the future profits or losses or valuation of a company or its securities, prior to, during, and immediately following an offering of securities, should: be fair and accurate and not misleading or untrue; if written, contain appropriate disclaimer language; be consistent with (and not contradict) the information that will be contained in any offering document; and in a listed context, if it contains any price-sensitive information, be released in a way which is appropriate and complies with relevant insider dealing legislation and stock exchange rules. Typically, in the context of security offerings, publicity guidelines are pre-agreed to effectively manage the release of communication from a regulatory and market practice compliance perspective.

There are no specific restrictions dealing with the publishing of research reports by underwriters, but the considerations set forth above apply equally.

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

There are no special rules differentiating secondary and primary offerings other than the distinction made in the Companies Act, described in question 2, between the requirement of a written statement rather than a prospectus and the Listings Requirements' obligation.

There are onerous prospectus provisions that impose statutory liability on persons involved in the preparation of a prospectus and directors of the issuer could also incur liability in relation to a prospectus or offer document at South African common law (for deceit or negligence) or for negligent or fraudulent misrepresentation under the South African law of delict. This is not the case for secondary offerings that are accompanied by a written statement. A secondary offering accompanied by a prospectus (which in practice is only likely to occur as part of a combined primary and secondary offering) results in selling shareholders being subject to almost all of the same prospectus liability provisions of the Companies Act as the directors of the issuer who approved the prospectus. In particular, selling shareholders are liable (in the same manner that the directors of the issuer are liable) to pay compensation to all persons who have acquired any shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement in the prospectus, or in any report or memorandum appearing on the face of, or issued with, or incorporated by reference in, the prospectus.

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

Typically, the underwriter provides the issuer or seller with a subscription notice or a purchase notice setting out the name of each subscriber or purchaser, as the case may be, who is entitled to acquire securities and, if specified by the subscriber or purchaser, the details of its account with a South African central securities depository participant (CSDP) into which the securities offered are to be credited (for dematerialised securities).

The issuer or seller is then provided with evidence that the underwriter has transferred the aggregate offer consideration for the securities to be issued by the issuer to such underwriter, or to subscribers arranged for by such underwriter, or to be sold by the seller as the case may be, into a bank account designated by the issuer or seller less a commission equal to a percentage of the gross proceeds from the issue of any securities subscribed for, or the sale of any shares purchased, and the expenses of the offering.

Upon receipt of confirmation of the payment for the securities offered as contemplated above, the issuer will then issue or procure the issuance of the shares to subscribers, or the seller will transfer the shares, as directed by the underwriter in the subscription or purchase notices and will ensure that either the securities offered are credited to the account of the offeree with the CSDP, as designated by the underwriter in the subscription or purchase notice, by issuing an instruction to the relevant CSDP, or in the case of materialised securities, share certificates in respect of such offered securities are issued as instructed in the subscription or purchase notices.

Underwriters are generally responsible for determining the procedures necessary to ensure that the interests of subscribers or purchasers of the securities offered are protected.

Typically, all settlements are done through the JSE's electronic settlement system (ie, Strate), which operates on a three-day settlement cycle (although, this has recently been reduced by the JSE from a five-day settlement cycle).

### **Private placings**

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

The Companies Act provides for the various instances in which the private placement of securities can occur. In a nutshell, a private placement under South African law is any offer for securities that does not constitute an offer to the public in accordance with the Companies Act. IPOs are often done on a private placement basis. The Companies Act only requires public offerings to be accompanied by a prospectus and has no rules or procedures for private placements.

If securities (including debt securities) are intended to be listed on the JSE following a private placement, the Listings Requirements (and in the case of debt securities, the Debt Listings Requirements) set out the specific requirements and documents to be submitted to the JSE by the issuer in order for the listing of the securities to take place. Typically, if an IPO is done by way of a private placement, a pre-listing statement will be required. The Listings Requirements also include rules that regulate vendor private placings (ie, private placings of shares issued to a vendor of assets to the company, to settle a vendor cash consideration). Privately placed debt securities (whether listed or unlisted) may also need to comply with the CP Regulations and, in the case of a securitisation, the Securitisation Regulations. If an existing issuer issues securities that are more than 50 per cent of its existing securities, revised listings particulars (effectively a new pre-listing settlement) are required.

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

The disclosure requirements are contractual for private placings. If the private placing coincides with an initial listing of securities, then a pre-listing statement containing the prescribed information will need to be prepared.

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

##### **Restrictions**

There are no special rules restricting the transferability of shares acquired in a private placement. This is usually governed by contract.

##### **Mechanisms to enhance liquidity**

This can be achieved by:

- placing appropriate provisions in the private treaties between the relevant parties;
- utilising the over-allotment or 'greenshoe' options in the case of price stabilisation of listed securities (permissible in terms of the Listings Requirements or the disclosure requirements); and
- market-making in the case of debt securities, subject to the conditions set out in the CP Regulations.

### **Offshore offerings**

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

Except for the prior approval of the FSD of the terms of the offerings and certain exchange control restrictions that may apply to such terms, there are no general South African rules or restrictions applicable to offerings of securities outside South Africa by South Africans. However, in certain industries, offerings of certain securities are restricted, for example, in the telecommunications industry.

For companies listed on the JSE, the Listings Requirements regulate dual listings and provide that the exchange on which the primary

listing resides takes precedence in the enforcement of any rules ahead of the exchange on which the secondary listing resides. However, where the primary listing is not on the JSE, the JSE reserves the right to instruct the issuer to comply with certain specific sections of, or in full with, the Listings Requirements, where it determines such requirements to be in the interest of shareholders. In the event that there is a conflict between the requirements of the relevant exchanges, the most stringent requirements must be complied with.

Notwithstanding any provisions in an issuer's memorandum of incorporation, an issuer may exclude from a rights offer any non-resident security holders with the Commission's approval, if the issuer can demonstrate that the number of excluded security holders is insignificant compared to the cost and inconvenience of issuing to them.

### Particular financings

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

Any issue of such convertible securities for cash (otherwise than to existing holders of equity securities in proportion to their existing holdings) requires approval from the JSE and from 75 per cent of equity securities holders present and voting in a general meeting. Pursuant to general issues for cash, issuers may not, in the aggregate in any one financial year, exceed 15 per cent of the issuer's relevant number of equity securities in issue of that class (taking into account the potential dilution effect, in the year of issue, of any convertible securities in issue). If the convertible securities are issued to a related party (broadly defined to include, among others, shareholders holding at least 10 per cent of the equity securities, directors and connected persons, etc) and the discount to the market price at the time of conversion of the convertible security is not known at the time of issue of the convertible security, or if it is known that the discount will exceed 10 per cent of the 30-day weighted average traded price of the security at the date of exercise, then the issue will be subject to the issuer providing holders of its securities with a fairness opinion from an independent professional expert acceptable to the JSE indicating whether or not the issue is fair to holders of the issuer's securities. The offering of convertible bonds through a book build has been made simpler by the removal of the requirement that convertible bonds can only be approved by shareholders after the specific terms of the convertible bonds have been agreed to.

A rights offer, where the securities offered will be listed, will not be an offer to the public and hence will not require a registered prospectus although a rights offer circular complying with the JSE Listings Requirements and the Companies Act will need to be prepared. In terms of the Companies Act, renounceable letters of allocation conferring rights on the recipients to either subscribe for securities in terms of the rights offer or renounce and cede their subscription rights to existing security holders or third parties, must be approved by the JSE in the case of listed securities, and the Commission in the case of unlisted securities.

### Underwriting arrangements

#### 12 What types of underwriting arrangements are commonly used?

'Best efforts' and 'bought deal' underwriting arrangements are common in South Africa. In a 'best efforts' deal, the underwriter undertakes to use its best efforts to procure that the securities are taken up. Two types of 'bought deals' are common: in the case of a 'bought deal' where the underwriter is obliged to take up any shares that are not taken up by investors and there is a book build, we have 'soft' as well as 'hard' underwriting arrangements. In a hard underwriting arrangement, the underwriter agrees, before the offer is made, to take up any shares not taken up by the investors. In a soft underwriting arrangement, the underwriter only undertakes to take up shares investors applied for in the book build but did not pay for (ie, the underwriter takes on the 'settlement risk'). Often a soft underwrite is achieved by only signing the relevant agreement or the placing terms after the book build. Of the two, a soft underwrite is more common.

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

Underwriting is usually regulated by agreement between the underwriter and the issuer or seller in terms of which the underwriter agrees to subscribe for or purchase, for a commission, any or a specified portion of the securities that are not subscribed for or purchased by the persons to whom they are offered. The commission is usually calculated as a percentage of the issue or purchase price of the securities being underwritten.

Where warranties and indemnities are given by the issuer in underwriting agreements for secondary offerings, care should be taken to ensure that there is no contravention of the provisions of the Companies Act prohibiting the granting of financial assistance by an issuer for the purchase of or subscription for its shares, although the Companies Act allows for this to be condoned in certain circumstances.

With regard to success fees, the parties are free to agree whatever they deem appropriate (subject to the restrictions on underwriting commissions as outlined below). However, the amount of the commission must be disclosed in the prospectus.

All force majeure clauses are subject to agreement between the parties.

Over-allotment options are regulated by the Listings Requirements or disclosure requirements in the case of listed securities.

#### 14 What additional regulations apply to underwriting arrangements?

In respect of an underwritten public offering requiring a prospectus, the underwriting agreement relating to the public offering must be filed with the Commission and accompanied by a sworn declaration by two directors of the underwriter that it is, and will be, in a position to carry out its obligations even if no securities are applied for.

Even if an offer of securities is made in respect of which no prospectus is required by the Companies Act, a copy of the underwriting agreement and sworn declarations must be lodged with the Commission no later than the date of the proposed offer of securities.

The Listings Requirements state that if a public offer is underwritten, the underwriter must satisfy the JSE that it can meet its commitments in the manner required by the JSE. Additionally, any underwriting commission paid to a shareholder of the issuer should not be greater than the current market rate payable to independent underwriters as the Listings Requirements limit the amount of commission payable and such limitation generally equates to (but does not exceed) the current market rate payable to independent underwriters. The applicant is required to present evidence to the JSE proving the reasonableness of such underwriting commission. The agreement and affidavits or declarations along the lines of those referred to above are also required to be provided to the JSE.

### Ongoing reporting obligations

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

The Listings Requirements (including the Debt Listings Requirements) set out certain continuing obligations that an issuer is required to observe once any of its securities have been admitted to listing on the JSE. In addition, the CP Regulations provide for quarterly returns to be furnished by the issuer of a commercial paper to the Registrar of Banks.

Issuers of unlisted securities must comply with the Companies Act's reporting obligations (including that reviewed interim and audited annual financial statements must be sent to members). The audited annual financial statements of a listed company must include details of all persons with beneficial interests of 5 per cent or more of the securities of such listed company.

In terms of the Takeover Regulations, a person (which includes concert parties and related and interrelated parties) who acquires a beneficial interest of 5 per cent or any further whole multiple of 5 per cent in a regulated company (which includes public companies, state-owned companies, and, subject to certain criteria being satisfied, private companies) will be under an ongoing obligation to inform the issuer within three business days, if and when it is a party to any transaction that will result in such acquisitions. Also, disposals of securities that result in a beneficial holder (which includes concert parties, related

and interrelated parties) in a regulated company dropping below any such 5 per cent multiple threshold must also be disclosed. Upon receiving such trading disclosure, the regulated company will be required to file a copy of such disclosure with the TRP and (unless the trading disclosed involves a trading disposal of less than 1 per cent) report the information to the other holders of the relevant class of securities, and in the case of listed securities, also inform the JSE.

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

### **Equity securities**

An issuer whose securities are listed on the JSE must, subject to approval by the JSE, release announcements regarding price-sensitive information in certain circumstances.

A trading statement must, subject to the Listings Requirements, be published by the issuer (other than issuers who publish quarterly results) as soon as it is satisfied that a reasonable degree of certainty exists that its financial results for the period to be reported upon next will differ by at least 20 per cent from: the financial results for the previous corresponding period; or a profit forecast previously provided to the market in relation to such period. Property entities that elect to adopt distribution per listed security as their measure of financial results, however, must issue a trading statement if the financial results differ by at least 15 per cent, as opposed to the 20 per cent referred to above.

Issuers who publish quarterly results must, instead of publishing a trading statement, include a general commentary in each quarterly results announcement. The declaration of dividends, interest and other similar payments by an issuer should be announced immediately.

Interim reports must be published and distributed to shareholders after the expiration of the first six-month period of a financial year and by no later than three months after that date. In the case of issuers that report to shareholders on a quarterly basis, the quarterly reports must be published and distributed to all shareholders as soon as possible after the expiration of each quarter.

If an issuer has not distributed annual financial statements to all shareholders within three months of its financial year-end, it must publish and distribute to all holders of securities provisional annual financial statements within the three months as specified, even if the financial information is unaudited at that time.

Every issuer must, within six months after the end of each financial year and at least 15 business days before the annual general meeting, distribute to all holders of securities and submit to the JSE a notice of the annual general meeting and annual financial statements for the relevant financial year, which financial statements will have been reported on by the issuer's auditors.

All issuers are required to use their best endeavours to ensure that a minimum percentage of each class of securities (at present 20 per cent) is held by the public (the minimum liquidity free float requirement) in order to ensure reasonable liquidity. An issuer must inform the JSE in writing, without delay, when it becomes aware that a proportion of any class of listed securities in the hands of the public has fallen below the minimum liquidity free float requirement.

An issuer must ensure that all the necessary facilities and information are available to enable holders of securities to exercise their rights. In particular, it must inform them of the holding of meetings that they are entitled to attend, enable them to exercise their right to vote, where applicable, and release announcements and distribute circulars in terms of the Listings Requirements.

An issuer, through its sponsor, must notify the JSE of any change to the board of directors or company secretary, including the appointment of a new director or company secretary, the resignation, removal, retirement or death of a director or the company secretary, and any changes to any important functions or the executive responsibilities of a director, and any trading in securities by directors or company secretaries (or their associates).

An issuer must notify the JSE of the termination, appointment, and the resignation of the auditors as well as any change of the individual auditor classified as the designated auditor. Notification must be given without delay and by no later than the end of the business day following the decision to terminate the appointment of the auditor or after receipt of the auditor's resignation.

If securities are registered in the name of a person who is not the holder of the beneficial interest, issuers must establish and maintain

a register of disclosures made in terms of the Companies Act, which requires the registered holder to disclose: the identity of the person on whose behalf the security is held; the identity of each person with a beneficial interest in the security; the number and class of securities held; and the extent of the beneficial interest. The issuer must further publish the beneficial interests of directors and major shareholders in its annual financial statements. If an issuer receives a notice regarding certain share transactions (namely, affected transactions and offers), the issuer must file a copy of the notice with the TRP and must report the information to the holders of the relevant class of securities, unless the notice concerns a disposal of less than 1 per cent of the class of securities. The issuer must, within 48 hours after receipt of such notice, publish the information contained in the notice on SENS, but not in respect of notices that relate to a disposal of less than 1 per cent of the relevant class of securities.

Issuers must comply with the specific requirements concerning corporate governance and must disclose their compliance with these requirements in their annual report. Additionally, issuers are annually required to confirm that they comply with the corporate governance requirements under the South African Code of Corporate Practices and Conduct as set out in the third King Report on Corporate Governance, and to explain any non-compliance.

Issuers must comply with certain disclosure requirements and obtain shareholder approval for material transactions concluded by the issuer or its material subsidiaries. These disclosure requirements increase depending on the size of the transaction and large transactions require shareholder approval.

### **Debt securities**

An issuer of debt securities is required to publish on SENS any information material to its financial or trading position.

## **Anti-manipulation rules**

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

#### **Financial Markets Act**

The Financial Markets Act prohibits insider trading. It stipulates that an insider (as defined) who knows that he or she has inside information (as defined) and who deals directly or indirectly or through an agent for his or her own account in the securities listed on a regulated market, to which the inside information relates or that are likely to be affected by it, commits an offence. Further, an insider, who knows that he or she has inside information and deals, directly or indirectly, for any other person in securities listed on a regulated market to which the inside information relates or that is likely to be affected by it, commits an offence. An insider who knows that he or she has inside information and who discloses the inside information to another person, commits an offence. Finally, it is an offence to encourage or cause another person to deal or discourage or stop another person from dealing in the securities listed on a regulated market to which the inside information relates or that are likely to be affected by it.

The Financial Markets Act also sets out prohibited trading practices. It provides that no persons may, either for their own account or on behalf of another person, directly or indirectly use or knowingly participate in the use of, any practice that creates (or is likely to have the effect of creating) a false or deceptive appearance of the trading activity in connection with that security; or that creates an artificial price for that security. No person may place an order to buy or sell listed securities that, to his or her knowledge, will, if executed, have the effect of creating a false or deceptive appearance of the trading activity in connection with a security; or creating an artificial price for that security. The section sets out a non-exhaustive list of certain transactions that are deemed to be false or deceptive trading practices and are thus prohibited. The section expressly provides that the employment of price-stabilising mechanisms regulated by the Listings Requirements or the JSE Equities and Directives Rules (JSE Rules) does not constitute a practice that creates an artificial price for securities that are subject to such price-stabilising mechanisms, and therefore does not constitute insider trading.

The Financial Markets Act prohibits the making of false, misleading or deceptive statements, promises and forecasts. It states that no person may, directly or indirectly, make or publish in respect of listed

### Update and trends

In September 2016, the FSB granted exchange licences to ZAR X Proprietary Limited (ZAR X) and 4 African Exchange Proprietary Limited (4AX). The FSB had, in March 2016, granted ZAR X a conditional stock exchange licence. However, following an appeal by the JSE, the conditional licence was suspended. The JSE's appeal was dismissed in September 2016. Prior to the granting of licences to ZAR X and 4AX, the JSE was South Africa's only licensed exchange. ZAR X has said that it will be particularly geared towards facilitating listing of the shares of restricted share schemes that are currently trading over the counter – such as restricted shares issued pursuant to broad-based black economic empowerment (BEE) schemes, under which shares may only be traded between 'black people'. The FSB has determined that these over-the-counter trading systems contravene the Financial Markets Act, prompting the MTN Group and Sasol Limited's BEE schemes to move to the JSE's empowerment board. According to 4AX, it intends to provide a low-cost yet well-regulated solution for issuers and investors alike through a proven world-class exchange technology platform. The impact of these two new exchanges on the South African capital markets space remains to be seen.

The JSE has recently completed its move from a T+5 settlement cycle to a new shorter T+3 cycle. 'T+' refers to the number of business days that elapse from the day on which a transaction takes place, to the day on which the transaction must be settled. The move to T+3 is intended to:

- more closely align the South African market to global standards;
- improve both the credibility and operational efficiency of the local market; and
- bring about a reduction in the value of unsettled trades (thereby contributing to the management of systemic risk), as well as improving liquidity in the market.

The JSE has recently seen an increase in the listings of special purpose acquisition companies (SPACs). In October 2016 Capital Appreciation Limited was the first SPAC to be listed on the JSE. Since then a number of SPACs have been admitted to the main board of the JSE including Hulisani Limited and Gaia Infrastructure Capital.

securities or in respect of the past or future performance of a public company (which does not have to be listed) any statement, promise or forecast that is:

- at the time and in the light of the circumstances in which it is made, false or misleading or deceptive in respect of any material fact and that the person knows, or ought reasonably to know, is false, misleading or deceptive; or
- by reason of the omission of a material fact is rendered false, misleading, or deceptive and that the person knows or ought reasonably to know, is rendered false, misleading or deceptive by reason of the omission of that fact.

A person who has made such a statement unaware that it was false, misleading or deceptive, and who becomes aware of this, must publish a full and frank correction without delay. Failure to do so results in an offence being committed.

### JSE Rules

The JSE Rules state that every transaction in equity securities entered into by a JSE member (a broker) must be concluded on the specific condition that the transaction is entered into subject to the provisions of the Financial Markets Act and JSE Rules.

The 'market conduct' provisions of the JSE Rules prohibit manipulative or deceptive trading practices. Prohibited practices include those that create a false or deceptive appearance of trading activity or an artificial price for an equity security. Specific practices are mentioned in the JSE Rules that require approving for entering on the JSE equities trading system, including:

- an order to buy or sell an equity security with the knowledge that an opposite order or orders of substantially the same size at substantially the same time and at substantially the same price, have been or will be entered by or for the same or different persons with the intention of creating a false or misleading appearance of active public trading in connection with, or an artificial market price for, such equity security;
- orders to buy any equity security at successively higher prices or orders to sell any equity security at successively lower prices for the purpose of unduly or improperly influencing the market price of such equity security;
- an order at or near the close of the market, the primary purpose of which is to change or maintain the closing price of such equity security;
- an order to buy or sell any equity security during an auction call period and cancelling such order immediately before the auction matching, for the purpose of creating or inducing a false or deceptive appearance of demand for or supply of such equity security;
- an order to buy or sell an equity security that involves no change in the beneficial ownership of that equity security;

- effecting or assisting in effecting a market corner;
- maintaining the price of an equity security at a level that is artificial;
- employing any device, scheme or artifice to defraud any other person as a result of a transaction effected through the JSE equities trading system; and
- engaging in any act, practice or course of business in respect of trading in equity securities that is deceptive or that is likely to have such an effect.

### Takeover Regulations

The Takeover Regulations, which apply in a takeover situation, impose diverse duties of disclosure on the board of directors of offeror and offeree companies. In addition, the Takeover Regulations impose a duty on such boards and their respective advisers, including financial advisers, to act in the best interests of the holders of the securities involved in an affected transaction and a duty on each director of an offeror and of the offeree company to ensure, so far as he or she is reasonably able, that the Takeover Regulations are complied with in the conduct of an affected transaction. This is explained more fully in the South Africa chapter of *Getting the Deal Through – Mergers & Acquisitions 2015*.

### Price stabilisation

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

Over-allotment, with or without greenshoe options, is, in terms of the Listings Requirements (including the Debt Listings Requirements), a permissible means of stabilising the prices of listed securities. The Listings Requirements limit the period during which the over-allotment and ancillary transactions may take place.

In the case of securities (including debt securities) listed or to be listed on the JSE, there are comprehensive regulations dealing with, inter alia:

- the size of the over-allotment (which may not exceed 15 per cent of the issue size);
- the stabilisation period (which will end 30 calendar days after the relevant listing or sale date in the case of pre-listing trading);
- disclosure requirements of the stabilisation (in announcements and circulars, including whether there is a greenshoe and the access of the issuer to the stabilising manager's register);
- pricing restrictions;
- the strict requirements and criteria for appointment as a stabilising manager and the obligation to maintain a register of all transactions effected by it in the course of the stabilising action, including net tangible assets of not less than 2 billion rand in jurisdictions acceptable to the JSE; and
- the requirement that the stabilising manager has a scrip lending agreement with a CSDP (to be approved by the JSE).

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**Liabilities and enforcement**


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

The Companies Act imposes liability for untrue statements in a prospectus on certain groups of people. These people are liable to pay compensation to all persons who have acquired shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement.

It is important to note that certain sections of the Companies Act regarding offers to the public impose strict statutory liability in respect of prospectuses and infringement of these sections can constitute both a criminal and a civil offence.

In summary, if there is a material misstatement or omission (whether fraudulent or not), the promoters, directors and other people responsible for the prospectus (including selling share-holders) may incur civil and criminal liability both under the Companies Act and the common law.

**Insider trading civil liability**

Civil liability that results from insider trading is governed by the Financial Markets Act. In terms of these provisions, the insider may be liable to pay to the FSB an administrative sanction not exceeding any profits or losses made as a result of such dealing, a penalty for compensatory and punitive purposes, interest and costs of suit.

**Offences under the Financial Markets Act**

In terms of the Financial Markets Act, any person who commits an offence in relation to insider trading, prohibited trading practices or the making of false, misleading or deceptive statements, promises and forecasts, is liable on conviction to a fine not exceeding 50 million rand or to imprisonment for a period not exceeding 10 years, or both.

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

Remedies are generally sought through the courts or regulators such as the FSB and the TRP. The remedies available can be obtained either through criminal, administrative or civil litigation.

The FSB was established in terms of the Financial Services Board Act, 1990 as an enforcement committee to discipline certain professionals operating in the securities industry. After consideration of a matter referred to the enforcement committee, an administrative penalty can be imposed on a person who provides securities services, or the committee may require such person to pay to the FSB a compensatory amount.

The Directorate of Market Abuse (DMA) is empowered in terms of the Financial Markets Act to investigate cases of insider trading, prohibited trading practices, and the making of false, misleading or deceptive statements, promises or forecasts in respect of listed securities. The DMA can refer cases of insider trading to the enforcement committee of the FSB, which has the power to impose administrative penalties on an offender. The DMA may also hand the matter over to the prosecuting authorities for consideration or take civil action against an alleged offender.


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# Switzerland

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## Statutes and regulations

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

The offering of securities by Swiss or foreign issuers in Switzerland is governed by a variety of rather fragmented rules and regulations, the applicability of which depends largely on the specifics of the offering, the securities offered, the issuer and the other parties participating in the offering.

For practical purposes, of most relevance are various provisions set forth in the Code of Obligations (CO), including those providing for the basic prospectus disclosure requirements for public offerings of equity and debt securities, and the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA) and its implementing ordinances and regulations, such as, in particular, the listing rules adopted by the relevant exchanges. The listing rules are not adopted by the governmental or regulatory authority, but by the relevant exchanges acting as self-regulated bodies entrusted with various supervisory and regulatory functions. The SIX Swiss Exchange (SIX) is by far the most important stock exchange in Switzerland.

If the offered product qualifies as a Swiss or foreign collective investment scheme under Swiss law, then such offering is subject to the requirements and restrictions set forth in the Federal Act on Collective Investment Schemes (CISA) and its implementing ordinances. The offering in or from Switzerland of structured products or notes (such as index- or fund-linked notes) to retail clients is also subject to specific requirements and restrictions under CISA.

The Swiss Financial Market Supervisory Authority (FINMA) is the key supervisory and regulatory authority in the Swiss financial market and, as such, is entrusted with various powers and responsibilities including the licensing and supervision of exchanges, banks, securities dealers (ie, brokers, own-account dealers, issuing houses, market makers and derivatives firms), insurance companies and collective investment schemes. Swiss law differentiates between the public offering of securities and their listing on an exchange. Although a government authorisation, filing or registration is neither required nor possible for the public offering of equity or debt securities, the listing of such securities requires prior filings with, and the authorisation of, the relevant exchange. Within SIX, it is the Regulatory Board that is in charge of admitting the listing of, the suspension of the trading in and the delisting of securities, and ensuring ongoing compliance.

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## Public offerings

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

As explained in question 1, Swiss law differentiates between the public offering of securities and their listing. While the public offering of equity or debt securities in Switzerland does not by itself trigger the obligation to submit filings with or seek the approval from a governmental or regulatory authority, this is different with respect to securities to be listed on a stock exchange. Any such listing requires the issuer to submit a listing application together with various annexes (including,

in principle, a listing prospectus to the relevant admission board for it to determine whether the listing requirements are met). On SIX, the application must contain various types of information, such as a short description of the securities, the requested date of the first trading day and a declaration that the listing particulars and the listing notice are complete and comply with the listing rules of SIX (the listing rules), and that there has been no material deterioration of the financial condition of the issuer since the publication of the listing particulars. The listing prospectus must contain specific information on the issuer, including its financial statements, the securities and the persons or companies bearing responsibility for the contents of the listing prospectus.

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

If a listing of securities on the SIX is intended, an authorised representative (recognised as a listing expert by SIX) must submit a listing application and all relevant annexes to the Regulatory Board on behalf of the issuer no later than 20 trading days prior to the scheduled listing date or, as the case may be, prior to the start of the book-building period. The listing application and its annexes may be in German, French, Italian or English. The SIX may require further information and explanatory statements as it deems necessary and takes a final or, upon the request of the applicant, a preliminary decision on the requested listing. Debt securities and derivatives are eligible for provisional trading pending the final decision on the application, but are not considered to be listed pursuant to the listing rules during that period. The provisional admission of bonds and derivatives can be processed online (internet-based listing) and, provided that the issuer has been approved by the Regulatory Board, allows trading three business days or, under certain circumstances as the case may be for derivatives, one day after the listing application is submitted.

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

Except for the obligation to prepare a prospectus in accordance with the relevant provisions in the CO and, with respect to listed public offerings, also in accordance with the listing rules, no publicity restrictions apply to the public offering of equity or debt securities. Publicity restrictions apply, however, to the distribution of foreign collective investment schemes in or from Switzerland to retail clients, which require prior registration with FINMA. The distribution of foreign collective investment schemes exclusively directed at qualified investors does not require prior registration with FINMA but may trigger an obligation to appoint a Swiss representative and a Swiss paying agent depending on the type of qualified investor targeted in Switzerland. Also, restrictions on the ability of underwriters to issue research reports have been introduced by the Swiss Bankers' Association in its Directive on the Independence of Financial Research. The Directive is formally recognised by the FINMA as the minimum standard in the banking industry and is therefore applicable to all Swiss banks and securities dealers. Pursuant to the Directive, the business unit of a bank responsible for financial research must be organisationally, hierarchically, functionally and physically independent from the unit that is responsible

for issuing securities or for the bank's investment banking activities. This implies that the investment banking operations and the financial research units of the relevant bank are structured in such a way that other units have no access to privileged information and that any such privileged information is made available simultaneously to the clients. A bank acting as a manager or co-manager in an IPO is barred from publishing research reports on, or releasing recommendations with respect to, the issuer during a certain 'blackout period'.

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

Swiss law allows a shareholder to participate in any newly issued equity or equity-related securities (primary offering) pro rata to its existing participation in the share capital of the issuer. The general shareholders' meeting of the issuer may, however, resolve to exclude such pre-emptive subscription rights on particular grounds ('important reasons'), for example, a merger or an acquisition of a business, with the approval of a qualified majority of two-thirds of the shareholder votes and an absolute majority of the nominal values represented at the meeting (the articles of association of the issuer may provide for higher majorities).

If a prospectus has been prepared in a primary or secondary offering, the persons having assisted in its preparation and distribution may become liable based on prospectus liability (see question 19).

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

Settlement of on- and off-exchange trades on SIX occurs through SIX SIS Ltd (SIS), Switzerland's central securities depository (CSD), which is currently licensed as a bank under Swiss law. In September 2007, SIX Securities Services Ltd introduced the single central counterparty (CCP) model with SIX x-clear (a wholly owned subsidiary of SIX Securities Services Ltd) acting as CCP for the clearing of most of the trades in clearing-eligible cash equities and ETFs listed and traded on SIX. These services have been extended to cover European equities and ETFs traded under SIX's Liquidnet Service. The 'Swiss value chain' comprises, among others, SIX, SIX x-clear, SIC4 (the updated Swiss interbank clearing system, which was introduced in April 2015 and is operated by SIX Interbank Clearing Ltd) and SECOM (the securities settlement system operated by SIS), and allows full automation and real-time integration of trade, settlement and payment involving central bank funds (SFIDVP - simultaneous, final, irrevocable delivery versus payment). Once SIX has matched buy and sell orders, settlement instructions are sent to the CCP in the case of transactions matched on-exchange and to the appropriate CSD in the case of transactions that have not been cleared. After having verified that the seller's securities account is sufficiently covered, a payment instruction is released to SIC and after receipt of payment has been confirmed, the transfer of the securities is effected from the seller's to the buyer's account.

#### Private placings

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

Swiss law does not provide for specific rules governing the private offering of equity or debt securities. As a general rule, the private placement of securities in Switzerland does not require a prospectus. A placement is deemed to be private if it is not made to the public (ie, if it is addressed to a limited circle of offerees). While no clear limitation on the permitted number of potential investors to whom securities can be offered by way of a private placement exists under Swiss law, the more conservative view in Switzerland is that an offering directed at or made to 20 or fewer potential investors (irrespective of their sophistication or wealth) qualifies as a private offering under Swiss law. For the purposes of determining the number of potential investors, the number of persons approached is relevant and not the number of persons who eventually purchase the relevant securities. This rule, which is or was used in other areas of Swiss financial legislation, may be viewed as a safe harbour rule. However, in light of the amended EU Prospectus Directive (although not applicable in Switzerland), pursuant to which an offering addressed to fewer than 150 persons per member state does not trigger

an obligation to prepare a prospectus, the above-mentioned 20 offeree rule has been criticised as being too stringent. It is at the same time not disputed that the legal concept of a 'limited circle of offerees' has not only a quantitative, but also a qualitative aspect. Arguing that the focus should not primarily be on the number of offerees approached but on the manner in which potential investors are being approached, an offering to more than 20 potential investors should be permissible (without triggering an obligation to prepare a prospectus), provided that:

- the prospective investors are hand-picked and are being approached on an individual basis (eg, through personal letters or 'by invitation only' presentations); and
- the offering is directed at or made to a predefined circle of potential investors that share common qualifying criteria that distinguish them from the public at large.

However, this latter approach is still untested and an offering of equity or debt securities directed at or made to more than 20 potential investors may not, in the present state of law and practice, be considered to be a safe harbour.

Privately placed debt securities issued by a non-Swiss issuer with the participation of Swiss banks or securities dealers are subject to the guidelines of the Swiss Bankers' Association on notes of foreign borrowers. If the issue of the debt securities is governed by Swiss law, and the securities are denominated in Swiss francs with denominations of 10,000 Swiss francs or more, then the relevant Swiss lead manager is required, pursuant to the guidelines, to prepare a prospectus that complies with the disclosure requirements set forth in the guidelines.

No prior approval of FINMA is required for the offering of shares or interests in a non-Swiss collective investment scheme in or from Switzerland if such offering is directed at and made exclusively to 'qualified investors' (as defined in CISA and its implementing ordinance and guidelines). However, under CISA such offering may trigger regulatory requirements such as the appointment of a Swiss representative and a Swiss paying agent.

- The concept of 'qualified investors' encompasses, inter alia:
- financial intermediaries that are subject to a prudential supervision (ie, banks, securities dealers, fund management companies, asset managers of collective investment schemes, and central banks);
  - supervised insurance companies;
  - pension funds with professional treasury management;
  - corporate investors with professional treasury management;
  - high net worth individuals (ie, individuals that are holding, directly or indirectly, a minimum net wealth of 5 million Swiss francs in financial assets or holding a minimum net wealth of 500,000 Swiss francs and having sufficient technical knowledge), provided such individuals or, in the case a private investment structure has been set up for one or more high net worth individuals, the person responsible for managing the investment structure, have expressly requested, on a written basis, ('opt-in') to be considered as 'qualified investors';
  - investors having entered into a written discretionary asset management agreement, provided that they do not exercise their right to 'opt out' of the 'qualified investors' status and the written discretionary asset management agreement is entered into with a regulated financial intermediary or with an independent asset manager that is subject to anti-money laundering supervision, rules of conduct meeting certain minimum requirements, and the relevant management agreement complies with the directives of a recognised professional organisation (eg, Swiss Bankers' Association guidelines); and
  - independent asset managers (if the relevant independent asset manager meets the requirements of the CISA and undertakes in writing to exclusively use the fund-related information for clients who are themselves 'qualified investors').

In contrast, an offering of non-Swiss collective investment schemes that is exclusively directed at, or made to, financial intermediaries that are subject to a prudential supervision (ie, banks, securities dealers, fund management companies, asset managers of collective investment schemes, insurance companies and central banks) or to investors having entered into a written discretionary asset management agreement is not considered a 'distribution' within the meaning of CISA and therefore is not subject to any regulatory requirements whatsoever.

Further, the distribution of structured products in or from Switzerland limited to 'qualified investors' as defined in CISA is not subject to regulatory requirements under CISA; in particular, no simplified prospectus will need to be prepared in connection with such offering.

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

Except for specific information and prospectus requirements applicable to privately placed debt securities governed by Swiss law and issued with the participation of Swiss banks or securities dealers pursuant to the guidelines of the Swiss Bankers' Association on notes of foreign borrowers (see question 7), no specific information is required to be made available to potential investors.

Non-Swiss collective investment schemes to be distributed to 'qualified investors' in Switzerland must use fund documentation mentioning the Swiss representative, the Swiss paying agent, the place of jurisdiction and the place where the relevant fund documents are available free of charge. In addition, and in order to comply with the Swiss Funds & Asset Management Association's (SFAMA) guidelines on the distribution of collective investment schemes (Distribution Guidelines) and the SFAMA guidelines on duties regarding the charging and use of fees and costs (Transparency Guidelines), certain information on fees and costs as well as on retrocessions and rebates must be disclosed in the relevant fund documentation.

Notwithstanding the above, information submitted to potential investors must be accurate and may not be misleading. If false or misleading statements are made in connection with a private placement, the issuer or the persons involved in preparing the relevant offering documents and the offering may become liable (see question 19).

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

As explained more fully in question 7, any private offering of securities made with an aim to ultimately offer or distribute the relevant securities to the public is deemed to be a public offering. Otherwise, no restrictions apply to the transfer of securities acquired in private placements. In view of the foregoing, liquidity enhancing mechanisms are not commonly used techniques with respect to private placements in Switzerland.

#### **Offshore offerings**

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

With regard to offerings of debt securities by foreign issuers in Switzerland, the substantive disclosure requirements for debt securities referred to in questions 2 and 8 also apply to such foreign issuers.

Swiss rules on conflicts of law allow an investor to initiate legal actions for compensation of damages incurred in connection with the public offering of equity (and debt) securities, either under the (foreign) law under which the foreign issuer is organised or the law of the jurisdiction where the offering took place (which is assumed to be Switzerland in this case). Foreign issuers should therefore be advised to ensure that their offering of equity (and debt) securities in Switzerland is, in substance, fully compliant with Swiss disclosure requirements, irrespective of the law by which they are organised or by which the offering is expressed to be governed.

Also, specific listing rules exist for foreign issuers with respect to primary, secondary and dual listings of equity securities. Debt securities and derivatives listed on SIX may be governed by Swiss law or the law of any other OECD country. Upon the request of an issuer, the SIX may under certain conditions admit the laws of other countries as well. Eurobonds are eligible for trading on SIX in the 'international bonds' segment and for certain additional exemptions (eg, an issuer of eurobonds does not have to prepare a listing prospectus and is exempt from compliance with ongoing disclosure requirements provided that the relevant bonds are already listed on an exchange recognised by SIX). With regard to the private placement of debt securities of foreign issuers governed by Swiss law with denominations of 10,000 Swiss francs or more in which Swiss banks or securities dealers are involved, the guidelines on notes of foreign borrowers issued by the Swiss Bankers' Association (referred to in question 7) are applicable.

#### **Particular financings**

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

Swiss law contains few specific rules governing the issue of exchangeable or convertible securities. These rules mostly address the circumstances under which the right of the issuer's shareholders to subscribe for the new securities by preference can be suppressed.

No issuance prospectus needs to be produced for the public offering of derivatives (although a listing prospectus may be required). However, the offering to the public of structured products, such as index- or fund-linked notes in or from Switzerland, requires a 'simplified prospectus', which, *inter alia*, must describe the key characteristics of the structured product, its profit and loss prospects and the important risks for the investors. Further, structured products within the meaning of CISA may only be distributed to retail clients in Switzerland if they are issued, guaranteed or distributed either by a Swiss bank, securities dealer or insurance company, or a non-Swiss bank, securities dealer or insurance company subject to an equivalent supervision and having an establishment in Switzerland whose duty is to make the relevant prospectus available to investors upon their request. If the non-Swiss issuer, the guarantor and the distributor do not comply with these requirements and, in particular, if none of them have an establishment in Switzerland, the structured products may only be distributed to retail clients in Switzerland through a financial institution regulated in Switzerland. The publication of a simplified prospectus is not required where a listing of the product on a Swiss stock exchange is contemplated.

The SIX has adopted specific rules for the listing of derivatives as well as convertible securities. These rules provide for substantive disclosure requirements with respect to both the derivative and the underlying securities.

#### **Underwriting arrangements**

#### **12 What types of underwriting arrangements are commonly used?**

Fixed-price underwriting is a common form of underwriting arrangement in Switzerland, in particular with regard to debt offerings, and means that the whole issue is bought by the underwriter (or underwriters, in the case of a syndicate) at a fixed price. By contrast, 'soft' underwriting has increasingly become a customary underwriting arrangement for equity offerings, whereby the issue price of the securities is fixed after a book-building process. Arrangements by which the securities to be offered are 'underwritten' on a best-effort basis only are also often used.

#### **13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and overallotment options?**

The underwriting agreement will typically contain an indemnity clause under which the issuer agrees to indemnify the underwriter against any losses, claims, damages or liabilities to which the underwriter may become subject, insofar as such losses, claims, damages or liabilities arise out of untrue statements or omissions in the prospectus or other materials prepared in connection with the issue, or the breach of representations, warranties and undertakings under the underwriting agreement. Depending on the nature and scope of the indemnification provisions, their enforceability may be limited by compulsory Swiss company law (such as the prohibition of redemption of the paid-in share capital). The underwriting agreement typically contains a clause allowing the underwriter to terminate the agreement in the case of force majeure (which may take the form of a suspension of trading, a moratorium on commercial banking activities, material adverse change to the financial condition of the issuer, material adverse change in international financial conditions, calamity, crisis, and others). The underwriting arrangement usually provides for the payment of the fee only in the case of completion of the offering. In addition, the underwriting arrangement usually provides for an incentive fee paid by the issuer in its sole discretion. Finally, the underwriting agreement typically entitles the lead manager of the underwriting syndicate to over-allot and effect transactions in the newly issued securities with a view to stabilising or maintaining the market price of the newly issued securities at a level other than that which might prevail in the open market.

### Update and trends

#### New proposed legislation

Following a consultation process initiated by the Swiss Federal Council in June 2014 concerning the drafts of a new Swiss Federal Financial Services Act (draft FinSA) and of a new Swiss Federal Financial Institutions Act (draft FinIA), the Swiss Federal Council in November 2015 adopted the dispatch (formal draft) of the FinSA and the FinIA to serve as a basis for a debate in the Swiss parliament. In December 2016, the two proposed acts passed the first chamber of the Swiss parliament and it is currently expected that the new legislation, if adopted by the Swiss parliament, will come into effect either mid-2018 or at the beginning of 2019.

#### The draft FinSA

The draft FinSA, *inter alia*, introduces uniform prospectus rules that shall generally apply to all securities offered publicly into or in Switzerland or admitted to trading on a trading platform in Switzerland. The content and approval of the prospectus are inspired by the EU Prospectus Directive. The obligation to prepare a prospectus

under the FinSA will be triggered by any public offering, be it primary or secondary. Similar to the EU Prospectus Directive, the draft FinSA provides for a number of exemptions from preparing a prospectus. The proposed prospectus rules also provide for an *ex ante* review and approval process by an independent authority. Further, the draft FinSA introduces an obligation to prepare a basic information sheet that will be necessary for any offering of financial instruments (other than mere equity instruments and, in the version passed by the first chamber of Swiss parliament, debt instruments without any derivative features) to retail investors in Switzerland and that has to be drafted in German, French, Italian or English.

#### The draft FinIA

The draft FinIA, *inter alia*, introduces a prudential supervision of all financial service providers who operate an asset management business (including asset managers of individual client assets and asset managers managing the assets of a Swiss pension fund).

### 14 What additional regulations apply to underwriting arrangements?

Pursuant to the Act on Stock Exchanges and Securities Trading (SESTA), only firms with a securities dealer licence from FINMA may act as underwriters in Switzerland in a professional capacity unless the underwriting by a non-Swiss bank or securities dealer occurs on a mere cross-border basis.

The acquisition of securities of an issuer already listed on a Swiss exchange by the underwriters under the underwriting agreement is subject to the notification requirements for material shareholdings set forth in FMIA (which are usually met by disclosing the relevant information in the prospectus prepared for the offering), unless the underwriters have been granted an exemption by SIX. Also, underwriters are subject to the Swiss Bankers' Association's Directive on the Allocation of Equity-related Securities offered by way of a Public Offering in Switzerland (the Allocation Directive), which sets up minimum standards for the Swiss banking industry and whose purpose is to safeguard fairness and transparency of the allocation of securities in the context of a public offering.

### Ongoing reporting obligations

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

Neither the offering and issue of securities of a Swiss or foreign issuer by way of private placement, nor the public offering of non-listed securities triggers by itself ongoing reporting obligations under Swiss law (except for the general obligation of, among others, corporations and limited liability companies to prepare financial statements). Rather, such reporting obligations (including *ad hoc* publicity) become applicable to the issuer only upon the listing of the relevant securities on a Swiss exchange.

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

Companies incorporated in Switzerland are required to file certain corporate documents with the commercial registry, such as their articles of association and the documents related to certain corporate actions. These documents are publicly available.

Pursuant to the listing rules of SIX, the main duties that an issuer is required to comply with in order to maintain the listing of its securities consist of:

- producing periodic financial statements in accordance with an accounting standard recognised by SIX (in principle, within four months from the close of the relevant financial year);
- notifying specific information to the SIX (in particular certain corporate actions or changes to the terms of the listed securities); and
- disclosing price-sensitive information on an ongoing basis ('*ad hoc* publicity' rules).

Further, issuers whose equity securities have their primary or main listing on SIX are required to include a corporate governance report in their annual report (including information on their organisation and governance structure) and to disclose to SIX transactions in equity securities (and assimilated instruments) carried out by their board members and senior management (management transactions), which will then be published by SIX on its website. In addition, Swiss companies having equity securities listed on a stock exchange are required to include a remuneration report in their annual report, which contains information relating to the remuneration received by their (current and former) board members and senior management, and to disclose the stakes held by these persons and significant shareholders of the company. Similar rules apply to non-Swiss companies having equity securities listed on the SIX and not in their home jurisdiction.

In addition, if a third party notifies an issuer incorporated in Switzerland and whose equity securities are listed in Switzerland, or an issuer incorporated outside Switzerland and whose equity securities have a primary listing on a Swiss stock exchange, that it has (directly, indirectly or acting in concert with other third parties) acquired or disposed of shares (including certain financial instruments relating to such shares) and thereby reaches, exceeds or falls below the thresholds of 3, 5, 10, 15, 20, 25, 33.33, 50 or 66.66 per cent of the issuer's voting rights, the issuer must publish a notice regarding such a shareholding on the electronic platform maintained by the relevant disclosure office, if any, or, in the absence of such an electronic platform, in the Swiss Official Gazette of Commerce and in at least one of the main electronic media specialising in stock market data. The same duty applies if the issuer acquires or disposes of its own shares. Issuers are subject to additional reporting obligations if they are subject to a public takeover offer.

### Anti-manipulation rules

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

The main rules prohibiting market abuse are the provisions of FMIA governing insider trading and market manipulation, which provide for both criminal law and regulatory remedies. The regulatory provisions define insider trading and market manipulation in a manner that goes beyond the criminal offences of insider trading and market manipulation set forth in FMIA (eg, no wilful intent is required) and apply to all market participants regardless of whether they are subject to the supervision of FINMA. Since the scope of those regulatory prohibitions is rather wide and also encompasses legitimate behaviour, the implementing ordinance to FMIA (FMIO) provides for certain exemptions.

Additional rules of conduct are imposed on banks, securities dealers and other financial intermediaries subject to the supervision of FINMA. However, these additional rules of conduct only apply to financial intermediaries subject to the supervision of FINMA, and do not generally apply (subject to certain exceptions) to foreign firms acting in Switzerland on a cross-border basis exclusively.

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

FMIO permits certain price stabilisation measures in connection with a public offering of securities. Such stabilisation measures are only permitted if, inter alia, both the contemplated stabilisation period and the securities dealer carrying out the market stabilisation are made public before the relevant securities start to trade, the market stabilisation occurs within 30 days of the offering, the trades in relation with the market stabilisation are made public and are carried out at a price not exceeding the respective issue price, or in the event of a trading with rights or convertible rights at a price not exceeding the relevant market price.

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

If there is a public offering of securities, the most common basis of liability is prospectus liability. The present view in Switzerland is that such liability is a liability in tort. Anyone who has participated intentionally or negligently in the preparation or dissemination of a prospectus or a similar instrument containing statements that are untrue, misleading or not in compliance with statutory requirements, is liable to compensate any person who acquires the relevant securities and suffers damage as a result. Improper securities transactions may also give rise to enforcement measures under FMIA and the Financial Market Supervision Act (eg, disgorgement of illicit profits) or criminal prosecution for insider dealing or market manipulation.

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

Although prospectus liability gives rise to civil litigation, insider dealing and market manipulation may give rise to criminal proceedings against the persons involved. Also, administrative proceedings may be initiated by FINMA, which may give rise to measures such as a suspension of the relevant trader, an injunction from assuming a supervisory function in a regulated firm or a disgorgement of illicit profit. Further measures may be taken against regulated firms, such as a licence withdrawal. Moreover, SIX has disciplinary powers in cases of improper activities in relation to securities listed on its markets and may decide to impose penalties on issuers, participant firms or individual traders.

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# United Kingdom

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## Statutes and regulations

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

The Financial Services and Markets Act 2000 (FSMA) as amended and supplemented by the Financial Services Act 2012 (FSA 2012), together with its subordinate legislation, the Listing Rules (LR) of the United Kingdom Listing Authority (UKLA) and the UKLA Prospectus Rules, which implement the Prospectus Directive (PD) as amended in the UK, constitute the primary regime governing offers of listed securities. Listed securities are securities that have been admitted to the Official List of the UKLA. The Prospectus Rules also apply to unlisted securities offered to the public. In the UK, the process of listing is separate from, albeit parallel to, gaining admission to trading (see question 2).

Part VI of FSMA sets out the circumstances in which publication of a prospectus is required. The Prospectus Rules set out the content requirements for prospectuses, including those prescribed by the Prospectus Regulation.

Under Part VI of FSMA, unless an exemption applies, an issuer will be required to produce a prospectus whenever there is either an offer of transferable securities to the public in the UK or a request for the admission to trading of transferable securities on a regulated market in the UK. FSMA and the Prospectus Rules exempt certain types of offer from the obligation to publish a prospectus, including, among others, offers addressed solely to qualified investors and offers made to or directed at fewer than 150 natural or legal persons (other than qualified investors) per EEA state. Provided the securities admitted to trading in any 12-month period represent less than 10 per cent of the number of securities of the same class already admitted to trading on the same regulated market, an obligation to publish a prospectus does not arise under the 'admission to trading' limb of the rule. The New Prospectus Regulation (see below) will increase this to 20 per cent. Exemptions must be considered separately in relation to public offers and the admission of securities to trading. Where a transaction involves both a public offer and admission of securities to trading, an exemption from both requirements is needed to avoid having to publish a prospectus.

In addition to its other regulatory functions, the Financial Conduct Authority (FCA) acts as the UKLA when exercising its functions under Part VI of FSMA and, in this capacity, is responsible for administering the rules relating to listed securities. The UKLA has issued the LR and the Disclosure Guidance and Transparency Rules sourcebook (DTR), which any company seeking or maintaining a listing on the Official List must comply with, and is responsible for approving the admission of securities to the Official List.

The Official List has two segments, which are governed by the LR:

- premium listing – a premium listing requires issuers of securities to comply with 'super-equivalent' UK measures in addition to the EU directive standards for listing of securities. It is available only for equity shares of commercial companies, close-ended investment funds and open-ended investment companies. Overseas companies can apply for a premium listing but, like their UK counterparts, will then be required to comply, or explain any failure to comply, with the UK Corporate Governance Code issued by the Financial Reporting Council and to offer pre-emption rights to existing shareholders in connection with any new issue of equity shares or sale of treasury shares for cash; and

- standard listing – a standard listing requires issuers of securities to comply with minimum EU directive standards for listing. It is available for equity shares and other securities, such as debt securities and securitised derivatives. Both UK and overseas companies can apply for a standard listing.

Issuers of securities may migrate between the two listing segments, subject, in certain cases, to shareholder approval.

The DTR govern the disclosure of certain information, such as periodic financial information and major shareholdings, by issuers whose securities are admitted to trading on a regulated market in the UK, which includes the Main Market of the London Stock Exchange (LSE), but not the Alternative Investment Market (AIM) (see below). The disclosure of inside information (see question 16) is now governed by the Market Abuse Regulation (MAR), which replaces the Market Abuse Directive (MAD). Prior to 3 July 2016, the Disclosure and Transparency Rules (now the Disclosure Guidance and Transparency Rules sourcebook, but also referred to as the DTR), had implemented the relevant provisions of MAD and the Transparency Directive (TD) regarding inside information. The provisions of MAR are now reflected in the updated DTR (see question 16). Some obligations in the DTR also extend to UK companies with shares traded on a prescribed market such as AIM (see questions 15 and 16).

In addition to the rules of the UKLA, issuers must also comply with the rules of the relevant stock exchange, both when seeking admission to trading and on an ongoing basis. Issuers admitted to the Main Market of the LSE (which includes issuers with a premium or standard listing) are subject to the LSE's Admission and Disclosure Standards.

AIM is the LSE's market for young and growing companies. Its admission requirements and continuing regulation of member companies are less stringent than those of the Main Market, enabling companies to raise funds at an earlier stage in their development. Securities admitted to AIM are not 'listed' since they are not admitted to the Official List. AIM issuers must comply with the AIM Rules for Companies (AIM Rules) and AIM Rules for Nominated Advisers.

In 2013, the LSE launched the High Growth Segment (HGS) of the Main Market for listing equity shares, which was designed to provide mid-sized European and UK companies that had achieved a certain level of historic revenue growth with access to capital and a public platform to continue their development. The HGS was intended to serve as a stepping stone to a premium listing, with applicants required to make a non-binding statement of their intention to apply for admission to the Official List, but has been utilised by very few companies to date.

## Public offerings

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

#### Filings

The LR require an issuer seeking a premium listing of equity shares to appoint a person approved under section 88 of FSMA to act as its sponsor (usually an investment bank). On an application for listing, the sponsor is responsible for ensuring that the issuer has complied with all the applicable conditions for listing and other requirements of the LR

and DTR. The sponsor acts as the principal contact between the issuer and the UKLA.

The filings to be made with the UKLA by an issuer applying for admission of its securities to listing in either segment (standard or premium) are set out in the LR. Such filings include, among others: an application for admission of the relevant securities to the Official List; a statement containing details of the number of shares of the issuer in public hands (in the case of an applicant that is applying for a listing of a class of shares for the first time); and (in the case of a premium listing) a sponsor's declaration in relation to the issuer's compliance with the LR and the procedures it has established for the purposes of complying with the DTR. The filings to be made will depend on whether a primary or secondary offer of securities is being made and the type of securities. A prospectus relating to admission or an offer of securities to the public must be submitted to the UKLA for approval, along with the relevant fee and certain other information prescribed by the Prospectus Rules, and filed with the UKLA before the prospectus is published.

The filings to be made with the stock exchange on which the securities are to be admitted to trading will depend on the rules of the relevant exchange. Before securities can be admitted to trading on the Main Market, an issuer must complete an application form giving details of the number, nature and characteristics of the securities to be traded and basic details about the issuer, such as a description of its business.

Companies seeking to join AIM do not have to produce a full prospectus that complies with the PD, unless an offer of securities is also being made to the public as part of the company's admission. The standard of information required for an AIM admission document (provided that there is not also an offer to the public under the PD) will be 'AIM-PD', which is based on the PD requirements with certain carve-outs. A company applying to AIM must appoint a nominated adviser (known as a NOMAD), who is responsible, among other duties, for assessing whether a company is appropriate for AIM. Rules regarding the role and responsibilities of NOMADs can be found in the AIM Rules for Nominated Advisers. Where securities are to be admitted to AIM, certain filings prescribed by the AIM Rules must also be made with the LSE, including an admission document, the first year's AIM fee, an application form and a NOMAD declaration.

#### Information to be provided to investors

FSMA and the Prospectus Rules prescribe the contents of a prospectus for offers of transferable securities, whether or not the issuer is listed or to be listed, and for applications for admission to trading on a regulated market in the UK.

The Prospectus Rules require that a prospectus that is drawn up as a single document must contain, among other things: a clear and detailed table of contents; a summary of the prospectus (in non-technical language and not exceeding 7 per cent of the length of the prospectus or 15 pages, whichever is the longer, and conveying the essential characteristics of and risks associated with the issuer, any guarantor and the securities), which must be read in conjunction with the rest of the document; a description of 'risk factors' about the issuer and the securities; information about the issuer and its capital; information about the securities for which a listing is sought; information about the issuer's business prospects and recent trends; audited historical financial information of the issuer (except for a new applicant, this may be incorporated in the prospectus by reference in many cases); details of the persons responsible for the prospectus; information about the guarantor of the issue (if any); and details of the issuer's advisers. These requirements will be amended by the New Prospectus Regulation, which is expected to come into effect in 2019 (see below).

Historical financial information presented or incorporated by reference in the prospectus must either be prepared in accordance with international financial reporting standards as adopted by the EU International Financial Reporting Standards (EU-IFRS) or be restated under, reconciled to or, for an issuer incorporated outside of the EU, prepared under a set of generally accepted accounting principles (GAAP) equivalent, to EU-IFRS. The obligation to prepare accounts under EU-IFRS or equivalent GAAPs is a continuing obligation for issuers. The European Commission has so far confirmed that the GAAPs of Canada, China, Japan, South Korea and the United States are equivalent to EU-IFRS. Indian GAAP no longer has IFRS-equivalent status.

The information required to be provided in the prospectus differs depending on whether the offer relates to equity securities, debt

securities or specialised securities such as asset-backed securities and derivative securities. Generally, there are fewer disclosures to be made in relation to an offer of debt securities than in relation to an offer of equity securities. In addition to the LR and the Prospectus Rules, the issuer must take into account section 87A of FSMA. This provides that a prospectus must contain the necessary information to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer and of any guarantor, and the rights attaching to the securities.

Issuers should also reflect the recommendations for the consistent implementation of the Prospectus Regulation and the guidance provided in 'Prospectuses: Questions and Answers' published by the European Securities and Markets Authority (ESMA).

#### Listing particulars

These are now prepared only for the admission of securities that are not being admitted to trading on a regulated market and have not otherwise triggered a prospectus requirement, for example, the admission of securities to the Professional Securities Market (PSM) (a market for specialist debt and equity-linked securities such as Eurobonds and depositary receipts) that have not been the subject of a public offer. The LR prescribe the content requirements for listing particulars.

#### AIM

Companies that are proposing to admit securities to trading on AIM will have to comply with the AIM Rules for information unless there is also an offer to the public under FSMA, in which case the admission document must also comply with the PD and Prospectus Rules.

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

Before an offer to the public is made or securities are admitted to trading, and in the absence of an exemption, a prospectus must be prepared by the issuer and approved by the UKLA for publication (see question 2). The issuer must submit the draft prospectus to the UKLA at least 10 working days before the intended approval date of the prospectus (or 20 working days in the case of a new applicant seeking admission to the Official List or a public offer by an issuer that does not have any securities admitted to trading on a regulated market and has not previously made a public offer), but, in practice, the first draft will be submitted much earlier to allow time for the UKLA to comment and for the issuer to respond to those comments and amend the draft. An application for the securities to be listed on the Official List must be made to the UKLA at least two business days before the UKLA is to consider the application and, in parallel, an application must be made to the relevant stock exchange for the securities to be admitted to trading.

Draft documentation should be given to the UKLA as far in advance of the intended publication date as possible. Once the UKLA is satisfied that all applicable information is contained in the prospectus, it will stamp the prospectus (thereby approving it for publication). The prospectus must then be filed with the UKLA and made available for a reasonable time before the public offer or admission to trading. In the case of an initial public offer of a class of shares not already admitted to trading on a regulated market, publication must take place at least six working days before the end of the offer. The Prospectus Rules allow for the prospectus to be approved without the final offer price and amount of securities being included in the prospectus. Where an issuer has taken advantage of this provision, the prospectus (known as a price range prospectus) is an approved, valid prospectus even though it does not contain the final price and number of securities and the six-day period can run from the date of that approval. To gain this approval, the price range prospectus must set out: the criteria or the conditions, or both, in accordance with which the missing elements will be determined and, in the case of price, the maximum price. The final offer terms must be determined as soon as practicable, filed with the UKLA and published.

Issuers can also prepare a pathfinder or pre-marketing document under the advertisement regime set out in the Prospectus Rules. However, if they do, the requirement that a prospectus is available for at least six working days before the end of an offer still applies from the date on which the actual prospectus is approved. It does not begin when the pathfinder or pre-marketing document is published because

that document constitutes an advertisement rather than an approved prospectus. By limiting the distribution of the pathfinder prospectus to certain financial entities for arranging underwriting, there is no offer of securities to the public and the pathfinder will not constitute an unlawful invitation to engage in investment activity, which is prohibited under section 21 of FSMA. It was initially thought that the 'six-day rule' would mean that issuers would be less likely to use a pathfinder for price-range offers where the price is determined by book-building. However, the UKLA has confirmed that this six-day rule does not apply to an institutional offer, which means that there is still flexibility to use a pathfinder to market the offer to institutions where there is no retail offer.

The timetable for the admission of the securities to trading on a stock exchange will depend on the rules of the particular exchange. In the case of admission to the Main Market, the finalised admission documents must be provided to the LSE at least two business days before the day on which the issuer is requesting that the LSE considers the application for admission to trading, though it should be noted that the draft application form and the draft prospectus must be submitted at least 10 business days before the intended consideration of the application for admission to trading.

Where the securities are to be admitted to AIM, the admission document must be submitted to the LSE three business days before the proposed date of admission of the securities to trading, together with an application form for admission to trading and certain other filings.

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

The Prospectus Rules provide that a prospectus or supplementary prospectus (required if certain circumstances arise) must not be published until it has been formally approved by the UKLA (see question 3).

As part of the pre-marketing of a public offering, research analysts linked with the issuer's underwriter (or underwriting syndicate) may publish research reports on the issuer (depending on the issuer and other circumstances of the offering). This is known as 'connected research'. The aim is to circulate the report to the underwriter's institutional clients in advance of the offering in order to provide an independent and objective view of the offeror. This is permitted under the PD, although, if the report promotes the specific offer of securities by the issuer, it may fall within the PD advertisement regime and must comply with certain content requirements as set out in the Prospectus Rules, including that it must contain an unequivocal statement that the document is an advertisement and investors should rely on the prospectus only when subscribing for the securities offered. The report also must not, among other things, contradict or present a materially unbalanced view of the information contained in the prospectus, including by making negative aspects less prominent than positive aspects. All information disclosed (even if not for advertising purposes and including any research reports) that concerns an offer of securities to the public must be consistent with information in the prospectus. MAR additionally requires that persons who produce such research reports take reasonable care to ensure the information is presented 'objectively' and disclose their interests or indicate conflicts of interests in connection with the applicable securities. See 'Updates and trends' on proposals to enhance the role of unconnected research.

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

On a primary offer of shares or securities convertible into shares wholly for cash, section 561 of the Companies Act 2006 (CA 2006) requires that a company first offers such securities to existing shareholders on a pro rata basis. This statutory pre-emption right may be disapplied by the issuer's articles of association or by means of a special resolution of shareholders in a general meeting. Listing Rule 9.3.11 requires a company (wherever incorporated) with a premium listing that proposes to issue equity shares for cash to offer those securities first to existing shareholders on a pro rata basis. This requirement can also be disapplied by a shareholder vote. Overseas companies with a standard listing are not required by the LR to offer pre-emption rights to existing shareholders in connection with an issue of equity shares.

Companies with a premium listing on the Main Market (wherever incorporated) should also take into account the principles set out by the Pre-Emption Group (and echoed by the Investment Association and the Pensions and Lifetime Savings Association) regarding the disapplication of pre-emption rights. Companies with other listings on the Main Market or on AIM are also encouraged to follow these guidelines. Generally, the principles state that shareholders should be consulted when a company decides to disapply pre-emption rights. It is common practice for listed companies to seek an annual disapplication of up to 10 per cent of the company's ordinary share capital (of which 5 per cent can be used only in connection with an acquisition or a specified capital investment). Disapplications relating to more than 10 per cent of the company's ordinary share capital in any one year will be considered 'non-routine' and therefore require greater consultation and discussion with shareholders. In addition, the pre-emption principles state that companies should not issue more than 7.5 per cent of their ordinary share capital for cash on a non-pre-emptive basis in any rolling three-year period (except in connection with an acquisition or specified capital investment).

The broad wording of the PD means that secondary offers of listed securities by existing shareholders may amount to offers to the public requiring the publication of a prospectus (see question 7 for an explanation of the circumstances in which sales by existing shareholders may not constitute offers to the public). Statutory pre-emption rights generally do not need to be considered by a shareholder when selling shares. However, pre-emptive offers may have to be made if required by the constitution of the company or if, for example, the selling shareholder is party to a shareholders' agreement.

See question 17 for information on liability issues for the seller of securities in secondary market transactions.

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

The securities of UK-listed companies in uncertificated (dematerialised) form are held through CREST, a service operated by Euroclear UK & Ireland Limited. The settlement of uncertificated securities depends on the rules and procedures of CREST.

Where shares or debentures are held in certificated or uncertificated form, the issuer must enter the details of the holder of the relevant security in its register of members or register of the holders of debentures. Third-party registrars maintain such registers on behalf of the majority of listed companies.

#### **Private placings**

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

FSMA and the Prospectus Rules contain provisions that may exempt private placements from constituting an offer to the public. The available exemptions include:

- where the offer is made to fewer than 150 people (other than qualified investors) per EEA state;
- an offer to qualified investors;
- an offer where the minimum consideration paid by each investor or denomination per unit is at least €100,000; and
- an offer where the total consideration for the securities being offered does not exceed €5 million over 12 months.

If the securities being placed are not being admitted to trading on a regulated market (or, if they are, if they and other securities of the same class admitted in the previous 12 months represent less than 10 per cent of the number of such securities already admitted to trading on the same market), no requirement for a prospectus under the 'admission to trading' rule will arise either.

#### **Procedures**

There are no special procedures that must be followed to implement a valid private placement.

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

For an exempt private placement (see question 7), there are no official requirements for providing information to potential investors if there is no additional proposal to admit the securities to listing.

Irrespective of whether a prospectus is produced, in practice, investors will require information on the issuer and securities to decide whether to make the investment.

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

No restrictions apply to the transferability of listed securities acquired in a private placement. However, in the case of unlisted securities in a private limited company, it is usual for places of shares to enter into lock-up agreements in which they undertake not to dispose of their shares within a certain period (usually six months) of their allotment. This is to avoid the placement being regarded as a public offer of shares in a private company in contravention of section 755 of the CA 2006.

Price stabilisation, through which the market price of a security is supported in order to achieve a successful offer, is prohibited other than on an IPO of listed securities or secondary offers (see question 18).

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**Offshore offerings**


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

The PD will apply to any public offer in any member state of the EU by an issuer. Section 755 of the CA 2006 prohibits public offers of securities by a private limited company, whether the public is in the UK or overseas.

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**Particular financings**


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

On an offering by a company of shares or securities convertible into shares (in each case, wholly for cash), the issuer must consider whether the pre-emption rights referred to in question 5 will apply to the offering. The PSM is the LSE's market for specialist debt and equity-linked listed securities (such as Eurobonds, convertible and asset backed securities, and depositary receipts). If an issuer chooses to list on the PSM, listing particulars must be published in connection with the listing of these securities but a prospectus will not be required.

There is no specific relief from the full prospectus requirements where shares are offered to existing shareholders under a rights offer and so a full prospectus is likely to be required.

An issue of depositary shares is subject to the same public offer rules as would apply to an issue of the underlying equity shares.

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**Underwriting arrangements**


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**12 What types of underwriting arrangements are commonly used?**

Fixed-price and book-building underwriting arrangements are commonly used.

In contrast to fixed-price underwriting arrangements, where the price is set in advance with limited feedback from potential investors, book-building is a process for offering shares under which potential investors are given the opportunity to bid for shares before the size and price of the offer are set and before the offer is underwritten. The underwriter's commitment does not occur until after completion of the book-building period (typically two to three weeks). By then the issuer and managers are better placed to assess the actual level of demand for the shares and the appropriate offer price.

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

The underwriting agreement invariably contains a provision under which the issuer agrees to indemnify the underwriter against all claims or losses arising out of the breach of the representations and warranties and any untrue statements or omissions in the prospectus. In addition, the issuer generally agrees not to make any claims against the underwriter to recover losses the issuer sustains arising out of the services provided by the underwriter, unless such losses arise owing to the negligence or wilful default of the underwriter or owing to a breach of its regulatory duties.

Section 678 of the CA 2006 prohibits a public company from giving financial assistance, whether directly or indirectly, to a person acquiring or proposing to acquire shares in the company. The CA 2006 specifically prohibits financial assistance given by way of an indemnity, other than indemnities in respect of the issuer's own negligence or default. Accordingly, a blanket indemnity given to an underwriter is at risk of falling foul of the prohibition on financial assistance since the issuer could be required to indemnify the underwriter for losses incurred as a result of the underwriter having to purchase shares in the issuer. Prohibited financial assistance would render the underwriting agreement void and expose the officers of the issuer to a fine, imprisonment, or both.

Consequently, to ensure that the indemnity in the underwriting agreement does not constitute prohibited financial assistance, such agreements provide that the indemnity is in respect of losses arising from untrue statements or misleading omissions of material facts in offer documents or a breach of warranty by the issuer and does not extend to losses sustained by the underwriter associated with its being required to acquire the issuer's shares.

**Force majeure clauses**

Commonly, underwriting agreements contain a force majeure clause. The provision is likely to relate to events affecting the financial markets and the success of the offering, such as the suspension or limitation of trading in shares on a specified stock exchange, changes in taxation, or the outbreak or escalation of hostilities or the occurrence of a material adverse change in the financial, political or economic conditions in specified countries.

**Success fees**

Success fees are a matter for negotiation.

**Over-allotment provisions**

It is usual for over-allotment provisions to be included in an underwriting agreement relating to an IPO where the underwriter is also to undertake price stabilisation (see question 18 for further information).

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**14 What additional regulations apply to underwriting arrangements?**

Sections 552 and 553 of the CA 2006 require that payment of the underwriting commission be authorised by the issuer's articles of association and that the consideration paid or agreed to be paid in respect of the underwriting must not exceed 10 per cent of the price at which the shares are issued or the amount or rate authorised by the articles, whichever is less. In relation to both listed and unlisted securities, the underwriting commission must generally be disclosed.

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**Ongoing reporting obligations**


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

Once the securities of a company have been admitted to the Official List, the issuer must comply with the continuing reporting obligations contained in the LR (primarily those in Chapter 9 for a premium listing and Chapter 14 for a standard listing of shares) and the DTR, by making public announcements through a regulatory information service (RIS). The information published by a RIS is picked up by newswires and the media and, in this way, is disseminated to the public. The DTR set out how this information is to be disseminated to the public on a RIS and how it is to be filed with the FCA.

## Update and trends

### New Prospectus Regulation

A new prospectus regulation to reform the European prospectus regime (the New Prospectus Regulation) is expected to be adopted in the first half of 2017 and will become effective 24 months after its publication in the Official Journal of the EU. The New Prospectus Regulation forms a key part of the European Commission's Capital Markets Union project, which aims to facilitate improved access to European capital markets and to increase their depth and liquidity. Key changes to the existing regime include:

- as noted above, where there is no offer to the public, giving issuers the ability to issue (on the same regulated market) new shares of the same class equivalent to up to 20 per cent of existing capital over a 12-month period without the need for a prospectus;
- enabling existing listed issuers and SMEs to benefit from new minimum disclosure regimes for their prospectuses;
- changing the contents and format of summaries, including by limiting the length of summaries to seven sides of A4 and limiting to 15 the number of risk factors included in a summary;
- requiring issuers to assess the materiality of each risk factor, which must be presented according to their materiality in a limited number of categories;
- enabling issuers to publish a uniform registration document that can be used both for the prospectus regime and the transparency regime; and

- allowing issuers to incorporate a wider range of information by reference.

### Review of the Effectiveness of Primary Markets

On 14 February 2017, the FCA published a discussion paper and a consultation paper proposing certain 'technical enhancements' to the LR, which include:

- clarifying the eligibility requirements for premium listing;
- introducing a concessionary route to premium listing for certain property companies that cannot meet the current track record requirements; and
- providing new guidance on existing concessionary routes.

### Reforming the availability of information in the UK equity IPO process

On 1 March 2017, the FCA published a consultation paper on reforming the availability of information in the UK equity IPO process. One of the proposed changes would allow a range of unconnected analysts to participate in any communication with an issuer's management team (or otherwise interact with management in a specified manner) before publication of any connected research by syndicate bank analysts (and if they did not want to allow that, syndicate banks would have to prevent their own analysts from communicating with the issuer or its advisers).

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

The DTR require a listed company to publish periodic financial information (annual reports and half-yearly reports) in accordance with EU-IFRS or (for non-EU issuers) an equivalent GAAP and to disclose information relating to major shareholdings or changes in the reporting company's share capital. Other information, such as changes to a reporting company's constitution or changes to rights attaching to the company's share capital, must also be disclosed as part of the company's continuing obligations. The FCA can exempt non-UK issuers from some of the reporting requirements if it considers the law in the issuer's home country to be equivalent to UK law and its requirements.

Issuers (both on the Main Market and AIM) are obliged by MAR to announce 'inside information'. This is information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the price of those financial instruments or on the price of related derivative financial instruments. Information is considered likely to have a significant effect on price only if it is the kind of information that a reasonable investor would be likely to use as part of the basis of an investment decision.

As a directly applicable form of EU law, MAR automatically transposed into English law those disclosure requirements that were previously found in, and given legal effect by, Chapters 1 to 3 of the DTR. Those provisions that overlapped with the provisions in MAR were removed, and the remaining rules and guidance have been conformed and aligned so as to operate alongside MAR. Deleted provisions that contained guidance have been replaced with signposts to the relevant 'replacement' provisions of MAR.

MAR itself contains guidance to help issuers identify inside information. Information likely to be relevant to investment decisions includes that which affects the assets and liabilities, performance and expectations, financial conditions and expectations of the business of the issuer, major new developments in the business of the issuer and information not previously disclosed to the market.

MAR requires inside information to be disclosed 'as soon as possible' (by making an announcement via a RIS), although there are circumstances in which disclosure can be delayed (subject to important conditions and limitations).

MAR also requires the creation by listed companies of 'insider lists', which are records of those people who have access to inside information. The lists must be kept for at least five years from the date of creation and the FCA may request to inspect these lists within that period. MAR introduced an exemption (which has yet to come into effect) from the obligation to maintain insider lists for issuers listed on 'SME

Growth Markets' provided that the issuer takes all reasonable steps to ensure that any person with access to inside information acknowledges his or her legal and regulatory duties and is aware of the associated sanctions in respect of insider dealing and unlawful disclosure of inside information. In order to benefit from the exemption, issuers on 'SME Growth Markets' will also need to be able to provide the FCA with an insider list upon request. 'SME Growth Markets' will be identified in accordance with the processes provided for in the Markets in Financial Instruments Directive II, the date of application of which has been delayed to 3 January 2018.

A company whose securities are traded on AIM must comply with the continuing obligation requirements of the AIM Rules, which are less stringent than the DTR. However, AIM-listed companies will have to comply with the obligations under the DTR to notify the market of major shareholdings or changes to their share capital. The AIM Rules have been updated to reflect the provisions of MAR to which AIM-listed companies are now subject.

## Anti-manipulation rules

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

MAR provides that it is an offence to:

- engage or attempt to engage in insider dealing;*
- recommend that another person engage in insider dealing or induce another person to engage in insider dealing;*
- unlawfully disclose inside information; or*
- engage in or attempt to engage in 'market manipulation'.*

These offences are very similar to the six civil law offences set out under the now repealed section 118 of FSMA, although there are certain key differences. For example, MAR:

- extends the scope of the EU market abuse regime beyond regulated markets to financial instruments traded on multilateral trading facilities (MTFs) or other organised trading facilities (OTFs) and certain over-the-counter activities (including derivatives and credit default swaps);
- extends the market abuse regime to cover behaviour both within and outside the EU in relation to instruments admitted to trading on an EU trading venue; and
- introduces a new prohibition on attempting to engage in market manipulation. Behaviour amounting to attempted market manipulation is described as any attempt to engage in any of the activities amounting to market manipulation. Such an attempt may include situations where the activity is started but is not completed, for

example as a result of a technical failure or an instruction to trade that is not acted upon.

In most EU member states, MAR sits alongside the Directive on Criminal Sanctions for Market Abuse (CSMAD). The UK, however, has not opted into the CSMAD, so MAR operates as the stand-alone replacement for MAD in the UK.

MAR provides guidance through identifying certain 'legitimate behaviours' and 'accepted market practices'. The FCA is entitled to determine what constitute 'accepted market practices' and submit them to ESMA for approval. The FCA can impose unlimited fines, apply for injunctions or prohibit regulated firms or approved persons for breaches of MAR.

MAR has not changed the criminal regime under FSMA, the FSA 2012 and the Criminal Justice Act 1993 (CJA), and so individuals are subject to the following criminal offences:

#### Misleading statements and misleading impressions

There are three offences under the FSA 2012:

- making false or misleading statements (section 89);
- creating false or misleading impressions (section 90); and
- making false or misleading statements or creating a false or misleading impression in relation to specified benchmarks (section 91).

A person convicted of any of these offences is liable to an unlimited fine or imprisonment for a maximum of seven years, or both.

#### Insider dealing

The CJA sets out two insider dealing offences, both of which relate to securities listed on a regulated market. Neither offence is capable of being committed by a body corporate.

#### The dealing offence

The CJA provides that an individual is guilty of insider dealing if he or she has inside information and deals on a regulated market in securities that are price-affected in relation to that information. 'Inside information' means information that:

- relates to particular securities or to a particular issuer (or issuers) of securities but not to securities generally or to issuers of securities generally;
- is specific or precise;
- has not been made public; and
- if it were made public, would be likely to have a significant effect on the price of any securities.

A person can only be an insider if he or she knows the information is inside information and knows that he or she has the information from an inside source.

#### The tipping offence

The second offence, the tipping offence, is committed by a person if he or she has inside information (as defined above) and either encourages

another person to deal in securities that are price-affected knowing or having reasonable cause to believe that the dealing would take place on a regulated market in specified circumstances, or discloses the information to another person other than in the proper performance of the functions of his or her employment, office or profession.

#### Penalties

A person convicted of insider dealing or the tipping offence is liable to an unlimited fine or imprisonment for a maximum of seven years, or both.

#### Price stabilisation

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

Price stabilisation is usually achieved by way of over-allocating the securities being issued. This over-allocation leaves the bank that has been appointed as the stabilisation manager with a short position. If the price of the securities falls, the stabilisation manager can settle this position by purchasing the securities in the market (or, in the case of equity issues, by borrowing stock and effectively deferring the settlement obligation). If the price of the securities increases, the stabilisation manager will invariably have an over-allotment option that can be exercised at the offer price.

To ensure that such steps do not contravene the restrictions detailed above in question 17, safe harbour exemptions are provided in the legislation.

MAR contains an exemption to ensure that price stabilisation of certain financial instruments by banks and other relevant institutions in relation to a 'significant distribution of securities' (such as an IPO) does not contravene the restrictions detailed in question 17 provided that:

- the stabilisation is carried out for a limited period;
- relevant information about the stabilisation is disclosed and notified to the FCA;
- certain limits as to price and volume are complied with; and
- further ESMA regulatory technical standards are met.

Another commonly used method of reducing price volatility in equity issues is to restrict the sale of shares by the management and key employees of the issuer participating in the offer for a defined period.

#### Liabilities and enforcement

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

Care must be taken to avoid committing the offences discussed in question 17 when engaging in securities transactions. In addition, any person responsible for a prospectus or listing particulars may be required to pay compensation for untrue or misleading statements contained in the relevant document (see question 20 for further information).

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

The FCA has responsibility for investigating suspected market abuse (see question 17). The FCA has wide powers to institute proceedings against anyone it suspects of having committed an offence under FSMA or the FSA 2012. The FCA is also the primary enforcer of the insider dealing provisions of the CJA, although the Department for Business, Energy and Industrial Strategy may also investigate insider dealing offences and appoint inspectors to investigate and report on suspected offences.

Under FSMA, the UKLA has the power to appoint an investigator to conduct an investigation if there are circumstances that suggest that there has been a breach of the LR or certain sections of FSMA.

The UKLA may impose sanctions (either a financial penalty or censure) on an issuer that breaches the LR, or a director of the issuer who the UKLA considers was knowingly concerned in the issuer's breach of the LR.

Under section 90 and Schedule 10 of FSMA, any person responsible for a prospectus or listing particulars is liable to pay compensation to a person who has acquired securities and suffered loss in respect of them as a result of any untrue or misleading statement contained in the relevant document or the omission of any matter that should have been included in the relevant document. There are certain defences to an action for compensation, including demonstrating that the person responsible for the prospectus or listing particulars reasonably believed that the factually inaccurate statement was true or not misleading or that the matter that was omitted from the relevant document was properly omitted.

The imposition of penalties for market abuse transactions does not make the transaction void or unenforceable in itself.

Under section 90A and Schedule 10A of FSMA, a listed company may be liable to compensate a person who acquires, continues to hold, or disposes of, shares and suffers loss as a result of any untrue or misleading statement in, or the omission of any required matter from, any information announced by the company (or the availability of which is announced by the company). The company may also be liable if the person suffers loss as a result of a delay by the company in announcing any such information.

However, in either case, the company will only be liable if a director or person occupying the position of a director (i) knew that the statement was untrue or misleading or was reckless as to whether it was untrue or misleading, (ii) knew that the omission was a dishonest concealment of a material fact, or (iii) acted dishonestly in delaying the announcement of the information.

Only the company (and not the directors) will be liable to third parties under section 90A and Schedule 10A of FSMA. However, the directors may be liable to the company if the statement or omission relates to an annual report.

# United States

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## Statutes and regulations

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

Two statutes primarily govern the US securities markets at the federal level:

- the Securities Act of 1933 (the Securities Act), which was designed to regulate offerings of securities to the public; and
- the Securities Exchange Act of 1934 (the Exchange Act), which was designed to regulate subsequent trading of those securities in secondary market transactions.

These statutes regulate the securities markets through disclosure requirements as opposed to any requirements for regulatory approval of the merits of an offering.

The Securities Act requires that every offer and sale of a security in the United States be registered with the Securities and Exchange Commission (SEC) unless an exemption is available (eg, offers and sales not involving a 'public offering'). The Securities Act has two basic objectives: to provide investors with material financial and other information regarding the securities to be offered, and to prevent fraud in connection with sales of securities.

To achieve these objectives, the Securities Act requires that, in the absence of an exemption, a statutory prospectus that has been filed with the SEC as part of the registration process be furnished in advance to purchasers of securities and imposes statutory liability for material omissions or misstatements in such documents or any other documents that may be furnished to purchasers of securities under the Securities Act.

The Exchange Act requires US and non-US companies with a security listed on a US stock exchange (including the New York Stock Exchange and NASDAQ), meeting certain asset amount and shareholder number requirements or making public offerings of securities in the United States, to register such securities with the SEC and to file with the SEC annual reports, quarterly reports (in the case of US companies) and certain other reports containing information similar to that required in a registration statement under the Securities Act (see also question 15).

On 5 April 2012, the US adopted a capital formation reform bill known as the Jumpstart Our Business Startups Act (the JOBS Act). The JOBS Act significantly eases restrictions under the Securities Act relating to the initial public offering process for equity securities of a newly designated class of smaller companies and to the private placement capital raising process for virtually all issuers. The JOBS Act also provides ongoing relief, mainly for these smaller companies, from certain requirements under the Exchange Act as well as from certain existing (and potentially future) accounting and auditing rules.

Offerings of securities are also subject to state 'blue sky' laws, although the National Securities Markets Improvement Act of 1996 has largely pre-empted state securities laws.

In addition, companies that complete a securities offering that is registered with the SEC or otherwise become subject to the reporting obligations of the Exchange Act also need to comply with the provisions of the Sarbanes-Oxley Act of 2002, including the provisions with respect to internal control over financial reporting, prohibitions on

loans made to executive officers and directors, auditor independence and independent audit committees, certifications by executive officers of financial reports and increased civil and criminal penalties for violations of the securities laws and also the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), which introduced important changes to the corporate governance and executive compensation landscape for public companies.

### Regulatory authority

The SEC is the primary administrative authority charged with administering the Securities Act, the Exchange Act and the other federal securities laws. In addition to enforcing these statutes, the SEC is charged with promulgating rules and regulations under such statutes.

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## Public offerings

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

Unless an exemption from the registration process exists, an issuer must file a registration statement with the SEC before any offers of securities may be made or solicited by the issuer or underwriters (other than specified communications in respect of 'emerging growth companies' as described below), and the registration statement must be declared effective by the SEC before the securities may be sold. The information required to be included in the registration statement is set forth in the rules under the Securities Act and is intended to provide investors with all material information about the offering as well as the business and financial condition of the issuer.

To facilitate disclosure of material information about the issuer and the offering, the SEC promulgated Regulation S-K (governing disclosure generally) and Regulation S-X (governing financial disclosure), which together codify the disclosure requirements for registration statements filed under the Securities Act, regardless of whether the offered security is debt or equity or the offering is primary or secondary.

The rules governing financial disclosure for non-US issuers now allow financial statements of non-US issuers prepared in accordance with International Financial Reporting Standards, as issued by the International Accounting Standards Board, to be accepted by the SEC, subject to certain conditions, without the need for reconciliation to US GAAP.

The JOBS Act eases certain of these registration requirements for 'emerging growth companies' (EGCs), entities that issue or propose to issue any security and that have less than US\$1 billion in total annual gross revenues and meet certain other requirements. EGCs are granted relief from, among other things, certain financial disclosures required in a common equity initial public offering (IPO) registration statement and may elect to have such registration statement confidentially reviewed by the SEC prior to its use.

In addition to registering the securities with the SEC, an issuer generally applies for listing on a US securities exchange for trading. To be listed on a US securities exchange, it is also necessary to register the securities under the Exchange Act, which can generally be accomplished with a short-form filing under the Exchange Act incorporating the Securities Act filings made with respect to the offering of

such securities. In addition, the relevant stock exchange application usually requires certain undertakings from the issuer that it meets the minimum standards for listing. Such listing standards vary for different types of equity and debt securities.

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

Section 5 of the Securities Act effectively divides the registration process into three periods: the pre-filing period, the waiting period and the post-effective period.

The pre-filing period is the period between the time there is an agreement or understanding between the issuer or seller and the underwriters to issue and sell securities and the filing of the registration statement. During the pre-filing period, which typically begins 30 to 45 days before the filing of the registration statement, offers to sell or buy securities, other than by WKSIs and EGCs (as set forth below), are prohibited under the Securities Act.

The waiting period is the period between the filing of the registration statement and when it is declared effective by the SEC. Until the registration statement is declared effective, it is unlawful under the Securities Act to sell the securities that are the subject of the registration statement. However, 'offers' made orally or pursuant to a preliminary prospectus or free-writing prospectus (discussed below) meeting the requirements of the Securities Act are permitted. Offers made by television, radio, internet or any sort of written notice, circular, advertisement, letter or communication in writing not meeting the requirements of a preliminary prospectus or free-writing prospectus under the Securities Act are impermissible during the waiting period. Accordingly, during the waiting period, the underwriters and certain executive officers of the issuer normally commence a 'roadshow' during which they distribute a preliminary prospectus and make oral presentations to potential investors. While on the roadshow, which can last up to several weeks, the underwriters also begin obtaining non-binding indications of interest from potential investors, enabling them to judge the level of investor interest and set an appropriate offering price for the securities.

The length of the waiting period varies according to several factors. A registration statement relating to an issuer's initial public offering will almost always be selected by the SEC for a full review, whereas registration statements relating to more frequent issuers and secondary offerings are less likely to be reviewed. In addition, the particular industry of the issuer and the presence of any 'hot-button' issues in the registration statement may also increase chances for SEC review. If a registration statement is selected for full review, the SEC will generally review the registration statement for approximately 30 days before issuing a comment letter containing questions and requests for additional or supplemental information. Depending on the number and the nature of the SEC comments, issuers are generally able to respond and clear comments within three to six weeks following receipt of the initial SEC comment letter.

The post-effective period is the period after the registration statement has been declared effective by the SEC. During this time the securities registered under the registration statement may be sold so long as the security or, in most instances, the confirmation of sale that is delivered to the purchaser is preceded by a filing with the SEC of a final prospectus meeting the requirements of the Securities Act. Once the registration statement has been declared effective, the issuer and underwriters will negotiate the final offering price and the size of the offering based on the indications of interest solicited during the roadshow as well as other factors, and a final prospectus containing such pricing information will be filed with the SEC and may be printed and sent to investors along with final sales confirmations.

SEC rules in effect from 1 December 2005 substantially altered the registration and communication framework applicable to public offerings. Among the most significant changes was the creation of a class of reporting companies referred to as 'well-known seasoned issuers' (WKSIs), comprising companies with a worldwide public float of US\$700 million or that have issued US\$1 billion of non-convertible securities in registered primary offerings for cash in the past three years. WKSIs are entitled to a flexible registration and communication regime, particularly with respect to 'shelf' registration statements. Shelf registration statements, once effective, allow issuers to make

continuous or delayed offerings of registered securities. Under the new rules, shelf registration statements filed by WKSIs become automatically effective upon filing with the SEC and are subject to minimal incremental disclosure requirements. Another significant change is that the SEC now permits issuers, subject to certain conditions, to use free-writing prospectuses after and, in the case of WKSIs, before filing a registration statement with the SEC. Free-writing prospectuses are written communications, including electronic communications, that constitute offers of securities other than statutory prospectuses filed with the SEC.

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

Offers of any kind made before the filing of a registration statement, and written offers made other than by a preliminary prospectus or a free-writing prospectus during the waiting period, are violations of section 5 of the Securities Act. Because 'offer' is defined to include 'every attempt or offer to dispose of, or solicitation of an offer to buy [...] for value', and prospectus is defined to include 'any notice, circular, advertisement, letter or communication, written or by radio or television', issuers and underwriters must carefully monitor all publicity about the issuer or the proposed offering in order to avoid running foul of the Securities Act.

Notwithstanding the provisions of section 5 of the Securities Act, the SEC has issued several rules to permit limited publicity relating to the issuer and the offering during the pre-filing and waiting periods. Before filing a registration statement, an issuer may publicly disclose in a press release that it intends to make a public offering of securities, provided that such release contains only limited information (such as the name of the issuer and the title, amount and basic terms of the securities being offered). The underwriters may not be named in such release. In addition, communications by issuers more than 30 days before filing a registration statement are not considered prohibited offers, provided they do not reference a securities offering and provided issuers take reasonable steps to prevent further distribution or publication of such communications during the 30-day period preceding the filing of a registration statement. The SEC also allows reporting issuers (but not other offering participants, including underwriters) to continue publishing regularly released factual business information and forward-looking information, but without referencing an offering. In addition, as discussed in question 3, WKSIs are permitted to make oral offers and use free-writing prospectuses even before a registration statement is filed. During the period after a registration statement is filed but before it is declared effective, the issuer can also advertise the offering through a 'tombstone ad' that complies with the Securities Act rules. Such advertisements are also restricted to certain basic information about the issuer and the offering, but may include the names of the managing underwriters.

The JOBS Act creates a new exemption under section 5 of the Securities Act to allow 'testing the waters' communications with certain investors. The new exemption permits EGCs and their representatives to engage in oral and written communications with potential investors that are qualified institutional buyers (as defined in rule 144A under the Securities Act) or institutions that are accredited investors (as defined in Regulation D under the Securities Act) to determine whether those investors 'might have an interest in a contemplated securities offering' at any time regardless of whether or not the issuer has filed a registration statement.

#### **Research reports**

In the absence of any exemptions, research reports would clearly constitute illegal prospectuses under section 5 of the Securities Act. Restrictions on the issuance of research reports are generally more stringent in initial public offerings. Underwriters, however, often conduct research on public companies and issue reports in the ordinary course of their business. To avoid hampering such ordinary course activities, the SEC has adopted rules allowing the limited publication of research reports during the course of an offering. These rules allow an investment bank that publishes research in the ordinary course of its business to continue to do so, provided the investment bank is not participating in the distribution of the issuer's securities and does not receive consideration in connection with the publication of such

information from that issuer or any other persons interested in the distribution. In addition, these rules allow a participating underwriter to publish research reports with respect to an issuer that is a reporting company under the Exchange Act, so long as such underwriter has been doing so in the regular course of its business.

The JOBS Act eased certain of these restrictions related to research activities by investment banks related to EGCs. Among other relief, the JOBS Act provides that a broker or dealer is permitted to publish or distribute a research report about an EGC that is the subject of the proposed public offering of common equity, even if the broker or dealer participates in the offering.

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

Contrary to the securities laws of several European countries, there are no special rules differentiating primary and secondary offerings in the United States. Pre-emptive rights in the United States are rare, and the US securities laws do not contemplate any special rules where these rights exist. Also generally absent from the corporate laws of several states are laws that, for example, require state approval for the issuance of shares or impede the ability of issuers to indemnify selling stockholders in such a way that would necessitate special rules differentiating primary and secondary offerings.

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

The SEC has adopted a rule mandating that the settlement date for sales of securities in a public offering is three business days after the date of the contract of sale (unless the securities were priced after 4.30pm Eastern Standard Time, in which case the settlement date may be four business days after the date of the contract of sale). The rule also provides that the parties to a sale transaction may agree to a longer or shorter settlement cycle, although stock exchange requirements may make a longer settlement cycle for a listed security difficult to implement. The SEC has proposed shortening the standard settlement date for trades in the secondary market to two business days, although public offerings would be excluded from the proposed rule.

**Private placings**

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

Yes, section 4(a)(2) (formerly 4(2)) of the Securities Act exempts 'transactions by an issuer not involving any public offering'. A substantial body of case law and SEC regulatory practice has developed concerning private placements under section 4(a)(2). The availability of the exemption turns on a factual analysis of several factors, including the number and sophistication of the offerees, the relationship between the issuer and the offerees, the minimum denomination of the securities being offered and the relative bargaining power between them. To ensure compliance with section 4(a)(2), issuers often have purchasers make certain representations as to their sophistication as investors and their receipt of all requisite information in connection with the offering.

In order to provide issuers with certainty regarding the section 4(a)(2) exemption, the SEC adopted Regulation D, which provides three regulatory exemptions from the registration requirements of the Securities Act for offers and sales by issuers. Rule 504 and rule 505 of Regulation D provide exemptions from the registration requirements of the Securities Act for certain securities offerings limited in aggregate dollar amount (eg, offerings not exceeding US\$1 million or US\$5 million, depending on the parameters of the offering). Rule 506 of Regulation D (by far the most widely used Regulation D exemption) provides issuers with a non-exclusive 'unlimited' safe harbour under section 4(a)(2) of the Securities Act, that exempts offerings of an unlimited amount of securities, to an unlimited number of 'accredited investors' (eg, institutions and certain wealthy individuals) and to no more than 35 non-accredited investors. The previous prohibition on general solicitation and advertising in rule 506 offerings was eliminated by rules adopted by the SEC pursuant to the JOBS Act. The relevant rule changes became effective in September 2013 and allow general advertising and solicitation in rule 506 offerings as long as all purchasers are accredited

investors. In an offering made under Regulation D (subject to narrow exceptions), the issuer must exercise reasonable care to ensure that the purchasers are not taking the securities with a view to distribution or other resale.

The primary method of offering high-yield debt securities in the United States is through a section 4(a)(2) private placement by the issuer to financial intermediaries, immediately followed by a resale of such securities to 'qualified institutional buyers' pursuant to rule 144A of the Securities Act or in 'offshore transactions' pursuant to Regulation S, or both methods may be used. Resales pursuant to rule 144A and Regulation S are more fully described in questions 9 and 10.

As required by the JOBS Act, the SEC adopted amendments that took effect in June 2015, which created a new exemption from registration pursuant to section 3(b) of the Securities Act for up to US\$50 million of securities (referred to as 'Regulation A+'). Under another requirement of the JOBS Act, the SEC adopted rules in October 2015 to create by rule a substantial regulatory framework providing for a crowdfunding exemption from registration, whereby small aggregate amounts of securities of an issuer can be sold through brokers or internet 'funding portals' to investors in small individual accounts.

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

If a sale is made to a non-accredited investor, Regulation D requires that certain information be provided to the purchaser within a reasonable time before the sale. The information to be provided varies according to whether or not the issuer is a reporting company under the Exchange Act, but in either case such information is similar to that which would be required in a registration statement in the case of a registered offering under the Securities Act. Regulation D does not require that any specific information be provided to accredited investors. Nonetheless, in practice issuers generally provide potential purchasers with information similar to that provided to non-accredited investors.

In addition, rule 144A and Regulation S have limited information requirements. However, issuers offering securities via section 4(a)(2) private placements coupled with resales pursuant to rule 144A and Regulation S typically provide information that is similar to what would be required in a registration statement in the case of a registered offering under the Securities Act.

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

Yes. Unregistered securities purchased in a private offering may not be resold except pursuant to a registration statement under the Securities Act or pursuant to an exemption contained in the Securities Act or the rules and regulations thereunder. Several mechanisms exist to facilitate the resale of these 'restricted' securities.

One such mechanism is the 'section 4(1-1/2)' exemption, now '4(a)(1-1/2)', which allows investors who purchased restricted securities in a valid private placement to resell those securities in a further private placement following the procedures set forth in section 4(a)(2) without being deemed an underwriter engaged in a distribution of securities (who would not be exempt from the registration requirements of section 5 of the Securities Act).

A similar but more commonly used mechanism for resales of restricted securities is rule 144 under the Securities Act, which defines the circumstances under which an owner of restricted securities or an affiliate of the issuer may offer and sell such securities to the public without being deemed an underwriter engaged in a distribution of securities. Following rule amendments that became effective on 15 February 2008, rule 144 provides a non-exclusive safe harbour for the resale of restricted securities of a reporting issuer beginning six months after issuance of such securities, subject to requirements as to the public availability of certain information regarding the issuer and, in the case of resales by affiliates only, to limitations as to the manner and volume of such sales. With respect to the restricted securities of a non-reporting issuer, rule 144 provides a non-exclusive safe harbour for resales beginning one year after issuance of such securities. Under rule 144, after a one-year holding period, public resales of restricted securities of reporting and non-reporting issuers may now be made by non-affiliates without any restriction.

Another important mechanism for reselling restricted securities is pursuant to rule 144A under the Securities Act, which permits an investment bank or other financial intermediary who has purchased restricted securities from an issuer in a private placement to make resales of those securities to an unlimited number of 'qualified institutional buyers' without being deemed an underwriter engaged in a distribution of securities. Generally speaking, qualified institutional buyers (QIBs) consist of large institutions that own or invest on a discretionary basis, in aggregate, at least US\$100 million in securities of unaffiliated issuers. Sales under rule 144A can take place immediately after a valid private placement under section 4(a)(2), and securities acquired by QIBs pursuant to rule 144A are deemed to be 'restricted securities' for purposes of the resale restrictions. Rule 144A may not be used to offer securities that are fungible (ie, of the same class) with a listed security, and therefore it is not available in connection with equity offerings (other than convertible offerings with a conversion premium of at least 10 per cent) of companies whose shares are listed on a US stock exchange.

Finally, Regulation S under the Securities Act (as described in question 10) enhances liquidity for holders of restricted securities by allowing them to resell restricted securities in offshore transactions.

### Offshore offerings

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

The SEC has adopted Regulation S to provide an exemption from the registration requirements for securities offered and sold outside the United States. Regulation S provides a safe harbour from the registration requirements of the Securities Act for offers and sales by issuers, distributors and their respective affiliates and resales by persons other than issuers, distributors and their respective affiliates. In general, for an offer or sale of securities to qualify for Regulation S, the offer or sale must be made in an offshore transaction and neither the issuer nor any distributor may engage in any selling activities that might condition the US market for the securities. For an offer or sale of securities to be made in an offshore transaction, the offer may not be made to a person in the United States, and at the time the buy order is originated, either the purchaser is outside the United States (or the seller reasonably believes that the purchaser is outside the United States) or the transaction takes place on a physical trading floor of an established foreign securities exchange located outside the United States. In practice, Regulation S permits US investors who purchase unregistered securities of a non-US issuer, among other things, to resell those securities in the non-US market in which such securities principally trade.

To sell restricted securities under the safe harbour provided by Regulation S, sellers must meet certain other requirements that vary according to the type of issuer. In general, these additional requirements are less burdensome when it is less likely that the securities will flow back to the US market (category 1) and more burdensome when there is an actual or potential substantial US market interest for the issuer's securities (category 3). When adequate information about the issuer is publicly available in the United States, the concerns about securities flowing into the US market are somewhat reduced, and the restrictions fall between the two extremes (category 2).

Historically, the exemption under rule 144A only has been available if both offers and sales were made only to QIBs and reliance on Regulation S is predicated on the absence of 'directed selling efforts' in the US. The prohibition on offers to non-QIBs was eliminated in the rule 144A context by rules adopted by the SEC pursuant to the JOBS Act. The relevant rule changes became effective in September 2013 and allow offers to non-QIBs in rule 144A offerings, as long as sales are made only to QIBs. In addition, the SEC has reaffirmed its historical view that permissible selling efforts in connection with a concurrent US offering should not preclude reliance on Regulation S for a non-US offering.

### Particular financings

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

##### Convertible securities

An offering of any convertible security, whether convertible debt or warrants, raises the question of what procedures, if any, must

be adopted to ensure that the issuance of the underlying securities upon conversion is exempt from the registration requirements of the Securities Act. In most cases, no additional procedures are required because section 3(a)(9) of the Securities Act exempts from the registration requirements of the Securities Act the issuance of securities upon conversion of other securities of the same issuer.

However, this exemption does not apply if a commission or other remuneration is paid or given directly or indirectly for soliciting such exchange, or where the underlying security is that of a different issuer from the issuer of the convertible security (other than in the case of an underlying security of an issuer that fully and unconditionally guarantees obligations of the issuer of the convertible security in respect of such convertible security). Accordingly, in cases where the section 3(a)(9) exemption is inapplicable, steps must be taken by the issuer either to register the underlying securities or to issue such securities pursuant to an exemption from the registration requirements of the Securities Act.

##### Exchangeable securities

Mandatorily exchangeable securities involve the issuance by one issuer of a debt security that is mandatorily exchangeable at its maturity into common stock of a different issuer (or its cash equivalent). In instances in which the underlying securities are restricted or the issuer of the mandatorily exchangeable securities is an affiliate of the issuer of the underlying securities, both components must be registered to consummate a public offering of the mandatorily exchangeable securities; otherwise, the underlying shares need not be registered to conduct a public offering (provided that the prospectus for the mandatorily exchangeable securities includes certain information concerning the issuer of the underlying securities unless such issuer meets certain registration eligibility and listing criteria).

##### Depositary shares

In lieu of issuing securities directly to US investors, a non-US issuer may establish an American depositary receipt programme whereby the non-US issuer deposits its outstanding securities with the foreign correspondent of a US commercial bank and the US commercial bank issues to the US investors securities (referred to as American depositary shares or ADSs) representing the deposited securities (the physical certificates representing such ADSs are referred to as American depositary receipts or ADRs). The SEC allows non-US issuers to set up, with the assistance of US depositary banks, over-the-counter ADR programmes for shares already outstanding without a need to register the ADRs or the underlying shares under the Exchange Act if the non-US issuer agrees to provide the SEC with certain required material information that it makes publicly available in its home country. However, if the ADRs are listed on a US stock exchange or on NASDAQ, both the ADRs and the underlying securities must be registered under the Exchange Act, which subjects the non-US issuer to the SEC reporting and disclosure requirements and to the provisions of the Sarbanes-Oxley Act of 2002. Also, public offerings of ADRs in the United States must be registered under the Securities Act.

##### Rights offerings

In 1999, the SEC enacted a rule exempting from the registration requirements of the Securities Act certain rights offerings of non-US issuers. The primary conditions to the exemption are that, at the time of the rights offering, US security holders own no more than 10 per cent of the securities that are the subject of the rights offering, and that the US security holders are permitted to participate in the rights offering on terms at least as favourable as those offered to the other holders of the securities that are the subject of the rights offering. In addition, the securities offered in the rights offering must be equity securities of the same class as those held by the offerees in the United States directly or through ADRs.

### Underwriting arrangements

#### 12 What types of underwriting arrangements are commonly used?

Public securities offerings in the United States are generally made through a syndicate of underwriters led by one or more managing underwriters. The underwriting agreement defines the relationship between the underwriters and the issuer and is the document pursuant

to which the underwriters commit to purchase the securities that are the subject of the offering. The underwriters typically agree to purchase the securities three business days after the pricing date. In contrast to the practices in many other countries, the underwriters' commitments to purchase securities pursuant to the underwriting agreement are always several rather than joint-and-several. This practice reflects the limitation of liability of an underwriter under section 11 of the Securities Act to the total offering price of the securities that it underwrites.

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

#### Indemnity

The issuer will covenant in the underwriting agreement to indemnify the underwriters (and their officers, directors, agents and controlling persons) against all liabilities and expenses arising out of alleged misstatements or omissions in the registration statement, the prospectus as well as any free writing prospectuses and roadshow materials, excluding certain minor portions for which the underwriters assume responsibility. Because of existing legal uncertainty as to the enforceability of such indemnity provisions, underwriting agreements also usually provide that if indemnification is held by a court to be unavailable, the issuer and the underwriters will share aggregate losses in such proportion as is appropriate to reflect the relative fault for the misstatement or omission giving rise to the loss, the relative benefits received by the issuer and the underwriters from the offering of the securities (with the liability of each underwriter being capped by the underwriting discount or commission received by such underwriter in respect of the sale of such securities), or both the losses and benefits.

#### Force majeure

Underwriting agreements in US offerings also routinely contain force majeure and termination clauses permitting the underwriters to terminate their obligations under the underwriting agreement if, in their judgment, there has been a sharp downturn in market conditions or deterioration of the financial condition or business of the issuer between the signing of the underwriting agreement and the scheduled closing of the offering such that consummating the offering would be impracticable. Typical force majeure clauses also extend to the occurrence of natural disasters or calamities, such as an outbreak of hostilities or suspension of trading in the United States or, in certain cases, non-US securities markets. Underwriters tend to view the unilateral right to declare a force majeure event and to terminate as a fundamental protection provided to them in the underwriting agreement. Nonetheless, force majeure clauses in US offerings are rarely exercised by the underwriters, namely because of the limited period of time between the signing of the underwriting agreement and the closing of the offering (typically three business days) and the potential reputational harm associated with an underwriter's exercise of such clauses.

#### Over-allotment

Because it is customary in US offerings to authorise the managing underwriters to over-allot (ie, to offer and sell more securities than the underwriters have contracted to purchase from the issuer), it is also customary in the underwriting agreement to provide the underwriters with an 'over-allotment option' allowing them to purchase from the issuer at the public offering price (less commission) up to an additional 15 per cent of the securities being offered to cover such over-allotments. The over-allotment option is more commonly found in equity offerings (and equity-linked offerings such as convertible debt) than in debt offerings.

#### Success fees

These are rare in US offerings because of the unique liability provisions of the Securities Act. Section 11(e) of the Securities Act limits the liability of an underwriter to the total price at which the securities underwritten by it and distributed to the public were offered. However, if any underwriter receives from the issuer some benefit, direct or indirect, for its services that is not shared proportionately with the other underwriters, then such an underwriter forfeits this limitation on liability. As a result, success fees are generally avoided by underwriters.

### 14 What additional regulations apply to underwriting arrangements?

Several rules and regulations of the Financial Industry Regulatory Authority (FINRA) apply to underwriting arrangements in registered securities offerings. Subject to a number of exemptions depending on the class of security and the particular offering, FINRA will review the underwriting agreement and certain other offering documentation governing the underwriting arrangements prior to an offering to ensure that the terms of such agreements and arrangements are fair and reasonable. FINRA also requires that any over-allotment option be limited to 15 per cent or less of the securities being offered. FINRA places limits on the amount of total compensation that any underwriter can receive in connection with an offering, as well as on participation by any underwriter with certain conflicts of interest in respect of the offering (for example, if the issuer will use offering proceeds to repay a loan to an affiliate of an underwriter). FINRA also imposes several limitations on the allocation of securities and other distribution practices, particularly in 'hot issues' where demand for the securities is high, the market price of the offered securities rises after pricing and potential abuses are considered more likely to occur.

#### Ongoing reporting obligations

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

An issuer may become subject to the ongoing reporting obligations of the Exchange Act in a variety of circumstances. For instance, any issuer that has a class of securities listed on a US securities exchange is subject to the reporting requirements of the Exchange Act. These requirements apply for both debt and equity securities, whether or not the security has been publicly offered in the United States. US companies (other than 'community banks') are also required to become reporting companies if they have US\$10 million or more of assets at the end of a fiscal year and a class of equity securities held by 2,000 or more persons, or 500 or more persons who are not accredited investors.

The same is true for non-US companies, provided that at least 300 of the holders of the class of equity securities are resident in the United States and the company has not claimed, or is not eligible for, the rule 12g3-2(b) reporting exemption under the Exchange Act, which provides that non-US companies otherwise subject to the reporting requirements of the Exchange Act may instead provide (in English) certain information that the company makes public pursuant to the laws of its home country, distributes to its security holders or files with any stock exchange on which its securities are listed. In August 2008, the SEC amended rule 12g3-2(b) to impose additional conditions on eligibility for this exemption. Among other things, rule 12g3-2(b) now requires the 'primary trading market' for the subject class of securities to consist of securities exchanges located within one or two non-US jurisdictions. 'Primary trading market' is defined to mean that at least 55 per cent of the average daily trading volume in the subject class of securities occurred on securities exchanges within one or two non-US jurisdictions during the company's most recently completed fiscal year (and at least one non-US jurisdiction has a greater average daily trading volume than in the US). Further, while the information required to be published remains substantially identical, the initial and existing paper submissions to the SEC were replaced by a requirement to electronically publish (in English) the information on a company's internet website or through another electronic information delivery system generally available to the public in its 'primary trading market'.

Finally, if an issuer files a registration statement pursuant to the Securities Act relating to any security, it must file Exchange Act reports for any year in which there are 300 or more holders (or, in the case of a non-US company, 300 or more US holders) of the securities that were registered (excluding the fiscal year in which the registration statement was declared effective, during which Exchange Act reports must be filed regardless of the number of holders).

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

The information required to be made available to the public pursuant to the Exchange Act is substantially similar to that required to be filed with the SEC in the context of a public offering of securities, reflecting a policy decision by the SEC that the information needed to make

an informed investment decision is similar in the context of both purchases in a public offering and purchases in the secondary market. Based on this belief, the SEC has implemented an integrated disclosure system to achieve substantial uniformity of disclosure in filings under the Securities Act and the Exchange Act, including disclosure regarding the issuer's business, legal status, results of operations and financial condition. The JOBS Act provides relief to EGCs for certain reporting and disclosure obligations, such as 'say on pay' votes and some executive compensation-related disclosures. Additionally, EGCs are exempted from auditor attestation requirements with respect to internal control over financial reporting under section 404 of the Sarbanes-Oxley Act of 2002 and may elect to omit selected financial data for any period prior to the earliest period for which audited financial statements were presented in their IPO registration statement.

### Anti-manipulation rules

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

Regulation M is the primary collection of rules in the United States on market manipulation and stabilisation, with the primary intent of preventing interested parties from engaging in activities that could artificially raise the price of a security in an offering. These rules generally prohibit underwriters and broker-dealers participating in the offering of a security, as well as issuers and selling security holders, from purchasing (or inducing others to purchase) the securities they are selling in the offering (with certain exceptions, most notably for actively traded securities) as well as specified 'reference' securities. Under Regulation M, persons conducting short sales within a specified time prior to pricing of an offering are generally prohibited from purchasing in that offering.

FINRA rules also aim to prevent certain manipulative practices. FINRA rules on 'free-riding and withholding' are intended, in the case of 'hot issues' where the price in the secondary market is higher than the public offering price, to ensure that all the securities in the offering are sold at the initial public offering price. The 'Papilsky Rules' adopted by FINRA are also intended to ensure that all the offered securities are sold at the public offering price without direct or indirect discounts, selling concessions or other allowances except as disclosed in a prospectus.

### Price stabilisation

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

Stabilising activities in connection with an offering are permitted, provided that persons initiating stabilising bids do so with reference to the independent prices in the principal market for the security and such bids do not exceed either the independent bid or the offering price of the security.

### Liabilities and enforcement

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

There are several common bases of liability for violating federal securities laws in a securities transaction. Under section 12(a)(1) of the Securities Act, parties who improperly offer or sell securities in violation of section 5 of the Securities Act are strictly liable to the purchaser regardless of whether such purchaser's loss was related to the violation. Recovery under section 12(a)(1) is limited to either rescission or, if the plaintiff no longer owns the security, to monetary damages in an amount equal to the difference between the purchase price and the sale price of the securities.

Section 11 of the Securities Act imposes liability on, among others, an issuer, its directors and the underwriters when a registration statement contains an untrue statement of a material fact or omits to state a material fact necessary to make the included statements not misleading. A fact is 'material' if there is a substantial likelihood that a reasonable purchaser would consider such fact to be important in making his or her investment decision. If such untruths or omissions exist, any purchaser may bring a civil suit, and he or she need not prove either a causal relationship between the material misstatement or omission and the decline in value or that he or she relied on the misstatement or

### Update and trends

The SEC completed its rulemaking obligations required by the Fixing America's Surface Transportation (FAST) Act of 2015. It issued interim final rules that permit smaller reporting companies filing a registration statement to forward incorporate information by reference and permit EGCs filing a registration statement to omit certain historical periods from financial statements if they reasonably believe that such periods will not be required to be included at the time the registration statement is declared effective. The SEC also adopted a rule pursuant to Dodd-Frank that requires resource extraction issuers to disclose certain payments made to US and foreign governments; however, the new administration has adopted legislation overturning the rule as adopted. In June 2016, the SEC proposed rules to increase the financial thresholds in the definition of a smaller reporting company (SRC). The proposal would increase the threshold for a reporting company to qualify as a SRC from less than US\$75 million of public float to US\$250 million of public float (or for registrants with no public float, from less than US\$50 million of annual revenues to less than US\$100 million of revenues). The SEC has also proposed rules consistent with its Disclosure Effectiveness Initiative that would eliminate certain outdated and redundant disclosure requirements under Regulations S-K and S-X and modernise disclosure requirements for mining registrants.

omission in purchasing the security. The plaintiff is also not required to prove intent on the part of the defendant. Under section 11, the defendants may escape liability by proving that the plaintiffs knew of the disclosure deficiency when purchasing the security. Defendants (other than the issuer) also have an affirmative 'due diligence' defence under section 11 whereby they can escape liability by showing that, after reasonable investigation, they had reasonable grounds to believe that the information contained in the registration statement was true and that nothing was omitted. With respect to the 'expertised' portions of the registration statement (eg, the audited financial information of the issuer), affirmative diligence is not required - such defendants need merely show that they had no reasonable ground to believe, and did not believe, that there was a material misstatement or omission at the time of effectiveness. The *WorldCom* decision, *In re WorldCom Inc Securities Litigation*, 346 FSupp 2d 628 (SDNY 2004), has introduced some uncertainty into the distinction between 'expertised' and 'non-expertised' portions of the registration statement for purposes of the due diligence defence. A plaintiff who prevails on section 11 grounds is entitled to monetary damages in an amount equal to the difference between the price paid for the securities (but not greater than the public offering price) and the price of the securities at the time of suit or the price at which the securities were disposed.

Another basis for liability in securities transactions is section 12(a)(2) of the Securities Act, which provides that any person who offers or sells a security by means of any oral or written communication that contains an untrue statement of a material fact, or omits to state a material fact necessary to make the included statements not misleading, is liable to the purchaser for damages. As under section 11, the plaintiff is not required to prove intent, but the plaintiff must show that he or she was not aware of the misstatement or omission and that the misstatement or omission somehow affected his or her decision to purchase the securities. Section 12(a)(2) liability extends only to those who offer and sell the securities, though courts have interpreted this to include officers, directors and principal stockholders of the issuer, where such persons authorise the promotional efforts of the underwriters and help prepare the offering and other selling documents. The SEC has also confirmed that issuers of securities constitute 'sellers' under section 12(a)(2), regardless of the form of underwriting arrangement entered into. Defendants have an affirmative defence if they can prove that they did not know, and reasonably could not have known, of such misstatement or omission. Unlike section 11, no duty to investigate is required. Plaintiffs who still own the securities are entitled to rescission. Plaintiffs who no longer own the securities are limited to recover damages actually caused by the false statements or omissions. Section 12(a)(2) liability attaches at the time an investor becomes committed to purchase securities and enters into a contract of sale (ie, when the investor makes the investment decision). Information conveyed after the contract of sale, for example, in a subsequently delivered final

prospectus, would not be considered in evaluating section 12(a)(2) liability at the time of the contract of sale.

Additionally, section 15 of the Securities Act provides that any person who controls any other person who is liable under either section 11 or 12 of the Securities Act will also be liable, jointly and severally, to the same extent as the controlled person (unless the controlling person had no knowledge of, or reasonable ground to believe in, the existence of the facts by reason of which the liability of the controlled person is alleged to exist).

Private placements and unregistered secondary market transactions do not trigger either section 11 or section 12(a)(2) liability. Instead, the anti-fraud provisions of the Exchange Act, in particular rule 10b-5, provide the basis for liability for material misstatements and omissions in such offerings and sales. The key difference in liability under rule 10b-5 as opposed to section 11 or section 12(a)(2), however, is that the plaintiffs must prove that the defendant had intent to defraud, deceive or manipulate investors, as well as reliance on the defendant's wrongful conduct in purchasing the security.

Although rule 10b-5 also applies to registered offerings, these heightened burdens to establishing liability generally result in plaintiffs relying instead on Securities Act liability claims in such offerings. Similar to sections 11 and 12(a)(2), however, the class of defendants can extend to the issuer, its officers and directors, the underwriters and anyone else who directly or indirectly committed the fraud. Plaintiffs who prevail in claims relying on rule 10b-5 may generally recover out-of-pocket losses. As with section 12(a)(2), liability under rule 10b-5 attaches at the time an investor becomes committed to purchase securities and enters into a contract of sale.

Whether section 10(b) of the Exchange Act and rule 10b-5 promulgated thereunder apply extraterritorially has been at issue in recent years. In April 2012, the SEC released a study of the issue mandated by Dodd-Frank as part of its response to the US Supreme Court's decision in *Morrison v National Australia Bank*, 561 US (2010). *Morrison* reversed lower court precedent by holding that section 10(b) applies only to securities fraud in transactions in securities listed on a US exchange and to transactions in any other security that occur in the US. The SEC's study lacks a definitive recommendation, but does provide Congress with certain options for consideration, including reinstatement of a narrower version of the 'conduct and effects' test, which lower courts applied to section 10(b) actions before *Morrison* or enactment of a clarified version of the 'transactions' test set out in *Morrison*.

Amendments to the securities laws as part of Dodd-Frank expanded the SEC's ability to bring 'aiding and abetting' enforcement actions previously allowed under the Exchange Act by allowing the SEC to also bring aiding and abetting enforcement actions under the Securities Act, the Investment Advisers Act of 1940 and the Investment Company Act of 1940. Dodd-Frank did not, however, provide a private cause of action for aiding and abetting claims, though it did require the

Government Accountability Office (GAO) to conduct a study concerning what effect introducing such a cause of action might have.

The GAO report sets forth arguments for and against authorising such a cause of action, but did not offer a conclusion or recommendation on the advisability of doing so. To date, no such legislation has been proposed or adopted.

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

### Civil litigation

Civil litigation may be brought by private parties (typically in the form of class action lawsuits), the SEC or other governmental agencies.

Private party plaintiffs generally seek to recover losses suffered as a result of the defendants' conduct. These private rights of action arise from express statutory provisions granting defendants such rights or judicially created rights of action. Private party plaintiffs may also seek injunctive relief to compel, or more likely to enjoin, certain actions by the defendants. Governmental agencies typically seek any of: forfeiture of illegally gotten gains, civil monetary penalties or injunctive relief.

### Administrative proceedings

Administrative proceedings may be brought by the SEC or other relevant governmental agencies pursuant to rules promulgated by such agencies and before administrative law judges that the SEC or such governmental agencies employ. These proceedings are subject to limited appellate court review. In particular, the SEC has an enforcement division with the legal capacity, in many cases, to impose civil penalties and to obtain cease-and-desist orders mandating immediate cessation of improper activities. Dodd-Frank expanded the penalties available to the SEC, most notably granting the SEC the ability to impose monetary penalties in cease and desist proceedings.

### Criminal prosecutions

Criminal proceedings based on federal securities laws may be instituted only by the United States Department of Justice, though such action is often based on the advice and recommendation of the SEC. Defendants subject to such criminal actions face potentially substantial fines and, in the case of individuals, imprisonment. At the direction of Dodd-Frank, the US Sentencing Commission promulgated in April 2012 amendments to the sentencing guidelines for financial fraud to take into account 'the potential and actual harm to the public and the financial markets resulting from the offences.' The amendments, which provide for increased penalties for certain fraud offences, took effect in November 2012. Dodd-Frank also extended the statute of limitations for securities fraud from five to six years.

Additionally, Dodd-Frank created an expansive whistleblower regime that provides significant financial incentives for individuals

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who know of a potential federal securities laws violation to come forward and that protects those individuals from employer retaliation. Under final rules adopted by the SEC in May 2011 to implement the whistleblower programme (and subject to certain limitations), if an individual voluntarily comes forward with original information about potential violations of the federal securities laws that leads to a successful enforcement action resulting in sanctions exceeding US\$1 million, such individual will receive an award equal to 10 to 30 per cent of the aggregate monetary recovery. Dodd-Frank also grants protection to whistle-blowers and others who assist SEC investigations by providing them with a private cause of action against retaliating employers. Remedies include reinstatement, double back pay and attorneys' fees.

\* *The writers would like to acknowledge the assistance of Virginia Anderson in the preparation of this chapter.*



## Getting the Deal Through

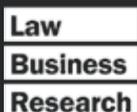
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Securities Finance  
ISSN 2055-5423



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