

Accessing debt capital markets: a guide for foreign issuers

An overview of the key features of US public and private offerings for foreign issuers.

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Corporate borrowers and their advisors continue to face uncertainty as to when they will be able to access the debt capital markets easily again. When the cycle does turn, the US capital markets will likely be among the first to open up given the historically great liquidity of the US markets, the depth and sophistication of the US investor base and, although often taken for granted, the widespread confidence in the integrity of the US securities markets.

Foreign issuers have regularly structured their securities offerings to allow them to tap the US markets to assure sufficient investor demand and competitive funding terms.

This article covers:

- The general framework of the US securities market.
- Public securities offerings in the US.
- Private securities offerings by foreign issuers in the US.
- Managing disclosure liability.

The framework

The most fundamental decision for an issuer into the US is whether it wishes to tap the public markets or the private markets. As in many jurisdictions, the US regulates securities offerings to the public and trading of securities on stock exchanges or other public markets more extensively than it does securities distribution and trading in private markets.

This article discusses securities laws at the federal level, although issuers and their offerings are also subject to securities regulation at the state level, under the so-called “blue sky” laws, which should be considered in connection with any securities offering into the US.

Raising new capital from public markets is regulated primarily under the Securities Act of 1933 (Securities Act), which requires that such offerings be registered with the Securities and Exchange Commission (SEC).

The registration process essentially requires disclosure in accordance with SEC rules in an offering document filed in a registration statement with the SEC before the relevant securities may be offered to the public. The registration statement must be declared "effective" before actual sales can be completed.

Once securities are registered, the issuer has ongoing disclosure requirements under the Securities Exchange Act of 1934 (Exchange Act).

A variety of other federal laws that are beyond the scope of this article may also be relevant to a US offering. These include the Investment Company Act of 1940, the Commodities Exchange Act of 1936 and the Employee Retirement Income Security Act of 1974.

Exemptions from this regulatory regime are available for private offerings. These exemptions have become the preferred choice for foreign issuers wishing to issue debt securities to US investors because they allow issuers to offer their securities and develop or preserve their profile among US institutional investors while avoiding reporting and registration requirements under US securities laws.

Common types of debt offering

The more common types of debt offerings made under the exemptions include medium-term note (MTN) programmes, stand alone bond offerings and high yield debt offerings.

MTN programmes normally provide flexibility to issue debt securities with maturities ranging from nine months to 30 years or more. The advantage to an issuer is that it is not required to produce a full suite of legal documents each time notes are issued under a programme. For this reason, MTN programmes are particularly well-suited for banks, consumer and other types of finance companies and finance subsidiaries of large multinational companies (that is, businesses with treasury departments that frequently tap the debt capital markets).

Stand alone bond offerings are more efficient for issuers that do not need to regularly access the debt markets and issue bonds in longer maturities.

For issuers that seek short term funding, the commercial paper market is another alternative, with the added advantage that commercial paper (debt with a maturity of not more than nine months) has its own exemption from SEC registration under Section 3(a)(3) of the Securities Act, provided that the proceeds are used for current transactions.

Generally, MTN programmes, stand alone bond offerings and commercial paper are readily available to investment grade issuers because investors will accept less protection (that is, security, guarantees and covenants that restrict the issuer's business), making these products easier to structure and, from the issuer's perspective, less restrictive on its business than bank facilities.

For non-investment grade issuers tapping the debt capital markets, high yield bonds are the best known alternative and the US, where this product was invented, offers the deepest investor base.

The distinctive feature of high yield bonds are their "incurrence" style covenants, as opposed to "maintenance" style covenants found in typical credit facilities.

Incurrence covenants are issuer-friendly in that they cannot be breached unless the issuer affirmatively takes an action not permitted by the covenants, such as incurring debt, granting liens or paying dividends. By comparison, maintenance covenants, such as minimum financial ratio requirements, can be breached even if the issuer takes no affirmative action but its business simply deteriorates.

Investors in high yield notes, while bearing greater risk, reap the benefit of a higher interest rate, or yield, and the possibility that the credit quality of the issuer will improve over time.

A high yield note offering can be undertaken for a variety of purposes, including to fund established public companies that do not carry an investment grade rating, refinance

companies that are looking to reorganise their capital structure and to finance leveraged buyouts.

While these various types of debt offerings can find deep markets in the US for debt instruments that are not SEC-registered, it may be advantageous for an issuer to consider issuing SEC-registered debt or debt with SEC registration rights, if better pricing (that is, a lower interest rate) can be obtained by making the instruments tradable in an unrestricted way in the broader public markets.

Although less common in recent years when capital markets were booming, registration rights have long been a feature of offerings, particularly high yield bond offerings, completed without SEC registration to save time in getting the offering to market.

Registration rights require the issuer, after closing, to register bonds with the SEC that are then exchanged with the original bonds and have the same terms. Failure to complete SEC registration within a specified period (typically six months) results in an increased interest rate on the original bonds. If debt markets are tighter in the foreseeable future, registration rights may become common again.

Key statutory provisions

Central to US securities regulations is the concept of regulating public offerings primarily through mandated disclosure, rather than through regulatory approval of the actual merits of the terms of the securities being offered or the creditworthiness of the issuer.

An issuer raising new funds through a public offering must provide proper disclosure through the SEC registration and prospectus delivery requirements of Section 5 of the Securities Act.

Once its securities are publicly traded, an issuer must provide ongoing disclosure in periodic reports filed publicly with the SEC under the Exchange Act. The Exchange Act also regulates the subsequent trading of securities in the secondary market.

In the case of debt securities, it is also necessary to qualify their governing instrument, an indenture, under the Trust Indenture Act of 1939 (the Trust Indenture Act), which imposes a

standard of independence and responsibility on the trustee and requires that certain protections for debt holders are included in the terms of the bonds or notes. Generally, these requirements are not burdensome for issuers.

Registered public offerings

The registration process for a public offering of debt or equity securities in the US can be divided roughly into three stages:

- The quiet period.
- The “red herring” period.
- The offer period.

The quiet period starts when the issuer decides to engage in a US public offering and continues until the first public filing of the registration statement with the SEC. During this stage, there can be no offers or sales of the securities that are being contemplated in the registration statement.

The second stage, or red herring period, is the period between the filing of the registration statement with the SEC and it being declared effective by the SEC. During this period, offers may be made by means of the preliminary prospectus (known as a red herring) that has been filed. However, no sales may be made during this time. While the red herring prospectus does not contain the pricing information for the offering, it is generally otherwise complete and is distributed to prospective investors by the underwriters of the securities.

The offer period commences when the registration statement is declared effective by the SEC and ends at the closing of the offering. During this period, offers and sales of the securities may be made by supplying each investor with a copy of the prospectus in final form.

Registration forms

A foreign private issuer registering securities for the first time under the Securities Act uses a Form F-1. The registration statement form has extensive financial and business disclosure requirements, many of them based on the requirements for annual reports of registered

foreign issuers filed on Form 20-F. Form F-1 also has disclosure requirements regarding the terms of the securities being registered.

The burden for any issuer in preparing its first registration statement can be significant. However, this process can become significantly less burdensome for registrations of subsequent offerings for which the shorter Form F-3 registration statement is available for a foreign issuer that already has a class of securities registered with the SEC and has been filing, for at least 12 months, reports as required under the Exchange Act as part of the ongoing reporting obligations of a publicly traded company in the US.

Form F-3 allows an issuer to incorporate significant amounts of information into the registration statement by reference to its previously filed reports. Large foreign issues can become eligible for the even more streamlined public offering process available to companies that are classified as well-known seasoned issuers (WKSIs). Among other things, eligible WKSIs, may register certain types of securities on Form F-3 registration statements that are immediately effective.

Generally, to qualify as a WKSI, a foreign issuer must be:

- Eligible to register a primary offering of its securities on Form F-3.
- Current and timely in its Exchange Act reports for at least one year.
- Have either \$700 million of worldwide public common equity float or have issued \$1 billion of non-convertible securities in registered offerings in the preceding three years.

Exchange Act registration and reporting

Separate from the obligations associated with a registered public offering of debt securities, a foreign issuer that fits into one of the following three categories will also be subject to the registration and ongoing, or periodic, reporting obligations imposed by the Exchange Act:

- Issuers that have made a US public offering under the Securities Act.
- Issuers that have a class of securities listed on the New York Stock Exchange or NASDAQ.
- Issuers with a class of "widely held" securities.

Issuers that have made a US public offering. Issuers that have had a registration statement for debt securities declared effective by the SEC under the Securities Act, generally must also file with the SEC periodic reports for any year in which there are 300 or more US holders of that class of security.

If there are fewer than 300 holders of such class, the issuer may be able to suspend its Exchange Act periodic reporting obligations. However, this exemption with respect to securities held by fewer than 300 US holders does not apply to the fiscal year during which the securities were registered under the Securities Act. This means that a foreign issuer that has made a US public offering will be required to file at least one annual report on Form 20-F within six months of the end of such fiscal year, regardless of its number of holders. In addition, the terms of the securities are likely to require SEC reporting to continue in order to satisfy holders that adequate information about the issuer will continue to be publicly available.

Issuers with a class of listed securities. Registration under the Exchange Act is necessary for a foreign issuer to list its securities on a US exchange. This requirement applies, even if the securities are currently outstanding and are not part of a new public offering in the US.

Since Exchange Act registration is necessary before the securities begin trading, registration is co-ordinated with the approval of listing by the relevant exchange and, if the securities are being issued in a US public offering, with the registration process under the Securities Act.

The foreign issuer must also comply fully with the relevant exchange's requirements, which typically include meeting minimum listing standards, filing a listing application, and paying related fees and expenses.

Issuers with a class of widely held equity securities. As a general rule, a foreign issuer that has over \$10 million in assets at the end of the most recent fiscal year must register any class of equity securities if its equity securities are held of record by 500 or more persons worldwide, including 300 or more persons resident in the US.

This means that even if a foreign issuer does not voluntarily enter the US market with a securities offering or a listing, it can inadvertently become subject to SEC registration and reporting requirements, if shares of any class of its equity securities end up being held by 300 or more US residents.

To accommodate foreign issuers inadvertently faced with the registration requirements of the Exchange Act, the SEC adopted Rule 12g3-2(b). This exemption from Exchange Act registration requires simply that the foreign issuer publish, in English on its website or through an electronic delivery system generally available to the public in its primary trading market, the information that the issuer makes public in its home country along with the information that the issuer files with the stock exchange on which its securities are traded.

Private offerings

A foreign issuer can gain access to US investors while avoiding SEC registration and reporting if it complies with exemptions from these requirements that are available for private offerings and private re-sales. A significant portion of debt capital markets offerings to US investors by foreign issuers over the past two decades have been conducted in reliance on these exemptions.

Private offerings by an issuer are exempt from registration under Section 4(2) of the Securities Act, which applies to “transactions by an issuer not involving any public offering” (a Section 4(2) private offering). Private re-sales by underwriters and investors may also qualify for exemptions.

The most commonly used exemption for private re-sales is the SEC’s Rule 144A, which exempts certain types of re-sales of securities (Rule 144A offerings) to qualified institutional buyers (QIBs) (*see box “QIBs”*).

QIBs

To be eligible as a qualified institutional buyer (QIB), an investor must be one of the types of institutions specified in Rule 144A and own or invest in, on a discretionary basis, at least \$100 million of securities. The institutions include:

- Certain types of insurance companies.
- Any investment company registered under the Investment Company Act of 1940.
- Certain types of small business investment companies.
- Certain types of employee benefit plans.
- Any broker-dealer registered under the Securities Exchange Act of 1934.
- Any US or foreign bank or savings and loan or equivalent institution that has an audited net worth of at least \$25 million.

In a Rule 144A offering, an issuer sells its securities in a private offering to one or more underwriters who, in turn, rely on Rule 144A for an exempt re-sale to QIBs. At the same time the underwriters may resell to investors outside the US, whether or not they are QIBs, relying on the exemption for offshore offerings and re-sales under the SEC's Regulation S.

One of the attractions of an offering under Rule 144A is that the debt can be issued in the form of a single or limited number of global instruments that are deposited with a depository for the relevant clearing system(s).

Interests in the global instrument can be traded in electronic book entry form through the relevant clearing systems, which operate similarly and, at least in the case of Euroclear and Clearstream in Europe and DTC in New York, have well-established systems for settling trades involving participants in the different systems. Electronic settlement is, of course, far more efficient and less costly than settling trades using physical certificates.

Section 4(2) private offering

The Section 4(2) exemption for “transactions by an issuer not involving a public offering” for many years created uncertainty as to what constituted a private, as opposed to a public, offering.

In order to create greater certainty, the SEC adopted Regulation D as a “safe harbor” rule in that an offering in compliance with Regulation D assures treatment as a private offering. It is important to note that this is not an underwriter or dealer exemption, but rather only exempts sales by an issuer directly to an end investor.

To qualify an offering for the Regulation D safe harbor:

- The issuer (or anyone on its behalf) may not engage in any form of general solicitation or advertising.
- Sales may be made to an unlimited number of “accredited investors” (the term “accredited investors” includes a wide range of institutional investors and certain high net worth individuals). A limited offering to up to 35 non-accredited investors is permitted, if certain disclosure and investor sophistication requirements are met.
- The issuer should obtain representations from the purchasers as to their investment intent, to ensure that the purchasers are not “underwriters” acquiring the securities with a view to reselling them.
- The issuer must file with the SEC a notice of the offering on Form D, including a sales report, no later than 15 days after the first sale of securities in the offering.

Securities that are privately placed under the Regulation D safe harbor are deemed to be “restricted” securities and, for this reason, not freely tradable. This is a significant disadvantage of private offerings versus public offerings, which result in freely tradable securities.

Private offerings in reliance on Section 4(2) have the added disadvantage that the instruments generally include mechanics for tracking transfers, usually using physical certificates and

manual transfer procedures through a registrar or transfer agent and requiring appropriate representations from each transferee as to its status as an “accredited investor”.

In some offerings, this burden is simplified somewhat by allowing distributions and re-sales only to accredited investors that are institutions (institutional accredited investors being a larger universe than QIBs), but excluding high net worth individuals.

Rule 144A offerings

SEC rules that permit re-sales of restricted securities without registration are, therefore, important to the functioning of the secondary market in the US. While Section 4(2) and Regulation D provide the basis for an issuer’s exemption from registration, Rules 144 and, more recently, Rule 144A, permit persons other than the issuer to resell securities that have not been SEC registered and have been purchased from the issuer in a transaction not involving a public offering.

Rule 144A, in particular, has dramatically changed the private offering market in the US, because, unlike the older Rule 144, it does not impose significant procedural limitations on trading. As a result, it has increased the willingness of foreign issuers to offer their securities in the US, often in conjunction with larger, global offerings.

Requirements. Rule 144A provides a non-exclusive safe harbor exemption from SEC registration for re-sales to institutions reasonably believed by the seller to be QIBs, provided that the securities are not of the same class as, or fungible with, securities listed on a national securities exchange or traded on a US automated inter-dealer quotation system (the non-fungibility requirement).

Rule 144A imposes only two procedural requirements:

- The seller must take reasonable steps to ensure that purchasers are aware that the seller may be relying on Rule 144A (the notice requirement).
- In the case of issuers (other than foreign governmental issuers) who do not report or furnish information to the SEC under the Exchange Act, purchasers must have a right to

obtain prior to sale certain information concerning the issuer of the securities (the information requirement).

- These procedural requirements are significantly less burdensome than the ongoing SEC reporting requirements under the Exchange Act that apply to companies publicly traded in the US.

Non-fungibility requirement. To prevent abuses of Rule 144A (in particular, issuing unregistered securities of the same class as registered securities), securities issued pursuant to the rule cannot be “fungible” with registered securities of the issuer.

Debt securities are considered fungible with each other if there is substantial similarity in terms relating to interest rate, maturity, subordination, security, convertibility, call, redemption and any other material terms.

Notice requirement. Rule 144A requires that a seller and any person acting on its behalf take reasonable steps to ensure that the purchaser is aware that the seller may rely on Rule 144A. This is easily accomplished by indicating in the offering document that the underwriters of the securities may be relying on Rule 144A.

Information requirement. Rule 144A requires an issuer to supply a brief description of its business and the products and services it offers, as well as its most recent balance sheet, profit and loss and retained earnings statements, and similar financial statements for the periods during the two preceding fiscal years that the issuer has been in operation.

In a Rule 144A offering, this requirement is met by the prospectus, which usually contains information and financial statements substantially similar to those included in the registration statement for a public offering.

Documenting a Rule 144A offering. The documentation for a Rule 144A debt offering can vary significantly, depending upon the type of debt instrument.

The most significant document in terms of time and effort is the prospectus or offering circular, given the disclosure requirements and practices in the case of any US targeted

offering. Although the specific disclosure rules applicable to registration statements for a public offering do not apply in a Rule 144A offering, the rules are viewed as guidance as to what is material to investors, even in a private offering.

For this reason, market practice has evolved such that Rule 144A offerings adhere generally to public disclosure guidelines, though the scope of disclosure can depend on a variety of factors, including:

- The customary scope of inquiry in the international market and, if it is well-developed, the issuer's home market.
- The type of securities being offered.
- The financial strength of the issuer and its credit standing.

In other words, while the required disclosure for a US public offering is often relevant in a Rule 144A offering, in practice the necessary disclosure may be more or less extensive depending on the circumstances.

The documents governing the bonds or notes themselves vary depending upon market practice and governing law. Some products use English law documents such as a trust deed and agency agreement to govern the debt and a subscription agreement to govern the underwriters' obligations to purchase the debt at closing. Products governed by New York law use an indenture to govern the debt and a purchase or underwriting agreement to govern the underwriting.

These products include high yield bonds, investment grade bonds, US MTN programmes and offerings of secured or other complex instruments, where the indenture contains many of the protections mandated by the Trust Indenture Act.

The covenant structure of securities in a Rule 144A offering tends to follow the practice in public transactions in the US and the Euromarket in areas such as cross-default or cross-acceleration clauses, as well as "negative pledge" clauses. Cross-default or cross-acceleration clauses generally refer to provisions in a bond indenture or loan agreement that give rise to a

default if the issuer or borrower defaults on payments of other indebtedness or other lenders accelerate the maturity of their bonds or loans as a result of defaults by the issuer or borrower. A negative pledge clause generally provides that the issuer will not pledge any of its assets to secure other capital markets instruments, unless the bonds are equally and rateably secured.

For a “world-class” foreign issuer (that is, a large, listed and most likely, multinational company), it can be expected that covenants or its existing eurobonds will be the starting point for its covenants in investment grade debt securities issued through a Rule 144A offering. Enforcement rights may vary between, for example:

- Provisions permitting acceleration of maturity only by security holders as a group, as is customary in the US debt market.
- Provisions permitting acceleration of maturity by individual security holders, that can be the case in a foreign issuance targeted primarily at non-US markets.

The more significant differences in covenant packages are driven by the credit rating of the issuer and the credit support, if any, behind a debt instrument, rather than the fact that the debt is being distributed in the US. While a typical investment grade issuer may have only a negative pledge and merger covenant, a high yield issuer will have the incurrence covenants that limit, among other things, debt, liens, dividends, minority investments, transactions with affiliates and the use of proceeds from asset sales.

Debt instruments may also be issued with maintenance covenants, although an issuer will want to be cautious in this respect given the potential difficulties of obtaining amendments and waivers when it cannot comply with a covenant. Covenant packages may also fall in between these extremes depending, again, on the creditworthiness of the issuer. Market conditions are also a major factor in the design of covenant packages, as demonstrated in recent years when “covenant light” debt became prevalent during a period of ready credit. Going forward into a period of limited liquidity and recessionary economies, bond covenants will most likely become more restrictive for all but the strongest investment grade credits.

Publicity

The prohibition on general solicitation and general advertising applies to both private offerings and private re-sales, including Rule 144A offerings.

An issuer's legal advisors usually provide detailed guidelines on what types of publicity are permissible while a private offering is in preparation and in the market. Compliance with these guidelines is critical because press reports or other publicity in the US markets about a private offering (whether as a result of issuer announcements, interviews with senior management, or other actions) prior to completion of the offering can lead to loss of the private offering exemption, scrutiny by the SEC and a delayed or failed offering. Certain public announcements of private offerings are permitted under SEC rules that set narrow limits on what may be announced.

Managing disclosure liability

A cornerstone of US securities law is its objective of ensuring disclosure to investors of information material to their decisions to purchase or sell securities. In addition to disclosure of information required under the registration and ongoing reporting requirements for public offerings, disclosure is also driven by a variety of securities laws and regulations that impose liability on certain parties for defective disclosure.

In the case of a registered offering, the issuer faces strict liability, for which there is no defence, with respect to any material misstatement or omission from the registration statement (*Section 11, Securities Act*).

Certain officers, as well as all directors and underwriters, are also liable unless they "had, after reasonable investigation, reasonable ground to believe and did believe... that the statements [in the registration statement] were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading".

Diligence in the preparation of registration statements is, therefore, essential to protecting the issuer and to establishing the so-called “due diligence defence” for its senior management and the underwriters.

Similarly, it is unlawful to use, in connection with the purchase or sale of any security, whether registered or not, any manipulative or deceptive device in contravention of rules adopted by the SEC (*Section 10(b), Exchange Act*).

Rule 10b–5, adopted pursuant to this section, makes it unlawful to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

In addition to the SEC’s powers to bring enforcement actions under this regulatory regime, individual purchasers, often as part of a class of purchasers, can bring actions for damages against the participants in a public or private offering, claiming that the seller acted intentionally or recklessly in preparing a misleading offering document and that the plaintiff relied on a material misstatement or omission in making its purchase. Here, too, the due diligence defence is available to defendants.

Due diligence

Given the importance of the due diligence defence to various parties in both registered and private offerings, establishing the grounds for such a defence is the driver behind the extensive due diligence process that characterises securities offerings involving US markets.

The goal of the process is to build a record that the potential defendants undertook significant and reasonable due diligence efforts to ensure the accuracy of disclosure in the offering materials.

A foreign issuer contemplating an offering to US investors, whether public or private, is expected to comply with the due diligence process, including opening its books and records to the underwriters involved in the offering.

For example, underwriters will seek to review certain documents that have been prepared by the issuer or its affiliates including:

- Stock exchange filings and other forms of correspondence.
- The issuer's constitutional documents.
- Research reports.
- Press releases.
- Minutes of board of directors, board committee and shareholders' meetings.
- Material agreements and licences and documents relating to regulatory issues, insurance and intellectual property.
- Tax returns.
- Internal management reports relating to the adequacy of the issuer's accounting procedures and controls.
- Documents relating to ongoing litigation.

The issuer is expected to facilitate aspects of the underwriters' due diligence, which involve discussion with various parties, such as key officers, board members and outside auditors. In particular, the issuer is expected to facilitate the following:

- A review of operations with the issuer's chief operating officer.
- A review of the issuer's financial condition, accounting standards and internal controls with the chief financial officer and the issuer's external accountants (often in separate meetings).
- A review of existing and potential litigation or governmental proceedings with internal and external counsel.
- Additional discussions to the extent the issuer's business and financial condition is dependent on a few important key customers, suppliers or lenders.
- In addition to the legal imperative to avoid material misstatements and omissions, due diligence procedures followed in preparing for Rule 144A offerings are often designed

with business and reputational issues of issuers and underwriters in mind.

This means that, while some reduction in the scope of due diligence may occur for certain types of securities and offerings, the core business and legal reasons for due diligence (that is, the need to avoid defective disclosure, liability and litigation) continue to drive substantial due diligence in Rule 144A offerings.

Legal opinion. Underwriters in a public or private offering usually receive legal opinions from their counsel and from the issuer's counsel on various matters.

In a US targeted offering, however, underwriters also insist on getting assurance that the issuer's external legal counsel are not aware of any material misstatement or omission in the offering document (a 10b-5 opinion or negative assurance letter).

A typical formulation of the 10b-5 opinion states that, subject to certain qualifications, the disclosure, as of the time it was made (that is the date of the prospectus) and as of the time of the closing of the transaction, did not contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading.

These 10b-5 opinions are based on issuer's counsels' involvement in the due diligence process throughout the offering. The appropriateness of such a 10b-5 opinion depends on a variety of factors, including the timing of the offering and the level of due diligence conducted.

Auditor's comfort letter. Another critical element for underwriters in building a due diligence defence is the comfort letter provided by the issuer's auditors at the closing and at the time of signing of the underwriting agreement.

The comfort letter is addressed to the underwriters and often to the board of directors of the issuer. This letter gives "comfort" that certain financial information contained in the prospectus has been audited and that certain tests and procedures have been undertaken by the accountants with respect to the period subsequent to the date of the latest financial statements (whether annual or interim) included in the prospectus.

Based on these procedures, the auditors essentially confirm that they have compared certain financial information in the prospectus to the books and records of the issuer and that the numbers agree, and that the procedures have not uncovered any undisclosed specified events, such as the incurrence of material new debt or material losses or other events affecting stockholders' equity, since the date of the last published financial statements.

Tax

The US tax system is generally hostile to debt instruments issued in bearer form (that is, payable to bearer rather than a named payee) due to the difficulty of tracing whether the ultimate beneficial owner is a US taxpayer receiving payments that should be included in taxable income.

Although less an issue in recent years (because the need to issue in bearer form outside the US has reduced as a result of tax reforms and market practice), certain offerings still do call for bearer form instruments.

In these cases, foreign issuers generally comply with rules of the US Internal Revenue Service that permit the use of bearer instruments while exempting the issuer from sanctions if those instruments trade to US taxpayers in the secondary market. (Sanctions apply, however, to any US taxpayers who purchase bearer instruments.)

The restrictions generally include a prohibition on offering the debt to US taxpayers during a 40-day restricted period and a requirement that holders certify as to non-US beneficial ownership before the first interest payment date or the first delivery of definitive instruments.

An issuer can issue the same debt in registered form to US taxpayers and in bearer form to non-US investors, although this bifurcated bearer/registered structure is becoming less common as the use of bearer instruments decreases.

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