United States

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EQUITY CAPITAL MARKETS: GENERAL

1. Please give a brief overview of the equity market(s) in your jurisdiction and initial public offering (IPO) activity generally. What were the large deals over the past year? Have there been many listings of overseas companies on your market(s)?

The financial crisis began in 2007 with the sub-prime crisis and has continued into 2009. This led to dislocation in the capital markets and an atypical level of activity in the equity markets.

Overall, IPO activity in the US equity markets increased in 2009:

- 2008: 51 IPOs in all.
- 2009: 31 IPOs in all.

Non-US companies (foreign private issuers (FPIs)) accounted for four of the 25 largest US-registered IPOs in 2009.

The number of follow-on equity offerings increased:

- 2007: 415 follow-on equity offerings raising a total of US$85 billion (EUR57.7 billion).
- 2008: 243 follow-on equity offerings raising a total of US$152.3 billion (EUR103.5 billion).
- 2009: 587 follow-on equity offerings raising a total of US$200.6 billion (EUR136.3 billion).

Many of the IPOs in 2009 were offerings by mortgage REITs, which formed to take advantage of opportunities to purchase distressed or undervalued mortgage-related securities. Another significant segment of the IPOs in 2009 were business development companies that formed to fill the perceived need for capital for smaller businesses. Many of the follow-on offerings were offerings by commercial banks bolstering their regulatory capital levels through issuing equity securities (*sources: www.ipovitalsigns.com, Bloomberg and www.ipohome.com*).

2. Please describe the main equity capital market(s) and summarise the following in relation to each market (distinguishing where appropriate the requirements for overseas companies seeking a primary listing in your jurisdiction):

- **The regulator.**
- **Any minimum size requirement.**
- **Any minimum trading record required.**
- **Any working capital requirements.**
- **Any minimum numbers of shares in public hands.**
- **Number of companies traded.**
- **Annual cost of being listed.**

The New York Stock Exchange (NYSE) and the NASDAQ Stock Exchange (*see box, The regulatory authorities*) are the main equity capital markets. There were about 1,831 NYSE-listed companies and 2,782 NASDAQ Composite Index members at 31 December 2009.

Regulator

The SEC, an independent US government agency, is the main US securities regulator. It 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).

The Financial Industry Regulatory Authority (FINRA) is the largest non-governmental self-regulatory organisation for US securities firms. It conducts (*see Question 4*):

- Rule writing.
- Firm examination.
- Enforcement.
- Arbitration and mediations.
- Market regulation.
- Trade reporting.
- Other securities industries utilities.

NYSE

NYSE quantitative listing requirements. The NYSE imposes quantitative listing requirements (for qualitative listing requirements *see below, NYSE and NASDAQ Stock Exchange qualitative listing requirements*):

- **Domestic 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 and do not take into account non-US shareholdings. Under these standards, an IPO issuer must satisfy the following criteria:

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- share distribution: a 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;
- market capitalisation: publicly held shares in the US must have a market value of US$60 million (EUR40.8 million) at the time of the IPO;
- financial tests: one of five financial tests with specified dollar thresholds must be satisfied:
  - an earnings test;
  - a 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);
  - an assets and equity test (based on total assets, shareholders' equity and global market capitalisation);
  - an affiliated company test (where the parent or affiliated company is NYSE-listed).

- **Alternate listing standards for US and non-US companies.** These take into account the worldwide distribution of shares and, consequently, non-US companies often qualify under these standards. Under these standards for FPIs, a non-US issuer must satisfy the following criteria:
  - shares in public hands: a 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;
  - market capitalisation: publicly held shares worldwide must have a market value of US$100 million (EUR67.9 million) (or US$60 million (EUR40.8 million) for companies qualifying under the affiliated company test (*see above*)); and
  - financial tests: there are four financial tests similar to those for domestic listing standards: earnings, valuation/revenue with cash flow, pure valuation/revenue and affiliated company (*see above*).

Fees. The initial listing fee for a class of common equity securities on the NYSE is between US$150,000 (EUR101,900) and US$250,000 (EUR169,830), including a one-off charge of US$37,500 (EUR25,475). The annual fee for the first listed class of equity securities is the greater of a minimum fee of US$38,000 (EUR25,814) or a fee calculated on a per-share basis. There are additional fees for additional listed classes. The total fees payable by a listed company in any calendar year are capped at US$500,000 (EUR339,660). These listing fees apply both to US issuers and FPIs.

A non-US company can list under either set of standards.

NASDAQ

There are three markets on the NASDAQ Stock Exchange:

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

The Global Select Market has the most stringent initial listing requirements, followed by the Global Market and the Capital Market. In each case, the issuer may also be required to meet specified revenues, pre-tax earnings, market capitalisation and cash flow tests.

NASDAQ quantitative listing requirements. Global Market quantitative listing requirements:

- The issuer must have at least 1.1 million publicly held shares with a market value of at least US$8 million (EUR5.4 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 (EUR2.7) per share.

Global Select Market quantitative listing requirements:

- The issuer must have at least 1.25 million publicly held shares with a market value of at least US$70 million (EUR47.6 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 (EUR2.7) per share.

Capital Markets quantitative listing requirements:

- The issuer must have at least one million publicly held shares with a market value of at least US$1 million (about EUR679,325). In the case of American Depositary Receipts (ADRs), 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 (about EUR2.67) per share.
- The company must have at least three registered and active market makers.

Listing fees. Global Select Market and Global Market listing fees:

- The initial listing fee consists of a US$5,000 (EUR3,396) application fee plus an additional amount of between US$100,000 (EUR67,933) and US$150,000 (EUR101,900).
- The annual fee for common or ordinary shares is based on total shares outstanding in the US for all listed classes. The fee ranges from a minimum of US$30,000 (EUR20,380) to a maximum of US$95,000 (EUR64,536). For American Depositary Shares (ADSs), the annual fee ranges from a minimum of US$21,225 (EUR14,420) to a maximum of US$30,000.
- There are no additional fees for listing other classes of equity securities.

Capital Market listing fees:

- Capital Market entry fees range from US$55,000 (EUR37,363) to US$80,000 (EUR54,346) (including the US$5,000 (EUR3,397) initial fee).
- Continued listing fees are up to US$27,500 (EUR18,680) or US$21,000 (EUR14,266) for ADSs.

NYSE and NASDAQ Stock Exchange qualitative listing requirements

Both the NYSE and the NASDAQ Stock Exchange 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 22*).

IPOs ON THE MAIN EQUITY CAPITAL MARKET(S)

3. 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 4*), the offer and sale must be registered with the SEC.

FPIs' equity securities are often listed and traded as ADRs, which represent 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.

4. Outline the procedure for a company applying for a primary listing of its shares in your jurisdiction. Is the procedure different for an overseas company? Is an overseas 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 (*see box, The regulatory authorities*).
- 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 cannot realise the advantages of a public offering.

Requirements for registration

Public securities offerings must be made under a registration statement (*section 5, Securities Act*). A registration statement must be 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 6, 7, 10 and 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 offered securities. The issuer is then subject to all of the following (*see Questions 2 and 22*):

- The continuing public reporting requirements of the Exchange Act.
- The SEC's rules, on an ongoing basis.
- The rules of the exchange on which the shares are listed.

Foreign private issuers

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

- A comparison of the pricing levels in the 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.
- Other matters.

5. Briefly outline the role of advisers commonly used for an IPO.

Underwriters

The lead underwriters both:

- Offer financial advice to the issuer, including advice on the valuation of the company.
- Manage the marketing of the securities to prospective investors (*see Question 13*).

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 19*).

Lawyers

The issuer's lawyers draft the registration statement and manage the legal aspects of the offering. The underwriters' lawyers also participate in drafting the registration statement and lead the due diligence process (for a discussion of liability for the registration statement and its defences, see *Question 12*). As part of the underwriters' 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 operations in non-US jurisdictions, the issuer and underwriters may retain lawyers that specialise in these matters.

Independent registered public accounting firm

The issuer's 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 underwriters' 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.

Others

An issuer appoints a transfer agent to facilitate the increased trading of the shares. The transfer agent both:

- Co-ordinates the issuing and tracking of the company's stock certificates.
- Maintains a list of the names of record shareholders.

An issuer may also retain outside investor-relations firms and other professionals.

6. What are the principal documents produced in an IPO?

The principal documents produced in an IPO are:

- **Prospectus.** This is the main marketing and disclosure document (*see Questions 10 to 12*). An IPO is marketed using a preliminary prospectus, which omits final pricing information. After the issuer and underwriters have agreed on pricing, investors receive a final prospectus along with written confirmations of sale.
- **Registration statement.** The prospectus forms part of the registration statement, which includes additional information. It must be declared effective by the SEC before securities can be offered to the public.
- **Underwriting agreement.** Once the offering has been marketed (*see Question 13*), the issuer and the underwriters enter into an underwriting agreement. This requires the underwriters, if specified closing conditions are met, to purchase the securities from the issuer at an agreed price (*see Question 17*).

Other documents produced include:

- A listing application.
- Comfort letters.
- Legal opinions.
- A road show presentation.

The issuer and underwriter may also use marketing documents known as "free writing prospectuses".

7. Please summarise the requirements for a prospectus (or other main offering document).

The prospectus is the primary disclosure document in a public offering. The contents of a prospectus depends on the applicable registration statement form, and 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) (*see Question 10*).

8. Is it possible to extend an offer to certain types of persons within your jurisdiction without preparing a full prospectus (for example, to sophisticated investors, employees or a small group)? If so, please set out suggested wording that would be used to restrict the offering.

There are a number of exceptions or exemptions to the registration requirements of section 5 of the Securities Act. These are available for certain specific types of securities or transactions.

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. These securities are subject to transfer restrictions.

9. Are there any exemptions from the requirements for a prospectus (or other main offering document)?

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.

A non-registered offering does not require a statutory prospectus but is usually made using an offering memorandum closely based on a statutory prospectus in form and content (*see Question 33*).

10. Please outline the contents of the prospectus (or other main offering document).

The requirements of the registration statement form that the issuer is eligible to use determine the contents of the prospectus. 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 a FPI) to make subsequent public offerings (*see Question 26*). Form S-3 is a short form registration statement that allows the issuer to merely refer in the prospectus to information from its periodic reports filed under the Exchange Act (*see Question 22*) that would otherwise be required to be stated in full.

A typical IPO prospectus contains the following sections:

- **Summary.** A summary of the information in the prospectus, including business overview, summary financial information and key offering terms.
- **Risk factors.** This identifies the most significant factors that make an investment in the issuer speculative or risky.
- **Use of proceeds.** This states the main purposes for which the issuer intends to use the net offering proceeds.
- **Dividend policy.** This describes the issuer's dividend policy and any contractual or other limitations on paying dividends.
- **Capitalisation.** This sets out the capitalisation of the issuer at the date of the most recent interim balance sheet and on an adjusted basis to reflect the application of the offering proceeds. This information is not required but is usually provided.
- **Dilution.** This sets out calculations of the public contribution under the public offering and the effective cash contribution of insiders (that is, officers, directors, promoters or affiliates). There is usually a disparity between the public offering price and the effective cash cost to insiders of their common equity securities.
- **Selected financial data.** This sets out five years (and any interim periods) of specified financial data.
- **Management's discussion and analysis of financial condition and results of operations.** This identifies business trends and key drivers of the issuer's performance that management believes important to an investor's understanding of the issuer's financial results. It also contains a comparative discussion of the results of operations for the three most recent fiscal years and any interim periods, and discussions of:
  - liquidity and capital resources;
  - off-balance sheet arrangements;
  - contractual obligations;
  - critical accounting policies.
- **Business.** This describes material aspects of the issuer's business, including information on its main products and services, raw materials, intellectual property, customer concentration, competition, research and development activities, environmental matters, regulatory concerns and material pending litigation.
- **Management.** This provides a five-year employment history of directors and executive officers, and includes disclosure about the existence and responsibilities of board committees, corporate governance guidelines and codes of ethics.
- **Compensation discussion and analysis and executive compensation.** This provides a detailed analysis of executive compensation policies and decisions, including information on compensation objectives and option grants, employee benefit plans and employment contracts. It also sets out cash and non-cash compensation paid or payable to management. FPIs may provide more limited information.
- **Related party transactions.** This identifies transactions between the issuer and its directors, executive officers and significant shareholders that meet specified thresholds.
- **Principal and selling shareholders.** This sets out share ownership (before and after the offering) of directors, executive officers, holders of more than 5% of the issuer's equity and any other holders who may sell shares in the offering.
- **Description of capital stock.** This describes the main terms of the issuer's organisational documents and the offered security, including voting rights and dividends.
- **Shares eligible for future sale.** This describes the shares available for sale in the public markets in the period following the IPO and the contractual and legal restrictions on certain resales, such as lock-up agreements.
- **Taxation.** This provides a general discussion of the material US federal income tax considerations applicable to a non-US holder with respect to the non-US holder's acquisition, ownership and disposition of the offered security.
- **Underwriting.** This describes the underwriters' and issuer's plans to distribute the securities, the factors considered in determining the IPO price and any other material relationship between the underwriters and issuer.
- **Legal matters.** This identifies the law firms representing the issuer and the underwriters.
- **Experts.** This identifies the independent public accounting firm and any other experts that may be required to give an opinion on the prospectus.
- **Financial statements.** This typically contains three years of audited financial statements and unaudited financial statements for any required interim periods. If an FPI prepares its financial statements in accordance with 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).
- **Exhibits.** As part of the registration statement, an issuer must file various exhibits including the company's organisational documents, material contracts and consents of experts. An issuer can request confidential treatment of sensitive information.

If the issuer is a FPI, certain additional information must be included 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).

11. How is the prospectus (or other main offering document) prepared and verified?

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 improve and clarify issuer disclosure as well as implement compliance with SEC formal requirements. The SEC does not independently verify any information contained in the registration statement.

12. Who is responsible for the content of the prospectus (or other main offering document) and any liability arising from its contents?

Liability

The issuer is strictly responsible for any liability arising from 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:

- **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 purchaser of 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);
  - anyone who was a director of the issuer (or 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); and
  - every underwriter.
- **Section 12 liability.** Any purchaser of a security can sue any person who:
  - offered or sold the security to that purchaser in violation of section 5 of the Securities Act; and
  - offered or sold the security to that purchaser 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. This is 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; and
  - engage in fraud or deceit.

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

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.

13. Briefly explain the ways used to market an IPO.

IPO's are generally marketed through road shows. Underwriters, accompanied by the issuer's management, make presentations to prospective investors and market the securities 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.

The use of electronic road shows has recently become common.

14. Describe any potential liability from publishing research reports by connected brokers 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 12*), which may create a rescission right for purchasers. Additionally, the issuer and the underwriters may be liable for the information contained in the research report.

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.

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15. Is the bookbuilding procedure used and if so, in what circumstances?

The bookbuilding procedure is used (*see Question 13*).

16. Where bookbuilding is used, how is any related retail offer dealt with?

Most IPOs include a significant retail component (about 10% to 30% of the shares are usually marketed to retail investors (*see Question 13*)). Issuers often use investment banks with significant retail distribution networks as co-managers or syndicate members to assist with retail sales.

17. How is the underwriting for an IPO typically structured? What are the typical terms of the underwriting agreement?

In an IPO, underwriters usually commit, at the time of pricing, to purchase the offered securities for resale to investors (firm commitment basis). This can be distinguished from conditional arrangements, such as best efforts (or agency) commitments. The responses below relate to firm commitment underwriting.

Purchase and sale

The underwriters commit to both:

- Purchase the securities from the issuer on the pricing date.
- Pay for the securities on the settlement date (subject to the satisfaction of the closing conditions (*see below, Closing conditions*)), which is usually three business days later.

In most 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.

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) during which the issuer and its directors, officers and 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 specified closing conditions are satisfied on the closing date, including:

- That the registration statement continues to be effective.
- That a "bring-down" comfort letter and legal opinion has been received 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.

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.

18. Please provide a summary of the timetable for a typical IPO.

The IPO process can take between three and six months, depending mainly on the time necessary to prepare the registration statement, which is typically determined by:

- The time needed to prepare SEC-compliant financial statements. FPIs may prepare financial statements in accordance with IFRS as issued by the IASB or US GAAP. They can also be prepared in accordance with 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 2*).

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 may not 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 the first trade.

19. Are there rules on price stabilisation in the period after trading starts?

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

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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.

20. What is the approximate cost of an IPO?

An IPO's cost depends mainly on the complexity of the issuer's business and can be between about US$1 million (about EUR679,325) and US$5 million (about EUR 3.4 million). The main costs include:

- Underwriters' discount or commission, which is a percentage of the gross offering proceeds.
- Professionals' fees.
- Regulatory filing fees.
- Printing costs.
- Road show expenses.

Ongoing costs include the costs of:

- Additional auditing staff necessary to comply with periodic reporting requirements and the Sarbanes-Oxley Act of 2002 (*Pub L No 107-204, 116 Stat 745*) (Sarbanes-Oxley Act) (especially section 404 relating to internal controls over financial reporting).
- Legal and investor relations matters.
- Directors' and officers' liability insurance.

21. What are the main tax issues that arise on an IPO?

Domestic investors that purchase shares in a US IPO must pay US federal income tax on dividends, if any, and capital gains. These taxes may apply to non-US holders:

- **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.

Additional tax issues may arise if the entity going public is:

- A limited liability company taxed as a partnership.
- An "S corporation" prior to going public. This is because the entity must first convert to be taxed as a "C corporation" before the IPO.

Potentially adverse tax consequences could apply to US investors in a non-US issuer's shares if the non-US issuer is either a:

- **Controlled foreign corporation (CFC).** Generally, a CFC is any foreign corporation where at least 50% of either the total voting power or the total value of the issuer's stock is owned directly or constructively by certain US investors.
- **Passive foreign investment company (PFIC).** Generally, a non-US issuer is a PFIC if, in any taxable year, either:
  - at least 75% of its gross income is passive; or
  - on average at least 50% of the value of its assets is attributable to assets that produce, or are held for the production of, passive income.

CONTINUING OBLIGATIONS

22. Please outline any continuing obligations to which listed companies are subject, in particular:

- **The key areas covered by the obligations.**
- **Whether the same rules apply to domestic and foreign companies and to issuers of shares and depositary receipts.**
- **How these obligations are regulated and any penalties for breach.**

Key areas

The key areas of continuing obligations for public companies are:

- Periodic reporting.
- Compliance with the Sarbanes-Oxley Act.
- Share ownership and transaction reporting by the company's officers, directors and 10% shareholders.
- Beneficial ownership reporting after acquiring 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.

Domestic and foreign companies

Periodic reporting. The reporting requirements imposed by the Exchange Act are similar for US companies and non-US companies.

A US company must file with the SEC:

- An annual report on Form 10-K after the end of each fiscal year.
- Quarterly reports on Form 10-Q after the end of its first three fiscal quarters.

- 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 non-US companies that qualify as 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). 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.

Many FPIs listed on an exchange file on Form 6-K much of the information typically required for current reports of Form 8-K.

The annual report on Form 20-F must also contain a summary of differences between US and home jurisdiction's corporate governance requirements.

The Sarbanes-Oxley Act and the Exchange Act rules implementing the Sarbanes-Oxley Act 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. The certifications must cover, among other things:

- Completeness and accuracy of the disclosure.
- Fairness of the presentation of the company's financial condition and results of operations in its financial statements.
- Effectiveness of the company'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 going public. Smaller public companies, whether domestic or foreign, are not required to provide the auditor's report until the annual report for the first fiscal year ending after 15 June 2010.

NYSE and NASDAQ corporate governance requirements

The two major exchanges have implemented 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 ways in which home jurisdiction practices differ.

Regulation and penalties

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

23. What action is required to de-list a company? Have there been many de-listings on your market(s) in the past year?

De-listing by the exchange

The NYSE and NASDAQ can seek to de-list a company that fails to comply with its continuing listing requirements, whether qualitative or quantitative, including minimum share price. After the exchange becomes aware of any failure, it begins a notice and hearing process, and the company has the opportunity to demonstrate its plan to regain compliance with the applicable requirement. If the NYSE or NASDAQ does not accept the company's plan or the company fails to regain compliance, the exchange makes appropriate filings with the SEC. The 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.

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 reports with the SEC 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 $10 million (EUR6.8 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 less than 300 persons worldwide or less than 300 persons resident in the US, and certain other conditions are met.

Recent de-listings

In 2009, the securities of 37 listed companies were de-listed from the NYSE and of 52 companies from NASDAQ.

REFORM

24. Please summarise any proposals for reform.

The financial crisis has triggered calls for comprehensive regulatory reform in the financial markets, and there have been numerous proposals over the last 12 months from the SEC, the US Treasury Department, the US Congress, and other US governmental agencies and non-governmental organisations. For example, the SEC:

- Recently approved rules to create additional disclosure obligations for credit rating agencies and require additional disclosure by issuers that use ratings in their prospectuses.
- Proposed changes to the regulation of money market funds, including requirements that the funds:
  - hold a portion of their investments in highly liquid investments;
  - limit their investment to only highest quality portfolio securities; and
  - submit regular reports to the SEC.
- Proposed changes to the regulation of certain alternative trading systems (ATSs). The rules subject certain indications of interest to disclosure requirements and require ATSs to make real-time disclosures comparable to those required of registered exchanges.

The SEC has proposed a number of other reforms, including amendments to regulations governing:

- Proxy disclosure and solicitation enhancements.
- Shareholder approval of executive compensation of recipients of direct government loans.
- The adoption of IFRS by US issuers.

Proposals released by the US Treasury Department include:

- The expansion of SEC regulatory authority to require certain investment advisers of hedge funds and other private pools of capital to register with the SEC as investment advisers under the Advisers Act.
- Proposals to have the SEC and the Commodities Futures Trading Commission regulate the over-the-counter derivatives markets and central counterparties.

Proposed legislation would require the SEC and federal bank regulators to prescribe regulations on asset-backed securitisations (ABSs) to require issuers that rely on securitisations to retain an economic interest in a material portion of the credit risk for any securitised asset and provide additional disclosures.

DEBT CAPITAL MARKETS: GENERAL

25. Please give a brief overview of the debt securities market in your jurisdiction. Has it been active? What were the major deals over the past year?

There were about US$1 trillion (about EUR679.3 billion) of debt securities issued by non-governmental borrowers in the US public debt markets in the first three quarters of 2009, about a 50% increase from the approximately US$671 billion (about EUR 455.8 billion) issued in 2008 (these amounts exclude mortgage-backed offerings and ABSs). A significant portion of the debt issued was investment grade debt and was guaranteed by the Federal Deposit Insurance Corporation as part of its Temporary Liquidity Guarantee Program (*source: Bloomberg*).

26. What are the different methods of raising finance through the issue of debt securities in your jurisdiction (for example, bonds or EMTN programmes)?

US securities offerings, including offerings of debt securities, must be registered under the Securities Act, unless a valid exemption from registration is available. Issuers also typically market investment grade debt securities in registered public offerings, while offerings of high yield debt securities are typically conducted as private placements or offerings under Rule 144A of the Securities Act.

Registration of debt securities

The registration process depends on whether the issuer files periodic reports with the SEC under the Exchange Act.

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 that covers an offering of equity securities. The registration statement includes 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 a FPI) if it:

- Has filed periodic reports under the Exchange Act for at least 12 months.
- Has at least a US$75 million (about EUR50.9 million) worldwide common equity float held by non-affiliates.
- Has been timely in its periodic filings.

Country Q&A

Form S-3 is a short form registration statement that incorporates disclosure from the issuer's periodic reports and includes a basic prospectus containing general descriptions of debt securities that may be offered in the future. 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 terms of the debt securities. Issuers often also use term sheet free writing (or FWP) prospectuses to describe the specific terms of the offered securities.

Shelf registration for well-known seasoned issuers. This is a streamlined registration process for certain issuers. Issuers eligible to use Form S-3 and that meet various requirements (*see below*) are well-known seasoned issuers (WKSIs) and can use Form S-3ASR (or Form F-3ASR for a 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 (about EUR475.5 million).
- Has issued in the last three years at least US$1 billion (about EUR679.3 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 that has been 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 trustees.

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. The issuer can privately place the securities under section 4(2) with an intermediary for subsequent resale under Rule 144A. This two-step process is known as a Rule 144A offering. In a Rule 144A offering, securities may be offered and sold without registration to qualified institutional investors (QIBs), a defined class of large, institutional investors that generally have at least US$100 million (about EUR67.9 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 that are sold under Rule 144A are restricted securities that cannot be resold freely (*see Question 41*). Resales are limited to other QIBs and trades are generally made in the over-the-counter market. Over the years, NASDAQ and certain market participants have established private exchanges or trading systems, including the PORTAL Alliance, to facilitate over-the-counter trading of Rule 144A securities among QIBs.

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 tradeable. 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.

27. For new issues to be cleared and settled through Euroclear or Clearstream, what percentage use the New Global Note (NGN) structure? What percentage retain the classic or traditional global note structure?

These figures are not available.

28. Please describe the main market(s) (including any exchange-regulated market or multi-lateral trading facility (MTF)) for debt securities and summarise the following in relation to each market:

- **The regulator.**
- **Any minimum size requirement.**
- **Any minimum trading record required.**
- **Any working capital requirements.**
- **Number of issues traded.**
- **Annual cost of being listed.**

Regulator

See *Question 2, Regulator*.

Size limits, trading record, working capital

The NYSE has separate listing standards for listed companies and their affiliates, and alternate listing standards for non-listed or affiliated companies.

Companies must meet specified financial criteria (*see Question 2*). In addition, an issuer cannot list debt securities with a total market value of less than US$5 million (about EUR3.4 million). 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).

Number of issues traded

From November 2009, about 4,872 debt securities are traded on the NYSE.

Annual cost

There is no fee for:

- Debt of NYSE listed companies and their affiliates.
- Debt of issuers exempt from registration under the Exchange Act.

All other debt securities carry an initial listing fee of US$15,000 (about EUR10,190). Non-NYSE listed companies incur an additional US$2,500 (about EUR1,698) fee to relist a previously listed issue to change the obligor or guarantor and a US$1,400 (about EUR950) fee for a shelf registration application.

LISTING ON THE MAIN DEBT CAPITAL MARKET(S)

29. What are the main ways of issuing debt securities on the debt capital market(s)?

The two main ways of issuing debt securities are:

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

30. Briefly outline the role of advisers commonly used 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 5*), and include lawyers for the trustee. The trustee's counsel negotiates provisions of the indenture relating to the trustee and represents the trustee's interests.

31. What are the principal documents produced when issuing and listing debt securities?

The principal documents in an SEC registered debt offering are the same as those for a registered equity offering (*see Question 7*) and also include:

- An indenture. This is an agreement between the issuer and an eligible trustee that includes the form of the debt security and its terms, including covenants and provisions governing payment and default.
- The bond or note or other security. This document sets out the holder's rights (often by reference to the indenture). Because of adverse tax treatment, securities are almost never issued in bearer form in the US. Debt securities are typically held in global (registered) form through a clearing system, such as the Depository Trust Company. Investors hold book-entry interests in the global security.
- The statement of eligibility of trustee on Form T-1.

A Rule 144A offering includes:

- An offering memorandum generally containing the same level of disclosure that would be required in a prospectus.
- A purchase agreement between the placement agent and the issuer containing terms substantially similar to the terms of an underwriting agreement.

32. Please summarise the requirements for a prospectus (or other main offering document).

The prospectus requirements for debt securities are the same as for other offerings (*see Question 7*).

33. Are there any exemptions from the requirements for a prospectus (or other main offering document)?

In a registered public offering of debt securities, a written prospectus meeting the requirements of the Securities Act must be delivered.

An offering under Rule 144A does not require a statutory prospectus. However, because Rule 144A offerings are subject to Securities Act and Exchange Act liability (*see Question 36*), they are usually made using an offering memorandum that closely tracks a statutory prospectus in terms of 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.

34. Please outline the content of the prospectus (or other main offering document).

The content of the prospectus for a registered offering of debt securities depends on whether the issuer has filed a registration statement on Form S-1, a shelf registration statement or a WKSI shelf registration statement (*see Question 26*):

- **Registration statement on Form S-1.** The prospectus must contain all the information outlined in *Question 10*. Because of the availability of shelf registration statements and Rule 144A, debt securities are rarely registered on Form S-1.
- **Shelf registration statement.** The base prospectus filed as part of the shelf registration statement is, at the time of an offering, supplemented by a prospectus supplement (or in some cases a free writing prospectus), including specific information about the debt securities and the terms of the offering.
- **WKSI registration statement.** See *Question 26*.

Rule 144A offerings are made using an offering memorandum that generally contains all the information required for a prospectus (*see Question 10*), either directly, or by reference to Exchange Act filings.

35. How is the prospectus (or other main offering document) prepared and verified?

For offerings made using a shelf registration statement, nearly all information about the issuer is incorporated by reference from the issuer's Exchange Act reports and the prospectus supplement discusses the terms of the securities and recent developments in the issuer's business. Regardless of the type of offering document used, the underwriters and their lawyers conduct due diligence on the issuer as described in *Question 11.*

36. Who is responsible for the content of the prospectus (or other main offering document) and any liability arising from its content?

Liability for public offerings of equity or debt securities is essentially the same. Rule 144A offerings are not subject to section 11 liability because they are not made pursuant to a registration statement (*see Question 12*).

37. Briefly explain the ways used to market debt securities.

Investment grade debt

Marketing of investment grade debt is often abbreviated, consisting of short or electronic-only road shows, or a single investor phone call with management, particularly for frequent issuers.

High-yield debt

High-yield offerings, or offerings of less frequent issuers of investment grade debt, often involve a road show. Road shows for high-yield debt offerings are typically shorter than equity road shows, at about two or three days (*see Question 13*).

38. Please provide a summary of the 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 how the offering is conducted.

For a reporting company that conducts an offering using a shelf registration statement, the timing is generally very quick because most information is already incorporated in the basic prospectus by reference to its periodic filings (*see Question 26*). The actual timing depends on the underwriters' ability to conduct due diligence (*see Question 5*), including obtaining a comfort letter from the issuer's auditor, and the time required to prepare a prospectus supplement.

If the issuer is not a reporting company and the offering is made under Rule 144A, the timing largely depends on the speed with which the issuer's lawyers can prepare an offering memorandum. Generally the timing is much faster than an IPO since no registration statement is necessary, eliminating the SEC comment period (*see Question 18*).

39. What is the approximate cost of issuing and listing debt securities?

The main costs of an offering (excluding underwriter discounts and commissions) are broadly the same as in an equity offering (*see Question 20*), although debt issuers incur some additional costs including:

- Rating agency costs.
- Trustee costs.
- Costs to participate in the PORTAL Alliance or a private exchange.

40. What are the main tax issues that arise when issuing and listing debt securities?

Payment of interest

US federal withholding income tax does not generally apply to a payment of interest to a non-US holder of a US issuer's debt security, if:

- 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" 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 (generally through the provision of a properly executed IRS Form W-8BEN or other applicable form).

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 REGULATORY AUTHORITIES

US Securities and Exchange Commission

Head. Mary L Schapiro (Chairman)

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Main responsibilities. The SEC is an independent agency of the US government and the main US securities regulator. The SEC aims to protects investors, maintain fair, orderly and efficient markets and facilitate capital formation.

Financial Industry Regulatory Authority (FINRA)

Head. Richard G Ketchum (Chairman and Chief Executive Officer)

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Main responsibilities. FINRA is the largest non-governmental regulator of securities firms doing business in the US. FINRA was created on 30 July 2007 through the consolidation of the National Association of Securities Dealers, Inc. and the member regulation, enforcement and arbitration functions of the New York Stock Exchange. FINRA is dedicated to investor protection and market integrity through effective and efficient regulation.

NYSE Euronext

Head. Duncan L Niederauer (Chief Executive Officer)

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Main responsibilities. NYSE Euronext is the holding company for NYSE Group, a leading provider of securities listing, trading and market data products and services, and operates the New York Stock Exchange. NYSE Regulation, a subsidiary of NYSE Euronext, has primary responsibility for the regulatory oversight of NYSE Group and its exchange subsidiaries.

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Head. Robert Greifeld (Chief Executive Officer)

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Main responsibilities. NASDAQ is a leading provider of securities listing, trading and information products and services. The NASDAQ Stock Market LLC operates The NASDAQ Stock Market (the largest equity securities market in the US, both in terms of number of listed companies and average traded share volume) and The NASDAQ Market Center (which provides market participants with the ability to access, process, display and integrate orders and quotes for stocks listed on The NASDAQ Stock Market and other national stock exchanges).

- 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

Debt securities offered at a discount (and certain other debt instruments) may be treated as being issued with original issue discount, which generally is amortised over the maturity of the debt security and taxed in the same manner as interest. Other tax issues may arise if the debt security is either:

- Purchased at a premium.
- A variable rate debt instrument or a contingent payment debt instrument for US tax purposes.

Additionally, debt securities issued in bearer form are not usually permitted to take advantage of exemptions from US federal withholding tax, and may also be subject to additional excise taxes and further adverse tax consequences.

CONTINUING OBLIGATIONS

41. Please outline any continuing obligations to which companies with listed debt securities are subject, in particular:

- **The key areas covered by the obligations.**
- **Whether the same rules apply to domestic and foreign issuers.**
- **How these obligations are regulated and any penalties for breach.**

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.

Companies with 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 22*). 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 23*).

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 (about EUR679,325).
- 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

Issuers that are not reporting companies nor exempt from reporting under Exchange Act Rule 12g3-2(b) (*see Question 23*) must provide reasonably current information to security holders and prospective investors (*Rule 144A*), including:

- A brief description of its business, products and offered services.
- The 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.

Domestic and foreign issuers

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.

Regulation and penalties

Debt securities holder's rights are contained in the operative debt documents, primarily the indenture. For registered debt offerings, the holders have the same rights as holders of registered equity securities.

REFORM

42. Please summarise any proposals for reform.

For a discussion of recent proposals affecting equity and debt markets, see *Question 24*.

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