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MAIN EQUITY MARKETS/EXCHANGES

1. What are the main equity markets/exchanges in your jurisdiction? Outline the main market activity and deals in the past year.

Main equity markets/exchanges

The primary public equity markets are the following:

- **New York Stock Exchange Euronext (NYSE) (*www.nyse.com*).** This operates the:
  - NYSE;
  - NYSE AMEX;
  - NYSE ARCA.

  There were over 2,460 NYSE-listed companies as at 30 November 2011. While there has been a large increase in non-US companies listing outside the United States, 20% of the companies listed on the NYSE are foreign and 50 of the largest 100 companies are non-US entities.

- **NASDAQ Stock Market (NASDAQ) (*www.nasdaq.com*).** NASDAQ operates the:
  - NASDAQ Stock Market (the largest equity securities market in the US, by number of listed companies and average traded share volume), which has three markets:
    - Global Market;
    - Global Select Market;
    - Capital Market.
  - NASDAQ Market Center, which provides market participants with the ability to access, process, display and integrate orders and quotes for stocks listed on NASDAQ and other exchanges.

There are over 2,800 NASDAQ listed companies. 83% of those companies have market capitalisation of less than US$1 billion but they represent only about 11% of the NASDAQ total volume (as at 1 February 2012, US$1 was about EUR0.76) (*Source: William Blair and Company*).

NASDAQ OMX, the parent of NASDAQ, is also launching in 2012 BX Venture Market, a new exchange targeting smaller companies by requiring minimal quantitative listing standards but compliance with many of the qualitative requirements for listing on other securities exchanges.

Market activity and deals

The US equity market is broad and deep, including a robust directly traded private market. In 2011, the equity markets started strong but extreme volatility in the third calendar quarter, over concerns about US and European economic and financial conditions, resulted in fewer IPOs overall than for the comparable period in 2010 (although with more than double the gross proceeds). Offerings rebounded in the fourth quarter of 2011 and there was an increase in IPO filings. Overall, there continue to be significantly fewer IPOs in the last ten years than in prior historical periods. In the nine months ended 30 September 2011:

- There were 112 IPOs, which raised US$32.6 billion, and 392 follow-on equity offerings, which raised US$108.1 billion.
- Foreign private issuers (FPIs) completed 28 US-registered IPOs, raising proceeds of US$7.3 billion (*Source: Thomson Reuters*).

During 2011, there were a number of sectors that were particularly active in IPOs, including technology, industrial, consumer and social media. There were a number of real estate investment trusts (REITs) offerings but that sector was more active in the follow-on market. The largest US IPO to 30 September 2011 was HCA Holdings, a healthcare company that raised gross proceeds of about US$3.8 billion in March 2011. There were few China-based IPOs, unlike previous years.

There were 125 companies on file with the Securities and Exchange Commission (SEC) waiting to go public and expected to raise about US$25 billion in gross proceeds. However, in the first three quarters of 2011, there were about 60 companies that postponed their IPOs by formally withdrawing their registration statements from review by the SEC.

2. What are the main regulators and legislation that applies to the equity markets/exchanges in your jurisdiction?

Regulatory bodies

The main securities regulator is the SEC (*www.sec.gov*). It is an independent US government agency that:

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

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

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Legislative framework

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

- Securities Act of 1933, as amended (*15 USC § 77a et seq.*) (Securities Act).
- Securities Exchange Act of 1934, as amended (*15 USC § 78a et seq.*) (Exchange Act).

In addition, the following also affect the capital markets:

- Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), parts of which are incorporated into the Exchange Act.
- Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).
- Jumpstart Our Business Startups Act (JOBS Act), signed into law on 5 April 2012 (*see Question 40*).

EQUITY OFFERINGS

3. What are the main requirements for a primary listing on the main markets/exchanges?

Main requirements

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

- Registered with the SEC (*see Question 6*).
- Accepted for listing on an exchange.

The main NYSE and NASDAQ listing requirements are set out below.

NYSE

The NYSE includes:

- **Quantitative listing standards for US companies.** The financial criteria under these standards are less stringent than the alternate listing standards (*see below, Alternate listing standards for US and non-US companies*), but the share distribution criteria are based on US shareholdings only. An IPO issuer must satisfy the following criteria:
  - minimum of 400 US shareholders must each hold at least 100 shares and at least 1.1 million shares must be publicly held in the US;
  - publicly held shares in the US must have a market value of US$60 million at the time of the IPO;
  - one of the following five financial tests with specified US dollar thresholds must be satisfied:
    - earnings test;
    - valuation/revenue with cash flow test (based on global market capitalisation, revenues and operating cash flow);
    - a pure valuation/revenue test (based on global market capitalisation and revenues);
    - assets and equity test (based on total assets, shareholders' equity and global market capitalisation); or
    - an affiliated company test (parent or affiliated company is NYSE-listed).
- **Alternate quantitative listing standards for US and non-US companies.** These take into account worldwide share distribution. Consequently, non-US companies often qualify under these standards. FPIs must satisfy the following criteria:
  - minimum of 5,000 shareholders worldwide must each hold at least 100 shares and at least 2.5 million shares must be publicly held worldwide;
  - publicly held shares worldwide must have a market value of US$100 million (or US$60 million for companies qualifying under the affiliated company test (*see above, Quantitative listing standards for US companies*);
  - four financial tests (similar to those for domestic quantitative listing standards, see above, *Quantitative listing standards for US companies*)):
    - earnings;
    - valuation/revenue with cash flow;
    - pure valuation/revenue; and
    - affiliated company.

NASDAQ

There are three markets within the NASDAQ Stock Market:

- Global Market.
- Global Select Market.
- Capital Market.

For each market, the issuer may also be required to meet specified revenues, pre-tax earnings, market capitalisation and cash flow tests, as follows:

- **Global Market quantitative listing requirements.** These are:
  - a minimum of 1.1 million publicly held shares with a market value of at least US$8 million;
  - listed shares must be held by at least 400 holders, each holding at least 100 shares, and must have a bid price of at least US$4 per share.
- **Global Select Market quantitative listing requirements.** These are:
  - a minimum of 1.25 million publicly held shares with a market value of at least US$70 million;
  - listed shares must be held by at least 450 holders, each holding at least 100 shares or 2,200 total holders, and must have a bid price of at least US$4 per share.
- **Capital Market quantitative listing requirements.** These are:
  - a minimum of one million publicly held shares with a market value of at least US$1 million. In the case of American Depositary Receipts (ADRs) (*see Question 4*), at least 400,000 ADRs must be issued;
  - listed shares must have at least 300 holders, each holding at least 100 shares and must have a bid price of at least US$4 per share;
  - the issuer must have at least three registered and active market makers.

NYSE and NASDAQ qualitative listing requirements

Both the NYSE and NASDAQ have qualitative requirements for their listed companies relating to, among other things, corporate governance, including:

- Maintenance of an audit committee.
- Compliance with ongoing requirements, such as distributing annual and interim reports.

FPIs are exempt from many qualitative requirements if they disclose their obligations under the law of their home jurisdiction (*see Question 19*).

4. What are the main ways of structuring an IPO?

An IPO can be structured as an agented or firm-commitment underwritten public offering, and as either or both a:

- **Primary offering.** The issuer offers and sells newly issued shares.
- **Secondary offering.** The issuer's shareholders offer and sell already outstanding (unregistered or restricted) shares.

In both cases, as the IPO involves a public offering (*see Question 6*), the offer and sale must be registered with the SEC.

FPIs' equity securities are often listed and traded as ADRs. An ADR represents a fractional interest in the underlying security issued by the FPIs. An ADR is:

- A negotiable certificate issued by a US commercial bank acting as depositary.
- Transferable on the books maintained by the depositary.
- Treated as a US security for settlement and other purposes.

5. What are the main ways of structuring a subsequent equity offering?

A subsequent (or follow-on) public equity offering can be structured in the same way as an IPO (*see Question 4*). Although each public offering must be registered with the SEC, timing concerns are significantly diminished because the issuer is already subject to continuing SEC reporting requirements and its securities may be listed on a securities exchange. The issuer may also be able to use a shorter form of registration statement for registering additional offered securities (*see Question 10*).

6. What are the main steps for a company applying for a primary listing of its shares? Is the procedure different for a foreign company and is a foreign company likely to seek a listing for shares or depositary receipts?

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

- Registered with the SEC.
- Accepted for listing on an exchange.

A company can also make a public offering in the US without listing on an exchange. However, without a listing, companies may not benefit fully from the advantages of being a US public company.

Requirements for registration

Public securities offerings must be made according to a registration statement (*section 5, Securities Act*), which is filed with, and declared effective by, the SEC. A registration statement contains two parts:

- A prospectus, which is the main marketing and disclosure document (*see Questions 8 to 11*).
- Other information filed with the SEC but not distributed to investors, including exhibits to the registration statement.

The registration statement usually becomes effective on the pricing date for the offering. The issuer is then subject to all of the following (*see Questions 2*, *3* and *19*):

- The continuing public reporting requirements of the Exchange Act.
- Other SEC rules.
- The rules of the exchange on which its shares are listed.

Foreign private issuers

The procedures for SEC registration and listing on an exchange are the same for FPIs and US issuers, although the specific disclosure and corporate governance requirements differ and an FPI may have the ability to file its registration statement with the SEC initially on a confidential basis. An FPI bases its decision whether to list shares or ADRs on a number of factors, including:

- A comparison of the pricing levels in its home jurisdiction to the typical pricing levels in the US markets.
- The perceived benefit of having its shares listed directly (not through ADRs).
- Research coverage.

ADVISERS: EQUITY OFFERING

7. Outline the role of advisers used and main documents produced in an equity offering. Does it differ for an IPO?

The advisers for IPOs and subsequent offerings are generally the same.

Underwriters

The lead underwriters:

- Offer financial advice to the issuer, including valuation advice. This is more critical in an IPO where there is no independent market valuation but underwriters often recommend that an issuer sell its shares at a discount from the public market price.
- Manage the marketing of the securities to prospective investors (*see Question 12*).

A broader syndicate of underwriters usually assists with marketing and distribution. Underwriters typically provide aftermarket support by repurchasing shares at the offer price in the secondary market to stabilise the price after the IPO (*see Question 17*). Underwriters also seek to maintain a long-term relationship with the issuer so as to continue to underwrite future offerings.

Lawyers

The issuer's lawyers draft the registration statement and manage the legal aspects of the offering. The underwriters' lawyers participate in drafting the registration statement and lead the due diligence process (*see Question 11*). As part of the due diligence process, lawyers for the underwriters and the issuer usually prepare letters stating that, based on specific inquiries (and subject to exclusions for financial and other information provided by experts), they are unaware of anything that may indicate that the prospectus contains any material misstatement or omission (*Rule 10b-5, Exchange Act*). For companies in highly regulated industries or with non-US operations, the issuer and underwriters may retain lawyers that specialise in these matters. While preparation of the registration statement is most intense and time-consuming for an IPO, the process is generally similar for subsequent offerings.

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

Independent registered public accounting firm

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

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

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

Others

At the IPO, an issuer appoints a transfer agent to facilitate the increased trading of the shares. The transfer agent both:

- Co-ordinates the issuance and tracking of the issuer's securities.
- Maintains a list of the names of record shareholders.

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

EQUITY PROSPECTUS/MAIN OFFERING DOCUMENT

8. When is a prospectus (or other main offering document) required? What are the main publication, regulatory filing or delivery requirements?

Public securities offerings must be made according to a registration statement (*section 5, Securities Act*), which is filed with, and declared effective by, the SEC. A registration statement contains two parts:

- A prospectus, which is the main marketing and disclosure document (*see Questions 10* and *11*).
- Other information filed with the SEC but not distributed to investors, including exhibits to the registration statement.

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

9. What are the main exemptions from the requirements for publication or delivery of a prospectus (or other main offering document)?

There are exemptions from the registration requirements of section 5 of the Securities Act based on the type of security or transaction. Generally, an issuer can make a limited offer of securities (without registration) in a private placement to sophisticated or institutional investors, subject to a number of conditions. Those securities are then subject to transfer restrictions.

A non-registered (exempt) offering does not require a statutory prospectus but is usually made using an offering memorandum that is often closely based on a statutory prospectus in form and content.

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

The prospectus is the primary disclosure document in a public offering. The contents of a prospectus depend on the applicable SEC registration statement form. The disclosure must include all material information (that is, matters that a reasonable investor would likely deem important in determining whether to purchase the security).

In an IPO, the issuer typically uses:

- Form S-1, if it is a US company.
- Form F-1, if it qualifies as an FPI.

Once the issuer has been a public company for at least 12 months and has filed its periodic reports on a timely basis, it may be eligible to use Form S-3 (or Form F-3 for an FPI) to make subsequent public offerings (*see Question 27*). Form S-3 is a short-form registration statement that allows the issuer to refer in the prospectus to information from its SEC reports filed under the

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Exchange Act (*see Question 19*) that would otherwise be required to be stated in full.

A typical IPO prospectus contains the following sections:

- Summary of prospectus, including business and financial information and key offering terms.
- Risk factors.
- Use of proceeds.
- Dividend policy.
- Issuer capitalisation (not required but usually provided).
- Dilution, setting out calculations of the public contribution under the public offering and the effective cash contribution of insiders (officers, directors, promoters or affiliates).
- Selected financial data.
- Management's discussion and analysis of financial condition and results of operations.
- Material aspects of the issuer's business.
- Management, providing a five-year employment history of directors and executive officers, and including disclosure about board committees, corporate governance guidelines and codes of ethics.
- Compensation discussion and analysis and executive compensation. FPIs may provide more limited information.
- Related party transactions.
- Principal and selling shareholders.
- Description of capital stock.
- Shares eligible for future sale and contractual and legal restrictions on certain resales, such as lock-up agreements.
- Tax issues.
- Underwriting.
- Legal matters.
- Identification of the independent public accounting firm and any other experts that may be required to give an opinion on the prospectus.
- Financial statements, typically three years of audited financial statements and unaudited financial statements for any required interim periods. If an FPI prepares its financial statements according to the International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB), it need not reconcile its financial information to US Generally Accepted Accounting Principles (US GAAP).

An FPI must include certain additional information in the prospectus (for example, information on the enforcement of judgments against the issuer, and on any exchange controls and taxation of shareholders in the issuer's home jurisdiction).

The registration statement also contains additional information and required exhibits, including organisational documents, material contracts and consents of experts. The issuer can request confidential treatment of sensitive information.

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

11. How is the prospectus (or other main offering document) prepared? Who is responsible and/or may be liable for its contents?

Preparation

The issuer and its lawyers prepare the prospectus working with the underwriters and their lawyers, and the auditors. The underwriters and their lawyers conduct due diligence on the issuer and verify the information in the prospectus. The diligence process includes:

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

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

For a subsequent offering, most of the disclosure is taken from the issuer's ongoing SEC filings, so the prospectus drafting process is typically shorter. In most cases, the SEC does not comment on the prospectus for a subsequent offering, although it may have commented on the issuer's ongoing public filings.

Liability

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

- **Section 11 liability.** If the registration statement contains an untrue statement of a material fact, or omits to state a material fact required to be stated in it (or that is necessary to make the statements not misleading), any buyer of a security under a registration statement can sue the issuer and the following persons:
  - anyone who signed the registration statement (a registration statement is signed by the issuer's chief executive, principal financial and accounting officers, and at least a majority of the issuer's directors);
  - any director (or person who consented to be named as a director) at the time the registration statement was filed;
  - every accountant, engineer, appraiser or other expert who consented to be named as having prepared or certified the accuracy of any part of the registration statement, or any report or valuation used in the registration statement (but liability is limited to that information);
  - every underwriter.

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- **Section 12 liability.** A buyer of a security can sue any person who both:
  - offered or sold the security to that buyer in violation of section 5 of the Securities Act;
  - offered or sold the security to that buyer by means of a prospectus or oral communication that included an untrue statement of a material fact (or omitted to state a material fact necessary to make a statement, in light of the circumstances under which it was made, not misleading.
- **Section 15 liability.** Every person who controls (through share ownership, agreement or otherwise) any other person that is liable under section 11 or 12 of the Securities Act is jointly and severally liable with the other person, unless the controlling person had no knowledge of, or reasonable grounds to believe in, the existence of the facts that resulted in the alleged liability.
- **Section 10(b) and Rule 10b-5 liability.** It is unlawful for any person to do any of the following in connection with the purchase or sale of any security:
  - employ any fraudulent scheme;
  - make any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading;
  - engage in fraud or deceit.

To succeed in a Rule 10b-5 claim, the claimant must show that the person selling the security intended to deceive or had a reckless disregard of the truth. This "scienter" requirement does not apply under sections 11 and 12 of the Securities Act.

Defences

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

MARKETING EQUITY OFFERINGS

12. How are offered equity securities marketed?

IPOs are marketed through road shows. In recent years, it has become less common to market follow-on offerings through road shows. Use of electronic road shows has become common, particularly for follow-on offerings. Underwriters, accompanied by the issuer's management, make presentations to prospective investors, using slide shows and a preliminary prospectus. After the road show, the underwriters both:

- Obtain indications of interest from prospective investors.
- Build a book of demand for the securities offered, based on the number of securities that investors indicate they would be willing to purchase at particular price points.

Issuers who are already public can use a variety of approaches to market their equity securities to minimise execution risk, including the potentially adverse impact on an issuer's stock price associated with an announced or marketed failed deal. Also, in recent years, the mere announcement of a follow-on offering has led to significant short selling in that issuer's securities in advance of pricing. If an issuer has an effective shelf registration statement (*see Question 16, Subsequent offerings*), underwriters may engage in pre-marketing activities before public announcement of a transaction, by contacting institutional investors on a confidential basis to gauge their potential interest.

Following a successful pre-marketing phase, the issuer may publicly announce the transaction and have the underwriters market the securities to a broader group of investors with the expectation of very quickly (usually in a matter of hours) pricing the offering. There are also other methods of sale, including at-the-market offerings, which typically do not involve a broad distribution of securities.

13. Outline any potential liability for publishing research reports by participating brokers/dealers and ways used to avoid such liability.

Underwriters participating in an IPO cannot issue research reports. If a distribution participant issues a research report, this may violate section 5 of the Securities Act (*see Question 11*), which may create a rescission right for buyers. Additionally, the issuer and the underwriters may be liable for the information contained in the research report. However, the new JOBS Act permits research reports before, during and after the IPO offering period for emerging growth companies (*see Question 40*).

Once the issuer is public, an underwriter is subject to different rules regarding publication of research reports. Permissible research activities depend on a number of factors, including whether the:

- Underwriter is an offering participant.
- Research report relates to the offered securities.
- Issuer meets the requirements for use of a short-form registration statement (which can indicate that the issuer has a larger capitalisation and greater market following).
- Underwriter regularly publishes reports of the kind being proposed.

Underwriters typically consult counsel on deal-specific concerns.

FINRA also prohibits managers and co-managers of an offering from publishing research for:

- 40 days after the offering (for an IPO).
- Ten days after offering (for a follow-on offering).

In an IPO, participating underwriters or dealers (other than managers and co-managers) cannot publish research during the 25-day period after the offering.

BOOKBUILDING

14. Is the bookbuilding procedure used and in what circumstances? How is any related retail offer dealt with? How are orders confirmed?

The bookbuilding procedure is used (*see Question 12*). Most IPOs include a retail component (about 10% to 30% of the shares are marketed to retail investors (*see Question 12*)). Issuers often use

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investment banks with significant retail distribution networks as co-managers or syndicate members to assist with this. The same process can apply in subsequent offerings.

UNDERWRITING: EQUITY OFFERING

15. How is the underwriting for an equity offering typically structured? What are the key terms of the underwriting agreement and what is a typical underwriting fee?

In an IPO, underwriters usually commit, at pricing, to purchase the offered securities for resale to investors (firm commitment basis). This is distinguished from conditional arrangements, such as best efforts (or agency) commitments. Follow-on offerings may be completed on a firm commitment basis or conditional basis. The structure of the underwriting agreement is generally similar. FINRA reviews underwriting arrangements for all IPOs and some follow-on offerings.

Purchase and sale

The underwriters either:

- Commit to purchase the securities from the issuer at pricing and pay for the securities on settlement (subject to satisfaction of the closing conditions (*see below, Closing conditions*)).
- Agree to use best efforts to solicit buyers but the contractual purchase obligation is between the issuer and the investor.

In most firm commitment equity offerings, the issuer grants the underwriters an option to purchase up to an additional 15% of the number of offered securities to cover over-allotments.

The underwriting fee for firm commitment IPOs ranges from 5% to 7% of the gross proceeds. The range for subsequent firm commitment offerings is somewhat lower. Underwriting fees for best efforts offerings are variable, ranging from 3% to 8%.

Representations and warranties

The issuer represents and warrants both:

- The completeness and accuracy of the prospectus.
- A variety of other matters relating to its organisation and operations.

Lock-up agreement

The underwriting agreement usually specifies a lock-up period (typically 180 days for IPOs and 60 to 90 days for subsequent offerings) during which the issuer and its directors, officers and, for IPOs, most shareholders, agree not to sell securities of the same class as the offered securities, subject to certain negotiated exceptions.

Closing conditions

The underwriters are only obliged to purchase the securities if the underwriters receive a "bring-down comfort" letter from the auditor and legal opinions from the issuer's and underwriters' lawyers.

Underwriting agreements also usually limit the underwriters' obligation to purchase the securities if a material adverse change in the issuer's business occurs after the underwriting agreement is signed but before the offering is due to close. For both firm commitment and best efforts offerings, settlement usually occurs three or four business days after pricing.

Indemnification

The issuer agrees to indemnify the underwriters for any loss or liability resulting from an untrue statement of a material fact or a material omission in the registration statement or prospectus. Any selling shareholders will also indemnify the underwriters but usually only as to the information related solely to the selling shareholders, and their liability will be capped at their net proceeds.

Termination

The underwriters can terminate the underwriting agreement if a significant external event occurs, such as suspension of trading on the relevant exchange.

TIMETABLE: EQUITY OFFERINGS

16. What is the timetable for a typical equity offering? Does it differ for an IPO?

IPO timetable

The IPO process can take between three and six months, depending mainly on the time necessary to prepare the registration statement, which varies based on:

- The time needed to prepare SEC-compliant financial statements. FPIs can prepare financial statements according to IFRS as issued by the IASB, or with US GAAP. Financial statements can also be prepared according to other accounting principles, as long as they are reconciled to US GAAP.
- The SEC comment process (*see Question 11*).
- Market conditions.
- The time needed to prepare and file a listing application (*see Question 3*).

There are three periods in the SEC registration process:

- **Pre-filing period.** During this "quiet period", the registration statement and prospectus are prepared and due diligence is conducted. No offers, whether oral or written, are permitted.
- **Period between filing the registration statement and effectiveness.** During this "waiting period", the SEC comments on the registration statement (generally within 30 days of filing) and the road show and other marketing efforts are undertaken. Oral offers are permitted, but written offers cannot be made (apart from under a statutory prospectus) until the registration statement is declared effective.
- **Period after effectiveness.** During this period the securities are priced, sales are confirmed and the securities are delivered to investors, typically within three business days of pricing.

Subsequent offerings

The timeline for a subsequent offering is typically much faster because most of the required disclosure will already be included in the issuer's ongoing SEC reports. If the issuer meets the requirements to use a short-form registration statement on Form S-3 (or Form F-3 for FPIs) (*see Question 27*), the issuer can prepare the prospectus and registration statement up to three years in advance of any proposed use, and may be able to conduct an offering virtually overnight. This is referred to as a shelf registration statement. Very large issuers, known as well known seasoned issuers (WKSIs), can file a Form S-3 that will be effective immediately, allowing the WKSI to move quickly to take advantage of market opportunities.

STABILISATION

17. Are there rules on price stabilisation and market manipulation in connection with an equity offering?

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

TAX: EQUITY ISSUES

18. What are the main tax issues when issuing and listing equity securities?

Domestic investors

Domestic investors that purchase shares in a US IPO must pay US federal income tax on dividends, if any, and capital gains. Corporate purchasers may be eligible for a deduction on dividends received.

Non-US investors

For non-US investors the following applies:

- **Dividends.** Non-US holders of shares are generally subject to a 30% US federal withholding tax on dividends. A tax treaty between the US and the shareholder's tax jurisdiction may provide relief from the withholding requirement.
- **Capital gains.** A non-US holder is generally not subject to capital gains tax unless:
  - he is an individual, is present in the US for at least 183 days of the taxable year and certain other requirements are met;
  - the gain is effectively connected with a US trade or business (or, if certain income tax treaties apply, the gain is attributable to a US permanent establishment (PE) maintained by the non-US holder);
  - the company is a US real property holding corporation (generally, if 50% or more of the company's assets by value are US real property related assets) and the non-US holder generally holds more than 5% of the shares.

The Foreign Account Tax Compliance Act (FATCA) enacted in 2010, will impose a 30% US withholding tax on dividends paid by US issuers and on the gross proceeds from the disposition of stock paid to a foreign financial institution. Originally effective for payments made after 31 December 2012, this 30% US withholding tax is effective for dividends as of 1 January 2014 and for gross proceeds from the disposition of stock as of 1 January 2015. This will apply unless the foreign financial institution enters into an agreement with the US Treasury to collect and provide to the US Treasury substantial information regarding US account holders with the foreign financial institution (including certain account holders that are foreign entities with US owners).

The legislation also generally imposes a withholding tax of 30% on dividends paid by US issuers and on the gross proceeds from the disposition of stock paid to a non-financial foreign entity, unless the entity provides the withholding agent with a certification that either:

- It does not have any substantial US owners.
- Identifies the direct and indirect substantial US owners of the entity.

Other tax issues

Additional tax issues may arise in certain circumstances.

CONTINUING OBLIGATIONS

19. What are the main areas of continuing obligations applicable to listed companies and the legislation that applies?

Key areas

The key areas of continuing obligations for public companies are:

- Periodic reporting.
- Compliance with the Sarbanes-Oxley Act and the Dodd-Frank Act.
- Share ownership and transaction reporting by the company's officers, directors and 10% shareholders.
- Beneficial ownership reporting for acquirers of 5% or more of the company's equity securities.
- Continued qualitative and quantitative listing requirements of the relevant exchange, including relating to corporate governance.
- Disclosure and timing requirements related to shareholder meetings.
- Rules relating to the conduct of tender offers and other securities-related transactions.

Periodic reporting

A US company must file with the SEC:

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

The reporting requirements are less onerous for FPIs. They must:

- File an annual report on Form 20-F within six months after the end of its fiscal year (within four months for annual reports filed for fiscal years ending after 15 December 2011). The annual report on Form 20-F must also contain a summary of differences between US and home jurisdiction's corporate governance requirements. However, they are not required to file quarterly reports on Form 10-Q or current reports on Form 8-K.

- Include on Form 6-K any material information that it either:
  - makes public under its home jurisdiction's laws or stock exchange requirements; or
  - is required to distribute to its shareholders, such as bi-annual or quarterly reports.

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

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

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

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

In addition, each annual report must include a management report and auditor's report on the company's internal control over financial reporting. Newly public companies are not required to file either report until their second annual report after their IPO. Smaller public companies, whether domestic or foreign, are not required to provide the auditor's report. The new JOBS Act also provides relief from certain ongoing disclosure obligations for emerging growth companies (*see Question 40*).

NYSE and NASDAQ corporate governance requirements

NYSE and NASDAQ both have ongoing corporate governance requirements, such as director independence, formation of certain board committees and regular meetings of non-management directors. They also require annual management attestations of compliance with corporate governance requirements. In many areas, the NYSE and NASDAQ permit FPIs to follow home jurisdiction governance practices, provided they disclose publicly the significant differences caused by following these practices.

There are no significant shareholder voting restrictions. US federal securities laws, including the Dodd-Frank Act, and the NYSE and NASDAQ corporate governance requirements for domestic issuers, encourage shareholder voting and involvement.

20. Do the continuing obligations apply to listed foreign companies and to issuers of depositary receipts?

The continuing obligations are similar to those that apply to listed companies, see *Question 19*.

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

Failure to file required Exchange Act reports can result in the SEC bringing an enforcement action against the issuer seeking injunctive relief. In addition, any officer of the company who knowingly makes a false certification in connection with an Exchange Act report can potentially be subject to both:

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

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

DE-LISTING

22. When can a company be de-listed?

Voluntary de-listing

A company can seek to de-list its shares from the NYSE or NASDAQ voluntarily because, among other reasons, it believes it cannot continue to satisfy a continuing listing requirement. However, the company may still be required to maintain its SEC registration if it meets the SEC's registration requirements.

Suspension of registration

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

- There are fewer than 300 record holders of the common equity.
- The number of holders of the common equity falls below 500 and the company's total assets have been no more than US$10 million at the end of each of its last three fiscal years.

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

Termination of registration

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

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

De-listing by the exchange

The NYSE and NASDAQ can de-list an issuer that fails to comply with its continuing listing requirements, whether qualitative or quantitative, including minimum share price. There is a notice and hearing process, and the issuer has the opportunity to demonstrate its plan to regain compliance with the applicable requirement. If the NYSE or NASDAQ does not accept the issuer's plan or the company fails to regain compliance, the exchange makes appropriate SEC filings. This process can take months or even years, depending on the applicable requirement. A de-listed company may still be required to maintain its registration with the SEC if it meets the SEC's registration requirements.

Recent de-listings

In the 11 months ended 30 November 2011, for failure to comply with listing requirements (without distinguishing FPIs who voluntarily de-list) (*source: Bloomberg*) about:

- Ten companies were de-listed from the NYSE.
- 64 companies were de-listed from the NASDAQ.

MAIN DEBT CAPITAL MARKETS/EXCHANGES

23. What are the main debt securities markets/exchanges in your jurisdiction (including any exchange-regulated market or multi-lateral trading facility (MTF))? Outline the main market activity and deals in the past year.

Main debt markets/exchanges

Issuers typically market investment grade debt securities in registered public offerings. Foreign issuers can also market debt securities as registered offerings (Yankee bonds) or in Rule 144A offerings. Offerings of high yield debt securities are typically conducted as private placements or offerings under Rule 144A of the Securities Act (*see Question 31*). Investment grade securities are usually not listed on an exchange. As at 30 November 2011, about 6,579 debt securities were listed on the NYSE, NYSE Arca and NYSE Amex (*source: Bloomberg*). NASDAQ began listing debt securities only in recent years and has an immaterial share of the listed debt market.

Market activity and deals

There were about US$804.4 billion of debt securities issued by non-governmental borrowers in the US debt markets (public and private) in the nine months ended 30 September 2011. This is about a 1.8% increase from the approximate US$790.4 billion issued in the comparable 2010 period. (These amounts exclude mortgage-backed and asset backed offerings.)

24. What are the main regulators and legislation that applies to the debt securities markets/exchanges in your jurisdiction?

Regulatory bodies

The main regulators are as apply to equity markets, see *Question 2*.

Legislative framework

The main legislation is as applies to equity markets, see *Question 2*.

LISTING DEBT SECURITIES

25. What are the main listing requirements for debt securities?

Main requirements

US securities offerings, including offerings of debt securities, must be registered under the Securities Act, unless a valid exemption from registration is available (*see Question 27, Private placement of debt securities*). Registered offerings of debt securities may not involve listing on an exchange although the issuer may be required for at least some time to file periodic reports with the SEC. Investment grade securities are likely to be listed on the NYSE.

Minimum size requirements

The NYSE has separate listing standards for listed companies and their affiliates and for non-listed or affiliated companies. Companies must meet specified financial criteria (*see Question 3*). In addition, an issuer cannot list debt securities with a total market value of less than US$5 million.

Trading record and accounts

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

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

If not rated, a company's:

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

Minimum denomination

There are limited minimum denomination requirements depending on the nature of the debt instrument. Certain structured debt instruments that are registered and listed can be required to have denominations of US$10. A customary denomination is US$1,000 and the offering may require a minimum purchase. Private offerings typically have both higher minimum denominations (for example, US$250,000) and minimum purchases (for example, US$1 million).

STRUCTURING A DEBT SECURITIES ISSUE

26. What are the main types of debt securities issued in your jurisdiction?

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

- Debt securities typically are offered and sold to institutional investors. However, some issuers offer their securities through retail note programmes and offer "baby bonds" or bonds having US$25 or US$1,000 denominations.
- Larger issuers, especially financial institutions, also offer structured debt securities, including securities with embedded derivatives, or that otherwise reference the performance of an underlying asset, which can include a currency, an index, or a commodity.
- Financial institution issuers also offer other hybrid securities that are intended to qualify for favourable regulatory capital treatment.
- Banks may offer debt securities through continuous offerings of bank notes.

- Smaller issuers or those whose debt securities are below investment grade may issue debt securities with more complex features, including secured debt or convertible debt. These securities may be offered in registered transactions or may be offered in exempt transactions to qualified institutional buyers in 144A qualifying transactions (*see Question 27*).

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

The two main ways of issuing debt securities are:

- A registered offering.
- A private placement (such as a Rule 144A offering).

Registered offering

The methods of registration include:

- **Registration on Form S-1.** An issuer that does not currently file, or has only recently begun filing, Exchange Act reports must use Form S-1 (Form F-1 for FPIs) to register issuances of its debt securities. The contents of the prospectus are essentially the same as for a registration statement on Form S-1 for an offering of equity securities, plus a description of the terms of the debt securities (*see Question 10*).
- **Shelf registration.** An issuer may be eligible to use Form S-3 (or Form F-3 for an FPI) if it:
  - has filed periodic reports under the Exchange Act for at least 12 months;
  - has at least a US$75 million worldwide common equity float held by non-affiliates;
  - has been timely in its periodic filings.

  Form S-3 is a short-form registration statement. A specific offering of a class or series of debt securities is made by means of a prospectus supplement to the basic prospectus. The prospectus supplement includes specific information about the terms of the offering and the debt securities. Issuers often also use term sheet free writing prospectuses (FWP) to describe the terms of the offered securities.
- **Shelf registration for WKSIs.** Issuers eligible to use Form S-3 and that meet various requirements (*see below*) are WKSIs and can use Form S-3ASR (or Form F-3ASR for an FPI). An issuer is a WKSI if, within 60 days of the issuer's eligibility determination date, it either:
  - has a worldwide market value of its outstanding equity held by non-affiliates of at least US$700 million;
  - has issued in the last three years at least US$1 billion of non-convertible securities (other than common equity securities) in primary offerings for cash registered under the Securities Act.

  A shelf registration statement filed on Form S-3ASR is effective automatically and an issuer can offer securities immediately.
- **Qualification under the Trust Indenture Act.** Debt securities that are SEC-registered must be issued under an indenture qualified under the Trust Indenture Act of 1939, as amended (*15 USC § 77aaa to 15 USC § 77bbbb*). Qualification includes appointing and registering the indenture trustee with the SEC. A qualified indenture contains mandatory provisions that apply automatically, including provisions related to the duties of the trustee.

Private placements of debt securities

Debt securities can also be issued in reliance on an exemption from registration, usually under section 4(2) of the Securities Act, as follows:

- **Rule 144A offering.** The issuer can privately place the securities under section 4(2) with an intermediary, for subsequent resale under Rule 144A (Rule 144A offering). In a Rule 144A offering, securities can be offered and sold without registration to qualified institutional investors (QIBs), or large institutional investors that generally have at least US$100 million of securities under management. Rule 144A also requires that:
  - the securities being offered are not of the same class as, or convertible into, securities listed on a national securities exchange;
  - the offering is not made using general solicitation or general advertising, or other forms of publicity in the US.

  Securities sold under Rule 144A are restricted securities that cannot be resold freely. Resales are limited to other QIBs and trades are generally made in the over-the-counter (OTC) market.
- **Exchange offers.** Issuers using Rule 144A may undertake, at the time of issuance, to register the securities with the SEC after the offering is completed, so that the securities become freely tradable. Registration is typically accomplished by an exchange offer (called an A-B or Exxon Capital exchange), in which the securities sold under Rule 144A are exchanged for securities with the same terms but registered on Form S-4 (or F-4 in the case of an FPI). FPIs in particular may prefer Rule 144A offerings without a subsequent exchange offer (Rule 144A for life).
- **Regulation S under the Securities Act.** Offerings to US investors under Rule 144A are often part of larger global offerings that include sales outside the US made in reliance on Regulation S. Regulation S is a safe harbour for offers and sales in offshore transactions.

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

In the US, larger, well-seasoned investment grade or high grade issuers generally offer straight senior or subordinated debt in registered public offerings. These securities can be fixed or floating rate obligations. Most floating rate obligations reference LIBOR. In recent years, fixed-to-floating and auto callable type structures have been popular. These issuers may also offer senior debt obligations with interest and/or principal payments that are based on the performance of a reference asset. These are generally referred to as structured notes. The reference asset may be an index (like the S&P 500), an equity security or basket of equity securities or a commodity. Most of these are issued in registered public offerings. Companies whose debt is not investment grade rated may offer senior or subordinated debt in private (Rule 144A) offerings or registered public offerings. Usually, the debt securities will include some covenants. Most convertible notes are offered in Rule 144A offerings. High yield debt typically is offered in private (Rule 144A) offerings, and the debt securities will contain numerous covenants. Historically, financial institutions and some utilities have offered hybrid securities using a trust structure, including trust preferred securities, REIT preferred securities or certain structured mandatory convertibles. Given regulatory changes, trust preferred securities are no longer as common.

ADVISERS: DEBT SECURITIES ISSUE

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

Offerings of debt securities in the US involve the same advisers as those involved in equity offerings (*see Question 7*), as well as lawyers for the trustee (equivalent to a fiscal/paying agent). The trustee's counsel negotiates provisions of the indenture relating to the trustee and represents the trustee's interests. The main documents are also substantially the same with the addition of an indenture or other instrument for the debt securities being offered.

DEBT PROSPECTUS/MAIN OFFERING DOCUMENT

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

In a registered public offering of debt securities, a written prospectus meeting the requirements of the Securities Act must be delivered (*see Question 8*).

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

A Rule 144A offering (see *Question 27, Private placements of debt securities*) does not require a statutory prospectus. However, because Rule 144A offerings are subject to Securities Act and Exchange Act liability (*see Question 11*), they are usually made using an offering memorandum that closely tracks a statutory prospectus in form and content.

Certain classes of debt securities are excluded from registration under the Securities Act. These include short-term notes (with maturities of 270 days or less), such as commercial paper, and securities issued by banks (bank notes).

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

The contents of the prospectus are essentially the same as for an offering of equity securities, plus a description of the terms of the debt securities (*see Question 10*).

33. How is the prospectus (or other main offering document) prepared? Who is responsible and/or may be liable for its contents?

See *Questions 7* and *11*. Regardless of the offering document used, the underwriters and their lawyers conduct due diligence on the issuer (*see Question 11*).

TIMETABLE: DEBT SECURITIES ISSUE

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

A US debt offering can take from between a few days to a few months to complete, depending on the structure of the offering, whether the issuer is already public, and the underwriters' ability to conduct due diligence and obtain a comfort letter (*see Questions 7 and 11*).

TAX: DEBT SECURITIES ISSUE

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

Payment of interest

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

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

If a non-US holder cannot satisfy the requirements described above, payments of interest are generally subject to a 30% US federal withholding tax, unless the non-US holder provides an IRS Form W-8BEN claiming an exemption from or reduction in withholding under the benefits of an applicable income tax treaty.

Dispositions

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

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

Other tax issues

FATCA, which imposes a 30% US withholding tax on payments (*see Question 18*), also generally applies to interest income from debt obligations of US issuers, and on the gross proceeds from a disposition of such obligations. However, the withholding tax will not be imposed on payments pursuant to obligations outstanding as of 18 March 2012.

Other tax issues may arise in certain circumstances.

CLEARING AND SETTLEMENT OF DEBT SECURITIES

36. How are debt securities cleared and settled and what currency are debt securities typically issued in? Are there special considerations for holding, clearing and settling debt securities issued in foreign currencies?

Debt securities issued in the US are more frequently than not denominated in US dollars. However, debt securities can be denominated in any currency. For any debt security that is denominated in a foreign currency (currency other than US dollars), special care should be taken to discuss payment and settlement issues with the trustee or fiscal and paying agent and with the Depository Trust Company (DTC). DTC will not handle payments to security holders in any currency other than US dollars. However, the trustee/fiscal agent and DTC can make arrangements for payments in foreign currency to be made through Euroclear or Clearstream.

CONTINUING OBLIGATIONS: DEBT SECURITIES

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

Key areas

Continuing obligations vary depending on whether the issuer has:

- Securities registered under the Exchange Act.
- Listed its debt securities on the NYSE.
- Offered debt securities under Rule 144A and is not otherwise a reporting company.

Debt securities registered under the Exchange Act

The key areas of continuing obligations are substantially similar to those for companies with equity securities registered under the Exchange Act (*see Question 19*). After it has filed its first annual report with the SEC, the debt issuer can cease to file periodic reports under the Exchange Act if it meets applicable deregistration requirements (*see Question 22*).

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

NYSE requirements

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

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

- The total market value or principal amount of publicly held bonds falls below US$1 million.
- The issuer is no longer able to meet its obligations on the listed debt securities.

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

Rule 144A ongoing information requirements

An issuer that is not a reporting company nor exempt from reporting under Exchange Act Rule 12g3-2(b) (*see Question 22*) must provide reasonably current information to security holders and prospective investors (Rule 144A), including:

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

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

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

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

Domestic and foreign issuers have the same obligations. The key issue is whether the issuer must be registered under the Exchange Act contractually or under SEC requirements.

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

If the securities are registered under the Exchange Act and trade on an exchange, *see Question 21*. There may also be contractual penalties for breaching the continuing obligations. Debt securityholders' rights are contained in the operative debt documents, primarily the indenture.

REFORM

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

In the aftermath of the financial crisis, there have been a number of proposals that will likely affect the capital markets. Since the Dodd-Frank Act was passed in July 2010, the SEC's attention has been focused on the many studies and rulemaking it must undertake and it has fallen behind in the timeline for implementing its provisions. The SEC must still:

- Impose a new regime for regulating OTC derivatives, including defining swaps and swaps dealers and registering dealers and a new marketplace.
- Contend with Volcker rule, which regulates proprietary trading.
- Finalise rule proposals relating to, among other things, executive compensation and the fiduciary duties of broker-dealers.

The many changes created by the Dodd-Frank Act will have an impact on the capital markets. US financial institutions are also likely to be affected by the Basel III framework (international reforms for the banking sector).

The US Congress, the US Treasury Department and the SEC have been focused on impediments to capital formation by private companies and the high financial and managerial costs of being a US public company. The growth of private markets for resales of securities issued privately and the proposed BX Venture Market also demonstrate non-governmental response to changing economic and financial conditions.

On 5 April 2012, the JOBS Act was signed into law by the US President. It is intended to ease the regulatory burdens on US and foreign smaller companies and facilitate capital formation. JOBS Act measures include:

- Creating a transitional "on-ramp" for emerging growth companies (generally an issuer with total annual gross revenues of less than US$1 billion that meets certain other requirements) to encourage them to pursue IPOs by phasing in disclosure requirements and compliance measures over time following their IPOs.
- Permitting companies to conduct offerings to raise up to US$50 million through a mini-registration process.
- Increasing the shareholder of record trigger for SEC reporting obligations from 500 to 2,000 (only 500 of which can be non-accredited investors, within the meaning of the securities laws) and with a higher threshold for certain banks and bank holding companies.
- Easing the prohibition against general solicitation and general advertising in connection with private placements.

Providing an exemption under the Securities Act for "crowdfunding" offerings. The JOBS Act is new and the SEC must engage in additional rulemaking as to parts of it. The Act holds the prospect of making a difference not only for emerging companies but also for already public companies and the banks that advise them.

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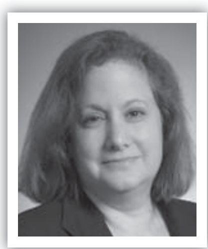

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