

# Debt Capital Markets 2021

Contributing editors

Catherine M Clarkin, John Horsfield-Bradbury, Ekaterina Roze and Jeffrey D Hochberg



**Publisher**

Tom Barnes  
tom.barnes@lbresearch.com

**Subscriptions**

Claire Bagnall  
claire.bagnall@lbresearch.com

**Senior business development manager**

Adam Sargent  
adam.sargent@gettingthedealthrough.com

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**Catherine M Clarkin, John Horsfield-Bradbury,  
Ekaterina Roze and Jeffrey D Hochberg**

Sullivan & Cromwell LLP

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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Debt Capital Markets*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

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

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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

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

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Catherine M Clarkin, John Horsfield-Bradbury, Ekaterina Roze and Jeffrey D Hochberg of Sullivan & Cromwell LLP, for their assistance with this volume.



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For further information please contact [editorial@gettingthedealthrough.com](mailto:editorial@gettingthedealthrough.com)

# Contents

<b>Global overview</b>	<b>3</b>	<b>Sweden</b>	<b>49</b>
Catherine M Clarkin, John Horsfield-Bradbury and Asa J Craig Sullivan & Cromwell LLP		Carl Hugo Parment and Michael Bark-Jones White & Case LLP	
<b>Germany</b>	<b>5</b>	<b>Switzerland</b>	<b>57</b>
Christian Storck Linklaters LLP		The Capital Markets Team Niederer Kraft Frey	
<b>Ireland</b>	<b>13</b>	<b>Thailand</b>	<b>66</b>
Cormac Kissane, Glenn Butt, Ronan O'Keefe and Maedhbh Clancy Arthur Cox		Veeranuch Thammavaranucupt, Jongtip Tangsriapiroje and Veerakorn Samranweth Weerawong, Chinnavat & Partners Ltd	
<b>Japan</b>	<b>22</b>	<b>Turkey</b>	<b>74</b>
Takuo Hirose and Tomoyuki Oka Anderson Mōri & Tomotsune		Kerem Turunç and Esin Çamlıbel Turunç	
<b>Malta</b>	<b>28</b>	<b>United Kingdom</b>	<b>81</b>
Luca Vella and Katia Cachia GVZH Advocates		Matthew Tobin and Eric Phillips Slaughter and May	
<b>Netherlands</b>	<b>34</b>	<b>United States</b>	<b>88</b>
Jeroen Bos, Vincent Engel and Rosa Temminghoff Simmons & Simmons LLP		Catherine M Clarkin, John Horsfield-Bradbury, Ekaterina Roze and Jeffrey D Hochberg Sullivan & Cromwell LLP	
<b>Spain</b>	<b>42</b>		
Antonio Herrera, Javier Redonet and Josep Moreno Uriá Menéndez			

# Thailand

Veeranuch Thammavaranucept, Jongtip Tangsripairoje and Veerakorn Samranweth

Weerawong, Chinnavat & Partners Ltd

## MARKET SNAPSHOT

### Market climate

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

The Thai debt securities market is smaller than the market for bank loans and equity. However, it is active, developing and increasing every year with various types of debt instruments. Offerings by corporates are growing faster than government offerings.

Debt securities in Thailand mainly consist of bonds (which normally refer to government, state agency or state-owned enterprise debt securities) or debentures (which normally refer to debt securities issued by corporates). Corporate debentures are issued by both public limited companies and limited companies. Other varieties include zero coupon debentures, convertible debentures, exchangeable debentures, Basel III subordinated debentures, securitised debentures, perpetual debentures and foreign debentures. Debt securities also include bills of exchange (bills). Furthermore, financial institutions issue structured notes, or derivative-embedded debentures, as alternative products for investors.

While a wide range of issue types is possible, typical corporate domestic issues are fixed rate with bullet repayment at maturity.

According to information from the Thailand Financial Instruments Information Center, as of 30 September 2020, the amount of outstanding debt securities of Thai issuers in the domestic market was 8,143,705.6 million baht, and of Thai issuers in overseas markets, it was 790,829.2 million baht.

### Regulatory framework

- 2 | Describe the general regime for debt securities offerings.

The general regime for debt securities offerings in Thailand is contained in the Securities and Exchange Act (1992), as amended (the SEC Act), the Public Limited Company Act (1992), as amended, the Civil and Commercial Code, as amended, and, more importantly, Regulation No. 17/2561 on the application and approval for offer for sale of newly issued debt instruments (as amended) issued under the Securities and Exchange Commission (SEC), which became effective as from 1 April 2018. There is also another regime of the SEC Act that regulates issues by Thai companies of debt securities denominated in foreign currency outside Thailand, which require approval from, and an after-sales report to, the SEC.

The main authorities that have key roles in formulating policy and regulating the Thai bond markets are the Ministry of Finance (MOF) and the Office of the Securities and Exchange Commission (the SEC Office). The MOF is responsible for the country's fiscal policy and the management of the public debt, which involves the formulation of a policy framework and the structuring of government bond issuance. The MOF is the key authority to push for reform and implementation of laws to influence the bond market, such as tax laws.

The SEC Office is the regulator of the capital markets, supervising the offering of securities and regulating those carrying out securities businesses, such as underwriters and financial advisers. The most significant industry group in Thailand in this area is the Thai Bond Market Association (ThaiBMA), previously the Bond Dealers Club, set up with the objective of establishing a basic system of trading debt securities among traders in the secondary market and encouraging the development of the market. The ThaiBMA focuses on being an information centre for debt securities for investors, and its other functions include surveillance and establishing market standards.

## FILING AND DOCUMENTARY REQUIREMENTS

### General filing requirements

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

An offer of debentures on a public offering basis requires approval from the Office of the Securities and Exchange Commission (the SEC Office), and the filing of a registration statement and draft prospectus with the SEC Office, which must become effective before an offer can be made.

The application for approval and the filing can be made to the SEC Office at the same time, but the registration statement and draft prospectus will become effective only after the approval from the SEC Office is obtained.

The SEC Office has the power to require disclosure of additional documentation and to have the registration statement and prospectus amended if it considers that they are incomplete or misleading. In practice, it carries out a detailed review of the registration statement and prospectus for a public offering to protect the interests of investors.

In addition to stand-alone offerings, since 2018, the SEC Office, under Regulation No. 17/2561, introduced two-year medium-term note (MTN) programmes, which enables issuers to carry out issues of uncomplicated debentures with no limit on the number of issues and tenors or types of offering (public offering and private placement).

Under an MTN programme, the issuer may apply for the approval at the same time as filing the registration statement (Form 69-Base) and draft prospectus. Form 69-Base will be submitted only once with the application for approval. Information on, among other things, the MTN programme must be included, for example, the type of debt securities, the total amount under the MTN programme, the master terms and conditions governing the rights and obligations of the issuer and holders of debentures issued under MTN programme, and the commencement and expiry dates of the MTN programme.

For each issue of debt securities under an MTN programme, a registration statement (Form 69-Pricing) and draft prospectus must be filed. Form 69-Pricing must contain the key commercial terms of each

issue, namely, the features of the debt securities to be offered and the commercial terms and conditions governing the rights and obligations of the issuer and debenture holders.

If the information on the issuer is to be updated or adjusted, including for material events specified by the SEC Office, a registration statement supplement (Form 69-Supplement) must be submitted without delay.

In July 2020, the SEC Office revised Regulation No. 17/2561, effective from 1 January 2021, by providing that unrated bonds or debentures that are below investment grade must not be offered under an MTN programme. Further, any issuer who received approval for an MTN programme but whose credit rating ceases to be investment grade can no longer offer debentures under an MTN programme.

### Prospectus requirements

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

The issuer is required to produce and file a prospectus in the case of a public offering of debt securities; the registration statement and draft prospectus can be filed at the same time in one document.

The draft prospectus must be in the form specified by the relevant notification of the SEC Office. The draft prospectus for public offerings requires more detailed information than that for private placements. The information in the draft prospectus is very similar to that required in the registration statement, which includes the following:

- objectives of the offer for sale (including details of use of proceeds);
- name of the issuer;
- capital of the issuer;
- amount and type of debentures offered for sale;
- expected selling price per unit;
- nature of the business;
- financial condition, business operations and material information on the business;
- management and major shareholders of the issuer;
- auditors, regularly contacted financial institutions and legal advisers of the issuer;
- procedure for subscription, underwriting and allocation of debentures;
- rights and restrictions related to the transfer of debentures (if any);
- return (interest) on debentures;
- property or other collateral as security (if any);
- debenture holders' representative (if any);
- encumbrances on the property of the issuer (in the case of unsecured debentures);
- outstanding amount of previous debt securities;
- procedure, time and place of repayment;
- procedure for conversion of rights (if any);
- management discussion and analysis;
- information on defaults in paying principal or interest under debt instruments, default in loans from financial institutions and default on terms and conditions over the past three years;
- key financial ratios;
- use of proceeds
- risks of issuer's business and risks of investment in the issuer's debentures; and
- other information as required.

### Documentation

#### 5 | Describe the drafting process for the offering document.

The drafting process for the registration statement and draft prospectus on domestic offerings principally involves the issuer and the underwriter. In most cases, the issuer is already a public company whose shares are traded on the Stock Exchange of Thailand; therefore, the issuer already has an annual registration statement (Form 56-1) that is updated and filed with the SEC Office and the Stock Exchange of Thailand each year.

The contents of the registration statement and draft prospectus would largely contain the same information as that contained in Form 56-1, with updated and additional information, such as a management discussion and analysis. Lawyers are generally not involved with the business description and would mainly focus on legal matters, such as the terms and conditions of the debentures governing the rights and obligations of the issuer and debenture holders (terms and conditions), certain risk factors, and drafting and negotiating the transaction agreements. The normal timeline for the drafting process is one to two months (excluding any due diligence process).

There are no particular documentation issues and no legal thresholds to help with disclosure. Form 56-1 requires disclosure of disputes that involve an amount of not less than 5 per cent of shareholders equity. They are materially in the same form as those prepared for a public offering.

A financial adviser is required to prepare the application for approval jointly with the issuer and to certify the accuracy of the information in the registration statement, except for debentures that are not convertible debentures when the issuer is a listed company that has no corporate governance concerns and an investment grade credit rating. In addition, the underwriter (or financial adviser) is required to submit to the SEC Office, together with the application, certification that it has performed its duty to select and analyse information on the issuer received from the issuer and public sources and use that information to provide advice to investors.

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

The terms and conditions comprise the terms and conditions of the debt securities. The issuer is required to sign the terms and conditions for them to become effective on the issue date of the debentures. Copies are kept with the issuer, the registrar, the debenture holders' representative and the SEC Office and are open to inspection by debenture holders.

The terms and conditions themselves are also set out in the registration statement and draft prospectus. The key elements of the terms and conditions comprise:

- the commercial terms (eg, interest rate, interest payment dates and maturity date);
- the covenants of the issuer (eg, financial ratios, negative pledge and restrictions on disposals of assets);
- the time, procedure and place for payment;
- events of default (eg, payment default, technical default, cross default and insolvency event) and consequences of default (eg, immediate payment); and
- procedure for debenture holders' meetings, appointment of debenture holders' representative (if any) and the form of debenture certificate (if any).

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

An offer of debentures on a public offering basis requires approval from, and the filing of a registration statement and draft prospectus with, the SEC Office, which must become effective before an offer can be made. Under an MTN programme, the Form 69-Base and draft prospectus will be filed once and be effective for two years (supplemented by any Form 69-Supplement), and on each issue a Form 69-Pricing and draft prospectus will be filed and must become effective before the offering of the debentures. The SEC Office requires a file to be submitted electronically, which is then made public through a posting on the SEC Office's website with a printed version delivered to the SEC Office.

### Authorisation

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

A public offer of debentures requires approval from the SEC Office.

Under the manual for the approval process issued by the SEC Office pursuant to the Facilitation Process Act (2015), the SEC Office has fixed 120 days as the maximum time for the normal approval process (25–45 days for the fast-track process) for unsubordinated debentures and up to 165 days for convertible debentures.

Once approval from the SEC Office is obtained, the SEC will issue a letter or email confirming its receipt of a complete registration statement and draft prospectus. In practice, if the registration statement and draft prospectus is not complete or omits certain information, the SEC Office will not issue the letter or email.

The registration statement and draft prospectus will become effective after the lapse of one, five or 10 business days (normally called a cooling-off period) after the date on which the SEC Office issued the letter to start the cooling-off period. For an MTN programme, the cooling-off periods are:

- one, five or 10 business days for Form 69-Base;
- five business days for Form 69-Supplement; and
- no cooling-off period for Form 69-Pricing, so the debentures can be offered immediately after online submission of Form 69-pricing to the SEC Office.

The issuer and the underwriter can offer the debentures (including through advertisements and invitations) only after the registration statement and draft prospectus become effective.

The one-business-day period applies in the case of an offer of debentures on the basis of the standard terms and conditions prescribed by the SEC Office, or the same terms and conditions as previous issues within the past year, and the issuer is a listed company or has offered debentures to the public that have not yet matured. The five-business-day period applies in the case of an offer of debentures not on the basis of the standard terms and conditions prescribed by the SEC Office, or on terms and conditions that differ from the terms and conditions previously submitted to the SEC Office, and the issuer is a listed company or has offered debentures to the public that have not yet matured. The 10-business-day period applies in cases where the SEC Office has required the issuer to disclose additional information in the registration statement and draft prospectus (if the issuer is listed) or if the issuer is unlisted.

Further, the offer for sale of debentures on a public offer basis can be made only when the prospectus, or in the case of an institutional investors and high-net-worth investors (II&HNW) placement at least a factsheet (in which the underwriter and the debenture holders'

representative is required to declare any relationship with the issuer, for example, as a creditor or shareholder), is distributed to investors. In practice, the prospectus is in printed or CD-ROM form and is delivered to investors with the subscription form attached, or it is in the form of a QR code at the end of the subscription form.

The SEC Office has issued a standard form of the terms and conditions for public offerings and for high-net-worth offerings with more specific provisions on affirmative and negative covenants, events of default and consequences of default and the rights and duties of debenture holders' representatives.

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

Generally, the SEC Office can withhold approval until it is satisfied with the information provided. It is also empowered to suspend the effectiveness of a registration statement and draft prospectus if the information in the registration statement and draft prospectus is inaccurate or misleading or new relevant information comes to light.

The SEC Office is also empowered to suspend offerings under an MTN programme if it appears to the SEC Office that the issuer has failed to comply with the approval conditions and qualifications or the disclosure in the registration statement and draft prospectus is incomplete.

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

Under Regulation No. 17/2561, a private offering of debentures does not require approval from the SEC Office. A private offering in this regard means:

- a limited private placement (limited PPor PP10 placement), which, for debentures, means an offer to not more than 10 investors in any four-month period and, for bills of exchange (bills), an offer limited to 10 bills outstanding at any time, in each case limited to persons related to the issuer (as specified in Regulation No. 17/2561, subject to an amendment which will become effective on 1 July 2021), such as directors, executives, affiliated companies and holders of 10 per cent or more of the shares of the issuer, and institutional investors;
- an institutional investors placement, for debentures and short-term bills (not more than 270 days), which means an offer to institutional investors only;
- for debentures only, an offer to creditors in a debt restructuring; and
- an offer made with a waiver from the SEC Office.

Since August 2020, the PP10 placements have excluded high-net-worth and retail investors.

The offer is deemed approved by the SEC Office when the issuer registers a transfer restriction with the SEC Office. In the case of an offering involving high-net-worth investors, prior approval by the SEC Office is required.

Except for an II&HNW offering, an offering on a private placement basis does not require a filing. An offering entirely to foreign investors does not require a filing but does require SEC approval.

An offer of debentures to II&HNW requires the filing of a specific registration statement (Form 69-II&HNW or, for an MTN programme, Form 69-II&HNW-MTN, Form 69-II&HN-Supplement and Form 69-II&HNW-Pricing) and draft prospectus.

An offer of debentures to the public requires the filing of a specific registration statement (Form 69-PO or, for an MTN programme, Form 69-PO-MTN, Form 69-PO-Supplement and Form 69-PO-Pricing) and a draft prospectus.

The registration statement and draft prospectus for public offerings require more detailed information than those for private placements, and the SEC Office will review them much more carefully.

In this regard, as from 1 January 2021, the SEC requires the issuer to disclose more information in an offering to high-net-worth investors and a public offering, for example. default in repayment of debt instruments or loans in the past three years, the purpose of utilisation of the proceeds and key financial ratios, as well as reports to the SEC and debenture holders' representative in respect of utilisation of the proceeds.

### Offering process

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

The public offering process for debentures starts with the internal approval procedures of the issuer: for a Thai public limited company, a shareholders' resolution for the issuance and offer for sale of debentures is required. The following is a typical process that can be adjusted on a case-by-case basis to suit the requirements of the issuer and structure of the debentures.

#### Mandate for underwriter, legal adviser and financial adviser (if any)

A financial adviser is generally not required, particularly if the debentures are issued by a listed company and made on a private placement basis. Under Regulation No. 17/2561, a financial adviser is required for public offerings that do not meet the exemption criteria.

An underwriter would generally be engaged to assist on document preparation in respect of corporate and financial matters, due diligence, applying for a credit rating and marketing the debentures. A mandate letter or proposal with the indicative terms and structure of debentures will be submitted to the issuer to kick off the transaction.

A legal adviser as deal counsel (for the issuer, underwriter, registrar and debenture holders' representative) in the case of a domestic offering must be engaged at the very beginning of the transaction. The legal adviser will help with the issuer's corporate approval process and the preparation of the terms and conditions, and advise on the mandate letter, other related agreements (eg, underwriting agreement, registrar appointment agreement and the debenture holders' representative appointment agreement) and the filing of documents. The legal adviser would normally perform due diligence to ensure that there are no impediments to the issue (negative pledges, etc).

### Filing preparation

For domestic offerings, lawyers are not involved much in the due diligence process. This is normally conducted by the underwriters concurrently with the preparation of the filings to ensure the accuracy of the registration statement and draft prospectus. In addition, in most cases, the issuer is a public company whose shares are traded on the Stock Exchange of Thailand; therefore, the issuer already has a yearly registration statement (Form 56-1) that is updated and filed with the SEC Office each year. The registration statement and draft prospectus for the offering of the debentures require similar information to that contained in Form 56-1, with updated information and certain additional information, such as a management discussion and analysis.

Once the structure of the debentures is finalised and the application and filing documents (including the terms and conditions) are available for submission to the SEC Office, a credit-rating agency will be involved.

### Marketing and pricing

After applying for approval and submission of the filing documents, the underwriting agreement will be signed after a period for marketing and book-building, which is conducted on the basis of a draft prospectus.

When the application has been approved and the filing documents have become effective, the prospectus, together with the subscription form, will be distributed to investors. The allocation and subscription process will be described in the prospectus.

### Settlement and closing

On the issue date of the debentures, the subscription monies received by the underwriters will be transferred to the issuer against the issue of debentures to the subscribers who have received allotments. The terms and conditions, registrar appointment agreement and debenture holders' representative appointment agreement are executed so as to be effective from the issue date.

The underwriter will assist the issuer to submit details of debenture holders to the registrar to prepare the register and to issue debenture certificates or inform the Thailand Securities Depository Co (a subsidiary of the Stock Exchange of Thailand providing securities depository services) of the identity and holdings of the debenture holders in the case of debentures issued in scripless form.

A sales report will be made to the SEC Office, and the debentures will be registered with the Thai Bond Market Association.

### Closing documents

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

For a domestic offering, a legal opinion on the corporate authority of the issuer is required, which, in some cases, covers the validity and legal and binding nature of the documentation. However, closing certificates and auditors' comfort letters are not required in a domestic offering.

### Listing fees

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

The fees to be paid to the SEC Office include an application fee and a fee for each issue. The fees are as follows:

- application: 10,000 baht for high-net-worth investors and 30,000 baht for public offerings;
- for an MTN programme: 10,000 baht per two years for high-net-worth investors and 30,000 baht per two years for public offerings; and
- filing (each issuance):
  - for private placements: 50,000 baht per tranche; and
  - for public offerings: a percentage varying according to issue size, from 30,000 baht to 500,000 baht per tranche.

Fees have recently been exempted for the issuance of government bonds, debentures and bills as green bonds, social bonds or sustainability bonds (any type of bond instrument where the proceeds will be exclusively applied in eligible environmental, social or sustainability projects) of which the proceeds will be utilised in Thailand.

The exact fees will vary depending on the nature of the debt securities.

## KEY CONSIDERATIONS

### Special debt instruments

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

In recent years, apart from the securitised debentures of the Secondary Mortgage Corporation (a state enterprise that issued securitised debentures every year until 2017), special debt instruments are rarely issued in the market. Perpetual debentures have been issued increasingly since 2018.

Subordinated debentures have been issued, while convertible debentures and exchangeable debentures have been issued outside Thailand. Convertible debentures are mostly issued domestically in private placements to strategic investors only. Structured notes, such as equity-linked notes or other derivatives debentures, are generally issued by the issuers that are financial institutions as the alternative investment products for the sophisticated investors as well as high-net-worth investors.

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

Additional rules may apply to the issue of special debt securities prescribed by the relevant authorities (eg, the Ministry of Finance, the Bank of Thailand and the Office of the Securities and Exchange Commission (the SEC Office)) such as the International Financial Reporting Standards 9 – Financial Instruments and the Thai Accounting Standards (TAS) 32 (for perpetual bonds). To qualify for equity treatment, the requirements of TAS 32 must be satisfied.

### Classification

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

If the securities are bonds or debentures, even though perpetual in nature, they will be considered as debt under Thai law. They may be considered equity from an accounting perspective (because investors cannot obtain repayment except on liquidation, according to TAS 32) but will remain as debt from a legal perspective.

### Transfer of private debt securities

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

The SEC Office requires the issuer to register a transfer restriction for debt securities issued on a private placement basis with the SEC Office, and the transfer restriction must be clearly shown in the filing, the terms and conditions and on the debenture certificates.

### Cross-border issues

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

There are particular rules that apply to an offer of debt securities by foreign issuers in Thailand. The following are the key criteria.

#### Baht-denominated debentures issued by foreign entities

##### Approval

A foreign entity can issue baht-denominated debentures (whether on a private or public offer basis), provided that the offer is approved by the Ministry of Finance and is made in accordance with the conditions of the approval. The offer will then be deemed approved by the SEC Office.

##### Filing

A foreign entity is required to submit a filing (unless the offer is made to no more than 10 investors in any four-month period) and the terms and conditions to the SEC Office and, in the case of a public offer, a credit rating must be obtained for the debentures. A local debenture holder's representative and a local contact person in Thailand must also be appointed. The filings and documents submitted to the SEC Office (eg, financial statements) can be in English.

#### Foreign currency-denominated debentures issued by Thai or foreign entities

##### Approval

Approval from the SEC Office is required for a public offer of foreign currency-denominated debentures in Thailand. Approval from the SEC Office will be deemed granted if the offer is made to institutional investors and high-net-worth investors (II&HNW) and the issuer registers the transfer restriction with the SEC Office.

For a foreign issuer, a local contact person in Thailand must be appointed, and investors must be those approved by the Bank of Thailand to invest in foreign currency-denominated debentures; otherwise, the offer must be made through an underwriter.

##### Filing

A filing is required to be submitted to the SEC Office. If made to II&HNW, the filing will be in the Form 69-II&HNW per tranche, and, if made to the public, in the Form 69-PO-per tranche or Form 69-FD-MTN. The filings and documents of foreign entities submitted to the SEC Office (eg, financial statements) can be made in English.

#### Domestic issuers offering debt securities outside Thailand

There are special rules for domestic issuers offering debt securities (debentures) entirely outside Thailand. Generally, payments of principal and interest on the debentures as well as transfer of the securities must be made outside Thailand. An approval from the SEC Office, but no filing, is required.

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

Thailand is open for foreign issuers to access the debt capital markets in Thailand. Debentures can be offered in a private placement or public offering.



## Underwriting

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

Underwriting may be on a firm commitment basis or a best efforts basis. If there is more than one underwriter, it is normal for the underwriters' liability to be on a several basis.

The arrangements for private offerings of debt securities are basically the same as for public offerings.

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

A licence to undertake securities business is required to be an underwriter of debt securities. The underwriters are regulated by the SEC Office. The SEC imposes some criteria on allocations by underwriters.

Furthermore, the underwriter is required to perform the product screening for the offering to its customers, as well as provides true, accurate and non-distorted information to its customers, especially retail and high-net-worth investors.

## Transaction execution

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

On the issue date of the debentures, the issuer will receive the proceeds from the offer. Further, on the issue date (or within the period specified in the prospectus but within 15 days after the issue date), named debenture certificates will be issued to the debenture holders by the registrar of the debentures, or the registrar will arrange for the deposit of debentures with the Thailand Securities Depository Co (TSD) within seven days, if the investors or subscribers requested debentures in scripless form in their subscription forms. The registrar will record the names of the debenture holders in the register, and the debenture holders will then be entitled to trade their debentures.

## Holding forms

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

Bonds and debentures are typically held in registered form and are either certificated or scripless. If certificated, the name of the holder will be entered in the register and specified on the certificate delivered to the holder. If in scripless form, no certificate is issued to the holder, and the TSD will act as a central securities depository for investors who, or whose custodians, have an account with it. The TSD will record the name and other information in respect of the holder and notify the registrar upon request to provide information for any interest or principal payment, closure of the register for bondholders' meetings and any other purposes.

Generally, both certificated and scripless debentures issued to the public can be freely transferred or traded after an offering, provided they comply with the procedures for the transfer required by the Securities and Exchange Act (1992), as amended, and specified in the relevant terms and conditions, as well as with the restriction on a secondary offer on a public offering basis.

Most investors deal through banks or the underwriters, even though there is an official secondary market, the Bond Electronic Exchange (BEX) (however, the BEX will cease operation from 1 March 2021).

## Outstanding debt securities

24 | Describe how issuers manage their outstanding debt securities.

The issuers may manage their outstanding debt securities in various ways.

Generally, most debentures have a fixed maturity date for one bullet redemption payment, and early redemption is not permitted. However, issuers may reduce their outstanding debentures by purchasing in the open market at any time after offering. If the issuer makes a general tender offer to buy back the debentures, the issuer must make a tender offer to each debenture holder and buy back the debentures pro rata from the debenture holders who want to sell their debentures.

If the issuer wants to redeem the debentures in a different way from the methods for redemption specified in the terms and conditions, the issuer may call a bondholders' meeting to amend the terms and conditions.

## REGULATION AND LIABILITY

### Reporting obligations

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

The issuer must report the result of an offering of debentures to the SEC Office within 15 days from the closing of the offer. Details to be provided include the identity of the debenture holders classified by type of investor and nationality, the results of the allotment and the amount of debentures that have been purchased by the investors.

In addition, under the Securities and Exchange Act (1992), as amended (the SEC Act), while the debentures are outstanding, the issuer must submit to the Office of the Securities and Exchange Commission (the SEC Office) financial statements, financial reports and business operation reports for the relevant periods as prescribed by SEC Office. The issuer must also submit a report to the SEC when certain incidents occur, for example, the issuer suffers serious losses, the issuer ceases operating all or part of its business and so on. The SEC has the power to instruct the issuer to, among other things, submit additional reports or documents, provide additional explanation, arrange an audit by an auditor and report the result to the SEC Office and disclose the information to the public. The SEC Office is empowered to disclose the information to the public itself. The SEC Office requires, after an issuer has issued debt securities, the issuer to disclose without delay if any of or all the following events occur:

- rehabilitation process;
- any event that entitles the holders to accelerate the debentures (event of default); and
- any payment default under the debentures (default).

In addition, the issuer must report to the SEC Office, among other things, any change of debenture holders' representative, early redemption and the use of proceeds from offering. The issuer and the registrar must also report a payment default (of interest or principal), no later than one business day after the due date, to the SEC Office and the debenture holders' representative.

## Liability regime

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

The issuer will incur liability under section 82 of the SEC Act if the registration statement and prospectus contain false statements or fail to disclose material facts that should have been stated as specified in the SEC Act. The issuer's directors who have power to bind the issuer and signed the registration statement and prospectus, and the underwriters, auditors, financial advisers or appraisers (if any) who intentionally or with gross negligence certified the information in the registration statement and prospectus, may be liable jointly with the issuer.

In principle, there is the same liability for participants in issues of debt securities as in issues of securities of other types, for example, stocks and warrants.

There is, at least theoretically, potential liability in tort; however, there is no precedent.

## Remedies

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

The SEC Act provides a remedy to an investor who holds debt securities acquired from the issuer and suffers damage arising from the registration statement and prospectus containing material false statements or failing to disclose material facts that should have been stated in them. An investor who acquired the debt securities before the matter became apparent has the right to claim compensation from the issuer within a specified period.

In addition, certain transaction participants are also liable jointly with the issuer for any material false statement and failure to disclose material facts unless they can prove that they were not aware of the facts or, by their position, they could not have been aware of the inaccuracy of the information or the failure to disclose the facts required to be stated.

## Enforcement

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

The SEC Office has broad power to control the contents of the documentation furnished by an issuer of debt securities and to instruct the issuer to, among other things, submit additional reports or documents, provide additional explanation, arrange an audit by an auditor and report the result to the SEC Office and disclose the information to the public. The SEC Office is itself empowered to disclose that information to the public. Failure of the issuer to comply with the instruction of the SEC Office could give rise to a one-off fine and a further fine for every day the contravention continues.

In addition, a person who makes a material false statement or conceals a material fact that should have been stated in a registration statement or draft prospectus may be liable to imprisonment or a fine as prescribed by the SEC Act.

## Tax liability

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

The issuer must deduct withholding tax on interest payments under the debentures as described below.

Tax implications for bond investors depend on various factors, including but not limited to the nature of the income, the type of investor, the type of issuer, the investor's permanent address and the investor's business.

Major relevant taxes are personal income tax, corporate income tax, special business tax and stamp duty under the Thai Revenue Code. Withholding tax is part of personal income tax and corporate income tax. However, foreign investors may be exempt from or benefit from lower rates of withholding tax pursuant to double tax treaties between Thailand and relevant countries. In addition, it is possible to establish a treasury centre company that is exempted from the requirement to withhold tax on interest paid to non-residents.

A summary of current relevant taxes follows. Investors should consult tax advisers with regard to their tax obligations in connection with investment in Thai bonds and debentures.

## Thai investors

### Ordinary persons

- Interest: withholding tax at 15 per cent; and
- other income from the transfer of debentures: withholding tax at 15 per cent for any profit above the acquisition cost.

Investors have the right not to include income that has already been subject to the withholding tax deduction in their annual tax returns.

### Juristic persons

- Interest: withholding tax at 1 per cent for financial institutions (except where the issuer is also a financial institution, in which case the withholding tax rate is zero per cent) and corporates, and 10 per cent for certain types of foundations and associations; and
- other income from the transfer of debentures: no withholding tax, but the investor must include the income in its annual income tax computation.

## Non-Thai investors

### Natural persons

- Interest: withholding tax at 15 per cent, except as provided under a relevant double taxation treaty; and
- other income from the transfer of debentures: withholding tax at 15 per cent for any profit above the acquisition cost, except as provided under a relevant double taxation treaty.

'Natural persons' includes any natural person who stays in Thailand for not less than 180 days in the same calendar year.

### Juristic persons

- Interest: withholding tax at 15 per cent, except as provided under a relevant double taxation treaty; and
- other income from the transfer of debentures: withholding tax at 15 per cent for any profit above the acquisition cost, except as provided under a relevant double taxation treaty.

'Juristic persons' refers to persons incorporated in any foreign country without operations, deemed operations or a permanent establishment in Thailand.

Transfer of debentures is currently exempt from Thai stamp duty.

A holder of the debentures who is a financial institution and receives interest payable on the debentures must pay specific business tax at the rate of 3.3 per cent.

**UPDATE AND TRENDS****Key developments of the past year**

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

Since mid-2020, the Office of the Securities and Exchange Commission (the SEC Office) has increased protection for high-net-worth investors by proposing a new set of regulations regarding matters including disclosure to those investors (ie, the supervision of the offering of debt securities to high-net-worth investors will be similar to public offerings to retail investors).

Furthermore, the SEC Office has supported the offering of environmental, social, and governance (ESG) bonds by waiving filing fees for issuers who wish to offer ESG Bonds until 31 May 2021.

In addition, public hearings have been conducted by the Securities and Exchange Commission to propose the amendment of the Securities and Exchange Act (1992), as amended, regarding debt instruments (eg, to eliminate the minimum par value of 100 baht and to eliminate the prohibition of set-off of subscription amounts against obligations owed by the issuer in the case of refinancing or rollover of debentures).

**Coronavirus**

31 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Bank of Thailand, the Ministry of Finance and the SEC Office have closely monitored the debt markets in Thailand. The Bank of Thailand and the Ministry of Finance established the Corporate Bond Stabilisation Fund to assist the liquidity of Thai issuers that had debt instruments falling due within 2020. Even if the SEC Office has not proposed particular amendments of the rules concerned in light of the covid-19 pandemic, it has considered measures to mitigate the widespread effect of it, including the rollover of bonds, debenture holders' meetings to extend maturity dates and checking that debenture holders' representatives are monitoring the status of the debentures and issuers.

Clients should carefully review documentation, such as the terms and conditions and the placement or underwriting agreement, to ensure that risks relating to the pandemic are covered.



**Veeranuch Thammavaranucupt**

veeranuch.t@weerawongcp.com

**Jongtip Tangsripairoje**

jongtip.t@weerawongcp.com

**Veerakorn Samranweth**

veerakorn.s@weerawongcp.com

22nd Floor, Mercury Tower  
540 Ploenchit Road  
Lumpini, Pathumwan  
Bangkok 10330  
Thailand  
Tel: +66 2 264 8000  
Fax: +66 2 657 2222  
www.weerawongcp.com

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